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Hong Kong Human Rights Commission
Society for Community Organization
Prisoners' Rights Organization
Detainees' Rights Association

Submission to Panel on Security

Regarding the Sixth Report of the People's Republic of China under the Convention Against Torture,

Part II: Hong Kong Special Administrative Region

October 2015

Society for Community Organization

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Introduction of the Hong Kong Human Rights Commission

The Hong Kong Human Rights Commission is a coalition of eleven non-governmental organizations including religious, women, community and students groups. It was founded in March 1988.

Although coming from different backgrounds, we share in the belief of the dignity and respect of each person and that every man and woman has inherent rights. As the "Human race is one", the Commission member organizations consider that mutual respect, equality and freedom form the foundation on which a just, peaceful, and humane society is built.

Over the years, the Commission has endeavoured to promote and protect the human rights of the community. Not only does Hong Kong lack a democratic political system, its legislation also allows the government substantial power so as to maintain social control. Civilians are forced to submit to this power and therefore justice often fails to prevail. The Commission has been gathering resources in order to consolidate civil power. By doing so we hope to arouse public concern to the level where the people will push the government to reform.

Since it was founded, in addition to lobbying for the Bill of Rights and subsequent amendments to the law at local level, the Commission has also submitted reports to UN treaty bodies, attended hearings and lobbying at international level. Recognizing that public awareness and participation are vital to the development of human rights, the Commission has promoted human rights education through exhibitions, gatherings in schools and community centres. Although the Commission recognizes that its work has benefited many there is much more that can be done.

Members of the Hong Kong Human Rights Commission:
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Hong Kong Christian Industrial Committee
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Police cell conditions

Since 2009, where SoCO revealed poor conditions in police cells, it seems that the government has not made any significant changes to improve the conditions. In its periodic report (CAT/C/CHN-HKG/5), the government has only briefly mentioned the measures taken to ensure proper conditions in police custody cells.
SoCO has received 39 individual complaints from people held in police custody during 2014-2015.

(i) Unsuitable physical conditions of the police cells

Detained persons have complained that they were required to sleep on a concrete bench. Only a blanket, but no pillows or mattresses were provided. This has led to body pain when sleeping and blankets have been reported to be dirty. Every complainant informed us that blankets provided were not enough to keep them warm (during winter period) or provide comfortable sleep.
Detainees reported of unhygienic conditions and that the cells were dirty and smelly. They claim that there was no proper ventilation, heating, fans, wash basins, windows, natural daylight or fresh air inside the police cells.
There was no drinking water available inside the cell and detained persons were forced to ask police officers for water every time they felt thirsty. Some complained that it took over an hour to receive water, and then only a small paper cup was brought. Some police officers would pretend not to hear. Some reported to have not received water during the entire time of their confinement.

(ii) Difficulties for detainees to maintain personal hygiene

There is no washbasin in the cells, so detainees were not able to wash their hands after using the toilet and would also have to eat without the chance to wash their hands. Further detainees reported that they were not provided with enough of toilet paper or sanitary wear (for women). The majority reported that they were not allowed to brush their teeth or shower during the entire time in police station (some for as long as 6 days).

(iii) Deficiencies in provision of medical care

Amongst the complainants systematic refusal of requests to see a doctor is observed.
Out of all complainants, 13 requested to see a doctor and only 2 were allowed.
For instance a 68-year-old detained woman asked for her prescribed medicine as she is suffering from hyper-tension, but was denied. When finally was taken to the hospital the next day, the blood pressure was 198/115.
The complainants who were refused the medical attention, did not receive any reasonable explanation. One detained woman informed us, that she was refused medical treatment because she was a “criminal”.

Recommendations

1. Establish an **independent monitoring scheme** to increase accountability of the Police similar to Her Majesty’s Inspectorate of Prisons in the UK to inspect police stations and other holding cells.
2. Empower the **Justices of Peace** to monitor and visit institutions under the control of the Police. Amend the Justices of the Peace Ordinance Chap 510, and include in Schedule 1, Part I on custodial institutions all institutions under the control of the Police.

3. **Amend the Force Procedure Manual and the Police General Orders** with reference to the United Kingdom's *Revised Code of practice for the detention, treatment and questioning of persons by police officers. Police and Criminal Evidence Act 1984 (PACE) – Code C* (May 2014). Especially include requirements of adequate ventilation, heating, cleaning, access to washing facilities, and detailed requirements in relation to medical care and treatment.
4. **Resources** should be allocated to ensure that detainees can maintain their personal hygiene and decency. Detainees should be offered to shower every day and have access to clean clothing. There should be access to hand wash facilities.
   Furthermore physical conditions must be up to standard, so that proper ventilation, clean bedding and access to natural light is ensured. Lastly, it must be ensured that proper attention to the health of detainees, including clinical attention, health assessment, exercise where possible, and access to drinking water is guaranteed.

Solitary confinement

Solitary confinement is widely used in Hong Kong prisons and detention cells either imposed as a punishment or as an administrative measure.
There are 5 different Rules under the Prison Rules Cap 234A that can be applied in order to isolate a prisoner. Below is an analysis of the different rules concerning important aspects of the confinement.

a) Rule 58: Segregation of a prisoner against whom a report has been made
Purpose: To segregate a prisoner who has been reported for a disciplinary offence.
Punishment/administrative: Administrative
Authority: Superintendent
Medical certification: The rule does *not* mention a medical officer to certify whether the prison is fit for isolation. It is unclear whether Rule 144(f) applies, that is whether a medical officer should make daily visits.
Time limit: None
Appeal: None
Regular review: Not mentioned

b) Rule 63(b): Separate confinement
Purpose: Punishment
Punishment/administrative: Punishment
Authority: Superintendent
Medical certification: Medical officer must certify in writing that he is fit for punishment.
Time limit: 28 days.
Appeal: Prison should notify Superintendent within 48 hours that he wishes to appeal to Commissioner (Rule 63(2)), and then afterwards to the Secretary for Security (Rule 63(4)).
Regular review: Not mentioned

c) Rule 68: Temporary confinement
Purpose: Temporary confinement of a refractory or violent prisoner.
Punishment/administrative: Administrative
Authority: Superintendent
Medical certification: The rule does not mention a medical officer to certify whether the prison is fit for isolation. It is unclear whether Rule 144(f) applies, that is whether a medical officer should make daily visits.

