

Panel on Constitutional Affairs
Meeting on Monday, 18 February 2013

Agenda item IV – Third Report of the Hong Kong Special Administrative Region (HKSAR) in
the light of the International Covenant on Civil and Political Rights (ICCPR)

SUBMISSION BY AMNESTY INTERNATIONAL HONG KONG

A) Protection from Discrimination on Grounds of Sexual Orientation (Articles 2, 26)¹

1. As a party to the International Covenant on Civil and Political Rights (ICCPR), Hong Kong has an international legal obligation to protect and fulfill the right to equality and non-discrimination. This entails taking necessary measures to ensure that all Covenant rights are enjoyed by all on an equal basis, and that the law shall prohibit discrimination on grounds such as sexual orientation.²
2. **In its Concluding Observations of 1999, the UN Human Rights Committee (HRC) expressed its concern that “no legislative remedies are available to individuals in respect of discrimination [on grounds of sexual orientation]” in Hong Kong.³ Even to date, this remains a valid statement of concern.**
3. Within the existing government structure, the functions of The Gender Identity and Sexual Orientation Unit (GISOU) under the Constitutional and Mainland Affairs Bureau are impeded by its restrictive mandate. For example, the ‘hotline for enquiries and complaint’ operates from a complaint-driven and conciliatory approach, without any comprehensive, enforceable follow-up mechanism. It is stated in an official document that ‘[if] a complaint ‘involves individuals or private organizations’, the GISOU has ‘no statutory power to direct individuals or private organisations to act in accordance with [its] request or suggestion.’⁴ The Sexual Minorities Forum has appeared inactive for over two years, and the Notes of Meeting from its last meeting of December 2010 has yet to be made publicly accessible.⁵
4. The policy of ‘self-regulation and education’, which the Government promotes as ‘the most appropriate means of addressing discrimination in this area’,⁶ has been proved insufficient and inadequate in eliminating discrimination and in promoting equality and diversity. According to a survey released by the Public Opinion Programme of The University of Hong Kong in November 2012, 75.8% of the respondents believed that the people of Hong Kong generally discriminate, to varying extents, against people of different sexual orientations; 26.9% believed they themselves discriminated against people on

¹ C.f. Articles 1, 22 Bill of Rights Ordinance; Article 25, Basic Law.

² *Secretary for Justice v Yau Yuk Lung Zigo & Anor* (FACC 12/2006) §11.

³ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region (1999) §15.

⁴ Constitutional and Mainland Affairs Bureau, Gender Identity and Sexual Orientation Unit, “Enquiries and Complaints Hotline - Guide to Complaint Procedures”

(http://www.cmab.gov.hk/doc/en/documents/public_forms/racedoc/Complaint_Form_guide_e.pdf) p. 2

⁵ http://www.cmab.gov.hk/en/issues/equal_forumdoc.htm Cf. HKSAR Common Core Document

(http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/iccpr3/Core-document-e.pdf) §85-86.

⁶ *Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights* §26.10.

grounds of sexual orientation; and 63.8% held the view that Hong Kong should legislate to protect people from such discrimination.⁷

5. Sexual orientation, as the Government constantly maintains, may be “a highly controversial issue” and public opinion may be divided.⁸ This, however, does not prevent consultation on legislation, as the Government seems to suggest. Instead, the apparent lack of ‘consensus’ on this issue reflects a real need for the Government to address this human rights issue in a progressive and systematic manner. To this end, a comprehensive public consultation exercise is a legitimate, constructive and practicable process towards establishing adequate legislative remedies for sexual orientation discrimination, in accordance with international human rights law.
6. We regret that a motion “urging the Government to conduct public consultation on legislation to ban discrimination on the basis of sexual orientation”, moved by Legislator Cyd Ho, was negated by this Council under the split-voting system on 7 November 2012.
7. **Moreover, we are of the view that the Government’s persistent refusal to conduct any form of consultation on legislation, and the absence of any plan to do so in the near future,⁹ are wholly inconsistent Hong Kong’s obligations under the ICCPR.**
8. **In this light, we urge the Government to take immediate and concrete steps towards a comprehensive public consultation on legislation against discrimination on grounds of sexual orientation, which would enable meaningful and inclusive participation from all members of the public and interested stakeholders.**

⁷ Public Opinion Programme, The University of Hong Kong, “Survey on Hong Kong Public’s Attitudes Towards Rights of People of Different Sexual Orientations” (Sponsored by Hon Cyd Ho Sau-lan), Legislative Councillor – Report (in Chinese) http://hkupop.hku.hk/english/report/LGBT_CydHo/content/resources/report.pdf

⁸ *Policy Address 2013* §131.

