The Fourth Report of the Hong Kong Special Administrative Region (the Seventh Periodic Report of the People's Republic of China) under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Hong Kong Bar Assocaition's Submission on the Outline of Report of the HKSAR Government to the United Nations Committee Against Torture

Article 1: Definition of Torture

1. The Hong Kong Bar Association ("HKBA") notes that the Hong Kong Special Administrative Region ("HKSAR") Government has hitherto taken no action to implement the recommendations of the United Nations Committee Against Torture ("the Committee") in its Concluding Observations of 3 February 2016 (CAT/C/CHN-HKG/CO/5), nor has it addressed the HKBA's observations in its previous submission to the Committee of 17 October 2015 ("Last Submission").

2. The HKBA repeats paragraphs 1 to 4 in the Last Submission and again invites the Committee to consider stating clearly in its Concluding Observations that the Crimes (Torture) Ordinance in its current form plainly fails to fulfil the obligation of the HKSAR under Article 4 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT").

Article 2: Legislative, administrative, judicial or other measures to prevent acts of torture

3. As the Committee noted in paragraphs 2-3 of its General Comment No 2 (UN Doc No CAT/C/GC/2) dated 24 January 2008, Article 2 of the UNCAT imposes on State Parties a "wide-ranging" general obligation to take actions to prevent or punish any acts of torture. It is an "umbrella clause" which requires effective measures in general.[1]

4. In relation to the obligation under Article 2 of the UNCAT, the HKBA particularly wishes to draw to the Committee's attention the development in relation to human trafficking and situation of migrant domestic workers.

5. The HKBA notes that at paragraph 20 of the Committee's Concluding Observations in 2016 (CAT/C/CHN-HKG/CO/5), concerns were expressed over the absence of change to include forced labour within the definition of human trafficking and the exploitation of migrant domestic workers, while the Committee also regretted the maintenance of the immigration policies such as the "live in requirement" and the "two week rule" which contributed to the risk of forced labour. Accordingly, the Committee recommended at paragraph 21 that the State Party should, *inter alia*, take the necessary legislative amendments to include the definition of trafficking as prescribed in the Palermo Protocol,

[1] The United Nations Convention Against Torture and its Optional Protocol: A Commentary (2nd edn, OUP 2019), Article 2, p.73, at [2].

abolish the "two week rule" and allow live-out arrangements to prevent risk of torture and ill-treatment of migrant domestic workers.

6. In relation to trafficking, the HKBA notes that the Committee stated that State Parties should enact comprehensive anti-trafficking legislation, including a definition for trafficking, as well as labour legislation that legally protects migrant domestic workers and effectively implementing this legislation.[2]

7. The HKBA notes that in the past 5 years, no such legislative or administrative measures have been implemented to address the concerns and the recommendations made by the Committee. The HKBA invites the Committee to question the State Party on its progress (or the lack thereof) in dealing with such issues and the reasons behind.

8. The Courts of the HKSAR have handed down the following relevant judgments:

   a. *ZN v Secretary for Justice* (2020) 23 HKCFAR 15, [2019] HKCFA 53

9. In *ZN*, the applicant was a migrant domestic helper who had been subjected to abuse, physical violence and restrictions on his movement during his employment in Hong Kong. The applicant subsequently returned to Hong Kong and mounted an application for judicial review for a breach of Article 4 of the Hong Kong Bill of Rights ("HKBOR") (implementing Article 8 of the International Covenant on Civil and Political Rights ("ICCPR")).

10. The Court of Final Appeal held that Article 4 of the HKBOR does not prohibit human trafficking generally for the puproses of exploitation, servitude and forced or complusory labour: see [80]. The Court further held that Article 4 of the HKBOR does not impose an absolute duty on the HKSAR Government to maintain an offence specifically criminalising forced or compulsory labour: see [122]. The Court refused to interpret "slavery and the slave-trade in all their forms" as a generic reference to servitude and forced or compulsory laobur: see [45]-[47].

11. In arriving at its conclusion, the Court expressly rejected to be informed by the Palermo Protocol in construing Article 4 of the HKBOR, as it has been made clear by the Central People's Government of the People's Republic of China as a matter of public international law that the Protocol shall not apply to Hong Kong: see [48]-[51]. Furthermore, the Court also refused to adopt the treaty body's construction of Article 8 of the ICCPR in the United Nations Human Rights Committee's General Comment No 28: see [64]-[71].

[2] The United Nations Convention Against Torture and its Optional Protocol: A Commentary (2nd edn, OUP 2019), Article 2, at [47], p 88.

12. The HKBA notes that in *ZN*, the domestic court's interpretation of an international human rights treaty differed from that adopted by the corresponding international treaty body responsible for monitoring the implementation of the treaty. Though the treaty concerned in *ZN* was not the UNCAT itself, the underlying facts of and the legal grounds raised in the case are closely relevant to the UNCAT. **The HKBA thus invites the Committee to clarify the proper ambit and interpretation of Article 2 in relation to human trafficking (including but not limited to the relevance of the Palermo Protocol) and to raise questions to the State Party on its compliance.**

b. *Lubiano Nancy Almorin v Director of Immigration* [2020] 5 HKLRD 107, [2020] HKCA 782

13. In *Lubiano Nancy Almorin*, the applicant, a former migrant domestic helper, applied for judicial review to seek to challenge the above-mentioned "live in requirement" requiring migrant domestic workers to live in their employer's residence.

14. At first instance ([2018] 1 HKLRD 1141, [2018] HKCFI 331), the applicant relied on, *inter alia*, the prohibition of "forced or compulsory labour" as a matter of customary international law and the right to safe and healthy working conditions under Article 7 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), in that the "live in requirement" heightened the risk of a breach of the fundamental right protected in the aforesaid rules of law.

15. The Court of First Instance held, *inter alia*, that there is no sufficient evidence to establish an international custom prohibiting forced labour: see [63]-[72]; that Article 7 of the ICESCR has not been implemented by the domestic Employment Ordinance (Cap 57): see [73]-[80]; and that it was in any event not proved on the facts that the "live in requirement" unacceptably or significantly increased the risk of violation of fundamental rights: see [81]-[99].

16. On appeal ([2020] 5 HKLRD 107, [2020] HKCA 782), the applicant abandoned her reliance on any customary international law but persisted with the challenge upon the heightening of the risk of a breach of her fundamental right under the ICESCR.

17. The Court of Appeal affirmed the finding in the court below that Article 7 of the ICESCR has not been implemented domestically and hence has acquired no domestic constitutional effect: see [82]-[110]. The Court went on to find that the heightened risk approach is not applicable Hong Kong so that it would not be open to an applicant to challenge a governmental measure on the basis that the measure heightens the risk of a breach of fundamental rights: see [117]-[141].

18. The HKBA notes that the Committee, in its Concluding Observations in 2016, expressed regret over the maintenance of the "live in requirement" exactly for the reason that the policy "could contribute to the risk of forced labour". The HKBA hence invites the Committee to clarify the proper ambit and interpretation of Article 2, particularly on its relationship with forced and compulsory labour and on whether it could be breachd by a State Party by implementing measures which would heighten the risk of a violation, by non-state actors, of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

Article 3: Torture as a ground for refusal to expel, return or extradite

19. The Unified Screening Mechanism ("USM") commenced on 3 March 2014 had been in operation for approximately one and a half years at the time of the last reporting period. At that time, the USM screened for torture under CAT, cruel inhuman and degrading treatment and punishment under HKBOR Article 3 (ICCPR Article 7) and persecution with reference to the non-refoulement principle under Article 33 of the Refugee Convention. On 12 September 2016, the HKSAR Government announced that it would extend the grounds for non-refoulement protection to include HKBOR Article 2, 'Right to life' (ICCPR, Article 6).

20. In the Last Submission, the HKBA expressed concern over the fact that the USM is not 'unified', in that it applies three different sets of standards., Whilst the determination of non-refoulement claims under UNCAT is underpinned by statute (namely Part VIIC of the Immigration Ordinance (Cap. 115) ("IO")), the assessments on the remaining applicable grounds are purely administrative in nature.

