

DISCIPLINARY AND REGULATORY PROCEEDINGS IN HONG KONG

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'All professions are conspiracies against the laity'

George Bernard Shaw

FOREWORD

Legal research nowadays has been made easy with the advent of technology. Cases decided in far-flung corners of the earth are now conveniently available by the tapping of a few fingers on the keyboard. But legal scholarship is much more than the faithful collection of legal data. Indeed the need for good legal scholarship is never as keenly felt as in this age of information explosion. The ability to distinguish, relative to an issue at hand, what is relevant from what is not is as treasured as ever. The ability to present systematically and intelligently, and where appropriate to analyse critically, the primary materials is what even the most powerful legal search engine does not offer.

Given the importance of disciplinary proceedings – and there are many different types covering a variety of activities in society – not only to those directly involved and the profession or vocation to which they belong, but also to society generally, it is perhaps a little surprising that a book like the present one, focusing as it does on Hong Kong law, has not appeared earlier.

The author is therefore to be particularly thanked for his careful and laborious endeavour. In this new book, not only are many of the more relevant and significant decisions and legal materials on disciplinary matters referred to and digested, but general principles are also clearly stated and explained. They are then followed by separate chapters dealing with different types of disciplinary proceedings. I believe both practitioners and others who in one way or another are involved in disciplinary matters will find this approach practical, as will they find the content of the book illuminating and helpful.

Both the author and publisher are to be congratulated for this new work.

The Hon Mr Justice Andrew Cheung
Chief Judge, High Court
July 2011

PREFACE

Hong Kong, like every modern and civilised society, has experienced growth in professional services and the need for their regulation to meet minimum ethical thresholds. This book is concerned with the increasing impact of new developments in Hong Kong's large body of jurisprudence on disciplinary and regulatory proceedings relating to the professions. In addition, this book also serves to update the reader on the ever-changing ambit of laws relating to disciplinary matters. The extensive references to judgments of the Hong Kong courts are intended to enable readers to ground the principles in reality by reference to their application in real-world scenarios. In law, context is everything.

Over the last two years, against the backdrop of a worldwide financial crisis, we have witnessed considerable change in self-regulation regimes amongst professions in other jurisdictions, with independent regulators being set up to handle discipline and industry associations focusing on their educational and marketing functions. Hong Kong remains relatively unaffected by this trend and only feels its impact when required to consider the common law as practised in different jurisdictions in the context of comparative jurisprudence, such as in referencing international practice standards.

There has been a number of important developments in recent years in Hong Kong's disciplinary proceedings laws. Most notable are the requirements for legal representation and development of the role of legal advisers in disciplinary proceedings. These have now been largely settled by the Court of Final Appeal which has held that there is only one standard – a civil standard – in disciplinary proceedings. Recently, the Court of Appeal held that the rule against double jeopardy does not apply in civil service disciplinary proceedings.

The Bill of Rights and Basic Law perspectives continue to occupy much of the scene. Contractual disputes between members of the profession and their professional associations or regulators have not been as commonplace. In a sense, such questions have become a rather specialised field of administrative law.

This book is divided into two parts. Part I deals with the law of disciplinary proceedings. It chronicles the various stages of proceedings, including the misconduct, investigations, the pre-hearing, the hearing, penalties and costs, appeals and judicial review. There is a chapter devoted to current issues, which focuses on advertising, conflicts of interest and competition. Part II is divided into sub-parts dealing with various professions. These are broadly divided into medical and paramedical professions, legal professions, construction professions, the accounting profession, economic and financial professions, and certain social professions or groups, all of which have made great contributions to Hong Kong as a modern and civilised society.

The scope of this book excludes topics on prison disciplinary proceedings and disciplinary proceedings concerning conduct of students. These do not fall within the subject of 'professions'. Therefore, this book in this edition does not cover

the disciplinary jurisdiction of schools (including universities) against students or prison authorities against persons in custody.

I am very grateful to his Lordship, the Honourable Mr Justice A Cheung, Chief Judge of the High Court, who kindly agreed to write the Foreword to this book. I could not have completed this work without the support of my beloved wife, Susan who encouraged me and bore with me through the long and cold evenings in Hong Kong, and during our holiday trips, while this work was being completed. I am also grateful to Gary Soo who, without a second of hesitation, shared with me his knowledge on the code of ethics for architects, engineers and surveyors.

The law stated in this book is as it stood on 31 March 2011.

For the avoidance of doubt, any errors made in this book and the opinions expressed in various places are those of the author alone.

