Second periodic report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Civil and Political Rights:

Government of the Hong Kong Special Administrative Region's Response to the List of issues presented by the Human Rights Committee on 7 December 2005 (CCPR/C/HKG/Q/2)

Contents

Government of the Hong Kong Special Administrative Region's Response to the List of issues to be taken up in connection with the consideration of the second periodic report of the Hong Kong Special Administrative Region of the People's Republic of China (CCPR/C/HKG/Q/2)

Constitutional and legal framework within which the Covenant is implemented and conformity of laws with it (article 2)

1. Please provide information on the re-interpretation of the Basic Law provisions (Annex I and II) issued by the Standing Committee of the National People's Congress (NPCSC) on 6 April 2004 and 26 April 2004, particularly in terms of its impact for the authority of the HKSAR courts and the principle of universal suffrage in the elections of the Chief Executive and the Legislative Council in 2007 and 2008. How is this interpretation consistent with the Standing Committee's obligation to respect civil and political rights in the HKSAR?

Reply

1.1 The Hong Kong Special Administrative Region (HKSAR) was established by the National People's Congress of the People's Republic of China (PRC) in accordance with the provisions of Articles 31 and 62(13) of the Constitution of the PRC. Under the principle of "one country, two systems", the socialist system and policies will not be practised in Hong Kong. In accordance with the Constitution, the National People's Congress has enacted the Basic Law (BL), prescribing the systems to be practised in the HKSAR, in order to ensure the implementation of the basic policies of the State regarding Hong Kong. The constitutional status of the HKSAR is prescribed in, inter alia, Articles 1, 2 and 12 of the Basic Law. That is, the HKSAR is an inalienable part of the PRC; the National People's Congress authorizes the HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law; and the HKSAR shall come directly under the Central People's Government etc.

Basic Law Provisions relating to the Methods for Selecting the Chief Executive and for Forming the Legislative Council

1.2 Articles 45 and 68 of the Basic Law provide that the methods for selecting the Chief Executive and for forming the Legislative Council shall be specified in the light of the actual situation of the Region and in

accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures, and the election of all members of the Legislative Council by universal suffrage. The specific methods to be followed are specified in Annexes I and II to the Basic Law.

1.3 The role of the Central Authorities in relation to amendment to the methods for selecting the Chief Executive and for forming the Legislative Council is expressly prescribed in Annexes I and II to the Basic Law. Article 7 of Annex I to the Basic Law provides that if there is a need to amend the method for selecting the Chief Executive for the term subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress (NPCSC) for approval. Article III of Annex II to the Basic Law provides that if there is a need to amend the method for forming the Legislative Council and its procedures for voting on bills and motions after 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the NPCSC for the record.

NPCSC's Power to Interpret the Basic Law

1.4 Article 158(1) of the Basic Law (BL158(1)) provides that the power of interpretation of the Basic Law shall be vested in the NPCSC. Under BL158(2), the HKSAR courts are authorized by the NPCSC to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of the Region. Under BL158(3), the HKSAR courts may also interpret other provisions of the Basic Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the Central People's Government (CPG), or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the NPCSC through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

1.5 The NPCSC's power of interpretation under BL158 has been the subject of detailed consideration by the Court of Final Appeal (CFA) in *Lau Kong Yung v Director of Immigration*[1]. According to the CFA (at 798B-800B), the NPCSC has a general power to interpret the Basic Law. This power of interpretation originates from Article 67(4) of the Constitution, under which the NPCSC has the power to interpret laws of the PRC, including the Basic Law which is a national law. This power is also contained in BL158(1) itself. The power of interpretation conferred by BL 158(1) is in general and unqualified terms. It is not restricted or qualified in any way by BL158(2) and BL158(3). It is not restricted to interpreting only the excluded provisions (that is, BL provisions "concerning affairs which are the responsibility of the CPG, or concerning the relationship between the Central Authorities and the Region"). The authority given by BL158(2) to HKSAR courts stems from the general power of interpretation vested in the NPCSC. BL158(3) extends that authority but subject to a qualification requiring a judicial reference.

1.6 In a subsequent CFA decision in *Director of Immigration v Chong Fung Yuen*[2], the binding effect of the NPCSC's interpretation on Special Administrative Region (SAR) courts has been further explained. According to the CFA, where the NPCSC has made an interpretation of the Basic Law pursuant to its power under Article 67(4) of the Chinese Constitution and BL158 of the Basic Law, the courts in the HKSAR are under a duty to follow it. The CFA so held in *Lau Kong Yung* where it stated that the NPCSC's power of interpretation of the Basic Law under art.158(1) originating from the Chinese Constitution "is in general and unqualified terms" (at p.323B). In particular, that power of the NPCSC extends to every provisions in the Basic Law and is not limited to the excluded provisions referred to in BL158(3). Equally, where the NPCSC makes an interpretation of an excluded provision pursuant to a judicial reference from the CFA under BL158(3), the courts in the HKSAR in applying the provision concerned shall follow the NPCSC's interpretation, although judgments previously rendered shall not be affected. This is expressly provided for in BL158(3).

The Interpretation

1.7 On 6 April 2004, and in accordance with Article 158(1) of the Basic Law, the NPCSC made an interpretation in respect of Article 7 of Annex I and Article III of Annex II to the Basic Law (the Interpretation). According to the Interpretation, the Chief Executive of the HKSAR shall make a report to the NPCSC as regards whether there is a need to make amendment to the

[1] [1999] 3 HKLRD 778.
[2] [2001] 2 HKLRD 533 at 545 A-G.

electoral methods; and the NPCSC shall, in accordance with the provisions of Articles 45 and 68 of the Basic Law, make a determination in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The Interpretation also provides that the bills on the amendment to the method for selecting the Chief Executive and the method for forming the Legislative Council and its procedures for voting on bills and motions and the proposed amendments to such bills shall be introduced by the Government of the HKSAR into the Legislative Council. It also provides that if no amendment is made to two electoral methods above and the provisions relating to the procedures for voting on bills motions in Annex II, the relevant provisions stipulated in the Annexes will still be applicable.

The Decision

1.8 On 15 April 2004, and in accordance with the procedures stipulated in the Interpretation, the Chief Executive submitted a "Report on whether there is a need to amend the methods for selecting the Chief Executive of the HKSAR in 2007 and for forming the Legislative Council of the HKSAR in 2008". The Report recommended that the two electoral methods should be amended in 2007 and 2008. At its Ninth Session on 25 and 26 April 2004, the NPCSC deliberated on the report submitted by the Chief Executive. On 26 April 2004, in accordance with the relevant provisions of the Basic Law and the Interpretation, the NPCSC adopted the "Decision of the Standing Committee of the National People's Congress on issues relating to the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in the year 2007 and for forming the Legislative Council in 2008" (the Decision). The Decision was promulgated on the same day.

1.9 The NPCSC Decision on the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008 in the HKSAR is as follows –

(1) The election of the third Chief Executive of the HKSAR to be held in the year 2007 shall not be by means of universal suffrage. The election of the Legislative Council of the HKSAR in the fourth term in the year 2008 shall not be by means of an election of all the members by universal suffrage. The ratio between members returned by functional constituencies and members returned by geographical constituencies through direct elections, who shall respectively occupy half of the seats, is to remain

unchanged. The procedures for voting on bills and motions in the Legislative Council are to remain unchanged.

(2) Subject to Article 1 of this Decision not being contravened, appropriate amendments that conform to the principle of gradual and orderly progress may be made to the specific method for selecting the third Chief Executive of the HKSAR in the year 2007 and the specific method for forming the Legislative Council of the HKSAR in the fourth term in the year 2008 according to the provisions of Articles 45 and 68 of the Hong Kong Basic Law and the provisions of Article 7 of Annex I and Article III of Annex II to the Hong Kong Basic Law.

1.10 The HKSAR Government welcomed the NPCSC's acceptance of the Chief Executive's recommendation, and the determination that the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008 could be appropriately amended. As referred to in the NPCSC Decision, before making the Decision, the NPCSC has consulted the Constitutional Development Task Force and different sectors of the Hong Kong community, and has considered the relevant views. In the Decision, the NPCSC has also stated that developing democracy in the HKSAR in the light of the actual situation and in a gradual and orderly manner according to the provisions of the Hong Kong Basic Law has all along been the resolute and firm stance of the Central Authorities.

