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Panel on Home Affairs

**Background brief prepared by Legislative Council Secretariat
for the meeting on 9 June 2006**

**Second report on the Hong Kong Special Administrative Region
in the light of the International Covenant on Civil and Political Rights**

Purpose

This paper gives an account of the discussions of the Panel on Home Affairs in respect of the second report on the Hong Kong Special Administrative Region (HKSAR) in the light of the International Covenant on Civil and Political Rights (ICCPR). For the discussions of the Panel on the first report, members may wish to refer to the background brief on ICCPR prepared for the meeting on 10 March 2006 (LC Paper No. CB(2)1291/05-06(02) issued on 8 March 2006).

Background

2. The Government of the United Kingdom (UK) extended ICCPR to Hong Kong in 1976. Article 39 of the Basic Law (BL) provides that the provisions of ICCPR as applied to Hong Kong shall remain in force. On 22 November 1997, the Ministry of Foreign Affairs in Beijing announced that in order to fully realise the “one country, two systems” principle, separate reports on the implementation of ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the HKSAR would be submitted to the United Nations (UN) treaty monitoring bodies. The Government of the People’s Republic of China (PRC) ratified ICESCR in 2001. The Government of PRC has signed but has not yet ratified ICCPR.

3. Formerly, reports in the light of ICCPR were required every five years. Since 1999, the UN Human Rights Committee (HRC) has specified the date for the submission of the next report in its concluding observations issued after examination of the report submitted by the HKSAR. The first report on the HKSAR under ICCPR covering the period from 1 July 1997 to 30 June 1998 was submitted to UN on 11 January 1999 and was heard by HRC on 1 and 2 November 1999. HRC issued its Concluding Observations on the HKSAR’s first report on 15 November 1999 in which the date for the submission of the next report was set as 31 October 2003. A copy of the Concluding Observations in respect of the first report was issued vide

Annex A to LC Paper No. CB(2)1291/05-06(01) on 8 March 2006.

4. The second report on the HKSAR in the light of ICCPR was submitted to HRC in January 2005. HRC published in December 2005 a list of issues to be taken up in connection with the consideration of the second report. These issues cover a wide range of subjects including interpretation of the provisions of BL by the Standing Committee of the National People's Congress (NPCSC), setting up a human rights institution and the mandate of the Ombudsman, review of the Equal Opportunities Commission, and the status of the National Security (Legislative Provisions) Bill, etc.

5. The Administration's response to the issues raised by HRC was issued vide LC Paper No. CB(2)1514/05-06 on 23 March 2006.

6. After consideration of the second report on the HKSAR at its hearing held on 20 and 21 March 2006, HRC issued its concluding observations on 30 March 2006, a copy of which was issued vide LC Paper No. CB(2)1653/05-06(01) on 4 April 2006.

Panel discussions on the second report on the HKSAR in the light of ICCPR

Outline of topics to be included in the second report

7. The Home Affairs Bureau (HAB) issued the outline of topics to be covered in the second report on the HKSAR in the light of ICCPR in February 2003 for public consultation. The Panel on Home Affairs discussed the outline of topics with deputations and the Administration at its meetings on 11 April 2003. The major issues raised by members at that meeting are summarised in paragraphs 8 to 13 below.

Development of democracy

8. Ms Emily LAU considered that the Administration should explain in the second report of the HKSAR why constitutional reforms that should be implemented by 2007 had not yet been initiated. She also expressed concern about the remarks made by Secretary for Constitutional Affairs that the Administration had to examine the interpretation of paragraph 7 of Annex I to BL to see whether the method for selecting the Chief Executive (CE) could be amended by 2007 or after. She opined that the Administration should consult the public, if it concluded that constitutional reforms could only be introduced after 2007.

9. Ms Cyd HO considered that the abolition of the Provisional Municipal Councils and the Government's proposals to enact legislation for the implementation of BL23 indicated that there was a retrogression in the development of democracy in Hong Kong. Ms HO considered that the second report on the HKSAR should cover these issues in detail. The Administration responded that it did not consider that there was a retrogression in the development of democracy in Hong Kong. The Government of the HKSAR had a constitutional duty to enact legislation to give effect to the provisions of BL23. Human rights in the HKSAR would not be affected by introduction of the National Security (Legislative Provisions) Bill because it was

specifically provided that the interpretation, application and enforcement of its provisions must comply with the various international human rights treaties applicable to Hong Kong. The Administration would explain the issue in its second report to be prepared.