Andrew Mak
November 2011

TABLE OF LEGISLATION

Hong Kong Ordinances

Air Pollution Control Ordinance	
(Cap 311)	4.25
Amusement Rides (Safety) Ordinance	
(Cap 449)	4.25
Animals (Control of Experiments)	
Ordinance (Cap 340)	13.06
Antibiotics Ordinance	
(Cap 137)	11.16, 11.17, 11.23, 13.06
Arbitration Ordinance (Cap 341) (repealed)	
s 2GA	23.03
s 2GM	23.04
s 25	23.01
s 25(1)	23.19
s 25(2)	23.19
Architects Registration Ordinance	
(Cap 408)	4.23, 16.03, 17.03
Part IV	17.12, 17.18
s 3	17.03, 17.10
s 4	17.05
s 8	17.07
s 8A	17.09
s 9	17.16
s 13	17.08
s 16(2)	17.09, 17.11
s 16(5)	17.10, 17.11
s 21	17.17, 17.24
s 21(1)(a)	6.11
s 21(3)	17.24
s 22(1)	17.21
s 22(2)	17.23
s 22(7)	17.22
s 24	17.36
s 26	17.13
s 26(1)	17.31
s 26(2)	17.33
s 26(3)	17.33
s 26(4)	17.34
s 26(5)	17.35
s 27(1)	17.30
s 28(1)	17.38
s 28(2)	17.38
s 29(1)	17.10, 17.39, 17.40

s 30(3)	17.04
s 31(1)(h)	17.09
Banking Ordinance (Cap 155)	
s 20	24.110
s 20(10)	24.66
s 71C	24.110
Basic Law	
art 8	6.56, 6.74
art 19	1.16, 6.57, 6.58, 6.59
art 27	3.32, 6.147, 8.76, 8.77
art 35	6.43, 6.44, 6.75, 6.86, 6.87, 24.182
art 39	2.04, 3.32, 6.140, 6.151, 6.162, 8.76, 8.77, 8.136
art 48	27.56
art 48(4)	27.15, 27.16
art 80	1.16, 6.59, 6.60, 6.72
art 81	6.59, 6.60
art 82	6.76, 6.79, 6.80, 6.81, 6.83, 6.84, 22.81
art 83	6.59, 6.60
art 84	6.59, 6.60
art 85	6.59, 6.60
art 86	6.59, 6.60
art 87	6.59, 6.60
art 87(2)	6.99
art 88	6.59, 6.60
art 89	6.59, 6.60
art 90	6.59, 6.60
art 91	6.59, 6.60
art 92	6.59, 6.60
art 93	6.59, 6.60
art 94	6.59, 6.60
art 95	6.59, 6.60
art 96	6.59, 6.60
art 105	24.260
art 138	9.05
Builders' Lifts and Tower Working	
Platforms (Safety) Ordinance	
(Cap 470)	4.25
Buildings Ordinance	
(Cap 123)	4.25, 16.05
s 3	16.06
s 3(1)	16.06
s 3(3)	16.03, 16.09

s 3(3A)	16.03, 16.09	Commodities Trading Ordinance	
s 5	16.10, 16.19	(Cap 250)	24.01, 24.11
s 5(4)	16.19	Companies Ordinance (Cap 32)	24.150
s 5A	16.13	s 141(3)	20.74
s 5A(3)	16.14	s 141D	20.20, 20.74
s 5AA	16.15	s 141D(1)(e)	20.74
s 5B(2)	16.17	s 141D(3)	20.74
s 7	16.10, 16.27	s 221	6.223
s 7(1A)	16.10	Construction Workers Registration	
s 7(1A)(a)	16.20	Ordinance (Cap 583)	4.25
s 7(1A)(b)	16.20	Crimes Ordinance (Cap 200)	
s 7(1A)(c)	16.20	Part V	20.26
s 7(1A)(d)	16.20	s 36(12)	24.233
s 7(1A)(e)	16.20	s 161(1)(c)	28.36
s 7(2)	16.21	Criminal Procedure Ordinance (Cap 221)	
s 7(2A)	16.22	s 67C	6.72
s 7(3)	16.22	Customs and Excise Service Ordinance	
s 7(4)(a)	16.23	(Cap 342)	27.27
s 7(4)(b)	16.24	Dangerous Drugs Ordinance	
s 7(4)(c)	16.24	(Cap 134)	11.16, 13.06
s 27	16.16	s 8(1)(a)	10.94
s 39A	16.03	s 8(2)	10.94
Chinese Medicine Ordinance		s 47(1)	7.03
(Cap 549)	4.23, 4.25,	s 47(2)	7.03
	9.07, 26.01, 26.04	Dangerous Drugs Regulations	
s 53	9.18	reg 5	8.49
s 69	9.18	reg 6	8.49
s 79(a)	9.30	Dentists (Registration and Disciplinary	
s 79(b)	9.30	Procedure) Regulations	
s 85	9.18	(Cap 156A)	10.53
s 90(3)(a)	9.42	reg 14(1)	10.59
s 91	9.28, 9.42	reg 15	10.60
s 98	9.20	reg 15A	10.61
s 98(2)	9.30	reg 17	10.67
s 98(3)	9.29	reg 18	10.67
s 108(1)(b)(iii)	26.10	reg 19	10.67
s 108(2)(a)	26.10	reg 20	10.67
s 109	9.48	reg 21	10.67
s 140	26.12	reg 22	10.67
s 141	26.14	reg 23	10.67
Schedule 1	9.48	reg 24	10.67
Chinese Medicines Traders (Regulatory)		reg 25	10.67
Regulation	4.25, 26.16	reg 26	10.67
Chiropractors Registration Ordinance		reg 27	10.67
(Cap 428)	4.23	reg 28	10.67
Civil Service Regulations		reg 29	10.67
art XVI	11.07	reg 30	10.67
art XVIIA	11.07	reg 31	10.67
Chapter V	11.06	reg 32	10.67
CSR 611	11.02, 27.03	reg 33	10.67
CSR 852(5)	6.196	reg 34	10.67
		reg 37(1)	10.71, 10.75, 10.77