Application of the ICCPR to the HKSAR

1.11 Upon ratification of the International Covenant on Civil and Political Rights (ICCPR) in 1976, the British Government made a reservation, reserving the right not to apply sub-paragraph (b) of Article 25 in so far as it might require the establishment of an elected Executive or Legislative Council in Hong Kong. After the reunification, in accordance with the Central People's Government's notification to the United Nations Secretary-General in June 1997 and Article 39 of the Basic Law, this reservation continues to apply to the HKSAR. As provided for in Articles 45 and 68 of the Basic Law, the HKSAR shall decide the methods for selecting the Chief Executive and for forming the Legislative Council in the light of the actual situation in Hong Kong and in accordance with the principle of gradual and orderly progress, with the ultimate aim of attaining universal suffrage. We maintain the view that the reservation against Article 25(b) means that these arrangements are not inconsistent with the provisions of the Covenant as applied to Hong Kong.

The NPCSC's Interpretation and Decision are Legal and Constitutional

1.12 Given the constitutional status of the HKSAR and in view of the provisions of the Basic Law relating to the electoral methods, the Central Authorities have the constitutional powers and responsibilities to oversee Hong Kong's constitutional development. Thus, to answer the Committee's question –

(a) under the Basic Law, the method for selecting the Chief Executive shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures. The method for forming the Legislative Council shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all members of the Legislative Council by universal suffrage;

(b) the power of the NPCSC to interpret the Basic Law is general and unqualified. This power of interpretation is acknowledged and respected in the Region and its courts. There is no question that the authority of the HKSAR courts has been undermined;

(c) the NPCSC Interpretation of 6 April 2004 and Decision of 26 April 2004 are legal and constitutional. They are consistent with our obligations under the Covenant as applied to Hong Kong;

(d) neither the Interpretation nor the Decision can be regarded as a re-interpretation of the Basic Law provisions, since the NPCSC had not authoritatively interpreted Article 7 of Annex I and Article III of Annex II to the Basic Law previously.

Background: Electoral Arrangements for Selecting the Chief Executive in 2007 and for Forming the Legislative Council in 2008

Review of Constitutional Development in Hong Kong

1.13 In his Policy Address of January 2004, the Chief Executive said that the Government would actively promote constitutional development in Hong

Kong on the basis of the prescriptions of the Basic Law. He also announced the establishment of the Constitutional Development Task Force. Since its establishment in January 2004, the Task Force has examined in depth the relevant issues of principle and legislative process in the Basic Law relating to constitutional development, consulted the relevant departments of the Central Authorities, and gathered the views of the public on the relevant issues.

1.14 In October 2005 - pursuant to the relevant provisions of the Basic Law and the NPCSC Decision of 26 April 2004 - we put forward a package of proposals for the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008. The proposed package was a product of wide and open public consultation conducted in stages for over 18 months. If the package was endorsed by the Legislative Council –

(a) **selection of the Chief Executive:** the size of the Election Committee would have been doubled from 800 to 1,600. More than 400 of the 1,600 (including elected District Council members and Legislative Councillors) would have been elected directly or indirectly by over thee million voters;

(b) **formation of the Legislative Council:** the number of seats would have increased from 60 to 70. Five of the ten new seats would have been returned by geographical constituencies, and the five new functional constituency seats would have been returned through elections by District Council members from among themselves. Close to 60% of all Legislative Council seats would have been elected directly or indirectly by over three million voters.

1.15 The package proposed could have greatly enhanced 'democratic representativeness' at both electoral levels and significantly advanced Hong Kong's constitutional development. It had majority support in the community and that of more than half of the Members of the Legislative Council. But, when put to vote on 21 December 2005, it did not receive the two-thirds majority support of all members of the Legislative Council as required under the Basic Law. In accordance with the NPCSC Interpretation of 6 April 2004, if no amendment is made to the two electoral methods as stipulated in Annexes I and II to the Basic Law, the relevant provisions relating to the two methods in Annexes I and II will continue to apply. In the circumstances, the election of the Chief Executive in 2007 and the election of the Legislative Council in 2008 will be held on the basis of the existing arrangements.

1.16 The HKSAR Government understands and recognises the community's aspirations in regard to universal suffrage. The Chief Executive has tasked the Commission on Strategic Development to study the matter in two stages. The Commission aims at concluding discussions on the principles and concepts relating to universal suffrage by mid-2006, and on the design of a universal suffrage system for the Chief Executive and the Legislative Council by early 2007.

2. In view of comments provided by the HKSAR government in paragraphs 76-78 of the report (CCPR/C/HKG/2005/2), please explain whether it has taken, or envisages to take, any steps to establish a national human rights institution in conformity with the Paris Principles, as well as to extend the mandate of the Ombudsman over the police and the Independent Commission Against Corruption.

Reply

2.1 Taking the two issues seriatim –

(a) **a 'national' human rights institution:** we are not averse to the eventual establishment of such an institution in Hong Kong. As we see it, however, that an institution purporting to be a national (or, regional in the case of Hong Kong) human rights institution must conform to the Paris Principles in order to secure international recognition as such an institution. At a minimum, therefore, such an institution would need -

- its independence to be guaranteed by statute or constitution;
- autonomy from government;
- a broad mandate based on universal human rights standards;
- to be pluralistic, including in membership;
- to have adequate powers of investigation; and
- to have sufficient resources.

(i) Additionally, though not a requirement of the Paris Principles, there would need to be –

- a broader range of anti-discrimination legislation; and
- the power to initiate legal action.

In Hong Kong, the institution that most nearly embodies the Paris Principles is the Equal Opportunities Commission (EOC), which conforms quite closely to the requirements in respect of independence, autonomy, pluralism, powers of investigation, resources, and the initiation of legal action. But the EOC's mandate is restricted to the scope of the equal opportunities ordinances (namely the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, and the Family Status Discrimination Ordinance). In principle, it might be feasible to extend that mandate to include additional forms of discrimination and even the oversight of universal human rights standards in Hong Kong. Having examined the issues in detail (in the light of the Committee's concluding observations of 1999), and having carefully considered the implications, we do not envisage significantly extending the EOC's mandate in the near future, nor are we ready to take the steps necessary for the establishment of an institution that fully meets the requirements of the Paris Principles.

(ii) That said, we have taken steps to ensure greater transparency in the public scrutiny of human rights by developing new channels of communications between human rights 'watchdogs' (such as non-governmental organisations (NGOs)) and the Government, and by increasing the participation in and transparency of older ones. Thus, we have extended the NGO/civil society membership of the Committee on the Promotion of Racial Harmony, which we established in 2002 to advise Government on the delivery of services to the minority communities and to propose effective publicity strategies. Additionally, we have subsumed the former Nepalese Community Forum into the newer Ethnic Minorities Forum, so ensuring that all the principal minority communities have the opportunity to air their concerns and to have those concerns acted on by the Government. A similar forum for the discussion of sexual minority rights was established in September 2004. And, in 2005, we established the Children's Rights Forum as a platform for NGOs and children's representatives. The latter complements our Human Rights Forum, a platform for dialogue between NGOs and the Government on issues whose ambit is self-evident from the Forum's name. All these bodies are open to the media.

(iii) These measures ensure a high level of public participation in the formulation of human rights policies and the delivery of human rights in action. They also subject the Government to an increased and increasing level and intensity of public scrutiny in the

performance of its obligations under the Covenant and the other international human rights treaties.

(b) **mandate of the Ombudsman:** the mandate does, in fact, extend to both the Police Force and the Independent Commission Against Corruption in relation to the Government's Code on Access to Information. However, it does not extend to them in any other respect and we have no immediate plans to so extend it.

3. Please elaborate on the 2002 review of the Equal Opportunities Commission (EOC) (paragraph 79 of the report) and provide information on the refusal to appoint an independent panel to investigate the alleged EOC incident of July 2003. What steps do the HKSAR authorities intend to take towards setting up a more transparent mechanism for the appointment of the EOC chairpersons and members?

Reply

3.1 Taking the issues seriatim –

(a) **action taken in the light of the 2002 review:** the Commission has made significant changes to its organisation and structure, and to its operational procedures. Specifically -

(i) **organisational/structural changes (effective March 2003):** these entailed –

- merging the two operational divisions for better operational efficiency and effective staff deployment; and
- improving efficiency by reducing the layers of supervision;

(ii) **operations (on-going):** among others, these include –

- staff coaching, experience sharing, and internal training with a view to improving the complaint-handling process;
- greater transparency in the handling of complaints;
- the establishment of special project teams – for example, the Commission's Severe Acute Respiratory Syndrome (SARS) quick response team - to handle complaints or situations of a complicated nature;

- encouraging the quick resolution of complaints through an 'early conciliation' mechanism;

- weekly case meetings to encourage intra-divisional communication, so ensuring consistency of practice and the correct interpretation of the law

- regular meetings with team leaders on investigators performance; and

- Random audits by the Director of Operations of active cases to ensure quality assurance and standardisation.