21. The fact that the USM is an administrative/statutory hybrid remains the case to date. Nevertheless, in *Ram Chander v Director of Immigration* [2018] HKCA 585, the Court of Appeal held that the statutory provisions under section 37ZO of the IO, namely "Limitation on subsequent claim", would apply not only to torture claims, but also to other non-refoulment claims (see [9], [14]) by virtue of the administrative provisions governing the USM. This comment may indicate further unification of the USM.

22. Further, some issues raised by the HKBA in the Last Submission remain a concern, including:

    a. That an immigration case officer is not to consider a non-refoulement claim unless he is satisfied that the written signification of the claimant has given a general indication that the reasons for making such a claim relate to an act falling within torture, ill-treatment, a breach of the right to life and/or persecution may result in potential abuse and amount pre-screening at a stage where a claimant is detained and without legal representation.

b. That s37ZD of the IO which allows an immigration officer to take certain behaviour into account for the purpose of assessing credibility fails to promote fairness in determining claims.

c. That the definition of "persecution risk" does not follow the definition of refugees under the Refugee Convention but instead is an amalgam of 1A(2) and Article 33 of the UNCAT.

d. That the USM does not prohibit or otherwise prevent chain refoulement.

e. That the HKSAR Government has not put in place any post-return monitoring despite the Committee's Concluding Observations in 2009.

f. That the time limit for submitting the Non-Refoulement Claim Form being 28 days is exceedingly short considering that a legal representative must take full instructions (often with the assistance of an interpreter, the arrangement for which is not without difficulty) and research Country of Origin Information ("COI") (whilst the claimant may still remain in custody).

g. That the Immigration Department ("ImmD") has declined to share with the legal profession its own COI resources despite the HKSAR courts having held that the evaluation of COI is a joint endeavour on part of the claimant and the ImmD.

h. That the number of substantiated claims is distinctly low. Between 2009 and December 2020, 22,988 determinations were made with only 243 substantiated. This represents a success rate of approximately 1.06% which is substantially lower than other jurisdictions.

i. That Torture Claim Appeal Board/Non-Refoulement Petitions Office ("TCAB/NRPO") decisions are not published. Whilst the HKSAR Government has expressed that this is a matter for the TCAB/NRPO, the HKBA urges the HKSAR Government to make available the resources necessary for the publication of appeal/petition decisions.

23. In 2016, the HKSAR Government undertook a 'comprehensive review' of the strategy of handling non-refoulement claims in 2016. As part of this review and in order to 'prohibit delaying tactics', the overall timeframe of screening claims was tightened through advanced scheduling of screening interview ("SI"). Under this arrangement, the screening interview is immediately scheduled upon the ImmD's referral of the claimant to the Duty Lawyer Service ("DLS") with the aim of enabling the SI to be held within three weeks after the submission of a completed claim form, reportedly reducing the average processing time from 25 weeks to around 15 weeks. It is unknown whether the arrangement has had such effect. The HKBA expresses concern that such expedience comes at the cost of fairness.

24. The HKSAR Government introduced the Immigration (Amendment) Bill in late 2020. The Bill is pending its Second Reading and is due to come into effect in August 2021. The stated objective for the amendments is (1) to enhance the statutory backing for screening by the Immd; (2) to prevent the re-emergence of what are stated to be delaying tactics by claimants; (3) to improve the procedures and functions of the TCAB to enhance its efficiency and effectiveness in handling appeals; and (4) to make further improvements in respect of removal, detention and law enforcement.

25. The HKBA is concerned that many of the proposed amendments in the Bill will diminish the fairness of the screening process without any real gains in efficiency and further that some of the biggest causes of delay under the USM are not addressed in the Bill – for example, severe delay in the handing down TCAB/NRPO decisions and low levels of legal representation at the appeal/petition stage.

26. The HKBA expresses particular concern on the following:

a. *The expansion of powers with regards to immigration detention - in addition to the specific circumstances of the individual case, the following factors can be taken into account, justifying a longer period of detention:-*

i. Whether there is a large number of claims or appeals pending screening by ImmD or TCAB at the same time;

ii. Whether any procedure (for removal and final determination of claim) is hindered directly or indirectly by the person being detained;

iii. Whether there are situations beyond the control of ImmD, e.g., some countries need more time to issue travel documents; and

iv. Whether the claimant poses, or is likely to pose, a threat or security risk to the community.

The HKBA considers that immigration detention is an exceptional measure of last resort which should only be used for the shortest period possible and only if justified by a legitimate purpose applicable in a particular case. The Court of appeal has held in *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138 that the existing provisions relating to immigration detention under s32 of the IO are subject to fundamental common law principles guarding against

arbitrary or unjustified detention and that the lawfulness of any detention is controlled by the *Hardial Singh* Principles [3] which require that:

i. The immigration authorities must intend to deport the person and can only use the power to detain for that purpose;

ii. The deportee may only be detained for a period that is reasonable in all the circumstances;

iii. If, before the expiry of the reasonable period, it becomes apparent that the immigration authorities will not be able to effect deportation within that reasonable period, they should not seek to exercise the power of detention; and

iv. The immigration authorities should act with the reasonable diligence and expedition to effect removal[4].

Accordingly, the Bill seeks to introduce new concepts that are not matters which would otherwise be capable of providing cogent justification for immigration detention and incompatible with the *Hardial Singh* Principles. The HKBA is extremely concerned that these amendments create a very high risk of immigration detention being applied in arbitrary and unjustified circumstances.

b. *Amendment of the circumstances in which an immigration officer may extend time for filing the Non-Refoulement Claim Form*

Under the existing provisions, an extension of time may be granted where it would be unjust to not allow further time. The amendment removed this provision and state that time may be extend only of the delay is due to circumstances beyond the claimant's control. The HKBA is concerned that the removal of an immigration officer's power to extend time even though it would be unjust to not grant the extension will likely lead to substantial procedural unfairness.

c. *Amendment to clarify that the making of a torture claim does not preclude the HKSAR Government from liaising with any party after the claim is rejected at first tier for the purpose of making arrangements to remove the claimant*

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[3] *R v Governor of Durham Prison ex p Hardial Singh* [1984] 1 WLR 704.
[4] *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138 at [23].

The HKBA expresses concern that liaising with the government of a receiving country prior to the final outcome of any appeal or judicial review will give rise to safety concerns and unnecessarily create or increase risk to a claimant whose claim may yet still succeed.

d. *Amendment to require claimants to attend interviews*

In the past, a claimant who failed to appear scheduled interviews generally had their SI rescheduled. However, in recent years the ImmD have demonstrated decreased tolerance and have refused re-schedule interviews more than once, instead requiring claimants to complete a Question and Answer sheet, negatively impacting claimants' opportunity to be heard. Further, whilst claimants previously had three days to produce medical evidence relating to their inability to attend an interview, claimants must now produce such medical evidence within 1 day. The HKBA is concerned that forcing claimants who are not fit to be interviewed in the name of expediency does not meet the high standards of fairness required.

e. *Amendment allowing an immigration officer and/or the TCAB/NRPO to specify the language to be used by a claimant/appellant/petitioner*

The HKBA has serious concerns about a provision which requires a claimant to communicate in a language that the ImmD/TCAB/NRPO 'reasonably considers' the claimant is able to understand and communicate in. It is of utmost importance that all claimants are able to both understand and participate fully in the proceedings and given the crucial importance of a claimant's own account in the screening process, fairness demands that claimants are given the best possible opportunity to make their case. Further, as a practical matter, it is uncertain how an immigration officer or the TCAB/NRPO will judge the claimant's proficiency in any language unless they are able to speak that language themselves.

f. *Amendment to compel the claimant to give 'any consent that is necessary to enable a medical examination to be arranged or conducted' and to provide that an immigration officer or TCAB/NRPO may decide not to take into account the disputed physical or mental condition of a claimant in certain circumstances*

In the Last Submissions, the HKBA raised a concern as to s37ZC of the IO which effectively denies the claimant the opportunity for presenting his or her own medical expert evidence on the occurrence of past torture by providing that medical examination be conducted by a medical practitioner arranged by an immigration officer or the TCAB/NRPO. Claimants may have a valid reason for electing a particular physician, especially in claims involving sexual violence and a medical report from a practitioner other than that nominated by

the ImmD of TCAB/NRPO should be assessed on its own merits. The HKBA is concerned that the requirement to give 'any consent that is necessary' is too wide, especially as the scope to medical examination is not required to be specified and may conflict with a claimant's religion or culture.

