



**Convention against Torture  
and Other Cruel, Inhuman  
or Degrading Treatment  
or Punishment**

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COMMITTEE AGAINST TORTURE

**CONSIDERATION OF REPORTS FROM STATES PARTIES  
UNDER ARTICLE 19 OF THE CONVENTION**

**Fourth periodic report of States parties due in 2001**

**Addendum**

**HONG KONG SPECIAL ADMINISTRATIVE REGION\* \*\* \*\*\* \*\*\*\***

**[14 June 2006]**

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\* The present document comprises the third component of the fourth periodic report of China (CAT/C/CHI/4)

\*\* For the initial report of China, see CAT/C/7/Add.5; for its consideration, see CAT/C/SR.50 and 51 and *Official Records of the General Assembly, Forty-fifth session, Supplement No. 44* (A/45/44), paras. 471 - 502

For the second periodic report, see CAT/C/20/Add.5; for its consideration, see CAT/C/SR.251, 252 and 254 and *Official Records of the General Assembly, Fifty-first session, Supplement No. 44* (A/51/44), paras. 138-150.

For the third periodic report, see CAT/C/39/Add.2; for its consideration, see CAT/C/SR.414, 417 and 421 and *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 44* (A/55/44), paras. 106-145.

\*\*\* Annexes to the present report are available with Secretariat

\*\*\*\* In accordance with the information transmitted to States parties regarding the processing of reports, the present document was not formally edited before being submitted for translation.

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### Preamble

1. This report, which is the second periodic report of the Hong Kong Special Administrative Region (HKSAR) under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, forms part of China's combined fourth and fifth under the Convention. It updates the Committee Against Torture on developments since the submission of the initial report (which formed part of China's third) and the Committee's hearing thereof at its 414th, 417th and 421st meetings on 4, 5, and 9 May 2000. It also responds to the Committee's Concluding Observations of 9 May 2000 and the subsequent comments of local observers on the implementation of the Convention in Hong Kong. The latter are presented in summary form but we have sent the Committee's Secretariat full, original copies of comments that were submitted to us in written form. In drafting the report, we have sought to adhere to the Committee's requirements as prescribed in the UN Manual on Human Rights Reporting.

2. The initial report contained detailed information on the laws, policies, and practices that are in place to ensure Hong Kong's compliance with the Convention. Many of those are of long standing and, by nature, tend to remain unchanged – or to change very little – over time. Thus, in accordance with the guidance in the UN Manual on Human Rights Reporting (page 67, final paragraph), we do not propose repeating descriptions/explanations of such matters in this report, considering it sufficient to advise the Committee that the situation remains essentially as previously explained. We believe that this approach is also consistent with Article 19.1 of the Convention.

### Part I

#### General Profile of the Hong Kong Special Administrative Region

##### Land and people

##### (a) Population by sex

| <u>Sex</u> | <u>Mid 1987</u><br>(million) | <u>Mid 1992</u><br>(million) | <u>Mid 1999</u><br>(million) | <u>Mid 2003</u><br>(million) | <u>Mid 2004</u><br>(million) | <u>End-2004<sup>#</sup></u><br>(million) |
|------------|------------------------------|------------------------------|------------------------------|------------------------------|------------------------------|--|
| Male       | 2.9                          | 2.9                          | 3.3                          | 3.3                          | 3.3                          | 3.3                                      |
| Female     | 2.7                          | 2.9                          | 3.3                          | 3.5                          | 3.6                          | 3.6                                      |
| Total      | 5.6                          | 5.8                          | 6.6                          | 6.8                          | 6.9                          | 6.9                                      |

