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18 June 2004

Mr Peter Yeung
Convenor
Task Force on Equal Pay for Equal Value
c/o Equal Opportunities Commission
Unit 2002, 20/F, Office Tower
Convention Plaza, 1 Harbour Road
Wanchai, Hong Kong

Dear Mr Yeung,

**Revised Draft Report on
Equal Pay for Work of Equal Value
in the Public Sector**

At the Task Force meeting on 2 March 2004, it was decided that the draft Report on Equal Pay for Work of Equal Value in the Public Sector should be presented as the consultant's report. Task Force members were subsequently asked to comment on the revised draft consultant's report. Our general comments are set out below and our specific comments are at the Annex.

We remain concerned over the methodology, findings, conclusions and recommendations of the report. We are of the view that the methodology chosen for the study was not appropriate for evaluating public sector jobs in Hong Kong. More importantly, the findings, conclusions and recommendations in no way reflect the consensus view of Task Force members.

While our detailed comments are at the Annex, we would like to state here that we have a fundamental problem with the methodology because the way weightings (particularly the weighting on academic qualifications) have been allocated, the sampling technique and the selective comparison of jobs taken together cast doubts on the validity of the findings

and hence the conclusions and recommendations.

We also have reservations about the way the data was interpreted and the conclusions were drawn. The consultant stated in the report that "If there was no discrimination towards either sex one would expect the two lines of best fit to broadly coincide. However, if the lines are clearly separated then there is a prima facie case for concluding that some discrimination has unwittingly occurred with the extent of the discrimination being reflected by the distance between the two lines". From the graphs at Appendices 7-12, we can see that the female line of best fit crosses over the male line of best fit at mid-point, indicating that some female-dominated jobs are paid better while others are paid less than male-dominated jobs. As the male line of best fit is not entirely above that of the female, there is no conclusive evidence of wage inequities due to sex discrimination. This finding, however, was not stated in the report clearly. There may be many other factors that led to the difference in pay. Instead of focusing on the wage lines, the consultant went on to selectively compare jobs for analysis and reached the conclusions and recommendations on the basis of these findings.

We do not agree with the recommendation regarding proposed legislation on pay equity or proposed amendments to the Sex Discrimination Ordinance. We are of the view that the Sex Discrimination Ordinance already covers the principle of EPEV. No finding of the study has suggested otherwise.

Subject to the comments made by Task Force members, the Task Force may need to consider whether further clarification from the consultant on the issues raised is necessary before submitting the final report to the Equal Opportunities Commission for consideration.

Yours sincerely,



(Mrs Hedy Chu)
for Secretary for Home Affairs

cc SCS (Attn: Mr Eddie Mak)
SHWF (Attn: Mr Jerry Cheung)
C for L (Attn: Ms Carrie Chang)
HA (Attn: Mr Clement Tse)

Annex**Page 10 Paragraph 26**

"intensely involved" is perhaps an overstatement of the degree that the Task Force was involved in the whole process. The Task Force met 4 times between 24 May 2000 to 31 October 2001 to discuss the broad framework and process of the study. It then met 4 times between 18 March 2002 to 12 May 2004 to discuss the draft report(s). This could be factually reported.

Page 18 Paragraphs 16 and 17

The consultant stated in paragraph 16 that the job evaluation process in this study does not include the employers' perspective, in comparison to the international practices which all stakeholder groups, that is, employers and employees, should be involved in the process. This could substantially impact the scores of the jobs and would bias the findings.

Paragraphs 16 and 17 state that the Canadian model was adopted with minor adjustments. For the Civil Service jobs, academic qualifications were included under the "knowledge" factor grouped under "skills" and were given a weighting of 16%. This is not in line with the norm in Hong Kong which places more emphasis on educational attainments and distorted the findings of the survey.

Paragraph 31 on page 32 concludes that "the current pay determination system which looks almost exclusively at just one factor, namely educational requirements; physical aspects of the jobs, multitasking and more complex forms of communication are given no credit in pay determination." Not only do we dispute this misleading and sweeping conclusion (paragraphs 14 and 15 on pages 28 to 29 actually pointed out that there was positive correlation between salary and "skill", "responsibility" and "effort"), we are more concerned that had a higher weighting been given to academic qualifications, the whole set of findings would have been entirely different. Given the social values and aspirations of our community and the market practice in recruitment, it is only reasonable to allocate a higher weighting.

Page 25 Paragraph 4

The findings of the study are naturally biased because the selection of jobs is not sufficiently "random" (sampling technique was adopted on the advice of the expert) and "traditionally" female or male job categories were pre-selected.

Page 25 Paragraph 5

Benefits and allowances were not included as part of the remuneration. This could significantly affect the findings.

Page 27 Paragraph 7 and Footnote 4

Paragraph 7 states that the Task Force agreed on the basic approach. Footnote 4 then sets out the key principles which were agreed. It must be emphasized that the Task Force only discussed the broad framework and concepts but did not discuss in detail and therefore never agreed on the actual job selection process and exact weightings.

Page 29 References to Appendices 7 to 9

There is no explanation as to why some job titles are anonymised and some not and why jobs are selectively compared. Specifically, we cannot understand why only primary school teachers and nurses are named in the female-dominated jobs that fall below the male wage line.

Appendices 7 to 9 - at the 500 evaluation score point, there are female-dominated jobs which are higher paid than higher scored male-dominated jobs. Between the 600 and 700 evaluation score points, female-dominated jobs were higher paid (at Appendix 9 this included a "assistant primary school master/mistress job) than other male-dominated jobs. These were not mentioned in the analysis.

Page 29 Paragraph 21

It is pointed out that there are "several" male jobs that are of very similar salary but of considerable difference in evaluation score and hence value. The fact that only "several" jobs feature this problem does not justify the conclusion in the same paragraph that the existing system for setting salary scales fails to differentiate adequately between higher and lower value jobs.

Page 30 Paragraph 23

The graphs at Appendices 8 and 9 show that the female-dominated jobs that fall below the male wage line are primary school teachers (other job titles were not shown). We do not understand therefore how this paragraph concludes that the main cause is due to the failure of the current pay policies to give recognition to some of the factors that exist to a greater degree in female positions, such as dexterity and multi-tasking - "dexterity" should not be a relevant job factor of teaching and multi-tasking is not featured in the job-related factors in the job evaluation model adopted in this study.

Page 31 Paragraph 27

With the small number of incumbents in the rank of Senior Intellectual Property Examiners (11 in total) and small number of employees being interviewed within the rank, we doubt the representativeness of the score of this job. Comparing this job to another that scored 18 points less certainly could not justify the first sentence of this paragraph that this serves as an example of inequitable pay at the senior level, given the low representativeness of the score of the job.

Page 32 Paragraph 29

This paragraph ended by saying that "whilst firemen also receive housing benefits at lower levels of seniority than non-disciplined services, this is not sufficient to make up for the difference in salary." This could not be substantiated because benefits have not been taken into account at all.



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21 June 2004

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Convenor of the Task Force on Equal Pay for
Work of Equal Value
c/o Equal Opportunities Commission
Unit 2002, 20/F, Office Tower
Convention Plaza, 1 Harbour Road
Wanchai
Hong Kong

Dear Mr Yeung,

**Consultant's Report on
Equal Pay for Work of Equal Value in the Public Sector**

Please find below our comments on the said report:

Recommendations by the consultant

2. As shown from the experience of Phase 1 of the study, the principle of "equal pay for work of equal value" (EPEV) is a rather new concept to Hong Kong. As a job may, or may be perceived to, entail different levels of skills, responsibilities and/or efforts in different industries or within the same industry, it is difficult for a consensus to be reached on the job evaluation method used and the outcome of such an evaluation. Obviously, putting the EPEV


principle into practice would have far-reaching impact on the economy, labour market and businesses, in particular small- and medium-sized enterprises which make up the bulk of local firms. We should therefore be prudent in deciding how the principle could best be promoted, especially when Hong Kong is just recovering from a period of economic setback and slack labour market.

3. As things stand, we simply do not see a case for legislating on pay equity. Nor do we see the need for amending the Sex Discrimination Ordinance, which already embodies the principle of EPEV. However, we should consider how best to step up public education and promotion with a view to enhance public awareness on equal opportunities, including the EPEV principle, in employment.

The Future of the Task Force on EPEV

4. Given that the Equal Opportunities Commission, with EPEV as part of its portfolio, is well resourced and positioned to carry out the publicity of the principle, it appears that input from the Task Force would no longer be required.

Yours faithfully,



(Miss Carrie Chang)

for Permanent Secretary for
Economic Development and Labour (Labour)

c.c. SCS (Attn: Mr Eddie Mak) 2501 0669
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Comments from Professor Kenneth Law

E-mail dated: 25 June 2004

Please find enclosed the three sections of the report and my comments -- all in red. As agreed, I am sorry that I cannot attend the meeting next week. Just hope that my one-cent comments would be help to EEOC on this issue of gender discrimination in pay.

Comments by Professor Law on Consultant's Report

Chapter One, para. 2: *One of the contributing factors to the pay gap stems from the relationship between gender segregation in the workplace and women's comparatively low wages. Segregation encompasses the clustering of women and men in different occupational groups, in different occupations within these groups, in different jobs within these occupations, and in different industries or companies performing the same jobs. Gender segregation may be the result of career choice based on socialisation and the expectations of the job market. Whether at the lower or upper end of the wage structure, earnings in female-dominated occupations have tended to lag behind those of male-dominated occupations due to the under-valuation of 'female jobs'.*

Comment: I think the author is talking about the case in Canada or US, not Hong Kong. I wonder (1) if there are strong evidences that female-dominated jobs (e.g., nurses, secretaries etc.) are "under-valued" in Hong Kong. (2) even if they were under-valued, there is no evidence that they were under-valued because they were "female jobs."

Chapter One, para. 9: *In 1993, a wage line methodology was added to Ontario's EPEV legislation, and the male wage line is the benchmark commonly used in Canada today. A wage line indicates the relationship between job value (job evaluation results) and pay. Generally, there are two wage line approaches – the job-to-line method and the line-to-line method. Under the job-to-line approach, each female job that is below the male wage line is brought up to the line; under the line-to-line approach, the entire female line is brought up to the male line with each female job maintaining its same relationship above or below the line as existed before. The statute also prescribes the criteria that should be used to determine if a job is male- or female-dominated, as well as the analytic method (job-to-job method, the wage line method) and the compensatory factors that should be used in evaluating jobs (i.e., skill, effort, responsibility and working conditions).*

Comment: Both the "job-to-line" approach and the "line-to-line" approach are not fully justified methodologically. The "job-to-line" approach is impractical. If we bring any female job (short form for "female-dominating jobs") up to the male line, at the end, we are just using male jobs to determine the "equitable" wage rate (I assume that people using this job-to-line approach will also bring female-dominating jobs which are above the male regression line down to match the male line as well). The same problem happens in the "line-to-line" approach – one is *only* using male jobs to determine pay. A more reasonable approach is to look at this issue at the job level (not segregating them

into male and female jobs). All male and female jobs should be used to run the regression line. At the end, all jobs which are x% (subjectively determined) above and below the regression line obtained by using all jobs need to be examined under scrutiny, regardless of whether they are male or female jobs.

- (1) We need an x% of leeway above/below the line because
 - (a) there does not exist an objective “market” wage rate – whether market mean, median or mode or other statistics is used would affect the results;
 - (b) the “market” wage rate fluctuates – one cannot change the pay rate of a certain job whenever it deviates from the “market pay rate” for this particular year only.
- (2) It may not be justified methodologically to run two separate lines, one for male job and one for female dominating jobs. This is especially true when the sample size is small (e.g., less than 30 jobs). One has to consider the effects of random statistical errors as well as measurement errors.

In fact, some of these issues are mentioned in point #10 below.

Chapter One, para. 13: The persistent gender pay gap may be attributable to a number of factors, such as occupational segregation, socialisation, under-valuation of ‘female jobs’, market forces and discrimination. This gap warrants concern and further in-depth investigation to clearly identify the underlying causes.

Comment: I totally agree with the author on this point. I would suggest that the HK government should spend some effort in finding out the root of pay differential between the two gender (if there exists). EPEV is only one possible solution and should not be enforced without proper investigation of the pay differential issue, such as the problems and their causes. For example, the Sex Discrimination Bill, if enforced effectively, may be one possible solution. It could help female to work in “high pay male jobs” so long as they can show that they are capable of doing so.

Chapter One, para. 27: The Task Force decided on the following objectives for Phase One...

Comment: I think this is a little bit of exaggeration. We have only studied a small number of jobs in the government sector as a testing ground. At that time, people are unfamiliar with the job evaluation technique. We just do a pilot study using some government jobs to show how job evaluation or EPEV could be executed. If committee member, the LEGCO, or the public can accept that, a full scale study on the government sector can be done. I doubt if we can draw conclusions on pay inequity of “two public sector employers” based on this pilot study.

Chapter Two, para. 10: In 2000, there were 185,868 employees within the Civil Service. Of this number, approximately 67% (or 124,303) were men and 33% (or 61,565) were women. For the purposes of this Study, the Task Force decided that a job is classified as male-dominated or female-dominated if one gender constitutes 75% or more of the total jobholders. According to this definition, there were 154 male-dominated jobs and 26 female-dominated jobs in the Civil Service entry rank jobs. When promotional ranks were included, the total number of male-dominated jobs more than doubled to 341 and the total number of female-dominated jobs increased to 51.

Comment: The current methodology of choosing jobs in the analyses may not be a very good one. Currently, the researchers first find two groups of job – one male-dominated, one female-dominated. They then test whether these two groups of jobs are overpaid or underpaid. If the pay for female-dominated jobs were lower than the male-dominated jobs, the conclusion would be there is pay discrimination. My judgment is that this would lead to an exaggeration of the actual pay discrimination issue. For example, if we expand the sample of jobs being studied, we may find that there are many other gender-neutral jobs which were underpaid or overpaid. At the end, the final conclusion may be pay discrimination by jobs, instead of by gender. Any pay differential found using the current methodology may only lead to conclusions of whether there is pay discrimination across jobs in the two employers, not necessarily gender discrimination in pay.

Chapter Two, para. 32: The points used to evaluate Hospital Authority jobs are generally consistent with the standard used in Canada. However, it is accepted that each organisation has different needs and hence there could be minor adjustments within the points assigned based on the needs and working environment of the organisation.

Comment: The author has not explained why different job evaluation weights are applied to Hospital Authority as compared with the Hong Kong Government. Practically, if one thinks that the Canadian system (I guess it is the system used on Governmental jobs) is an acceptable one, one should continue to use the same system without any changes. If different system were used in different organizations, one cannot come up with any judgment at the end. This is because a different evaluation scheme may lead to quite different evaluation results.

Chapter Three, para. 1: Job Evaluation is a well-established and well-accepted method of comparing the size or value of different jobs. It is regarded as objective, analytical and fair and produces mathematical results that can be used for several purposes. It is

commonly used within the private sector to compare job “sizes”, to group jobs into grades and to set pay ranges. There are many different methodologies in existence but most seek to analyse the jobs by reference to a number of job “factors” such as skill, technical knowledge, decision making etc, and assigning scores to each of these factors. It is a thorough, objective, quantitative and equitable approach to dealing with the many issues surrounding the question of comparative values of different jobs.

Comment: I don’t think people would say that job evaluation methods are “objective.” Definitely, any job evaluation method is subjective. We could only say that for a good job evaluation system, there are detailed descriptions of each factor as well as its point factor so that subjectivity can be reduced to an acceptable level.

Chapter Three, para. 3: *Despite the shortcomings of job evaluation, it is the best means of comparing the value of different jobs. The methodology of job evaluation adopted for this study is an internationally accepted method of looking at Equal Pay for Work of Equal Value (EPEV). It is a proactive process of seeing if discrimination exists within the employment system and to develop a plan to redress inequities over time. The gender-neutral evaluation method—looking at Skill, Responsibility, Effort and Working Condition—is used throughout Canada. The United Kingdom uses a similar method—looking at Skill, Responsibility and Effort. It was assumed at the start and agreed by the Task Force that to adopt such a tried and tested methodology would be the most reliable and acceptable way to proceed with this study. In the view of the consultants, there is nothing so different about Hong Kong or the way work is conducted in Hong Kong as to invalidate this method of determining the value of a job, i.e. job evaluation, or to justify the adoption of a uniquely different methodology from that used in other countries.*

Comment: Neither would I say that job evaluation is the “best” mean of comparing the value of different jobs. Different organizations may use different job evaluation schemes and different scheme may lead to totally different results. Again, I would only say that job evaluation is a commonly used approach for general pay determination. As far as I know, may Government uses the classification system instead of job evaluation system.

Chapter Three, para. 4: *On the advice of the expert, a sampling technique was adopted for this exercise whereby 10% to 15% of jobs with either male or female dominance were taken through the evaluation process. Traditionally female jobs were selected such as clerks, secretaries, primary school teachers and nurses Efforts were also made to select traditionally male job categories—such as firemen and engineers. This is*

potentially the area that could contribute most to questions of reliability of the final results since a few abnormal jobs amongst a relatively small sample could have a notable effect on the overall results. Normally however where random sampling is adopted, a 15% sample is adequate to overcome any such problems. However, in this situation, it proved difficult to get an even spread of either male or female dominated jobs throughout the different ranks and hence the selection of jobs was not entirely random. Only by analysing more jobs could this effect be overcome but this would have been impossible with the time and resource constraints of the project.

Comment: The above point is a fair description of the research difficulties. However, the final issue is whether we are interested in investigating the existence of pay inequity in the government sector in general or pay inequity across gender.

Chapter Three, para. 6: *Typically when an organization is putting together a plan for Equal Pay for Work of Equal Value, it establishes an Employer-Employee Working Committee to decide on the weightings to be allocated to the different job factors of Skill, Responsibility, Effort and Working Condition. Since each organization is different the committee first need to decide upon the weightings that it will adopt for each factor in order to best reflect the nature of its business. Whilst the Hospital Authority set up an Observer Committee to help with the general progress of the study including allocating the weightings, this committee did not have the full delegated authority to confirm the weightings. The Civil Service was not unable to set up a similar committee nor were they willing to define the weightings to be applied to the job factors. As a result, the Task Force decided that the decision on weighting be left to the evaluation expert and the consultants who opted to use the weightings used in Canada for similar organisation.*

Comment: Since the consultant highlighted that many countries have used job evaluation on their governmental jobs, a fair way is to apply two to three job evaluation weighting scheme and see how reliable the point assessments are.

Chapter Three, para. 12: *This graphical method is used in Canada where, if the line of best fit for females falls below the line of best fit for males, it would be concluded that the females are relatively underpaid compared to the males and the employer would be obliged to progressively equalise the salaries over a number of years. In Hong Kong, where the Government has said that the Sex Discrimination Ordinance is to be used for the enforcement of pay equity, this method provides a tried and tested benchmark against which one could see if female or male jobs are comparatively lower paid.*

Comment: The regression technique is very sensitive to outliers. I would recommend that the top and bottom 10% of data (each job is one data point) be eliminated when the regression lines are fitted.