Dentists Registration Ordinance

(Cap 156)	4.23, 6.17, 10.01, 10.05
s 4	10.01, 10.02
s 8	10.62
s 17	10.54
s 18(1)	10.54
s 18(1)(b)	6.12
s 18(2)	10.55
s 23(3A)	10.95
s 29	10.54

Disciplinary Committee Proceedings Rules

r 6(1)	4.05
r 11(1)	6.268, 20.61
r 15(1)(b)	6.309
r 17	6.305

Disciplinary Rules

Part II	17.24
Part III	17.26
r 15(iii)	17.24
r 20	17.27
r 25	17.28
r 28(i)	17.18, 17.19
r 28(ii)	17.19

Dogs and Cats Ordinance

(Cap 167)	13.06
-----------------	-------

Dutiable Commodities (Liquor)

Regulations	4.25
-------------------	------

Dutiable Commodities Ordinance

(Cap 109)	4.25
-----------------	------

Education Ordinance (Cap 279)

Electricity Ordinance (Cap 406)

Employment Ordinance

Energy Efficiency (Labelling of Products)

Ordinance (Cap 598)	4.25
---------------------------	------

Engineers Registration Ordinance

(Cap 409)	4.23, 16.03
s 3(1)	18.07
s 7	18.09
s 8(d)	18.10
s 20(1)	18.12
s 20(1)(a)	18.25
s 20(3)	18.28
s 21(1)	18.27
s 21(2)	18.29
s 21(3)	18.42
s 21(4)	18.42
s 22	18.50
s 23	18.34, 18.51
s 23(1)(a)	18.54
s 23(1)(b)	18.54
s 23(1)(c)	18.54

s 23(1)(d)	18.54
s 23(1)(e)	18.54
s 23(1)(g)	18.52, 18.53
s 23(2)	18.52
s 23(3)	18.53
s 24	18.31
s 24(3)	6.292, 18.33
s 24(4)	18.32
s 25(1)	18.34
s 25(2)	18.35
s 25(4)	18.41
s 25(5)	18.43
s 27(1)	18.54
s 27(2)	18.55
s 28	18.54
s 28(1)	18.56
s 28(2)	18.58
s 28(3)	18.57
s 28(4)	18.58

Enrolled Nurses Ordinance

(Cap 164)	6.17
-----------------	------

Enrolled Nurses (Enrolment and

Disciplinary Procedure) Regulations

(Cap 164B)	14.10
reg 15	14.08
reg 16	14.09
reg 21	14.11
reg 23	14.12
reg 24	14.18
reg 31	14.13
reg 37(1)	14.18
reg 37(5)	14.19
reg 39	14.15
reg 40	14.16

Estate Agents Ordinance (Cap 511)...

s 35(2)(i)	25.14
------------------	-------

Estate Agents (Licensing)

Regulation	25.07
------------------	-------

Exchanges and Clearing Houses

(Merger) Ordinance (Cap 555)	24.11
-----------------------------------	-------

Factories and Industrial Undertakings

Ordinance (Cap 59)	4.25
--------------------------	------

Factories and Industrial Undertakings

(Lifting Appliances and Lifting Gear)