# Provisional figures

(b) **Population by age group and sex<sup>1</sup>**

|                   |               | <u>Percentage of total population</u> |                 |                 |                 |                 |                             |
|-------------------|---------------|---------------------------------------|-----------------|-----------------|-----------------|-----------------|-----------------------------|
| <u>Age</u>        | <u>Sex</u>    | <u>Mid 1987</u>                       | <u>Mid 1992</u> | <u>Mid 1999</u> | <u>Mid 2003</u> | <u>Mid 2004</u> | <u>End-2004<sup>#</sup></u> |
| Under 15          | Male          | 11.7                                  | 10.6            | 9.1             | 8.1             | 7.8             | 7.7                         |
|                   | Female        | 10.8                                  | 9.9             | 8.4             | 7.6             | 7.3             | 7.2                         |
| 15-18             | Male          | 3.3                                   | 2.9             | 2.9             | 2.6             | 2.6             | 2.6                         |
|                   | Female        | 3.0                                   | 2.7             | 2.7             | 2.5             | 2.5             | 2.5                         |
| <i>(0-18)</i>     | <i>Male</i>   | <i>15.0</i>                           | <i>13.5</i>     | <i>11.9</i>     | <i>10.7</i>     | 10.4            | 10.3                        |
|                   | <i>Female</i> | <i>13.8</i>                           | <i>12.6</i>     | <i>11.1</i>     | <i>10.1</i>     | 9.8             | 9.7                         |
| 19-64             | Male          | 33.1                                  | 33.3            | 32.5            | 32.3            | 32.2            | 32.2                        |
|                   | Female        | 30.2                                  | 31.6            | 33.6            | 35.2            | 35.6            | 35.8                        |
| 65 and<br>over    | Male          | 3.4                                   | 4.0             | 4.9             | 5.4             | 5.5             | 5.6                         |
|                   | Female        | 4.5                                   | 5.0             | 5.8             | 6.3             | 6.4             | 6.4                         |
| All age<br>groups | Male          | 51.4                                  | 50.8            | 49.4            | 48.4            | 48.2            | 48.1                        |
|                   | Female        | 48.6                                  | 49.2            | 50.6            | 51.6            | 51.8            | 51.9                        |

# Provisional figures

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<sup>1</sup> Since August 2000, population estimates have been compiled based on "resident population". Formerly, they were based on the "extended de facto" approach, which counted all Hong Kong Permanent and Non-Permanent Residents and visitors at a reference time-point. We have revised the population and related statistics for 1996 onwards on this basis.

(c) **Educational attainment (population aged 15 and above)<sup>2</sup> & 6**

| <u>Educational attainment</u> | <u>Percentage</u> |        |             |        |             |        |             |        |             |        |
|-------------------------------|-------------------|--------|-------------|--------|-------------|--------|-------------|--------|-------------|--------|
|                               | <u>1986</u>       |        | <u>1991</u> |        | <u>1996</u> |        | <u>2003</u> |        | <u>2004</u> |        |
|                               | Male              | Female | Male        | Female | Male        | Female | Male        | Female | Male        | Female |
| No schooling/<br>kindergarten | 7.0               | 21.6   | 7.1         | 18.5   | 5.1         | 13.8   | 3.4         | 10.2   | 3.3         | 10.0   |
| Primary                       | 30.8              | 27.7   | 26.1        | 24.3   | 22.7        | 22.6   | 19.8        | 20.9   | 19.2        | 20.2   |
| Secondary and above           | 62.2              | 50.7   | 66.8        | 57.2   | 72.2        | 63.6   | 76.8        | 68.9   | 77.5        | 69.8   |
|                               | 100.0             | 100.0  | 100.0       | 100.0  | 100.0       | 100.0  | 100.0       | 100.0  | 100.0       | 100.0  |

(d) **Literacy rate<sup>3</sup> & 6**      1984:85.7%; 1996:90.4%; 2000:92.4%; 2001:92.7%;  
2002:93.0%; 2003:93.1%; 2004:93.2%

(e) **Percentage of population (excluding mutes) aged five and over by usual language/dialect**

| <u>Usual language/dialect</u> | <u>Percentage</u> |             |                         |
|-------------------------------|-------------------|-------------|-------------------------|
|                               | <u>1991</u>       | <u>1996</u> | <u>2001<sup>4</sup></u> |
| Cantonese                     | 88.7              | 88.7        | 89.2                    |
| Putonghua                     | 1.1               | 1.1         | 0.9                     |
| Other Chinese dialects        | 7.1               | 5.8         | 5.5                     |
| English                       | 2.2               | 3.1         | 3.2                     |
| Others                        | 1.0               | 1.3         | 1.2                     |

<sup>2</sup> The figures for 1991 are derived from the Population Census taken in that year; those for 1986 and 1996 are derived from the respective By-censuses. Those for 2003 and 2004 are from the General Household Survey.