Chapter Three, para. 20: The Graphs on starting, mid, and maximum salary points for the Civil Service are very similar and give a broad overview of the results of the study. They show that women in the junior ranks are paid better than men, but that women in the middle and senior ranks are paid less than the men for work of equivalent value.

Comment: I think I have commented on this in the last report of analysis results. Given such a small sample, I do not see any point of running a male-line and compare it with the female-line. A more appropriate approach is to maximize the sample size by running a total regression line and then check how many female-dominating jobs are below the average regression line. However, as I have said, even we find that many female-dominating jobs under the average regression line, it may not mean gender-discrimination in pay. One has to see how many gender-neutral jobs are under the regression line as well. Another important factor to be considered is random error. As I have suggested, one needs to draw two lines parallel to the average regression line using the standard error of estimates. Exactly how wide a difference could be considered acceptable is a subjective judgment.

Chapter Three, para. 44: Hospital staff are subject to very onerous rostering and shift regimes with no compensation for unsocial shifts or the extremely frequent change from early to late shift. Nursing staff are all subject to such rosters and shift duties, thus with so many of them and so many late duties being required, they almost certainly are disadvantaged by this practice more than male colleagues. In the private sector shift changes are far less frequent in order to permit the body clock to adjust and unsocial shifts are generally compensated by shift premia. Given the relatively low salaries of nurses compared to male jobs, this absence of shift pay aggravates an already discriminatory situation.

Comment: I want to highlight one point at the end of all these analyses. The analytical method can only lead to one possible conclusion – whether there is job discrimination in pay, not pay discrimination across gender. As the author put correctly in point #25, at most one can only say that “females may not be getting a fair share of these better-remunerated posts.” Unless there are evidences that female are blocked from moving into these jobs, one cannot say that there is pay discrimination across gender. As the

author has noted, “this phenomenon may be due to historical reasons, hiring practices, or the relative lack of supply of female applicants to such posts. It may also reflect gender stereotyping that existed strongly in the past and continues today.”

Chapter Three, para. 46: That the forthcoming review of Pay Systems and Pay Policies for the Civil Service include the issues identified in this study, and recommend the replacement of the salary setting system that overly emphasizes academic qualifications with a system that considers multiple factors such as “effort” and “working conditions”.

Comment: I totally endorse the author on this point.

Comments from Mr. Lee Lap-sun

E-mail dated: 24 June 2003

Having gone through the embargoed draft report, I am puzzled at certain presentational points:

For instance, para.29 says that the Enrolled Nurse is relatively underpaid compared to job "c"; Para. 30 says that the Registered Nurse is underpaid when compared to the 100% male-dominated job "d"; Para. 31 says that the Ward Manager pay is significantly lower than that of the 75% male-dominated job "e".

To convince the readers that the comparisons are fair, you should state both types of jobs, in other words, what are jobs "c", "d" and "e"? The readers should at least be allowed to judge for themselves whether these jobs are, for any reason, more likely to be filled by males because of specific job requirements. Using the Police Force as an example: nowadays many PTU officers of all ranks are females, something unheard of ,says, a decade ago and it is doubtful whether any other country in Asia allows their female Police officers to take on that kind of anti-riot duties.

However, so far no female has joined the SDU (more generally known as the Flying Tigers). It is not because females are not able to apply, but a SDU member has to be equipped with extremely heavy assault weapons, ammunitions, walkie-talkies, body armour,gas mask and other equipments.

Physically, none of the members of the female gender managed to pass the stringent test so far. In fact, the great majority of their male counterparts fail to pass the same tests either. This is not gender discrimination, it is job demand.

Spelling out only one kind of job when comparing with another (ie. Enrolled Nurse, Registerd Nurse, Ward Manager to "c". "d" and "e" is , in my opinion, not convincing at all because I cannot tell whether apples are being compared to apples, and oranges to oranges.

People used to associate nurses with caring, gentle females, since it was Florence Nightingale who started the noble profession. But the only nurse who so tragically died in the SARS attack was a male. He had been in the profession for more than a

decade already. Having spent three and a half year working for the HK Government in Japan (the ONLY developed country in Asia), I must say we are not doing too badly,although there is always room for improvement.

As far as this exercise goes,the gender ratio in the AO grade is more relevant than that in the EO grade,as CSB's letter has pointed out. But the report chose to depict the latte grade instead.

As I have said in the very few meetings I have attended, what is more important is whether there is artifical gender barrier in application for the job and whether the recruitment procedure is gender neutral. I do not believe affirmative action is the right thing for the SDU, when terrorism is now a world-wide threat.

Sorry for missing the deadline for comments. I am copying this to Mr. Thomas Leung who happens to be a member of the Directorate Committee which I also serve.

E-mail dated: 19 February 2004

My views on the EPEV report were conveyed to your Ms SW Lam via my e-mails(2) dated 24 June, 2003. I stand by my views as expressed in those e-mails. I have no objection if you wish to make them available to other members.

E-mail dated: 25 June 2004

I am still puzzled as to why a member of the secretariat serving unofficial advisory bodies on civil service salaries and conditions of services is serving on the task force. I was not involved in the task force's early deliberations. Nonetheless, herewith a few comments on the draft report. These are raised from the presentational angle, in case the report is made public one day.

Apparently, one single yardstick has been used to judge what is perceived to be happening in HK. Canadian values and experiences were mentioned throughout the report. UK and Minnesota were briefly touched on in passing but the case is still very lopsided. In our recent study of civil service pay policy and system, our consultant

looked into the experience of five countries: Australia, Canada, New Zealand, Singapore and the UK. More importantly, one country in this region was included (i.e. Singapore). I know some members dislike the mentioning of Asian values. But the report will be that much more convincing if there is comparison of HK with countries in the region. Not all Asian countries are "backward": Japan is an OECD and developed country also.

More specifically, para. 4 of Section One said, amongst other things, that " ...if a majority of women were employed in a particular occupation, the job may come to be seen as one that is suitable for females only. Failure to challenge these stereotypes results in 'natural' division of jobs along gender lines as women select certain types of profession and men select others. This then results in job segregation or hiring discrimination by individual employers who would hire men or women into different kinds of jobs to stereotypes regarding the abilities ascribed to men and women and the contributions they are able to make to an organisation" Yet, para. 49 and 50 of Section Three recommended that : "recruitment and promotion practices be examined and more effort be made to encourage females to apply for traditionally male-deminated jobs and senior positions." and "that at the earlier stages of education, girls be encouraged to take tertiary qualifications in the traditionally male-dominated professions."

Affirmative action is neither a policy nor a practice in HK, it is certainly not practised in the civil service where everyone is judged only by merits, not sex. The said recommendations will only reinforce the stereotyping mentioned in Section One. Since EOC stands for "Equal Opportunities Commission" (and not "Women's Commission"), perhaps paras 49 and 50 of Section Three should be modified to say " efforts should also be made to encourage males to appy for traditonally female-dominated jobs" and " boys be encouraged to take tertiary qualifications in the traditionally female-dominated professions." This is not impractical. More males are becoming nurses and one day there will be more male kindergarten teachers like the way things are in developed countries.

Again on presentation: comparing Primary School Mistress with Senior Technical Officer and an Officer of the Correctional Services is difficult to swallow. Supervising angel-like children and hard-core criminals are obviously very different. Not to mention that many officers of the Correctional Services are females already these days. Using the male gender "he" to describe the CSD officer in para. 4 of Section Three is not 100% accurate.

Just a few observations from a "layman's" point of view for what they are worth.

Will try to make the meeting next Tuesday. Missed the last one as I was recovering from two small medial operations.



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26 June 2004

Mr Peter YEUNG
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 Equal Opportunity Commission
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 Convention Plaza, 1 Harbour Road,
 Wan Chai.

Dear Mr YEUNG,

**Consultant's Report on Equal Pay
 for Work of Equal Value in the Public Sector**

Thank you for letting us have sight of the captioned report.
 Our comments are set out as follows.

In studying the issue of EPEV in the Public Sector, it is important to appreciate that there are many factors, such as historical ones, that have given rise to the situation that some jobs are dominated by either sex. These are important in shaping the current situation and understanding of such is instrumental to the development of options. While the study managed to highlight that the number of women in the workforce has increased by over 44% in the fifteen year between 1985 and 2000, it failed to point out that a reduction of job segregation is happening between men and women in many fields. We are seeing more and more women entering traditional male employment domains, e.g. doctors and lawyers. Besides, there are more women holding senior managerial posts

than some twenty years ago and this is reflected in the civil service as well. Since the current study is conducted in a snapshot manner and has not taken into account the historical origins, developments and trends, underlying factors for job segregation and changing patterns, we doubt whether the recommendations could reduce male/female job segregation which is the root of the problem or whether they might perpetuate the problem, e.g. lessening the incentive for women to enter traditional male professions thereby maintaining the segregation.

The important issue we see is the need to remove gender stereotyping and job segregation between men and women. This should be the long term objective that we should be working towards. By achieving this objective, the issue of EPEV between male-dominated and female-dominated jobs would fade away. It would be more constructive to identify if there are any obstacles for men or women to enter a certain profession; the measures required to overcome any such obstacles; and the possible public education effort to reduce gender stereotyping in education, employment and society in general. These may be the areas we need to look into in further details.

No recommendations are given in the report on capacity and expertise building as well as raising public awareness, which are also the objectives of the study. Given the limited knowledge of the community on this subject, we see the need for a comprehensive strategy to be mapped out in these areas.

Yours sincerely,



(Jerry CHEUNG)

for Secretary for Health and Welfare

Consultant's Report on Equal Pay for Work of Equal Value

Introduction

This note summarizes the major comments of the Civil Service Bureau (CSB) on the report of a consultancy study commissioned by the Equal Opportunities Commission (EOC) on the subject of Equal Pay for Work of Equal Value (EPEV). The detailed comments of CSB are set out in the Annex.

Comments on the study methodology

2. In the course of the consultancy study, CSB had identified a number of fundamental issues concerning the way the consultancy study was carried out. These issues would have an important bearing on the validity of both the Consultant's findings and the recommendations made thereon. We, however, note that these issues have not been addressed by the Consultant or dealt with in the consultancy report.

3. First, the Consultant's approach of using the same set of job factors and the same weighting for each job factor in the evaluation of all the civil service jobs examined in the study is questionable. Given the great variety of civil service jobs with distinctly different job nature (e.g. disciplined services jobs vis-à-vis general administrative jobs), this approach for job-evaluation is considered improper.¹

4. Second, the sampling methodology adopted by the Consultant for the selection of jobs for the study and of job-holders from each job for group interview casts doubt on the statistical reliability of the study findings. The consultant has admitted that the sampling was not entirely random.² It is noted that the consultant had interviewed only one to six job-holders for each job, despite the fact that the establishment of the selected jobs is up to 19 000 job-holders.

5. Third, the incomplete basis (i.e. basic salaries only) adopted by the

¹ A study by an academic indicates that "when there are substantial differences in job content across job families, it might be necessary to adopt entirely different compensable factors for each job family." See "*Feasibility Study on Equal Pay for Work of Equal Value: Final Report*" by Professor Sung Yun Wing *et al* (16 April 1998), page 6.

A study by a professional consultant suggests that under the job factor analysis approach, different job factors would need to be adopted to take account of the unique nature of certain civil service jobs (e.g. disciplined services jobs) and that it would be inappropriate to compare the pay of jobs with vastly different job nature. See "*Final Report: Methodology of a Pay Level Survey for the Civil Service*" by the Hay Group Limited (November 2004), paragraph 2.28.

² See paragraph 4 in Section 3 of the Consultant's Report.

Consultant for comparing the pay of different jobs clearly presents a distorted picture. The consultant's sweeping statement that "cash allowances, when averaged over all job holders of the job in question, would be insufficiently large to make any material difference to the general results"³ was not supported by any facts or data. Indeed job-related allowances (e.g. hardship allowance) and/or housing benefits (e.g. housing allowances) provided to certain categories of civil servants (e.g. disciplined services staff) cannot, and should not, be regarded as insignificant.

6. Fourth, the Consultant's attempt to analyze the survey data on a selective basis is questionable. The misleading comment that "women in the junior ranks are paid better than men, but that women in the middle and senior ranks are paid less than the men for the work of equivalent value" ignores that the picture as presented by the full set of survey data gives no conclusive evidence of gender-based pay differentiation.

Comments on the Consultant's major recommendations

On the recommendation that the pay anomalies amongst individual jobs be looked into

7. The Consultant has advised that while the problems inherent in the job evaluation method can be statistically smoothed out across many jobs, at individual job level the results may not be entirely accurate.⁴ The Consultant's approach of selectively comparing individual jobs against the line of best fit to arrive at the misleading conclusion that there are pay anomalies amongst the selected jobs is clearly against its earlier advice. A study of this nature should focus on general patterns observed and it would be dangerous to draw conclusions by comparing individual jobs against the lines of best fit.⁵

On the recommendation that the existing pay determination system which overly emphasizes academic qualifications be replaced with one that considers multiple factors such as "efforts" and "working conditions".

8. It is factually incorrect to suggest that the pay for civil service jobs are determined purely on the basis of academic requirements. The pay for individual civil service ranks is determined by reference to a combination of factors including pay for the job (which is assessed on the basis of its collective job weight, working conditions and other relevant factors), qualifications (in terms of education qualification, professional qualifications and relevant working experience) and broadbanding (i.e. the application of a common pay

³ See paragraph 5 in Section 3 of the Consultant's Report.

⁴ See paragraph 2 in Section 3 of the Consultant's Report.

⁵ This view is shared by Professor Kenneth Law, a member of the EPEV Task Force.

structure to grades with comparable job weights and requirements). The Consultant's recommendation is unsubstantiated, and incorrect as evidenced by a clear example that the entry pay of a disciplined services grade is set at about 67% higher than that of a civilian grade with the same academic qualification requirement.⁶

On the recommendation that any changes in the qualification requirement for recruitment should be reflected in starting salaries

9. The education qualification for a job is set having regard to the requirement for the job, not the qualification possessed by the recruits. The appointment of candidates who are better qualified than the entry qualification requirements does not mean that the job requirement has already been raised. It only reflects the prevailing situation of the manpower market where job-seekers are generally better educated. The Administration from time to time reviews the entry qualification requirements for civil service entry ranks where necessary.

On the recommendation that the recruitment and promotion practices be examined and more effort be made to encourage females to apply for traditionally male-dominated jobs and senior positions

10. To encourage and facilitate one gender to apply for certain jobs in the civil service at the expense of the other gender goes against the principle of equal opportunities. It would be a retrograde step compared to the current civil service policy for recruitment and promotion, under which the most suitable candidates, in terms of skills, experience, attributes and aptitude relevant to the job concerned, are identified through open and fair competition irrespective of gender.

Conclusion

11. A study conducted based on an improper approach, a statistically unreliable methodology and an incomplete comparison would naturally lead to incorrect findings. It is not surprising that the consultant's study has come up with many inconceivable findings in terms of the job values of individual jobs. It is inappropriate and dangerous to accept any conclusions or recommendations that were made on the basis of incorrect findings.

⁶ For illustration, the benchmark pay point for the "Degree and Related Grades" is set at Master Pay Scale (MPS) Point 11 (currently at \$15,215). The entry pay for a Police Inspector with a degree qualification is set at Police Pay Scale Point 21 (currently at \$25,480), which is above the benchmark pay of \$15,215 for MPS 11 for the "Degree and Related Grades" in recognition of the relevant job factors (e.g. requirement to work shifts) and the special working conditions (e.g. exposure to danger, etc.).

12. The policy and practice for the determination of civil service pay is gender neutral by design and is in full compliance with the requirements for EPEV under the existing framework as provided for under the Sex Discrimination Ordinance. We shall continue to uphold the principle of equal opportunities in the civil service, and to have in place appropriate measures to avoid any discrimination against either women or men within the service.

Civil Service Bureau

Annex

Detailed comments of CSB on the Consultant's Report**Identified problems of the survey**Survey methodology

For the purpose of this study, the Consultant has adopted a particular job evaluation method used by the Canadian public sector and has then drawn his conclusions based on the results obtained from the study under this method. We note that there are many different approaches to studying EPEV and the Canadian model is but one of them.¹ We should point out that the Canadian model is not mandated under the existing framework for compliance of EPEV as provided for under the Sex Discrimination Ordinance (SDO). In the course of the study, the Consultant has not examined the pros and cons of different approaches. Nor has the Consultant examined whether the Canadian model is a suitable model for Hong Kong in general given our local circumstances, and for the Hong Kong civil service in particular.

2. The Consultant has used the same set of job factors and the same percentage weighting for each job factor for evaluating all selected jobs. It is relevant to note that the civil service in Hong Kong has an establishment size of some 163 000 covering over 400 grades and 1 000 ranks. There is a great variety of jobs in our civil service embracing different job levels and widely different job natures. We consider that **the Consultant's approach of using the same set of job factors and the same weighting for each job factor in the evaluation of all the civil service jobs examined in the study despite their vastly different job nature (e.g. disciplined services jobs vis-à-vis general administrative work) is improper.**²

¹ According to the findings of a research by the EOC Office, job evaluation is not a common approach for implementing EPEV in countries other than Canada and the UK.

² A study by an academic indicates that "when there are substantial differences in job content across job families, it might be necessary to adopt entirely different compensable factors for each job family." See "*Feasibility Study on Equal Pay for Work of Equal Value: Final Report*" by Professor Sung Yun Wing *et al* (16 April 1998), page 6.

A study by a professional consultant suggests that under the job factor analysis approach, different job factors would need to be adopted to take account of the unique nature of certain civil service jobs (e.g. disciplined services jobs) and that it would be inappropriate to compare the pay of jobs with vastly different job nature. See "*Final Report: Methodology of a Pay Level Survey for the Civil Service*" by the Hay Group Limited (November 2004), paragraph 2.28.

Data elements

3. The Consultant has pointed out that a study of this nature normally looks at total remuneration including all benefits.³ This study, however, focused on salary only, without regard to other remuneration components such as job-related allowances (JRAs) which are payable based on job conditions and the provision of employee benefits. We should point out that certain benefits/JRAs are provided to certain categories of civil servants only rather than to all civil servants in general. Indeed, job-related allowances (e.g. hardship allowance) and/or housing benefits (e.g. housing allowances) provided to certain categories of civil servants (e.g. disciplined services staff) cannot, and should not, be regarded as insignificant. **The incomplete basis (i.e. basic salaries only) adopted by the Consultant for comparing the pay of different jobs clearly presents a distorted picture.**

Data collection

4. There are various inadequacies in the data collection process. On the sampling size of each selected rank, the Consultant has interviewed at most six job-holders and in some cases, only one job-holder despite the fact that the establishment of the selected jobs is up to 19 000 job-holders. Given the relatively large size of some of the selected ranks and that the duties of a rank may vary considerably among different posts in different departments, we have serious doubts about the representativeness of the interviewed posts and hence whether the job evaluation outcome could truly reflect the job value of the relevant ranks. On the sampling method, the Consultant has advised that the reliability of study results obtained from non-random sampling of jobs is questionable since a few abnormal jobs amongst a relatively small sample could have a notable effect on the overall results.⁴ However, the selection of jobs in the study was not entirely random. There is also little evidence of a systemic and consistent method to verify job evaluation results to ensure data consistency. In view of the foregoing, **the sampling methodology adopted by the Consultant for the selection of jobs for the study and of job-holders from each job for group interview casts doubt on the statistical reliability of the study findings.**

Data analysis

5. In some other parts of the Report, **the Consultant is being inconsistent in the approach to data analysis.** For example, the Consultant has advised that “[i]f there was no discrimination towards either

³ See paragraph 5 in Section 3 of the Consultant’s Report.

