

Legislative Council Panel on Home Affairs

**Initial response to the Concluding Observations
of the United Nations Human Rights Committee
on the Second Report
of the Hong Kong Special Administrative Region (HKSAR) in the
light of the International Covenant on Civil and Political Rights**

Introduction

The Human Rights Committee considered the Second Report of the Hong Kong Special Administrative Region (HKSAR) in the light of the International Covenant on Civil and Political Rights (ICCPR) at its 2350th and 2351st meetings, on 20 and 21 March 2006. A 10-member government delegation led by the Permanent Secretary for Home Affairs attended the hearing to provide further information to the Committee. The Committee adopted its concluding observations at its 2364th and 2365th meetings on 30 March 2006, issuing them on 31 March, New York time. The concluding observations are attached at the Annex. The purpose of this paper is to inform the Panel of the Government's preliminary response to these observations, as Members requested at the meeting on 7 April 2006. Representatives of the Administration will attend to answer Members' questions about the contents.

2. In the concluding observations, the Committee welcomed the submission of the HKSAR's second report which was compiled in conformity with the reporting guidelines. It also appreciated the constructive dialogue with the delegation who provided comprehensive replies to the written and oral questions formulated by the Committee and the consultative process adopted by the HKSAR Government in compiling the report. The Committee commended Hong Kong in a number of key areas. These included our efforts in meeting the needs of minority communities, the promotion of racial harmony and non-discrimination on the grounds of sexual orientation, the establishment of an administrative procedure for assessing claims of torture made by persons facing deportation, and our measures against domestic violence. In response to these general remarks, we welcome the Committee's endorsement of our work and will continue with efforts in safeguarding human rights in the HKSAR.

3. The Committee has expressed concerns on certain subjects and provided its recommendations. Our preliminary response arranged in the order of these concerns and recommendations as they appear in the concluding observations is as follows.

Response to the Committee's concerns and recommendations

Non-implementation of previous recommendations [paragraph 8]

4. We hold the Committee and its views in the highest esteem and implement its recommendations, either wholly or in part, where they are feasible, practicable, affordable and in line with local circumstances. That said, it remains a fact that unlike international laws, the recommendations made by the United Nations' treaty monitoring bodies are of an exhortatory nature rather than legally-binding. We appreciate the Committee's good will in making those recommendations. But the Government has the ultimate responsibility for the governance and well being of our people and must act as we, as the authorities on the spot, judge to be right and responsible in the prevailing circumstances. This being our highest priority, we must sometimes respectfully differ with the Committee as to what can or should be done. And that is the case in regard to the recommendations that the Committee cites in paragraph 8. The principle applies in relation to several of the concerns and recommendations addressed below.

5. As regards the specific recommendation that we establish a human rights commission, our position remains that that Hong Kong's current human rights framework, underpinned as it is by the rule of law, an independent judiciary, a comprehensive legal aid system, our three human rights institutions - namely the Equal Opportunities Commission, the Ombudsman, and the Office of the Privacy Commission, and a free and vigilant media corps, provides sufficient protection and support for human rights in the SAR. We therefore see no obvious need for another human rights institution and have no plans or timetable for the establishment of such an institution in the immediate future.

Investigations of police misconduct [paragraph *9¹]

6. The Complaints Against Police Office (CAPO), which is responsible for investigating into complaints against the police, operates independently of all operational and support formations of the Hong Kong Police Force (the Police). The Independent Police Complaints Council (IPCC), an independent body comprising non-official members from a wide spectrum of the community, closely monitors and reviews CAPO investigations. There are effective checks and balances to ensure that complaints are handled thoroughly, fairly and impartially. The IPCC examines all investigation reports submitted by CAPO and may, as necessary, interview complainants, complainees, and witnesses. It may also ask CAPO to submit for its reference any document or information relevant to a complaint. CAPO addresses questions that the Council may raise about a case and will re-investigate the case if the Council so requests. We are taking steps to convert the IPCC into a statutory body, and are preparing the necessary legislative proposals. This should increase the transparency and credibility of the system.