Time limit: None
Appeal: None
Regular review: Not mentioned

d) Rule 68A: Medical officer ordering prisoner to a protected room to ensure no harm or hardship to himself or other prisoner
Purpose: Prevention of harm/hardship to prisoner or other prisoners.
Punishment/administrative: Administrative
Authority: Superintendent
Medical certification: The rule does not mention a medical officer to certify whether the prison is fit for isolation. It is unclear whether Rule 144(f) applies, that is whether a medical officer should make daily visits.
Time limit: None
Appeal: None
Regular review: Not mentioned

d) Rule 68B: Removal from association
Purpose: "Where the Superintendent has reasonable grounds for believing it is desirable, for the maintenance of good order or discipline or in the interests of a prisoner, that such prisoner should not associate with other prisoners, either generally, or for particular purposes, he may order the removal of such prisoner.." (Rule 68B(1)).
Punishment/administrative: Administrative
Authority: Superintendent/Commissioner of Correctional Services
Medical certification: Medical officer must certify that he is fit for removal
Time limit: Removal from association can be renewed after 72 hours, thereafter every month. There is no upper limit
Appeal: No formal appeal mechanism, but prisoner can make representations to the Superintendent.
Regular review: A Board of Review consisting of the Superintendent, the Medical Officer and other officers selected by the Commissioner reviews the progress of prisoners removed from association and makes recommendations to the Commissioner as to the suitability for further removal or to be returned to association. The review takes place each month.

The above analysis reveals the following:

1. **Administrative**: Most of the rules permit the use of solitary confinement as a purely administrative decision and by discretion of the Superintendent, except for Rule 63(b). No hearings or written detailed reasons for special unit confinement are required. Especially Rule 68B provides for wide discretion to the Superintendent to place a prisoner in isolation since "good order", "discipline", and "interest of prisoner" are rather vague terms and provides for the risk of arbitrary use of the rules.

2. **Judicial oversight:** None of the rules requires judicial oversight for placing a person in solitary confinement, except for Rule 63(b), which requires a disciplinary hearing. However, the hearing is internal and not conducted by an independent judicial body. No legal representation is allowed.

3. **Medical certification:** Some of the rules do not require the medical officer to certify that the prisoner it fit for removal and that daily visits from a medical officer will be conducted (Rules 58, 68, 68A). No rules specify that a mental health specialist should monitor the isolation.

4. **Time limit:** Only rule 63(b), where solitary confinement can be imposed as a punishment, specifies an upper time limit of 28 days. All the other rules do not have any upper time limit for isolating a prisoner.

5. **Appeal:** Only Rule 63(b) has a formal appeals procedure if a prisoner wants to appeal the results of the disciplinary hearing. The appeals mechanism is not independent however.

6. **Regular review:** Only Rule 68B includes a Board of Review to review the cases on a monthly basis. However, the Board of Review is not independent.

Statistics

Number of people in solitary confinement

The CSD has stated that it does not maintain regular statistical data on the issue of solitary confinement. This in itself is a manifestation of inadequate monitoring of the use of solitary confinement. A request for statistics in 2015 was replied with the fact that no statistics are available.

However, the following statistics have been provided in late 2010.

2000-Oct 2010: Prison Rule 63(B): Separate confinement: 37,135 cases. ***Thus the monthly average was 285 cases during this period.***

2006-Sep 2010: Prison Rule 68(B): Removal from association: 3,026 cases. ***Thus the monthly average was 52 cases during this period.***

No statistics exist for the following:

Prison Rule 58: Segregation of a prisoner against whom a report has been made. Prison Rule 68: Temporary confinement

Prison Rule 68A: Medical officer ordering prisoner to a protected room to ensure no harm or hardship to himself or other prisoner.

International standards

The UN Committee Against Torture (CAT) has criticized isolation practices in different countries and has recommended that **"the use of solitary confinement be abolished** [….] or at least that it should be strictly and specifically regulated by law (maximum duration, etc.) and that judicial supervision should be introduced"[1].

[1] CAT, Visit report, Denmark, 1. May 1997, para 186, quoted from Peter Scharff Smith (2009). "Solitary confinement: History, practice, and human rights standards." *Prison Service Journal 181*. http://www.hmprisonservice.gov.uk/assets/documents/100043E4solitary_confinement.pdf

Other international standards and recommendations agree that the use of solitary confinement should be reduced. The Istanbul Statement of the Use and Effect of Solitary Confinement adopted on 9 December 2007 states that **solitary confinement should only be used in exceptional cases, that it should only be used as a last resort, and that the duration of solitary confinement should be as short as possible**[2].

According to UN Special Rapporteur on Torture Mr. Juan Mendez solitary confinement as punishment should be banned as punishment and solitary confinement in excess of 15 days should also be absolutely banned[3]. The Human Rights Committee has commented that "solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with [ICCPR]" and that it may amount to torture or cruel, inhuman or degrading treatment or punishment[4].

Case example:

A:
A is a male prisoner who in 2011 was charged with possession of unauthorized articles. After being charged, he was sent to a special unit (solitary confinement) on administrative grounds. The day after there was a disciplinary hearing, where no legal representative is permitted. He was sentenced to special unit confinement for 21 days. However, after the confinement, he was not released to resume normal association. Instead the CSD continued to confine him administratively in the special unit stating security reasons. He was never told when he would be released. He was not given any written reasons, and his request for a lawyer was rejected. In total he spent more than 100 days involuntarily in solitary confinement.

Other incidences told by female prisoners

- A prisoner was sent to the special unit for a few days because she mixed food in her tea.

- Another female prisoner was sent to special unit because she ate some of a fellow inmates' food.