⁴ See paragraph 4 in Section 3 of the Consultant’s Report

sex one would expect the two lines of best fit [respectively for male-dominated jobs and female-dominated jobs] to broadly coincide. However, if the lines are clearly separated then there is a prima facie case for concluding that some discrimination has unwittingly occurred with the extent of the discrimination being reflected by the distance between the two lines”⁵. The three graphs for the civil service as shown in Appendices 7-9 of the Report indicate that the two lines of best fit intersect and are not clearly separated. In fact, the two lines for starting salaries at Appendix 7 are very close to each other. Judging from these graphs, we consider that there is **clearly no conclusive evidence of gender-based pay differentiation**.⁶ However, in drawing his conclusion for the study, the Consultant has taken a completely different approach from the one he had advised. Based on selected survey data, instead of the full set of survey data as represented by the afore-mentioned graphs, the Consultant has made the dubious conclusion that “women in the junior ranks are paid better than men, but that women in the middle and senior ranks are paid less than the men for work of equivalent value”.⁷

6. The Consultant has advised that the problems inherent in the job evaluation method “are statistically smoothed out across many jobs but at individual job level, the results may not be entirely accurate”⁸. Despite this advice, the Consultant has selectively compared individual jobs against the regression line of best fit. **A study of this nature should focus on general patterns observed and it would be dangerous to draw conclusions by comparing individual jobs against the lines of best fit.**⁹

Study findings

7. **A study conducted based on an improper approach, a statistically unreliable methodology and an incomplete comparison would naturally lead to incorrect findings.** It is not surprising that the consultant’s study has come up with many inconceivable findings. **It is inappropriate and dangerous to draw any conclusions or make any recommendations based on the incorrect findings.**

⁵ See paragraph 10 in Section 3 of the Consultant’s Report.

⁶ Our view is shared by Professor Kenneth Law, a member of the EPEV Task Force.

⁷ See paragraph 20 in Section 3 of the Consultant’s Report.

⁸ See paragraph 2 in Section 3 of the Consultant’s Report.

⁹ Our view is shared by Professor Kenneth Law, a member of the EPEV Task Force.

Other comments on Section 3 of the Consultant's Report

Paragraph 1: "Job evaluation is ... commonly used within the private sector ..."

8. This raises a fundamental question about the applicability of the job evaluation methodology adopted in the study to the civil service in Hong Kong. In the study, the consultant applied the same set of job factors and the same weighting for each job factor to all the jobs covered in the study. That approach may be appropriate in the private sector as the employment size of private sector organizations is relatively small and the job nature is relatively homogenous within the same private sector firm as compared with the civil service. But the applicability of the same methodology to the Hong Kong civil service cannot be assumed given the large establishment size and the diverse range of jobs in the civil service.

Paragraph 2: "However, job evaluation neither claims to be perfect nor is perceived to be so due to several limitations on its absolute accuracy. For example, different incumbents in the jobs will be more or less skilful in describing their duties and explaining the more demanding aspects of their work ... These problems are statistically smoothed out across many jobs but at the individual level, the results may not be entirely accurate."

9. The Consultant has pointed out at the individual job level, the results may not be entirely accurate. Despite this and despite the limited number of data points obtained for the surveyed ranks, the Consultant has, in the latter part of his report, sought to draw conclusions based on an analysis of an incomplete set of survey data obtained with varying degree of reliability.

Paragraph 3: "Despite the shortcomings of job evaluation, it is the best means of comparing value of different jobs."

10. This is a very sweeping and unsubstantiated statement. The Consultant has not made any attempt to address the identified shortcomings of the job evaluation method and as such we have serious reservations on the credibility of the methodology, the findings and the conclusions drawn by the Consultant.

Paragraph 3: "In the view of the consultants, there is nothing so different about Hong Kong or the way work is conducted in Hong Kong as to invalidate this method of determining the value of a job, i.e. job evaluation, or to justify the adoption of a uniquely different methodology from that used in other countries."

11. The popularity of the job evaluation method seems to be overstated by the consultant. According to the findings of a research conducted by the EOC

Office, job evaluation is not a common approach for implementing EPEV in countries other than Canada and the UK.

Paragraph 4: "Traditionally, female jobs were selected such as clerks, secretaries, primary school teachers and nurses. Efforts were also made to select traditionally male job categories - such as firemen and engineers. This is potentially the area that could contribute most to the question of relativity of the final results since a few abnormal jobs amongst a relatively small sample could have a notable effect on the overall results ... However, in this situation, it proved difficult to get an even spread of either male or female dominated jobs throughout the different ranks and hence the selection of jobs was not entirely random."

12. The Consultant has made it clear that the results may not be reliable because jobs are not randomly sampled. This casts doubt on the validity of the results.

Paragraph 5: "A study of this nature normally looks at total remuneration including all benefits... The consultants are of the view that other cash allowances, when averaged over all job holders of the job in question, would be insufficiently large to make any material difference to the general results..."

13. The Consultant has not analyzed the nature of these excluded items and the possible impact of such exclusions on the survey findings before drawing the conclusion, which is not supported by any facts or data. Since certain benefits/job-related allowances (JRAs) are provided to certain categories of civil servants only rather than to all civil servants in general, the survey findings based on incomplete data have presented a distorted picture and are thus unreliable.

Paragraph 6: "Typically when an organization is putting together a plan for Equal Pay for Work of Equal Value, it establishes an Employer-Employee Working Committee to decide on the weightings to be allocated to the different job factors of Skill, Responsibility, Effort and Working Condition. Since each organization is different the committee first need to decide upon the weightings that it will adopt for each factor in order to best reflect the nature of its business..."

14. As pointed out by the Consultant, the agreement of both the employer and the employees on the weighting of each job factor is an important step in the job evaluation process to best reflect the nature of each job under survey. In the absence of the involvement of the management and staff in determining the relative weightings of the job factors in the study, it is doubtful whether the evaluation results based on weightings used overseas would be able to reflect the nature and requirements of jobs in the Hong Kong civil service and thus the value of the jobs studied.

15. We should also reiterate that the study covered a wide range of civil service jobs with diversified functions, job nature and work content. Most notably, it covered both civilian and disciplined services jobs. The application of the same set of job factors with the same weightings for each factor to jobs of such diversified nature is improper.

Paragraph 7: "... Accordingly the methodology was discussed in some detail amongst the task force in advance and, apart from the question of the weightings to be applied to the different factors, the basic approach was agreed."

16. Before embarking on the study, the Consultant had only outlined the broad framework of the consultancy study to the Task Force, without giving a clear explanation of the many relevant considerations related to the detailed methodology of the survey (e.g. job selection, job sampling method, scope of remuneration under study) and the approach to data analysis. The Task Force has not reached any agreement on the detailed survey methodology, nor was such an agreement specifically sought from Task Force members. Many of the inadequacies of the survey approach came to light only after the survey had been completed and when the draft consultancy report was available.

Paragraph 8: "In reporting the results, these limitations must always be kept in mind. Despite this, the following results and conclusions should nevertheless be treated as the most accurate and objective available to date and that the trends and results highlighted are a solid indication of very real issues."

17. It is not clear from the Consultant's Report how these limitations have been taken into account in presenting the results. Given our queries about the applicability of the methodology to the civil service, the reliability of the survey methodology and the validity of the data collection and analysis processes as explained in paragraphs 1-6 above, we do not accept that the study has led to any conclusive findings of very real issues.

Paragraph 12: "This graphical method is used in Canada where, ... In Hong Kong, where the Government has said that the Sex Discrimination Ordinance is to be used for the enforcement of pay equity, this method provides a tried and tested benchmark against which one could see if female or male jobs are comparatively lower paid."

18. The method based on the Canadian model had only been used for the first time in this pilot study on EPEV in Hong Kong. We cannot understand why this method provides a tried and tested benchmark for assessing whether a job receives comparatively poorer pay in the EPEV context.

Paragraph 16: "Working Condition was found to have a negative correlation

(-0.173) indicating that this factor does not appear to been given due consideration when setting salaries. This would disadvantage those jobs that involve harsher working conditions."

19. Duties performed under work environment which may render staff liable to bodily harm or physical impairment are in certain civil service ranks compensated by JRAs. The exclusion of JRAs from the remuneration under study may have explained the negative correlation found in the study. Without making any analysis of the impact of the exclusion of JRAs from the study, it is incorrect to make the conclusion that those jobs that involve harsher working conditions have been disadvantaged.

Paragraph 20: "The Graphs on starting, mid, and maximum salary points for the Civil Service are very similar and give a broad overview of the results of the study. They show that women in the junior ranks are paid better than men, but that women in the middle and senior ranks are paid less than the men for work of equivalent value."

20. Under the "line-of-best fit" approach as explained by the Consultant, there is a prima facie case for concluding that discrimination has occurred only if the lines for male-dominated and female-dominated jobs are clearly separated (see paragraph 10 of Section 3). The three graphs for the civil service as shown in Appendices 7-9 indicate that the two lines of best fit intersect and are not clearly separated. In fact, the two lines for starting salaries at Appendix 7 are very close to each other. We consider that there is no conclusive evidence to support the conclusion made by the Consultant that "women in the junior ranks are paid better than men, but that women in the middle and senior ranks are paid less than the men for work of equivalent value." The way that the Consultant has interpreted the results by comparing different segments of the lines of best fit instead of looking at the results in their entirety is questionable.

Paragraph 21: "Amongst the jobs falling in the lower salary ranges, there are several male jobs that are of very similar salary but of considerable difference in evaluation score and hence value. This indicates that for these junior jobs, the existing system for setting salary scales fails to differentiate adequately between higher and lower value jobs as measured by the multi-factor evaluation method."

21. As pointed out by the Consultant in paragraph 2 of Section 3 of the Report, the results at individual jobs levels may not be statistically accurate. There are thus no reliable results to support the above sweeping conclusion.

Paragraph 22: "At these lower salary levels, female dominated posts are better paid than male dominated posts (except at their scale minima). This reflects a strong historic differentiation between manual jobs (blue collar) and office jobs

(white collar). An example of blue-collar versus white-collar pay can be seen by comparing the jobs of Chainman, Ganger, Artisan and Motor Driver versus the Clerical Assistant ..."

22. The payment of JRAs to compensate for duties which are extraneous to the job descriptions for the officers concerned and which is not normally expected of staff in the same grade or rank is quite common among manual jobs. A pay comparison without taking the JRAs into account presents a distorted picture.

Paragraph 23: "At the middle and higher levels of the Master Pay Scale (MPS) female dominated jobs increasingly fall below male dominated jobs... This is probably caused by the failure of the current pay policies to give recognition to some of the factors that exist to a greater degree in female positions than male, such as dexterity and multi-tasking."

23. There is no evidence to suggest that our current pay policy does not give due regard to those factors that exist to a greater degree to female jobs. The civil service pay determination system takes into account a host of factors which are gender-neutral (see further details in our comments on paragraph 29 below).

Paragraph 24: "An example of this result can be seen in the case of the Primary School teachers who are paid below the male salary line. The Assistant Primary School Mistress, with 587 points, has a starting salary of \$17,100 and reaches her maximum salary of \$38,695 after 17 annual increments. By comparison the male dominated Senior Technical Officer has fewer points at 514, but starts at a significantly higher salary of \$29,400 and caps out at approximately the same salary of \$38,695 after 7 increments. Alternatively, when she is compared to an Officer of the Correctional Services, worth 459 points, one finds that he starts at \$20,765 and caps at \$47,675 after 17 increments. While both jobs have the same number of increments, the male job with less points starts higher and has a higher maximum point. Thus, the Assistant Primary School Mistress job is worth more but is paid broadly the same as a position that is worth less."

24. Assistant Primary School Mistress is the entry rank of the primary school teaching grade, while Senior Technical Officer is the second tier of the Technical Officer grade and the Officer of the Correctional Services is an officer rank in the disciplined services. It is rather inconceivable that the score for Assistant Primary School Mistress is significantly above those of the latter two. This is possibly due to the limitations and deficiencies of the methodology adopted (e.g. application of the same set of job factors for evaluating civilian and disciplined services jobs).

Paragraph 25: "Still higher up the MPS and at the professional engineer level,

jobs are virtually all male dominated ... This demonstrates that females may not be getting a fair share of these better-remunerated posts. This phenomenon may be due to historical reasons, hiring practices, or the relative lack of supply of female applicants to such posts. It may also reflect gender stereotyping that existed strongly in the past and continues today."

25. We should point out that the relative number and distribution of male-dominated jobs and female-dominated jobs are not the subject matters for examination in the study. On civil service appointment, we adhere strictly to the principle of open and fair competition. Whether in recruitment and promotion, we seek to identify the most suitable candidate, in terms of skills, experience, attributes and aptitude relevant to the jobs concerned, through a process of open and fair competition, irrespective of gender. Promotion within the civil service is based on an open and fair selection process whereby all eligible candidates are considered on an equal footing by promotion boards and are selected for promotion on merits. The process also includes advice and monitoring by an independent and statutory body, i.e. the Public Service Commission. Given this and in the absence of any evidence, we strongly refute the Consultant's suggestion that the domination of male officers in certain civil service positions may be due to "hiring practices".

Paragraph 26: "When looking at the promotion ranks, one finds some other empirical evidence that as jobholders move up the promotional ladder, there are more males in the promotional ranks. For example, the entry level of Assistant Operations Officer is 60% female but at the level of Operations Officer, it becomes 32% female, and there are no women at the level of Senior Operations Officer. This aspect was not studied in depth and there is inadequate data to make solid conclusions but is interesting enough to bear further examination (Appendix 5)."

26. Again, the relative number and distribution of male-dominated jobs and female-dominated jobs are not the subject matters for examination in the study. It would be rather misleading to assert that there are more males in the promotional ranks by looking at just one grade. In the Administrative Officer grade, for example, half of the directorate officers are female.

Paragraph 27: "An example of inequitable pay at the senior level can be found in the case of the female dominated Senior Intellectual Property Examiner's job which is worth 694 points and caps at \$73,815 after 10 increments. Her pay at maximum point is similar to that of the male dominated Engineer whose job was scored 18 points less at 676 points."

27. The above example shows that the score for Engineer is 18 points (or 2.6%) lower than that of Senior Intellectual Property Examiner. As a matter of fact, both the starting pay (MPS 27) and the mid-point (MPS 37) of the Engineer rank are lower than those of the Senior Intellectual Property

Examiner rank (MPS 34 and MPS 39 respectively). The example quoted does not point to any inequitable pay at the senior level.

Paragraph 29: "Similarly, the family of Fireman to Fire Station Officers consistently falls below the male average line revealing that they too are being unfairly remunerated by comparison to other male dominated jobs. This is almost certainly caused by the fact that their pay scales are strongly influenced by their rather modest academic requirements with no account being given to their higher than average service to the community, exposure to danger and adverse working conditions generally. This disparity can be seen in the case of the Fireman who scored 426 evaluation points, and who starts at \$12,940 and caps at \$18,965 with 12 increments. On the other hand, the female-dominated job of Senior Dental Surgery Assistant, with 425 points, starts at \$23,170 and caps at \$29,400 with 5 increments. Whilst firemen also receive housing benefits at lower levels of seniority than non-disciplined services, this is not sufficient to make up for the difference in salary."

28. It is rather inconceivable that the job score for Fireman (426) is only slightly lower than that of Officer of the Correctional Services (459). The job requirement and the level of responsibility of the latter, which is an officer rank in the disciplined services, is much higher than that of the former which belongs to the rank and file in the disciplined service. We have serious doubts about the validity of the job evaluation outcome.

29. It is factually incorrect to suggest that the pay scales are strongly influenced by academic requirements with no account being given to the working conditions of the Fireman. The pay for individual civil service ranks is determined by reference to a combination of a number of factors including pay for the job (which is assessed on the basis of its collective job weight, working conditions and other relevant factors), qualifications (in terms of education qualification, professional qualifications and relevant working experience) and broadbanding (i.e. the application of a common pay structure to grades with comparable job weights and requirements). In practice, this system involves establishing benchmark pay points for essential qualifications which are stipulated as normal requirements for appointment. The starting pay for an entry rank requiring a particular qualification is then set with reference to the relevant benchmark, having regard also to other relevant factors (e.g. working conditions).¹⁰ In determining the pay beyond the entry

¹⁰ For illustration, the benchmark pay point for the "Degree and Related Grades" is set at Master Pay Scale (MPS) Point 11 (currently at \$15,215). The entry pay point for the Assistant Social Work Officer rank which falls within this qualification group is set at MPS 13 (currently at \$17,145, i.e. two point above the benchmark pay point) in recognition of the special job nature of and the requirement of a relevant degree for that particular rank. In another example, the entry pay for a Police Inspector with a degree qualification is set at Police Pay Scale Point 21 (currently at \$25,480), which is above the benchmark pay of \$15,215 for MPS 11 for the "Degree and Related Grades" in recognition of the relevant job factors (e.g. requirement to work shifts) and the special working conditions (e.g. exposure to danger, etc.).

civil service ranks, the level of responsibility exercised by officers of those ranks is a key consideration.

30. Based on the civil service pay determination arrangement described above, the pay for Civil Service positions carrying similar level of responsibility and exercising skills which bear some resemblance in the training and aptitude requirements are set in a broadly consistent manner, with suitable adjustments to take account of differences in working conditions and other relevant factors where appropriate. The three independent advisory bodies on Civil Service salaries and conditions of service, namely the Standing Commission on Civil Service Salaries and Conditions of Service, the Standing Committee on Disciplined Services Salaries and Conditions of Service and the Standing Committee on Directorate Salaries and Conditions of Service, carry out pay reviews for individual civil service grades and ranks periodically to take account of any changes to the job nature and job requirements of the concerned grades and ranks and adjust the relevant pay scales accordingly.

31. In the case of Fireman quoted by the Consultant, we should point out that a Fireman with 5 passes in HKCEE including English is paid at General Disciplined Services (Rank and File) Pay Scale Point 3 or \$13,388, which is 49.3% above the pay of civilian ranks of the same qualifications (which is at Master Pay Scale Point 2 or \$8,965).

Paragraph 30: "On looking at pay ranges, female-dominated positions have an average slightly longer pay ranges with more pay points than male-dominated jobs. Female jobs have 9.45 increments on average and males have 8.31. The variation appear random and irrational but nevertheless could be considered to be unfair treatment for people in different jobs but of similar value."