Regulations (Cap 59)

18.19, 18.20

reg 5(3)	18.20
----------------	-------

r 21(2)	6.191, 18.24
---------------	--------------

First Sch para 2(1)	18.21
---------------------------	-------

First Sch para 2(2)	18.22
---------------------------	-------

First Sch para 2(3)	18.22
---------------------------	-------

para 8.1	18.30, 18.34
para 9.6	18.38, 18.39
Factories and Industrial Undertakings (Safety Management) Regulations	4.25
Film Censorship Ordinance (Cap 392)	4.25
Financial Reporting Council Ordinance (Cap 588)	20.84
s 25	20.26
s 26	20.26
s 27	20.26
s 28	20.26
s 31	20.26
s 32(2)(b)	20.26
s 43	20.26
s 45(2)(b)	20.26
Fire Service (Installation Contractors) Regulations	4.25
Fire Services Ordinance (Cap 95)	4.25, 27.27
Firearms and Ammunition Ordinance (Cap 238)	13.06
GEM Listing Rules r 24.13	20.82
Chapter 36	24.149
Government Flying Service Ordinance (Cap 322)	27.27
High Court Ordinance (Cap 4)	16.24
s 21K(6)	7.46
s 21K(6)(a)	7.72
HKIA Rules for the Conduct of Architectural Competitions	17.43
HKIE Constitution art 12 cl (1)	18.13
art 12 cl (3)	18.15
art 13	18.60
art 13(4)(a)	18.60
art 13(4)(d)	18.60
art 13(4A)	18.60
art 13(5)	18.60
HKIE Rules of Conduct r 1.2	3.90, 3.94
r 2	3.92
r 3	3.76
r 3.1	3.71
r 3.2	3.71
r 3.3	3.73
r 3.6	3.73, 3.91
HKIS bye-laws Part VII	19.35
art 6.1	19.33

HKIS Rules of Conduct

Part VI	19.33
r 1	19.35
r 1.1	19.37
r 1.1.1	19.37
r 1.1.2	3.95, 19.37
r 1.1.3	3.95, 19.37
r 1.1.5	19.37
r 1.1.6	19.37
r 1.2	3.97, 19.36, 19.38
r 1.2.1	3.96, 19.38
r 1.2.2	3.96, 19.38
r 1.2.3	3.96, 19.38
r 1.2.4	3.97, 19.38
r 1.2.5	3.97, 19.38
r 1.2.6	3.97, 19.38
r 1.2.7	3.97
r 1.3	19.36, 19.39
r 1.3.1	3.75, 19.39
r 1.3.2	3.75, 3.76, 19.39
r 1.3.3	19.39
r 1.3.4	3.75, 19.39
r 1.3.5	19.39
r 1.3.6	19.39
r 1.4	3.76, 3.77, 3.97, 19.36, 19.40
r 2	19.35
r 3	19.35
r 4	19.35
HKSARG Civil Service Regulations Chapter III	29.10
Hong Kong Auxiliary Police Force Ordinance (Cap 233)	29.09
Hong Kong Bill of Rights Ordinance (Cap 383) art 3	6.247
art 6	6.30
art 6(1)	6.30, 6.299
art 10	1.24, 6.29, 6.30, 6.45, 6.51, 6.53, 6.88, 6.89, 6.90, 6.91, 6.93, 6.94, 6.95, 6.96, 6.101, 6.115, 6.119, 6.122, 6.124, 6.131, 6.132, 6.138, 6.162, 6.166, 6.167, 6.267, 6.298, 6.299, 6.300, 6.313, 7.07, 7.08, 7.21, 10.84, 24.182, 24.238, 24.247, 24.290, 27.55, 29.47, 29.57, 29.61
art 11	1.24, 6.29, 6.95, 6.101, 6.103, 6.115, 6.119, 6.122, 6.124, 6.131, 6.132, 6.138, 6.139, 24.238, 24.247

