

## Chapter 2

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# The Legal System

*'Decisions to prosecute or not, as the case may be, must be based on an objective and professional assessment of the available evidence and the law and be in accordance with the published Prosecution Code. Politics can have no role to play in such decisions.'* – Secretary for Justice, Ms Teresa Cheng Yeuk-wah, SC, at the ceremonial opening of the Legal Year 2018 on 8 January 2018

The legal system of the Hong Kong Special Administrative Region (HKSAR) differs from that of the Mainland, and is based on the common law.

### Basic Law

The constitutional framework of the HKSAR is provided by the Basic Law, enacted by the National People's Congress (NPC) of the People's Republic of China (PRC) under Article 31 of the Constitution of the PRC.

Since the establishment of the HKSAR, the gradual development of a body of jurisprudence on the Basic Law has been reinforcing its effectiveness in determining the rights and freedoms guaranteed to the people of Hong Kong.

### Continuation of Legal System

The Basic Law guarantees the continuance of the common law legal system after China resumed the exercise of sovereignty over Hong Kong on 1 July 1997.

The laws in force in Hong Kong before 1 July 1997 continue to apply in the HKSAR except for those which contravened the Basic Law or are amended by the HKSAR's legislature. Some ordinances were adapted to bring them into line with the Basic Law and to reflect Hong Kong's new status as a Special Administrative Region of the PRC.

The judicial system was maintained except for those changes consequent upon the establishment of the Hong Kong Court of Final Appeal on 1 July 1997, which replaced the Judicial Committee of the Privy Council as the appellate court possessing the power of final adjudication for Hong Kong. Pursuant to the Basic Law, judges from other common law jurisdictions have been invited to sit on the Court of Final Appeal since 1 July 1997.

## Law in HKSAR

The laws in force in the HKSAR are:

- the Basic Law;
- the national laws listed in Annex III to the Basic Law and as applied to the HKSAR by way of promulgation or legislation;
- the laws in force before 1 July 1997 (including the common law, rules of equity and customary law as well as statutory law), other than those not adopted as laws of the HKSAR by the NPC's Standing Committee because they contravened the Basic Law; and
- laws enacted by the HKSAR's legislature.

National laws that may be added to Annex III to the Basic Law are confined to those relating to defence and foreign affairs, as well as other matters outside the HKSAR's autonomy.

The Chinese and English texts of the legislation of the HKSAR are equally authentic. The Hong Kong e-Legislation website provides current and past versions of consolidated legislation dating back to 30 June 1997 and copies of legislation marked 'verified copy' have legal status. The hard-copy loose-leaf edition of legislation is being phased out.

## Legal Protection for Rights of the Individual

Chapter III of the Basic Law prescribes the fundamental rights and duties of Hong Kong residents. Among others, Article 39 provides that the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

Protection against discrimination is provided for in the Sex Discrimination Ordinance, Disability Discrimination Ordinance, Family Status Discrimination Ordinance and Race Discrimination Ordinance, which are enforced by the Equal Opportunities Commission, while the Personal Data (Privacy) Ordinance, which is administered by the Privacy Commissioner for Personal Data, protects the privacy of individuals in relation to personal data.

## United Nations Human Rights Treaties

Fifteen international human rights treaties are applicable to Hong Kong. Seven of these, namely the ICCPR, ICESCR, International Convention on the Elimination of All Forms of Racial Discrimination, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, and United Nations (UN) Convention on the Rights of Persons with Disabilities, require states parties to submit periodic reports and other requested information to UN treaty monitoring bodies. With the exception of the ICCPR, which does not apply to the Mainland of China, the HKSAR submits these reports as part of corresponding reports submitted by China and HKSAR teams attending hearings of the relevant treaty bodies

as part of the Chinese delegation. The HKSAR delegation attends ICCPR hearings under the leadership of the Chinese Permanent Representative and Ambassador to the UN. In addition, the UN Human Rights Council conducts a Universal Periodic Review of the human rights situation in all UN member states.