32. We note that the male-dominated jobs selected for this study comprise more senior ranks than the female-dominated jobs. Generally speaking, senior ranks in the civil service have a shorter pay scale than that of the junior ranks. This explains the phenomenon that female-dominated jobs appear to have a longer pay ranges than male-dominated jobs. There is no evidence to support the comment that the variations could be considered to be unfair treatment for people in different jobs of similar value.

Paragraph 31: "Overall, the results reveal a considerable number of anomalies when jobs are evaluated on this multi-factor basis. One explanation lies in the current pay determination system which looks almost exclusively at just one factor, namely educational requirements; physical aspects of the jobs, multitasking and more complex forms of communication are given no credit in pay determination."

33. The explanation put forth is totally unfounded and reflects that the

Consultant does not understand the civil service pay system. As explained in our comment on paragraph 29 above, we take account of not only educational requirements but also other relevant job factors in determining the pay for each civil service job.

Paragraph 32: "One aspect of the problem of placing overriding importance on the academic requirement of the job is that these can gradually change with time and, sometimes, changes in recruiting practices do not get officially recognized or taken into account in pay scale determination. For example, the stated academic requirements of Police Sergeants and Police Inspectors at the time of the study appeared to be out of line with the prevailing practice. This may simply reflect that higher qualified applicants are applying for the jobs and are generally being selected, or that the jobs have become more sophisticated calling for higher intellectual skills."

34. The comment of the Consultant again reflects that he does not understand the civil service pay system. The education qualification for a job is set having regard to the requirement for the job, not the qualification possessed by the recruits. The appointment of candidates who are better qualified than the entry qualification requirements does not mean that the job requirement has already been raised. It only reflects the prevailing situation of the manpower market where job-seekers are generally better educated. The Administration from time to time reviews the entry qualification requirements for civil service entry ranks where necessary. As a result of such reviews, we have, for example, raised the entry qualification requirement of Executive Officer and Chinese Language Officer (now renamed as Official Languages Officer) from matriculation to degree level to reflect the higher job requirement.

Paragraph 46: "That the forthcoming review of Pay Systems and Pay Policies for the Civil Service include the issues identified in this study, and recommend the replacement of the salary setting system that overly emphasizes academic qualifications with a system that considers multiple factors such as "efforts" and "working conditions".

35. It is wrong to say that our salary system overly emphasizes academic qualifications. As explained in our comment on paragraph 29 above, apart from academic requirements we also take account of other relevant job factors in determining the pay for each civil service job.

Paragraph 47: That the Government undertake a systematic review of entry qualifications to ensure that recognized job requirements are in line with current recruitment practices. Where higher academic qualifications are now being sought, and can be demonstrated to be required in the way the jobs are now undertaken, these changes should be acknowledged and reflected in starting salaries.

36. We do not accept that this recommendation, which is based on the Consultant's misunderstanding about civil service pay policy (see our comments on paragraph 32 above).

Paragraph 48: Pay ranges and scales vary significantly from job to job, thus producing anomalies and situations that could be interpreted as discriminatory. The whole structure needs to be re-examined in order to reflect a fairer situation of jobs enjoying a similar number of increments from starting to maximum salary point.

37. As explained earlier, the salary structure of a civil service grade/rank is determined on the basis of qualification requirement as well as other job-related factors. Grades requiring the same level of educational qualification share a similar structure but there may be variations with additional pay points granted to individual grades/ranks to reflect particular job nature and requirements. The variation in pay ranges and pay scales among different civil service jobs just rightly reflect their different job requirements and job factors. The Consultant's recommendation is inconsistent with the principle of "pay for the job".

Paragraph 49: That recruitment and promotion practices be examined and more effort be made to encourage females to apply for traditionally male-dominated jobs and senior positions.

38. We do not agree with this recommendation. We consider that to encourage and facilitate one gender to apply for certain jobs in the civil service at the expense of the other gender goes against the principle of equal opportunities. It would be a retrograde step compared to our current policy on appointment under which we identify the most suitable candidates, in terms of skills, experience, attributes and aptitude relevant to the job concerned, through open and fair competition irrespective of gender.

Paragraph 51: That teachers' salaries be reviewed against the broad evaluation criteria and measures be put in place to narrow the gap with male-dominated jobs.

39. The pay of the teaching profession is determined by reference to the same criteria, which are gender neutral, as all other jobs in the civil service. As pointed out in paragraph 7 above, the study was conducted on the basis of an improper approach, a statistically unreliable methodology and an incomplete comparison. The findings arising from the study are bound to be incorrect.

Paragraph 52: Male-dominated jobs, with greater emphasis on physical skills that appear to be unfairly low paid, should be looked at by reference to private sector salaries to see if their pay may be affected market forces.

40. Given the identified problems with the approach and methodology of the study, we could not accept the alleged pay anomalies in male-dominated jobs based on incorrect findings.

Civil Service Bureau

Implementing Equal Pay for Work of Equal Value in Hong Kong: A Feminist Analysis*

By Carole J. Petersen[#]

I. Introduction

Ever since women entered the labour force, they have been paid less than men. Originally, unequal pay was an express policy. For example, in Hong Kong, the Salaries Commission of 1947 stated that the salary of a female civil servant should be approximately 80% of a male officer doing comparable work.¹ This was not based upon evidence that women were less productive than men, but rather on the assumption that women did not need to earn a “living wage”, as their husbands were supporting the family. Employers and policy-makers (who were almost always men) were also very likely motivated by the belief that women *should* earn less than their husbands, viewing the alternative as a threat to the traditional balance of power within the family.

Hong Kong did not formally reject the practice of paying women less than men until fairly recently. Equal pay and benefits for female civil servants were not fully achieved until the 1980s. In the private sector, sex discrimination was perfectly lawful until December 1996. Sex-specific job advertisements (e.g. for “male engineers” and “female clerks”) were common and demonstrated that our labour market was sexually segregated, both horizontally (in that certain industries were largely closed to women) and vertically (in that managerial posts were more likely to be reserved for men, even in industries that employed primarily women).²

Fortunately, the discriminatory *advertisements* have finally disappeared, due to section 43 of the Sex Discrimination Ordinance and vigorous enforcement by the Equal Opportunities Commission. But it would be naive to assume that the *attitudes* that led employers to place sex-specific advertisements have magically disappeared, only a few years after the legislation came into force. Common sense tells us that hiring, promotion, and compensation decisions are still influenced by sexist notions. It will take years of education and enforcement of the legislation to overcome the effects of this historical pattern.

This paper considers the concept of “equal pay for work of equal work” (also known as “comparable worth” and “pay equity”), as a tool to redress the gender pay gap. Part II considers the evidence that discrimination causes traditionally female positions to be underpaid and the potential for comparable worth to address that phenomena. Parts III and IV analyze the existing

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¹ Kwok Pui-lan, Grace Chow, Lee Ching-Kwan, and Rose Wu, “Women and the State in Hong Kong”, in Fanny M. Cheung, ed, *Engendering Hong Kong Society: A Gender Perspective of Women’s Status* (Chinese University Press 1997), p. 248.

² See, e.g., Ho Suk Ching, “The Position of Women in the Labour Market in Hong Kong: A Content Analysis of the Recruitment Advertisements”, (1985)10 *Labour and Society* 334. For a general discussion of gender segregation in the Hong Kong labour market, see Thomas W.P. Wong, “Women and Work: Opportunities and Experiences”, in Veronica Pearson and Benjamin K.P. Leung, eds, *Women in Hong Kong* (Oxford University Press 1995).

legislative framework in Hong Kong. I argue there that Section 11 of the Sex Discrimination Ordinance (which broadly prohibits discrimination in the terms of employment) already prohibits comparative worth discrimination in certain circumstances. However, the Code of Practice on Employment has introduced confusion as to when employers should implement comparative worth policies and it is not being actively pursued (either by employers or employees) at this time. I argue that the Code of Practice should be amended and the Equal Opportunities Commission should actively study whether traditionally female jobs are being devalued in Hong Kong as a result of discrimination.

II. Comparative Worth Discrimination

In the campaign to achieve equality for women, one of the most important goals should be to eliminate the gender pay gap. Research in other jurisdictions has shown that a significant cause of the gap in male-female earnings is the fact that women have been segregated into certain positions, which have been devalued precisely because they are considered “female job”. Nurses, librarians, elementary school teachers, speech therapists, and clerical workers are examples of workers who have been found to suffer a wage penalty *because* they work in female-dominated professions. For example, in 1980 the City of San Jose (California) commissioned a study of its wage scheme and found that female-dominated jobs were paid 15-25% less than comparable male-dominated jobs. Some of the more glaring inequalities were published in the local press, including:

- a nurse earned \$US 9,120 (about \$HK 70,000) less per year than a fire truck mechanic;
- a senior librarian earned \$US 5,304 (about \$HK 40,000) less per year than a senior chemist;
- a legal secretary earned \$US 7,288 (about \$HK 56,000) less per year than an equipment mechanic;
- secretaries generally were paid less than men in positions that required only an 8th grade education (including men who washed the city’s cars).³

Similarly, nurses in Denver found that they were paid less by the city government than tree trimmers, despite the fact that nurses were required to have much higher education for their jobs. The City of Philadelphia paid practical nurses (mostly women) less than gardeners (mostly men). These are just a few examples of the many cases in which job evaluation studies have found that female-dominated jobs were underpaid, to an extent that simply could not be justified by non-discriminatory factors. In contrast, “one is hard pressed to come up with a single example of a male job paying less than a female job that reasonable people would find comparable in skill, effort, or difficult working conditions.”⁴

³ Linda M. Blum, *Between Feminism and Labor: The Significance of the Comparable Worth Movement* (University of California Press 1991), pp 60 and 82-3.

⁴ Paula England, *Comparable Worth: Theories and Evidence* (New York: Walter de Gruyter, Inc. 1992), p. 2.

Neo-classical economists often argue that differences in female wages can be explained by differences in their commitment, education, experience or other “human capital”. However, when these theories are actually tested, they do not fully explain the gender pay gap. A recent review of the research concluded:

[M]uch of the human capital theory simply does not withstand scrutiny. The gender-pay gap cannot, it seems, be explained by reference to women’s lack of education, skills, or commitment to the world of paid employment. In the first place, the theorized relationships appear to depend mainly on assumptions about women’s work than on hard evidence. Secondly, human capital theories fail to explain the abundant evidence that, skills, education, training, labour market experience, etc. held constant, men *still* earn more than women.⁵

Similarly, research by the International Labour Office found that even when female-dominated occupations “involve the same skill, effort, responsibility and working conditions as the male-dominated jobs, they tend to pay less than the male-dominated jobs.”⁶ A 1999 review of several different studies concluded that the sex composition of an occupation or job category exerts a *net* effect on its wage level after other factors are accounted for.⁷ Thus we should be wary of claims that the gender pay-gap in Hong Kong can be explained away by non-discriminatory factors. The Hong Kong government tried to assert this view in 1992 (in the unsubstantiated Findings of the “Inter-departmental Working Group on Sex Discrimination”⁸) and again in 1993 (in the *Green Paper on Equal Opportunities for Women and Men*⁹). However, the government eventually conceded that it had made this assertion without having done any real research on the causes of the male-female earnings gap in Hong Kong.

Economists who concede that the gender pay gap is at least partly caused by discrimination often maintain that the root of the problem is *hiring* discrimination rather than *pay* discrimination. They argue that because employers refuse to hire women for traditionally “male” jobs, women are pushed into traditionally “female” jobs, creating an excess supply of women for these jobs and lowering wages by the normal forces of demand and supply. However other researchers have concluded that this “crowding effect” is not the major cause of depressed wages in female jobs. Rather, they maintain that traditional discriminatory attitudes about women’s abilities and the

⁵ Aileen McColgan, *Just Wages for Women* (Oxford University Press 1997), p. 238.

⁶ Morley Gunderson, “Comparable Worth and Gender Discrimination: An International Perspective” (Geneva: International Labour Office 1994), p. 1.

⁷ See Paula England, “The Case for Comparable Worth” (1999) 39 *The Quarterly Review of Economics and Finance* 743-55.

⁸ I say “unsubstantiated” because the Findings cited no studies (other than a vague reference to unnamed “surveys” allegedly showing that Hong Kong women did not perceive themselves to be victims of discrimination). The Findings reveal that the Working Group did not conduct actual research – it simply repeated the government’s position at that time (which was to deny the existence of discrimination and oppose all anti-discrimination legislation). Thus we should not rely on these “Findings” for any conclusions about the causes of the gender pay gap in Hong Kong.

⁹ In the *Green Paper on Equal Opportunities for Women and Men* (Hong Kong Government Printer 1993), the government asserted that the persistent differences between male and female earnings could be explained by several non-discriminatory variables (e.g. differences in education, capabilities, and experience). However, in a public meeting with women’s organizations (held on 29 September 1993), the Secretary for Home Affairs admitted (in response to a question by me) that he had no evidence supporting this assertion. A follow-up letter to the government, repeating the question, also generated no supporting evidence.

contribution they make to an organization leads to a devaluation of their work. Thus, there is a tendency to pay a job less simply because women are in it “whether because of a cognitive mistake about the skill requirement or contribution to profit of the job, or because of believing women need or deserve less money than men.”¹⁰ Once wages are set in this biased way, women are placed on a lower pay scale than men and institutional inertia perpetuates the error.

While some economists argue that market forces alone will eliminate these attitudinal prejudices (because such prejudices are inherently inefficient), others believe that this is an overly-optimistic view.¹¹ Indeed, if market forces could eliminate employers’ bias against women, why was it necessary to enact legislation in order to stop Hong Kong employers from advertising for “male engineers” and “female clerks”? Obviously the employers who were placing those ads (as recently as 1996) are motivated by prejudice -- prejudice that is *stronger* than any desire to maximize profits by attracting the best people. Economists have also acknowledged that employers may exclude women from certain positions because they are “willing to sacrifice profits to maintain the morale” of those male workers who oppose the hiring of women.¹²

The principle of “equal pay for work of equal value” (often referred to as “comparable worth” or “pay equity”) was thus developed as a means of addressing the problem directly, by revealing and removing the wage penalty for female jobs. Essentially, this principle provides that sex discrimination includes not only a situation in which a woman is paid less than a man in precisely the same job, but also a situation in which a woman is paid less than a man performing a different job that is comparable in terms of education, skills, working conditions and other factors. I will refer to this situation as “comparable worth discrimination”.

Proponents of pay equity see it as a necessary *complement* to legislation that prohibits sex discrimination in hiring. Even with effective enforcement of our Sex Discrimination Ordinance, it will take time to desegregate the labour market. In order to do so, we need to change not only the attitudes of employers but also the attitudes of educators (who unfortunately still discourage Hong Kong girls from pursuing highly paid male-dominated careers).¹³ Moreover, the gradual desegregation of the labour market will not necessarily help those women who are already employed in devalued female-dominated positions.

¹⁰ England, note 4 above, p. 284. See also Richard Perlman and Maureen Pike, *Sex Discrimination in the Labour Market: the Case for Comparable Worth* (Manchester University Press 1994), pp 12-19.

¹¹ See England, note 4 above, pp 54-68; Perlman and Pike, note 10 above, pp 12-19; and Barbara R. Bergmann, “The Economic Case for Comparable Worth”, in Heidi I. Hartmann, ed, *Comparable Worth: New Directions for Research* (National Academy Press, Washington D.C. 1985), pp 71-85.

¹² England, note 7 above, section 5.1 (citing Barbara Bergmann and W. Darity Jr., “Social Relations, Productivity, and Employer Discrimination”, (1981) 109(4) *Monthly Labour Review* 47-49).

¹³ Female students are discouraged by teachers from entering the prestigious “science stream”, which leads to better opportunities to attend university and obtain a high paying job in Hong Kong. See Choi Po King, “Women and Education in Hong Kong”, in Veronica Pearson and Benjamin K.P. Leung, eds, *Women in Hong Kong* (Oxford University Press 1995), p. 111. It has also been reported (in 1999) that nearly half of Hong Kong’s co-educational schools still bar girls from taking design and technology classes. While the Education Department has promised to ask schools to change this practice, it is clear that the attitudes of the teachers who established the rule will not change immediately. In the meantime, those attitudes will discourage girls from studying in related fields. See *South China Morning Post*, 18 November 1999, p. 5.

As noted above, there have been several publicized cases in the United States in which employees have succeeded in obtaining pay increases through the principle of comparable worth. By 1989, 42 states had enacted laws “mandating some data collection on the equity of their pay structures for state employees, 21 had done a formal pay equity study, and 20 had made some pay equity adjustments.”¹⁴ National legislation requiring comparable worth has never been enacted in the United States, largely due to resistance from the Reagan/Bush republican administrations, the religious right, and neoclassical economists (such as Mark Killingsworth) who see it as a violation of the free market.¹⁵ However, certain public employees are covered by individual states’ comparable worth policies or legislation. A leading example is the state of Minnesota, where job evaluations revealed numerous situations in which female jobs were paid less than male jobs although the jobs received equivalent or higher points on the evaluation scale. (For example, women who cared for disabled children were being paid less than male zoo keepers.)¹⁶ The legislature enacted the State Employees Pay Equity Act and significant adjustments were made. While some researchers have criticized various elements of the Minnesota programme, others argue that it has been a success *overall* and has made a significant contribution to gender equality.¹⁷ It should also be noted that many American employees who are not covered by comparable worth legislation have, nonetheless, used non-legislative mechanisms (such as collective bargaining and union activity) to persuade employers to make pay adjustments to female dominated jobs that were paid less than comparable male-dominated positions.¹⁸ As one review concluded, “pay equity [in the United States] has done extraordinarily well as a reform policy, despite its very limited coverage”.¹⁹

Many other jurisdictions (including the United Kingdom, Canada, and Australia) have expressly included the principle of comparable worth in legislation and have actively implemented it through a variety of mechanisms. There is a wide variety of opinions on the impact of these policies. Certain economists focus on the negative aspects -- for example, they argue that raising wages in traditional female jobs may cause more women to seek such jobs (perpetuating the segregation of the market) while causing employers to hire fewer of them (creating unemployment).²⁰ However other economists argue that these negative elements are less significant than previously believed. For example, Perlman and Pike maintain that comparable worth legislation can have “indirect or long-run effects that are likely to mitigate any negative employment effects.”²¹ They also note that the knowledge that the employer is implementing a

¹⁴ Paula England, note 7 above, section 3.

¹⁵ Ibid.

¹⁶ See, e.g., Sara M. Evans and Barbara J. Nelson, “Translating Wage Gains into Social Change: International Lessons from Implementing Pay Equity in Minnesota”, in Judy Fudge and Patricia McDermott, eds, *Just Wages: A Feminist Assessment of Pay Equity* (University of Toronto Press 1991), p 229.

¹⁷ Ibid, pp 227-246. See also Elaine Sorensen, *Comparable Worth: Is It a Worthy Policy?* (Princeton University Press 1994).

¹⁸ See e.g. the case studies published in Peggy Kahn and Elizabeth Meehan, eds, *Equal Value/Comparable Worth in the UK and the USA* (Macmillan Press Ltd. 1992).

