



COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE

on

FOREIGN AFFAIRS, DEFENCE AND TRADE

(Human Rights Subcommittee)

Reference: Hong Kong's transfer to Chinese sovereignty

MELBOURNE

Friday, 31 January 1997

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

(Human Rights Subcommittee)

Members:

Mr Nugent (Chair)

Mr Hollis (Deputy Chair)

Senator Bolkus

Senator Bourne

Senator Chapman

Senator Harradine

Senator Schacht

Mr Barry Jones

Mr Lieberman

Mr Price

Mr Slipper

Ms Worth

Matter referred to inquire into and report on:

the future of democratic political structures in Hong Kong after the transfer of sovereignty;

the protection of human rights in the territory of Hong Kong as established by the United Nations Charter, the international human rights covenants, relevant United Nations General Assembly resolutions and the Hong Kong Bill of Rights;

the impact on the implementation of human rights protection of the Joint Declaration made by the United Kingdom and the People's Republic of China and the Basic Law enacted by the People's Congress of the People's Republic of China and subsequent negotiations between the United Kingdom and the People's Republic of China;

the condition of the remaining asylum seekers and the repatriation of those screened out under the Comprehensive Plan of Action for Indochinese Refugees;

the future status of those whose citizenship of China or a third country, or right of abode in Hong Kong might not be assured;

the implications for Australia of the transfer of power from the United Kingdom Government to the Government of the People's Republic of China.

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JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE
(Human Rights Subcommittee)

Hong Kong's transfer to Chinese sovereignty

MELBOURNE

Friday, 31 January 1997

Present

Mr Nugent (Chair)

Senator Bourne

Mr Hollis

Senator Chapman

Mr Barry Jones

Mr Slipper

Ms Worth

The subcommittee met at 2.08 p.m.

Mr Nugent took the chair.

\DB\WLBIDDULPH, Ms Sarah Catherine

CHAIR—I declare open this public hearing of the Human Rights Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. The subcommittee is inquiring into Hong Kong's transfer of sovereignty from Britain to China on 1 July 1997. The committee visited Hong Kong last week for meetings and discussions with a variety of relevant individuals and organisations. The committee expects to table its report on this reference before June of this year.

Ms Biddulph, I welcome you on behalf of the subcommittee. The subcommittee prefers that all evidence is given in public, but should you at any stage wish to give any evidence in private you may ask to do so and the subcommittee will give consideration to your request. You are not representing an organisation?

Ms Biddulph—No, I am appearing as a private citizen.

CHAIR—I invite you to make a short opening statement before we proceed to questions.

Ms Biddulph—I have been giving some consideration as to how I can help the committee. As you probably know, my area is the domestic law of the PRC. Your committee very helpfully gave me a list of the things you might be interested in. From that I have prepared a number of areas that I thought you might be interested in. So I will tell you what they are and you can tell me whether you are interested in them or not.

CHAIR—That is fine, thank you.

Ms Biddulph—The first area generally is on domestic legal reforms in the PRC which falls into two or three major areas. The first is the recent spate of laws on legalisation and professionalisation of the judicial actors. So recently there has been a police law, judges law, procurates law and lawyers law. The second major area of reform that I think might be of interest to you is in the area of administrative law generally—better definition of administrative powers and increased powers of supervision of administrative action. And the third is in the area of criminal law. There was a new criminal procedure law passed last year which comes into effect on 1 January this year. It is anticipated that the criminal law will be substantially revised in the March session of the NPC this year.

CHAIR—Tightened or relaxed—Or you will talk about that.

Ms Biddulph—It is hearsay because drafts of legislation are usually never available for anyone to look at before, so it is really just what people have told me. It may or may not remain the case; it may or may not be true; but I can tell you what I have heard.

It seems that you are also interested in the relationship between the party and the judicial system. I thought that I might try to give you a concrete example in the order of law enforcement and public order to demonstrate what my understanding of that relationship is. Then I will make a couple of comments—I suppose more anecdotal than otherwise—about some of the aspects of the PRC system that I think might not help you anticipate what might happen but provide some more substance to what you see written in the Basic Law, because there is a number of understandings about certain terms behind that. That is really what I

thought I would raise.

CHAIR—That is fine, keep going.

Ms Biddulph—In terms of legal actors, I will start with the lawyers law. There was a lawyers law which was passed in 1980. There has been a lot of criticism of that law, because the basis of that law was that lawyers were the judicial workers of the state and there are doubts about legal definitions of independence of lawyers. The lawyers law has been drafted for quite a long time. It was finally passed in 1996.

The lawyers law attempts to create a more professional type of legal body and establish bodies of rules which govern lawyers work, not in reference in their obligations primarily to the state. For example, it sets out the requirements for qualification to practice, which is passing a university degree, passing a bar exam, doing a year's worth of practical experience and then getting registered with the lawyers section of the department of justice at that local level. It also provides a position for the All China Lawyers' Association to do internal disciplinary work and education for lawyers. So I think this law in China—and probably outside as well—was seen as one step in the professionalisation of legal actors work.