(b) **the Independent Panel of Inquiry on incidents relating to the EOC:** appointed by the Secretary for Home Affairs to investigate the incidents submitted its report in 2005. We and the EOC are working on its recommendations;

(c) **appointments of EOC chairperson and members:** as with all appointments to advisory and statutory bodies, the Chair and membership of the EOC are selected on merit. The current membership of the EOC covers a broad spectrum of Hong Kong society and, while the Paris Principles do not apply to the EOC, we believe that the Commission's membership is broadly consistent with the Principle concerning the appointment composition of national human rights institutions. We have invited the EOC to nominate further candidates for our consideration.

4. Please provide information on the status of the National Security Bill, introduced in February 2003 under article 23 of the Basic Law and withdrawn on 5 September 2003. Does the HKSAR Government plan to reintroduce any elements of this Bill? If so, when and what measures have been taken, or are envisaged, to ensure compatibility of these elements with the Covenant.

Reply

4.1 The position is as explained in paragraphs 338 and 339 of the HKSAR's second report. That is, the National Security (Legislative Provisions) Bill was withdrawn from the legislative programme in September 2003. At present, there is no pre-determined timetable for any related legislative proposals.

Principles of gender equality and non-discrimination; Freedom from torture and cruel, inhuman or degrading treatment; Right to be free of arbitrary arrest and detention; Security of the person and protection from arbitrary arrest; Treatment of prisoners and other detainees

(arts. 3, 7, 9, 10, and 26)

5. What measures has the HKSAR Government taken to combat violence against women, including domestic and sexual violence?

Reply

Legal framework (sexual violence)

5.1 The key provisions are contained in –

(a) **the Crimes Ordinance (Chapter 200):** which deals, inter alia, with sexual and related offences. Amendments passed in 1997 increased the maximum imprisonment for incest with women aged between 13 and 16 from seven to 20 years, this age group being particularly vulnerable. It was further amended in 2002 to make it clear that marital rape was a criminal offence;

(b) **the Offences Against the Person Ordinance (Chapter 212):** which deals, inter alia, with homicide, assaults, forcible taking or detention of persons, unlawful abortion, and so forth;

(c) **The Dangerous Drugs, Independent Commission Against Corruption and Police Force (Amendment) Ordinance 2000**[3]**:** the amendment came into effect in 2001. As so amended, the Ordinance authorises police officers to take both intimate and non-intimate samples from suspects arrested in connection with serious arrestable offences (including sexual offences) for the purpose of investigation. These powers are subject to safeguards provided for in the Ordinance;

(d) **the Evidence (Amendment) Ordinance 2000**[4]**:** as a general rule, evidence given against a defendant does not need to be corroborated. A defendant can generally be convicted on the uncorroborated evidence of a single credible witness, provided that the judge or jury is satisfied, beyond reasonable doubt, of the defendant's guilt. However, there are exceptions and previously, the evidence of accomplices, children and the complainant in sexual offences had to be corroborated. In 1994 and 1995 respectively, that

[3] The Ordinance amended the Dangerous Drugs Ordinance (Cap.134), the Independent Commission Against Corruption Ordinance (Cap. 204) and Police Force Ordinance (Cap. 232).

[4] Chapter 8 amending legislation.

requirement was abolished in respect of the evidence of accomplices and children but was retained in respect of the evidence of complainants.

It soon became clear that the corroboration rules worked to the disadvantage of victims of sexual offences: they were inflexible, complex and created anomalies. Taking the view that the abolition of the corroboration rule would not leave defendants inadequately protected (because the obligations of a trial judges would suffice to ensure that defendants received a fair trial), we abolished it in 2000; and

(e) **the Criminal Procedure (Amendment) Ordinance[5]:** provided greater protection to vulnerable witnesses such as children, mentally incapacitated persons, and witnesses in fear by allowing them to give evidence-in-chief in court by way of video recorded tapes and to be cross-examined via television link.

Police response to cases of domestic and sexual violence

5.2 Police officers are trained to handle victims of – or at risk of - violence (whether domestic, sexual, or both) with compassion and care. Indeed, the handling of such cases is included in the basic training programme for new recruits. Continuation training on the subject is provided for police officers through promotion and development courses, and through Training Day packages. Additionally, at various stages of their careers, they receive training on the 'Victim's Charter', 'Victim Psychology' and 'Empathetic Listening and Response'.

5.3 There are specific police guidelines for officers handling cases of sexual violence. Areas covered include the need to safeguard the privacy of victims and to help reduce trauma. Similar guidelines and handling procedures have been formulated in respect of domestic violence.

5.4 A comprehensive legislative framework is in place to protect women from violence. In addition to social welfare services, victims have access to a wide range of medical services as well as financial and housing assistance. In addition, we set up in 2001 the Working Group on Combating Violence to provide high-level coordination amongst parties concerned to tackle domestic and sexual violence.

Services for victims of sexual violence

5.5 The Social Welfare Department's Family and Child Protective Services Units (FCPSU) and the Integrated Family Service Centres (IFSCs)

[5] Chapter 221 amending legislation.

operated by the Department, NGOs, and social workers of the Medical Social Service Units, provide extensive treatment and counselling services to victims of sexual violence. The services include crisis intervention, counselling, and support. If necessary, the service providers arrange for victims to receive other services according to their needs. The latter include such things as medical treatment (including post-coital contraception, screening of sexually-transmitted diseases, medical examination, forensic examination), clinical psychological service, financial assistance, arrangement of accommodation, legal services, and so forth.

5.6 We consider it crucially important that these services should be convenient to the victims and that the service units are well co-ordinated so that, as far as possible, victims do not have to go to different places to undergo different procedures and repeat accounts of what happened to them. This requires the availability of appropriate personnel throughout the procedural chain to offer victims instant support and to coordinate the work of other parts of the 'chain' so that the victims can undergo the entire process in safety, confidentiality, and protection. It was to these ends that, in 2002 the Department adopted the 'case manager' approach, whereby social workers acting as case managers arrange follow-up services for victims and proactively liaise with relevant service centres throughout the procedural chain. They also provide extensive follow-up services after the crisis, so maintaining continuity of service.

5.7 The Department is planning to review the existing service model with a view to developing a long-term service mode. Areas of review include strengthening collaboration among different disciplines, the co-ordination function of case managers, and the synergy among related welfare service units. We aim to be able to complete the review before mid-2006.

Domestic violence

5.8 The Government does not tolerate domestic violence and, where such cases involve assaults or other criminal offences, the perpetrators are liable to criminal charges. Our strategy to combat it comprises –

(a) preventive measures (such as publicity, community education and enhancing social capital);

(b) supportive services (such as family services, housing assistance, financial assistance and child care services); and

(c) specialised services and crisis intervention (such as Family and Child Protective Services Units, a Family Crisis Support Centre, refuge centres for women, and so forth).

Legislative framework (domestic violence)

5.9 The protections discussed in paragraph 5.1 above in regard to sexual violence apply equally to domestic violence. Additionally, the Domestic Violence Ordinance (Chapter 189) empowers the court to grant injunctions on application by a party to a marriage to restrain the other party from molesting the applicant or exclude the other party from a specified area, which may include the matrimonial home. We are now reviewing the Ordinance to determine whether, and if so, how the protections to victims of domestic violence might be strengthened. Key issues under study include the scope of the Ordinance, the provision of counselling for batterers, and the duration of the injunction order.

Preventive measures against domestic violence

5.10 The key measures include –

(a) **prevention and support:** the Social Welfare Department has strengthened its preventive and supportive services in order to enable individuals and families to prevent domestic violence. Its network of IFSCs provides a continuum of preventive, supportive and remedial services. Examples include family life education, parent-child activities, enquiry service, volunteer training, outreach service, mutual support groups, counselling, and referral. The aim is to meet the changing needs of families in a holistic manner;

(b) **public education:** in 2002, the Department initiated an ongoing territory-wide publicity campaign: "Strengthening Families and Combating Violence". The objectives of the campaign are to foster public awareness of the need to strengthen families, to encourage families to seek early assistance, and to prevent violence. Sub-themes include spouse battering, child abuse, abuse of the elderly, sexual violence, and suicide;

(c) **co-ordination:** in 2001, the Department established a 'Working Group on Combating Violence' to co-ordinate the work of departments, professionals, and NGOs working to prevent and deal with family and sexual violence; and

(d) **training:** between April 2001 and March 2004, the Department organised over 70 training programmes on the handling of domestic violence Over 3,500 participants took part. The trainees included social workers, clinical psychologists, police officers, teachers, and medical staff.