¹⁹ Evans and Nelson, note 16 above, p. 243.

²⁰ For examples of the arguments of two of the leading critics of comparable worth, see Steven E. Rhoads, *Incomparable Worth: Pay Equity Meets the Market* (Cambridge University Press 1993); and Mark R. Killingsworth, “The Economics of Comparable Worth: Analytical, Empirical and Policy Questions”, in *Comparable Worth: New Directions for Research*, note 11 above.

²¹ Perlman and Pike, note 10 above, p. 79.

fairer wage structure will likely have a positive impact on morale of female workers and increase their productivity (thus offsetting any incentives for the employer to reduce female employment levels).²² Comparable worth also may actually help to *solve* the underlying problem of sex-segregation of jobs as it gives employers an incentive to integrate positions that have traditionally been segregated (because they are far less likely to be held liable for comparable worth discrimination if their workforce is not segregated into “female” and “male” positions).²³

I have briefly reviewed these arguments primarily to demonstrate that there are different views among economists and other experts in the labour field regarding the potential impact of comparable worth legislation. The Hong Kong community should carefully examine studies of experts on *both sides* of the debate. In this light, I question the objectivity of the *Feasibility Study on Equal Pay for Work of Equal Value*. It is my understanding that the Equal Opportunities Commission appointed the authors (Sung Yun-wing, Zhang Junsen, Ng Sek-hong, and Paul Hempel) to conduct this study. However, the cover of the report also lists Mark Killingsworth as the “External Expert”. In their final report, the authors thanked Professor Killingsworth for his advice and guidance, noting that the report drew heavily on papers written by him and that he had visited Hong Kong to offer suggestions on the study and the report.²⁴ As I have noted earlier in my paper (see note 20 above), Mark Killingsworth is well known in the United States as a staunch opponent of comparable worth legislation. Therefore, when the authors of this *Feasibility Study* retained him as their guide and external expert, they essentially pre-ordained the result of the study, which was to oppose comparable worth policies. Of course, Professor Killingsworth and the four authors are entitled to their opinion. But the Equal Opportunities Commission cannot now rely on this study as an *objective* appraisal of the feasibility of implementing comparable worth in Hong Kong. Rather, it should treat this study for what it is -- a strong statement of the arguments against comparable worth -- and seek experts on the other side of this important policy debate for the alternative perspective. This is the only way that the Equal Opportunities Commission can achieve a balanced perspective on whether it should actively pursue equal pay for equal value as a policy goal in Hong Kong.

It should also be noted that some of the critique of comparable worth legislation does not argue for its abandonment but rather for refining and strengthening the mechanisms through which it is enforced. Hong Kong is in a position to benefit from these suggestions. For example, substantial research has now been done on how to design gender neutral job evaluations (to ensure that the evaluation does not simply perpetuate the same prejudices that originally caused female jobs to be underpaid).²⁵ Similarly, in 1997 Aileen McColgan published a comprehensive review of UK, European Community, Canadian, and Australian approaches to pay equity. She concluded that one of the current problems with the UK legislation is the fact that its enforcement depends almost entirely upon individual complaints, which are difficult to maintain and do not have any

²² Ibid, p. 81.

²³ England, note 7 above, section 5.4.

²⁴ See Sung Yun-Wing, Zhang Junsen, Ng Sek-Hong, and Paul Hempel (with Mark Killingsworth as External Expert), *Feasibility Study on Equal Pay for Work of Equal Value: Final Report* (16 April 1998), at “Acknowledgements” page.

²⁵ See, e.g. Leslie Zebrowitz McArthur, “Social Judgment Biases in Comparable Worth Analysis”, in *Comparable Worth: New Directions for Research*, note 11 above.

direct effect on other workers. She recommended a much more collective approach to the issue, one in which the enforcement body would be proactive and address the *systemic* devaluation of female-dominated positions.²⁶ This suggests that the Hong Kong Equal Opportunities Commission could play an important role -- designing gender neutral job evaluation criteria, studying the pay scales of employers (particularly large institutional employers at the outset), and advising employers and employees. The point is that there is a wealth of literature out there that does not reject pay equity but rather offers constructive criticism of the various mechanisms for implementing it. If we study it carefully and objectively, we can develop mechanisms for implementing comparative worth that will be more advanced and more effective than those developed previously in other jurisdictions.

We must also be careful not to reject the concept of comparable worth simply because it represents interference in the market (the primary objection of those economists who oppose it). This same objection could also be made of many worker safety laws, laws against child labour, and laws that prohibit firing a female worker because she is pregnant. Indeed, the entire concept of sex discrimination legislation was long opposed in Hong Kong by those who argued that it would be too interventionist. But the community, the legislature, and ultimately the government rejected this position -- as demonstrated by the results of the *Green Paper* consultation exercise and the adoption of an enforceable Sex Discrimination Ordinance.²⁷ The question therefore is not whether comparable worth constitutes intervention in the market, but rather whether it is justified and worthwhile.

The next two sections analyze the provisions of the Sex Discrimination Ordinance relating to pay discrimination. I argue that the Ordinance does already prohibit comparative worth discrimination in certain circumstances. However, in the present situation (without any active implementation of the concept), the Ordinance will probably not have any significant impact on the tendency to devalue traditionally female positions.

III. Comparative Worth Discrimination: the Legal Position in Hong Kong

In 1995 Hong Kong enacted its first anti-discrimination law, the Sex Discrimination Ordinance.²⁸ As originally drafted by the government, the Sex Discrimination Bill prohibited discrimination in the terms of employment offered to applicants for jobs. However it did not contain a provision prohibiting discrimination in the terms of employment for existing employees.²⁹ This omission in the bill probably resulted from the fact that the government had essentially copied

²⁶ Aileen McColgan, note 5 above, p. 412.

²⁷ At the conclusion of the *Green Paper* consultation exercise the government was compelled to admit that the majority of responses supported the enactment of sex discrimination legislation and the extension of CEDAW to Hong Kong. See S.Y. Yue, "UN Convention to Be Adopted", *South China Morning Post*, 31 December 1993, p. 2 (quoting Secretary for Home Affairs Michael Suen).

²⁸ Cap 480, Laws of Hong Kong.

²⁹ Compare Clause 10(1) with Clause 10(2) of the Sex Discrimination Bill, *Hong Kong Government Gazette*, 14 October 1994, *Legal Supp No. 3*.

the UK Sex Discrimination Act 1975 (which does not apply to pay discrimination in employment contracts as this is addressed in separate legislation, the Equal Pay Act 1970).

The omission was pointed out to the government during the examination of the Bill by the Bills Committee. At first the government suggested that the issue of equal pay should be left entirely to the Sex Discrimination Ordinance Code of Practice on Employment.³⁰ Indeed, it appears that the government expected the Code of Practice to borrow heavily from the UK Equal Pay Act, as the government added a provision to the Sex Discrimination Bill stating that a code of practice relating to discrimination in the *terms of employment* may make reference to and incorporate provisions from an enactment of a jurisdiction outside of Hong Kong.³¹ However legislators also pressed the government to add a provision relating to equal pay to the Ordinance itself. The government thus agreed to amend the Bill so that it would expressly prohibit discrimination in the terms of employment for existing (as well as prospective) employees.³²

Discrimination in the “terms of employment” is a broad concept and in my view can be interpreted as requiring *both* equal pay for equal work and *also* equal pay for work of equal or comparable value. Indeed, it is my understanding that the government has often taken this position. For example, when legislator Christine Loh was drafting her bill to amend the Sex Discrimination Ordinance (which was enacted in June 1997³³), she wrote a letter to the government seeking clarification on the issue. She noted that if the Ordinance were interpreted by the courts as providing *less* protection in respect of equal pay than is available in the UK, this result would be “contrary to the general understanding given the Bills Committee that studied the Sex Discrimination Bill.”³⁴ The government replied as follows:

Although the Ordinance makes no reference to the notion of equal pay for work of equal value, in determining whether, say, a woman was discriminated against in terms of pay, the court would need to consider whether she was doing work of equal *or comparable* value to that of the man with whom she wished to be compared. Whether the principles adopted under the UK Equal Pay Act would be followed in this respect would be a matter for the court to decide.³⁵

Thus the government’s expressed view was that that the Ordinance would allow a woman to sue for unlawful discrimination if she could prove that a male colleague performing “work of equal

³⁰ See Adam Mayes, “Missing Pieces of the Jig-saw Puzzle: The Right to Equal Pay Under the SDO”, paper presented at the conference *Equal Opportunities Law in International and Comparative Perspective*, Hong Kong (10 November 1997).

³¹ This provision now appears as section 69(13) of the Sex Discrimination Ordinance.

³² This provision now appears as section 11(2)(b) of the Sex Discrimination Ordinance.

³³ See Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance 1997, *Hong Kong Government Gazette*, Legal Supp. no. 1, 27 June 1997.

³⁴ Letter of Adam C. Mayes (for Legislative Councilor Christine Loh Kung-wai) to Home Affairs Branch, 5 March 1996 (reprinted as Document No. 278, p. 1737, in Vol. 4 of *Hong Kong Equal Opportunity Law-- Legislative History Archive 1993-1997* (Centre for Comparative and Public Law, University of Hong Kong 1999)).

³⁵ Letter of Ms. Chang King-yiu (for Secretary for Home Affairs) to Mr. Adam C. Mayes, Legislative Assistant to Ms. Christine Loh, 18 April 1996 (emphasis added) (reprinted as Document No. 298, p. 1874, in Vol. 4 of *Hong Kong Equal Opportunity Law-- Legislative History Archive 1993-1997* (Centre for Comparative and Public Law 1999)).

or comparable value” was being paid more than her without any non-discriminatory justification. This is a perfectly sensible interpretation of the Ordinance: if a female employee is in comparable circumstances to a male employee (e.g. she has comparable qualifications, skills, and seniority, and is doing work of comparable value in comparable working conditions), but she is nonetheless paid less than that male employee then she can make a prima facie case of direct discrimination.³⁶ She would argue that the unequal pay scales constituted unfavourable treatment on the ground of sex -- that her job has been devalued by the employer because it is a female job. Note that the statute does not require the plaintiff to show that the employer *intended* to discriminate against women in order to prove direct discrimination.³⁷ Moreover, Section 4 of the Ordinance expressly states that if an act is done for two or more reasons and one of the reasons is the sex of the plaintiff, then the act will be taken as having been done for that reason even if the sex of the plaintiff was not the dominant reason. This provision (which is not in the UK Sex Discrimination Act) should make it easier for plaintiffs to prove direct discrimination. However, if the employer can demonstrate that the differential pay was not based upon sex (but rather on a non-discriminatory factor), then the different treatment may not constitute direct discrimination.

Alternatively, a case of indirect discrimination could be made where the female plaintiff alleges that a requirement or condition which appears to be gender neutral actually has a disproportionate detrimental impact on female employees (e.g. because it is applied to jobs that are all or mostly female). For example, if an employer requires all employees in female-dominated positions to serve longer or have higher educational qualifications in order to receive a certain pay rate, while allowing employees in male-dominated positions to move up to that pay rate with lesser requirements, then the requirements applied to the female jobs could constitute a prima facie case of indirect discrimination. A requirement that employees must work full-time in order to receive a raise or a performance bonus (which would have a disproportionate impact on women³⁸) could also constitute indirect discrimination.

My interpretation of the Ordinance is consistent with Hong Kong’s obligations under the United Nations Convention on the Elimination of All Forms of Discrimination (CEDAW). CEDAW explicitly requires the right to equal pay, including the right to equal pay for work of equal value. Article 11 states that State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment and in particular:

- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.

³⁶ See *Enderby v. Frenchay Health Authority* [1994] 1 All ER 495 (Court of Justice of the European Communities), at p. 514 (noting that where the female plaintiff can prove the objective elements of discriminatory pay (lower pay for a woman when compared with a man doing comparable work for the same employer), then a “reputable presumption” of direct sex discrimination arises. It is then for the employer to furnish counter-evidence, by adducing objective grounds for the unequal pay, which are not based on the sex of the recipient.

³⁷ In 1995 Anne Cheung expressed concern that the definition of direct discrimination would not include comparable worth discrimination as it did not involve an “expressed intention”. See Anne Cheung, “Pay Equity for Hong Kong”, (1995) *Hong Kong Law Journal* 383, at p. 393. However, there is actually no need for the plaintiff to show an expressed intention to discriminate.

³⁸ See *Enderby v. Frenchay*, note 36 above, p. 515.

The United Nations Committee on the Elimination of Discrimination Against Women (which considers the reports of State Parties to CEDAW) has also issued a General Recommendation urging State Parties to ratify ILO Convention No. 100 and to take action to ensure that the principle of equal pay for work of equal value is not only enshrined in legislation but also implemented in practice.³⁹

The Sex Discrimination Ordinance does not contain a provision expressly stating that CEDAW must be interpreted so as to comply with CEDAW (and indeed the government successfully opposed amendments proposing such language). However, it is still a general rule of statutory construction that the legislature is presumed to intend to conform to public international law.⁴⁰ Where the terms of legislation are reasonably capable of more than one meaning, the terms of the relevant treaty become particularly relevant. Thus, if “one of the meanings which can be ascribed to the legislation is consonant with the treaty obligation and another or others are not, the meaning which is consonant is to be preferred.”⁴¹ When the Hong Kong government announced that it would propose a Sex Discrimination Bill it expressly informed the legislature that it was doing so in order to comply with CEDAW (which the government had by that time conceded would soon be extended to Hong Kong).⁴² Moreover, the government has frequently cited the Sex Discrimination Ordinance as its principle means of implementing CEDAW in Hong Kong.⁴³ It should also be noted that although the government entered reservations to certain requirements of Article 11 (e.g. relating to pension schemes), it did not express any reservation to equal pay for work of equal value (which is also contained in Article 11).⁴⁴ Thus, the courts should interpret the broad language in Section 11(2)(b) of the Sex Discrimination Ordinance as complying with Article 11 of CEDAW and therefore prohibiting comparable worth discrimination.

We should also consider Hong Kong’s obligations under the International Covenant on Economic, Social and Cultural Rights, which is now enshrined in Article 39 of the Basic Law. This Covenant also recognises, in Article 7(a)(i), the right to just conditions of work, including “equal remuneration for work of equal value”. In 1976, when the United Kingdom extended this Covenant to Hong Kong, it entered a reservation stating that it reserved the right to “postpone the application” of Article 7(a)(i) “in so far as it concerns the provision of equal pay to men and women

³⁹ General Recommendation No. 13, Committee on the Elimination of Discrimination Against Women.

⁴⁰ See Francis A. R. Bennion, *Statutory Interpretation: A Code* (Butterworths, 3rd ed 1997), Section 270, pp 630-35.

⁴¹ *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116, per Diplock, LJ, at 143.

⁴² In 1994 the government informed the Legislative Council that “we will need to introduce some form of legislation prohibiting discrimination, which would include equal pay legislation, before CEDAW is formally extended to Hong Kong”. See Home Affairs Branch, Legislative Council Brief: Equal Opportunities for Women and Men, June 1994, par. 10 (reprinted as Document No. 27, p. 336, in Vol. 1 of *Hong Kong Equal Opportunity Law -- Legislative History Archive 1993-1997*) (Centre for Comparative and Public Law, University of Hong Kong 1999)). Similarly, a government press release of 3 June 1994 stated that the “institution of sex discrimination legislation is a means to implement the provisions of CEDAW”. Ibid, Document No. 26, pp 333-35.

⁴³ See, for example, the *Initial Report on the Hong Kong Special Administrative Region under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women* (Hong Kong Government Printing Department 1998) (hereinafter referred to as the *Initial CEDAW Report*).

⁴⁴ Ibid, paras 78-80.

for equal work in the private sector” in Hong Kong.⁴⁵ Of course, in 1976 this reservation was necessary, as Hong Kong had no sex discrimination legislation. However, in 2000 (more than 20 years later) there is no longer any need to “postpone” the application of Article 7. Moreover, the Hong Kong government has not taken the position that it wishes to postpone it. Rather, in 1999, the government indicated to the United Nations Committee on Economic, Social and Cultural Rights that the Sex Discrimination Ordinance *does* prohibit comparable worth discrimination. In language quite similar to that used in its letter to legislator Christine Loh, the government informed the Committee that:

The Sex Discrimination Ordinance outlaws sex discrimination in all areas of employment, including terms and conditions of work, recruitment, promotion, staff transfers, or training. It is left to the Courts to determine whether, in a particular instance, the work taken by a female plaintiff is equal -- or of comparable value to -- that of a male colleague with whom she wishes to be compared.⁴⁶

Note that the government did not raise any doubt about whether the Sex Discrimination Ordinance requires equal pay for work of comparable value. Rather it assumed that it does and stated that the court would simply need to determine the *factual* question of whether the work done by the female plaintiff is, indeed, of comparable value to the male colleague with whom she wishes to be compared.

Given the broad language of Section 11 of the Sex Discrimination Ordinance and Hong Kong’s international obligations, a court may well interpret Section 11 so as to incorporate the concept of equal pay for work of equal value. Of course, this is problematic in that the Code of Practice (which I discuss in the next section) introduces some confusion on this point.

IV. The Sex Discrimination Code of Practice on Employment

As we all know, the government was in no particular hurry to bring the Sex Discrimination Ordinance and the Disability Discrimination Ordinances into force. It declined to bring the employment provisions into force until the Equal Opportunities Commission had promulgated a code of practice on employment for each ordinance. The government then took its time in establishing the Commission. It did not even advertise the position of Chairperson until March 1996 (seven months after the legislation was enacted). As a result, the first Chairperson, Dr. Fanny Cheung, was not appointed until May 1996 and the Commission was not staffed and operational until September 1996. By this time more than a year had elapsed since the enactment of the two discrimination ordinances, and many people feared that the onerous job of drafting the codes of practice would require another year or more. However, the Commission worked very quickly. The two codes were drafted and put through two rounds of consultation and amendments

⁴⁵ See excerpts from “Reservations Made by the United Kingdom Upon Signature and Ratification of the Covenant”, republished in Andrew Byrnes and Johannes Chan, eds, *Public Law and Human Rights: A Hong Kong Sourcebook* (Butterworths 1993), p. 283.

⁴⁶ *Report of the Hong Kong Special Administrative Region of the People’s Republic of China in the light of the International Covenant on Economic, Social and Cultural Rights* (Hong Kong Government Printing Department 1999), para. 81.

in less than six months. The Legislative Council endorsed both codes and the legislation came into force in December 1996.

As expected, the Sex Discrimination Code of Practice on Employment does borrow legal concepts from the UK Equal Pay Act. After noting (in paragraph 12.1) that the Ordinance prohibits discrimination in the listed aspects of employment, the Code discusses employment terms and conditions in more detail under the headings “equal pay for equal work” (paragraphs 12.2-12.4) and “equal pay for work of equal value” (paragraphs 12.5-12.8). The discussion of equal pay for equal work states that a female employee is entitled to equal pay when she is doing the same or like work as that of a male employee. “Like work” is defined as “work which is of a broadly similar nature and where the differences between the tasks performed by either of them are not of practical importance to the terms and conditions of employment.” This definition is borrowed from the UK Equal Pay Act.