## **Department of Justice**

The Department of Justice, headed by the Secretary for Justice, plays a significant role in the legal system and in upholding the rule of law in Hong Kong. The Secretary for Justice is the government's chief legal adviser and represents the government in all actions brought by, or against, it. She also has a constitutional duty to make prosecutorial decisions independently, free from any interference.

There are five legal divisions in the department, namely the Civil Division, the International Law Division, the Law Drafting Division, the Legal Policy Division and the Prosecutions Division.

Among other tasks, the department handles criminal prosecution; drafts government legislation; and advises the government on, for example, administrative, commercial, criminal, international and constitutional laws. In addition, it drafts commercial contracts and franchises; conducts civil litigation, arbitration and mediation on behalf of the government, and promotes Hong Kong as a leading centre for international legal and dispute resolution services in the Asia-Pacific region. In 2018, the department set out the following major policy initiatives and undertook measures to take these initiatives forward.

### **Major Policy Initiatives**

#### *Promotion of Hong Kong's International Legal and Dispute Resolution Services*

The department promotes Hong Kong as an international legal and dispute resolution centre in the light of opportunities arising from the Belt and Road Initiative. It provides support to a non-governmental organisation to develop an online deal-making and dispute resolution platform which is expected to be completed by the end of 2019. The online platform will offer efficient, cost-effective and secure services to assist parties in resolving cross-border disputes, including commercial and investment disputes involving Belt and Road economies, and entering into business deals.

To further promote the use of mediation for the settlement of investment disputes, the department provides legal assistance in implementing the mediation mechanism established under an investment agreement concluded in January under the framework of the Mainland and Hong Kong Closer Economic Partnership Arrangement. The mediation rules and the designated mediation institutions and mediators of Hong Kong and the Mainland were announced on 14 December.

In October the department, in collaboration with the World Bank Group's International Centre for Settlement of Investment Disputes and the Asian Academy of International Law, organised the first Investment Law and Investor-State Mediator Training course in Hong Kong. The objective was to build up a team of investment mediators in Asia and develop Hong Kong into a training base for international investment law and international investment dispute resolution

skills. Course participants included government officials from the Mainland, ASEAN countries, the Middle East, Africa, South America and Hong Kong, as well as local and overseas legal and mediation practitioners.

In order to attract quality talent, the government published a Talent List in August. The Talent List accords successful applicants immigration facilitation under the Immigration Department's Quality Migrant Admission Scheme, covering dispute resolution professionals specialising in resolving international financial and investor-state disputes and transactional lawyers, including those from developing countries in the Belt and Road region, with specialised knowledge of and experience in cross-border transactions from investing or host states.

An Inclusive Dispute Avoidance and Resolution Office will be established in January 2019 directly under the Secretary for Justice, to better cope with the challenges and to harness the additional opportunities offered by the Belt and Road Initiative and the Guangdong-Hong Kong-Macao Greater Bay Area plan. The office will be tasked to raise Hong Kong's international profile in deal-making and dispute resolution by way of cooperation or partnership with other jurisdictions and international organisations. It will organise, support and encourage important international capacity-building events in Hong Kong.

The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, gazetted on 23 June 2017, clarifies that third party funding of arbitration and mediation in Hong Kong is not prohibited by the common law doctrines of maintenance and champerty, adding to Hong Kong's attractiveness as an international legal and dispute resolution centre. The Code of Practice for Third Party Funding of Arbitration was issued on 7 December 2018 after a two-month public consultation, while the new provisions relating to third party funding of arbitration will come into operation on 1 February 2019.

The new West Kowloon Mediation Centre started operation in November to promote the use of mediation and enhance public awareness of mediation. It is a purpose-built mediation facility for a pilot scheme to provide mediation services to litigants of Small Claims Tribunal cases that are suitable for mediation and other suitable cases, and is run by an independent coordinator appointed by the Department of Justice.

### *Enhancement of Hong Kong-Mainland Cooperation*

To promote Hong Kong as an ideal hub for making deals and resolving disputes in the Greater Bay Area, the department held the 5th biennial Hong Kong Legal Services Forum, its flagship event in the Mainland, in Guangzhou on 5 September, registering a record high of over 1,200 participants. The business and legal sectors showed a keen interest in the topics featured, including a mock arbitration, tailored specifically for Mainland enterprises, and they also had a useful exchange with legal and dispute resolution professionals from Hong Kong.