Another important law that has affected the position of lawyers is the criminal procedure law. Under the guise of increasing the rights of criminal defendants, lawyers now have access at a much earlier stage of the interrogation process to defendants. Basically, the criminal procedure law says that after a person has been taken in and a coercive measure has been used against them—either they have been arrested or they have been detained under some other coercive power or interrogated—then within 24 hours they can ask for a lawyer to come and represent them.

In fact, the criminal procedure law in that area is slightly ambiguous because there are two different provisions. One provision says 24 hours after a coercive measure assistance can be given but another provision says that participation in the legal process starts when the case is transferred to the procurate and the procurate starts investigating. But what academics have said to me is that that is a distinction without a difference and it was put in to satisfy a number of requirements because they could not convince a number of organs to let lawyers in that early. But, in fact, lawyers have a role from quite early on.

The other thing about the lawyers law is that it specifically places an obligation on lawyers to provide legal assistance to people who do not have the capacity to pay for a lawyer themselves. I think that there are going to be more specific provisions—and there is work being done on that at the moment—to provide a unified system of legal aid. There is experimental work going on in a number of areas in China now about establishing legal aid funding and setting up parameters for who is entitled to legal aid. So that is lawyers.

With police, judges and the procurate, the law is important in that it was an attempt to specify the rules publicly and the parameters within which each of these organs of state must do their work. I know that, with the police in the past, the rules governing police powers and laws were specified by state council documents which were not publicly available. This is part of a process of creating greater professionalisation and stricter legal parameters within which all of these organs and individuals operate.

I am not quite sure how much you know about the PRC, so please stop me

immediately if I am telling you things you already know. In the area of administrative law, since 1989 there has been very great movement in the way in which powers of state organs are defined and powers for supervision of the exercise of those powers.

The first law was the administrative litigation law which gave a more general power to the courts to review the legality of particular administrative actions. Now, because of a number of practical difficulties and historical and cultural factors, the use of the administrative litigation law has not been enormous. Firstly, the traditional attitude is that it is wrong for citizens to question what administrative agencies do. There is a saying that the people are low down and the officials are high up. There is quite a strong influence of that type of thing.

The second is that many administrative agencies considered they were working on behalf of the government for the benefit of the people and that it was not appropriate for them to appear as defendants in a court. Many agencies are still very resistant to appearing as defendants in court because they think it lowers their position and undermines their authority. So that is certainly a problem.

The administrative litigation law does not cover every citizen's right; it covers a specified list. But, despite all of those limitations, I think it was the signifier of an important change in attitude because it was hailed as the first time that citizens could actually complain about administrative acts. That was followed very closely by the administrative review regulations which provided for internal administrative review, usually by the higher level administrative agency, about the lawfulness and reasonableness of administrative actions.

Of course, the power of the administrative review agency, because it is the higher level administrative department, is much greater, although citizens then have to form a view about the extent to which the higher level administrative agency will be willing to find fault with a lower level administrative agency. Those regulations were amended afterwards to add another channel of review, which was the local people's government. So now you can either go vertically to the higher level administrative agency or go horizontally to the local level government which has powers of review.

One of the criticisms of this law, which was a matter of debate when it was being drafted, was that the administrative review regulations are passed by the state council, and it is a question about the status of the rules. Some people say that it actually should have been passed at a higher level—at the National People's Congress level—to give those review regulations higher status. There is some discussion about whether that revision should be made.

Administrative supervision was another mechanism for supervision which was introduced, and that is by a new ministry of supervision. The problems of the status of that law are the same in that, in traditional Chinese law, there was a censorate which had very high status and the people in the censorate reported directly to the emperor. Some people said that you should have a very high status organisation that does not report to the state council but can make independent decisions itself about the lawfulness of administrative acts. That agency now works cooperatively with a party organ, the discipline inspection committee. They are the ones who are primarily responsible for looking at wrongful internal acts of administrative officials, including corruption. They are often the first port of call for a complaint about corrupt activity.

Last year there was another law passed in this area—tell me if I am boring you to tears—which was the administrative punishments law. This was considered to be quite significant for a number of reasons. The first is that it specifies the organs of state which can pass rules about punishments—all sorts of punishments including fines, closing down factories, detention of people and things like that. Some agencies could not pass rules about certain things, so it was attempting to clear the channels of authority for passing laws.

The administrative punishments law also specified mandatory procedures for giving punishments. One of the features of Chinese law, which is quite different from our system, is because it is basically a civil law system there has not been a lot of emphasis placed on procedures. One of the issues has been that if there are not mandatory procedures for giving a punishment or doing something else, it is very hard to say that that act is unlawful. You had to actually judge the substantive nature of the decision to judge that it was unlawful.

By specifying mandatory procedures, I think it actually demonstrates that, within the PRC, there is now a greater awareness that procedural law is very important. Up until now there has been some lack in that area. It also increases the scope of operation of administrative litigation. Now you can say that not only have you made a substantively wrong decision but you also made a procedurally wrong decision, which means that it has increased the scope of supervision.