⁹ *Policy Address 2013* §131.

B) Promotion of Human Rights Education (Article 2)

9. The right to human rights education is internationally affirmed: “Everyone has the right to know, seek and receive information about all human rights and fundamental freedoms and should have access to human rights education and training.”¹⁰ The United Nations (UN) has set out comprehensive principles and guidelines in this respect, including Plans of Action and other documents pursuant to the UN World Programme for Human Rights Education.¹¹
10. While the HKSAR Government acknowledges the importance of “education in schools” in the promotion of human rights,¹² little has been achieved in terms of integrating human rights into the school curriculum and across different subjects. The Government has also pledged to promote human rights education in general, as part of civic education,¹³ but has yet to demonstrate a genuine commitment in this respect.
11. In the New Senior Secondary (NSS) Curriculum, references to human rights only form a very small part under one of the six Modules of Liberal Studies.¹⁴ While curriculum coverage is inadequate, the perspectives from which human rights-related issues are taught and represented also warrant scrutiny. For example, there is a general lack of recognition of human rights as universal values and inherent entitlements of the individual. **It is particularly worrying that the fulfillment of ‘responsibilities’ or ‘duties’ are sometimes misrepresented as ‘conditions’ for the enjoyment of rights.**¹⁵
12. Training and professional development provided to teachers and educators on human rights, if any, is insufficient. A survey conducted in 2011 revealed an alarmingly poor understanding of basic human rights principles among senior Liberal Studies teachers in local secondary schools. These include the findings that almost half of the respondents agreed that citizens must first fulfill their responsibilities before enjoying their human rights, and that over one-third agreed that the use of secret tortures by the police in obtaining evidence was acceptable.¹⁶ **We request that the Government renew, revise and**

¹⁰ Article 1(1), UN Declaration on Human Rights Education and Training. C.f. Preamble to Universal Declaration of Human Rights (‘every individual and every organ of society [...] shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance [...]’)

¹¹ UNGA Res 59/113 A (10 December 2004); Plan of Action for the first phase (2005-2009) of the World Programme for Human Rights Education (<http://www.ohchr.org/Documents/Publications/PActionEducationen.pdf>); Plan of Action for the second phase (2010-2014) of the World Programme for Human Rights Education – Joint OHCHR-UNESCO booklet (http://www.ohchr.org/Documents/Publications/WPHRE_Phase_2_en.pdf)

¹² *Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights* §2.16.

¹³ HKSAR Common Core Document (http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/iccpr3/Core-document-e.pdf) §73.

¹⁴ This refers to the Theme ‘Rule of law and socio-political Participation’ under the Module ‘Hong Kong Today’.

¹⁵ Curriculum Development Council & Hong Kong Examinations and Assessment Authority, “Liberal Studies – Curriculum and Assessment Guide” (Secondary 4 - 6) (http://www.edb.gov.hk/FileManager/EN/Content_5941/ls_e_070307.pdf)

¹⁶ Hong Kong Institute of Education (HKIEd), ‘Study on Liberal Studies Teachers’ Attitudes towards Human Rights and the Rule of Law’ (2011) (http://www.ied.edu.hk/upload_main/manage/file/LS%20Survey%20Factsheet%20Eng_final%281%29.pdf)

strengthen professional training for all teachers and educators in international human rights standards and human rights education.

