

Outline of the Third Periodic Report of the Hong Kong Special Administrative
Region of the People's Republic of China in the light of the
International Covenant on Civil and Political Rights

COMMENTS OF THE HONG KONG BAR ASSOCIATION

General Observation

1. The Hong Kong Bar Association (“the HKBA”) observes that the general profile of the Hong Kong Special Administrative Region (“HKSAR”) should also include a concise accurate summary on how the HKSAR has met long standing deficiencies highlighted from the last Concluding Observations of the Committee (CCPR/C/HKG/CO/2, 21 April 2006).

Article 1: Self-determination

Article 25: Right to participate in public life

Right to take part in the conduct of public affairs; right to vote, right to stand for the election and to be elected (Arts 1 and 25)

2. Apart from providing an accurate narrative of the developments in the electoral methods for returning the Chief Executive and forming the Legislative Council in 2012 and beyond, the HKBA considers that the Central People's Government (“the CPG”) and the HKSAR Government should indicate in the Third Periodic Report the following: -

(1) Their understanding of the continued application to Hong Kong of Article 25 of the ICCPR to elections for political offices of the HKSAR;

(2) Their understanding of Articles 45 and 68 of the Basic Law of the HKSAR (including the meaning of “nomination by a broadly representative nominating committee in accordance with democratic procedures” under Art 45 with respect to Chief Executive elections by universal suffrage);

(3) Their understanding of the concept of universal suffrage and its application to right to vote and the right to stand for elections and be elected;

(4) Their understanding of functional constituencies and their stance towards their abolition within the programmatic and progressive time frame set for achieving universal suffrage in the electoral method for forming the Legislative Council in 2020 (as set out in a Decision of the Standing Committee of the National People’s Congress in December 2007).

Article 2: Ensuring to all individuals the rights recognized in the ICCPR

3. While the HKBA welcomes the establishment of a statutory Independent Police Complaints Council in June 2009, the HKBA considers that the HKSAR Government should explain in the Third Periodic Report why all complaints are still handled by the police force’s internal complaint investigating unit known as CAPO, with the Council having the limited role of reviewing CAPO’s findings and no power to require police officers to attend interviews with members of the Council.

Article 6: Right to life and Article 7: Prohibition of torture, and cruel, inhuman and degrading treatment and punishment

4. The HKBA notes the Human Rights Committee’s Concluding Observations in 2006, where, at para 10, the Committee observed that the

HKSAR should establish an appropriate mechanism to assess the risk faced by individuals expressing fears of being victims of grave human rights violations, such as those contrary to Arts 6 and 7 of the ICCPR in the location to which they may be returned.

5. While the HKBA appreciates the HKSAR Government's efforts in putting in place a new screening procedure with publicly funded legal assistance and an avenue of appeal for torture claimants and in seeking to put that procedure on a statutory basis, the HKBA considers that the HKSAR Government should explain in the Third Periodic Report its reasons for not including in the screening procedure claims of a well-founded fear of persecution or cruel, inhuman and degrading treatment or punishment, as these claims are ordinarily made simultaneously. The HKSAR Government should also take the opportunity to clarify whether the present immigration policy is refoulement of persons who claim to fear cruel, inhuman and degrading treatment or punishment.
6. The HKBA considers that the HKSAR Government should explain to the Human Rights Committee why it remains a satisfactory arrangement for refugee claims raised in Hong Kong to continue to be screened by the local office of the UN High Commission for Refugees, whose procedures had been criticized as unfair and not amenable to local judicial redress, when officers of the Immigration Department have been seconded to the UNHCR office to assist in processing claims. The HKSAR Government should also explain why it considers this bifurcated system preferable to screening both refugee and torture claims of non-refoulement in the same procedure.
7. The HKBA considers that the HKSAR should explain to the Human Rights Committee whether there is a policy or practice of refoulement of Mainland Chinese residents in the pretext of them being illegal

immigrants notwithstanding their claims of fear of persecution and/or torture or other cruel, inhuman and degrading treatment or punishment if returned to their hometowns.