The department also contributes to the strengthening of the legal cooperation between Hong Kong and the Mainland so that civil and commercial disputes with a cross-boundary dimension can be dealt with more effectively. On 31 July, a two-month public consultation began on a proposed arrangement to establish a mechanism for the recognition and enforcement of judgments in a wider range of civil and commercial matters not already provided for between

Hong Kong and the Mainland. The objective is to reduce the need for re-litigation and offer better protection to the parties' interests.

### *Capacity Building in Partnership with International Organisations*

The department promotes Hong Kong as an international and regional capacity-building centre for international law and dispute resolution through organising conferences and training programmes on its own or with international and local bodies.

In April, the department supported the Hague Conference on Private International Law (HCCH) and its Asia Pacific Regional Office in hosting the conference, The HCCH 125 – Ways Forward: Challenges and Opportunities in an Increasingly Connected World, which celebrated the HCCH's 125th anniversary; in September, it co-organised with the UN Commission on International Trade Law and the Asian Academy of International Law the Hong Kong Forum: 60th Anniversary of New York Convention, and supported the academy in arranging the Hong Kong session for the China-AALCO (Asian-African Legal Consultative Organisation) Exchange and Research Programme on International Law. These events provided opportunities for capacity building and the establishment of a network of judicial and legal experts among the participating jurisdictions, which will facilitate cooperation for the Belt and Road economies and beyond.

In addition, the department takes an active role in the 'Friends of the Chair on Strengthening Economic and Legal Infrastructure', which was established under the Economic Committee of the Asia-Pacific Economic Cooperation (APEC) and supported various capacity-building initiatives under APEC, including a work plan on online dispute resolution. For example, in March the department organised a Workshop on the Use of Modern Technology for Dispute Resolution and Electronic Agreement Management (particularly Online Dispute Resolution) in Papua New Guinea. It also assisted Indonesia in conducting a national capacity-building workshop about online dispute resolution in July, and organised a policy discussion on online dispute resolution for APEC economies during the plenary meeting of the APEC Economic Committee in Papua New Guinea in August.

### *Grooming Talent*

The department supports the grooming of legal talent by offering internships and placements to young legal professionals and by engaging less experienced barristers to undertake court work. A Joint Training Programme is organised with the two legal professional bodies biannually to train young lawyers to conduct prosecutions in the Magistrates' Courts.

### *Legal Hub*

The government will provide space to law-related organisations in the West Wing of the former Central Government Offices (CGO) and the former French Mission Building, pursuant to the policy objective of consolidating Hong Kong's status as a leading centre for international legal and dispute resolution services in the Asia-Pacific region. Together with the department's offices in the former CGO, the whole area will form a Legal Hub in the heart of Hong Kong. Renovation works are in progress and space will be made available to the law-related organisations from around mid-2019.

### *Implementation of Law Reform Proposals*

To implement the *Report on Hearsay in Criminal Proceedings* published by the Law Reform Commission in 2009, the department introduced the Evidence (Amendment) Bill 2018 into the Legislative Council on 4 July. The bill seeks to reform the common law rule against the admission of hearsay evidence in criminal proceedings, which has been criticised for its inflexibility resulting in the exclusion of cogent and reliable hearsay evidence.

### **The Judiciary**

A key element in the success and continuing attraction of the HKSAR is that its judicial system operates on the principle, fundamental to the common law system, of the independence of the judiciary from the executive authorities and legislature. The courts make their own judgments, whether disputes before them involve private citizens, corporate bodies or the government itself. The government is advised on matters relating to the pay and conditions of service of judicial officers by an independent Standing Committee on Judicial Salaries and Conditions of Service. The Chief Justice is the head of the Judiciary, assisted in its overall administration by the Judiciary Administrator.