13. With respect to the promotion of public understanding of human rights in society, we are aware that the Community Participation Scheme administered by the Committee on the Promotion of Civic Education (CPCE), sponsors community organisations to promote education on human rights on an annual basis.¹⁷ However, the sponsoring priorities of the Scheme seem to have shifted from human rights education onto areas such as national education, where **sentiments, social harmony and national identity are given prevalence over universal rights, freedoms and the respect for diversity.**
14. In the past, a vast majority of the projects sponsored by the CPCE did not have a clear human rights focus or objective.¹⁸ In 2013 – 2014, The Scheme prioritises applications for sponsorship to organise activities on the theme of “Cherish yourself and your family, Love Hong Kong and your country” – a theme of remote (if any) relevance to human rights, but rather in resonance with Moral and National Education, which was withdrawn as a curriculum in September 2012 amidst wide controversies. Under the Guidelines for Applications to the Scheme, “Human Rights Education” is only included as one of the six subsidiary areas which may be sponsored.¹⁹ **We believe resource allocation ought to be revised to prioritise the sponsorships of genuine human rights education initiatives, in accordance with the mandate and objectives of the Scheme and the CPCE as a whole.**
15. Furthermore, we are concerned over the Government’s view that ‘there are established channels to monitor the human rights situation in Hong Kong, including the EOC, the PCPD, The Ombudsman, and ‘various complain channels of Government departments’.²⁰ It is noteworthy that while these statutory bodies may deal with certain issues with human rights implications or relevance, they may only exercise limited powers within their respective mandates. This has been a recurrent principal subject of concern which the HRC highlighted in all of its Concluding Observations on the HKSAR.²¹ **We regret that after over a decade, the HKSAR still fails to give due regard to, let alone implement, these recommendations of the Committee.**
16. **We hereby urge the Government to set up an independent human rights institution with broad competence to monitor, promote and protect human rights in Hong Kong, in compliance with The Paris Principles.²²**

¹⁷ *Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights* §2.18.

¹⁸ Committee on the Promotion of Civic Education, Community Participation Scheme – Successful Projects (<http://www.cpce.gov.hk/eng/cpscheme/project.htm>)

¹⁹ Committee on the Promotion of Civic Education, “Community Participation Scheme 2013-2014 – Guidelines for Applications” (http://www.cpce.gov.hk/common/doc/cps13_guideline_e.pdf) pp.2-3

²⁰ *Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights* §2.20.

²¹ CCPR/C/HKG/CO/2 (21 April 2006) [8]; CCPR/C/79/Add.117 (15 November 1999) §9.

²² Principles relating to the Status of National Institutions (The Paris Principles) GA Res 48/134 (20 December 1993)

C) Protection from Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CIDTP) (Article 7)

17. Under Article 7 of the ICCPR, the HKSAR has an obligation to protect the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment (CIDTP). This is an absolute and non-derogable right, protected by the Hong Kong Bill of Rights (HKBOR).²³
18. In its General Comment No. 20, the HRC stated that ‘States parties must not expose individuals to the danger of torture or [CIDTP] upon return to another country by way of their extradition, expulsion or *refoulement*’.²⁴
19. In its previous Concluding Observations, the HRC specifically raised its concern over ‘the absence of adequate legal protection of individuals’ against deportation to locations where they might be subjected to torture or CIDTP, and recommended that the HKSAR ‘should establish an appropriate mechanism to assess the risk faced by individuals expressing fears of being victims [of such human rights violations]’.²⁵
20. By way of the Immigration (Amendment) Ordinance 2012, an ‘enhanced’ process was introduced in Hong Kong for determining torture claims – claims for *non-refoulement* protection relating to torture under Article 3 of the United Nations Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (CAT).²⁶ Under the amendment which came into effect on 3 December 2012, a successful torture claim would, in principle, protect the claimant from expulsion, return or extradition to a torture risk State’.²⁷
21. While the standards of fairness, efficacy and compliance with CAT of this torture claim determination process invite further scrutiny,²⁸ we are most concerned that the process is inherently incapable of identifying the *non-refoulement* protection needs of persons who would be in danger of being subjected CIDTP if returned to a certain State. Without an adequate CIDTP claim determination process in place, the HKSAR currently falls short of implementing HRC’s specific recommendations.
22. We note that the Government has relied on the immigration reservation to the ICCPR as applied to Hong Kong in response to the Committee’s relevant recommendations.²⁹ Nonetheless, such reservation cannot effectively absolve the Government of its obligations of *non-refoulement* to CIDTP, due to the absolute and non-derogable nature of the right.