- Yet another prisoner was sent to special unit because she was washing her clothes in her cell.

Recommendations

1. Solitary confinement should only be used in very **exceptional cases**, for as short a time as possible and only as a last resort. It should be absolutely prohibited for mentally ill prisoners and children under the age of 18. At best it should be abolished.

2. Amend the **legislative framework** currently governing the use of solitary confinement:
- Hearing: Solitary confinement should only be used after an independent hearing. For the hearing the following should apply:

[2] http://www.univie.ac.at/bimtor/dateien/topic8_istanbul_statement_effects_solconfinment.pdf
[3] https://www.un.org/apps/news/story.asp?NewsID=40097
[4] Human Rights Committee, Concluding Remarks on Denmark. 31/10/2000. CCPR/CO/DNK

a) Prisoner should be presented with detailed written reasons for solitary confinement.
b) Prisoners have the right to be represented by a legal representative at the government's expense.
c) The hearing should be conducted by an independent body.

- Time limit: For all types of solitary confinement there must be a time limit and prisoners should be informed about the length of confinement.

- Medical attention: All persons should be evaluated by a mental health professional as to the suitability of being confined in a special unit. Once in solitary confinement their mental health should be regularly monitored.

- Regular review: All prisoners who are in solitary confinement should have a right to have their confinement regularly reviewed.

- Appeal mechanism: Prisoners should have a right to appeal their cases to an independent body.

3. Increase **monitoring** of the use of solitary confinement.

- Set up independent monitoring body.

- A list of all people confined in special unit should be maintained, including dates, dates of last review and reasons of placement of special units.

- Maintain regular statistics on the number of people confined in special units, number of self-harm and suicide attempts.

4. Raise the level of **meaningful social contact** and activities for prisoners in solitary confinement.
    - Allow access to social activities with other prisoners
    - Allow more visits
    - Arrange talks with mental health specialists, volunteers and other relevant personnel.
    - Provide meaningful in cell and out cell activities.

Compensation for work injuries in prison

Legislation

According to the Prison Rules (Cap 234A) all prisoners shall work not less than 6 hours per day (Rule 43). The work is mandatory and prisoners can only be excused on medical grounds (Rule 38). If a prisoner, through no fault of his own, is unable to work, he may receive payment in accordance with rates, in each case, approved by the Commissioner (Rule 39).

Prison work

Prisoners are required to work in different trades. The Industries & Vocational Training (I&VT) Section under the Rehabilitation Unit of the Correctional Services Department (CSD) comprises 3 Industries Units and 1 Vocational Training Unit.

Except for trades such as envelope making and doing simple manual work (such as sorting printed matter) many of the trades requires workers to work with industrial machines that may pose a risk to their safety. Their occupational safety is therefore of highest importance and it is important that they enjoy same rights and protection as other workers.

Injury rates in prison

From 2003-2010 a total of 793 prisoners sustained injuries in workplaces[5]. That means that an average of 99 prisoners sustain injuries every year. For the same period, the average daily prison population was 10,203. Thus the average yearly injury rate was **9.7 per 1000 workers**.

Prison workers are confined to only 13 trades in prison and cannot engage in all the types of work available in the community outside prison. The injury rate can therefore not be directly compared with the injury rate in the community. However, for reference the average injury rate from 2003-2010 was 16.9 per 1,000 employees in Hong Kong[6].

Thus the overall average injury rate for the total Hong Kong population in 2003-2010 is higher than that of the prison population for the same period. This higher figure can partly be explained by the relatively higher rates of industrial accidents. The average accident rate from 2003-2010 was 28.9 per 1000 workers[7]. For certain industries the figure is much higher. For instance, in the construction industry the average accident rate per 1,000 workers in 2003-2010 was 60.2[8].

Existing protection of prison workers

Ex-gratia payment policy

If prisoners suffer injuries from work in prison, they may apply for an ex-gratia payment from the government. A cross-departmental task group including the Department of Justice, Security Bureau, Financial Service and Treasury Bureau and the Labour Department has formulated guidelines in 2002 for the payments.

In order to be eligible for such a payment, the injury must meet three criteria. The injury must be:

1. Work-related
2. Not self-deliberated or caused by self-harm
3. Confirmed with some degree of permanent disability.

[5] Statistics provided by the Correctional Services Department to SoCO on 18 Jan 2012.

[6] This figure is based on the injury rates per 1,000 employees who suffered occupational injuries from 2003-2010. Occupational injuries (including industrial accidents) are injury cases arising from work accidents, resulting in death or incapacity for work of over three days, and reported under the Employee's Compensation Ordinance (Occupational Safety and Health Branch, Labour Department: "Occupational Safety and Health Statistics Bulletin, Issue No. 11 (July 2011). Link: http://www.labour.gov.hk/eng/osh/pdf/Bulletin2011.pdf

[7] This figure is based on the accident rates per 1,000 workers involved in industrial accidents from 2003-2010. Industrial accidents refer to injuries and deaths arising from industrial activities in industrial undertakings as defined under the Factories and Industrial Undertakings Ordinance (ibid).

[8] This figures is based on the accident rate per 1000 workers in Construction Industry 2003-2010.

The institution will investigate the injury and if the case is found eligible, it will forward findings and recommendations to the above-mentioned departments. There is no appeal mechanism.

According to the CSD the guidelines for the ex-gratia payment is internal and it is thus not possible for prisoners to know the details of the policy. In fact, prisoners are not informed in writing regarding the existence of such a scheme, nor about the application procedures.

Only two of the 793 prisoners who suffered work injuries during the period 2003-2010 have been granted compensation in the form of ex-gratia payments by the government.

The Commissioner of Correctional Services does not maintain regular statistics on the number of ex-gratia payment applications. Nor has CSD released any statistical data regarding the number of civil cases against it for acquiring compensation in relation to injuries. According to our research there have been no published court cases against the CSD related to work injuries.