Services for victims of domestic violence

5.11 Services include –

(a) prompt emergency treatment from public hospitals;

(b) integrated services including outreaching, crisis intervention, casework and group work treatment, and statutory protection of children;

(c) a telephone hotline;

(d) shelter in one of four refuges. These have a total of 162 places, providing temporary accommodation for women victims of family violence, sexual abuse, or other crisis situations (and their children). Admission is on a 24-hour basis;

(e) financial assistance, where needed, from the Comprehensive Social Security Assistance and charitable trust funds;

(f) housing assistance for those in genuine need and whose social/medical circumstances so warrant; and

(g) legal aid for eligible and meritorious applicants seeking court injunctions under the Domestic Violence Ordinance, or initiating proceedings for divorce, child custody, and maintenance payments.

New measures

5.12 In the last 12 months, we have secured additional resources to tackle the problem and strengthen support for families in need. These include –

- increased manpower;
- better co-ordination between the Police, the Social Welfare Department, and NGOs;
- reviews of the guidelines on child abuse and the shelter service for battered women;
- improving district welfare planning and co-ordination;
- developing a central database on domestic violence and related cases reported to the Police;

- strengthening our efforts in the area of publicity; and
- improved staff training.

Additionally, the Department has commissioned a tertiary institution to conduct a series of mass seminars to raise general awareness of domestic violence. These were held between November 2005 and January 2006. They were organised on a regional/cluster basis and over 2,400 members of related professions – such as social workers, police officers, medical personnel, and teachers – and district personnel, such as District Council members – participated.

Future measures

5.13 In 2006-07, the Department will initiate –

(a) a Family Support Programme: The purpose of the Programme is to increase connection with the vulnerable families in our community which are unmotivated to seek help. Through telephone contacts, home visitations and other outreaching service, we aim to introduce the needy families to various support services available and motivate them to receive appropriate services to prevent further deterioration of their family problems;

(b) two batterers'-intervention programmes: these will be run on a pilot basis from January 2006 to March 2008. The object is to better address the treatment needs of the batterers so as to break the cycle of violence. Treatment will be provided to batterers joining the programmes, whether voluntarily or in compliance with conditions stipulated in probation orders. The two projects will be run by the Department and an NGO. They will be evaluated upon completion with a view to identifying effective treatment modalities for batterers of various backgrounds.

6. Please provide further information on the notification system set up to assist HKSAR residents detained in mainland China (paragraph 198 of the report).

Reply

6.1 Under the 'Reciprocal Notification Mechanism' introduced in January 2001, the Mainland authorities will notify the Hong Kong Police of the unnatural deaths of Hong Kong residents in the Mainland and the imposition of criminal compulsory measures on Hong Kong residents by the

public security authorities and the Mainland customs authorities[6]. In June 2003, following a review, the coverage of the mechanism was extended to cases under the purview of the People's Procuratorates and the Ministry of State Security. On a reciprocal basis, the Hong Kong Police will notify the Mainland authorities of criminal prosecutions instituted by the Hong Kong Police Force, the Customs and Excise Department and the Immigration Department against Mainland residents, and the unnatural deaths of Mainland residents in Hong Kong.

6.2 On receiving such notification from the Mainland, the Hong Kong Police Force will inform family members of the Hong Kong resident concerned as soon as is practicable. Pursuant to the request of either the Hong Kong resident being detained or of his or her family, we will provide practical assistance and convey such request or appeal to the Mainland authorities as appropriate.

Prohibition of slavery or forced or compulsory labour (article 8)

7. Please provide information on legal proceedings, if any, instituted against traffickers in human beings, on the penalties imposed, on the protection of victims and redress granted to them.

Reply

7.1 Hong Kong is not a destination for human trafficking or a place of origin for exporting illegal migrants either. Cases of trafficking-in-persons are rare[7]. However, it is a convenient and busy marine/aviation hub with a liberal visa regime. As such, Hong Kong is more vulnerable than are many other places to human smuggling and trafficking activities.

Legal provisions and penalties

7.2 Traffickers may be prosecuted under several ordinances. For example –

- trafficking in persons to or from Hong Kong for the purpose of prostitution may be prosecuted under section 129 of the Crimes

[6] To date, most such notifications have related to matters that occurred in Guangdong Province and have involved fraud and smuggling offences. Notifications concerning Mainland residents prosecuted in Hong Kong have mostly related to forgery, furnishing of false statements, prostitution, smuggling, and dangerous drugs offences.

[7] Only one case – which occurred in 2004 - has been recorded in the last two years.

Ordinance (Cap. 200) with a maximum imprisonment penalty of 10 years; and

- persons arranging passage to Hong Kong of unauthorised entrants may be prosecuted under section 37D of the Immigration Ordinance (Cap. 115) with a maximum penalty of a fine of $5,000,000 and imprisonment for 14 years.

Protection and redress

7.3 Services are available to victims of trafficking, though not on a dedicated basis. They include –

- **welfare and psychological support/counselling:** provided by Government departments and NGOs;

- **legal aid and medical services:** on the same basis as other victims/patients;

- **temporary accommodation/refuge:** provided in places of refuge gazetted under the Protection of Children and Juveniles Ordinance (Cap. 213), refuges designed for victims of domestic violence, and overnight accommodation provided by the Family Crisis Support Centre; and

- **other short-term emergency intervention:** the Family Crisis Support Centre provides counselling, hotline service, self-learning facilities, and so forth.

Victims are encouraged to assist in the investigation of their cases and to give evidence against the traffickers with a view to apprehending the culprits. However, their co-operation is not prerequisite to the provision of services.

7.4 As regards protection –

- Department of Justice guidelines on the grant of immunities, permit the waiver, in appropriate circumstances, of prosecution against victims who have broken our immigration laws;

- there is a well established witness protection mechanism; and

- we provide all necessary logistic support for victims' safe and early return to their home countries.

Illegal immigrants from the Mainland

7.5 Most such persons enter Hong Kong on their own volition for economic reasons, rather than being trafficked by coercion or abduction. Unlike persons seeking asylum (see below), Hong Kong is their primary destination. Arrests of such persons have steadily decreased in recent years –

Year	Total no. of Mainland illegal immigrants arrested (denotes daily average)	Increase or decrease compared with previous year
2001	8,322 (23)	-1.82%
2002	5,362 (15)	-35.37%
2003	3,809 (10)	-28.96%
2004	2,899 (8)	-23.89%
2005	2,191 (6)	-24.4%

Right to privacy; Right to freedom of thought, conscience and religion; Right to freedom of opinion and expression, peaceful assembly and association: (arts. 17, 18, 19, 21, and 22)

8. Please provide information about the extent to which the Telecommunications Ordinance, the Post Office Ordinance and the Interception of Communications Ordinance are in compliance with articles 17 and 19 of the Covenant, as well as details on the announced review of regulations under the Interception of Communications Ordinance (paragraph 248 of the report).

Reply

8.1 Currently, the interception of communications by law enforcement agencies is authorised under section 33 of the Telecommunications Ordinance (Chapter 106) and section 13 of the Post Office Ordinance (Chapter 98). These permit such interceptions only under authorisation from the highest level of the Administration. The agencies are also bound by internal procedures that strictly control access to intercepted information.

8.2 The review foreshadowed in paragraphs 190 to 192 of our report in relation to Article 17 is now complete. Inter alia, this took account of –

- the Law Reform Commission's Report of 1996;
- a draft Government Bill published for consultation in 1997;
- the Interception of Communications Ordinance: a former private member's bill that was passed by the Legislative Council in June 1997 but was formulated without prior consultation with the Administration or discussion by a Bills Committee;
- overseas legislation and practice; and
- technological developments.

In February 2006, on the basis of the outcome of the review, we announced the key parameters of our legislative proposals for discussion with the Legislative Council.

8.3 The proposals are for a comprehensive regime covering both the interception of communications and covert surveillance by the law enforcement agencies. They include many important safeguards and strike a balance between protecting the individual's right to privacy and the need to protect law and order and public security. They seek to improve on the existing legislative regime and we consider them to be consistent with the provisions of the Covenant including, of course, Article 17.

8.4 Subject to consideration by the Legislative Council, we aim to have the legislation enacted within the current legislative session (that is, by July 2006).

9. Please comment on reports of allegedly increasing self-censorship by the media in the wake of the so-called "patriotism campaign" of April 2004, criticism from the mainland officials, and threats from the triads against leading media figures that were reportedly not acted upon by the HKSAR authorities. Please provide information on policies to ensure compliance with article 19 of the Covenant.

Reply

9.1 Freedom of expression and freedom of the press are fundamental rights enjoyed by all other persons in Hong Kong. They are enshrined in BL27, and Article 16 of the Hong Kong Bill of Rights. The Government is firmly committed to protecting those freedoms and to maintaining an

environment in which a free and active press can operate under minimum regulation that does not fetter either freedom of expression or editorial independence.