Paragraphs 12.5-12.8 then address the concept of equal pay for work of equal value. Paragraphs 12.6 and 12.7 state (my emphasis added) that:

A related principle to equal pay for equal work is that of equal pay for work of equal value. Where women undertake work as demanding as that of their male colleagues, even though the work is different, women should receive the same pay and benefits. *That is, jobs of equal value warrant equal pay.*

. . . . Employers can set individual pay rates based on market forces and individual performance but *should not pay a class of workers less for doing work of equal value on the basis of sex.*

These paragraphs are consistent with the interpretation of Section 11 that the government suggested to legislators and to the Committee on Economic, Social and Cultural Rights. That is, Section 11 of the Sex Discrimination Ordinance (which broadly prohibits discrimination in the “terms” of employment) permits a female plaintiff to sue for unlawful discrimination if she can demonstrate that she is paid less than a man doing work of equal value for the same employer without some nondiscriminatory justification.

However, a later paragraph introduces confusion as to *when* employers need to comply with this duty not to pay female workers less for work of equal value. Paragraph 12.8 states that:

[E]mployers should maintain the principle of equal work and are encouraged to progressively implement equal pay for equal value. This will require objective and professional evaluation of different jobs within the same establishment, or alternative methods of approaching the issue of equal pay which can be demonstrated to be non-discriminatory. Large organizations in both the public and private sectors with a structured human resources department could take a lead in this.

This paragraph can be interpreted as indicating that while employers are *required* to implement equal pay for equal work, they are only *encouraged to progressively implement* equal pay for work of equal value. In my opinion, this is potentially dangerous advice, because:

1. the Ordinance itself does not distinguish between the two types of pay discrimination, but rather broadly prohibits sex discrimination in the terms of employment;
2. international treaties binding upon Hong Kong require “equal pay for work of equal value” and the courts should interpret the broad prohibition on discrimination in the terms of employment as complying with those treaty obligations; and
3. the government has made statements to legislators and international treaty bodies indicating that the Ordinance does allow a woman to sue for discrimination if she can prove that a male colleague performing *comparable* work is being paid more than her without some nondiscriminatory justification.

Of course, in practice, it may be difficult for a female employee in Hong Kong to bring such an action at this time (because she would probably need a professional job evaluation of her position and that of the male colleague to whom she wished to be compared). However, women working in female-dominated positions for large institutional employers may be able to obtain the necessary information. For example, women in female-dominated positions in the government hospitals (e.g. nurses) may wish to investigate whether there are any male-dominated positions in the hospitals that receive higher salaries, despite the fact that the male positions are not particularly difficult to fill and do not require greater education, impose greater duties, or entail harsher working conditions.

If such a complaint were filed, the employer might argue that the courts should (despite the three points I have noted above) adopt a narrow interpretation of Section 11 of the Sex Discrimination Ordinance, so as to require only “equal pay for equal work” (although the statute does not use that phrase).⁴⁷ However, if the defendant employer were the government or a public body, then I do not see how it could possibly argue in court for a narrower interpretation of the Ordinance than the government put forth to legislators and the United Nations Committee on Economic, Social and Cultural Rights. Such a position would be extremely disingenuous and would leave the government open to enormous criticism before international treaty bodies.

It should also be noted that although the Code of Practice can be taken into account by the court if it is relevant to a question, it is not law and cannot have the effect of amending the

⁴⁷ Support for this argument may be found in the fact that legislature did not remove paragraph 12.8 when the Code of Practice was laid before it, although it did amend it somewhat. As initially drafted by the Commission, paragraph 12.8 stated that employers should simply “consider” progressive adoption of equal pay for equal value. This generated substantial discussion in the legislature and in the end the word “consider” was removed entirely so that the paragraph now states that: “employers ... are encouraged to progressively implement . . .” See LegCo Paper No. CB(2) 881/96-97, Ref: CB2/SS/2/96, Minutes of the Meeting of 12 December 1996, Subcommittee on the Rules and Codes of Practice on Employment under the Sex Discrimination Ordinance and the Disability Discrimination Ordinance (reprinted as Document No. 377, pp 2426-28, in Vol. 5 of *Hong Kong Equal Opportunity Law -- Legislative History Archive 1993-1997*) (Centre for Comparative and Public Law, University of Hong Kong 1999)).

Ordinance or delaying the obligations imposed there.⁴⁸ For example, if the Code of Practice advised employers to “progressively” eliminate sex-specific job advertisements, that advice could not over-ride the fact that such advertisements are already prohibited under Section 43 of the Ordinance. If there is an inconsistency between the Code and the Ordinance, then the Ordinance must prevail.

The ambiguity created by the Code has not been lost on the United Nations bodies that review Hong Kong’s compliance with the international treaties that apply to Hong Kong. For example, the Committee on Economic, Social, and Cultural Rights expressed concern on this issue and it was in *response* to that concern that the Hong Kong government made the comment that I quoted above indicating that a woman *can* sue under the Ordinance if a court determines that she is being paid less than a man who is doing work of “comparable value”. However, the advice given in the current Code of Practice gives employers and employees the impression that equal pay for work of equal value is not required (thus discouraging employers from implementing it and discouraging employees from making complaints). Clearly this situation cannot continue: it is not appropriate for the government to indicate to treaty bodies that Hong Kong law *does* require equal pay for work of equal value while the Code of Practice implies that employers can take some unspecified amount of time to comply with that law.

V. Conclusions

I believe that paragraph 12.8 of the Code of Practice should be amended and that the Equal Opportunities Commission should develop mechanisms to assist employers to avoid unlawful devaluation of female dominated positions. It should start by studying the pay scales of the Hong Kong government and public authorities (which I assume would be happy to cooperate with any effort to ensure that the Hong Kong government is complying with its own treaty obligations). The Commission should also publish recommendations to all employers on how to remove gender discrimination in pay scales. Large employers should be urged to do their own studies, to compare pay scales of female-dominated and male-dominated positions, and to eliminate discrimination.

Finally, I would argue that a pro-active approach to the gender pay gap is even more important in Hong Kong than in many other jurisdictions. I say this because of the absence of strong unions and collective bargaining. In many countries, unions (assuming that they are supportive of women’s right to equality) can compel employers to adjust pay scales that clearly devalue female-dominated positions. But in Hong Kong the unions have far less power. The right to collective bargaining was briefly expanded by the elected legislature (before the handover). But this legislation was almost immediately frozen (and later repealed) by the Provisional Legislative Council. It is highly unlikely that a right to collective bargaining will be established

⁴⁸ Section 69 of the Sex Discrimination Ordinance states that: “. . . in any proceedings under this Ordinance before any court any code of practice issued under this section shall be admissible in evidence, and if any provision of such a code appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.”

under our current constitutional order.⁴⁹ Thus we cannot rely on union activity to address the gender pay gap in salaries in Hong Kong. In my view, this makes a particularly compelling case for the Equal Opportunities Commission to start developing mechanisms to implement equal pay for work of equal value.

⁴⁹ For a general discussion of these developments see Wilson W.S. Chow and Anne Carver, “Employment and Trade Union Law: Ideology and the Politics of Hong Kong Labour Law”, in Raymond Wacks, ed, *The New Legal Order in Hong Kong* (Hong Kong University Press 1999).

Date: 28 June 2004

To: Mr. Peter Yeung, Convenor, Task Force on Equal Pay for Equal Value

From: Carole Petersen

Re: Consultants' Report on Equal Pay for Work of Equal Value in the Public Sector

Dear Mr. Yeung,

Thank you for arranging for the most recent draft of the Consultants' Report to be distributed to members of the Task Force. Apart from some minor typographical errors, I think that the Report is ready to be sent to the Commission. I hope that it can be published soon, as the public is awaiting the results of this research project. My understanding (based upon our discussion and minutes from recent meetings) is that the Report has now been completed as "The Consultants' Report", not as a report of the Task Force. Individual members of the Task Force are free to submit separate comments if they wish to do so but these will not change the substance of the Consultants' Report. Rather these separate comments will be sent to the Commission as separate documents and included as Appendices to the Consultants' Report when it is published

Initially, I did not intend to submit any separate comments, as I believe that the Consultants have fulfilled their responsibilities and that their Report stands on its own. However, I have noted that some recent comments (both written and oral) by certain Members of the Task Force appear to reject the entire theory underlying "equal pay for work of equal value", which is that female dominated jobs have tended to be undervalued historically *because* they are occupied by women. Of course, individual members of the Task Force are free to reject that theory if they wish. However, it would be incorrect for a member to imply that there is "no evidence" to support that theory. In fact, there is substantial evidence of this phenomena world-wide, particularly with respect to nurses and other jobs that are still widely perceived as "female jobs". I have cited some of those sources in my attached paper "Implementing Equal Pay for Work of Equal Value in Hong Kong: A Feminist Analysis", published at pages 52-69 of the Proceedings: Equal Pay for Work of Equal Value (Hong Kong EOC 2000). I have not seen any evidence that would suggest that Hong Kong is different in this regard from the rest of the world. It should be noted that the Consultants were not asked to defend this *general* theory when they were appointed, probably because it is considered to be the very foundation of the concept of equal pay for work of equal value, a concept that has now been incorporated into various international treaties and domestic anti-discrimination laws.

I would appreciate it if this letter and the attached article could be submitted as my comments on the Consultants' Report.

Sincerely yours,



Carole J. Petersen

Associate Professor, Department of Law
University of Hong Kong

**IMPLEMENTING EQUAL PAY FOR
WORK OF EQUAL VALUE IN
HONG KONG: A FEMINIST ANALYSIS**

Carole J. PETERSEN
Associate Professor, Faculty of Law
University of Hong Kong

I. Introduction

Ever since women entered the labour force, they have been paid less than men. Originally, unequal pay was an express policy. For example, in Hong Kong, the Salaries Commission of 1947 stated that the salary of a female civil servant should be approximately 80% of a male officer doing comparable work.¹ This was not based upon evidence that women were less productive than men, but rather on the assumption that women did not need to earn a "living wage", as their husbands were supporting the family. Employers and policy-makers (who were almost always men) were also very likely motivated by the belief that women *should* earn less than their husbands, viewing the alternative as a threat to the traditional balance of power within the family.

Hong Kong did not formally reject the practice of paying women less than men until fairly recently. Equal pay and benefits for female civil servants were not fully achieved until the 1980s. In the private sector, sex discrimination was perfectly lawful until December 1996. Sex-specific job advertisements (e.g. for "male engineers" and "female clerks") were common and demonstrated that our labour market was sexually segregated, both horizontally (in that certain industries were largely closed to women) and vertically (in that managerial posts were more likely to be reserved for men, even in industries that employed primarily women).²

Fortunately, the discriminatory *advertisements* have finally disappeared, due to section 43 of the Sex Discrimination Ordinance and vigorous enforcement by the Equal Opportunities Commission. But it would be naive to assume that the *attitudes* that led employers to place sex-specific advertisements have magically disappeared, only a few years after the legislation came into force. Common sense tells us that hiring, promotion, and compensation decisions are still influenced by sexist notions. It will take years of education and enforcement of the legislation to overcome the effects of this historical pattern.

This paper considers the concept of "equal pay for work of equal value" (also known as "comparable worth" and "pay equity"), as a tool to redress the gender pay gap.

¹ Kwok Pui-lan, Grace Chow, Lee Ching-Kwan, and Rose Wu, "Women and the State in Hong Kong", in Fanny M. Cheung, ed, *Engendering Hong Kong Society: A Gender Perspective of Women's Status* (Chinese University Press 1997), p. 248.

² See, e.g., Ho Suk Ching, "The Position of Women in the Labour Market in Hong Kong: A Content Analysis of the Recruitment Advertisements", (1985)10 *Labour and Society* 334. For a general discussion of gender segregation in the Hong Kong labour market, see Thomas W.P. Wong, "Women and Work: Opportunities and Experiences", in Veronica Pearson and Benjamin K.P. Leung, eds, *Women in Hong Kong* (Oxford University Press 1995).

Part II considers the evidence that discrimination causes traditionally female positions to be underpaid and the potential for comparable worth to address that phenomena. Parts III and IV analyze the existing legislative framework in Hong Kong. I argue there that Section 11 of the Sex Discrimination Ordinance (which broadly prohibits discrimination in the terms of employment) already prohibits comparative worth discrimination in certain circumstances. However, the Code of Practice on Employment has introduced confusion as to when employers should implement comparative worth policies and it is not being actively pursued (either by employers or employees) at this time. I argue that the Code of Practice should be amended and the Equal Opportunities Commission should actively study whether traditionally female jobs are being devalued in Hong Kong as a result of discrimination.

II. Comparative Worth Discrimination

In the campaign to achieve equality for women, one of the most important goals should be to eliminate the gender pay gap. Research in other jurisdictions has shown that a significant cause of the gap in male-female earnings is the fact that women have been segregated into certain positions, which have been devalued precisely because they are considered "female job". Nurses, librarians, elementary school teachers, speech therapists, and clerical workers are examples of workers who have been found to suffer a wage penalty *because* they work in female-dominated professions. For example, in 1980 the City of San Jose (California) commissioned a study of its wage scheme and found that female-dominated jobs were paid 15-25% less than comparable male-dominated jobs. Some of the more glaring inequalities were published in the local press, including:

- a nurse earned \$US 9,120 (about \$HK 70,000) less per year than a fire truck mechanic;
- a senior librarian earned \$US 5,304 (about \$HK 40,000) less per year than a senior chemist;
- a legal secretary earned \$US 7,288 (about \$HK 56,000) less per year than an equipment mechanic;
- secretaries generally were paid less than men in positions that required only an 8th grade education (including men who washed the city's cars).³

Similarly, nurses in Denver found that they were paid less by the city government than tree trimmers, despite the fact that nurses were required to have much higher

³ Linda M. Blum, *Between Feminism and Labor: The Significance of the Comparable Worth Movement* (University of California Press 1991), pp 60 and 82-3.

education for their jobs. The City of Philadelphia paid practical nurses (mostly women) less than gardeners (mostly men). These are just a few examples of the many cases in which job evaluation studies have found that female-dominated jobs were underpaid, to an extent that simply could not be justified by non-discriminatory factors. In contrast, "one is hard pressed to come up with a single example of a male job paying less than a female job that reasonable people would find comparable in skill, effort, or difficult working conditions."⁴

Neo-classical economists often argue that differences in female wages can be explained by differences in their commitment, education, experience or other "human capital". However, when these theories are actually tested, they do not fully explain the gender pay gap. A recent review of the research concluded:

[M]uch of the human capital theory simply does not withstand scrutiny. The gender-pay gap cannot, it seems, be explained by reference to women's lack of education, skills, or commitment to the world of paid employment. In the first place, the theorized relationships appear to depend mainly on assumptions about women's work than on hard evidence. Secondly, human capital theories fail to explain the abundant evidence that, skills, education, training, labour market experience, etc. held constant, men *still* earn more than women.⁵

Similarly, research by the International Labour Office found that even when female-dominated occupations "involve the same skill, effort, responsibility and working conditions as the male-dominated jobs, they tend to pay less than the male-dominated jobs."⁶ A 1999 review of several different studies concluded that the sex composition of an occupation or job category exerts a *net* effect on its wage level after other factors are accounted for.⁷ Thus we should be wary of claims that the gender pay-gap in Hong Kong can be explained away by non-discriminatory factors. The Hong Kong government tried to assert this view in 1992 (in the unsubstantiated Findings of the "Inter-departmental Working Group on Sex Discrimination"⁸) and again in 1993 (in the *Green Paper on Equal*

⁴ Paula England, *Comparable Worth: Theories and Evidence* (New York: Walter de Gruyter, Inc. 1992), p. 2.

⁵ Aileen McColgan, *Just Wages for Women* (Oxford University Press 1997), p. 238.

⁶ Morley Gunderson, "Comparable Worth and Gender Discrimination: An International Perspective" (Geneva: International Labour Office 1994), p. 1.

⁷ See Paula England, "The Case for Comparable Worth" (1999) 39 *The Quarterly Review of Economics and Finance* 743-55.

⁸ I say "unsubstantiated" because the Findings cited no studies (other than a vague reference to unnamed "surveys" allegedly showing that Hong Kong women did not perceive themselves to be victims of discrimination). The Findings reveal that the Working Group did not conduct actual research – it simply repeated the government's position at that time (which was to deny the existence of discrimination and oppose all anti-discrimination legislation). Thus we should not rely on these "Findings" for any conclusions about the causes of the gender pay gap in Hong Kong.

*Opportunities for Women and Men*⁹). However, the government eventually conceded that it had made this assertion without having done any real research on the causes of the male-female earnings gap in Hong Kong.

Economists who concede that the gender pay gap is at least partly caused by discrimination often maintain that the root of the problem is *hiring* discrimination rather than *pay* discrimination. They argue that because employers refuse to hire women for traditionally “male” jobs, women are pushed into traditionally “female” jobs, creating an excess supply of women for these jobs and lowering wages by the normal forces of demand and supply. However other researchers have concluded that this “crowding effect” is not the major cause of depressed wages in female jobs. Rather, they maintain that traditional discriminatory attitudes about women’s abilities and the contribution they make to an organization leads to a devaluation of their work. Thus, there is a tendency to pay a job less simply because women are in it “whether because of a cognitive mistake about the skill requirement or contribution to profit of the job, or because of believing women need or deserve less money than men.”¹⁰ Once wages are set in this biased way, women are placed on a lower pay scale than men and institutional inertia perpetuates the error.

While some economists argue that market forces alone will eliminate these attitudinal prejudices (because such prejudices are inherently inefficient), others believe that this is an overly-optimistic view.¹¹ Indeed, if market forces could eliminate employers’ bias against women, why was it necessary to enact legislation in order to stop Hong Kong employers from advertising for “male engineers” and “female clerks”? Obviously the employers who were placing those ads (as recently as 1996) are motivated by prejudice – prejudice that is *stronger* than any desire to maximize profits by attracting the best people. Economists have also acknowledged that employers may exclude women from certain positions because they are “willing to sacrifice profits to maintain the morale” of those male workers who oppose the hiring of women.¹²

⁹ In the *Green Paper on Equal Opportunities for Women and Men* (Hong Kong Government Printer 1993), the government asserted that the persistent differences between male and female earnings could be explained by several non-discriminatory variables (e.g. differences in education, capabilities, and experience). However, in a public meeting with women’s organizations (held on 29 September 1993), the Secretary for Home Affairs admitted (in response to a question by me) that he had no evidence supporting this assertion. A follow-up letter to the government, repeating the question, also generated no supporting evidence.

¹⁰ England, note 4 above, p. 284. See also Richard Perlman and Maureen Pike, *Sex Discrimination in the Labour Market: the Case for Comparable Worth* (Manchester University Press 1994), pp 12-19.

¹¹ See England, note 4 above, pp 54-68; Perlman and Pike, note 10 above, pp 12-19; and Barbara R. Bergmann, “The Economic Case for Comparable Worth”, in Heidi I. Hartmann, ed, *Comparable Worth: New Directions for Research* (National Academy Press, Washington D.C. 1985), pp 71-85.