art 11(1)	6.98, 6.100, 6.133, 6.253	s 13A.....	22.82
art 11(2)	6.98	s 17(2)(b)	4.45
art 11(2)(d).....	7.63	s 25.....	22.76
art 11(2)(g).....	6.102, 6.299	Part III (ss 27–39)	21.02
art 11(6)	6.142	s 32.....	21.03, 21.22
art 14	4.55, 6.144, 6.145	s 34.....	21.03, 21.04
art 16	3.32, 6.146, 6.147, 6.150, 8.76, 8.77	s 34(1)	21.26
art 21	6.151, 8.136	s 34(2)	21.27
Hong Kong Court of Final Appeal Ordinance		s 35.....	21.04
s 22.....	6.80	s 35(1)	21.28
Hong Kong Institute of Architects Incorporation Ordinance (Cap 1147)		s 35(2)	21.29
s 13(1)	17.42	s 35A(1)	21.26
Hong Kong Institute of Surveyors Ordinance (Cap 1148)	19.32	s 35B(2)	21.30, 21.35
Hong Kong Institution of Engineers Ordinance (Cap 1105)	18.03	s 36(1)	6.34, 21.31
s 7.....	18.03	s 36(4)	21.32
s 10(1)	18.03	s 37.....	21.33
Hospital Authority Ordinance (Cap 113)	15.03	s 37A.....	21.34
Housing Managers Registration Ordinance (Cap 550)	4.23	s 37B.....	21.39
Immigration Ordinance (Cap 115).....	4.25	s 37B(1)	21.40
Inland Revenue Ordinance		s 37B(2)	21.10
s 4(1)	5.07, 5.50	s 37B(3)	21.40
Interpretation and General Clauses Ordinance (Cap 1)		s 67(3).....	22.81
s 2A(1)	6.95	s 73(1)(c).....	22.33
Land Drainage Ordinance (Cap 446)...	4.25	Leveraged Foreign Exchange Trading Ordinance (Cap 451)	
Land Survey Ordinance (Cap 473)		(repealed)	24.11, 24.69
s 20.....	19.22	Lifts and Escalators (Safety) Ordinance (Cap 327)	4.25, 18.11
s 20(a)	19.23	s 5.....	18.11
s 28.....	19.21	Magistrates Ordinance (Cap 227)	10.54
Landscape Architects Registration Ordinance (Cap 516)	4.23, 16.03	Main Board Listing Rules	
Legal Practitioners Ordinance (Cap 159)	4.02, 22.01	Chapter 38.....	24.149
s 5(2)	4.34	r 19.20.....	20.82
s 8A(3)	22.02	Medical Disciplinary Regulation	
s 9A.....	22.02	s 28(1)	6.203
s 9AB	22.02	s 27(1)	6.203
s 10(2)(e).....	22.72	Medical Practitioners (Electoral Provisions) (Procedure) Regulations (Cap 161B)	4.35, 8.164
s 12.....	22.04	s 4(2)(b)	6.151, 8.136
s 12(6)	22.05	Medical Practitioners (Registration and Disciplinary Procedure) Regulations (Cap 161E)	
s 13.....	22.22, 22.80	reg 12A(1).....	6.22
s 13(1)	6.77, 22.26, 22.80	reg 14	6.19
s 13(2)	22.26	reg 23	6.303
s 13(2A)	22.23, 22.26, 22.80	reg 23(3)	6.303
		reg 31(1)	8.122
		reg 32(4)	8.163
		reg 33	4.35

Medical Registration (Miscellaneous

Provisions) Regulation

(Cap 161D)	8.159
reg 37(1)	10.70
reg 6(1)	8.162
reg 8	4.39, 8.166
s 8	4.35
reg 8(1)	4.28, 8.164, 8.165, 8.167, 10.70

Medical Registration and Disciplinary

Procedure) Regulations

(Cap 161 sub leg)

reg 12(2)	4.49
-----------------	------

Medical Registration Ordinance 1957

(No. 25 of 1957)

s 31	4.35
------------	------

Medical Registration Ordinance

(Cap 161)

Part III	8.37, 8.148, 10.08
----------------	--------------------

s 3(2)	8.32
--------------	------

s 3(3)	8.32
--------------	------

s 3B	8.159
------------	-------

s 9(2)(b)	8.13
-----------------	------

s 20BA	8.03
--------------	------

s 20BA(2)	8.03
-----------------	------

s 20T	8.04
-------------	------

s 20W(3)(b)	6.49
-------------------	------

s 21	6.41, 8.04, 8.47, 8.63, 8.192
------------	----------------------------------

s 21(1)	8.09, 8.28, 8.30, 8.175, 8.192
---------------	-----------------------------------