In that area there is a national compensation law which provides that a citizen can claim compensation if they have suffered loss as a result of an unlawful administrative act or an unlawful act in the criminal justice system. For example, if someone is wrongfully committed, deprived of their freedom for a number of years, they can actually claim compensation. That compensation law provides a measure of compensation. There was a bit of concern about that because a lot of government agencies were worried about how much money they would have to pay out to people under this compensation scheme. It is actually relatively broad in operation. I do not think we have anything like that.

If you look at all of these laws together, what you can say is that there is greater effort now to specify clearly what the powers of administrative agencies are and how they should exercise those powers. That type of activity has been quite pronounced in the last six or seven years. It creates a large number of mechanisms for supervision of administrative action. In my view, the problem is that, with so many different agencies exercising supervision powers in relation to particular areas of administrative acts or particular aspects of administrative acts, those powers of supervision are quite fragmented. But certainly when officials at the highest political levels have talked about law reform in China in the last few years, increased supervision is something that is considered to be very important.

Mr HOLLIS—Can I just interrupt you there. With the change in sovereignty and given that the law as exercised currently in Beijing comes from a different legal basis than what it does in the PRC, what sort of impact do you think that will have? You have been talking about the various changes, but what impact do you think that will have on the PRC or do you think that we are going to have one country, two legal systems?

Also the fact is that the final level of appeal within the PRC is going to be the people's congress. Indeed, when we were there, one of the issues that people put to us at various

times—and I think it was put to us yesterday again—is that it would be difficult for an Australian judge as a visiting judge to serve on a panel there because of that final appeal to a political system rather than to a judicial system. How do you think all this is going to impact on Hong Kong or do you think it is going to have no impact and we will have one country, two judicial systems?

Ms Biddulph—Everyone I have spoken to in China is very adamant that you will have one country, two legal systems. But I will attempt to answer your question because I have a couple of other thoughts. I would not really like to speculate what will happen but there are a couple of issues that you may want to think about. The first is the status of law and that has to do with the relationship between law and policy, and law and the party. The second has to do with interpretation power and how that is understood in the PRC, because the standing committee is going to have final interpretation power in a number of areas.

Turning to the status of law question, a lot of people when they look at the PRC system—I think it is because of our western ideas about law and the supremacy of law—tend to formulate law as being independent and somehow opposed to the exercise of political power or policy decision making power by the party.

CHAIR—They have the separation of powers.

Ms Biddulph—Yes, and in China you do not have that. But there is still a number of conceptual difficulties in thinking about law in the PRC as not being contradictory to policy. My personal view is that, in a way, maybe what we do when we think about the PRC is actually overstate the isolation of law from the political process in our own system as a comparative tool. But that is just my view.

Mr SLIPPER—Excuse me, are you actually saying that, in the PRC, policy can override law?

Ms Biddulph—No, I am not saying that. I am saying that the relationship is a more intricate relationship than we might suggest. Let me explain: it is clearly stated in the constitution of the PRC and in the party constitution that all agencies will be subject to the law. So it means that if there is a law that says X, then you cannot just say, 'I am going to do Y because that is what I feel like doing or the policy says I can do that.'

Mr SLIPPER—Does that happen in practice?

Ms Biddulph—I will give you an example to show you the point I am trying to make. What happens though is that when laws are being drafted, they are usually drafted—especially important laws and regulations—in accordance with policy and usually after a decision has been made either by the central committee or the politics and law committee, depending what it is on. It means that often the law itself is not 100 per cent a codification of the policy but is close to the policy. With very important laws, they usually go to the standing committee of the central committee in any case for them to look at the law before it is passed.

So in the law drafting process, I do not think you can actually conceptualise it as the state agencies drafting it in isolation from the party organs. If you also bear in mind that senior officials in China—at all levels of government, the courts and the procurate—are all party officials anyway. You have a very high degree of overlap between government or judicial

officials and high party officials. You can see that that distinction is blurred immediately. For example, Ren Jianxin, who is the Chief Judge in the Supreme People's Court, is also now the head of the politics and law committee of the central committee of the party, which is their main committee that is responsible for political and legal things.

Mr SLIPPER—Just one last thing. I think the constitution includes a right to freedom of religion, yet that does not conform with policy.

Ms Biddulph—Well, yes, but—

Mr SLIPPER—I was just wondering whether that discrepancy could extend to areas of the future of Hong Kong—not specifically with respect to religion. But if there is a freedom of religion in the constitution, yet no freedom of religion in practice there, when you look at the future of Hong Kong, that kind of discrepancy—if extended to Hong Kong—could be utterly disastrous.

CHAIR—Could I perhaps help. When you have not been with us, Mr Slipper, we have heard from other witnesses that one of the key issues is that under section 158 of the Basic Law, which is the codification of the joint agreement, the final interpretation of what the Basic Law means and whether something is in conformance with it or not is at the discretion of the standing committee in Beijing—in other words, a political body. So, ultimately, judges in Hong Kong will have their decisions scrutinised by a political body who may say, 'Yes, we agree,' or they may say, 'That is wrong, this is how this particular section is to be interpreted.' So you very clearly have a political ultimate control on what the law actually says and means.