Protection of asylum seekers [paragraph 10]

7. Our position is that the existing mechanism provides effective safeguards for persons liable to deportation. They are given opportunities to make representations before the issue of deportation orders. Additionally, deportees may –

- (a) lodge an objection under section 53 of the Immigration Ordinance with the Chief Secretary for Administration within 14 days, for consideration by the Chief Executive in Council;
- (b) request the suspension or rescission of the deportation order under sections 54 and 55 of the Immigration Ordinance;
- (c) petition to the Chief Executive under Article 48 of the Basic Law for the suspension or rescission of their deportation orders; and
- (d) apply to the Court for judicial review.

¹ Asterisked paragraphs are those earmarked for response within one year, in accordance with the Committee's request at paragraph 21 of the concluding observations (see paragraph 42 below).

8. Administrative procedures have also been put in place for the assessment of claims made under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Claimants whose claims are established will not be removed to places where there are substantial grounds for believing that they would be in danger of being subjected to torture. Unsuccessful claimants may lodge petitions with the Chief Executive pursuant to Article 48 of the Basic Law. The Secretary for Security – acting under delegated authority from the Chief Executive - will consider such petitions and his decisions are subject to judicial review.

Hong Kong residents detained on the Mainland [paragraph 11]

9. The ‘Reciprocal Notification Mechanism’ introduced in January 2001 provides that the Mainland authorities will notify the Hong Kong Police of the unnatural deaths of Hong Kong residents in the Mainland and the imposition by the authorities there of criminal compulsory measures on Hong Kong residents². In June 2003, the mechanism was extended to cases under the purview of the People’s Procuratorates and the Ministry of State Security. On a reciprocal basis, the Hong Kong Police will notify Mainland authorities of criminal prosecutions instituted by the Hong Kong Police, the Customs and Excise Department and the Immigration Department against Mainland residents, and the unnatural deaths of Mainland residents in Hong Kong.

10. Upon receiving notifications from the Mainland authorities, the Hong Kong Police would inform the families of the detainees concerned as soon as practicable and provide them with the contact details of the Immigration Department’s ‘Assistance to Hong Kong

² The compulsory measures (強制措施) that can be taken by the People's Courts, the People's Procuratorates and the public security organs in the investigation of criminal offences in the Mainland are defined in Chapter VI of Part One of the *Criminal Procedure Law of the PRC*. These are –

- to issue a warrant to compel appearance (拘傳);
- to obtain a guarantor pending trial (取保候審): similar to the granting of bail in the Common Law;
- to place (a person) under residential surveillance (監視居住);
- arrest (逮捕); and
- detention (拘留).

Residents Unit', the Office of the Government of the HKSAR in Beijing, and the Hong Kong Economic and Trade Office in Guangdong in case they need to seek our assistance. We will provide practical assistance and convey any request or appeal to the Mainland authorities as appropriate.

11. The mechanism provides that notification is to be made as soon as practicable. If we learn of any case that has not been notified, or if there is any doubt in any particular case, the Hong Kong Police will make enquiries with the Mainland Notification Unit.

12. As at the end of March 2006, the Mainland Notification Unit had made a total of 3,943 notifications involving 2,980 Hong Kong residents, of whom 2,758 persons were subject to criminal compulsory measures and 222 were dead. The cases relating to the imposition of criminal compulsory measures mostly concerned offences of fraud and smuggling. Most of these were committed in Guangdong Province.

13. The HKSAR Government will continue to make full use of the Reciprocal Notification Mechanism inform family members of affected Hong Kong residents as soon as practicable. The mechanism operates smoothly and the two sides will review it periodically to ensure that it continues to meet the needs of Hong Kong residents in distress.

Interception of communications and covert surveillance [paragraph 12]

14. In March 2006, we introduced the 'Interception of Communications and Surveillance Bill' into the Legislative Council. The Bill seeks to regulate the conduct of interception of communications and the use of surveillance devices by law enforcement agencies. It proposes a regime with comprehensive safeguards, such as authorization of interception of communications and more intrusive covert surveillance by members of a panel of judges, the establishment of an independent oversight authority to review and receive complaints, and so forth. We believe that the new regime, as proposed, will be in full conformity with the Covenant, including article 17. We envisage the Bill being enacted within the current legislative year (that is, by July 2006).