International human rights standards

According to the Standard Minimum Rules for the Treatment of Prisoner published by the Office of the United Nations High Commissioner of Human Rights (OHCHR), governments should make provisions to "indemnify prisoners against industrial injury, including occupational disease, on terms not less favourable than those extended by law to free workmen." (Rule 74(2))[9]. Thus prisoners should be accorded fair treatment in terms of work injuries on the same level as people who are not in prison. This, however, is not the case in Hong Kong.

Employees Compensation Ordinance (Chap. 282) – a comparison

Prisoners are not covered by the Employees Compensation Ordinance (Chap. 282) (the Ordinance). The Ordinance only applies to employees who are employed under contracts or apprenticeship (section 2(1)).

Prisoners who work under the management of the CSD cannot be defined as employees, since they do not enter into any contract with the CSD. However, they *are* engaged in compulsory work, which they receive payments for. Their work results in products and services to government departments and tax-supported organizations. According to the CSD, in 2011 the Industrial Units produced goods and services equivalent to $422 million in commercial value[10].

[9] http://www2.ohchr.org/english/law/treatmentprisoners.htm
[10] http://www.csd.gov.hk/english/reh/reh_ind/reh_ind.html

Also both the Prisons Ordinance (Cap 234) and the Prison Rules (Cap 234A) refer to their work as "work"[11], "employment"[12] and "labour"[13]. There is thus no question that prisoners are performing work.

It is therefore useful to compare the type of protection that prison workers have with the protection enjoyed by people covered by the Employees Compensation Ordinance.

Coverage:

Degree of injury

The Employees Compensation Ordinance covers both permanent and temporary incapacity. For prisoners, the ex-gratia payment only covers confirmed cases of permanent disability.

Types:

The Employees Compensation Ordinance covers injuries, occupational diseases and death. The ex-gratia payment only covers injuries.

Assessment:

For prisoners the eligibility for ex-gratia payments is first assessed by the prison institution and then referred to a cross departmental task group.

However, for free workers injuries leading to more than 7 days of temporary incapacity is assessed by the Commissioner of Labour, while permanent incapacity is assessed by the Employees' Compensation Assessment Board and then referred back to the Commissioner of Labour. Other cases are referred to the District Court.

The assessment under the Employees' Compensation Ordinance is in many cases therefore made by a party independent to the contract. For prisoners, it is the institution, in which the prisoner worked, which makes the assessment.

Review:

No review is possible for ex-gratia payment decisions.

For cases referred to the Commissioner of Labour under the Ordinance appeal is possible within 14 days.

Amount of compensation:

For ex-gratia payments the CSD has not revealed how payments are calculated and prisoners therefore have no knowledge of payments available for different injuries. In fact the CSD has stated that the outcome will depend on decisions jointly made by the departments of the task group and on a case-by-case basis.

In contrast, the Employees' Compensation Ordinance provides for very clear rules regarding amounts payable in different circumstances and how they are to be calculated. For instance an injury leading to permanent partial injury is calculated with reference to age and monthly earnings and the percentage of permanent loss of earning capacity (please see appendix A for a comparison between the ex-gratia payment and the Employees' Compensation Ordinance).

[11] Prisons Ordinance (Cap 234) Section 25 (1)(j) and Prison Rules (Cap 234A) Rules 38, 39, 40, 41, 44.
[12] Prison Rules (Cap 234A) Rule 40 and 46.
[13] Prison Rules (Cap 234A) Rule 43 and 45.

As seen from above the coverage for free workers is much better than that provided to prison workers.

Overseas policies and legislation

United States
Pursuant to the statute Inmate Accident Compensation Act, 18 U.S.C § 4126, the 28 Code of Federal Regulations part 301 governs inmate accident compensation.

According to the regulations, Inmate Accident Compensation is awarded to former inmates or their dependents for physical impairment or death sustained while working in prison (§ 301.101(a)). Compensation covers both injuries and occupational diseases.
Compensation is also paid for claims alleging improper medical treatment of a work-related injury (§ 301.301).
Lastly, compensation may be paid for lost-time wages, if the prisoners have sustained a work-related injury resulting in time lost from the work assignment (§ 301.101(b)).
Lost-time wages are paid for time lost in excess of three consecutively scheduled workdays at a rate of 3/4. (§ 301.203)

In California the Labor Code covers all workers, including prisoners. Thus prison workers are treated on an equal footing as free workers (Section 3351(e)) and are defined as employees under the Labor Code[14]. Compensation covers injury and death (section 3370(a)). Benefits are paid after release.

United Kingdom: There is no specific legislation covering prison workers, and the Factories Act does not apply to prison workshops. Prisoners who are injured at work must rely on a civil claim in negligence, as the prisoners are owed a duty of care under the Occupiers Liability Act 1957.

Canada: According to the Corrections and Conditional Release Regulations SOR/92-620[15], prisoners are provided with compensation for disability and death attributable to participation in an approved programme. This includes both work and training courses in prison. Cases are referred to the Labour Department for assessment.

Case law: In USA there have been successful cases of prisoner plaintiffs appealing under the Civil Rights Act 42 U.S.C § 1983. In the case *Leonard Moreno v Mike Thomas* 2005, the prisoner successfully claimed against California Prison Industry Authority and California Department of Corrections and Rehabilitation for US$138,000 for bad health conditions resulting from a poor work environment.

Recommendation

[14] http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=03001-04000&file=3350-3371
[15] http://laws-lois.justice.gc.ca/eng/regulations/SOR-92-620/FullText.html

1. Enact legislation so that prison workers enjoy equal rights with free workers in respect of injuries, occupational disease or death caused by accidents arising out of and in the course of employment.
2. Review the ex-gratia payment policy, so that the eligibility criteria are relaxed. The criteria should be amended so that it also covers temporary incapacity, occupational diseases and death.
   Furthermore an appeals mechanism should be available for the process, and assessment of serious cases should be referred to the Commissioner of Labour and the Employees' Compensation Assessment Board.

3. The Correctional Services Department should publish its guidelines on the ex-gratia payment and make it available to all prisoners. All prisoners should be informed of their right to make civil claims.