The Court of Final Appeal, headed by the Chief Justice, is the HKSAR's highest appellate court. There are three permanent judges, four non-permanent Hong Kong judges and 14 non-permanent judges from other common law jurisdictions. The court, when sitting, will comprise five judges – usually the Chief Justice, three permanent judges and one non-permanent judge from another common law jurisdiction. If the Chief Justice is not available to sit, one of the three permanent judges will preside and an additional Hong Kong non-permanent judge will sit. If a permanent judge is not available to sit, again a Hong Kong non-permanent judge will sit in his place. The Registrar deals mainly with interlocutory and taxation matters.

The High Court, comprising the Court of Appeal and Court of First Instance, is headed by the Chief Judge of the High Court. There are 13 Justices of Appeal and 34 Judges of the Court of First Instance on the establishment. The Registrar, Senior Deputy Registrars and Deputy Registrars deal mainly with interlocutory and taxation matters.

The Court of Appeal hears civil and criminal appeals from the Court of First Instance, District Court and Lands Tribunal. The Court of First Instance has unlimited jurisdiction in all civil and criminal matters. Civil matters are usually tried by Court of First Instance judges sitting without juries, although there is a rarely used provision for jury trials in certain cases, including defamation. Criminal offences in the Court of First Instance are tried by a judge with a jury of seven, or when a judge so orders, a jury of nine. The Court of First Instance also hears appeals from the Magistrates' Courts, Minor Employment Claims Adjudication Board, Labour Tribunal and Small Claims Tribunal.

The Competition Tribunal has primary jurisdiction to hear and adjudicate competition-related cases. All Judges of the Court of First Instance are members of the tribunal, while the Registrar, Senior Deputy Registrars and Deputy Registrars of the High Court hold the corresponding positions in the tribunal.

The District Court is one level below the Court of First Instance. It is led by the Chief District Judge, who is assisted by the Principal Family Court Judge. There are, at present, 39 District Judges on the establishment. There is no jury. The Registrar and Deputy Registrars deal mainly with civil interlocutory matters and taxation of costs. The District Court's general civil jurisdiction is limited to claims up to \$3 million, or recovery of land where the rateable value does not exceed \$320,000. It has jurisdiction over employees' compensation, equal opportunities and matrimonial matters including divorce, custody, maintenance and adoption. It also has jurisdiction to hear stamp duty assessment appeals. It tries criminal cases except murder, manslaughter and rape. The maximum sentencing power is seven years' imprisonment.

The Family Court, comprising 10 courts, is part of the District Court. It hears applications pertaining to divorce, separation and related family and matrimonial matters such as applications concerning children and financial relief. Notwithstanding the District Court's general civil jurisdiction, there is no limit on the amount claimed in the Family Court. It also deals with applications under domestic violence legislation and the Inheritance (Provision for Family and Dependants) Ordinance. Most hearings are conducted in private, save for defended divorces and enforcement actions.

The seven Magistrates' Courts process about 90 per cent of criminal cases. Led by the Chief Magistrate, the team, excluding Deputy Magistrates and Deputy Special Magistrates, comprises nine Principal Magistrates, 53 Permanent Magistrates and six Special Magistrates. Magistrates exercise criminal jurisdiction over a wide range of offences. Their sentencing power is generally limited to two years' imprisonment and a \$100,000 fine, though statutory provisions empower them to impose up to three years' imprisonment and a \$5 million fine. They handle cases in the Juvenile Courts, which deal with offences, except homicide, committed by children and young persons below age 16. In addition to Permanent and Deputy Magistrates, Special Magistrates can also handle departmental summonses for offences such as traffic contraventions, but their sentencing power is limited to imprisonment for six months and a maximum fine of \$50,000 or as specified in their warrants of appointment.

There are five specialised tribunals. The Lands Tribunal is led by a President who is a High Court Judge and comprises presiding officers who are District Judges and members who may be experienced professional surveyors. The tribunal handles tenancy claims, building management matters, rating and valuation appeals, applications for the compulsory sale of land for redevelopment, and compensation assessments when land is resumed by the government or reduced in value by development. The Labour Tribunal handles claims arising from employment contracts and the Employment Ordinance. The Small Claims Tribunal handles civil claims of up to \$75,000. The Obscene Articles Tribunal determines whether articles are obscene or indecent. It also classifies articles submitted by authors and publishers. The Coroner's Court conducts inquests into the causes and circumstances of a death.