Ms Biddulph—There are two issues. One is the freedom of religion and, in a way, you have got a principle. But in domestic law in the PRC, what is in the constitution is a statement of general principle. Then, in order to see whether that is implemented or if it is implemented or what happens in particular, you need to look at the specific implementing rules and the structures that are set up, because the constitution is not directly enforceable. There are moves afoot possibly to introduce systems to make it directly enforceable or a special organ of the state standing committee so that citizens can complain about a breach of a constitutional provision, but at the moment there is no mechanism to do that.

With article 158, that was the thing I wanted to say about the interpretation power. It is true that matters about what are the affairs which are the responsibility of the central people's government, what are the matters which relate to the relationship between Hong Kong and the central people's government are going to be decided by the standing committee. I think that actually reflects the way in which the PRC system is set up in any case. Because there is no separation of powers, the highest level of law making power and law interpretation power is in the standing committee anyway. So it actually follows that system and brings Hong Kong in in that way.

In China, there are three different sorts of interpretation powers. They are called legislative, administrative and judicial powers. The highest authority of interpretation is in the standing committee, which is a legislative interpretation, and that power is exercised very rarely. There is no special organisation that I know of at the moment specifically devoted to questions of interpretation. They usually do it by way of amendment to legislation.

CHAIR—Unfortunately, I am conscious of the time. This is the question that I would

like you to address, if you would: given that there are procedures and entitlements and all the rest of it under PRC law—we have got the Basic Law in Hong Kong, but you are talking about PRC which is your area of expertise—do you see in the implementation of that law, the practice of that law on a daily basis, that the good intentions of the law, if you like, actually upholds the rights that the law gives people and the treatment that they are entitled to be afforded; or is the law observed almost as much in the breaches as in the observance?

One of the things that I think is exercising the minds of this committee in respect of Hong Kong is that there are a number of claims about whether the provisional Legco is legal, whether the judiciary will remain independent and all those things. But a lot of those who are pro-Beijing tend to say, 'Don't worry, all is okay,' while those in the democracy camp tend to be worried quite seriously.

A lot of it boils down to, first, it is people's opinions on what is going to happen and we are trying to second-guess but, secondly, it is a question of whether the law is going to be administered with a benevolent approach and a respect for law as we would understand it in this country or whether it is going to be a real true colonial approach—which I have to say was the British approach until about four years ago. The British only changed the law in 1991 in essence in human rights terms.

So, based upon your experience in China with the application of the law, how would you see that perhaps being a forerunner of what might happen in Hong Kong? And in your time in Shanghai with your work, have you talked to others in the Chinese hierarchy about their view of what might happen in Hong Kong?

Ms Biddulph—I suppose that is a difficult question to answer—

CHAIR—That is why I asked it.

Ms Biddulph—I think there are a number of political issues that would mean that the PRC is actually going to try their best to implement the Basic Law according to its terms. Firstly, they have their eye on Taiwan and they do not want Hong Kong to fall over. Everyone I have spoken to in China has always treated Hong Kong as if there is a sort of membrane between it and the PRC, because a lot of the laws in the PRC do not look like those in Hong Kong.

There are a number of difficult issues that I do not think have been worked out, questions about conflicts of laws and how they are going to deal with those sorts of issues. The standing committee has set up a consultative process to make sure that it is seen to be doing the right thing with interpretation, but you cannot expect that the PRC is not going to interpret those questions about its own authority to deal with matters in accordance with its own interests. It does not mean that it is always going to see that the principles that it applies will diminish Hong Kong's powers. But, certainly, the way in which they think about interpretation can only be in accordance with how they understand that system.

I suppose that, if you think about it, the common law system is something that is very hard to understand unless you have actually been trained in the actual operations of the common law. Of course, there are lots of people in the PRC who have spent a long time in Hong Kong and actually know a lot about Hong Kong, but it may be a technical issue about how do you understand the operation of your own system—being a civil law system—and

how do you understand the operation of the Hong Kong system?

CHAIR—Then you get into difficulties with language and the fact they are using Cantonese in the lower courts in Hong Kong and it translates into all sorts of practical problems when it gets into the higher courts.

Ms Biddulph—When it gets higher up, yes. I suppose you also have to bear in mind that the PRC is very sensitive about sovereignty issues as well and a lot of things that motivated those sorts of issues.

CHAIR—I think that was put to us fairly forcefully when we were there last week by one or two of our witnesses.

Ms Biddulph—Yes. But everything that people have said to me in the PRC about Hong Kong coming back has to do with sovereignty and has to do with these bitter memories of the Opium War and the sort of colonial carving up of China. So for them it is something that seems to be quite important.