g. *Amendment to revise the grounds on which an immigration officer or TCAB may revoke a previous decision upholding a torture claim*

The existing legislation allows non-refoulement protection to be revoked if the original decision is found to have been materially affected by false or misleading information or non-disclosure or if the risk of torture has ceased to exist due to changes in the circumstances of either the claimant or the torture risk state. The proposed amendment allows a substantiated claim to be revoked 'if upon review of all the prevailing circumstances, the Immigration Department is of the view that the claim should not be accepted as substantiated.' The HKBA is concerned that the proposed amendment is inconsistent with the principle of legal finality by providing for decisions to be revoked where there has been no change in circumstances but where the authorities have simply re-evaluated the claim.

h. Amendment requiring the notice of appeal to be 'duly completed and signed' and disallowing any action to be taken on any notice that fails to comply

This provision directly conflicts with the judgement of the High Court in *YA v TCAB* [2018] HKCFI 2445 where it was held that non-compliance with the formalities was only a procedural irregularity which could be cured and did not make the notice of appeal a nullity. The HKBA is concerned that a right to appeal can be negated by a mere procedural irregularity.

i. Amendment to what the TCAB/NRPO may take into account in deciding whether to allow a late filing of a Notice of Appeal

Previously, under s37ZT of the IO, the TCAB when deciding whether to allow a late filing of a notice of appeal could take into account the statement of reasons for late filing AND any other relevant matters. If the Board was satisfied that by reason of special circumstances it would be unjust not to allow the late filing, the Board was at liberty to allow the late filing. However, the amendments only permit the TCAB/NRPO to take into account the reasons given for late filing, ignoring all other considerations. This is at odds with the approach repeatedly taken by the courts whereby even where there is no good reason for an extension of time, the decision-maker must conduct an evaluation of the merits as fundamental rights are at stake. The HKBA is concerned that this approach amounts to relieving the HKSAR Government of its non-refoulement obligations due to minor procedural non-compliance.

j. *Amendment to enable the TCAB/NRPO to give less than 28 days notice of an appeal hearing*

The HKBA is of the view that 28 days notice is not sufficient for a legal representative to properly prepare a case and would seriously compromise the quality of legal representation.

k. *Amendment to address situations on which an appellant/petitioner is absent from a hearing*

Under the current provisions, where an appellant/petitioner fails to appear, the TCAB/NRPO will issue a notice informing the appellant/petitioner of their intention to determine the appeal in their absence, allowing the appellant/petitioner 7 days to submit an explanation. The TCAB/NRPO may re-fix the hearing where it considers there is a reasonable cause for the absence. The proposed amendment removes the requirement to give notice of the intention to determine the appeal without a hearing and limits the time to provide an explanation to 3 days. Further, it prevents the TCAB/NRPO from re-fixing a new date even if there is a reasonable cause unless the appellant/petitioner is absent due to reasons beyond their control. The HKBA is concerned that as only around 8% of appellant/petitioners are legally represented, unrepresented appellants/petitioners who are not prompted by such notice will be seriously disadvantaged and run the risk of losing their opportunity to be heard being unaware of this provision in the Ordinance. The proposed amendment goes beyond streamlining and creates a situation that is inherently unfair by depriving the appellant/petitioner access to relevant information as it relates to the law and/or procedure in the conduct of the appeal.

Article 7: Prosecution of Torture

27. It is a State Party's obligation to prosecute individuals on the charge of torture if the evidence and the circumstances so require.

28. In *HKSAR v Wong Cho-shing* (DCCC 980/2015, 14 February 2017 and 17 February 2017), the seven defendants were police officers on duty dealing with a protest. At the material time, the police were dispersing the protestors and subsequently subdued the victim. Instead of escorting the victim directly to the escort vehicles for transport to police stations, the 1st to 6th Defendants carried the victim to a substation, where they were joined by the 7th Defendant. At the substation, the 3rd to 7th Defendants assaulted the victim. The 1st and the 2nd Defendants did not take part in the assault but stood around as onlookers. The victim sustained injuries to his face; the left side of the neck; the left shoulder and clavicle; the left flank; the right flank and his chest and back. The victim was subsequently escorted to a police station, in which he was slapped in his face twice

by the 5th Defendant, in the presence of the 6th Defendant. After trial, all the Defendants were convicted of a count of assault occasioning actual bodily harm, whereas the 5th Defendant was in addition convicted of a count of common assault (the 4th and the 7th Defendants successfully appealed against conviction[5]). Nevertheless, none of the defendant was charged with the offence of "Torture" under section 3 of the Crimes (Torture) Ordinance (Cap. 427).

29. In *HKSAR v Au Kwok Wai and others* [2020] HKDC 1204, the three defendants were police officers on duty, dealing with the victim who was an arrested person under alcohol influence. At the material time, the victim was taken to North District Hospital and his four limbs were subsequently restrained on a bed due to his aggressive behaviour. The victim was then moved to a "Disturbed Patient Room". Inside the room, the 1st and the 2nd Defendants intermittently but persistently assaulted the victim for over 20 minutes. The 3rd Defendant stayed in the room for some 2 minutes but took no action to stop the assault on the victim. The 1st and 2nd Defendants pleaded guilty to a charge of "misconduct in public office" and the 3rd Defendant was found guilty of the same after trial (see the Reasons for Verdict in *HKSAR v Lam Yik Sing* [2020] HKDC 1143 in Chinese). Despite the Court's description of the defendants' acts as "evil and prolonged torture" in the Reasons for Sentence,[6] none of the defendants was charged of the offence of "Torture" under section 3 of the Crimes (Torture) Ordinance (Cap 427).

30. Whlist the HKBA acknowledges that the Secretary for Justice and her Department is best-positioned to decide whether to charge and what (if any) charge(s) to lay in the above cases in the light of the available evidence and the public interest, the HKBA also notices signicant public concerns over the exercise of the prosecutorial discretion by against the aforesaid perpetuators in the above potential torture cases.

31. Hence, it may be appropriate for the HKSAR Government to address the concerns over these decisions before the Committee in a timely manner.

Article 12: Prompt and impartial ex-officio investigation of acts of torture

32. Article 12 of the UNCAT obliges State Parties to undertake impartial and effective investigation "wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction" even without any complaint.

33. The HKBA notes that in its General Comment No 3 (UN Doc No CAT/C/GC/3) adopted on 13 December 2012, the Committee emphasised at paragraph 23 that "[s]tates parties shall undertake prompt, effective and impartial investigations, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction as the result of its actions or omissions". A similar obligation can also be found under Article 3(b) of the Basic Principles and Guidelines on the Right to a

[5] *HKSAR v Wong Cho Shing* [2019] HKCA 839 at [186].
[6] *HKSAR v Au Kwok Wai and others* [2020] HKDC 1204 at [37].

Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Doc No A/RES/60/147).

34. In *Chan Ki Kau v Hong Kong Police Force* [2020] 5 HKLRD 653, [2020] HKCFI 2882, at paragraph 75, the Court of First Instance affirmed that the HKSAR Government has a positive investigate duty once it is aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an identified individual has been, or is at real and immediate risk, of having been subjected to ill treatment by a police officer falling within the scope of Article 3 of the HKBOR (implementing Article 7 of the ICCPR).

35. The HKBA welcomes the decision in *Chan Ki Kau v Hong Kong Police Force* [2020] 5 HKLRD 653, [2020] HKCFI 2882 as it explicitly recognises a positive investigative duty on the HKSAR Government. However, as will be shown hereinbelow, there are widespread concerns over the existing complaints mechanisms against the Hong Kong Police Force.

36. While the HKBA is unaware of any substantiated report of torture as defined in the Crimes (Torture) Ordinance involving the Hong Kong Police Force in the past 5 years, the HKBA seeks to highlight the recent judgment of *Sham Tsz Kit and another v Commissioner of Police and another* [2021] HKCFI 746. In that case, an application for leave to apply for judicial review was mounted against the decision made by the Hong Kong Police Force to disperse the lawful meeting using tear gas grenades without reasonable prior notification on 12 June 2019. In determining whether to grant leave to the applicant to pursue the judicial review, the Court held at paragraphs 24 and 47 that the applicants' case that the Hong Kong Police Force using tear gas in the circumstances acted in breach of Article 3 of the BOR is reasonably arguable and has a realistic prospect of success.