***Intimidation and harassment of journalists and media personnel
[paragraph 13*]***

15. As we stressed during the hearing, Hong Kong is a safe and peaceful city, with a crime rate lower than that of many developed countries. The Government is committed to protecting the safety and property of every member of the community, and will not tolerate any acts of violence, damage of property, or criminal intimidation. The Police investigate any allegations of such intimidation thoroughly, and swift action is taken to uphold the law and protect the rights and freedoms of everyone in Hong Kong. At the same time, the investigation of a crime and any subsequent prosecutions must proceed in conformity with the rule of law. Any prosecution and judicial proceedings must be based on sufficient and concrete evidence.

16. The Police most rigorously pursued cases referred to in observation 13, diverting additional resources and effort to their investigation. In one of the two cases, the offenders were arrested and convicted. The other case is still under investigation. So far no evidence has been discovered to indicate that the offences were committed in response to the views expressed by the victims.

17. The Hong Kong media has always operated without intervention from the Government. The freedoms of speech, of the press, and of publication are (inter alia) guaranteed under Article 27 of the Basic Law and under Article 16 of the Bill of Rights, which gives effect in domestic law to Article 19 of the Covenant. There has been no departure from these guarantees, nor would the Government contemplate such departure.

Treason and sedition [paragraph 14]

18. One of the aims of the National Security (Legislative Provision) Bill of 2003 was to modernise the existing offences of treason and sedition. However, we decided to withdraw the Bill in the light of public concern.

19. Hong Kong courts have long held that the judiciary should “give a generous interpretation to the provisions in Chapter III [of the Basic Law] that contain constitutional guarantees of freedoms that lie at the heart of Hong Kong’s separate system.” (*Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211). In adjudicating cases where human rights are involved, the Court of Final Appeal held that –

“In interpreting the provisions of Chapter III of the Basic Law and the provisions of the Bill [The Hong Kong Bill of Rights], the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals, on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions.” (*Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793)

Hong Kong has a strong tradition on the rule of law. Like other provisions in our criminal code, the existing offences of treason and sedition under the Crimes Ordinance will be construed in accordance with the human rights provisions of the Basic Law, if and when the occasion arises.

Split families and the right of abode [paragraph 15*]

20. As we explained in our response to question 19 in the Committee’s list of issues, Mainland residents who have no legal right to stay in Hong Kong must return to the Mainland. The Director of Immigration may exercise his discretion on a case-by-case basis to allow individual Mainland residents to stay if there are exceptional humanitarian or compassionate considerations.

21. Whilst we fully understand and respect the wish for family reunion, it is not an absolute right. Governments worldwide require people who wish to join their families to submit – prior to entering the jurisdictions in question – formal applications for processing in accordance with local laws and policies.

22. Eligible Mainland residents who wish to settle in Hong Kong must apply under the One-way Permit Scheme for exit permits from the Mainland authorities in accordance with the relevant national laws and administrative regulations. In order to ensure orderly entry at a rate that our socio-economic infrastructure can practicably absorb, the Scheme is subject to a daily quota of 150 entrants, or 54,750 a year. Applications are assessed in accordance with a transparent point-based system. Between July 1997 and 31 October 2005, over 433,000 Mainland residents have settled in Hong Kong under the Scheme.

23. Many right of abode claimants who have returned to the Mainland have successfully applied for settlement in and visits to Hong Kong through the proper legal channels. In 2005, over 11 million Mainland visitors came to Hong Kong.

Domestic violence [paragraph 16]

24. We can assure the Committee that Hong Kong will spare no effort in combating domestic violence through cross-sectoral co-operation, enhanced training for police officers, and support programmes for victims and offenders. This response explains the specific ways in which we are tackling the issue.