The only other point I wanted to make—and I do know that I have gone way over my time allocation, but it might help you—is that I have actually been talking about domestic law reforms but I did not talk about the relationship between law and policy. I had started a little bit to do that.

Traditionally, or up until quite recently, many powers have been exercised not in accordance with specific empowering rules, but that process is starting now. But still the way in which administrative agencies carry out their job, they do not necessarily always see it as, 'I do not have any power unless I have got a rule to give me that power.' Now the legal system has actually changed in that regard to say that, but the perception of the exercise of power is still different. To that extent, I think that is a big cultural difference in that in our system you look for a power and you go to the court to interpret that power; whereas the central status of law is something that is not so well entrenched in the PRC.

CHAIR—I am conscious of the time but do any members of the committee have particular questions?

Ms Biddulph—I am sorry I did not actually answer your question in full but it takes a bit of explanation.

Mr SLIPPER—I am aware of the constraints of time.

Senator BOURNE—Can I just ask one question and, if you do not mind, I will send you a couple more. What I was interested in is that, now that lawyers have access to clients a lot earlier than they did—I was last there in 1993 and they saw them after they were in court—has that made any difference to the rate at which people are convicted or not convicted of crimes? When I was there, I think there were 11 people who were found not guilty in Shanghai in that year but hundreds and hundreds who were found guilty. Because the general idea is that, once the procuracy has got you, you must be guilty.

Ms Biddulph—It is too early to tell. It has to do with a number of issues: firstly, how

the law is going to be implemented and, secondly, how lawyers are going to do their job in that respect. You see, we have a very high conviction rate too. I suppose the thing is that you go through the police investigation and then the police have to hand the file to the procurate. If the procurate thinks there is not enough evidence, then they will send it back to the police for reinvestigation. There is now a limit on how many times they can send it back, and the procurate now has greater powers to say, 'That is it, I am not going to proceed with that.'

Senator BOURNE—That is good.

Ms Biddulph—The other major change in the criminal procedure law as far as trials went was that, under the old system, the procurate would get a case together and then, when it was ready, they would send it to the court. The court would then go out and do investigation of the main facts. So it meant that the court had actually determined the facts before the hearing. That is why criminal hearings looked like they did.

The major change, apart from that first stage, is that the procurate now—in order to commence a trial—only has to give the originating documents to the court, a list of the main evidence and the main witnesses and a basic statement of the evidence that they are going to rely on. They are then, in accordance with this law, required to prove their case in court. The court is not actually under such a positive obligation to go out and investigate the matter beforehand.

It means that, if it works the way it is written, the cases that might have gone to the court which were without adequate evidence and which the court might have sent back to the procurate or just said, 'Look, this one cannot happen,' they are actually more likely to go through to trial in accordance with the theory; so I suppose there is more possibility because there is less filtering processes earlier on. But it will take a while, though, to make it work.

Senator BOURNE—But because of that, it seems that it is coming just that little bit closer to the Hong Kong system. There are more checks and balances, so that is a possibility too.

Ms Biddulph—Yes. The criminal procedure law is interesting because the people who comment on it say that they have studied the adversarial system and have actually incorporated in that trial procedure reform aspects of the adversarial system as they understand it.

Senator BOURNE—I will send you a couple of more questions, if you do not mind.

Ms Biddulph—That is fine.

Mr BARRY JONES—Very quickly, because it is essentially the inquisitorial system rather than the adversarial system—to put it mildly, there are no Martin Lees in the PRC—you do not have defence counsel acting as advocates. I have forgotten what they are called but you have figures who are sort of freestanding characters, who are not part of the prosecution and who can intervene if they see some glaring error in process. But you do not have anything like a defence counsel, I understand.

Ms Biddulph—The system works like this: the procurate has two major responsibilities. One is for investigating and prosecuting criminal matters, and the second one is a legal supervision power to ensure a fair trial and to ensure that the procedure is followed

correctly. So in a way they have both of those functions.

You do have a defence lawyer but defence lawyers have traditionally been very passive. I suppose because of what happened in their cultural revolution and beyond, it was firstly hard for the lawyers to argue very strongly that somebody was innocent because they did not have much time to prepare the case and, secondly, there has been a number of examples of retribution against a lawyer for acting that way.

Of course, the implementation of the laws takes a long time, and changing a culture is not going to happen overnight because you have a new law. These new laws are intended to give lawyers more independent power. The legal aid provisions are also intended to ensure that a criminal defendant has access to a lawyer who is responsible for their defence and that lack of money is not going to stop them from having a defence.

The vigour of the defence is something else. The other thing that I think influences the vigour of a defence, apart from political and cultural issues, has to do with rules of evidence and procedure. Our system is quite different in that we have very technical rules of evidence, whereas in the PRC it is an inquisitorial system. As you say, the rules of evidence are not as technical in that it is more difficult to challenge the admissibility of evidence.

This law deals with one aspect of evidence which was a real problem before, which was evidence of a confession which had been extorted through some coercive means. It is still a little bit unclear about whether that is excludable. But there is provision—I think it is article 184 but I would have to look it up—which says that, if there is an appeal and the higher court thinks there has been a miscarriage of justice because of the admission of some evidence which was wrongfully and unlawfully obtained, they can overturn the decision.