Transfer of prisoners

Most foreign prisoners who wish to go back to their home countries to serve their sentences cannot do so because Hong Kong has only signed Transfer of Sentenced Persons (TSP) agreements with 14 countries/jurisdictions. The first was entered with United Kingdom in 1998, and the latest agreement was concluded with India in June 2015.

The 14 countries/jurisdictions with agreements are Australia, Belgium, Czech Republic, France, India, Italy, Portugal, Spain, United Kingdom, United States of America, Philippines, Sri Lanka, Thailand, Korea and Macao Special Administrative Region[16].

In comparison Australia has agreements with 68 jurisdictions, USA has agreements with 89 jurisdictions and the United Kingdom has agreements with 94 jurisdictions[17].

Many of the prisoners known to SoCO are however from Africa and South America and they cannot be transferred due to the lack of a transfer agreement. Although they can seek to be transferred on an ad hoc basis, the likelihood of success of extremely small. Foreign nationals are usually just removed from the country once the sentence is served without the benefit of any parole supervision or the rehabilitation measures available in prisons.

It's important to note the same problem applies to Hong Kong residents imprisoned abroad. If a HK resident is imprisoned in a country which Hong Kong does not have any transfer agreement with, he/she will most likely not be transferred back to Hong Kong but must serve the whole sentence abroad before being able to come back to Hong Kong.

What is a transfer agreement?

When a person is serving a sentence in a foreign country, he may seek to be transferred back to his home country to serve his sentence. Many prisoners wish to serve their sentences at home without language or cultural barriers and most importantly they wish to be near their families.

[16] Letter from Security Bureau 17 July 2014. Please note that Macao's transfer agreement does not appear on the List of Transfer of Sentenced Persons Agreements (Gazette References) http://www.doj.gov.hk/eng/laws/table5ti.html

[17] http://www.prisonersabroad.org.uk/uploads/documents/prisoners/Prison%20transfer%20v7.1.pdf, extracted 14/8/14

In order to be transferred, there must be a transfer agreement in place, in which the transferring country, the receiving country and the prisoner agree to the transfer. It is a requirement that the judgment of sentence and conviction is final and a certain minimum period remains to be served.
There is also a requirement of dual criminality meaning that the conduct underlying the offence is a criminal offence both in the sentencing and administering State.
Regarding the sentence the receiving State can either continue to enforce the sentence or convert the sentence.
If the parties agree on a continued enforcement of the sentence, the prisoner will serve the remainder of the original sentence in the receiving State. If the sentence is converted, the receiving State will impose a new sentence. This may be less severe, but not more severe than the original one.

Statistics on Hong Kong prison population

As at 6 June 2014, there were 1,016 sentenced persons from places outside Hong Kong/of other nationality. As seen in Table 1 the majority (653 sentenced persons) were from Asia, followed by 249 people from Africa.

Table. 1. No. of sentenced persons of other nationality/from places outside Hong Kong.

Continent	**No. of sentenced persons**
Asia	653
Africa	249
South America	85
Western	29
Total	**1,016**

Applications for outward transfer
During the period 1 June 2001-16 June 2014, the government received 259 transfer applications.
Of these only 23 have been successful, and nearly all (22) were to countries that have a Transfer of Sentenced Persons agreement with Hong Kong, while the last one was made through an ad hoc transfer. That person was from Nigeria.
When one compares the success rates, the rate with TSP agreement (33%) is much higher than that of the ad hoc applications (0.5%).

Table 2. Applications for outward transfer made by sentenced persons in HK
(1 June 2001 – 16 June 2014).

Country to be transferred to	**No. of applications received**	**No. of successful applications**	**No. of unsuccessful applications**	**No. of withdrawn applications**	**No. of applications under process**
With TSP Agreement	66	22	12	14	18
No TSP Agreement	193	1	49	6	137
Total	**259**	**23**	**61**	**20**	**155**

Applications for inward transfer

Hong Kong residents sentenced abroad[18] may also apply to be transferred back to Hong Kong.

During the period 1 June 2001 – 16 June 2014 Hong Kong SAR received 90 applications from Hong Kong residents to be transferred back to Hong Kong. Of these 31 were successful. 20 people's applications are under process, and 39 applications have been categorized as unnecessary/withdrawn.

As for the successful applications, the majority were from Thailand (28 applications) and 3 were from the USA (table 3).

Table 3. Applications for inward transfer made by HK residents (1 June 2001 – 16 June 2014)

Transferring country	**No. of applications received**	**No. of successful applications**	**No. of unnecessary/withdrawn applications**	**No. of applications under process**
Australia	32	0	23	9
Philippines	7	0	1	6
Thailand	47	28	14	5
USA	4	3	1	0
Total	**90**	**31**	**39**	**20**

Transfer agreements

There are two types of legal instruments that are available to transfer prisoners.

Multilateral instruments:

Firstly, there's the European Convention on the Transfer of Sentenced Persons[19]. This has been ratified by 64 countries[20], of which 18 countries are States outside Europe. Thus it is open to signature by non-member States. For instance Japan and Korea have ratified the Convention[21], but not Hong Kong or China.

Besides from this, there are The Scheme for the Transfer of Convicted Offenders within the Commonwealth; The Inter-American Convention on Serving Criminal Sentences which has 17 States parties.

The benefit of ratifying a multilateral agreement is that a State can enter into agreements with several other States in one go, and avoid the lengthy and costly process of negotiating new bilateral treaties. On the other hand bilateral agreements offer flexibility regarding which States a State enters into agreements with and allows for special provisions.

Bilateral agreements

[18] Excluding Macau SAR

[19] Entry into force 1 July 1985 http://conventions.coe.int/Treaty/EN/reports/html/112.htm. This however, has been replaced by framework decision 2008/909/JHA in respect of transfer decisions among European Union member States.

[20] http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=14/08/2014&CL=ENG, extracted on 14/8/14

[21] http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=08/08/2014&CL=ENG

Many bilateral agreements are entered into by States, also where there are multilateral agreements. For instance United Kingdom has 23 bilateral agreements with other States/jurisdictions.