¹² England, note 7 above, section 5.1 (citing Barbara Bergmann and W. Darity Jr., “Social Relations, Productivity, and Employer Discrimination”, (1981) 109(4) *Monthly Labour Review* 47-49).

The principle of "equal pay for work of equal value" (often referred to as "comparable worth" or "pay equity") was thus developed as a means of addressing the problem directly, by revealing and removing the wage penalty for female jobs. Essentially, this principle provides that sex discrimination includes not only a situation in which a woman is paid less than a man in precisely the same job, but also a situation in which a woman is paid less than a man performing a different job that is comparable in terms of education, skills, working conditions and other factors. I will refer to this situation as "comparable worth discrimination".

Proponents of pay equity see it as a necessary *complement* to legislation that prohibits sex discrimination in hiring. Even with effective enforcement of our Sex Discrimination Ordinance, it will take time to desegregate the labour market. In order to do so, we need to change not only the attitudes of employers but also the attitudes of educators (who unfortunately still discourage Hong Kong girls from pursuing highly paid male-dominated careers).¹³ Moreover, the gradual desegregation of the labour market will not necessarily help those women who are already employed in devalued female-dominated positions.

As noted above, there have been several publicized cases in the United States in which employees have succeeded in obtaining pay increases through the principle of comparable worth. By 1989, 42 states had enacted laws "mandating some data collection on the equity of their pay structures for state employees, 21 had done a formal pay equity study, and 20 had made some pay equity adjustments."¹⁴ National legislation requiring comparable worth has never been enacted in the United States, largely due to resistance from the Reagan/Bush republican administrations, the religious right, and neoclassical economists (such as Mark Killingsworth) who see it as a violation of the free market.¹⁵ However, certain public employees are covered by individual states' comparable worth policies or legislation. A leading example is the state of Minnesota, where job evaluations revealed numerous situations in which female jobs were paid less than male jobs although the jobs received equivalent or higher points on the evaluation scale. (For example, women who cared for disabled children were being paid less than male zoo

¹³ Female students are discouraged by teachers from entering the prestigious "science stream", which leads to better opportunities to attend university and obtain a high paying job in Hong Kong. See Choi Po King, "Women and Education in Hong Kong", in Veronica Pearson and Benjamin K.P. Leung, eds, *Women in Hong Kong* (Oxford University Press 1995), p. 111. It has also been reported (in 1999) that nearly half of Hong Kong's co-educational schools still bar girls from taking design and technology classes. While the Education Department has promised to ask schools to change this practice, it is clear that the attitudes of the teachers who established the rule will not change immediately. In the meantime, those attitudes will discourage girls from studying in related fields. See *South China Morning Post*, 18 November 1999, p. 5.

¹⁴ Paula England, note 7 above, section 3.

¹⁵ *Ibid.*

keepers.)¹⁶ The legislature enacted the State Employees Pay Equity Act and significant adjustments were made. While some researchers have criticized various elements of the Minnesota programme, others argue that it has been a success *overall* and has made a significant contribution to gender equality.¹⁷ It should also be noted that many American employees who are not covered by comparable worth legislation have, nonetheless, used non-legislative mechanisms (such as collective bargaining and union activity) to persuade employers to make pay adjustments to female dominated jobs that were paid less than comparable male-dominated positions.¹⁸ As one review concluded, "pay equity [in the United States] has done extraordinarily well as a reform policy, despite its very limited coverage".¹⁹

Many other jurisdictions (including the United Kingdom, Canada, and Australia) have expressly included the principle of comparable worth in legislation and have actively implemented it through a variety of mechanisms. There is a wide variety of opinions on the impact of these policies. Certain economists focus on the negative aspects – for example, they argue that raising wages in traditional female jobs may cause more women to seek such jobs (perpetuating the segregation of the market) while causing employers to hire fewer of them (creating unemployment).²⁰ However other economists argue that these negative elements are less significant than previously believed. For example, Perlman and Pike maintain that comparable worth legislation can have "indirect or long-run effects that are likely to mitigate any negative employment effects."²¹ They also note that the knowledge that the employer is implementing a fairer wage structure will likely have a positive impact on morale of female workers and increase their productivity (thus offsetting any incentives for the employer to reduce female employment levels).²² Comparable worth also may actually help to *solve* the underlying problem of sex-segregation of jobs as it gives employers an incentive to integrate positions that have traditionally been segregated (because they are far less likely to be held liable for

¹⁶ See, e.g., Sara M. Evans and Barbara J. Nelson, "Translating Wage Gains into Social Change: International Lessons from Implementing Pay Equity in Minnesota", in Judy Fudge and Patricia McDermott, eds, *Just Wages: A Feminist Assessment of Pay Equity* (University of Toronto Press 1991), p 229.

¹⁷ *Ibid*, pp 227-246. See also Elaine Sorensen, *Comparable Worth: Is It a Worthy Policy?* (Princeton University Press 1994).

¹⁸ See e.g. the case studies published in Peggy Kahn and Elizabeth Meehan, eds, *Equal Value/Comparable Worth in the UK and the USA* (Macmillan Press Ltd. 1992).

¹⁹ Evans and Nelson, note 16 above, p. 243.

²⁰ For examples of the arguments of two of the leading critics of comparable worth, see Steven E. Rhoads, *Incomparable Worth: Pay Equity Meets the Market* (Cambridge University Press 1993); and Mark R. Killingsworth, "The Economics of Comparable Worth: Analytical, Empirical and Policy Questions", in *Comparable Worth: New Directions for Research*, note 11 above.

²¹ Perlman and Pike, note 10 above, p. 79.

²² *Ibid*, p. 81.

comparable worth discrimination if their workforce is not segregated into “female” and “male” positions).²³

I have briefly reviewed these arguments primarily to demonstrate that there are different views among economists and other experts in the labour field regarding the potential impact of comparable worth legislation. The Hong Kong community should carefully examine studies of experts on *both sides* of the debate. In this light, I question the objectivity of the *Feasibility Study on Equal Pay for Work of Equal Value*. It is my understanding that the Equal Opportunities Commission appointed the authors (Sung Yun-wing, Zhang Junsen, Ng Sek-hong, and Paul Hempel) to conduct this study. However, the cover of the report also lists Mark Killingsworth as the “External Expert”. In their final report, the authors thanked Professor Killingsworth for his advice and guidance, noting that the report drew heavily on papers written by him and that he had visited Hong Kong to offer suggestions on the study and the report.²⁴ As I have noted earlier in my paper (see note 20 above), Mark Killingsworth is well known in the United States as a staunch opponent of comparable worth legislation. Therefore, when the authors of this *Feasibility Study* retained him as their guide and external expert, they essentially pre-ordained the result of the study, which was to oppose comparable worth policies. Of course, Professor Killingsworth and the four authors are entitled to their opinion. But the Equal Opportunities Commission cannot now rely on this study as an *objective* appraisal of the feasibility of implementing comparable worth in Hong Kong. Rather, it should treat this study for what it is – a strong statement of the arguments against comparable worth – and seek experts on the other side of this important policy debate for the alternative perspective. This is the only way that the Equal Opportunities Commission can achieve a balanced perspective on whether it should actively pursue equal pay for equal value as a policy goal in Hong Kong.

It should also be noted that some of the critique of comparable worth legislation does not argue for its abandonment but rather for refining and strengthening the mechanisms through which it is enforced. Hong Kong is in a position to benefit from these suggestions. For example, substantial research has now been done on how to design gender neutral job evaluations (to ensure that the evaluation does not simply perpetuate the same prejudices that originally caused female jobs to be underpaid).²⁵ Similarly, in 1997 Aileen McColgan published a comprehensive review of UK, European Community,

²³ England, note 7 above, section 5.4.

²⁴ See Sung Yun-Wing, Zhang Junsen, Ng Sek-Hong, and Paul Hempel (with Mark Killingsworth as External Expert), *Feasibility Study on Equal Pay for Work of Equal Value: Final Report* (16 April 1998), at “Acknowledgements” page.

²⁵ See, e.g. Leslie Zebrowitz McArthur, “Social Judgment Biases in Comparable Worth Analysis”, in *Comparable Worth: New Directions for Research*, note 11 above.

Canadian, and Australian approaches to pay equity. She concluded that one of the current problems with the UK legislation is the fact that its enforcement depends almost entirely upon individual complaints, which are difficult to maintain and do not have any direct effect on other workers. She recommended a much more collective approach to the issue, one in which the enforcement body would be proactive and address the *systemic* devaluation of female-dominated positions.²⁶ This suggests that the Hong Kong Equal Opportunities Commission could play an important role – designing gender neutral job evaluation criteria, studying the pay scales of employers (particularly large institutional employers at the outset), and advising employers and employees. The point is that there is a wealth of literature out there that does not reject pay equity but rather offers constructive criticism of the various mechanisms for implementing it. If we study it carefully and objectively, we can develop mechanisms for implementing comparative worth that will be more advanced and more effective than those developed previously in other jurisdictions.

We must also be careful not to reject the concept of comparable worth simply because it represents interference in the market (the primary objection of those economists who oppose it). This same objection could also be made of many worker safety laws, laws against child labour, and laws that prohibit firing a female worker because she is pregnant. Indeed, the entire concept of sex discrimination legislation was long opposed in Hong Kong by those who argued that it would be too interventionist. But the community, the legislature, and ultimately the government rejected this position – as demonstrated by the results of the *Green Paper* consultation exercise and the adoption of an enforceable Sex Discrimination Ordinance.²⁷ The question therefore is not whether comparable worth constitutes intervention in the market, but rather whether it is justified and worthwhile.

The next two sections analyze the provisions of the Sex Discrimination Ordinance relating to pay discrimination. I argue that the Ordinance does already prohibit comparative worth discrimination in certain circumstances. However, in the present situation (without any active implementation of the concept), the Ordinance will probably not have any significant impact on the tendency to devalue traditionally female positions.

²⁶ Aileen McColgan, note 5 above, p. 412.

²⁷ At the conclusion of the *Green Paper* consultation exercise the government was compelled to admit that the majority of responses supported the enactment of sex discrimination legislation and the extension of CEDAW to Hong Kong. See S.Y. Yue, "UN Convention to Be Adopted", *South China Morning Post*, 31 December 1993, p. 2 (quoting Secretary for Home Affairs Michael Suen).

III. Comparative Worth Discrimination: the Legal Position in Hong Kong

In 1995 Hong Kong enacted its first anti-discrimination law, the Sex Discrimination Ordinance.²⁸ As originally drafted by the government, the Sex Discrimination Bill prohibited discrimination in the terms of employment offered to applicants for jobs. However it did not contain a provision prohibiting discrimination in the terms of employment for existing employees.²⁹ This omission in the bill probably resulted from the fact that the government had essentially copied the UK Sex Discrimination Act 1975 (which does not apply to pay discrimination in employment contracts as this is addressed in separate legislation, the Equal Pay Act 1970).

The omission was pointed out to the government during the examination of the Bill by the Bills Committee. At first the government suggested that the issue of equal pay should be left entirely to the Sex Discrimination Ordinance Code of Practice on Employment.³⁰ Indeed, it appears that the government expected the Code of Practice to borrow heavily from the UK Equal Pay Act, as the government added a provision to the Sex Discrimination Bill stating that a code of practice relating to discrimination in the *terms of employment* may make reference to and incorporate provisions from an enactment of a jurisdiction outside of Hong Kong.³¹ However legislators also pressed the government to add a provision relating to equal pay to the Ordinance itself. The government thus agreed to amend the Bill so that it would expressly prohibit discrimination in the terms of employment for existing (as well as prospective) employees.³²

Discrimination in the “terms of employment” is a broad concept and in my view can be interpreted as requiring *both* equal pay for equal work and *also* equal pay for work of equal or comparable value. Indeed, it is my understanding that the government has often taken this position. For example, when legislator Christine Loh was drafting her bill to amend the Sex Discrimination Ordinance (which was enacted in June 1997³³), she

²⁸ Cap 480, Laws of Hong Kong.

²⁹ Compare Clause 10(1) with Clause 10(2) of the Sex Discrimination Bill, *Hong Kong Government Gazette*, 14 October 1994, *Legal Supp* No. 3.

³⁰ See Adam Mayes, “Missing Pieces of the Jig-saw Puzzle: The Right to Equal Pay Under the SDO”, paper presented at the conference *Equal Opportunities Law in International and Comparative Perspective*, Hong Kong (10 November 1997).

³¹ This provision now appears as section 69(13) of the Sex Discrimination Ordinance.

³² This provision now appears as section 11(2)(b) of the Sex Discrimination Ordinance.

³³ See Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance 1997, *Hong Kong Government Gazette*, *Legal Supp*. no. 1, 27 June 1997.

wrote a letter to the government seeking clarification on the issue. She noted that if the Ordinance were interpreted by the courts as providing *less* protection in respect of equal pay than is available in the UK, this result would be “contrary to the general understanding given the Bills Committee that studied the Sex Discrimination Bill”.³⁴ The government replied as follows:

Although the Ordinance makes no reference to the notion of equal pay for work of equal value, in determining whether, say, a woman was discriminated against in terms of pay, the court would need to consider whether she was doing work of equal *or comparable* value to that of the man with whom she wished to be compared. Whether the principles adopted under the UK Equal Pay Act would be followed in this respect would be a matter for the court to decide.³⁵

Thus the government’s expressed view was that the Ordinance would allow a woman to sue for unlawful discrimination if she could prove that a male colleague performing “work of equal *or comparable* value” was being paid more than her without any non-discriminatory justification. This is a perfectly sensible interpretation of the Ordinance: if a female employee is in comparable circumstances to a male employee (e.g. she has comparable qualifications, skills, and seniority, and is doing work of comparable value in comparable working conditions), but she is nonetheless paid less than that male employee then she can make a *prima facie* case of direct discrimination.³⁶ She would argue that the unequal pay scales constituted unfavourable treatment on the ground of sex – that her job has been devalued by the employer because it is a female job. Note that the statute does not require the plaintiff to show that the employer *intended* to discriminate against women in order to prove direct discrimination.³⁷ Moreover, Section 4 of the Ordinance expressly states that if an act is done for two or more reasons and one of the reasons is the sex of the plaintiff, then the act will be taken as having been done for that

³⁴ Letter of Adam C. Mayes (for Legislative Councilor Christine Loh Kung-wai) to Home Affairs Branch, 5 March 1996 (reprinted as Document No. 278, p. 1737, in Vol. 4 of *Hong Kong Equal Opportunity Law – Legislative History Archive 1993-1997* (Centre for Comparative and Public Law, University of Hong Kong 1999)).

³⁵ Letter of Ms. Chang King-yiu (for Secretary for Home Affairs) to Mr. Adam C. Mayes, Legislative Assistant to Ms. Christine Loh, 18 April 1996 (emphasis added) (reprinted as Document No. 298, p. 1874, in Vol. 4 of *Hong Kong Equal Opportunity Law – Legislative History Archive 1993-1997* (Centre for Comparative and Public Law 1999)).

³⁶ See *Enderby v. Frenchay Health Authority* [1994] 1 All ER 495 (Court of Justice of the European Communities), at p. 514 (noting that where the female plaintiff can prove the objective elements of discriminatory pay (lower pay for a woman when compared with a man doing comparable work for the same employer), then a “reputable presumption” of direct sex discrimination arises. It is then for the employer to furnish counter-evidence, by adducing objective grounds for the unequal pay, which are not based on the sex of the recipient).

³⁷ In 1995 Anne Cheung expressed concern that the definition of direct discrimination would not include comparable worth discrimination as it did not involve an “expressed intention”. See Anne Cheung, “Pay Equity for Hong Kong”, (1995) *Hong Kong Law Journal* 383, at p. 393. However, there is actually no need for the plaintiff to show an expressed intention to discriminate.

reason even if the sex of the plaintiff was not the dominant reason. This provision (which is not in the UK Sex Discrimination Act) should make it easier for plaintiffs to prove direct discrimination. However, if the employer can demonstrate that the differential pay was not based upon sex (but rather on a non-discriminatory factor), then the different treatment may not constitute direct discrimination.

Alternatively, a case of indirect discrimination could be made where the female plaintiff alleges that a requirement or condition which appears to be gender neutral actually has a disproportionate detrimental impact on female employees (e.g. because it is applied to jobs that are all or mostly female). For example, if an employer requires all employees in female-dominated positions to serve longer or have higher educational qualifications in order to receive a certain pay rate, while allowing employees in male-dominated positions to move up to that pay rate with lesser requirements, then the requirements applied to the female jobs could constitute a prima facie case of indirect discrimination. A requirement that employees must work full-time in order to receive a raise or a performance bonus (which would have a disproportionate impact on women³⁸) could also constitute indirect discrimination.

My interpretation of the Ordinance is consistent with Hong Kong's obligations under the United Nations Convention on the Elimination of All Forms of Discrimination (CEDAW). CEDAW explicitly requires the right to equal pay, including the right to equal pay for work of equal value. Article 11 states that State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment and in particular:

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.

The United Nations Committee on the Elimination of Discrimination Against Women (which considers the reports of State Parties to CEDAW) has also issued a General Recommendation urging State Parties to ratify ILO Convention No. 100 and to take action to ensure that the principle of equal pay for work of equal value is not only enshrined in legislation but also implemented in practice.³⁹

³⁸ See *Enderby v. Frenchay*, note 36 above, p. 515.

³⁹ General Recommendation No. 13, Committee on the Elimination of Discrimination Against Women.

The Sex Discrimination Ordinance does not contain a provision expressly stating that CEDAW must be interpreted so as to comply with CEDAW (and indeed the government successfully opposed amendments proposing such language). However, it is still a general rule of statutory construction that the legislature is presumed to intend to conform to public international law.⁴⁰ Where the terms of legislation are reasonably capable of more than one meaning, the terms of the relevant treaty become particularly relevant. Thus, if “one of the meanings which can be ascribed to the legislation is consonant with the treaty obligation and another or others are not, the meaning which is consonant is to be preferred.”⁴¹ When the Hong Kong government announced that it would propose a Sex Discrimination Bill it expressly informed the legislature that it was doing so in order to comply with CEDAW (which the government had by that time conceded would soon be extended to Hong Kong).⁴² Moreover, the government has frequently cited the Sex Discrimination Ordinance as its principle means of implementing CEDAW in Hong Kong.⁴³ It should also be noted that although the government entered reservations to certain requirements of Article 11 (e.g. relating to pension schemes), it did not express any reservation to equal pay for work of equal value (which is also contained in Article 11).⁴⁴ Thus, the courts should interpret the broad language in Section 11(2)(b) of the Sex Discrimination Ordinance as complying with Article 11 of CEDAW and therefore prohibiting comparable worth discrimination.