According to the Basic Law and Official Languages Ordinance, the courts can use either or both Chinese and English, the two official languages, in any proceedings.

## **Legal Aid**

Publicly funded legal aid services are provided through the Legal Aid Department and the Duty Lawyer Service. Legal aid ensures a person who has reasonable grounds for taking or defending a legal action in Hong Kong courts is not prevented from doing so because of a lack of means. Eligible applicants are granted legal aid certificates and receive the services of a solicitor and/or a barrister.

The department provides legal aid services to any person, irrespective of residence or nationality, who satisfies both the means and merits tests. It has about 540 staff, including 79 lawyers.

### ***Legal Aid in Civil Cases***

The department runs an Ordinary Legal Aid Scheme for civil proceedings in the District Court, Court of First Instance, Court of Appeal and Court of Final Appeal; applications to the Mental Health Review Tribunal; and death inquests if the interests of public justice so require. Major types of cases covered include family disputes, personal injury claims, employment disputes, disputes related to landed properties, contractual disputes, immigration matters and professional negligence claims.

The means test requires applicants to show their financial resources – the sum of the person's annual disposable income and total disposable capital after deducting a statutory allowance and certain deductible items – do not exceed \$307,130. For applicants aged 60 or above, the test also disregards the first \$307,130 when calculating the disposable capital.

The Director of Legal Aid may waive the statutory financial eligibility limit in meritorious cases where a breach of the Hong Kong Bill of Rights Ordinance or an inconsistency with the ICCPR as applied to Hong Kong is an issue.

The merits test requires applicants to satisfy the director that there are reasonable grounds for bringing or defending the civil proceedings.

Aided persons may have to pay a contribution, depending on their financial resources, and are required to repay all the expenses incurred in the proceedings that are not recovered from the opposite party out of the property recovered or preserved on their behalf in the proceedings.

An applicant who is refused civil legal aid may appeal to the Registrar of the High Court or, in Court of Final Appeal cases, to a Review Committee chaired by the Registrar of the High Court and also including a barrister and a solicitor.

### ***Supplementary Legal Aid Scheme***

This scheme helps people whose financial resources exceed the Ordinary Scheme's limit, allowing an eligibility limit of \$1,535,650. The scheme covers the following types of cases where the claim is likely to exceed \$60,000 – personal injury claims; medical, dental or legal professional negligence claims, as well as professional negligence claims against practising certified public accountants, registered architects, registered professional engineers, registered professional surveyors, registered professional planners, authorised land surveyors, registered



landscape architects and estate agents; negligence claims against insurers or their intermediaries in respect of the taking out of personal insurance products; and monetary claims against vendors in the sale of first-hand residential properties.

It also covers employees' compensation claims and representation for employees in appeals against awards made by the Labour Tribunal regardless of the amount in dispute.

The scheme is self-financing, being funded by contributions from aided persons and a percentage payment deducted from damages or compensation recovered on their behalf.

### **Legal Aid in Criminal Cases**

Legal aid is available under the Ordinary Legal Aid Scheme for criminal trials in the Court of First Instance and the District Court, committal proceedings in the Magistrates' Courts, appeals from the Magistrates' Courts and appeals to the Court of Appeal and Court of Final Appeal. Applicants who pass the means test receive legal aid for trial, provided the director is satisfied it is in the interests of justice to grant legal aid. For appeals, it must be shown there are reasonable grounds to appeal, except where the applicant has been convicted of murder, treason or piracy with violence.

The director has the discretion to grant legal aid in a criminal case where the applicant's financial resources exceed the eligibility limit, if the director is satisfied it is desirable in the interests of justice to do so, subject to the payment of a contribution at higher rates calculated according to the applicant's financial resources.