Monitoring of the implementation of ICCPR

10. Some members expressed dissatisfaction about the lack of monitoring over the implementation of ICCPR in the HKSAR and the Administration's failure to implement the UNHRC's recommendation of establishing an independent human rights commission in the HKSAR for such a purpose. The Administration responded that it would need to review relevant past discussions and consider the issue in the light of the availability of resources, the public administration system, and appropriateness of setting up such an institution at the present stage.

11. Ms Cyd HO expressed concern that the Department of Justice had said that ICCPR and the concluding observations of HRC were not legally binding. She considered that if the Government of the HKSAR was not legally required to implement ICCPR and the recommendations made by HRC in its concluding observations, it would be meaningless to discuss the progress of the Administration's work in this respect. The Administration assured the Panel that the Government of the HKSAR would respond to the concerns of HRC in its concluding observations made in 1999 in the second report to be prepared.

12. Mr Albert HO was of the view that to facilitate the monitoring over the implementation of ICCPR, the Administration should report the progress of its work in promoting human rights to the Legislative Council (LegCo) on an annual basis.

13. Members may wish to note that the Panel had discussed the monitoring mechanisms for the implementation of international human rights treaties in the HKSAR at its meeting on 9 May 2003. At the Panel's request, the Administration has been providing annual overviews of developments relating to the six treaties applicable to Hong Kong which entail an obligation to submit periodic reports to the UN treaty monitoring bodies since the 2003-04 session.

Second report on the HKSAR

14. The Panel discussed the second report on the HKSAR in the light of ICCPR at its meeting on 10 March 2006. The major issues raised by members at that meeting are summarised in paragraphs 15 to 30 below.

Implementation of the recommendations made by HRC

15. Some members expressed support for the Administration's position that the Government of the HKSAR should have regard to the special circumstances in the territory in following up the recommendations of HRC. They considered that the Government of the HKSAR should not undertake to implement any recommendations

made by HRC without regard to the actual situation of the territory.

16. Some other members, however, expressed disappointment at the slow progress made by the Administration in implementing the recommendations. These members queried the rationale for the Administration taking the view that the recommendations were of an exhortatory nature only. They considered that it did not reflect the commitment to fulfill the obligations under ICCPR if the State Parties refused to give an undertaking to follow the recommendations to be made by HRC.

17. The Administration explained that the Government of the HKSAR accepted the international obligations to implement ICCPR which were defined by the provisions of the Covenant and any relevant declarations and reservations. If the recommendations reflected a specific obligation in ICCPR, the Government of the HKSAR would be obliged to take action. However, the Government of the HKSAR was not obliged to follow a recommendation made by HRC as to a particular way of implementing the Covenant. The Administration reiterated that the Government of the HKSAR took the recommendations of HRC seriously. Many concerns raised by HRC had been addressed although not necessarily in the way suggested by the Committee.

Setting up an independent human rights institution

18. Some members reiterated their view that the Administration should set up an independent human rights institution, as repeatedly recommended by HRC, to investigate and monitor human rights violations in the HKSAR. They considered that the existing institutional arrangements were not effective for the implementation of the rights under ICCPR since many Government policies and measures relating to human rights were under the purview of policy bureaux other than HAB.

19. Members noted that it was the Administration's stance that there were adequate safeguards which provided a sound framework for the protection and enhancement of human rights in the HKSAR, and there was no need for such an independent human rights institution. The Administration explained that the Bill of Rights enabled the courts to provide effective remedies against violations of human rights, complemented by an independent judiciary, a sound and comprehensive legal aid system, an effective Ombudsman, and an active advisory committee on civic education. Moreover, the Government operated in the full view of a free and active press and was monitored by local and international non-governmental organisations. The Administration also considered that there were effective mechanisms within the Government to coordinate the formulation of policies which straddled various bureaux, e.g. the Policy Committee chaired by the Chief Secretary for Administration.

Methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008

20. With reference to the Interpretation and Decision promulgated by NPCSC on 6 April and 26 April 2004 respectively, Ms Emily LAU expressed concern about the

adverse impact on the principle of universal suffrage in the elections of CE and LegCo in 2007 and 2008 respectively. She also queried whether the Interpretation and Decision were consistent with the NPCSC's obligation to respect civil and political rights in the HKSAR.