Article 8: No slavery or servitude

8. While the HKSAR does not condone servitude, the position of foreign domestic helpers in Hong Kong, the majority of whom come from the Philippines and Indonesia, is of a matter of concern to the HKBA and, as the HKBA understands from the Concluding Observations throughout the years, the Human Rights Committee.

9. The HKBA notes that the immigration policies applicable to foreign domestic helpers are different from those offered to other expatriates, leaving them vulnerable to exploitation by their employers. In particular, the HKBA considers that the HKSAR Government should explain in the Third Periodic Report the following: -

- (1) the maintenance of the “two-week” rule;
- (2) the maintenance of the “live-in” requirement;
- (3) the exclusion of foreign domestic helpers from minimum wage legislation;
- (4) the exclusion of foreign domestic helpers from mandatory provident fund legislation;
- (5) the denial of the possibility of acquiring permanent residence by foreign domestic helpers by the statutory preclusion of their continuous periods of stay in Hong Kong from being counted as ordinary residence.

Article 9: Liberty and security of the person

10. The HKBA considers that the HKSAR Government should explain in the Third Periodic Report the policy of the police force to strip search every arrested person who is to be detained in the detention facility of a police

station. The HKSAR Government should also explain the policy of the prison authorities to strip search and conduct anal examination of every prisoner or detained person at the occasion of reception from outside. The HKSAR Government should in both cases explain the necessity and proportionality of these measures.

11. The HKBA considers that the HKSAR Government should explain in the Third Periodic Report its policies and measures in addressing Hong Kong's youth drug problem, particularly the introduction on an allegedly test basis of a drug testing regime for secondary school students in a school district. The HKSAR Government should explain why it considers the drug testing regime to be voluntary and not coercive and why extending the drug testing regime to all secondary schools in Hong Kong is a proportionate response to tackling the youth drug problem.

Article 10: Rights of persons deprived of their liberty

12. The HKBA notes that the prison discipline system in Hong Kong has been the subject of judicial scrutiny and the aspect where the prison superintendent hears and determines the disciplinary complaint against an inmate of the prison he administers (which often includes determining matters of credibility of prison officers under his command) was found to be unfair. The HKBA also notes that prisoners who have complained of abuse by prison officers were denied CCTV recordings to substantiate their complaints. The HKSAR Government should explain in the Third Periodic Report the prison discipline system and the measures for effective investigation and redress of abuse of prisoners.
13. The HKBA considers that the HKSAR Government should consider addressing in the Third Periodic Report further reforms in relation to voting by prisoners, such as allowing long-term prisoners to register the

address of the prison as their address for the purpose of voter registration and thus determination of the relevant geographical constituency.

Article 12: Liberty of movement

14. The HKBA invites the HKSAR Government to comment in the Third Periodic Report the effect of the Court of First Instance judgment in Lo Hom Chau v Director of Marine (unreported, 7 May 2010, HCAL 58/2009), where the Director of Marine's decision to stop a fishing vessel leaving port out of safety and licensing grounds effectively brought to an end an attempt by HKSAR residents to go by sea to the remote Diaoyutai Islands to stage a demonstration there against the claim by Japan to the islands, on the freedom of movement, including the right to leave one's country.

15. The HKBA also invites the HKSAR Government to state in the Third Periodic Report all the residence requirements involved in different aspects of the HKSAR's social welfare system and the justifications for maintaining these requirements, which operate as hurdles to social welfare benefits and restrictions of the freedom of movement of HKSAR residents.

Article 14: Equality before the courts and right to fair and public hearing

16. The HKBA considers that the HKSAR Government should indicate in the Third Periodic Report its reasons for vesting with the prosecution authorities the power to determine the venue of trial for an offence whose likely sentence is above 2 years' imprisonment, with the effect that the prosecution holds the power to opt between a trial before a judge and a trial before a more senior judge sitting with a jury, a matter which is likely to raise an issue of equality of arms.