There is now a specific power to overturn a decision because of unlawfully obtained evidence. It is certainly an inquisitorial system but, in a way, all systems have moved away from their pure form. The Chinese system is moving more towards the adversarial system, the increased power of lawyers, and I suppose the decreased active power of judges is an indication of that.

CHAIR—I am going to stop it there because I am conscious that we have 12 other people coming in at 2 o'clock for a private meeting and we have another witness to deal with before that. I will ask members of the committee, if they have further questions for Ms Biddulph, to give them to the secretary.

I would like to thank you for coming in today. I am sorry we have been under a bit of time pressure. But if there are other matters that we want to ask you, the secretary will write to ask you for further information. We will also send you a transcript of today's evidence to which you can make corrections of grammar and fact, but not of basic argument. Thank you very much for coming in. It was nice to see you.

[1.43 p.m.]

\DB\WLB\JACOBS, Professor Jeffrey Bruce, Head, Department of Asian Languages and Studies; Director, Centre of East Asian Studies, Monash University, Clayton, Victoria, 3168

CHAIR—On behalf of the subcommittee, I welcome you to the hearing today. I am sorry we appeared to have a little bit of confusion about whether or not you were coming. The subcommittee prefers that all evidence is given in public but should at any stage wish to give any evidence in private, you may ask to do so and the subcommittee will give consideration to your request. I invite you to make a short opening statement and then we will move on to some questions.

Prof. Jacobs—I would like to express my appreciation to the committee for its invitation to appear to discuss the question of Hong Kong's transfer of sovereignty. I believe this issue is important for Australia's future economic, diplomatic and security interests, but it is also universally important in that the human rights of six million Hong Kong people are at stake.

My overall prognosis for Hong Kong's future can be summarised as cautious pessimism. Those who argue for cautious optimism tend to express the importance of Hong Kong to China's interest. They note the importance of Hong Kong to China's economic growth; China's repeated assertions of 'one nation, two systems' with its implied autonomy for Hong Kong during the next 50 years; the importance of providing a good example in Hong Kong for the even greater interest of regaining sovereignty over Taiwan; and international pressure as a means to protect the interests of Hong Kong's residents.

Furthermore, some analysts claim Hong Kong's residents are primarily concerned with economic welfare and wealth rather than political rights, despite repeated elections and surveys which demonstrate Hong Kong's residents are strongly concerned about their future political situation. It is because of these above arguments that I modify my pessimism with the adjective cautious.

However, I am basically pessimistic about the future of Hong Kong for the following reasons. Firstly, the key to Hong Kong's current prosperity is not a laissez faire economy. In fact, in many ways Hong Kong's economy is far from free and prices for many items are very expensive. The key to Hong Kong's current prosperity is the rule of law. It is the rule of law which enables the dependable economic contracts that provide the basis for Hong Kong's economic prosperity.

The repeated evidence that the Chinese leadership shows a very limited understanding of the rule of law provides a first reason for pessimism about Hong Kong. A Hong Kong economy run on the base of 'who you know' rather than law will lose its special position in China and become simply another relatively provincial centre with no special characteristics.

Second, when fundamental political interests are at stake, the Chinese leadership has demonstrated its willingness to sacrifice important economic interests. This became most obvious at the time of Beijing massacre of 3 to 4 June 1989. At that time China was attempting important economic reform. 'Opening to the outside' was an important aspect of this economic development strategy, but China's leaders sacrificed economic and diplomatic

interests when they felt their fundamental political positions were threatened. Similarly, I believe China's leaders would sacrifice Hong Kong's economic interests if they believed they were losing control over Hong Kong.

Third, a Hong Kong within the People's Republic of China will find itself competing with other Chinese centres as China's premier economic, financial and trade centre. Shanghai poses a special threat. Furthermore, Shanghai has many strong supporters among the central leadership in China, many of whom gained their prominence while working in Shanghai. Should Hong Kong prove restive under Chinese rule, many Chinese leaders may favour downgrading Hong Kong in favour of Shanghai, which has proved relatively politically quiescent and cooperative over the past several decades.

Fourth, through repeated elections and surveys, Hong Kong's residents have shown a preference for democratic methods and human rights. Furthermore, at the time of the student movement of early 1989, Hong Kong citizens provided large amounts of financial support to the students demonstrating in Tiananmen Square. Following the Beijing massacre of 3 to 4 June 1989, very large numbers of Hong Kong residents marched in protest. Yet, repeatedly, the Chinese leadership has shown no sympathy with these democratic and human rights aspirations and is preparing to negate the modest political reforms implemented by the British. I believe Chinese actions will lead to restiveness among the population, increased efforts to emigrate, and to political and economic instability.