9.2 A free and vigilant press, with rights and freedoms guaranteed by law, is the most effective safeguard against self-censorship. Ultimately, those working in the field must protect the integrity of their profession. In this regard, we continue to see the press reporting freely, commenting extensively and critically on local and Mainland matters.

9.3 Arising from the allegations surrounding the resignation in May 2004 of three radio programme hosts, it is the fundamental policy of the Central Government to safeguard the 'One Country, Two Systems' principle, with Hong Kong people running Hong Kong and enjoying a high degree of autonomy. The Central Government will not do anything to undermine that principle, or any other of Hong Kong's interests. It supports the action that we have taken to safeguard the freedom of expression and of the press in accordance with the law.

9.4 Turning, then, to the question of threats, the Government's policy is one of 'zero tolerance' for any acts of intimidation, threat, criminal damage or violence against anybody in Hong Kong. The Police treat cases of such acts with the utmost seriousness, and take every necessary and possible step to bring the perpetrators to justice. We have urged any persons who have, or feel they have, been the subject of intimidation, threat, or violence to report the matter immediately and to provide as much information as possible to the Police.

10. Please provide information on the reported raid against the premises of seven news agencies and their journalists' homes by the Independent Commission Against Corruption (ICAC) on 24 July 2004, which the Court of First Instance found to be "wrong in fact and in law" in a judgement in August 2004. What is the effect on the freedom of the press of the Court of Appeal's ruling, which dismissed the ICAC appeal on technical grounds in October 2004, but concluded that ICAC had acted lawfully? Please elaborate on the monitoring role of the Independent Commission against Corruption Complaints Committee (paragraph 51 of the report).

Reply

10.1 In early July 2004, the ICAC arrested a number of persons for suspected corruption offences under the Prevention of Bribery Ordinance

(Cap. 201). One of those arrested (the Participant) agreed to assist the ICAC and participated in the witness protection programme (WPP) established under the Witness Protection Ordinance (Cap. 564). The Programme served to protect the Participant against any potential intimidation, harassment, or danger, including a prohibition against the disclosure of her identity and personal information and the fact that she was a Participant.

10.2 On 13 July 2004, lawyers acting on the instructions of some of the other suspects sought access to the Participant. This was denied and the lawyers then applied to the Court of First Instance for a writ of habeas corpus, seeking the Participant's release from the ICAC's custody. The Judge dismissed the application as the Participant was neither in custody nor held against her will.

10.3 That should have been the end of the matter but details of the habeas corpus proceedings, including the Participant's full name, age, position within her company, and so forth were subsequently reported in the press. The publication of this information put the Participant's well-being at risk, undermining the protection programme. The ICAC was therefore concerned that the purpose of the habeas corpus application had not been to seek the Participant's release but rather to disclose her identity and status as a witness in the protection programme, so intimidating and dissuading her from acting as a prosecution witness. If these things were so, they would constitute a contravention of the Ordinance.

10.4 Against this background, the ICAC found it necessary to ascertain the identity of the person(s) who had disclosed to the press information proscribed by law. Accordingly, the Commission applied for warrants to search premises of the seven newspapers concerned and the homes of the journalists who had reported the story. In deciding whether to make the application, the ICAC had taken the following factors into consideration –

(a) the seriousness of the offences suspected to have been committed;

(b) the involvement of legal professionals in perverting the course of justice and in using the media to serve a purpose that might result in compromising the security of a witness; and

(c) the likelihood that ICAC officers might not be able to secure the journalistic material as evidence without executing search warrants.

The Court of First Instance granted the application on the condition that all seized materials must be sealed and held for three days in order to allow the affected parties to consider applying for their return. The warrants were executed on 24 July.

10.5 Three days later, one of the newspaper offices and its reporter applied to the Court to set aside the warrants and for the return of the items seized during the search. In the interim, however, the newspaper and reporter concerned allowed the ICAC access to the seized journalistic materials. Subsequently, the newspaper's application was granted, and the warrants set aside. The ICAC immediately lodged an appeal, which the Court of Appeal dismissed on 11 October on the ground that it had no jurisdiction to determine it. However, considering that the appeal involved the examination of provisions that singularly affected the freedom of press in Hong Kong and that the case was of considerable importance for the public interest, the Court gave its views on the subject matter of the appeal[8]. Essentially –

- had the Court possessed the necessary jurisdiction to hear the ICAC's appeal, they would have allowed the appeal with costs;

- the issue of the search warrants was justified as it was crucial for investigating an extremely serious offence where the well-being or life of the Participant in a witness protection programme might have been put at risk. The Participant's further co-operation in the criminal investigation could have been compromised and the integrity of protection programme potentially undermined;

- the ICAC's decision to apply for search warrants instead of production orders was entirely justified, given the risk that its investigation might have been unwittingly leaked by the newspaper offices to third parties, including the suspected offenders, had the latter approach been adopted;

- the ICAC had fulfilled the necessary requirements under the law to obtain the search warrants and had acted entirely lawfully in seeking those warrants; and

- the public interest required the maintenance of a balance between the freedom of the press and need to effectively investigate and deal with crime.

Effect on the freedom of the press

10.6 Robust measures are in place to preserve press freedom and to protect journalistic materials against malicious raids and seizure. When our law enforcement agencies need to acquire this kind of material for the investigation of serious crime and to safeguard the public interest, they must

[8] From *So Wing Keung v Sing Tao Limited and Hsu Hiu Yee* [2005] 2 HKLRD 11.

first apply to the Court for either a production order or a search warrant. In both cases, they must satisfy the Court that the materials sought are important for the investigation and in the public interest. In applying specifically for search warrants (as opposed to production orders), they must also show that the alternative of issuing a production order for the voluntary surrender of the materials may seriously prejudice the investigation.

10.7 When search warrants are granted, the Judge may impose a condition that the materials seized be sealed for three days to allow an application to the court for their return. These protections demonstrate that the power to search for and seize journalistic materials for investigation purposes cannot be used lightly.

10.8 The Court also affirmed that the ICAC had acted entirely lawfully. The Commission is one the most professional anti-corruption agencies in the world and will continue scrupulously to execute its powers of investigation, with due regard to the rights and freedom of all Hong Kong citizens. Meanwhile, and notwithstanding the high level of judicial scrutiny to which the law enforcement agencies are subject, the Legislative Council's Security Panel has appointed a sub-committee to review the existing statutory provisions on the search and seizure of journalistic materials. That review is still on-going.

Monitoring role of the ICAC Complaints Committee (ICC)

10.9 The ICAC Complaints Committee (ICC) is an independent body, whose members include representatives of the Executive and Legislative Councils, the Ombudsman, and members of the community. Its function is to monitor and, where it deems it appropriate, review the ICAC's handling of non-criminal complaints against the Commission and its officers. Additionally, in the pursuit of its monitoring function, the Committee scrutinises the ICAC's internal procedures, guidelines and practices, in order to determine whether these needed to be updated, clarified, or formalised, with a view to making improvements.

10.10 The Commissioner Against Corruption must submit to the ICC an investigation report on each complaint that the Committee receives. The Committee may ask the Commission to clarify these reports and/or for additional information. It also holds regular meetings to discuss the reports and determine the substance or otherwise of the allegations made in particular complaints. In all cases, the complainants and the ICAC officers involved are advised in writing of the Committee's conclusions.

10.11 In 2004, the ICC considered 22 complaints containing a total of 60 allegations. Seven allegations contained in five complaints were found to be substantiated or substantiated in relation to matters other than the original allegation. The allegations mainly concerned misconduct or neglect of duty, such as failure to provide a suspect with a copy of the video recording of his interview in accordance with standard procedures, and failure to make appropriate arrangements for the return to a complainant of property seized in the investigation of a case. The officers concerned were either subject as appropriate to disciplinary action or advice. Letters of apology from the Commissioner Against Corruption were sent to the complainants.

11. According to information before the Committee, there are reports of academics based in Hong Kong detained by the mainland security agents for political reasons, and that the government of the Special Administrative Region has not intervened. In this respect, please elaborate on the steps taken by the HKSAR authorities to protect academic freedoms, enshrined in article 34 of the Basic Law and provided for by article 19 of the Covenant.

Reply

11.1 Hong Kong residents travelling outside Hong Kong are expected to abide by the laws and regulations of the relevant jurisdiction. Under the "One Country, Two Systems" principle, the HKSAR Government does not interfere with law enforcement and the judicial process in the Mainland and the Mainland authorities do not interfere with ours. We do insist and believe that the legitimate rights of Hong Kong residents under detention in the Mainland are protected in accordance with the Mainland laws. And, as explained in our reply to Question 6 above, we convey requests or appeals from detainees or their families to the Mainland authorities as appropriate. We maintain close liaison with Mainland authorities on the subject of these cases and keep persons seeking assistance informed of progress.