²³ Section 5(2)(c), BORO (Cap. 383); Article 3 BOR.

²⁴ CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (10 March 1992) §9.

²⁵ CCPR/C/HKG/CO/2 (21 April 2006) §10.

²⁶ Part VIIC, Immigration Ordinance (Cap. 115).

²⁷ ss. 37U, 37ZI (3)-(5), Immigration Ordinance (Cap. 115).

²⁸ For example, the non-exhaustive list of circumstances which may damage the claimant’s credibility, the highly stringent procedural requirements imposed on the claimant throughout the process and the standard of proof, etc. See for example ss. 37ZD, 37ZO (3) Immigration Ordinance (Cap. 115).

²⁹ *Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights* §7.9. Such reservation is reflected in section 11 of the Hong Kong Bill of Rights Ordinance (HKBORO): ‘As regard persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.’ Also *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 at §§21-22.

23. In other words, such immigration reservation cannot operate to exclude the application of this right – even ‘in relation to the exercise of powers and the enforcement of duties under immigration legislation regarding persons not having the right to enter and remain in Hong Kong’.³⁰ This principle was recently affirmed by the Court of Final Appeal, in a judgment delivered after the submission of the present Report by the HKSAR. Accordingly, as it was held, deportation orders compliant with immigration legislation must not be proceeded with, where it could expose the individuals to genuine risks of CIDTP (or torture).³¹ This echoes the Committee’s recurrent call upon the HKSAR to enhance its protection of the right of individuals not to be subjected to CIDTP, in particular those facing deportation orders.
24. **In relation to the *non-refoulement* protection of refugees, we consider the Government’s ‘firm position not to seek the extension of the Convention relating to the Status of Refugees (Refugee Convention) to Hong Kong, and not to take up the screening of Refugee Status Determination (RSD) applications’,³² inconsistent with its international obligations.**
25. The concept of *non-refoulement* of refugees (as enshrined in the Refugee Convention³³) has evolved into a norm of customary international law (CIL), imposing upon States the obligation not to expel or return a refugee to “where his life or freedom would be threatened” on certain grounds.³⁴ Therefore, the *mere* fact that HKSAR is currently a non-signatory to the 1951 Convention Relating to the Status of Refugees does not absolve the HKSAR, which prides itself as an international city, of its CIL obligations of *non-refoulement* protection.
26. Moreover, the screening of RSD applications, currently conducted by the United Nations High Commissioner for Refugees (UNHCR), has been criticised for being substandard in terms of efficiency and fairness. Recently, the head of the UNHCR Hong Kong office also called upon the HKSAR Government to take more responsibility for the protection of refugees and asylum seekers.³⁵
27. **We urge the Government to comply with its international obligations by ensuring that *non-refoulement* protection is accorded to those in need Hong Kong. This would include taking immediate and concrete steps towards establishing a comprehensive, transparent and integrated mechanism for determining claims for *non-refoulement* protection relating to torture, CIDTP and refugees, with high standards of fairness and reasonable access to judicial redress.³⁶**

³⁰ *Ubamaka Edward Wilson v Secretary for Security and Director of Immigration* (FACV15/2001), §§2, 115.

³¹ *Ibid.* §§142, 145, 160.

³² *Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights* §7.11.

³³ Article 33(1): ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

³⁴ This has also been affirmed by the courts of HKSAR. See for example *C v Director of Immigration & Secretary for Security* (CACV 132-137/2008).

³⁵ J Chiu, “New UNHCR head urges Hong Kong to protect refugees and asylum seekers”, SCMP (2 December 2012)

³⁶ This would include, but not limited to, amending relevant immigration legislation which *purports* to override the operation of the CIL norm and to keep the Director of Immigration’s relevant powers unfettered: *C v Director of Immigration & Secretary for Security* (CACV 132-137/2008) §§93-94