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Panel on Constitutional Affairs

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 19 May 2014**

**Third Report of 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 Constitutional Affairs ("the CA Panel") in respect of the third report of the Hong Kong Special Administrative Region ("HKSAR") in the light of the International Covenant on Civil and Political Rights ("ICCPR").

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 realize 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 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. The first report of HKSAR in the light of ICCPR was submitted to UN Human Rights Committee ("HRC") in early 1999 and heard by HRC in November 1999. Since 1999, HRC has changed to specify the date for the submission of the next report of HKSAR in the concluding observations issued after consideration of a report submitted by HKSAR.

4. The second report of HKSAR in the light of ICCPR was submitted to HRC in January 2005. After consideration of the second report of HKSAR at its hearing held on 20 and 21 March 2006, HRC issued its concluding observations

on 30 March 2006 (LC Paper No. CB(2)1653/05-06(01)). The Administration's report on its follow-up to the concluding observations was issued vide LC Paper No. CB(2)369/07-08(01) on 16 November 2007.

5. Members may wish to refer to the background briefs (LC Paper Nos. CB(2)1291/05-06(02) and CB(2)746/07-08(02)) prepared by the Legislative Council ("LegCo") Secretariat for the past discussion of the Panel on Home Affairs¹ on the first and the second reports of HKSAR in the light of ICCPR.

6. In June 2010, the Constitutional and Mainland Affairs Bureau issued the outline of topics to be included in the third report of HKSAR for public consultation. The CA Panel discussed the outline of topics with deputations and the Administration at its meeting on 21 June 2010. After the HKSAR's third report was submitted to UN in 2011, the CA Panel discussed it with the Administration on 21 November 2011. In November 2012, HRC published a list of issues to be taken up in connection with the consideration of the HKSAR's third report. The Administration's written response to the list of issues was issued vide LC Paper No. CB(2)882/12-13(01).

7. Prior to the UN hearing held on 12 and 13 March 2013, the CA Panel received public views on the third report at its meeting on 18 February 2013, and discussed the relevant concluding observations on 20 May 2013 with deputations and the Administration. The major issues raised by members at these meetings are summarized in paragraphs 8 to 22 below.

Discussions of the CA Panel on the third report of HKSAR

Development of democracy

8. At the CA Panel meeting on 21 June 2010, some members expressed concern that the Administration's constitutional reform package for electing the Chief Executive ("CE") and for forming LegCo in 2012 as well as the Democratic Party's proposal on "one-person-two-votes" for returning the five new District Council FC seats in 2012 did not conform to Article 25² of ICCPR. They reiterated that HRC had repeatedly pointed out that once an elected LegCo

¹ With effect from the 2008-2009 legislative session, issues relating to human rights have been placed under the purview of the CA Panel.

² Article 25(b) of ICCPR provides that every citizen shall have the right and the opportunity to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. When the UK Government extended ICCPR to Hong Kong in 1976, the following reservation was added –

"The Government of the United Kingdom reserve the right not to apply sub-paragraph (b) of Article 25 in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong ..."

was established, its election had to conform to Article 25 of ICCPR. They considered that the Administration's reliance on the reservation made in respect of Article 25(b) of ICCPR³ to justify the non-compliance of the electoral system for the formation of LegCo with that provision was not legally sound. In addition, the provisions of ICCPR including Article 25 had been incorporated in the laws of Hong Kong by way of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO"). They requested the Administration to explain in the third report of HKSAR whether its definition of the principles of universality and equality was different from that held by HRC.

9. The Administration explained that the Central People's Government notified the UN Secretary General in June 1997 that the provisions of ICCPR as applied to Hong Kong would remain in force beginning from 1 July 1997. In other words, those provisions which did not apply to Hong Kong (including Article 25(b) of ICCPR for which a reservation had been made by the UK Government when extending ICCPR to Hong Kong in 1976) would also not be applied to HKSAR. In the case of *Chan Yu Nam v Secretary for Justice* in 2009, the High Court was of the view that such reservation continued to apply to HKSAR. The Administration also advised that Article 21 of Hong Kong Bill of Rights mirrored Article 25 of ICCPR and the reservation made in respect of Article 25(b) was specifically provided for in section 13 of HKBORO.