25. Police officers are trained to handle victims of – or at risk of – violence (whether domestic, sexual, or both) with compassion and care. Indeed, the handling of such cases is included in the basic training programme for new recruits. Continuation training on the subject is provided for police officers through promotion and development courses, and through Training Day packages. The training content also takes account of the need to prevent and detect crime in domestic violence, as well as the need for sensitivity, conflict management skills and awareness of victim psychology.

26. In December 2004, an ‘Acknowledgement System’ was introduced to strengthen communication between frontline police officers and social workers of the Social Welfare Department. On receiving a Police referral under the System, the Department puts the Police in contact with the responsible social worker and advises whether the parties to the case have received support services. This information

may also be accessed through a Central Domestic Violence Database', which is discussed immediately below.

27. In March 2005, with a view to improving the Police response to reports of domestic violence, the Force introduced the 'Central Domestic Violence Database' to record all relevant cases known to the Police that occurred in the last two years. This enables frontline officers to make more evidence-based risk assessments and thence better-informed decisions as to the appropriate mode of intervention. The database will be upgraded in August 2006 with the installation of an alert mechanism that will automatically alert Divisional supervisory officers of repeat incidents.

28. Also in early 2005 – with a view to strengthening multi-disciplinary collaboration, which includes liaison and cooperation at the frontline working level – the Social Welfare Department formed 13 'District Liaison Groups on Family Violence'. These are chaired by District Social Welfare Officers from the Department and core members include representatives from local NGOs, social welfare service units, and a Chief Inspector from each of the Police Districts concerned. This helps to ensure that cases are dealt with expeditiously.

29. Additional improvements will come on stream in August 2006, with the introduction of an 'Emergency Referral Questionnaire and Action Checklist'. The Questionnaire is an assessment tool to guide officers in identifying existing high risk factors within victim families. It will do so by taking the user through a series of simple but crucial threat assessment questions, based on methods and principles that have been widely adopted in overseas jurisdictions for the policing of domestic violence. The answers will facilitate assessment of whether immediate threat management is required, whether victims and their children should be removed to a place of refuge, or whether to call out Social Welfare Department's response teams immediately. The Checklist provides guidance on the appropriate action to be taken at the scene.

30. The foregoing relates to the role of Police. The role of the Social Welfare Department and the legal framework for the protection of victims of domestic violence remain as explained in our response to question 5 of the Committee's list of issues. But as regards the

Committee's concerns about the funding of social services for victims of domestic violence, we are pleased to advise that the Department has a budget of US\$171 million for the year 2006-07, which will enable it and subvented NGOs to provide a wide range of family and child welfare-related services. Those services include counselling, shelters for battered women, child care, clinical psychology, emergency financial support, compassionate re-housing, and a batterer-intervention programme. Within this budget, the sum of US\$18.7 million has been earmarked for the provision of specialised services that specifically target victims of domestic violence and families in crisis. These efforts will continue.

Harassment of legislators [paragraph 17]

31. As we have explained in response to observation 13 (paragraphs 15 to 17 above), the Government accords the utmost importance to protecting the safety and property of the community and to safeguarding the freedoms of speech and of the press, both of which are guaranteed under the Basic Law and the Bill of Rights. We will not tolerate criminal acts of any kind.

32. Most of the criminal acts against Legislative Council Members were of a relatively minor nature, comprising such things as the vandalism of publicity banners and acts of minor nuisance. Nevertheless, in view of the nature of these cases the Hong Kong Police accorded much importance to these incidents and took rigorous measures to deal with them. Those measures include taking statements from relevant parties, locating witnesses, gathering evidence at scenes of crime, establishing the culprits' profiles, and analysing their modus operandi. Depending on the evidence available and subject to legal advice, the Police may arrest and lay charges against the persons concerned.

33. Difficulties commonly encountered in the investigation of such cases include the lack of direct links between the culprits and their victims and the often limited availability of information related to the cases that can be obtained from the witnesses and victims. Clearly, the investigations – and any subsequent prosecutions – must proceed in conformity with the rule of law and that requires that proceedings must be based on sufficient and concrete evidence. And conclusions should

not be drawn on the basis of speculation or rumours. The Police are committed to protecting public safety and will not tolerate the use of violence or the threat of violence, whether the victims are ordinary members of the public or well known public figures. The Police will continue their investigations and will offer appropriate protection to witnesses and victims as necessary.