Benefits of transferring prisoners

Reintegration

One of the most important aims of prisons is to rehabilitate offenders into society so they will not reoffend again. Keeping good contact with family members and having access to training and employment programmes is therefore important for prisoners to reintegrate into society.

If a prisoner is a foreigner and not a resident of Hong Kong that person will normally be deported back to his country of origin after serving his sentence. He will thus not be integrated into Hong Kong society upon release. As the training and employment programmes in Hong Kong prisons are aimed at reintegration in Hong Kong, it would be better if a foreign prisoner, if he so wishes, goes back to his country of origin to serve his prison term. He would then be able to make full use of the reintegration services and measures available there.

Having family support improves the likelihood of successful reintegration. If foreign prisoners could serve their sentences in their home country, they would be able to receive family visits just like local residents are allowed visits from their families and friends.

Law enforcement

Besides from the rehabilitative benefits of transferring prisoners, it is also beneficial from a law enforcement perspective. Prisoners who are not transferred will in most cases just be deported to their country when released. However, in such a case the receiving country has no control over the timing or mode of that person's arrival, nor what the person will do. Nor does it have any information about the offence committed.

However, as stated by the United Nations Office of Drugs and Crime in its *Handbook on the International Transfer of Sentenced Persons* if a person is transferred the State can use its own criminal justice system to exercise some control over the prisoners prior to and following release into the community, thereby benefitting crime prevention and law enforcement. Also if transferred the receiving State has detailed information about the offence and the prisoner's adjustment to life in prison[22].

Recommendations:

1. The HKSAR should enter into more bilateral agreements with countries in order to transfer foreign prisoners. It should proactively negotiate agreements with countries from which its foreign prisoner population comes from.
2. The HKSAR should ratify the European Convention on the Transfer of Sentenced Persons in order to enter into agreements with multiple countries at the same time.

Prison disciplinary mechanism

Independent impartial tribunal

[22] United Nations Office of Drugs and Crime 2012: *Handbook on the International Transfer of Sentenced Persons*, p. 13

The right to have trial by independent impartial tribunal was protected in the article 10 of Hong Kong Bill of Rights Ordinance, which states that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Under the present Hong Kong prison system, there is no independent tribunal for disciplinary hearings. According to section 57 and 62 of Prison Rules, the Superintendent is entitled to deal with the reports against prisoners, to interrogate "any person touching any alleged offence against prison discipline" and adjudicate the charge. And according to Standing Orders (64-02(2)), only the officer suffered from the offence of prisoner, officer witnessing the offence or the officer dealing with the offence can lay the charge, except there is absence of officers of CSD. The role as a superintendent and the relationship between the prosecutor and adjudicator made the impartiality and independence of the trial in doubt.

Legal representation at adjudication

Also, legal representation is protected by the Hong Kong Bill of Rights Ordinance. As set out in the article 11(2) (d), everyone is entitled "to defend himself in person or through legal assistance of his own choosing" in a criminal proceeding.

Under the present prison disciplinary mechanism, prisoners are not entitled the right to have legal representation. According to paragraph 10 of Disciplinary offences adjudicating procedure manual, the accused inmates will be requested to (a) defend for himself if he plea non-guilty, or (b) make sense of his behaviour and explain why he should be entitled mitigation if he plead guilty. Also, in the case *Hung Chi Kwan v Tai Wing Kin & Another*, Seagroatt J commented that legal representation is not practicable in prison disciplinary mechanism.

But in the case *R v Home Secretary, ex p Tarrant*, the issue was under unprecedented change. Webster J quashed the conviction handed down by the Board on the ground that they had failed even to consider whether they had a discretion to grant representation. He indicated that there are six factors needed to be considered in deciding the matter of legal representation which are:

(a) the seriousness of the charge and the potential penalty;
(b) the likelihood that difficult points of law would arise;
(c) the capacity of a prisoner to present his own case;
(d) procedural difficulties, such as the inability of prisoners to trace and interview witnesses in advance;
(e) the need for reasonable speed in deciding cases;
(f) the need for fairness between prisoners and between prisoners and prison officers.

Record of disciplinary proceeding

Under the present system, there is no requirement that an accused prisoner would receive any record of disciplinary proceeding. According to the Disciplinary offences adjudicating

procedure manual, the accused prisoner will know the verdict of the proceeding in oral at the end of the disciplinary proceeding, without the provision of reason. Some prisoners complained that they will not receive any written record or judgment after the proceeding. They will not know the reasoning of the verdict when they appeal against the conviction.

However, according to the case *Henry v Jamaica*, the court that "in order to enjoy the effective use of this right (right of convicted persons to have the conviction and sentence reviewed 'by a higher tribunal according to law'), the convicted person is entitled to have, within a reasonable time, access to written judgments, duly reasoned, for all instances of appeal".

Recommendations:

1. Establish an independent disciplinary tribunal

2. Provide legal aid in disciplinary hearings

3. Provide records of disciplinary proceedings

Complaint mechanisms and regulations of disciplinary forces

In recent years, there is a noteworthy trend of a rise in the number of complaints raised by prisoners[23], which casts doubts on the management of penal institutions regarding human rights. From 1998 to 2012, only 69 out of 1031 complaints, a rate of 6.7 percent, were substantiated [24], which further questions the effectiveness of the complaint-handling mechanism in penal institutions in Hong Kong.

The existing mechanism

a) Internal monitoring mechanism

The Complaints Investigation Unit is responsible for handling and investigating complaints in relation to the CSD's work. It is appointed by the Commissioner of Correctional Services (CCS) to handle and investigate all complaints

As for the Correctional Services Department Complaints Committee (CSDCC), it is vested with the authority to examine all investigation findings handled by CIU for the purpose of check and balance. After endorsement of the outcome of the investigation by CSDCC, the complainant will be informed of the outcome in writing by CIU accordingly. Furthermore, a complainant who is dissatisfied with the outcome of the CIU investigation may apply in writing for re-examination of the complaint by CSDCC[25]. It is chaired by the Civil Secretary who is appointed by the CCS.