s 21(1)(a)-(d)	8.175
----------------------	-------

s 21(1)(iva)	8.192, 8.193
--------------------	--------------

s 21(2)	8.30
---------------	------

s 24	8.154
------------	-------

s 24(1)	6.41
---------------	------

s 24(2)	6.49
---------------	------

s 25(3)	8.178, 8.179, 8.188
---------------	---------------------

s 26	8.192
------------	-------

s 26(1)	8.197, 8.198
---------------	--------------

s 33	8.04, 8.05, 8.30
------------	------------------

s 33(3)(b)	8.159
------------------	-------

Medical Registration Regulations

reg 8(1)	8.08
----------------	------

reg 9	8.08
-------------	------

reg 9(2)(b)	8.08
-------------------	------

reg 9(2)(f)	8.08
-------------------	------

reg 11	8.13
--------------	------

reg 11(6)	8.13, 8.14
-----------------	------------

reg 11(7)	8.16
-----------------	------

reg 11(8)	8.14
-----------------	------

reg 12	8.19
--------------	------

reg 12(1)	4.07, 8.25
-----------------	------------

reg 12(2)	8.06
-----------------	------

reg 12A(1)	8.06
------------------	------

reg 13(1)	8.17
-----------------	------

reg 13(2)	8.18, 8.26
-----------------	------------

reg 13(4)	8.19
-----------------	------

reg 14(1)	8.27
-----------------	------

reg 14(2)	8.27
-----------------	------

reg 14(3)(a)	8.30
--------------------	------

reg 15	8.22, 8.24
--------------	------------

reg 16	8.20
--------------	------

reg 25	8.21
--------------	------

First Schedule Form 5	8.27
-----------------------------	------

Midwives Ordinance (Cap 162)

Midwives Registration Ordinance	6.17
---------------------------------	------

(Cap 162)

Nurses (Registration and Disciplinary

Procedure) Regulations (Cap 164A)

reg 15	14.07
--------------	-------

reg 16	14.09
--------------	-------

reg 17	14.10
--------------	-------

reg 21	4.23, 14.11
--------------	-------------

reg 23	14.12
--------------	-------

reg 24	14.18
--------------	-------

reg 37(1)	14.18
-----------------	-------

reg 37(5)	4.27, 14.19
-----------------	-------------

reg 39	14.15
--------------	-------

reg 40	14.16
--------------	-------

Nurses Registration Ordinance

(Cap 164)