21. The Administration explained that the NPCSC's power to make the interpretation originated from Article 67(4) of the Constitution of the People's Republic of China and BL158(1). The power of interpretation of BL conferred by BL158(1) was in general and unqualified terms, and its exercise was not restricted or qualified in any way by BL158(2) and 158(3). This principle had also been confirmed by the courts in the HKSAR. It was the Administration's view that the proposed package put forth in the Fifth Report of the Constitutional Development Task Force was consistent with the BL provisions as well as the Interpretation and Decision made by NPCSC in April 2004, and was a substantive and democratic package leading the HKSAR's political structure towards the ultimate aim of universal suffrage. While the proposed package did not receive the support of a two-thirds majority of all LegCo Members as required in BL, the Administration recognised the community's aspirations for universal suffrage and remained committed to promoting constitutional development in the HKSAR.

22. The Administration did not accept that the NPCSC Interpretation and Decision might be inconsistent with provisions of ICCPR. The Administration pointed out that the issue involved in the Interpretation was related to a determination of constitutional interpretation. In fact, the courts had not been given the power of final determination on all issues relating to constitutional interpretation and the application of the interpretation mechanism under BL158 in no way undermined the independence of the Judiciary.

23. In response to Miss CHOY So-yuk's question as to whether the existing electoral methods for selecting CE and for forming LegCo were legally in compliance with ICCPR. The Administration confirmed that the electoral system for selecting CE was consistent with ICCPR, as ICCPR did not mandate a particular type of system for the selection. The electoral system for forming LegCo would not be consistent with Article 25 of ICCPR if the reservation against Article 25(b) did not exist.

24. Ms Margaret NG requested the Administration to address the concerns raised by HRC that the electoral system for LegCo did not comply with several provisions including Article 25(b) of ICCPR. She considered that Article 25(b) applied once LegCo elections were held and the functional constituencies system in no way fulfilled the requirement of election by universal and equal suffrage.

25. The Administration maintained its view that insofar LegCo elections were concerned, the reservation against Article 25(b) which had existed when ICCPR was extended to Hong Kong still applied. The electoral system for the formation of LegCo was appropriate to the circumstances of the HKSAR and gave rise to no incompatibility with any of the provisions of ICCPR as it applied to the territory.

Prohibition of discrimination

26. Mr Ronny TONG considered that the Government of the HKSAR had a constitutional obligation and was also obliged under Articles 2 and 26 of ICCPR to enact legislation to prohibit discrimination against persons on any ground such as race, colour, sex, language, religion, political or other opinion, etc. Since people subject to discrimination were always the minorities in the community, it was unacceptable for the Administration to defer taking action on the excuse that the community had not yet reached a consensus on the need to introduce such legislation. He asked whether the Administration would consider enacting legislation as soon as possible to prohibit all forms of discrimination for the implementation of Article 26 of ICCPR.

27. The Administration explained that discrimination laws in Hong Kong specifically included sex, disability and family status as prohibited grounds of discrimination. After the enactment of the Race Discrimination Bill, the Administration would conduct further studies on the need to introduce legislation to prohibit discrimination on the grounds of sexual orientation, age and religion. In considering the need to introduce anti-discrimination legislation which might give rise to religious and moral controversies, it would be necessary for the Administration to first understand the public attitudes towards the subjects. It was not the Administration's stance that anti-discrimination legislation should be considered only when the majority of the community agreed to such a need. Since public education and seeking consensus in the community were important components of the initial phase of any legislative exercise, the Administration must need to know whether there was support in the community and LegCo in deciding whether to put forward any legislative proposal.

Establishment of a Mental Health Council

28. Dr Fernando CHEUNG raised the need for a Mental Health Council to coordinate policy formulation, programme delivery, research and public education in the area of mental health. The Administration informed the Panel that the Administration had put forward the issue to the Rehabilitation Programme Plan Review Working Group for discussion. The Working Group agreed that mental health was an important issue and should involve the participation of the whole society. The Working Group did not express the need for setting up a Mental Health Council but agreed that the Rehabilitation Programme Plan would address more on the issue of mental health including the enhancement of integrated services, inter-sectoral collaboration and tripartite partnership.

Basic needs of asylum seekers

29. Dr Fernando CHEUNG requested the Administration to address the concerns about the basic needs of asylum seekers in the HKSAR. The Administration informed the Panel that the Director of Immigration may, on a case by case basis, give an indication of no objection to the provision of schooling where removal was unlikely for a considerable length of time. The Administration also offered welfare

assistance in kind, in collaboration with non-governmental organisations, to asylum seekers who were deprived of basic needs while their claims were being processed by relevant authorities on a case-by-case basis. The types of assistance offered included temporary accommodation, food, clothing and counselling.