We should also consider Hong Kong’s obligations under the International Covenant on Economic, Social and Cultural Rights, which is now enshrined in Article 39 of the Basic Law. This Covenant also recognises, in Article 7(a)(i), the right to just conditions of work, including “equal remuneration for work of equal value”. In 1976, when the United Kingdom extended this Covenant to Hong Kong, it entered a reservation stating that it reserved the right to “postpone the application” of Article 7(a)(i) “in so far as it concerns the provision of equal pay to men and women for equal work in the private

⁴⁰ See Francis A. R. Bennion, *Statutory Interpretation: A Code* (Butterworths, 3rd ed 1997), Section 270, pp 630-35.

⁴¹ *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116, per Diplock, LJ, at 143.

⁴² In 1994 the government informed the Legislative Council that “we will need to introduce some form of legislation prohibiting discrimination, which would include equal pay legislation, before CEDAW is formally extended to Hong Kong”. See Home Affairs Branch, Legislative Council Brief: Equal Opportunities for Women and Men, June 1994, par. 10 (reprinted as Document No. 27, p. 336, in Vol. 1 of *Hong Kong Equal Opportunity Law – Legislative History Archive 1993-1997*) (Centre for Comparative and Public Law, University of Hong Kong 1999)). Similarly, a government press release of 3 June 1994 stated that the “institution of sex discrimination legislation is a means to implement the provisions of CEDAW”. *Ibid*, Document No. 26, pp 333-35.

⁴³ See, for example, the *Initial Report on the Hong Kong Special Administrative Region under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women* (Hong Kong Government Printing Department 1998) (hereinafter referred to as the *Initial CEDAW Report*).

⁴⁴ *Ibid*, paras 78-80.

sector” in Hong Kong.⁴⁵ Of course, in 1976 this reservation was necessary, as Hong Kong had no sex discrimination legislation. However, in 2000 (more than 20 years later) there is no longer any need to “postpone” the application of Article 7. Moreover, the Hong Kong government has not taken the position that it wishes to postpone it. Rather, in 1999, the government indicated to the United Nations Committee on Economic, Social and Cultural Rights that the Sex Discrimination Ordinance *does* prohibit comparable worth discrimination. In language quite similar to that used in its letter to legislator Christine Loh, the government informed the Committee that:

The Sex Discrimination Ordinance outlaws sex discrimination in all areas of employment, including terms and conditions of work, recruitment, promotion, staff transfers, or training. It is left to the Courts to determine whether, in a particular instance, the work taken by a female plaintiff is equal – or of comparable value to – that of a male colleague with whom she wishes to be compared.⁴⁶

Note that the government did not raise any doubt about whether the Sex Discrimination Ordinance requires equal pay for work of comparable value. Rather it assumed that it does and stated that the court would simply need to determine the *factual* question of whether the work done by the female plaintiff is, indeed, of comparable value to the male colleague with whom she wishes to be compared.

Given the broad language of Section 11 of the Sex Discrimination Ordinance and Hong Kong’s international obligations, a court may well interpret Section 11 so as to incorporate the concept of equal pay for work of equal value. Of course, this is problematic in that the Code of Practice (which I discuss in the next section) introduces some confusion on this point.

IV. The Sex Discrimination Code of Practice on Employment

As we all know, the government was in no particular hurry to bring the Sex Discrimination Ordinance and the Disability Discrimination Ordinances into force. It declined to bring the employment provisions into force until the Equal Opportunities Commission had promulgated a code of practice on employment for each ordinance. The government then took its time in establishing the Commission. It did not even advertise

⁴⁵ See excerpts from “Reservations Made by the United Kingdom Upon Signature and Ratification of the Covenant”, republished in Andrew Byrnes and Johannes Chan, eds, *Public Law and Human Rights: A Hong Kong Sourcebook* (Butterworths 1993), p. 283.

⁴⁶ *Report of the Hong Kong Special Administrative Region of the People’s Republic of China in the light of the International Covenant on Economic, Social and Cultural Rights* (Hong Kong Government Printing Department 1999), para. 81.

the position of Chairperson until March 1996 (seven months after the legislation was enacted). As a result, the first Chairperson, Dr. Fanny Cheung, was not appointed until May 1996 and the Commission was not staffed and operational until September 1996. By this time more than a year had elapsed since the enactment of the two discrimination ordinances, and many people feared that the onerous job of drafting the codes of practice would require another year or more. However, the Commission worked very quickly. The two codes were drafted and put through two rounds of consultation and amendments in less than six months. The Legislative Council endorsed both codes and the employment provisions of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance came into force in December 1996.

As expected, the Sex Discrimination Code of Practice on Employment does borrow legal concepts from the UK Equal Pay Act. After noting (in paragraph 12.1) that the Ordinance prohibits discrimination in the listed aspects of employment, the Code discusses employment terms and conditions in more detail under the headings "equal pay for equal work" (paragraphs 12.2-12.4) and "equal pay for work of equal value" (paragraphs 12.5-12.8). The discussion of equal pay for equal work states that a female employee is entitled to equal pay when she is doing the same or like work as that of a male employee. "Like work" is defined as "work which is of a broadly similar nature and where the differences between the tasks performed by either of them are not of practical importance to the terms and conditions of employment." This definition is borrowed from the UK Equal Pay Act.

Paragraphs 12.5-12.8 then address the concept of equal pay for work of equal value. Paragraphs 12.6 and 12.7 state (my emphasis added) that:

A related principle to equal pay for equal work is that of equal pay for work of equal value. Where women undertake work as demanding as that of their male colleagues, even though the work is different, women should receive the same pay and benefits. *That is, jobs of equal value warrant equal pay.*

. . . . Employers can set individual pay rates based on market forces and individual performance but *should not pay a class of workers less for doing work of equal value on the basis of sex.*

These paragraphs are consistent with the interpretation of Section 11 that the government suggested to legislators and to the Committee on Economic, Social and Cultural Rights. That is, Section 11 of the Sex Discrimination Ordinance (which broadly prohibits discrimination in the "terms" of employment) permits a female plaintiff to sue for

unlawful discrimination if she can demonstrate that she is paid less than a man doing work of equal value for the same employer without some nondiscriminatory justification.

However, a later paragraph introduces confusion as to *when* employers need to comply with this duty not to pay female workers less for work of equal value. Paragraph 12.8 states that:

[E]mployers should maintain the principle of equal work and are encouraged to progressively implement equal pay for equal value. This will require objective and professional evaluation of different jobs within the same establishment, or alternative methods of approaching the issue of equal pay which can be demonstrated to be non-discriminatory. Large organizations in both the public and private sectors with a structured human resources department could take a lead in this.

This paragraph can be interpreted as indicating that while employers are *required* to implement equal pay for equal work, they are only *encouraged to progressively implement* equal pay for work of equal value. In my opinion, this is potentially dangerous advice, because:

1. the Ordinance itself does not distinguish between the two types of pay discrimination, but rather broadly prohibits sex discrimination in the terms of employment;
2. international treaties binding upon Hong Kong require “equal pay for work of equal value” and the courts should interpret the broad prohibition on discrimination in the terms of employment as complying with those treaty obligations; and
3. the government has made statements to legislators and international treaty bodies indicating that the Ordinance does allow a woman to sue for discrimination if she can prove that a male colleague performing *comparable* work is being paid more than her without some nondiscriminatory justification.

Of course, in practice, it may be difficult for a female employee in Hong Kong to bring such an action at this time (because she would probably need a professional job evaluation of her position and that of the male colleague to whom she wished to be compared). However, women working in female-dominated positions for large institutional employers may be able to obtain the necessary information. For example,

women in female-dominated positions in the government hospitals (e.g. nurses) may wish to investigate whether there are any male-dominated positions in the hospitals that receive higher salaries, despite the fact that the male positions are not particularly difficult to fill and do not require greater education, impose greater duties, or entail harsher working conditions.

If such a complaint were filed, the employer might argue that the courts should (despite the three points I have noted above) adopt a narrow interpretation of Section 11 of the Sex Discrimination Ordinance, so as to require only "equal pay for equal work" (although the statute does not use that phrase).⁴⁷ However, if the defendant employer were the government or a public body, then I do not see how it could possibly argue in court for a narrower interpretation of the Ordinance than the government put forth to legislators and the United Nations Committee on Economic, Social and Cultural Rights. Such a position would be extremely disingenuous and would leave the government open to enormous criticism before international treaty bodies.

It should also be noted that although the Code of Practice can be taken into account by the court if it is relevant to a question, it is not law and cannot have the effect of amending the Ordinance or delaying the obligations imposed there.⁴⁸ For example, if the Code of Practice advised employers to "progressively" eliminate sex-specific job advertisements, that advice could not over-ride the fact that such advertisements are already prohibited under Section 43 of the Ordinance. If there is an inconsistency between the Code and the Ordinance, then the Ordinance must prevail.

The ambiguity created by the Code has not been lost on the United Nations bodies that review Hong Kong's compliance with the international treaties that apply to Hong Kong. For example, the Committee on Economic, Social, and Cultural Rights expressed concern on this issue and it was in *response* to that concern that the Hong Kong government made the comment that I quoted above indicating that a woman *can* sue under

⁴⁷ Support for this argument may be found in the fact that legislature did not remove paragraph 12.8 when the Code of Practice was laid before it, although it did amend it somewhat. As initially drafted by the Commission, paragraph 12.8 stated that employers should simply "consider" progressive adoption of equal pay for equal value. This generated substantial discussion in the legislature and in the end the word "consider" was removed entirely so that the paragraph now states that "employers ... are encouraged to progressively implement ..." See LegCo Paper No. CB(2) 881/96-97, Ref: CB2/SS/2/96, Minutes of the Meeting of 12 December 1996, Subcommittee on the Rules and Codes of Practice on Employment under the Sex Discrimination Ordinance and the Disability Discrimination Ordinance (reprinted as Document No. 377, pp 2426-28, in Vol. 5 of *Hong Kong Equal Opportunity Law - Legislative History Archive 1993-1997*) (Centre for Comparative and Public Law, University of Hong Kong 1999).

⁴⁸ Section 69 of the Sex Discrimination Ordinance states that "... in any proceedings under this Ordinance before any court any code of practice issued under this section shall be admissible in evidence, and if any provision of such a code appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

the Ordinance if a court determines that she is being paid less than a man who is doing work of "comparable value". However, the advice given in the current Code of Practice gives employers and employees the impression that equal pay for work of equal value is not required (thus discouraging employers from implementing it and discouraging employees from making complaints). Clearly this situation cannot continue: it is not appropriate for the government to indicate to treaty bodies that Hong Kong law *does* require equal pay for work of equal value while the Code of Practice implies that employers can take some unspecified amount of time to comply with that law.

V. Conclusions

I believe that paragraph 12.8 of the Code of Practice should be amended and that the Equal Opportunities Commission should develop mechanisms to assist employers to avoid unlawful devaluation of female dominated positions. It should start by studying the pay scales of the Hong Kong government and public authorities (which I assume would be happy to cooperate with any effort to ensure that the Hong Kong government is complying with its own treaty obligations). The Commission should also publish recommendations to all employers on how to remove gender discrimination in pay scales. Large employers should be urged to do their own studies, to compare pay scales of female-dominated and male-dominated positions, and to eliminate discrimination.

Finally, I would argue that a pro-active approach to the gender pay gap is even more important in Hong Kong than in many other jurisdictions. I say this because of the absence of strong unions and collective bargaining. In many countries, unions (assuming that they are supportive of women's right to equality) can compel employers to adjust pay scales that clearly devalue female-dominated positions. But in Hong Kong the unions have far less power. The right to collective bargaining was briefly expanded by the elected legislature (before the handover). But this legislation was almost immediately frozen (and later repealed) by the Provisional Legislative Council. It is highly unlikely that a right to collective bargaining will be established under our current constitutional order.⁴⁹ Thus we cannot rely on union activity to address the gender pay gap in salaries in Hong Kong. In my view, this makes a particularly compelling case for the Equal Opportunities Commission to start developing mechanisms to implement equal pay for work of equal value.

⁴⁹ For a general discussion of these developments see Wilson W.S. Chow and Anne Carver, "Employment and Trade Union Law: Ideology and the Politics of Hong Kong Labour Law", in Raymond Wacks, ed, *The New Legal Order in Hong Kong* (Hong Kong University Press 1999).

HA's Comments on the EPEV Report

The Hospital Authority (HA) has concern over the way the data were interpreted and the conclusions were drawn. There are some flaws in the study and these are elaborated below.

2. From a statistical point of view, the final interpretation of the data is not convincing as reflected by the following limitations:

- (a) The HA jobs chosen for the study have no sex restriction in recruitment. Using these jobs as representative data and fitting them into regression lines (male salary line and female salary line) are not appropriate.
- (b) As most of the jobs were chosen from AHNH, the study was not based on a random sample.
- (c) Some jobs belong to the same job family, e.g. Enrolled Nurse, Registered Nurse, Nursing Officer and Ward Manager. As the starting salary and maximum salary of these four jobs are inter-dependent, treating them as 4 individual data points and fitting them into one regression line are not appropriate.
- (d) The report has not stated the goodness of fit of the model and model assumption checking. When comparing individual jobs against the salary line the report has also not indicated the confidence level of the findings and advised whether they are statistically significant.
- (e) As reflected from the findings, it is reasonable to deduce that higher job evaluation score generally commands higher salary. However, the relationship is not necessarily linear. The study has not addressed this point.

3. As the report contains some very technical and controversial information, we should ensure that the right message is delivered to the lay readers to avoid misinterpretation. However, the report has not brought out explicitly the salient points inherent in a study involving job evaluation. These include the following:

- (a) The job factors adopted for this study represent a different value system. Whether this value system is a better system or is more suitable for Hong

Kong is yet to be proved. As a matter of fact the HA has adopted a set of factors in evaluating new jobs it creates from time to time. These include contribution to patient care, qualification, practical skills, effort, job environment, problem solving and decision making. None of these carries any gender consideration.

- (b) The job evaluation results only show the relativity among jobs and for this reason we should exercise care in drawing a conclusion as to whether a job is underpaid or overpaid. There is a possibility that the pay anomalies identified in the study are caused by some of the male jobs being overpaid rather than the female jobs being underpaid. The pay for a job does not necessarily equate to the job evaluation scores since other factors are included in the pay determination process of an organization. Hence we would need to satisfy ourselves that the pay anomalies identified in the study cannot be explained by any reasons other than gender bias before we draw the conclusion. This would entail a comparison between the two pay systems to reconcile the difference before translating the job evaluation results into conclusions. The study has, however, not gone through this process.

4. The data presented in the report do not show a discernible trend that there is a gender bias. Since the male and female lines intersect at about 500 evaluation points in all the three scenarios i.e. starting salary, mid-point salary and maximum salary, there is no strong basis to suggest that there is a gender bias. However the reasoning put forward in the report seems to be biased towards drawing such conclusion. The report has concluded that the pay of nursing staff is clearly lower than equal value male jobs and that the whole question of nurses' pay should be re-examined. We need to point out that this is a premature conclusion, in particular when the mid-point salary chart (Appendix 11) also shows a number of male jobs which are below equal value nursing jobs. In determining the pay scales of ranks in the nursing grade, consideration had been given to the onerous nature of their duties and the need to work frequent overnight shifts and on Sundays and public holidays. As a matter of fact the minimum and maximum pay of the Registered Nurse and Nursing Officer ranks had been increased by one pay point in the last salary structure review conducted in 1989. For this reason these two ranks generally command a higher pay than other ranks requiring the same entry qualification. As mentioned above, the observed pay anomaly may be due to the fact that some of the male jobs are overvalued, rather than the nursing jobs are being underpaid. The study needs to disprove the former situation before drawing such a conclusion, otherwise one can easily discredit it.

5. We have the following comments on the findings and recommendations drawn in Section Three of the Report:

- (a) Paragraph 41 says that “To be promoted to Registered Nurse, the Enrolled Nurse must take a conversion course and receive a degree”. This statement is not entirely correct. A more appropriate statement should be “To be promoted to Registered Nurse, the Enrolled Nurse must take a conversion course that would qualify one for registration with the Nursing Council of Hong Kong”.
- (b) Paragraph 44 says that “Hospital staff are subject to very onerous rostering and shift regimes with no compensation for unsocial shifts or the extremely frequent change from early to late shifts”. This statement is again incorrect. In setting the present pay scales in the nursing grade, the Hong Kong Standing Commission on Civil Service Salaries and Conditions of Service had taken into consideration frequent overnight shifts as well as work on Sundays and public holidays. This is stated in its Second Report on 1989 Salary Structure Review.
- (c) Paragraph 55 says that “As in the case of CS, pay ranges vary significantly between jobs of similar value thereby producing unfairness and anomalies in pay”. This statement is not entirely correct and may mislead readers. Difference in the length of pay ranges among jobs does not necessarily produce unfairness. There may be genuine reasons to maintain different pay ranges for different jobs. For example a longer pay range for a job versus other jobs may reflect the longer period of seasoning required in that particular job. Hence we need to be very careful when we draw a conclusion like this.
- (d) Paragraph 56 recommends that “recruitment practices be reviewed to ensure that there is no bias in favouring males or females when recruiting staff for jobs that traditionally are dominated by one sex”. This statement seems to suggest that there is an issue in the HA's recruitment policies and practices but has not given any evidence to substantiate it. As stated in our Human Resources Policies Manual, it is the objective of the HA to maintain the principle of equity and fairness in its recruitment and appointment processes. Equal opportunity of employment will be provided irrespective of sex, age, marital status, race, religion, disability and employment status. There are administrative guidelines to ensure that hospitals adhere to these principles in

their recruitment practices. Take nursing profession as an example, we actually have a higher percentage of male nurses in comparison with other countries. We consider it not appropriate to include this paragraph in the report since it is not in line with the context of the study.

- (e) Paragraph 58 says that “the whole question of Nurses’ pay should be re-examined in light of these job evaluation results and steps should be put in place to gradually reduce the imbalance”. As elaborated in paragraph 4, this is a subjective conclusion not supported by any evidence.

- (f) Paragraph 59 recommends that the shift rostering system in the nursing profession be re-examined but it has not given any reasoning to support this recommendation. By nature of the profession, nurses are required to work shift duty in hospitals. The shift pattern may vary from department to department and from hospital to hospital. There is no fixed shift pattern in HA hospitals. The roster usually consists of five day-shifts (either early morning shifts or afternoon shifts), one night shift and one day-off within a week. These guiding principles are being adopted in rostering to meet service needs, to provide continuity of care and to comply with labour legislations. The staff’s special request will also be taken into consideration. Mechanism is in place in all hospitals for continuously monitoring and evaluating the shift rostering system to safeguard the health and welfare of our staff. We are also aware of the general practices in other countries, which are similar to HA’s. As a matter of fact the shift duty of nurses is not in line with the context of this study.

6. In summary, we have reservation on endorsing the report as the study has not been able to produce convincing conclusions. We strongly urge that a more thorough research be conducted to ascertain the real causes of the pay anomalies identified in the study before conclusions are drawn. Our view is that to ascertain whether an organization's pay is gender biased, the pay determination system of the organization should also be reviewed. Job evaluation is only one of the factors included in the pay determination system and hence the job evaluation scores above do not necessarily conclude that the pay system is biased.