s 9	4.23, 14.01 14.15, 14.16
-----------	-----------------------------

s 17	14.01, 14.15, 14.16
------------	---------------------

s 17(1)	14.05
---------------	-------

s 17(2)	14.26
---------------	-------

s 17(3)	14.21
---------------	-------

s 17(5)	14.20
---------------	-------

s 17(6)	14.28
---------------	-------

s 18	14.17
------------	-------

s 18(1)(a)	14.17
------------------	-------

s 18(1)(b)	14.17
------------------	-------

s 18(1)(c)	14.17
------------------	-------

s 18(1)(d)	14.17
------------------	-------

s 18(1)(e)	14.17
------------------	-------

s 19	6.292
------------	-------

s 20	6.41, 14.01
------------	-------------

s 21	14.30
------------	-------

s 22	14.28
------------	-------

s 22(1)	14.29
---------------	-------

s 22(2)	14.30
---------------	-------

s 25(1)	14.05
---------------	-------

s 27	14.05
------------	-------

Open University of Hong Kong Ordinance (Cap 1145).....	6.87	Police General Order (1999 version) Chapter 6-01(8).....	6.53, 29.20, 29.24, 29.29, 29.30, 29.36
Pension Benefits Ordinance (Cap 99).....	29.61	Police General Orders.....	29.11
s 27(2).....	6.95, 6.138, 6.139, 27.55, 29.61	§ 1-02 Para 2.....	29.13
Personal Data (Privacy) Ordinance (Cap 486).....	9.37, 9.47, 13.06	§ 1-02 Para 3.....	29.14
Pesticides Ordinance (Cap 133).....	13.06	§ 1-02 Para 4.....	29.15
Pharmacists (Disciplinary Procedure) Regulations (Cap 138E) reg 5.....	11.15	§ 1-02 Para 5.....	29.15
reg 6.....	11.15	Chapter 6.....	29.16
reg 6(8).....	11.15	§ 6-01 Para 2(a)(i).....	29.16
Pharmacy and Poisons Ordinance (Cap 138).....	4.23, 6.343, 11.11, 11.16, 11.19, 11.22, 13.06	§ 6-01 Para 2(b).....	29.16
s 15.....	11.12	§ 6-01 Para 3.....	29.16
s 15(1)(a).....	11.13	§ 6-01 Para 4.....	29.16
s 15(2).....	11.14	§ 6-01 Para 6.....	29.16
s 16(2)(b).....	11.12	§ 6-01 Para 7.....	29.16
s 16(3).....	11.26	§ 6-01 Para 8.....	29.16
s 17.....	11.16	§ 6-01 Para 18.....	29.16
s 17(1).....	11.16	§ 6-01 Para 24.....	29.16
s 17(2).....	11.16, 11.17, 11.18	§ 6-01 Para 44.....	29.16
s 17(2)(b).....	11.25	§ 6-04.....	29.16
s 17(2)(d).....	11.25, 11.27	Chapter 26.....	29.17
s 23(1).....	26.10	§ 26-03.....	29.12
s 3(2)(e).....	11.13	Prevention of Bribery Ordinance (Cap 201).....	3.59, 29.06
s 33(1).....	26.10	s 9(3).....	6.196, 27.49
s 34.....	26.10	s 12(1).....	6.196, 27.49
Planners Registration Ordinance (Cap 418).....	4.23	Prevention of Cruelty to Animals Ordinance (Cap 169).....	13.06
Police (Disciplinary) Regulation (Cap 232A).....	29.07	Prison Rules (Cap 234A).....	27.36
reg 3(2)(e).....	6.53	Prisons Ordinance (Cap 234).....	27.27
s 3(2)(m).....	29.19	Professional Accountants By-laws by-law 34.....	20.56
reg 3(2)(m).....	29.44	Professional Accountants Ordinance (Cap 50).....	20.02
reg 9(11).....	6.40, 6.51, 29.18, 29.23, 29.31, 29.57	Part IVA.....	3.10, 20.16
reg 9(12).....	6.40, 6.51, 29.18, 29.23, 29.31, 29.57	Part V.....	20.12
Police Force Ordinance (Cap 232).....	27.27, 29.06	Part VA.....	5.47, 20.28
s 17.....	6.134	s 3.....	20.05
s 45.....	6.40, 29.18	s 7.....	20.06
s 46.....	29.11	s 10.....	20.07, 20.09
Police Force Regulations.....	29.08	s 17.....	20.07
		s 31(1)(a)(iv).....	3.19
		s 32D.....	20.17
		s 32D(1).....	20.17
		s 32D(2).....	20.18
		s 32D(3).....	20.18
		s 32D(5).....	20.19
		s 32D(7).....	20.26
		s 32E.....	20.17
		s 32F(2).....	20.26

s 33.....	20.13	Public Service (Administration)	
s 33(3).....	4.05, 20.46, 20.56	Order.....	27.15, 29.09
s 33(3)(a).....	4.05	s 8(3).....	6.42
s 33(3)(b).....	4.05	s 9.....	27.18, 27.19
s 33B(3).....	20.66	s 10.....	27.18, 27.20, 27.33, 27.34
s 34.....	5.46, 20.14, 20.46, 20.56, 20.57	s 13.....	6.134
s 34(1).....	20.49	s 15.....	6.196, 27.46, 27.47, 27.48, 27.50
s 34(1)(a).....	20.26, 20.45	s 19.....	6.134
s 34(1)(a)(iii).....	20.45	s 20.....	27.56
s 34(1)(a)(iv).....	20.45	Public Service (Disciplinary)	
s 34(1)(a)(v).....	20.45	Regulations.....	27.15, 29.09
s 34(1)(a)(vi).....	20.45, 20.89	s 8(4).....	27.22
s 34(1)(a)(vii).....	20.45	s 8(5).....	27.21
s 34(1)(a)(viii).....	20.45	Rabies Ordinance (Cap 421).....	13.06
s 34(1)(a)(ix).....	20.45	Radiation Ordinance (Cap 303).....	13.06
s 34(1)(a)(x).....	20.45	RICS Rules of Conduct	
s 34(1)(a)(xi).....	20.45	Part V.....	3.76
s 34(1)(a)(xii).....	20.45	Part VIII.....	19.35
s 34(1)(b).....	20.45	r 3.....	3.94, 19.34
s 34(1A).....	20.15	r 4.....	19.37
s 34(1AA).....	20.45	r 5.....	19.37
s 35.....	20.57, 20.67, 20.72	r 6.....	19.37
s 35(1)(c).....	20.73	r 7.....	19.37
s 36.....	20.67	r 8.....	19.39
s 36(1)(c).....	6.268, 20.61	r 9.....	19.39
s 36(1A).....	6.268, 20.61	r 10.....	19.39
s 41.....	20.76	r 11.....	19.39
s 41(2).....	20.76	r 12.....	19.40
s 42.....	5.45, 6.277, 20.38, 20.55	r 15(c).....	3.76
s 42C.....	5.21, 20.30, 20.31, 20.49, 20.53	r 16.....	19.39
s 42C(1).....	20.46	r 17.....	19.39
s 42C(2).....	20.45	r 18.....	19.39
s 42C(2)(a).....	5.45	r 19.....	19.39
s 42D.....	20.26, 20.36	r 20.....	19.39
s 42D(1)(a).....	20.36, 20.37	r 21.....	19.39
s 42D(2).....	20.37	r 22.....	19.38
s 42D(4).....	6.293, 20.39	r 23.....	3.96, 19.38
s 42E(1).....	5.34	r 30.....	19.39
s 42G.....	5.33, 5.34	Road Traffic Ordinance	
s 51(1)(f).....	4.05	(Cap 374).....	4.25, 29.09
Protection of Endangered Species of Animals and Plants Ordinance (Cap 586).....	13.06	s 38(1).....	8.135
Protection of Investors Ordinance (Cap 335).....	24.11	Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited.....	24.152
Public Health (Animals and Birds) Ordinance (Cap 139).....	13.06	Chapter 2A.....	24.159
Public Health and Municipal Services Ordinance (Cap 132).....	4.25	r 2A.15.....	24.158, 24.159
		r 2A.16.....	24.158
		Rules of the District Court (Cap 336 H)	
		O 62 Schedule 1 Part I.....	18.53