Fifth, the inefficiencies of China's bureaucracies will begin to reduce Hong Kong's renowned efficiency, further diminishing Hong Kong's ability to compete within China and internationally. The inability of China to establish clear-cut rules of residency, for example—despite years of preparation—does not bode well for a complicated, modern economy.

Finally, in accord with Samuel Johnson's wisdom, that 'Patriotism is the last refuge of a scoundrel' many of China's conservative leaders are playing the patriotic card in their efforts to gain political power during the current succession struggle. Sovereignty has become a motherhood concept which is especially powerful when reference is also made to the nasty 'imperialist' powers which have historically, and at present, insulted the great Chinese nation and its people.

In China today, the exercise of sovereignty means a country can do virtually as it likes in a place over which it has sovereignty. This was made explicit in the 1993 white paper on Taiwan:

Every sovereign state has the right to use any measures which it considers necessary, including military measures, to protect its sovereignty and territorial integrity.

Such attitudes do not bode well for the future of Hong Kong. Naturally, for the future prosperity and happiness of Hong Kong's residents, as well as for the peace and stability of the Asia-Pacific region, I hope this analysis is unduly pessimistic. However, I cannot see any factor leading to a major change in this analysis other than a massive liberalisation of the Chinese regime. In the short term—and even in the medium term future—I find such transformation unlikely. Rather, in the succession struggle which will dominate Chinese politics over the next few years, I see greater potential for repression. Unfortunately, Hong Kong's transfer of sovereignty and its formative period as a part of the People's Republic of China will occur during this inauspicious period. I hope that provides some food for thought

so we can have some discussion.

CHAIR—Yes. As you will be aware, the committee actually visited Hong Kong last week—not all the members of the committee but a number. We had meetings across the board from Governor Patten downwards, including with a lot of local media, Australian media, academia, human rights groups, the judiciary and the legal profession. We also met with most of the different political movements there, from those who are in the pro-democracy camp through to the Beijing side, including a meeting with the preparatory committee. So it was quite an interesting exercise.

Many of the points that you have raised came out during the course of those sorts of discussions. It would seem to me essentially that you have pretty concisely summarised the various pressures. I suppose the bottom line is nobody really knows what is going to happen and we are all second-guessing. Depending on what one's perspective or on what one's vested interest is, then one might put a different interpretation on that. Have you had any contacts with people in Hong Kong and/or in the PRC that would give an indication as to what their thinking has been of recent times?

Prof. Jacobs—I have met a range of people, of course. My main specialty areas are China and Taiwan, so my main interests in Hong Kong are as a model for Taiwan. In that context I have met a lot of senior people in China who deal with Taiwan and have heard their discussions and feelings on those issues. That obviously has some relevance to Hong Kong. The range, even within China, is very broad. When you speak frankly to people, you see there is a wide range of opinion about how Hong Kong should be handled and about how Taiwan should be handled.

CHAIR—I think that is right. Any questions?

Mr HOLLIS—Just one. I enjoyed your paper, one always enjoy papers that coincide with one's own view. The only point at issue—and it is not a great point—is where you say that the Hong Kong residents have shown a preference for democratic methods and human rights. They may have a preference for human rights, but I do not think there has been very much democracy in Hong Kong. The Brits were very late in giving the gift of democracy to Hong Kong and now—

CHAIR—And what is there is not very democratic.

Mr HOLLIS—Yes. I think there is a certain amount of hypocrisy in the Brits being so strong in protesting that the people's republic will come in and take away this fragile flower of democracy, which I must say has been—

Mr SLIPPER—Late bloomer.

Mr HOLLIS—Yes, it has been a very late bloomer. In my own view of what will be happening in Hong Kong, I actually do think there will be a diminution of human rights but, as long as ever people are making a buck, I do not think they will particularly care. It is only those who decide to protest at some time and then are arrested and things like that. I think that is where the human rights may come in, but I do not think that human rights will be a big issue to the bulk of the population in Hong Kong, provided—and this is the big proviso—an economic base stays there and provided it becomes for the majority, although not all, of the

population a wealthy and rewarding place in which to live.

Prof. Jacobs—You raised a number of issues there, some of which I would agree with you and some of which I would not. First of all, I think the elections have shown strong support, even as limited as they are. If I were writing a different paper, I would have had a lot to say about the Brits which is not very complimentary. The elections have shown that a very substantial and surprisingly large proportion of the population has supported democracy, even though there is no interest in it.

There is also a very interesting project called the Hong Kong transitions project, which was run by a person who is now at the University of Southern Queensland, Professor Don McMillan. I do not know whether you have talked to him. Perhaps it would be good if you have not. He was at Hong Kong Baptist University, was originally at Griffith University. He came back to Australia and is now in Queensland. He ran this Hong Kong transitions project. The papers that I have seen from that, and they did repeated polls, all indicate that quite a surprisingly large number of people did want human rights and at least some democracy.

Senator Bourne would perhaps know from earlier testimony some of my feeling about this, but I feel that the need for human rights is fairly universal and I very much disagree with those who argue that there are sort of Asian values which are different. No-one likes to be beaten up, no-one likes to be executed or have their family executed and so on. In the Chinese cultural context—at an earlier session, I think it was of this committee, we went into this at some great length—I think there is no evidence that Chinese like to be oppressed any more than any others.