Article 13: Right of complaint

37. Article 13 of the UNCAT requires a State Party to undertake impartial investigation in response to a complaint of torture by a victim (as opposed to the obligation of ex officio investigation under Article 12). As the obligation under this Article substantially overlaps with that under Article 12 and the Committee does not clearly differentiate between the two articles, the HKBA adopts and reiterates the submissions in relation to Article 12 above. The HKBA seeks to highlight a few concerning issues under this section.

Hong Kong Police Force

38. There is currently in force in Hong Kong a two-tier mechanism for handling complaints against the Hong Kong Police Force, with (i) the Complaints Against Police Office ("CAPO") and the Independent Police Complaints Council ("IPCC") carrying out the first and second tiers of the complaint mechanism respectively.[7]

39. Between 2015 and 2020, there were 1,113 allegations of assault by a police officer involved in CAPO cases endorsed by the IPCC. The HKBA notes that between 2015 and 2020, only 2 of the allegations were determined as substantiated. No criminal proceedings were initiated against these defaulting officers.[8] Since 9 June 2019, a series of public order events arising out of the now withdrawn Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 took place in Hong Kong ("POEs"). The use of force by the Hong Kong Police Force therein has been widely criticized in the media and by a wide cross-section of the public resulting in a large number of complaints. In the wake of the POEs from 9 June 2019 until 29 February 2020, there have already been 303 reportable complaints against the Hong Kong Police Force concerning use of force.[9]

40. In *Chan Ki Kau v Hong Kong Police Force* [2020] 5 HKLRD 653, [2020] HKCFI 2882, ata paragraph 101, the Court noted that an investigation, to comply with the procedural duty arising under Article 3 of the HKBOR, must be conducted by persons who are "independent" of the suspected perpetrators. For this purpose, independence requires both "institutional" and "practical" independence. An independent oversight of the primary investigative body which is not independent will not provide a sufficient safeguard for the purpose of satisfying the requirement of independent investigation under Article 3 of the HKBOR.

41. The HKBA notes the Committee's Concluding Observations in 2016 (UN Doc No CAT/C/CHN-HKG/CO/5), at paragraph 8, that the HKSAR should continue to take steps to establish a fully independent mechanism mandated to receive and investigate complaints against all officials and ensure that there is no institutional or hierarchical relationship between the investigators of that particular body and the suspected perpetrators of the acts that form the basis of a complaint. The HKBA finds that there has been no institutional improvement in line with the Concluding Observations to date. The IPCC has remained a monitoring body of investigations of police complaints conducted by the CAPO. The CAPO also remains neither practically nor institutionally independent of the Hong Kong Police Force.

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[7] *Chan Ki Kau v Hong Kong Police Force* [2020] 5 HKLRD 653, [2020] HKCFI 2882 at [46].

[8] Independent Police Complaints Council, Report of IPCC 2015/2016, 2016/2017, 2017/2018, 2018/2019, 2019/2020.

[9] Independent Police Complaints Council, A Thematic Study by the IPCC, at p.24, para. 6.2.

42. The above observation, which has been repeated for years, draws support from a recent decision of *Chan Ki Kau v Hong Kong Police Force* [2020] 5 HKLRD 653, [2020] HKCFI 2882, which held that the two-tier mechanism for handling complaints against the Hong Kong Police Force failed to meet the requirement of independent investigation.[10] At paragraph 102, the Court made the following observations:

> "102. In relation to the two-tier mechanism for handling complaints against the Force in Hong Kong:
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> (1) CAPO is part of the Force itself. It is headed by a Senior Superintendent answerable to the Chief Superintendent in command of C&IB and ultimately to the Commissioner, who is charged with the "supreme direction and administration of the police force" under s 4 of the PFO. **It is clear that CAPO is not institutionally independent of the Force.** Further, there is no segregation of personnel of CAPO from the rest of the Force. CAPO officers are generally experienced police officers who have already served in the Force for a long period of time. They are chosen from other units or branches of the Force and serve in CAPO for a limited duration of about 2 - 3 years, after which they would return to the Force generally. In other words, CAPO officers are career police officers. **CAPO cannot, in my view be regarded as practically independent of the Force either.**
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> (2) IPCC is institutionally and practically independent of the Force. However, it lacks the necessary investigative powers of its own. It has no power to overturn the decisions of CAPO. If it has queries about CAPO's findings or disagrees with CAPO's conclusion, it may request CAPO to make clarifications or carry out further investigation. It may disclose its disagreement with the views of CAPO to the Chief Executive and/or the public, but **it has ultimately no power to make any binding determination.**" (emphasis added)

43. As accepted in *Chan Ki Kau v The Commissioner of Police and Another* [2020] 5 HKLRD 653, [2020] HKCFI 2882, at paragraph 78, to fulfil the investigative duty falling upon the HKSAR Government to investigate suspected cases of breach of Article 3 of the BOR, the investigation must be independent from those implicated in the events. This echoes the observation of the former Special Rapporteur on Torture, Manfred Nowak, in his report dated 5 Febraury 2010 (UN Doc No A/HRC/13/39/Add.5) at paragraphs 148-149, where he obsersved that investigation of the Police by the Police themselves is often ineffective and there is a need for a truly indepednent special "police-police" to investigate into torture and ill-treatment related police misconduct[11].

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[10] *Chan Ki Kau v Hong Kong Police Force* [2020] 5 HKLRD 653, [2020] HKCFI 2882 at [103].

[11] The United Nations Convention Against Torture and its Optional Protocol: A Commentary (2nd edn, OUP 2019), Article 13, at [27]-[28], p 366-367.

44. The HKBA further notes the Committee's Concluding Observations in 2016 (UN Doc No CAT/C/CHN-HKG/CO/5), at paragraph 8, that the IPCC was found to have no power to conduct investigation on its own. The HKBA finds that such observation stands true as far as "reportable complaints" are concerned.

45. In *Lui Chi Hang Hendrick v Independent Police Complaints Council* [2020] 2 HKLRD 911, [2020] HKCFI 614, the Court of First Instance examined whether the IPCC has proactive investigation powers under the Independent Police Complaints Council Ordinance (Cap. 604) ("IPCCO") to conduct a study on its own initiative. The case arose out of the following background: in 2019, a series of public order events arose as a result of the HKSAR Government's proposed amendment to the Fugitive Offenders Ordinance (Cap. 503). On 25 June 2019, the IPCC set up a Special Task Force to investigate the conflicts that broke out between the Police and some members of the public. The Special Task Force would conduct a fact-finding study ("Study") and publish the findings. The issue was whether the Study is *ultra virus*. The Court summarized the scope of the Study in paragraphs 101 - 103:

(a) the Study involves 3 steps: (1) fact-finding; (2) assessment, and (3) recommendation;

(b) that the IPCC, in anticipation of the increasing number of complaints arising from the public order events happened in 2019, decided to carry out the Study;

(c) the Study was to be front-loaded for specific reasons, primarily to facilitate collection of information and expedition;

(d) the purpose of the Study is to get an overall or broad picture of the public order events concerned, which picture will assist and facilitate the IPCC (and is reasonably necessary for / incidental to / conducive to) in the performance of its duties under ss 8(1)(a) and (b) of the IPCCO in due course;

(e) through press releases, official website, the media, media interviews and meetings with police staff associations, the IPCC has proactively appealed to its stakeholders and the public for public order events related information;

(f) as at 16 August 2019, the IPCC has received over 1,200 submissions containing more than 24,000 texts, photos, video clips and hyperlinks;

(g) another aspect of the fact-finding step is to get a better understanding of the equipment and weapons used by the Police and the related guidelines, which understanding would help the IPCC to review the investigation reports to be submitted by CAPO;

(h) the Study covers consideration of the handling by the Police of the public order events concerned;

(i) the matters covered were the equipment and weapons used by the Police and the related guidelines, the Police practice and procedure of Police identification, and of the handling of arrested persons in general, and at in particular at the San Uk Ling Holding Centre;

(j) the Study would allow the IPCC to identify any possible fault or deficiency in the practice or procedure adopted by the Police so that the IPCC can make appropriate recommendations.