30. The Administration further explained that public hospitals and clinics would provide an asylum seeker with the necessary medical attention if he had in hand a valid Asylum Seeker Certificate issued by the UN High Commissioner for Refugees. The High Commissioner may issue a letter requesting the Hospital Authority (HA) to waive the medical fees on humanitarian ground if asylum seekers had difficulty in paying the charges at public hospitals and clinics. The bearer of such a letter would be granted an exceptional waiver by HA on a case-by-case basis. However, it was necessary for HA to discharge its duty to report any illegal immigrant or person who was suspected to have breached the conditions of his/her stay in the territory to the authorities concerned.

Relevant motion and questions moved/raised at Council meetings

31. A motion was moved by Ms Emily LAU at the Council meeting on 1 March 2006 urging the Government to implement the recommendations of HRC. The motion was negatived.

32. Details of the questions relating to ICCPR raised at Council meetings since the first term of LegCo are in **Appendix I**.

Relevant papers

33. A list of relevant papers, minutes of meetings and reports in **Appendix II**.

**Questions relating to the International Covenant on Civil
and Political Rights raised by Members at Council meetings
since the first term of the Legislative Council**

Meeting Date	Question
2 December 1998	Hon LEUNG Yiu-chung raised an oral question on the submission of reports by the Government of the Hong Kong Special Administrative Region (HKSAR) under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
9 June 1999	Hon Ambrose CHEUNG raised an oral question on potential breach of the Basic Law (BL) and relevant International Covenant as a result of dissolution of the Provisional Municipal Councils.
24 November 1999	Dr Hon YEUNG Sum raised an oral question on the Government's follow-up action on the Concluding Observations of the United Nations Human Rights Committee.
8 December 1999	Hon Emily LAU raised an oral question on the need to modify the electoral systems to achieve full compliance with ICCPR.
29 March 2000	Hon Cyd HO raised a written question on the detention of ex-prisoners pending deportation or removal.
21 February 2001	Hon Cyd HO raised a written question on the deportation and removal of persons and the reservation with respect to relevant provision of ICCPR.
12 December 2001	Hon James TO raised an oral question on the Falun Gong followers in Hong Kong and the protection of the freedom of assembly and of speech under BL and ICCPR.
18 December 2002	Hon LEE Cheuk-yan raised a written question on the operation of the Appeal Board on Public Meetings and Processions and measures to ensure that its board members had full understanding of, among others, ICCPR.
9 April 2003	Hon Cyd HO raised a written question on legal aid applications in respect of litigations relating to breaches of the Hong Kong Bills of Rights Ordinance and/or inconsistency with ICCPR.
20 October 2004	Hon Fred LI raised a written question on the accessibility of polling stations by the mobility-handicapped persons to protect their right to vote at elections.

Meeting Date	Question
1 March 2006	Hon Emily LAU raised an oral question on the Administration's plan to enact a new legislation subsequent to the ruling of the Court that the Law Enforcement (Covert Surveillance Procedures) Order was inconsistent with BL30 Law and that section 33 of the Telecommunications Ordinance was also inconsistent with relevant provisions of BL and ICCPR.

Council Business Division 2
Legislative Council Secretariat
6 June 2006

A list of relevant papers

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
13.3.00	Panel on Home Affairs	Concluding observations made by the United Nations Human Rights Committee on the initial report of the Hong Kong Special Administrative Region (HKSAR) of People's Republic of China in the light of the International Covenant on Civil and Political Rights (ICCPR)	CB(2)338/99-00(01) http://www.legco.gov.hk/yr99-00/english/panels/ha/papers/338e01.pdf
11.4.03	Panel on Home Affairs	Minutes of meeting	CB(2)1959/02-03 http://www.legco.gov.hk/yr02-03/english/panels/ha/minutes/ha030411.pdf
		Administration paper on "An outline of the topics to be covered in the second report on the HKSAR under ICCPR"	CB(2)1219/02-03(01) http://www.legco.gov.hk/yr02-03/english/panels/ha/papers/ha0314cb2-1219-1e.pdf
		Submission from Equal Opportunities Commission	CB(2)1748/02-03(01) http://www.legco.gov.hk/yr02-03/english/panels/ha/papers/ha0411cb2-1748-1e.pdf
		Submission from Hong Kong Human Rights Commission	CB(2)1680/02-03(02) http://www.legco.gov.hk/yr02-03/english/panels/ha/papers/ha0411cb2-1680-2e.pdf
		Submission from Hong Kong Confederation of Trade Unions	CB(2)1680/02-03(03) (Chinese version only)