Rules of the High Court

(Cap 4 sub leg. A)

O 53 r 4(1)	6.53, 29.39
O 53 r 5(1)	7.56
O 55	16.27
O 59	7.29, 22.05
O 59 r 10(2)	7.01, 7.23
O 59 r 12	7.08
O 59 r 13	7.10

Rules of the Stock Exchange

r 354	24.207
r 601	24.208, 24.212
r 604	24.214
r 723(1)(c)	24.209, 24.214
r 723(2)(e)	24.210, 24.214
r 723(2)(f)	24.211, 24.214

RSC

Ord 53	7.41
--------------	------

Securities (Disclosure of Interests)

Ordinance (Cap 396)	24.11
---------------------------	-------

Securities (Insider Dealing) Ordinance

(Cap 395) (repealed)	6.104, 24.226, 24.233, 24.237
s 8	24.223
s 9	24.221, 24.222, 24.224
s 17	6.298, 24.243
s 17(b)	24.231
s 17(d)	24.231
s 23(1)(a)	6.129, 6.132, 24.235
s 23(1)(b)	24.235, 24.295
s 23(1)(c)	6.111, 6.125, 6.128, 24.235, 24.250, 24.252
s 27	24.236
s 29	6.125, 24.293

Securities and Futures Commission

Ordinance (Cap 24)

(repealed)	24.08, 24.11
s 20	24.192
s 33	24.239, 24.242
s 33(4)	6.298, 24.232, 24.241, 24.244, 24.247
s 33(4)(c)	24.241
s 33(6)	6.298, 24.232, 24.241

Securities and Futures Commission

Ordinance (Cap 571)	24.34
---------------------------	-------

Securities and Futures

(Clearing Houses) Ordinance

(Cap 420) (repealed)	24.11
----------------------------	-------

Securities and Futures Ordinance

(Cap 571)	1.15, 6.104, 6.199, 24.10, 24.11, 24.226, 24.237
Part IX	24.198
Part XIII	24.274, 24.284
Part XIV	24.199
s 4(1)	24.192
s 5	24.151
s 19	24.150
s 21	24.157
s 21(4)	24.157
s 23	24.157
s 23(1)	24.156
s 23(2)(d)	24.156, 24.157
s 24	24.156
s 30	24.277
s 126(1)	24.110
s 129	24.59
s 182(1)(e)	24.67
s 183(1)	24.271, 24.292
s 183(1)(c)	24.112
s 187(2)	24.292
s 194	24.110, 24.113, 24.194
s 194(2)	24.115, 24.261
s 194(2)(ii)	24.120
s 196(2)	24.115
s 196(2)(ii)	24.120
s 198	5.29, 24.28
s 199(1)	24.115
s 201	24.304, 24.317
s 201(3)	24.299, 24.320
s 213	24.261
s 213(2)(c)	24.261
s 213(4)	24.31
s 213(6)	24.194, 24.196, 24.260
s 213(9)	24.196
s 214	24.108
s 216	24.129, 24.136, 24.138, 24.141
s 216(3)	24.131
s 218	24.141
s 218(7)	24.146
s 219(1)(a)	24.146
s 220	24.146
s 221(3)	24.146
s 251(1)	24.284
s 252	6.32, 24.272, 24.274, 24.291
s 252(2)	24.277, 24.283
s 252(3)	24.275, 24.284
s 253	24.291