[23] "Rise in complaints by prison inmates" South China Morning Post 8 Jun 2012 http://www.scmp.com/article/62892/rise-complaints-prison-inmates

[24] "Rise in complaints by prison inmates" South China Morning Post 8 Jun 2012 http://www.scmp.com/article/62892/rise-complaints-prison-inmates

[25] Website of Hong Kong Correctional Services Department http://www.csd.gov.hk/english/other/other_complaint/other_complaint.html

However, in practice, the impartiality and degree of independence of these two units are often questionable because they are integral parts of the CSD. The low rate of complaints being handled and a high rate of repeated complaints[26] further cast doubts on whether they will handle complaints independently with justice. Very often, the complaints are not substantiated due to a lack of evidence[27].

Besides, the appointment system for staff in CSDCC is totally secretive to make it hard to convince the public that independent and appropriate committee members can be chosen to monitor CSD staff.

b) External monitoring mechanism

The external monitoring mechanism includes the Justice of Peace, Office of the Ombudsman and non-governmental organizations (NGOs).

(1) Justice of the Peace (JPs)

JPs are considered to be the primary monitoring mechanism for penal institutions in Hong Kong because it is the only external channel that is specifically envisaged to handle complaints for prison inmates.

In addition to its paramount importance to prisoners, the statutory power of JPs is one point that should never be ignored. JPs are appointed to perform their functions under the Justices of the Peace Ordinance (Cap. 510). Under this ordinance, one of the functions of a JP shall be to visit any custodial institution or detained person[28] every two weeks and they can visit without prior notice. The objective of the visits is to ensure that the rights of the inmates in the institutions are safeguarded through a system of regular visits by independent visitors. Besides, the power of investigation and access to prisons is clearly stated in Prison Rules (Cap. 234A)[29].

In handling complaint cases, JPs can either initiate investigative actions by making personal inquiries into the complaints (such as requesting background information from staff of the institutions and examining relevant records and documents), or referring them to the concerned institutions, usually CIU, for follow-up actions. The concerned institutions will advise the JPs of the outcome of their investigations in writing[30].

However, the functions of JPs are usually improperly performed due to various practical problems.

In the first place, there is no clear standard or criteria for appointing JPs. According to section 3(1) of the JP Ordinance, the Chief Executive may from time to time appoint any person whom he considers to be fit and proper, to be a justice of the peace.

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[26] According to the 2012 Annual Review of the CSD, CIU received 496 cases from persons in custody and the public. Among them, only 137 cases entailed full investigation by CIU while 128 were repeated complaints.

[27] According to the 2012 Annual Review of the CSD, none of the complaints are substantiated from 2011 to 2012.

[28] Section 5(1a) of JP Ordinance

[29] See Appendix 4

[30] Quote from 2012 Annual Report on JPs Visits
Available at:http://www.info.gov.hk/jp/eng/anreport12_eng.pdf

Furthermore, upon receiving complaints from prison inmates, JPs usually direct them to CIU or Office of the Ombudsman. However, as mentioned above, the impartiality of CIU has always been in doubts in handling the complaints. As for Office of the Ombudsman, since JPs will not be informed about the results of investigations after directing complaints to the Ombudsman[31], they are discouraged from doing so.

Finally, the visiting arrangements have discouraged prisoners from lodging complaints to JPs, making the JP system ineffective as the CSD staffs often stay in the same venue and listen to the conversation. This put pressure on the prisoners making complaints because of a fear of retaliation. Also, JPs do not visit the same prison every time so there is a lack of continuity in monitoring the progress of improvement in a prison and following up complaints from prisoners. For unannounced visit, it is also not practically feasible.

(2) Office of the Ombudsman

Office of the Ombudsman is not specifically established to handle complaints from prisoners and they do not visit prisons. Rather, it addresses issues of maladministration in the public sector to improve the quality of public administration. But it has a prison team of five investigators, with the statutory power of direct investigation.

Normally when a prisoner files a complaint through various channels, it is first referred to the CIU for an internal complaint handling procedure. If, however, the complaint cannot be satisfactorily resolved and it appears that an injustice has occurred, then the Ombudsman's office undertakes an in-depth investigation that culminates in a judgment and recommendations. If these recommendations are not acted upon, the Ombudsman may submit a report to the Chief Executive, so the recommendations are normally accepted.

Although the Ombudsman has a wide range of powers in investigations, this system does have many shortcomings in practice.

One point that is noteworthy is that the Ombudsman has a limited mandate to hear complaints: most notably, they cannot involve a crime and the complaints must be submitted by the prisoners themselves, not by relatives[32].

Apart from the limited mandate, this system is extremely complaint-specific and reactive. The Office of Ombudsman normally will not initiate investigations upon receiving complaints. Also, as mentioned above, since the law discourages JPs from directing complaints to the Ombudsman, the function of this system in preventing torture in prisons is further weakened.

Mechanism	External/Internal	Inadequacies
CIU and CSDCC	Internal	- Questionable Impartiality and degree of independence because they are integral parts of the CSD - Appointment system is not transparent

[31] Section 15 “Ombudsman and his staff to maintain secrecy” of the Ombudsman Ordinance
[32] Section 10 “Restrictions on investigation of complaints” of the Ombudsman Ordinance

JPs	External	- Unclear standard of appointment - No prior training - No investigation initiative - Poor visiting arrangements
Ombudsman	External	- Limited mandate to hear complaints - Complaint reactive

However, in United Kingdom, the monitoring mechanisms can be summarized as follows:

