香港兒童權利委員會
THE HONG KONG COMMITTEE ON CHILDREN'S *RIGHTS*

Submission to the Panel on Home Affairs of the Legislative Council in response to the 2nd report by HKSAR Government in light of the International Covenant on Civil and Political Rights

The Hong Kong Committee on Children's Rights takes this opportunity to draw attention to particular aspects of the situation relating to children and young persons under the ICCPR in the HKSAR as follows:

1. Promoting the Best Interests of the Child

Article 2 of the ICCPR

1.1 We wish to emphasize that the setting up of *a series of forums* by the HKSAR government including a Human Rights Forum, Ethnic Minorities Forum, Sexual Minorities Forum, NGO Forum on Community Development and more recently the Children's Rights Forum, can by no means be a substitute for an independent body to investigate and monitor human rights violations in the HKSAR as proposed by the United Nations Human Rights Committee in its concluding observations on the last occasion when it considered the periodic report (15th November 1999) on the HKSAR[1]. These forums are passive and hardly address the concerns and aspirations of the public.

1.2 In respect of the rights of children, we urge the Panel to request the HKSAR government to set up an independent Children's Commission, in accordance with the Paris Principles (please see Annex 1 for the extracts of the Paris Principles), to champion children's rights and ensure that their needs are considered by all levels and arms of government and all elements of society consistent with the principles of the Convention on the Rights of the Child. We do not accept that the Commission on Youth could be an appropriate forum for this purpose.

2. The Administration of Juvenile Justice

Article 10 of the ICCPR

2.1 While the current stated practice is that young prisoners below the age of 21 are separated from those aged over 21, youngsters as young as 14 can still be held

[1] CCPR/C/79/Add.117

together with young adults aged between 18 and 20. We are shocked that in this century the HKSAR government can seek to use "overcrowding" as an excuse to avoid its responsibility for the protection of juveniles. We regret that reservations remain with regard to Articles 10.2 (b) and 10.3 of the ICCPR as applied to HKSAR, as juveniles are vulnerable, should always be segregated from adult offenders and be accorded treatment appropriate with their age and legal status.

Article 14 of the ICCPR

2.2 The UN Committee on the Rights of the Child, in its concluding observations issued on 30 September 2005 ,after consideration of the second report submitted by China of which HKSAR initial report formed a part ("UNCRC Concluding Observations 2005"), recommended that the "State party ensure that all children under the age of 18 are consistently accorded special protection when coming into conflict with the law, and that their cases are heard in specialized juvenile courts by appropriately trained magistrates"[2].

Section 3C (2) (a) of the Juvenile Offenders Ordinance (Cap 226) which stipulates that "a charge made jointly against a child or young person and a person who has attained the age of 16 years shall be heard by a court of summary jurisdiction other than a juvenile court" is in violation of the principle of "the best interests of the child" in the juvenile justice system and Article 14.4 of the ICCPR.

Article 24 of the ICCPR

2.3 Since the last report submitted by the HKSAR government, the minimum age of criminal responsibility was raised from 7 to 10 (2003). However, we are strongly of the view that the age of 10 (i.e. the age of a primary 5 student) is far too low to be acceptable. We would stress that while there was consensus in the community to raise the minimum age, there was no consensus that 10 is the appropriate age. Many parties proposed raising it to 12 or 14, in line with neighbouring jurisdictions. (i.e. China and Taiwan: 14, Macau: 16). In the HKSAR Administration's Response to concerns raised by the Bills Committee on the Juvenile Offenders (Amendments) Bill 2001[3], the Security Bureau concluded that "We hope that Members of the Bills Committee will support raising the minimum age of criminal responsibility from seven to ten at this stage. We undertake to propose raising the age further from ten to 12 years of age when we put forward proposals to provide additional supportive measures for unruly children below the minimum age".

[2] Paragraph 94 (c) of the UNCRC Concluding Observations 2005
[3] LC Paper No. CB(2) 965/02-03(02)

2.4 The HKSAR government, in response to the UNCRC Concluding Observations 2005 claimed that "the current age of 10 is not out of line with the practice of most common law jurisdictions". This is a distraction and indeed a direct contradiction to the recommendations of the UN Committee on the Rights of the Child– first made in 1996[4] and repeated in 2005[5] – that the HKSAR government shall give consideration to "raise the minimum age of criminal responsibility to an internationally acceptable level", instead of just comparing with some countries using the common law. Some of the latter have raised the age in their own countries in recent years and do not merely follow British initiatives.

The HKSAR government appears to have taken an administratively convenient step by raising the age only to 10, mainly because there had been a relatively small number of prosecutions of children under the age of 10 in the preceding years. This lack of a logical or sincere approach to the protection of children does not do justice to children, nor does it address the recognized and proper age of moral understanding of children.
(Please see Annex 2 for the position of HKCCR on the criminalizing of children in Hong Kong)

2.5 In the HKSAR, there are inconsistencies in legislation in our approach to children. For instance:

- Prior to 1995, evidence of children below the age of 14 had to have corroboration. Since 1995 this is not required and evidence is unsworn, recognizing that children of this age are incapable of understanding the nature of sworn testimony.
- In the Criminal Procedure Ordinance, a child means a person who is under 17 in the case of an offence of sexual abuse; or under 14 in the case of an offence other than an offence of sexual abuse.
- For a girl under 16, even if she consents to sexual intercourse, her partner will be charged i.e. basically she cannot consent (Offences Against the Person Ordinance)

These few examples in legislation reflect differing conceptions about children's reasoning ability, a child's comprehension and decision making ability or responsibility, and approaches to the protection of children up to at least the age of 14.