10. At the CA Panel meeting on 18 February 2013, some members urged the Administration to provide a timetable for public consultation on the methods for selecting CE in 2017 and for forming LegCo in 2016. They criticized the Administration for its delay in conducting the public consultation. They also considered that the Government lacked sincerity in fulfilling its international obligation under ICCPR as demonstrated by its decision to maintain the reservation in relation to Article 25(b) concerning universal suffrage. Some members, however, considered that the constitutional development of Hong Kong should be taken forward in accordance with the principle of gradual and orderly progress.

11. In its concluding observations published on 28 March 2013 after consideration of the HKSAR's third report, HRC expressed concern about the HKSAR Government's lack of a clear plan to institute universal suffrage and to ensure the right of all persons to vote and to stand for election without unreasonable limitations. Some members urged the Administration again to formulate proposals on the CE election in 2017 for public consultation as early as possible.

³ For a historical account of development on the issue of the reservation made in respect of Article 25(b) of ICCPR, members may refer to the information paper prepared by the LegCo Secretariat (LC Paper No. CB(2)1652/09-10(02)).

12. The Administration advised that universal suffrage was the ultimate aim of Hong Kong's constitutional development and the Standing Committee of the National People's Congress ("NPCSC") had made a decision on 29 December 2007 on issues relating to universal suffrage. The Administration stressed that Hong Kong would have universal suffrage because of BL and not ICCPR and there was no provision in ICCPR regarding the model for the implementation of universal suffrage to be adopted by parties which ratified ICCPR. The Administration stressed that the HKSAR Government was committed to attaining the ultimate aim of selecting CE and electing all the Members of LegCo by universal suffrage in accordance with BL and the relevant Interpretation and Decisions adopted by NPCSC. The Administration would conduct comprehensive consultations on the methods for selecting CE in 2017 and for forming LegCo in 2016, and would initiate the constitutional procedures at an appropriate juncture.

Setting up of a human rights institution

13. Some members reiterated that the Administration should set up an independent human rights institution, as repeatedly recommended by HRC, to investigate and monitor human rights violations in HKSAR. The Administration reiterated its stance that given a comprehensive framework for the protection and promotion of human rights was in place in HKSAR, the Administration did not see the need to establish another human rights institution to duplicate the functions of the existing mechanism. While the Administration respected the recommendations of HRC, such recommendations were not legally binding. The Administration advised that ICCPR allowed each State Party to implement appropriate measures, taking account of its own situation, to discharge its obligations under ICCPR.

Support measures for non-Chinese speaking students

14. Some members urged the Administration to provide more support measures for non-Chinese speaking children and enhance the employment opportunities of ethnic minorities. They expressed concern that the number of ethnic minorities students attaining higher level of education was disproportionately low as compared with the majority of local students who were ethnic Chinese due to lack of policy support to cater for their needs. Besides, many ethnic minorities had experienced difficulties in securing Government jobs due to their failure to meet the Chinese language proficiency requirement. The Administration advised that the Education Bureau had implemented a series of measures to provide education support for non-Chinese speaking students since 2006-2007 academic year and it would take time to evaluate the effectiveness of these support measures. In 2011, 17 out of a total of 64 non-Chinese speaking students applying for admission to post-secondary institutions were admitted,

representing a success rate of 27%. Individual Government Departments would also have regard to their respective operational needs and job requirements whilst stipulating the language requirement for their job vacancies.

Investigation of complaints against the Police

15. Some members reiterated that an independent mechanism for the investigation of complaints against Police should be set up and the recommendations made after an investigation should be made legally binding on relevant authorities. The Administration advised that the Independent Police Complaints Council ("IPCC") was made a statutory and independent body since the commencement of the IPCC Ordinance (Cap. 604) on 1 June 2009. The Administration considered that the operation of IPCC, which comprised 24 non-official members from a wide spectrum of the community, had been effective since its inception. The Administration pledged to provide the necessary resources for IPCC to ensure effective performance of its role.

Torture claims

16. Some members expressed concern on whether the handling of torture claims by the Administration had complied with the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Administration advised that it had briefed the Panel on Security at its meeting held in December 2009 on the enhanced mechanism for screening torture claims and the pilot scheme to provide publicly-funded legal assistance to torture claimants who met the requirements. The Administration was of the view that Hong Kong's relative economic prosperity in the region and its liberal visa regime would make the territory vulnerable to possible abuses if the UN 1951 Convention relating to the Status of Refugees ("CSR") was applied to Hong Kong. The Administration had a firm policy of not granting asylum and its established position on CSR remained unchanged.