Mechanism	International/ National	Work
European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	International	- Handle claims brought by European prisoners on ECPT and ECHR - Examine Custodial systems annually to safeguard against torture - Annual report with recommendations is received by the UK
United Nations Subcommittee on Prevention of Torture	International	- Examine Custodial systems annually to safeguard against torture - Guidance is received by the UK on how to set up a NPM - Annual report with recommendations is received by the UK
Independent Monitoring Board	National	- Monitor the day-to-day life local prisons to ensure that proper standards of care and decency are maintained. - Handle complaints from prisoners - Educate prisoners on their rights and channels for complaint - Publish annual report on each prison with recommendations
Her Majesty's Inspectorate of Prisons	National	- Inspect or arrange for the inspection of prisons to report to the government on the treatment of prisoners and conditions in prisons - Submit an annual report for each prison to be laid before Parliament - Inspect serious matters like riots or deaths in the custodial system - Detailed check of every single aspect in prisons to ensure they live up to standards
Human Right Commission	National	- Raise public awareness on human right issues - Conduct research on law reforms
Ombudsman	National	- Handles complaints after the

		complainants have gone through NPM but are still dissatisfied - Clear follow-up actions - Can accept complaints from third parties

Recommendations

1. The government should review the existing complaint mechanisms and set up an independent complaints channel where prisoners feel safe to make complaints.

2. The government should set up a monitoring mechanism which can inspect all parts of prisons and create awareness of prisoners' rights.

3. The government should consider being a party to the Optional Protocol to the Convention Against Torture.

Refugees

Non-*refoulement* protection is not a durable solution

Asylum seekers in Hong Kong can seek asylum under the Unified Screening Mechanism (USM) of the Hong Kong government. However, the system only protects against being deported to the country of origin rather than providing durable solutions.
According to the United Nations High Commissioner for Refugees there are three different durable solutions:

1. Voluntary repatriation
2. Resettlement
3. Local integration

For most HK-refugee cases, voluntary repatriation as a free and informed choice is seldom an option. Mostly, they are resettled to a third country. The resettlement country provides the refugee with legal and physical protection, including access to civil, political, economic, social and cultural rights similar to those enjoyed by nationals.

However, it is worthwhile to note that only a small number of states take part in UNHCR resettlement programmes. The United States is the world's top resettlement country, while Australia, Canada and the Nordic countries also provide a sizeable number of places annually. In recent years there has been an increase in the number of countries involved in resettlement in Europe and Latin America[33].

Thus it is not all refugee cases that are resettled. Here local integration should be considered. Where there is little hope of voluntary repatriation or resettlement local integration should be an option, where refugees are fully integrated into the host society.

[33] http://www.unhcr.org/pages/4a16b1676.html

This includes respecting their human rights, such as the right to work and education, and to be integrated into the local community.

So far the government has not offered any local integration to successful USM claimants who could not be voluntarily repatriated or resettled. Recent statistics show that only 6 people out of 36 substantiated cases under the USM system have been referred by the government to the UNHCR for resettlement. In fact only those cases that fall under the criteria of the Refugee Convention are referred.

Becoming party to the Refugee Convention

The government has repeatedly stated that it will not become a party to the Refugee Convention. It should strongly consider becoming a signatory to the 1951 Convention relating to the Status of Refugees (the Refugee Convention), as its the only international agreement that recognizes the rights and obligations of refugees. It also includes basic human rights such as the right not to be forcibly returned, the right to education, work and public assistance. If Hong Kong signs it demonstrates its commitment to treating refugees according to internationally recognized standards.

Right to work

1. Most refugees able to work

While most refugees and asylum seekers receive assistance from the government, in fact most would rather work to cover their living expenses. The vast majority are in the age 18-59 who would be able to provide for themselves and contribute to society.

2. Other countries allow refugees to work

In Australia asylum applicants are allowed to work after 6 months, in United Kingdom after 12 months, and in USA after 150 days of stay, if the processing of the claim has not been finalized.
According to the Convention relating to the Status of Refugees ('Refugee Convention' article 17 (3) "[the] Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals".
Recognized refugees and successful CAT claimants may have to stay in Hong Kong for several years before they can be resettled to another country. It is important that they fully develop their skills while they are awaiting resettlement.
We suggest that the government allows claimants and asylum seekers to work after 1 year of stay if the claim is still in process. All refugees should enjoy the right to work.

Right to vocational training

1. International law

According to international law, governments are not allowed to discriminate against people on the basis of their immigration status. Thus the right to secondary education, including technical and vocational secondary education shall be made generally available and accessible to all according to article 13, 2(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which came into force in Hong Kong in

1976. The ICESCR emphasizes that the rights shall be enjoyed by all irrespective of status such as race, national origin or *other* status. Other status would thus include immigration status.

Secondly, the UN Committee on the Elimination of Racial Discrimination has published a "General Recommendation 30 (2004) on discrimination against non-citizens", which states that the government should "[ensure] that public educational institutions are open to non-citizens". Also it should "[remove] obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health"[34]. Thus people who are not residents of Hong Kong also enjoy the right to education.

2. Government policy on vocational training

According to government policy publicly funded vocational training and post-secondary education is only available to Hong Kong residents, but not to refugees, asylum seekers and torture claimants, who are either on recognizance or without any immigration papers. The Education Bureau claims that there are resources restraints and that vocational training is not obligatory.

Furthermore, the Education Bureau has pointed out that the vocational training courses are intended for subsequent *local* employment. It points out that since asylum seeker/refugees/torture claimants are not allowed to work in Hong Kong, then it is not appropriate to arrange any kind of vocational training for them.

However, these arguments are highly flawed, as in fact the skills that can be obtained through the Vocational Training Council are basic skills within areas such as computing, business, housekeeping and automobile engineering, which can easily be used in other countries as well. By equipping refugees and asylum seekers with some basic skills the Hong Kong government can secure them a brighter future instead of wasting their potential.

<u>Recommendations</u>

1. The government should allow claimants under the USM to work after 1 year of stay if the claim is still in process. All substantiated cases should enjoy the right to work.

2. Vocational training should be made available to all refugees, and particular attention should be paid to young asylum seekers and refugees.

[34] Office of the United Nations High Commissioner for Human Rights 2006: "The Rights of Non-citizens", p. 51, New York and Geneva.