In fact, when given the opportunity, people of Chinese cultural background have demonstrated the desire for democracy. A case where that is shown most explicitly is the Taiwan case where you had many years of increasing prosperity but you also had increasing agitation and desire for democratisation, which has now taken place. I do not see that as a contradiction. If anything, as people become better educated and have more time owing to economic prosperity, civil liberties, human rights become more important. To some extent, I think the agitation has taken place in China although it is much more repressed. But it is also symptomatic of that.

Mr BARRY JONES—Actually my colleague took the very words out of my mouth, although more eloquently.

CHAIR—Did you want to forgo your questions?

Mr HOLLIS—Just as well I went first.

Mr BARRY JONES—On the basis of the strong experience that we picked up over a week in Hong Kong, I would have thought that there was a greater danger to democratic freedom from the Taipans than there was from the bureaucrats in Beijing. In a sense, the view that you get from people who are associated with wealth and influence is to say, 'Look, all these small human rights areas are just marginal and providing that people have got economic stability and the rest you do not need to worry too much about whether they can demonstrate like that. It is only a handful of people anyway.'

In the last week I have started rethinking very seriously my position about capitalism,

something that I have not thought about for donkey's years because, in a sense, you see the ugly face of capitalism up there. We saw some academics and business people last week who remarked jovially that Chinese people do not even understand what the word 'human rights' means and that they say, 'We have got no idea what you are talking about when you talk about human rights.' They are obviously in the van.

Mr SLIPPER—They were Chinese people?

Mr BARRY JONES—Hong Kong citizens.

Prof. Jacobs—To the extent that this is an academic discussion, I would disagree—

CHAIR—We are not trying to have a discussion, we are trying to get some questions.

Prof. Jacobs—I would disagree that this is an issue of capitalism versus socialism; I think it is a matter of democracy versus dictatorship.

Mr BARRY JONES—No—

Prof. Jacobs—Well, capitalism or something else—

Mr BARRY JONES—Individual rights.

Prof. Jacobs—The economic system is one issue. You can any kind of economic system, I would think, in more or less a democratic system either with human rights or with repression. I think this is an issue of repression. Again, the Taipans are a limited group. They have their interests; they know which way the wind is blowing. Many of them, if they do not personally have two or three passports, certainly have children with two or three passports. It is quite easy. They can move any which way, go as the wind blows. They are sitting pretty, are they not? So are the sons and daughters of the high officials in China, who are also very much involved in business and who are working mates with these Taipans.

CHAIR—It was certainly put to us by more than one witness in Hong Kong that those who have an alternative to staying there might well have different views than those who have live with it on an ongoing basis. There is no question about that. Senator Bourne has forgone any questions. Mr Slipper?

Mr SLIPPER—Mr Chairman, through you to Professor Jacobs, I am nowhere near an expert on Hong Kong but I found your paper very interesting. I think you hit the nail right on the head. Obviously those people who have nowhere else to go obviously must make the best of what is coming. But do you see the uncertainty and possible instability of Hong Kong as events—although unfortunate for Hong Kong—which would be very beneficial to, say, Singapore?

Prof. Jacobs—Singapore may benefit in what sense? That is another place that worries me about human rights but that is not on the agenda. Singapore is an obvious—

CHAIR—A lot of people have made the point that the Chinese may see Singapore as an appropriate model for developing Hong Kong, where you have the form and the process,

apparently, of democracy but perhaps not the reality.

Prof. Jacobs—There is a theory that has gone around China a bit called new authoritarianism, which I think is a Singapore model, a Taiwan model and the way South Korea was. But what is interesting is that, in places like South Korea and Taiwan where the population have had an option, they have opted for more democratisation. That sort of Singapore model, the whole idea of new authoritarian, has as its base this idea that Asian values are different.

Mr SLIPPER—I was referring to economic matters in that a possible concern over the future of Hong Kong will drive a lot of investment to Singapore.

Prof. Jacobs—I think that is quite a possibility, yes, and in a selfish sense we hope some might come here too. Obviously, Singapore is an alternative. Possibly, it depends on what sorts of investment: whether it is China based investment, East Asian based investment or South-East Asian based investment. I think the areas of proximity and communications are all important. But, again, some of the worries that people have about Singapore is the possibility of lack of free transmission of information. I think that is one thing that is causing some concern at least among some businesses.

CHAIR—As so often has happened, we have found that we are pushing time. We have got a commitment to do some other things fairly shortly. I would like to thank you for coming here today. The committee may well have other questions when we sit down to deliberate. If we do, the secretary will write to you with those further questions.

Resolved (on motion by **Senator Bourne**):

That, pursuant to the power conferred by paragraph 16 of the committee's resolution of appointment, this subcommittee authorises publication of the evidence given before it at public hearing this day.

Subcommittee adjourned at 2.01 p.m.