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
		Submission from Hong Kong Bar Association	CB(2)1775/02-03(01) http://www.legco.gov.hk/yr02-03/english/panels/ha/papers/ha0411cb2-1775-1e.pdf
		Submission from The Frontier	CB(2)1775/02-03(02) (Chinese version only)
10.3.06	Panel on Home Affairs	Minutes of meeting	CB(2)1610/02-03 http://www.legco.gov.hk/yr05-06/english/panels/ha/minutes/ha060310.pdf
		Administration's paper on "Submission of report by the HKSAR in the light of ICCPR "	CB(2)1291/05-06(01) http://www.legco.gov.hk/yr05-06/english/panels/ha/papers/ha0310cb2-1291-1e.pdf
		Second report on the HKSAR of the People's Republic of China in the light of ICCPR	http://www.legco.gov.hk/yr05-06/english/panels/ha/papers/ha0310cb2-iccpr-e.pdf
		Administration's response to the list of issues raised by the Human Rights Committee on 7 December 2005	CB(2)1514/05-06(01) http://www.legco.gov.hk/yr05-06/english/panels/ha/papers/ha0310cb2-1514-1e.pdf
		Concluding observations adopted by the United Nations Human Rights Committee on the second report of the HKSAR in the light of ICCPR	CB(2)1653/05-06(01) http://www.legco.gov.hk/yr05-06/english/panels/ha/papers/hacb2-1653-1e.pdf
		Administration's response to the suggestion put forward by the Equal Opportunities Commission about the establishment of a Mental Health Council	CB(2)1910/05-06(01) http://www.legco.gov.hk/yr05-06/english/panels/ha/papers/ha0310cb2-1910-1e.pdf

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
		Administration's response to members' concerns regarding the basic needs of asylum seekers in Hong Kong	CB(2)1954/05-06(01) http://www.legco.gov.hk/yr05-06/english/papers/ha0310cb2-1954-1e.pdf
		Submission from Equal Opportunities Commission	CB(2)1291/05-06(03) http://www.legco.gov.hk/yr05-06/english/papers/ha0310cb2-1291-3e.pdf
		Submission from Hong Kong Bar Association	CB(2)1291/05-06(04) http://www.legco.gov.hk/yr05-06/english/papers/ha0310cb2-1291-4e.pdf
		Joint submission from Hong Kong Human Rights Commission, Voices of the Rights of Asylum Seekers and Refugees and Society for Community Organization	CB(2)1291/05-06(05) http://www.legco.gov.hk/yr05-06/english/papers/ha0310cb2-1291-5e.pdf
		Submission from The Association for the Advancement of Feminism	CB(2)1291/05-06(06) (Chinese version only)
		Submission from Hong Kong Human Rights Commission	CB(2)1319/05-06(01) (Chinese version only)
		Submission from EOC Concern Group	CB(2)1338/05-06(01) http://www.legco.gov.hk/yr05-06/english/papers/ha0310cb2-1338-1e.pdf
		Submission from Democratic Party	CB(2)1347/05-06(01) (Chinese version only)

Date of meeting	Meeting	Minutes/Paper	LC Paper No.
		Submission from Hong Kong Committee on Children's Rights	CB(2)1347/05-06(02) http://www.legco.gov.hk/yr05-06/english/papers/ha/papers/ha0310cb2-1347-2e.pdf
		Submission from Hong Kong Christian Institute	CB(2)1358/05-06(01) (Chinese version only)
		Joint submission from the Power for Democracy and the Frontier to the United Nations	CB(2)1580/05-06(01) http://www.legco.gov.hk/yr05-06/english/papers/ha/papers/ha0310cb2-1580-1e.pdf
		Submission from 23 pro-democracy members of the Legislative Council to the United Nations	CB(2)1580/05-06(02) http://www.legco.gov.hk/yr05-06/english/papers/ha/papers/ha0310cb2-1580-2e.pdf
		Submission from the Democratic Party to the United Nations	CB(2)1580/05-06(03) http://www.legco.gov.hk/yr05-06/english/papers/ha/papers/ha0310cb2-1580-3e.pdf