After examining the relevant scope of the Study and the statutory framework, the Court held that the Study was not *ultra virus*.

46. Despite the finding in *Lui Chi Hang Hendrick v Independent Police Complaints Council* [2020] 2 HKLRD 911, [2020] HKCFI 614, the HKBA notes that the IPCC still lacks the necessary investigatory power to carry out effective investigation into complaints against the Hong Kong Police Force for the following reasons:

a. The case of *Lui Chi Hang Hendrick v Independent Police Complaints Council* [2020] 2 HKLRD 911, [2020] HKCFI 614 does not engage the issue as to whether the IPCC has any power (express or implied) to conduct any fact-finding investigation into a "reportable complaint".[12] This is because the Study is not an investigation of any reportable complaint, does not involve any investigation into any of the reportable complaints at all, and will not come up with any finding or conclusion in relation to any individual report complaint. No fault of any individual officer would be attributed.[13] In fact, as explicitly admitted in the affidavit of Mr. Mui Tat Ming, the Deputy Secretary-General (Operations) of the IPCC, investigation of the reportable complaints remains to be handled by the CAPO.[14] Such evidence is accepted by the Court.[15] As observed by the Court in *Chan Ki Kau v Hong Kong Police Force* [2020] 5 HKLRD 653, [2020] HKCFI 2882, at paragraph 102(2), the IPCC "lacks the necessary investigative powers of its own." It may, at most, request CAPO to make clarifications or carry out further investigation if it has queries about CAPO' findings or disagrees with CAPO's conclusion but cannot launch investigations into reportable complaints on its own initiative. Over the past 5 years, no legislative, administrative or judicial measures were taken to render the IPCC proactive investigation power into reportable complaints;

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[12] *Lui Chi Hang Hendrick v Independent Police Complaints Council* [2020] 2 HKLRD 911, [2020] HKCFI 614 at [91]
[13] *ibid,* at [89]
[14] *ibid,* at [89]
[15] *ibid,* at [90]

b. The lack of investigation power of the IPCC is to certain extent evidenced in the final report of the Study. In May 2020, the IPCC published the findings of the Study, titled "A Thematic Study by the IPCC on the Public Order Events arising from the Fugitive Offenders Bill since June 2019 and the Police Actions in Responses". This report, however, does not make any finding on whether the Hong Kong Police Force has used excessive force when policing the public order events starting since 2019 or any individual liabilities arising out of the use of force by the police;

c. The IPCC remains to lack the powers to require the production of documents and to require witnesses to attend interviews. As admitted by the IPCC, it does not have powers to compel the supply of information in relation to the Study.[16] The HKBA notes that the Independent Expert's Panel set up to facilitate the Study decided to formally stand aside from its role because of the crucial shortfall in the powers, capacity and independent investigative capability of the IPCC.[17] They are concerned that the IPCC lacks legal power to compel any person to give testimony or provide real or documentary evidence;[18]

d. There remains to be inadequate protection to stakeholders giving information to the IPCC which may be passed onto the police; and

e. While it is affirmed that the IPCC has the investigative power to proactively conduct the Study and arguably any study of similar nature in the future, the recommendations made by the IPCC therein will not have any binding effect on the Hong Kong Police Force.

47. In the recent judgment of *Sham Tsz Kit and another v Commissioner of Police and another* [2021] HKCFI 746, at paragraph 28, the Court of First Instance again noted the issues of "lack of independence" in respect of the CAPO and limitation of "investigative powers" in respect of the IPCC.

48. In addition to the above deficiencies in the complaint resolution mechanism against the Hong Kong Police Force, the HKBA notes the concerns that the mechanism was undermined by the police officers' failure to display their unique identification numbers ("UI Numbers") or other distinctive identification numbers or marks when carrying out non-covert duties in relation to the POEs.

49. Such concerns were addressed in *Chan Ki Kau v Hong Kong Police Force* [2020] 5 HKLRD 653, [2020] HKCFI 2882. At paragraph 78, the Court held that to fulfil the

[16] *ibid.* at [93].
[17] *ibid.* at [128].
[18] *ibid.* at [129].

investigative duty falling upon the HKSAR Government to investigate suspected cases of breach of Article 3 of the HKBOR, such investigation must also be capable of leading to the identification and punishment of individuals responsible. At paragraph 96, the Court found that the existence of an effective system which allows identification of police officers who may have committed acts in violation of Article 3 of the HKBOR is integral to an effective system of investigation, and is essential to achieve the purpose of ensuring accountability for ill-treatment by police officers. The Court then held that it is necessary that the identification number or mark must be unique to each police officer to facilitate identification and avoid the obvious risk of confusion, and it must be worn and displayed prominently to allow victims and eyewitnesses and reasonable opportunity to identify the police officers concerned and file effective complaints. Notably, at paragraph 98, the Court noted that the police's concern of disclosing their individual identities when carrying out duties having regard to the risk of doxxing cannot of itself override the duty to maintain an adequate system to investigate suspected cases of breach of Article 3 of BOR. Whilst the HKBA welcomes the decision, its concerns over the deficiencies of the two-tier complaint mechanisms as explained above remain despite the judgment.

50. The HKBA invites the Committee to raise questions on the independence of the CAPO, the investigation power of the IPCC, and the effectiveness of the two-tier complaint resolution mechanisms.

Correctional Services Department

51. The HKBA expresses concerns that the Complaints Investigation Unit ("CIU") of the Correctional Services Department is also not institutionally and practically independent from the Correction Services Department in general (in a way similar to the CAPO vis-a-vis the Police Force in general). Furthermore, even in the latest Annual Review of 2019, no statistics were provided on the number of successful complaints as handled by the CIU.[19] The HKBA invites the Committee to raise questions on the independence of the CIU and the effectiveness of the CIU in receiving and handling complaints.

ImmD

52. The HKBA notes that the ImmD hosts a detention facility at the Castle Peak Bay Immigration Centre ("CIC"). Nevertheless, not only is there no institutionally independent organisation equipped with adequate investigatory powers to handle complaints against the ImmD on issues related to the detention facility,[20] it also appears that there is not any internal division within the ImmD specifically entrusted with the duty to deal with complaints.

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[19] Available at https://www.csd.gov.hk/annualreview/2019/textonly/en/chapter5/#cc3, last accessed on 29 March 2021.

[20] The only mechanism of preventive outsider visit is the visits by Justices of the Peace under section 16 of the Immigration (Treatment of Detainees) Order (Cap 115E). However, Justices of the Peace do not otherwise possess any investigatory powers and are essentially a part-time duty.

53. No such division could be found on the Government Telephone Directory of the ImmD;[21] no hotline, address or email address is available on the ImmD's "Contact Us" webpage;[22] and no mention or reference was made to any independent complaint investigatory unit within the ImmD in its very recent press release dated 17 December 2020 to specifically address several issues of complaints against the ImmD.[23]

54. Accordingly, the HKBA invites the Committee to question the State Party on the institutional and practical arrangements in dealing with complaints made against the ImmD (and its officials) in relation to detention matters.

Provision of Legal Assistance to Detainee Complainants

55. The HKBA also notes that the Committee has held that victims who lack the necessary resources to make complaints should be provided with adequate legal assistance and should be granted access to all relevant evidence or information concerning the acts of torture or ill-treatment.[24] The HKBA notes that there is currently no legal assistance of any kind provided for victims to make complaints of torture to the CAPO/IPCC, the CIU, or to the ImmD.

Article 14: Right to Redress

56. Article 14 of the UNCAT states that each State Party shall endure in its legal system that the vicim of an act of torture obtains redress and has an enforceable right to fair and adequate compensaiton, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

57. In this regard, the HKBA expresses concerns over the effect of Article 60 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Administrative Region ("NSL") over the right to fair and adequate compensation of certain victims of torture in Hong Kong.