Press freedom and freedom of information

17. In response to the concern about incidents of restrictions on media news coverage by the Police, the Administration explained that the Police would liaise with the event organizers with a view to reaching a consensus on the arrangements for news reporting activities taking into account the time, location, number of participants of a public activity. The major considerations of the Police included striking a balance among public safety, public order and the disruption caused to the nearby area and traffic arrangement, so as to ensure that the activity would be conducted in a safe and orderly manner. As long as Police operations would not be affected, media news coverage would be facilitated as far as practicable.

18. At the CA Panel meeting on 18 February 2013, some members expressed concern that Hong Kong's ranking for press freedom had fallen to a five-year low of 58th in the world. These members stressed the importance of safeguarding freedom of information and press freedom to the development and progress of the society. They also called on the Administration to enact an archives law and a law on freedom of information to ensure freedom of public access to Government information. The Administration advised that The Ombudsman was conducting a direct investigation into the access to information regime in Hong Kong. Besides, the Law Reform Commission had set up two subcommittees to review in detail the topic of access to information and embark on a comprehensive study of the relevant laws in overseas jurisdictions with a view to making recommendations. Pending the outcome of the investigation and study, the Administration would take necessary action to follow up the recommendations. The Administration advised that since the introduction of the Code on Access to Information ("the Code") in 1995, about 98% of the requests for information held by bureaux and departments were met in full or in part. The Administration would continue to monitor compliance with the Code by the Government.

Freedom of procession and assembly

19. Some members considered that there had been retrogression in freedom of procession and assembly since the Reunification, and more and more participants of public processions and demonstrations were prosecuted under the Public Order Ordinance (Cap. 245). Some other members, however considered that, while freedom of procession and assembly should be respected, the majority of Hong Kong people would not support unlawful activities that would seriously affect public order. Some members pointed out that the 2012-2013 Rule of Law Index Report released by the World Justice Project showed that Hong Kong was falling in ranking to 31st for protection of the fundamental rights while its ranking for order and security was the second highest in the world. These members considered that the Administration should attach the same importance to safeguarding order and security and to protecting fundamental human rights. The Administration advised that the Police respected the rights of members of the public to conduct peaceful assemblies and processions. However, the participants should observe the law and the Police would act resolutely against persons who breached the law.

Discrimination on the ground of sexual orientation

20. Some members pointed out that HRC had expressed concerns back in 1999 in its concluding observations on the HKSAR's initial report about the absence of legislative remedies to individuals in respect of discrimination on the ground of sexual orientation, and HRC had recommended at that time the enactment of necessary legislation. These members considered that the Administration

should not postpone conducting public consultation on legislating against such discrimination. They pointed out that the findings of a survey sponsored by Hon Cyd HO in November 2012 showed that 63.8% of the respondents supported enacting the legislation, whereas only about 14% of the respondents were against it. Besides, it was noted that 31 Members had voted for the motion on "Equal right for people of different sexual orientations" at the Council meeting of 7 November 2012 although it was negatived because of failure to secure majority support of the Members returned by functional constituencies.

21. At the CA Panel meeting on 18 February 2013, some members urged the Administration to enact legislation to prohibit discrimination on the ground of sexual orientation as requested by HRC. They queried the basis of the Administration's stance stated in the HKSAR's third report that "self-regulation and education, rather than legislation, are the most appropriate means of addressing discrimination in this area". They suggested that the Administration should explain to the public that enacting such a law did not mean legalization of same-sex marriage nor would it lead to "reverse discrimination". Some other members, however, cautioned that the issue was very controversial. They suggested that disputes in this regard might be resolved by mediation and requested the Administration to explore in this direction.

22. The Administration explained that while the Government had no plan at present to conduct public consultation on legislating against discrimination on the ground of sexual orientation given the controversial nature of the issue, the Administration would make sustained efforts in promoting equal opportunities for sexual minorities through public education and publicity. The Administration would increase provision for this area of work. These included sponsoring worthwhile community projects through the Equal Opportunities (Sexual Orientation) Funding Scheme, and establishing a new platform to exchange views with different stakeholders. In this connection, a dedicated Advisory Group would be set up in mid-2013 to advise on matters specially relating to concerns about discrimination faced by sexual minorities in Hong Kong. Also, the Administration would study the relevant legislative and administrative measures adopted by overseas jurisdictions to map out the way forward.