12. Please provide information on the extent to which the provisions concerning treason and sedition under the Crimes Ordinance is in compliance with article 19 of the Covenant. Please indicate what measures have been taken to implement the Committee's previous concluding observations on this issue.

Reply

The 1999 concluding observations

12.1 For the benefit of Hong Kong readers, we take the opportunity to rehearse here the concerns that the Committee expressed in paragraph 18 of its 1999 concluding observations –

> "The Committee is concerned that the offences of treason and sedition under the Crimes Ordinance are defined in overly broad terms, thus endangering freedom of expression guaranteed under article 19 of the Covenant.
>
> "All laws enacted under article 23 of the Basic Law must be in conformity with the Covenant."

12.2 The existing offences of treason and sedition under the Crimes Ordinance (Cap. 200) were 'inherited' from long-established common law offences. Similar, if not identical, offences are still found in the statutes of all major common law jurisdictions. Modernizing those provisions was one of the aims of the National Security (Legislative Provisions) Bill.

12.3 Chapter III of the Basic Law entrenches constitutional protection of fundamental rights and freedoms currently enjoyed by HKSAR residents. In particular, Article 27 provides that Hong Kong residents shall have, inter alia, the freedoms of speech and expression. Additionally, the Hong Kong Bill of Rights Ordinance (Cap. 383) gives effect in domestic law to the provisions of the Covenant as applied to Hong Kong. These freedoms are cornerstones of modern, progressive society and Hong Kong courts have long held that the judiciary should "give a generous interpretation to the provisions in Chapter III that contain constitutional guarantees of freedoms that lie at the heart of Hong Kong's separate system.[9]"

12.4 In adjudicating cases where human rights are engaged, our Court of Final Appeal has held that –

> "In interpreting the provisions of chap. III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions[10]."

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[9] *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211.
[10] *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793.

12.5 In summary, therefore, Hong Kong has a strong tradition of submission to the rule of law. The court rulings we have cited here are firmly entrenched in our administrative, legislative and judicial systems. The existing offences of treason and sedition under the Crimes Ordinance will be construed in accordance with the human rights provisions of the Basic Law, if and when the occasion arises.

13. Please provide information on whether the HKSAR authorities intend to amend the Societies Ordinance to replace the current compulsory registration system, which makes the establishment of associations conditional on government approval, with a system of notification. Please provide statistical information on the number of registration requests refused on the grounds of national security, public safety, public order, or the protection of the rights and freedom of others.

Reply

13.1 We explained the background and operation of the Societies Ordinance in paragraphs 386 to 389 of the initial report and in paragraphs 226 to 229 of the second report. The current system has been operating well and there is no plan to replace it with a notification system. Police records indicate that no registrations have been refused on the grounds cited in the question. At the end of December 2005, there a total of 20,501 registered/exempted societies, of which **12,909** were registered/ exempted after 1 July 1997.

14. Please comment on information before the Committee that police authorities have used the "notice of no objection" procedure under the Public Order Ordinance to make it more difficult for groups to obtain permissions for marches, demonstrations, and rallies, and to arrest journalists and students during peaceful protests. Please elaborate on the conditions and/or penalties imposed on such protestors. What types of application for public demonstrations have been rejected for reasons of "national security," "public order," or their subject matter?

Reply

14.1 The 'notice of no objection' procedure has not been used to hinder groups from engaging in peaceful protest. Demonstrations remain an

integral part of daily life here, as is clearly shown by the number of marches, demonstrations and rallies that regularly take place: some 18,534 between July 1997 and December 2005. During this period, the Police have raised objections on only 21 occasions, nine of which subsequently took place after the organizers had revised their routing, venue, or scale. The remaining 12 were either called-off, or their size was scaled down to such a level that the events were no longer notifiable. Some were cancelled after appeals were dismissed by the Appeal Board on Public Meetings and Processions, an independent appeal mechanism established under section 43 of the Ordinance. No application for public demonstration has been objected to on the ground of its subject-matter, national security or otherwise.

14.2 We explained the operation of the Public Order Ordinance (Cap. 245) - including the "notice of no objection" system - and addressed related concerns in paragraphs 376 to 381 of the initial report and paragraphs 214 to 224 of the second report.

14.3 The freedoms of association, of assembly, of procession and of demonstration are guaranteed under both Article 27 of the Basic Law (BL 27) and Article 17 of the Hong Kong Bill of Rights. Article 17 of the Hong Kong Bill of Rights gives domestic legal effect to Article 21 of the Covenant. In *Yeung May-wan & others v Hong Kong Special Administrative Region*[11], the Court of Final Appeal (CFA) held that the freedoms protected by BL 27 were at the heart of Hong Kong's system. However, the law required reasonable give and take between users of public places. In *Leung Kwok Hung & others v Hong Kong Special Administrative Region*[12], the CFA observed that the right of peaceful assembly involved a positive duty on the part of the Government to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully. It also accepted the need to have a reasonable and proportionate notification procedure which can be applied responsibly and with a right to review that can only enhance and not restrict the relevant freedoms. We are guided by those judgments.

14.4 It must be stressed that the 'notice of no objection' system is a notification system, not a permit system. The Public Order Ordinance provides that a public meeting/procession at which the attendance exceeds the prescribed limits may take place if notice has been given in accordance with the requirements of the Ordinance and that the Commissioner of Police has not prohibited or objected to it. The Commissioner carefully examines each case and will not lightly exercise her/his discretion by objecting to or by imposing conditions on notified public order event. And he must state the

[11] [2005] 2 HKLRD 212.
[12] [2005] 3 HKLRD 164.

grounds of any such prohibition/objection or imposition of conditions by way of written notice.

14.5 The Commissioner has the discretion to restrict the right of a peaceful assembly by imposing conditions on a notified public order event. In deciding whether and if so what restriction(s) to impose in the exercise of his discretion, she/he must consider whether a potential restriction is rationally connected with one or more of the statutory legitimate purposes and whether the potential restriction is no more than is necessary to accomplish the legitimate purpose. In short, she/he must consider whether the restriction is proportionate.

14.6 So far, proceedings for failure to give prior notification have been instituted on only two occasions. The legal proceedings relating to the first case were concluded in July 2005, the offenders being bound over in a sum of $500 for three months. The second case will be heard in early 2006. These prosecutions are the only relevant ones since the enactment of the current Public Order Ordinance in July 1997.

15. According to information before the Committee, restrictions have been placed on Falun Gong practitioners in HKSAR (including limited use of public facilities, denial of entry into HKSAR to followers based outside the Region, and public warnings by officials). Please comment and provide information on the compatibility of these restrictions with articles 18, 19 and 21 of the Covenant.

Reply

Use of public facilities

15.1 The position is as explained in paragraph 196(a) of our report, which referred the Committee to paragraphs 15.19 and 15.20 of our second report under the International Covenant on Economic, Social and Cultural Rights (ICESCR), in relation to Article 15 of the Covenant. That is, all civic centres managed by the Government's Leisure and Cultural Services Department are open for hire by the public. Booking applications from all applicants are processed in accordance with established policies and procedures. In processing booking applications, consideration is given to whether the proposed activity is of a type compatible with the designated purpose of the venue and whether the desired date and time of hire is available. When applicants compete for the same time slot, they are prioritised in accordance with a points system.

15.2 Applications received from the Hong Kong Association of Falun Dafa – like all other applications – have been processed in accordance with that system. Not all the Association's applications have been successful. But several have been, as our booking records clearly demonstrate. In September 2000, the Association successfully applied for the Piazza of Hong Kong Cultural Centre for a "Falun Dafa Photo Exhibition and Picture Exercise". And, in January 2001, they secured the Concert Hall of Hong Kong City Hall for a "Falun Dafa Cultivation Experience Sharing Conference". In August 2002, we offered the Association –

(a) the Tsuen Wan Town Hall Auditorium on 24 October 2002 for a performing arts variety show;

(b) the Tuen Mun Town Hall Auditorium on 25 October 2002 for a performing arts variety show;

(c) the Tuen Mun Town Hall Exhibition Gallery on 24 and 25 October 2002 for a Falun Dafa Cultivation Photo Exhibition;

(d) the Tuen Mun Town Hall Auditorium on 28 October 2002 for a conference.

The Association declined the offer in (d) but accepted those in (a) to (c). And, on 24 January 2004, it secured the Tsuen Wan Town Hall Auditorium for a video show. Since then, it has submitted no new applications.