<sup>3</sup> The literacy rate refers to the proportion of persons aged 15 and above with educational attainment at primary or above. The figures are derived from the General Household Survey.

<sup>4</sup> The figures for 2001 are the latest available.



100.0

100.0

100.0

(f) **Crude birth and death rates**

|  | <u>1987</u> | <u>1992</u> | <u>1999</u> | <u>2002</u> | <u>2003</u> | <u>2004</u> <sup>#</sup> |
|--|-------------|-------------|-------------|-------------|-------------|--------------------------|
| Crude birth rate<br>(per 1,000 population) | 12.6        | 12.3        | 7.8         | 7.1         | 6.9         | 7.0                      |
| Crude death rate<br>(per 1,000 population) | 4.8         | 5.3         | 5.0         | 5.0         | 5.4         | 5.3                      |

(g) **Life expectancy at birth (number of years)**

| <u>Sex</u> | <u>1987</u> | <u>1992</u> | <u>1999</u> | <u>2002</u> | <u>2003</u> | <u>2004</u> <sup>#</sup> |
|------------|-------------|-------------|-------------|-------------|-------------|--------------------------|
| Male       | 74.2        | 74.8        | 77.7        | 78.6        | 78.5        | 78.6                     |
| Female     | 79.7        | 80.7        | 83.2        | 84.5        | 84.3        | 84.6                     |

(h) **Infant mortality ratio (per 1,000 live births)**

| <u>1987</u> | <u>1992</u> | <u>1999</u> | <u>2002</u> | <u>2003</u> | <u>2004</u> <sup>#</sup> |
|-------------|-------------|-------------|-------------|-------------|--------------------------|
| 7.4         | 4.8         | 3.1         | 2.3         | 2.3         | 2.5 <sup>#</sup>         |

(i) **Maternal mortality ratio (number of deaths per 100,000 registered live births)**

| <u>1987</u> | <u>1992</u> | <u>1999</u> | <u>2002</u> | <u>2003</u>      |
|-------------|-------------|-------------|-------------|------------------|
| 4.3         | 5.5         | 2.0         | 2.1         | 4.2 <sup>#</sup> |

<sup>#</sup>Provisional figure

(j) **Fertility rate**

|   | <u>1987</u> | <u>1992</u> | <u>1999</u> | <u>2002</u> | <u>2003</u> <sup>5</sup> |
|---|-------------|-------------|-------------|-------------|--------------------------|
| General fertility rate<br>(per 1,000 women –<br>excluding foreign domestic<br>helpers – aged 15-49) | 47.9        | 46.3        | 28.1        | 26.2        | 25.2                     |

(k) **Percentage of household heads by sex**

| <u>Sex</u> | <u>1986</u> | <u>1991</u> | <u>1996</u> | <u>2001</u> |
|------------|-------------|-------------|-------------|-------------|
| Male       | 73.0        | 74.3        | 72.8        | 71.2        |
| Female     | 27.0        | 25.7        | 27.2        | 28.8        |

(l) **Unemployment rate (%)**<sup>6</sup>

| <u>1987</u> | <u>1992</u> | <u>1999</u> | <u>2000</u> | <u>2001</u> | <u>2002</u> | <u>2003</u> | <u>2004</u> |
|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| 1.7         | 2.0         | 6.2         | 4.9         | 5.1         | 7.3         | 7.9         | 6.8         |

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<sup>5</sup> The drop in general fertility rate over the period 1987 to 2003 was associated with a number of factors like marriage postponement, postponement of low-order live births, curtailment of high-order births and unfavourable economic climate.

<sup>6</sup> Figures are averages of the estimates obtained from the General Household Surveys for the four quarters of the year.

(m) **Rate of inflation**

(i) Composite Consumer Price Index (CPI)<sup>7</sup>

| <u>Year</u> | <u>Annual rate of change in CPI (%)</u> |
|-------------|---|
| 1996        | 6.3                                     |
| 1997        | 5.8                                     |
| 1998        | 2.8                                     |
| 1999        | -4.0                                    |
| 2000        | -3.8                                    |
| 2001        | -1.6                                    |
| 2002        | -3.0                                    |
| 2003        | -2.6                                    |
| 2004        | -0.4                                    |