58. The NSL was implemented in Hong Kong on 1 July 2020 through the Promulgation of National Law 2020 (Instrument A406). Article 60 of the NSL reads (English translation):

> "Article 60 The acts performed in the course of duty by the Office for Safeguarding National Security of the Central People's Government in the

[21] Available at https://tel.directory.gov.hk/index_IMMD_ENG.html, last accessed on 29 March 2021.
[22] Available at https://www.immd.gov.hk/eng/contactus/index.html, last accessed on 29 March 2021.
[23] Available at https://www.immd.gov.hk/eng/press/press-releases/20201217.html, last accessed on 29 March 2021.
[24] The United Nations Convention Against Torture and its Optional Protocol: A Commentary (2nd edn, OUP 2019), Article 13, at [22], p 364.

> Hong Kong Special Administrative Region and its staff in accordance with this Law shall not be subject to the jurisdiction of the Hong Kong Special Administrative Region.
>
> In the course of performing duty, a holder of an identification document or a document of certification issued by the Office and the articles including vehicles used by the holder shall not be subject to inspection, search or detention by law enforcement officers of the Region.
>
> The Office and its staff shall enjoy other rights and immunities provided by laws of the Region."

The "Office" is defined as the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region established under Article 48 of the NSL.

59. Although the correct interpretation of Article 60 of the NSL has yet to be examined in Court, its literal meaning appears to exempt the Office and its staff from any criminal or civil liability in Hong Kong arising out of their acts, including that of torture. The HKBA also notes that there is no complaint mechanism against the Office or its staff under the laws of Hong Kong. As such, victims of torture done by these public officers may be left with no redress nor reparation.

60. On the other hand, in light of the decision in *Chan Ki Kau v Hong Kong Police Force* [2020] 5 HKLRD 653, [2020] HKCFI 2882 as elaborated hereinabove, victims of torture by the police should now be more capable to identify the concerned police officers and hence start civil actions and private prosecutions against them in the future. The HKBA welcomes the decision.

Article 16: Prevention of other acts of cruel, inhuman or degrading treatment or punishment

61. As the Committee noted in its General Comment No 2 (UN Doc No CAT/C/GC/2) at paragraph 3, the obligation to prevent torture under Article 2 and the obligation to prevent other cruel, inhuman or degrading treatment or punishment ("ill-treatment") are "indivisible, interdependent and interrelated", and the measures outlined in, including but not limited to, Articles 10-13 are also applicable vis-a-vis ill-treatment.

62. The HKBA draws the Committee's attention to the following areas of concern.

Detention of Arrested Persons in Police Custody

63. Since June 2019, mass arrests have become commonplace in Hong Kong after the POEs and where the Police makes many coordinated planned arrests at the same time (usually related to a certain event which took place long before the arrests). It has come to the HKBA's attention that poor detention conditions in police custody were not uncommon:

    a. For example, it has been reported in a news report dated 3 January 2020[25] that after the New Year's Day rally, 287 persons were arrested. One of the detainees held in North Point Police Station complained that he was held in police custody for over 42 hours. The detainees were placed in a covered car park, which was divided into several zones, each holding 40-50 detainees. Each detainee was only given a plastic chair. No bed or any facility providing any degree of privacy was given. Detainees were given 3 meals each day, but only of ham. Only 1 telephone was provided to the substantial number of detainees to use to inform their families and friends. In relation to the same event, a news report of Standnews dated 2 January 2020[26] reported that despite the cold weather at that time, police officers refused to pass on warm-keeping clothing from the detainees' family members.

    b. Another example was reported by Mingpao in a news report dated 1 August 2019.[27] After a rally on 28 July 2019, 49 persons were arrested and more than 40 persons were detained in the carpark of Kwai Chung Police Station for more than 20 hours, irrespective of their genders. Only a plastic chair was provided to each of the detainees. Electronic fans were only provided after some detainee(s) apparently suffered from heatstroke.

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[25] 黃廸雯, 余睿菁, "【元旦遊行】被捕人羈留停車場逾 40 小時　警三餐派火腿" (HK01, 3 January 2021), <https://www.hk01.com/%E7%AA%81%E7%99%BC/417474/%E5%85%83%E6%97%A6%E9%81%8A%E8%A1%8C-%E8%A2%AB%E6%8D%95%E4%BA%BA%E7%BE%88%E7%95%99%E5%81%9C%E8%BB%8A%E5%A0%B4%E9%80%BE40%E5%B0%8F%E6%99%82-%E8%AD%A6%E4%B8%89%E9%A4%90%E6%B4%BE%E7%81%AB%E8%85%BF> accessed 29 March 2021.

[26] "【元旦大圍捕】北角警署估計 170 人被扣查　律師指或室外羈留　有家屬望轉交衣物被拒" (Standnews, 2 January 2021) <https://www.thestandnews.com/politics/%E5%85%83%E6%97%A6%E5%A4%A7%E5%9C%8D%E6%8D%95-%E5%8C%97%E8%A7%92%E8%AD%A6%E7%BD%B2%E4%BC%B0%E8%A8%88-170-%E4%BA%BA%E8%A2%AB%E6%89%A3%E6%9F%A5-%E5%BE%8B%E5%B8%AB%E6%8C%87%E6%88%96%E5%AE%A4%E5%A4%96%E7%BE%88%E7%95%99-%E6%9C%89%E5%AE%B6%E5%B1%AC%E6%9C%9B%E8%BD%89%E4%BA%A4%E8%A1%A3%E7%89%A9%E8%A2%AB%E6%8B%92/> accessed 29 March 2021.

[27] "728 被捕 楊政賢：40 人關警署「蒸籠」一天", (Mingpao, 1 August 2019) http://www.mingpaocanada.com/TOR/htm/News/20190801/hk-gab2_r.htm> accessed 29 March 2021.

c. Similarly, it has been reported in Mingpao in a news report dated 7 September 2019[28] that after a rally in the Kowloon area, 289 persons were arrested. Detainees were again put in a carpark together, irrespective of their genders.

d. In Mingpao's news article dated 4 November 2019,[29] pro bono lawyers expressed concerns that police officers stopped arrested persons from calling hotlines of pro bono legal assistance services; that procedure including cautioned statement taking and house searching were often done with detainees before they had access to any lawyer; that detainees were often held in car parks within police stations for a long time (such as 12 hours) without being registered; and that detainees were often transferred to other police stations even where no such registration has been made.

e. Amnesty International Hong Kong has also compiled a report dated 19 September 2019[30] after having interviewed multiple detainees and revealed cases of torture, etc. under detention.

f. After each of several mass rallies in August 2019, arrested persons were taken to the San Uk Ling Holding Centre ("SULHC"), which was extremely remote and distant from the location of the rallies. The SULHC has no CCTV system or computer system for recording and processing arrested persons, one of the 2 rooms for legal visits had no door, and multiple mistakes were subsequently found with the manual record system.[31] According to a news report of Apple Daily dated 21 September 2019,[32] multiple arrested persons were again placed in car parks of police stations without any cooling ventilation for a long time, before they were eventually put on coaches to transfer them to SULHC. The toilet in the female custody had no doors and male police officers went in and out without informing the inmates inside the custody in advance. In addition, a

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[28] "九龍遊行被捕者陸續保釋　被捕者：男女同擠停車場羈留「全身都係汗」" (Mingpao, 7 September 2019) <https://news.mingpao.com/ins/%E6%B8%AF%E8%81%9E/article/20200907/s00001/1599456263270/%E4%B9%9D%E9%BE%8D%E9%81%8A%E8%A1%8C%E8%A2%AB%E6%8D%95%E8%80%85%E9%99%B8%E7%BA%8C%E4%BF%9D%E9%87%8B-%E8%A2%AB%E6%8D%95%E8%80%85-%E7%94%B7%E5%A5%B3%E5%90%8C%E6%93%A0%E5%81%9C%E8%BB%8A%E5%A0%B4%E7%BE%88%E7%95%99%E3%80%8C%E5%85%A8%E8%BA%AB%E9%83%BD%E4%BF%82%E6%B1%97%E3%80%8D> accessed 29 March 2021.

[29] "義務律師：警指支援熱線「唔係律師」拒被捕者致電" (Mingpao, 4 November 2019) <https://www.mingpaocanada.com/tor/htm/News/20191104/HK-gaa2_r.htm> accessed 29 March 2021.