Against this background, we submit that the assertions that have been made to the Committee are unfounded.

Entry into Hong Kong

15.3 All entry applications are handled in strict accordance with the law and existing policy. No one is barred from entering Hong Kong on the ground of religious belief. The Immigration Department is responsible for maintaining effective immigration controls and, like immigration authorities elsewhere, has the statutory discretion to decide whether to permit an alien to enter Hong Kong. In arriving at any such decision, the Department takes account of all relevant factors and circumstances pertaining to the case in question. All these considerations were engaged in relation to a recent case involving visitors professing to be practitioners of Falungong, which we assume to be the subject of the Committee's concern. At the time of finalising this response, that case was sub judice and it would therefore be inappropriate for us to comment further at this stage.

15.4 In conclusion, therefore, we submit that the information before the Committee is without foundation.

16. Please explain how the absence of an institutional framework for union recognition and collective bargaining is compatible with article 22 of the Covenant.

Reply

Union recognition

16.1 With the greatest respect, we are perplexed by the assertion that Hong Kong lacks an institutional framework for union recognition. As explained in paragraph 390 of our initial report, section 21B(1) of the Employment Ordinance (Chapter 57) confers on employees the rights to –

(a) be or to become members or officers of trade unions registered under the Trade Unions Ordinance;

(b) take part in, at any appropriate time, the activities of the trade union of which they are members or officers; and

(c) associate with other persons for the purpose of forming or applying for the registration of a trade union.

An employer who contravenes the anti-union discrimination provisions under the Ordinance shall be liable to prosecution and a maximum fine of HK$100,000 (US$12,821) upon conviction. And an employee who is unreasonably and unlawfully dismissed (including dismissal on the ground of the employee exercising his trade union rights provided under the Ordinance) is entitled to make a claim for remedies against his employer. Remedies, to be ordered by the Labour Tribunal, include an order for reinstatement or re-engagement subject to the consent of both parties, or an award of terminal payments and a maximum of HK$150,000 (US$19,231) of compensation.

16.2 The Trade Unions Ordinance (Chapter 332), which is administered by the Registrar of Trade Unions, provides the legislative framework for registration of trade unions. Once registered, a trade union becomes a body corporate and enjoys immunity from certain civil suits. Trade Unionism is vigorous and, in the past decade, their number has increased, with an average of 23 new trade unions formed each year: 28 were registered in the year 2005. And, as at the end of December 2005, there were three trade union

federations and 729 trade unions (comprising 686 employee unions, 21 employer associations, and 22 mixed organisations of employees and employers). In the past five years, the declared membership of employee unions and the trade union participation rate have hovered around 680,000 and 22% respectively.

16.3 Against this background, we cannot envisage how these things, taken together, comprise anything other than an institutional framework for trade union recognition. Nor, with respect, does the question indicate how, if at all, these mechanisms are incompatible with Article 22 of the Covenant.

Collective bargaining

16.4 We are unclear as to the relevance of collective bargaining to the provisions of Article 22, since the latter contains no use of the term, whether direct or implied. Nor is there any discussion of the issue in the Committee's General Comments. Ipso facto, therefore, this part of the question appears to be based on false premises. Nevertheless, we will explain our position on the subject as we have done in response to similar questions from the Committee on Economic, Social and Cultural Rights. As we explained in paragraph 8.12 of our second report under the ICESCR, in regard to Article 8 of that Covenant, the Labour Department has established a 'Workplace Consultation Promotion Division'. The Division's purpose is to promote voluntary and direct negotiation between employers and employees at both the enterprise and industry levels. At the enterprise level, the Division has –

(a) formed 18 Human Resources Managers' Clubs for over 1,800 human resources practitioners from different trades and industries to share experience and to promote good people management practices;

(b) organised seminars and talks to promote effective communication and good human resource management practices; and

(c) introduced a special award scheme to encourage the implementation of those practices.

16.5 Additionally, the Division promotes dialogue between representatives of employers and employees through tripartite committees at the industry level. So far, nine such committees have been formed. Among other things, they have deliberated on issues of common concern to employers and employees and compiled guidebooks for specific industries to promote good people management practices.

16.6 We are committed to promoting collective bargaining on a voluntary basis and actively promote voluntary collective bargaining in the ways explained above. But the fact remains that the existing system works well, as is evidenced by the fact that the average number of working days lost through strikes (0.03 per 1,000 salaried employees in the year 2005) is among the lowest in the world. Even if there is legislation to force the parties to go through the process of collective bargaining, there is no guarantee that it would result in agreement. And compulsory collective bargaining –

(a) could result in a more confrontational and rigid system of labour relations. Rigidities in the labour market would weaken Hong Kong's attractiveness to overseas investors, leading to reduced employment opportunities in the long run, to the disadvantage of employees; and

(b) would reduce the role of market forces in wage settlements, so distorting the labour market and undermining the responsiveness of the economy to market changes.

For these reasons, we have no plans to institutionalise the practice of compulsory collective bargaining: a position that, as explained in paragraph 16.4 above, is entirely compatible with a plain reading of the wording of the provisions of Article 22.

Expulsion of aliens; right to enter one's own country; protection of the family and children (arts. 12, 13, 23, 24)

17. Please provide additional information on the powers of the Chief Executive to issue a removal order or a deportation order according to the relevant provisions of the Immigration Ordinance. For the purposes of a removal order (Section 19.1 (a)), who qualifies as an "undesirable immigrant"? What criteria are used by the Chief Executive to determine whether the deportation of an immigrant is "conducive to the public good" (Section 20.1)?

Reply

Removal Orders under Section 19(1)(a) of the Immigration Ordinance, Chapter 115 by the Chief Executive

17.1 Under section 19(1)(a) of the Immigration Ordinance, the Chief Executive or his delegate may make a removal order against a person

requiring him to leave Hong Kong if it appears to him that the person is an undesirable immigrant who has not been ordinarily resident in Hong Kong for three years or more. A person may only be regarded as an 'undesirable immigrant' if he/she is not a Hong Kong permanent resident or a person with the right to land in Hong Kong, and that his/her presence in Hong Kong is undesirable, prejudicial to the interests or general well-being of Hong Kong, or poses a threat to the law and order of Hong Kong. The power is only exercised in justifiable cases having regard to the individual circumstances, including representations made by the individual concerned. To date, the power has not been exercised.

Deportation Orders under Section 20 of the Immigration Ordinance

17.2 Section 20 empowers the Chief Executive or his delegate to make a deportation order against a person who is not a Hong Kong permanent resident, requiring him to leave Hong Kong and prohibiting him from being in Hong Kong while the deportation order is in force, if –

(a) the person has been found guilty of an offence punishable with imprisonment of not less than two years; or

(b) the deportation of the person is deemed to be conducive to the public good.

17.3 The power under section 20(1)(a) to deport on the ground of conviction in Hong Kong of a criminal offence may only be exercised if the person is not a Hong Kong permanent resident and has been found guilty of an offence punishable with imprisonment for not less than two years. When determining whether or not a deportation order should be made under section 20(1)(a), all relevant circumstances including the person's connections with Hong Kong and other countries would be taken into consideration. In each of the past three years, about 500 to 600 persons have been deported under section 20(1)(a).

17.4 The power under section 20(1)(b) to deport on the ground of conduciveness to the public interest may be exercised in various circumstances. It is difficult to delimit by express criteria the circumstances in which the decision maker may properly exercise his power. But the power may only be exercised when the public interest is seriously at stake. As yet, the power has not been exercised.

17.5 Sections 54 and 55 of the Immigration Ordinance empower the Chief Executive to suspend and to rescind deportation orders. In the exercise of that power, the Chief Executive or his delegate would carefully consider every request for suspension or rescission of the deportation order,

having regard to the individual circumstances of the case. In the past three years, a total of 15 orders were rescinded and 43 suspended.

18. Please elaborate on the status of refugees or asylum-seekers on the HKSAR territory since the Government's elimination of the temporary protection policy, and provide information on the requests received and granted by the Director of Immigration. Please explain how the HKSAR authorities have given effect to the Court of Final Appeal's judgement of 8 June 2004 in the case of *Prabakar v. Secretary for Security*. What provisions exist with respect to employment of those who are granted refugee status (or are awaiting an assessment of their status by the Office of the United Nations High Commissioner for Refugees) and school attendance of their children?