17. The HKBA considers that the HKSAR Government should indicate in the Third Periodic Report its rationale for extending the privilege against self-incrimination only to “direct use immunity” (ie the prohibition against using forced confessions in criminal proceedings against the statement-maker) and not also to “derivative use immunity” (ie the prohibition against compelling a person to give information that may be used to attain incriminating evidence against that person).

18. The HKBA notes the promotion under the HKSAR’s Civil Justice Reform of mediation to the extent that all parties to civil litigation must now try to resolve their disputes using alternative dispute mechanisms before trial will be allowed to proceed. However, there is no accompanying provision of government or community facilities for the holding of mediation sessions. The HKSAR Government should comment in the Third Periodic Report how it seeks to minimize this hindrance of access to justice.

Article 16: Right to recognition as person before law

19. The HKBA considers that the HKSAR Government should address the limitations in statutes and practices a post-operative transgender person encounters in having her reassigned gender status recognized.

Article 17: Protection of privacy, family, home, correspondence, honour and reputation

20. The HKBA notes the serious concerns raised by the Commissioner appointed under the Interception of Communications and Surveillance Ordinance (Cap 589) in his annual reports of the poor conduct of officers of the law enforcement agencies in complying with the Ordinance. The HKSAR Government should address in the Third Periodic Report the measures it proposes to introduce to meet the recommendations and concerns of the Commissioner.

21. The HKBA notes the frequent cases of invasion of privacy including data privacy of individuals in Hong Kong and asks the HKSAR Government to indicate in the Third Periodic Report whether there should be a statutory tort of invasion of privacy.

Articles 19, 21 and 22: Freedoms of opinion and expression, of assembly and of association

22. The HKBA notes the increased tempo of political policing in Hong Kong. There appears to be an increase in criminal prosecutions against protestors. Legislation regulating places of public entertainment on safety issues was applied to induce the removal of exhibits related to the June Fourth Incident on public display. Individuals associated with the commemoration of the June Fourth Incident and the Falun Gong movement were denied entry into Hong Kong. The HKSAR Government should set out in the Third Periodic Report the statistics of arrests and prosecutions (be it successful or unsuccessful) arising out of a public meeting, assembly, procession or demonstration and provide an explanation to each of its actions above.
23. The HKBA notes that there is a restrictive broadcasting regime against political advertising in Hong Kong, which has operated to make it impossible for political parties wishing to place advertisements against promotional messages of government policies to buy time slots. The HKBA also notes that the same regime also stifles community radio, another means of political discussion. The HKSAR Government should provide an account in the Third Periodic Report on how the freedom of political speech is facilitated in Hong Kong.

Article 23: The family – a vital component of society

24. The HKBA considers that the HKSAR Government should address in the Third Periodic Report the questions of subsistence and education of families in Hong Kong on asylum and torture claims.
25. The HKBA considers that the HKSAR Government should address in the Third Periodic Report the situation of transgender persons in forming families through marriage.

Article 26: Right to Equal Protection before the law

26. The HKBA considers that the HKSAR Government should explain in the Third Periodic Report its reasons for maintaining the textual exemptions in section 8 of the Race Discrimination Ordinance (Cap 602) that exclude from the scope of the Ordinance discrimination on the basis of nationality, immigrant status or length of residence in Hong Kong or elsewhere. The absurdity of the textual exemptions has recently been brought to light recently by cases of persons of Pakistani nationality refused by banks to open bank accounts.
27. The HKBA notes that homosexual couples are not afforded “dependency” immigration status in cases where such status would ordinarily be granted to materially identical heterosexual couples – even where lawfully married in another jurisdiction. The HKSAR Government should provide an explanation in the Third Periodic Report.

Dated 15th July 2010.

Hong Kong Bar Association.