[30] "Hong Kong: Arbitrary arrests, brutal beatings and torture in police detention revealed" (Amnesty International Hong Kong, 19 September 2019) <https://www.amnesty.org.hk/en/hong-kong-arbitrary-arrests-brutal-beatings-and-torture-in-police-detention-revealed/> accessed 29 March 2021.

[31] Independent Police Complaints Council, "A Thematic Study by the IPCC on the Public Order Events arising from the Fugitive Offenders Bill since June 2019 and the Police Actions in Response" (15 May 2020) at [14.12], [14.17], [14.21], and [14.32].

[32] "【逆權●黑幕】831 被捕者 48 小時羈留實錄 「一聽到要去新屋嶺，我驚到想咬舌」" (Apple Daily, 21 September 2021) <https://hk.appledaily.com/lifestyle/20190921/M7TDYWNV7WZUPPHZS2BDIPHRPY/> accessed 29 March 2021.

news report of Singtao Daily dated 13 August 2019[33] also reported a solicitor saying that detainees were not allowed to meet legal representatives even 12 hours after their arrest, and that the duty officer responsible for the SULHC declined to answer the lawyers' calls.

g. More recently, in the recent NSL arrest of 47 participants in a primary election, the bail applications of all 47 defendants were fixed to be heard together in a single hearing. This resulted in a "marathon" bail hearing which lasted 4 days. On the 2nd day of hearing (i.e. the 4th day under detention), lawyers for the defendants informed the Court that the detained defendants were given no time to change or shower. In fact, as the 1st-day hearing only finished at 3 am (of the 2nd day morning), some defendants were transferred back to their cells for less than 3 hours and little time was given them to take rest.[34]

64. The HKBA notes that the Committee's General Comment No 2 (UN Doc No CAT/C/GC/2) states at paragraph 15 that the State Party should prohibit, prevent and redress torture and ill-treatment in "all contexts of custody and control". In paragraph 13, the Committee opines that "[c]ertain basic guarantees apply to all persons deprived of their liberty", including, *inter alia*, "maintaining an official register of detainees,... the right promptly to receive legal assistance, independent medical assistance and to contact relatives". Insufficient detention conditions could amount to a breach of Article 16.[35] The HKBA suggests t Committee totion the State Party in general as to the arrangement of conditions in police custody. The HKBA also invites the Committee to recommend, *inter alia*, that the State Party should maintain an official electronic register where all detainees are systematically registered from the moment of deprivation of liberty, with lawyers and relatives of those detained having access to these records.[36]

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[33] "【逃犯條例】警以「無房」為由扣留示威者逾 12 小時 律師：做法離譜不能接受" (Singao Daily,13 August 2019) <https://www.singtao.ca/3684067/2019-08-13/news-%E3%80%90%E9%80%83%E7%8A%AF%E6%A2%9D%E4%BE%8B%E3%80%91%E8%AD%A6%E4%BB%A5%E3%80%8C%E7%84%A1%E6%88%BF%E3%80%8D%E7%82%BA%E7%94%B1%E6%89%A3%E7%95%99%E7%A4%BA%E5%A8%81%E8%80%85%E9%80%BE12%E5%B0%8F%E6%99%82+%E5%BE%8B%E5%B8%AB%EF%BC%9A%E5%81%9A%E6%B3%95%E9%9B%A2%E8%AD%9C%E4%B8%8D%E8%83%BD%E6%8E%A5%E5%8F%97/?variant=zh-hk> accessed 29 march 2021.

[34] Helen Davidson, "All 47 Hong Kong activists kept in custody after bail hearing" (Guardian, 4 March 2021) <https://www.theguardian.com/world/2021/mar/04/hong-kong-court-denies-bail-to-32-detainees-under-security-law> accessed 29 March 2021; Grace Tsoi, "Hong Kong activists: 15 of 47 granted bail but remain detained pending appeal" (BBC, 4 March 2021) <https://www.bbc.com/news/world-asia-china-56281684> accessed 29 March 2021; Brian Wong, "Hong Kong national security law: marathon bail hearing triggers complaints from the 47 defendants over authorities' handling of the subversion case" (South China Morning Post, 4 March 2021) <https://www.scmp.com/news/hong-kong/law-and-crime/article/3124134/hong-kong-national-security-law-marathon-bail-hearing> accessed 29 March 2021.

[35] The United Nations Convention Against Torture and its Optional Protocol: A Commentary (2nd edn, OUP 2019), Article 16, at [26]-[27], p 450-451.

[36] Such recommendations have been made before: The United Nations Convention Against Torture and its Optional Protocol: A Commentary (2nd edn, OUP 2019), Article 2, at [36], p 85.

Detention of Non-Refoulement Claimants

65. As noted above, the State Party's obligation to prevent torture and other cruel, inhuman or degrading treatment or punishment is applicable in "all contexts of custody and control".

66. In the Last Submission, the HKBA has expressed substantial concerns over the conditions of detention of non-refoulement claimants in police cells and immigration facilities (see paragraph 21). Unfortunately, it does not appear that such conditions have improved

67. A hunger strike wasstaged by those detained in the ImmD's CIC due to the prolonged detention and the poor detention conditions.[37]

68. The poor conditions could be summarised from a Facebook post made by a former member of Legislative Council (who was in office at the time), SHIU Ka Chun,[38] and some other news articles[39] as follows:

    a. The toilets had no water;

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[37] "Activists mark 100 days since detainees began hunger strike" (The Standard, 7 October 2020) <https://www.thestandard.com.hk/breaking-news/section/4/156879/Activists-mark-100-days-since-detainees-began-hunger-strike> accessed 29 March 2021; "Inmates go on hunger strike" (South China Morning Post) <https://www.scmp.com/article/979861/inmates-go-hunger-strike> accessed 29 March 2021.

[38] SHIU Ka Chun, (Facebook, 11 July 2020) <https://www.facebook.com/bottleshiukachun/posts/1421023701416943> accessed 29 march 2021.

[39] "【羈留者絕食抗爭・上】青山灣首次被聽見的呼聲：不自由毋寧死" (Standnews, 6 August 2020) <https://www.thestandnews.com/politics/%E7%BE%88%E7%95%99%E8%80%85%E7%B5%95%E9%A3%9F%E6%8A%97%E7%88%AD-%E4%B8%8A-%E9%9D%92%E5%B1%B1%E7%81%A3%E9%A6%96%E6%AC%A1%E8%A2%AB%E8%81%BD%E8%A6%8B%E7%9A%84%E5%91%BC%E8%81%B2-%E4%B8%8D%E8%87%AA%E7%94%B1%E6%AF%8B%E5%AF%A7%E6%AD%BB/> accessed 29 March 2021; "【羈留者絕食抗爭・下】聽見絕望悲鳴的支援者：不能丟下他們" (Standnews, 7 August 2020) <https://www.thestandnews.com/politics/%E7%BE%88%E7%95%99%E8%80%85%E7%B5%95%E9%A3%9F%E6%8A%97%E7%88%AD-%E4%B8%8B-%E8%81%BD%E8%A6%8B%E7%B5%95%E6%9C%9B%E6%82%B2%E9%B3%B4%E7%9A%84%E6%94%AF%E6%8F%B4%E8%80%85-%E4%B8%8D%E8%83%BD%E4%B8%9F%E4%B8%8B%E4%BB%96%E5%80%91/> accessed 29 March 2021; "青山灣中心羈留者絕食十三日　抗議無限期羈留　邵家臻稱有人寫好遺書　下星期斷水" (Standnews, 11 July 2020) <https://www.thestandnews.com/society/%E9%9D%92%E5%B1%B1%E7%81%A3%E4%B8%AD%E5%BF%83%E7%BE%88%E7%95%99%E8%80%85%E7%B5%95%E9%A3%9F%E5%8D%81%E4%B8%89%E6%97%A5-%E6%8A%97%E8%AD%B0%E7%84%A1%E9%99%90%E6%9C%9F%E7%BE%88%E7%95%99-%E9%82%B5%E5%AE%B6%E8%87%BB%E7%A8%B1%E6%9C%89%E4%BA%BA%E5%AF%AB%E5%A5%BD%E9%81%BA%E6%9B%B8-%E4%B8%8B%E6%98%9F%E6%9C%9F%E6%96%B7%E6%B0%B4/> accessed 29 March 2021; Laura Westbrook, "Coronavirus: Hong Kong lawyers, lawmakers flag hygiene issues at detention centre, but Immigration says health measures in place" (South China Morning Post, 26 April 2020) <https://www.scmp.com/news/hong-kong/health-environment/article/3081544/coronavirus-hong-kong-lawyers-lawmakers-flag> accessed 29 march 2021.

b. The air ventilation was poor and no cooling facility was provided throughout the year;
c. Rats were rampant;
d. Each inmate was only given a small piece of soap per month;
e. Only Panadol was assigned to inmates regardless of the illnesses they were suffering from;
f. Some inmates were not assigned beds and could only sleep on the floor;
g. Inmates were put into solitary confinement for disciplinary reasons without independent adjudication;
h. Not every inmate was given a notice of detention; and
i. Each inmate, who could not possibly earn any income, was only permitted to make calls to the outside world 10 minutes every week for HK$50 through IDD.

