

**Submissions of the Hong Kong Bar Association to
the Committee on the Rights of the Child**

1. In response to the Part relating to the Hong Kong Special Administrative Region (“HKSAR”) in the Combined Third and Fourth Reports of the People’s Republic of China under the Convention on the Rights of the Child (“the Report”), the Hong Kong Bar Association (“HKBA”) would make the following submissions to the Committee on the Rights of the Child.

2. While the HKSAR Government represents in paragraph 105 of the Report that: “In the HKSAR, the best interests of the child are necessary considerations in all relevant decision-making, including legislative proposals and policies, and are taken into account as a matter of course. It is paramount in all actions in the areas of social welfare facilities, courts of law, administrative authorities and legislative bodies. The Convention as applied to Hong Kong will be taken into account in the courts of the HKSAR where appropriate”, this statement *does not* describe in accurate and adequate terms the domestic effect and enforceability of the Convention on the Rights of the Child (“CRC”) in the HKSAR. Under the common law system of Hong Kong, international treaties have to be incorporated into domestic law by way of legislation in order to be enforceable in Hong Kong courts. The CRC has not been incorporated into the legal system of Hong Kong, and as such does not have the force of domestic law in Hong Kong. This is recently recognised by the Court of First Instance in the case of *Comilang Milagros Tecson v Commissioner of Registration*, HCAL No.28 of 2011, 15 June 2012, paragraph 36 (which can be downloaded at: http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2011/HCAL000_028_2011.doc).

3. Further, reference to the concept of “best interests” of the child only appears in limited legislative context, for example, the Guardianship of Minors Ordinance (Cap.13) and the Adoption Ordinance (Cap.290). There is no single statute which deals comprehensively with the rights of the child, or a single authority (e.g. Children’s Commission) which has the responsibility of ensuring that any policy or legislative proposals are in compliance with the requirements of the CRC.

4. In the absence of any general legislation that makes provision for the “best interests” of the child to be taken into account as a first and paramount consideration in the making of policies and the making of administrative decisions which will have an impact on a child or children in general, the HKSAR courts have very limited power to supervise or ensure compliance with the “best interests” of the child principle by the executive authorities, save and except where the executive authorities have expressed a policy or practice in a specified context that the “best interests” of a child affected by decision-making would be taken into account.
5. Accordingly, the HKBA considers that it will be useful for the Committee on the Rights of the Child to question the HKSAR Government as to whether its statement in paragraph 105 of the HKSAR Part of the Report expresses a general policy or practice commitment in *all* decision-making affecting a child or children in general and to note the confirmation of the HKSAR Government in the Committee’s Concluding Observations, so that this expressed commitment may be presented to the HKSAR courts to found the basis of judicial review of the executive authorities in both policy-making and decision-making applying the standard of anxious scrutiny.
6. The HKBA notes the reservation entered by the People’s Republic of China for the HKSAR in relation to immigration legislation and the criteria for qualifying as permanent residents of the HKSAR. Under Hong Kong law, a child born in Hong Kong and born of a parent who is a Hong Kong permanent resident would be a Hong Kong permanent resident and enjoy right of abode in Hong Kong. As part of the right of abode, the child would not be liable to be deported from Hong Kong and would be able to enjoy free education, free public health services and various social security benefits in Hong Kong. However, there are instances where, for various reasons (e.g. death of the other parent or divorce or separation of the parents), the responsibility of being the primary carer of the child falls on the parent who is not a Hong Kong permanent resident. As that parent does not enjoy right of abode in Hong Kong, he/she would only be able to stay in Hong Kong as a visitor for a limited period of time to take care of the child. Should he or she overstay, he/she would be liable to be removal from Hong Kong. While the removal of

the primary carer parent will have a significant impact on the HKSAR permanent resident child and the child's continuing enjoyment of the right of abode and the public benefits the status of permanent resident brings, especially where removal results in the primary carer parent having to leave Hong Kong with the child or having to abandon the child in Hong Kong to be cared by the social welfare organizations, the Immigration Department has maintained that such matters are merely humanitarian grounds that the Director of Immigration is under no duty to consider. Given that the child concerned is a HKSAR permanent resident to whom the immigration legislation reservation does not apply, the HKBA urges the Committee on the Rights of the Child to impress upon the HKSAR Government that it is under an international obligation at the very least to take into account the best interests of the HKSAR permanent resident child, as well as the views of the HKSAR permanent resident child, when making decisions concerning the proposed removal of the primary carer parent of that HKSAR permanent resident child.

Dated: 5th September 2013.

Hong Kong Bar Association.