Recent development

23. In its concluding observations issued on 26 March 2013 (LC Paper No. CB(2)906/12-13(01), HRC specifically requested the HKSAR Government to provide, within one year, information on its implementation of HRC's recommendations in the following areas -

- (a) the implementation of universal and equal suffrage in conformity with ICCPR as a matter of priority for all future elections;

- (b) the adoption of measures to ensure that all workers enjoy their basic rights, independently of their migrant status; and
- (c) improvements to the quality of Chinese language education for ethnic minorities and non-Chinese speaking students with an immigrant background.

24. The report of HKSAR on its follow-up to the concluding observations of HRC on the third report of HKSAR was issued vide LC paper No. CB(2)1351/13-14 on 24 April 2014. The CA Panel will discuss the report at the next meeting on 19 May 2014.

Relevant motions/questions and papers

25. A list of questions and motions relating to ICCPR raised/moved at Council meetings since the First LegCo as well as relevant papers available on the LegCo website (<http://www.legco.gov.hk>) are in **Appendix**.

Council Business Division 2
Legislative Council Secretariat
15 May 2014

**Relevant documents on Third Report
of the Hong Kong Special Administrative Region
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Committee	Date of meeting	Paper
Legislative Council	14 October 1998	Official Record of Proceedings (Written question raised by Hon Christine LOH)
	2 December 1998	Official Record of Proceedings (Oral question raised by Hon LEUNG Yiu-chung)
	9 June 1999	Official Record of Proceedings (Oral question raised by Hon Ambrose CHEUNG)
	24 November 1999	Official Record of Proceedings Pages 16 - 25 (Oral question raised by Hon YEUNG Sum)
	8 December 1999	Official Record of Proceedings Pages 50 - 60 (Oral question raised by Hon Emily LAU)
	29 March 2000	Official Record of Proceedings Pages 13 - 16 (Written question raised by Hon Cyd HO)
	21 February 2001	Official Record of Proceedings Pages 57 - 61 (Written question raised by Hon Cyd HO)
	12 December 2001	Official Record of Proceedings Pages 37 - 46 (Oral question raised by Hon James TO)
	18 December 2002	Official Record of Proceedings Pages 54 - 62 (Written question raised by Hon LEE Cheuk-yan)
Legislative	9 April 2003	Official Record of Proceedings

Committee	Date of meeting	Paper
Council		Pages 7 - 8 (Written question raised by Hon Cyd HO)
	20 October 2004	Official Record of Proceedings Pages 93 - 95 (Written question raised by Hon Fred LI)
	1 March 2006	Official Record of Proceedings Pages 39 - 48 (Oral question raised by Hon Emily LAU)
	1 March 2006	Official Record of Proceedings Pages 170 - 248 (Motion moved by Hon Emily LAU)
Panel on Home Affairs ("HA Panel")	9 June 2006 (Item III)	Agenda Minutes
Legislative Council	25 April 2007	Official Record of Proceedings Pages 7 - 17 (Oral question raised by Hon LEUNG Kwok-hung)
HA Panel	11 January 2008 (Item IV)	Agenda Minutes
Legislative Council	2 July 2008	Official Record of Proceedings Pages 69 - 77 (Oral question raised by Hon Emily LAU)
	7 January 2009	Official Record of Proceedings Pages 216 - 326 (Motion moved by Hon Margaret NG)
Panel on Security	1 December 2009 (Item IV)	Agenda Minutes
Legislative Council	28 April 2010	Official Record of Proceedings Pages 70 - 81 (Oral question raised by Hon Albert HO)
Panel on	21 June 2010	Agenda

Committee	Date of meeting	Paper
Constitutional Affairs ("CA Panel")	(Item III)	Minutes
Legislative Council	23 June 2010	Official Record of Proceedings Pages 11 - 22 (Oral question raised by Hon Alan LEONG)
	14 July 2010	Official Record of Proceedings Pages 79 - 90 (Oral question raised by Hon LEE Wing-tat)
	18 May 2011	Official Record of Proceedings Pages 72 - 83 (Oral question raised by Hon Albert HO)
CA Panel	21 November 2011 (Item V)	Agenda Minutes
Legislative Council	30 May 2012	Official Record of Proceedings Pages 14 - 25 (Oral question raised by Hon Cyd HO)
CA Panel	18 February 2013 (Item IV)	Agenda Minutes
Legislative Council	20 March 2013	Official Record of Proceedings Pages 7 - 19 (Oral question raised by Hon Emily LAU)
CA Panel	20 May 2013 (Item IV)	Agenda Minutes