69. Further, due to the COVID-19 pandemic, many inmates detained at the CIC will not know when they will be deported, as deportation and repatriation arrangements are now essentially brought to a halt. Unfortunately, the Director of Immigration is given very broad power of detention under section 37ZK of the IO.

70. The HKBA invites the Committee to raise questions to the State Party as to the detention arrangement and conditions of the CIC, and make recommendations that would ensure the State Party's compliance with its obligation under Article 16. In particular, the Committee may consider recommending that preventive immigration detention with no reasonably ascertainable time of deportation should not be permissible.

Prevention of Torture / Ill-Treatment under Detention in Police Vehicles

71. In recent years, Hong Kong saw a number of incidents where individuals complained to have been assaulted by police officers in police vehicles, where generally no CCTVs were installed.[40]

72. In October 2016, a then-member of the IPCC suggested to the Police Force "to seriously study the need for installing CCTV cameras in the cars".[41] The Police Force rejected the suggestion citing privacy concerns.

73. In October 2018, a jury of a coroner's court returned a verdict of unlawful killing as to the death of a taxi driver after a death inquest. The taxi driver's death was caused by neck injury which resulted from a headlock employed by a police officer on the former while he was being dragged to the police vehicle.[42]

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[40] Ellie Ng, "Govt rejects call to install CCTV cameras in police cars to prevent abuse, citing privacy concerns" (Hong Kong Free Press, 5 October 2016) <https://hongkongfp.com/2016/10/05/govt-rejects-call-to-install-cctv-cameras-in-police-cars-to-prevent-abuse-citing-privacy-concerns/> accessed 29 March 2021.
[41] *Ibid.*
[42] "Police constable likely to face prosecution over cabbie's death" (ejinsight, 25 October 2018) <https://www.ejinsight.com/eji/article/id/1974800/20181025-police-constable-likely-to-face-prosecution-over-

74. The jury recommended that the Police Force should "install CCTV systems with voice recording function in police vehicles". Afterwards, the then Commissioner of Police pledged to study the possibility of installing CCTV cameras inside police vehicles and adopting other measures recommended by the Coroner's Court,[43] and the Police has set up a working group to examine the recommendation,[44] but no update has been available since then.

75. The HKBA invites the Committee to raise question to the State Party as to the progress of such study, and makes the same recommendation as the jury of the coroner's court did since it would be a useful step to prevent torture and other cruel, inhuman and degreating treatment or punishment. Privacy concerns should be able to be properly addressed with appropriate data collection and user protocols in place.

Transgender and Intersex Persons

76. The HKBA notes that the Committee expressed concerns in its last Concluding Observations in 2016 at paragraph 28 that transgender persons are required to have completed sex-reassignment surgery (including the removal of reproductive organs, sterilizaiton and genital reconstruction) in order to obtain legal recognition of their gender identity, and recommended at pagraph 29 that the State Party should guarantee respect for the autonomy and physical and psychological integrity of transgender and interex persons, including the removal of abuse preconditions of the legal recognition of the gender identityof transgerder persons such as sterilization.

77. However, no such measures as recommended have been brought into place. In *Q v Commissioner of Registration* [2019] 1 HKLRD 1244, [2019] HKCFI 295, the Court of First Instance found that the restriction of requiring transgerder persons to undergo full sex reassignment surgery was justifiable. The Court justified its finding by holding that it was a legitimate aim for the government to seek to balance the public interests: at [21]-[26]. The Court went on to hold that such restriction was proportionate to achieve the

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cabbie-s-death> accessed 29 March 2021; Sophie Hui, "Arrested cabbie unlawfully killed, inquest finds" (The Standard, 25 October 2018) <https://www.thestandard.com.hk/section-news/section/11/201510/Arrested-cabbie-unlawfully-killed,-inquest-finds> accessed 29 March 2021; Kris Cheng, "Taxi driver who died after police grabbed him by the neck was unlawfully killed, jurors rule" (Hong Kong Free Press, 25 October 2018) <https://hongkongfp.com/2018/10/25/taxi-driver-died-police-grabbed-neck-unlawfully-killed-jurors-rule/> accessed 29 March 2021; the HKBA notes that there is an ongoing application for judicial review (HCAL 194/2019) by the involved police officer in relation to the death inquest and it will be heard on 18 October 2021: see Jasmine Siu, "Police officer launches legal bid to stop Hong Kong prosecutors charging him over unlawful death of taxi driver he helped arrest" (South China Morning Post, 22 January 2019) <https://www.scmp.com/news/hong-kong/law-and-crime/article/2183149/police-officer-launches-legal-bid-stop-hong-kong> accessed 29 March 2021.

[43] Christy Leung, "Police chief 'sad' but not sorry over unlawful killing of Hong Kong taxi driver" (South China Morning Post, 26 October 2018) <https://www.scmp.com/news/hong-kong/law-and-crime/article/2170437/police-chief-sad-not-sorry-over-unlawful-killing-hong> accessed 29 March 2021.

[44] "LCQ13: Police's procedures and guidelines on handling arrested persons" (HKSAR Government, 23 January 2019) <https://www.info.gov.hk/gia/general/201901/23/P2019012300454p.htm> accessed 29 March 2021.

aforesaid legitimate aim, "unless and until the society as a whole is readily equipped with the mentality and facilities that could be catered for transgender persons who, while still having intact the biological sex and reproductive organs of the assigned gender, have their chosen gender stated in the identification documents and paper": at [59]. The Court also held that there was no violation of the right against cruel, inhuman or degrading treatment or punishment, since a transgergender person voluntarily consented to such operation, notwithstanding that such operation is a necessary pre-requisite before transgender persons could change their gender entry on their identity cards: at [92]-[104].

78. It is also noted that the Government set up an Interdepartmental Working Group on Gender Recognition in 2014. However, in the past 7 years, it had only conducted Part 1 of the public consultation in 2017, and there is no sign of when Part 2 of the public consultation will be done or when it will ever make a report, let alone when the Government will put forward any administrative or legislative proposals in that respect.

Restraint of Children Tested Positive with COVID-19

79. The HKBA notes that there are recent news reports and official confirmations that children infected with COVID-19 have been restrained and secured to their beds in hospitals for an extended period of time.[45]

80. Given that such children have not caused or threatened to cause any violence or physical danger to any other persons, the HKBA is concerned if such measures, which almost totally depriving the children of any personal liberty, would constitute cruel, inhuman or degrading treatment or punishment. The HKBA invites the Committee to consider whether such treatments are compliant with Article 16, considering the physical constraint and mental impact which they could lead to.

Dated 28 April 2021

HONG KONG BAR ASSOCIATION

[45] Phila Siu and Elizabeth Cheung, "Hong Kong coronavirus: children restrained to ward beds for safety and parents told beforehand, officials say over row on isolation of babies" (South China Morning Post, 18 March 2021) <https://www.scmp.com/news/hong-kong/health-environment/article/3125882/hong-kong-coronavirus-children-only-restrained> accessed 29 March 2021; Joshua Berlinger "Stories of children separated from parents highlight the price of Hong Kong's coronavirus success" (CNN, 17 March 2021) <https://edition.cnn.com/2021/03/16/asia/hong-kong-quarantine-children-intl-hnk/index.html> accessed 29 March 2021.