Reply

18.1 The 1951 Convention Relating to the Status of Refugees (the Refugees Convention) has not been extended to Hong Kong. Hong Kong is small in size and has a high and dense population. Our unique situation, set against the backdrop of our relative economic prosperity in the region and our liberal visa regime, makes us vulnerable to possible abuses if the Refugee Convention applied to Hong Kong. We therefore have a firm policy of not granting asylum and are under no obligation to admit individuals seeking refugee status under the Convention. Claims for refugee status are dealt with by the United Nations High Commissioner for Refugees (UNHCR) and we liaise closely with the latter's local Sub-office to ensure that persons whose claims are denied – and who have no permission to remain - leave Hong Kong in accordance with the law.

18.2 Refugees mandated by the UNHCR are normally permitted to enter into recognizance pending their overseas resettlement arranged by UNHCR. Persons awaiting the UNHCR's assessment may be permitted, on a case-by-case basis, to enter into recognizance in lieu of detention. But doing so does not constitute permission to remain or to take up employment.

18.3 Requests to allow children of mandated refugees to attend schools are considered on their individual merits – and may be granted if there are exceptional compassionate/humanitarian grounds. As at 30 November 2005, eight children of mandated refugees were receiving education in Hong Kong.

Secretary for Security v Sakthevel Prabakar

18.4 Following the Court of Final Appeal's judgment in this case, we put in place administrative procedures for assessing claims made under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). We believe that those procedures fully meet the high standards of procedural fairness prescribed by the Court of Final Appeal.

19. According to information before the Committee, the grounds for claiming the right of abode have been considerably narrowed. In January 2002, a judgement of the Court of Final Appeal found that only some 400 out of 5,000 claimants had the right of abode. In this respect, please provide information on the status, legal protections, and numbers of claimants of the right of abode and the right to family reunion.

Reply

19.1 The criteria for eligibility for the right of abode in Hong Kong are prescribed in Article 24 of the Basic Law (BL24). Those prescriptions and other laws and policies on the right of abode are consistent with the relevant human rights treaties. So too are the related arrangements for their implementation.

19.2 In its interpretation of 26 June 1999, the Standing Committee of the National People's Congress (NPCSC) made it clear that BL24(2)(3) conferred the right of abode only on persons born to parents of Chinese nationality at least one of whom had attained the status of Hong Kong permanent resident ***at the time of the person's birth***. All persons from the Mainland – including those eligible for the right of abode under BL24(2)(3) – must obtain approval to enter Hong Kong under the relevant national laws and administrative regulations and in accordance with BL22(4). The NPCSC interpretation took effect from 1 July 1997. But it did not affect the right of abode acquired by the individuals who were the subjects of the judgments made by the Court of Final Appeal on 29 January 1999. In a judgment delivered on 3 December 1999, the Court confirmed that the NPCSC Interpretation was valid and binding on the Court and that it was effective from 1 July 1997.

19.3 On the day of the NPCSC Interpretation, we announced that certain persons would be treated as being parties to the related legal proceedings and thus unaffected by the Interpretation, provided that they satisfied certain

criteria. This so-called 'concession policy' was intended to benefit those persons whose claims for the right of abode had –

(a) been lodged with the Immigration Department while they were in Hong Kong during the period from 1 July 1997 to 29 January 1999; and

(b) been recorded by the Department.

As at the end of December 2005, a total of 3,806 persons had benefited from the policy.

19.4 In January 2002, the CFA prescribed key principles for dealing with the outstanding right of abode cases that were before the Court in connection with the concession policy[13]. As at the end of December 2005, the Court had disposed of some 4,998 cases, or 97.7% of the outstanding 5,116. Of these, 4,340 were dismissed, 238 were allowed and 420 were withdrawn. The Court is still dealing with the remaining 118.

19.5 Mainland residents who have no legal right to stay in Hong Kong must return to the Mainland. The Director of Immigration may exercise his discretion on a case-by-case basis to allow individual Mainland residents to stay if there are exceptional humanitarian or compassionate considerations.

19.6 The wish for family reunion is fully understood and respected. But it is not an absolute right. Governments worldwide require people who wish to join their families to submit – prior to entering the jurisdictions in question – formal applications for processing in accordance with local laws and policies.

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

19.8 Many right of abode claimants who have returned to the Mainland, have successfully applied for settlement in Hong Kong through the proper legal channels. And others have frequently visited their Hong Kong-based relatives under the Two-way Permit Scheme.

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[13] *Ng Siu Tung & Others v Director of Immigration*" [2002] 1 HKLRD 561

Right to take part in the conduct of public affairs; right to vote (article 25)

20. There have been a number of allegations of threats and of cases of vandalism against democratic legislators and allegations of a poor response by the police to investigate and prosecute the offenders. Please provide information on the actions taken, if any, to prevent, investigate, and prosecute threats and vandalism reportedly perpetrated against legislators of the Democratic Party in the lead-up to the September 2004 elections.

Reply

20.1 Hong Kong is a safe and peaceful city, with a crime rate lower than that of many developed countries. The Government is committed to protecting the safety and property of every member of the community, and will not tolerate any acts of violence, damage of property, or criminal intimidation. The Police investigate any allegations of such intimidation thoroughly, and swift action is taken to uphold the law and protect the rights and freedoms of everyone in Hong Kong.

20.2 At the same time, the investigation of a crime and any subsequent prosecutions must proceed in conformity with the rule of law. Any prosecution and judicial proceedings must be based on sufficient and concrete evidence.

Prohibition of discrimination and rights of persons belonging to minorities (arts. 26 and 27)

21. Please elaborate on the measures taken or planned to protect foreign domestic workers, predominantly women, from direct and indirect discrimination in their workplaces and government offices, and to reduce the incidence of contract violations, underpayment and criminal abuse against them. Please provide information on support mechanisms, including legal remedies, as well as statistical information on investigations and prosecutions relating to underpayment or non-payment of wages and allegations of abuse or maltreatment, and their outcome (judgements and compensation).

Reply

21.1 Foreign domestic helpers are entitled to the same rights and benefits as local workers under Hong Kong's labour law, the keystone of which is the

Employment Ordinance (Chapter 57) and the Employees' Compensation Ordinance (Chapter 282). Those rights and benefits include wage payment, rest days, holidays with pay, maternity protection, long service payment, protection against anti-union discrimination, compensation for work-related injuries/death, rights to form and join trade unions, and so forth. The Sex Discrimination Ordinance (Chapter 480) provides full protection against discrimination on gender grounds, regardless of the status of the 'discriminator'. And, as regards the actions of the Government or public bodies, the Hong Kong Bill of Rights protects all persons in Hong Kong from all forms of discrimination.

21.2 Helpers receive further protection from the standard employment contract, which is the only document that the Government recognises for their employment. The contract requires employers to pay their salaries no less than the Government-prescribed Minimum Allowable Wage, and to provide them free accommodation, meals (or meal allowance instead), medical treatment, and return passage.

21.3 Under the Employment Ordinance, the maximum penalty for wage offences is a fine of HK$200,000 (US$25,641) and imprisonment for one year. Subject to the completion of the related legislative processes, with effect from 30 March 2006, the maximum penalty will be raised to a fine of $350,000 (US$44,872) and imprisonment for three years. Any person convicted of making false representations to an Immigration Officer (for example by signing a standard employment contract without the intention of complying with the conditions provided for) is liable to a maximum fine of HK$150,000 (US$19,231) and imprisonment for 14 years. In 2003, an employer was sentenced to four months' imprisonment for conspiracy to defraud and making the false representation that he would pay his helper at least the minimum allowable wage.

21.4 The Government is fully committed to safeguarding the rights and benefits of foreign domestic helpers. It does not, and will not, tolerate abuses. Helpers with grievances against their employers can seek redress through legal proceedings, including the provision of legal aid in accordance with the statutory criteria. They also have free and full access to the full range of services provided by the Labour Department, which provides assistance to those whose employment rights have been infringed, promptly investigating all complaints and/or claims. In 2005, helpers lodged 373

wage-related claims: some 18% of all claims relating to foreign domestic helpers[14]. The corresponding figures in 2004 were respectively 390 and 17%.

21.5 Prosecutions are pursued where there is sufficient evidence and the helpers concerned are willing to be witnesses for the prosecution. In 2005, a total of 35 summonses relating to the employment of foreign domestic helpers led to conviction. The corresponding figure for 2004 was 33.

21.6 The Department liaises closely with relevant NGOs and the consulates of the major exporting countries to ensure that helpers are aware of their employment rights and benefits and the channels for redress. Two information expos for this purpose were held in October 2005 at places where helpers gather in large numbers on their rest days. It also distributes free publicity materials in the appropriate languages and conducts periodic briefings for helpers on their statutory and contractual employment rights.

[14] In 2005, the Labour Department handled a total of 2,047 claims involving foreign domestic helpers, 373 (18%) being wage-related. In this context, 'wage-related claims' means claims involving non-payment and underpayment of wages.