2.6 No breakdown for the number of prosecutions involving young persons under the age of 16 could be provided by the Judiciary and the Department of Justice. This

[4] The concluding observations issued by the United Nations Committee on the Rights of the Child on 30 October 1996, after consideration of the report submitted by the United Kingdom of Great Britain and Northern Ireland – Hong Kong
[5] The UNCRC Concluding Observations 2005

seems to demonstrate a lack of sincerity on the part of the HKSAR government in respect of its pledge to review the situation regularly. The attitude of the HKSAR government reflects a limited vision and understanding of the welfare of children, the nature of childhood and the current status of young persons' involvement in the juvenile justice system. This must inevitably handicap the HKSAR government in having a comprehensive juvenile justice system including developing and implementing policies to deter re-offending and facilitate rehabilitation of young offenders. In view of what we understand has been the concern of the Security Bureau about the use of juveniles by adult criminals we would request to have information about this phenomenon.

2.7 The Security Bureau commissioned a research on the Measures Alternative to Prosecution for Handling Unruly Children and Young persons in 2003 in respect of the raised minimum age (10) of criminal responsibility[6] (the "Commissioned Study"). Recommendations including use of Family Conferencing and Empowerment Programme for young offenders were made. However, implementation of the recommendations is in doubt. On many occasions, we have learned, police officers have simply released the young delinquents who are below the age of 10 without any follow up measures.

2.8 At the 30th meeting of the House Committee of the Legislative Council held on 25 June 2004[7], the Hon Margaret Ng, Chairman of the Subcommittee on Juvenile Justice System, requested the Administration to report to the relevant Panels in the new LegCo term on:

(a) the effectiveness of the enhanced support measures introduced by the Administration since October 2003 and (b) the outcome of the review on the development of a new juvenile justice system incorporating the principles and practices of restorative justice.

We agree with the Subcommittee that there is a need for positive steps to be taken to develop a new juvenile system featuring restorative and reintegrative principles and practices. We would like to know from the HKSAR government the progress on the follow up to the Commissioned Study, and the positive steps taken by the Administration to foster the development of a new juvenile justice system.

2.9 We agree with the recommendations made by the Law Reform Commission in the Report on Child Custody and Access in March 2005, that:

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[6] Measures Alternative to Prosecution for Handling Unruly Children and Young Persons: Overseas Experiences and Options for Hong Kong, Commissioned by: Security Bureau, HKSAR Government, Youth Studies Net, City University of Hong Kong, Dr. T. Wing Lo, Dr. Dennis S. W. Wong, Dr. Gabrielle Maxwell, August 2003

[7] LC Paper No. CB(2) 3052/03-04

i) legal representation be provided as a matter of course for young people in proceedings involving possible loss of liberty, including proceedings brought under the Protection of Children and Juveniles Ordinance (Cap 213).
ii) special training on how to interview and represent children should be provided to lawyers, and only lawyers with this special training should handle these sensitive and complex cases. These arrangements should also apply to cases involving care and supervision orders in the Family Court.

We would request the Panel to ask the HKSAR government about progress made in implementing the relevant recommendations of the above report.

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Annex 1

Extracts of the Paris Principles

United Nations A/RES/48/134

General Assembly

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ANNEX

Principles relating to the status of national institutions

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, inter alia, have the following responsibilities:

(a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

(i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the

legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

(ii) Any situation of violation of human rights which it decides to take up;

(ii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

(iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

(b) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

(d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

(e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;

(f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be

established with, or through the presence of, representatives of:

(a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

(b) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

(e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

(a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;

(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;

(e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

(f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular

ombudsmen, mediators and similar institutions);

(g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

(a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

Annex 2

The Hong Kong Committee on Children's Rights
Views on the Age of Criminal Responsibility in Hong Kong

The purpose of the criminal law has traditionally been stated to be the protection of society, the deterrence of the criminal and of others from the commission of acts forbidden by the law, and the punishment of the guilty. The law proceeds on the assumption that criminals are responsible people, free to decide to commit or refrain from committing crime.

Studies show that autonomous morality in an individual does not truly begin to develop until a child is aged 12 or 13. A theorist on moral development, Lawrence Kohlberg illustrates 3 levels of moral reasoning. Level 2 is at middle adolescence when conventional reasoning is developed. Many studies support the theory that children will have reached a level of conventional reasoning at 14, at which time they may more reliably perceive society's expectations of law abiding behaviour.

Children are weak and vulnerable. They are in great need of an adult's guidance and supervision. This concept is generally supported by the respondents of a Study undertaken by the Hong Kong Federation of Youth Groups in 1998 (44.8% said that a person is only mature at age 18 to 20). The concept would seem to be supported by Hong Kong's Police Superintendent's Discretion Scheme which seeks, as a general principle and whenever possible, to deal with young people under age 18 without resorting to the courts i.e. to caution them if it is a first offence. Should the behaviour of an ignorant child, which in an adult capable of moral reasoning would be criminal, result in the criminalization of the child lacking such reasoning capacity?

The earlier we criminalize a child, the more difficulties he encounters in his life, and this denies him the right to childhood as well as depriving him of opportunity to learn to behave and to control himself in the period of transition to adulthood.

If we adopt an approach similar to Scandinavia we can decriminalize the acts of children under the age of 14 while we can, at the same time, retain the power to protect society and to rehabilitate that child, giving him access to "the protective and rehabilitative opportunities".

In the meeting of the Subcommittee in juvenile justice system held on 14 May 2004[1], Hon Margaret Ng and Ms Miriam Lau opined that the Administration had made little progress in developing a new juvenile justice system since the Juvenile Offenders

[1] LC Paper No. CB(2)3113/03-04

(Amendment) Bill 2001. We strongly believe that positive steps by the government are needed to take forward the development of a new juvenile justice system featuring more of a restorative justice approach.