34. As regards the observation that we did not supply the Committee with information about this matter, the fact is that we were unable to do so at the hearing because the matter was raised on the second day when it was too late for us to obtain the details from Hong Kong. And because a proper response required the collation of information from different sources, it was not possible to respond before the Committee issued its concluding observations. Nevertheless, we will do so at the earliest appropriate opportunity, which we judge to be the submission in March 2007 of our response to, inter alia, observation 13, which covers ground similar to that in observation 17.

Establishment of an elected legislature [paragraph 18]*

35. Our position remains that, when the Covenant was applied to Hong Kong in 1976, a reservation was entered reserving –

“the right not to apply sub-paragraph (b) of Article 25 to in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong”

This reservation continues to apply, which allows Hong Kong to decide the method for forming the Legislative Council in the light of the actual situation and the principle of gradual and orderly progress. With every respect due to the Committee, we strongly disagree with its view that this reservation lapsed once an elected Legislative Council was established. It is our firm view that the reservation remains fully operative.

36. Hong Kong’s electoral system shall be determined in accordance with the Basic Law. Our electoral system is appropriate to Hong Kong’s circumstances and gives rise to no incompatibility with

any of the provisions of the Covenant as applied to Hong Kong. Indeed, we note that the Committee recognizes in its General Comment No.25 that “the allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws”.

37. Both the Central Authorities and the Government are fully committed to promoting constitutional development in accordance with the Basic Law, with a view to achieving the ultimate aim of universal suffrage. The package for the electoral methods for 2007-08 that the Government proposed in October last year would have greatly enhanced the democratic representativeness of the methods for electing the Chief Executive and the Legislative Council, and would significantly have advanced Hong Kong's constitutional development. It is regrettable that the package, which was supported by the majority of the public and more than half of the Legislative Council Members, was not endorsed by a two-thirds majority of all Legislative Council Members as required in Annexes I and II of the Basic Law.

38. The Government is fully alive to the public's aspirations for universal suffrage. In November last year, the Chief Executive initiated discussions on the formulation of a roadmap for universal suffrage through the Commission on Strategic Development. The Commission aims to draw conclusions on the discussions by early 2007 and hopes that this will provide a basis for the commencement of our next phase of work.

39. As regards the interpretation of the Basic Law by the Standing Committee of the National People's Congress (NPCSC), in accordance with the PRC Constitution (Article 67(4)) and the Basic Law (Article 158), the NPCSC has the power to interpret the Basic Law. This is part of Hong Kong's constitutional order under the “One Country, Two Systems” principle. The NPCSC's power to interpret the Basic Law conferred by Article 158(1) is in general and unqualified terms. This principle is fully acknowledged and respected in Hong Kong and by its courts.

40. And as regards the procedure for interpreting the Basic Law, Article 158 of the Basic Law provides that the NPCSC shall consult its

Committee for the Basic Law before giving an interpretation of the Basic Law. This has been done on each of the three occasions when the NPCSC has interpreted the Basic Law. In any case, none of the three interpretations conflict with the Covenant as applied to Hong Kong.

Legislation against racial discrimination [paragraph 19]

41. We aim to introduce the Racial Discrimination Bill into the Legislative Council within the year. We will consider the need for legislation against other forms of discrimination once the Race Discrimination Bill passes into law

Concluding observations to be published and widely disseminated [paragraph 20]

42. On 1 April, in accordance with long-established practice, we issued a press release presenting the gist of the concluding observations, discussing the major issues, and announcing that the full text was available on the Home Affairs Bureau's website. We have thus complied with the Committee's request.

Response within one year to the recommendations in paragraphs 9, 13, 15, and 18 of the concluding observations [paragraph 21]

43. We will submit this information in one year's time as requested.

Home Affairs Bureau

May 2006