An applicant who passes the means test but is refused legal aid may apply to a judge for legal aid to be granted. Applicants charged with or convicted of murder, treason or piracy with violence may apply to a judge not only for legal aid for the trial or appeal, but also for exemption from the means test or payment of a contribution. The Review Committee hears appeals against the refusal of legal aid for appeals to the Court of Final Appeal.

### **Legal Aid Cases in 2018**

	Civil Cases		Criminal Cases
	Ordinary Scheme	Supplementary Scheme	Ordinary Scheme
Number of applications	14,856	235	3,314
Number of certificates granted	5,738	150	2,364
Amount of expenditure incurred	\$577 million	\$4.5 million*	\$242.5 million
Monies recovered	\$1,370.7 million	\$124.3 million*	N/A

\* The figures are unaudited

### **Official Solicitor**

The Director of Legal Aid is also the Official Solicitor, appointed under the Official Solicitor Ordinance. The Official Solicitor's main duties are to act as 'guardian ad litem' or 'next friend' in legal proceedings for persons under a disability of age or who are mentally incapacitated, as representative of deceased persons' estates for the purpose of legal proceedings, as Official

Trustee and Judicial Trustee, and as committee of the estate of mentally incapacitated persons. In 2018, the Official Solicitor took up 295 new cases.

### **Director of Intellectual Property**

The office of the Director of Intellectual Property, established under the Director of Intellectual Property (Establishment) Ordinance, runs the Intellectual Property Department, which operates four registries on trade marks, patents, designs and copyright licensing bodies. With regard to intellectual property, the department makes recommendations on policy and legislation, provides civil legal advice to the government, and promotes public awareness of and respect for intellectual property rights. It also facilitates and promotes Hong Kong's development as an intellectual property trading hub in the Asia-Pacific region.

### **Equal Opportunities Commission**

The Equal Opportunities Commission (EOC) is an independent statutory body that implements anti-discrimination legislation. There are four anti-discrimination ordinances: the Sex Discrimination Ordinance, Disability Discrimination Ordinance, Family Status Discrimination Ordinance and Race Discrimination Ordinance. The EOC's functions include working towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, disability, family status and race, and towards the elimination of sexual harassment, and harassment and vilification on the grounds of disability and race.

In 2018, the EOC received 2,390 enquiries and 1,018 complaints relating to the four ordinances. A total of 132 complaint cases were conciliated successfully.

### **Office of the Privacy Commissioner for Personal Data**

The Office of the Privacy Commissioner for Personal Data is an independent statutory body established under the Personal Data (Privacy) Ordinance to monitor, supervise and promote compliance with the ordinance.

In 2018, the office received 1,890 complaints, 16,875 enquiries and 37 matching procedure consent applications. It also conducted 293 compliance actions and published two guidance notes.

The office organised 421 talks, seminars, workshops and meetings with stakeholders to promote public and industry knowledge and understanding of personal data privacy, including 33 professional workshops for data users.

### **Websites**

Administration Wing, Chief Secretary for Administration's Office: [www.admwing.gov.hk](http://www.admwing.gov.hk)

Constitutional and Mainland Affairs Bureau: [www.cmab.gov.hk](http://www.cmab.gov.hk)

Department of Justice: [www.doj.gov.hk](http://www.doj.gov.hk)

Equal Opportunities Commission: [www.eoc.org.hk](http://www.eoc.org.hk)

Home Affairs Bureau: [www.hab.gov.hk](http://www.hab.gov.hk)

Hong Kong e-Legislation: [www.elegislation.gov.hk](http://www.elegislation.gov.hk)

Intellectual Property Department: [www.ipd.gov.hk](http://www.ipd.gov.hk)

Judiciary: [www.judiciary.gov.hk](http://www.judiciary.gov.hk)

Law Reform Commission: [www.hkreform.gov.hk](http://www.hkreform.gov.hk)

Legal Aid Department: [www.lad.gov.hk](http://www.lad.gov.hk)

Privacy Commissioner for Personal Data: [www.pcpd.org.hk](http://www.pcpd.org.hk)

Treaties and international agreements: [www.doj.gov.hk/eng/laws/treaties.html](http://www.doj.gov.hk/eng/laws/treaties.html)