(ii) Implicit price deflators of Gross Domestic Product (GDP)

| <u>Deflator year</u> | <u>(2000 = 100)</u> | <u>Annual rate of change (%)</u> |
|----------------------|---------------------|----------------------------------|
| 1996                 | 106.9               | 5.8                              |
| 1997                 | 113.0               | 5.7                              |
| 1998                 | 113.2               | 0.2                              |
| 1999                 | 106.6               | -5.8                             |
| 2000                 | 100.0               | -6.2                             |
| 2001                 | 98.1                | -1.9                             |
| 2002                 | 94.6                | -3.6                             |
| 2003                 | 89.6                | -5.3                             |
| 2004                 | 87.1                | -2.8                             |

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<sup>7</sup> The Composite CPI is compiled on the basis of the expenditure patterns of about 90% of Hong Kong households with an average monthly expenditure of HK\$4,500 to HK\$65,999 in the base period of October 1999 to September 2000. This approximately corresponds to a monthly expenditure range of HK\$4,200 to HK\$60,400 at 2004 prices.

(n) **Gross Domestic Product**

| <u>Year</u> | At current<br>market prices<br>(US\$ Million) | At constant (2000)<br>market prices<br>(US\$ Million) <sup>8</sup> |
|-------------|---|--|
| 1996        | 156,572                                       | 146,434  |
| 1997        | 173,669                                       | 153,703  |
| 1998        | 165,249                                       | 146,009  |
| 1999        | 160,626                                       | 150,744  |
| 2000        | 165,362                                       | 165,362  |
| 2001        | 162,828                                       | 165,958  |
| 2002        | 160,015                                       | 169,175  |
| 2003        | 156,676                                       | 174,807  |
| 2004        | 164,612                                       | 189,011  |

(o) **Per capita income**  
(Per capita GDP for 1996-2003)

| <u>Year</u> | At current<br>market prices<br>(US\$) | At constant (2000)<br>market prices<br>(US\$) |
|-------------|---------------------------------------|---|
| 1996        | 24,329                                | 22,754  |
| 1997        | 26,762                                | 23,686  |
| 1998        | 25,253                                | 22,313  |
| 1999        | 24,313                                | 22,818  |
| 2000        | 24,811                                | 24,811  |
| 2001        | 24,213                                | 24,678  |
| 2002        | 23,577                                | 24,926  |
| 2003        | 23,030                                | 25,695  |
| 2004        | 23,917                                | 27,462  |

<sup>8</sup> Using the exchange rate of the respective year to convert the GDP at constant (2000) market prices.

(p) **External debt:** the HKSAR Government does not incur external debts.

(q) **Ethnic composition of the Hong Kong population**

**Population by ethnicity in 2001**

| <u>Ethnicity</u> | <u>Males</u> | <u>Females</u> | <u>Both sexes</u> | <u>% share<br/>in total</u> |
|------------------|--------------|----------------|-------------------|-----------------------------|
|                  | (‘000)       | (‘000)         | (‘000)            | (%)                         |
| Chinese          | 3,202        | 3,163          | 6,364             | 94.9                        |
| Non-Chinese      | 83           | 261            | 344               | 5.1                         |
| <i>Of which:</i> |              |                |                   |                             |
| Filipino         | 7            | 135            | 143               | 2.1                         |
| Indonesian       | 1            | 49             | 50                | 0.8                         |
| British          | 12           | 7              | 19                | 0.3                         |
| Indian           | 9            | 9              | 19                | 0.3                         |
| Thai             | 1            | 13             | 14                | 0.2                         |
| Japanese         | 8            | 7              | 14                | 0.2                         |
| Nepalese         | 7            | 5              | 13                | 0.2                         |
| Pakistani        | 7            | 4              | 11                | 0.2                         |
| Others           | 31           | 31             | 61                | 0.9                         |
| Total            | 3,285        | 3,423          | 6,708             | 100.0                       |

## General political structure

### Constitutional document

2. In accordance with the provisions of Article 31 and sub-paragraph 13 of Article 62 of the Constitution of the People's Republic of China (PRC), and the relevant decisions of the National People's Congress (NPC) adopted at the Third Session of the Seventh NPC on 4 April 1990, the Hong Kong Special Administrative Region of the People's Republic of China (HKSAR) was established on 1 July 1997. The Basic Law of the HKSAR came into effect on 1 July 1997. Among other things, the Basic Law provides that, under the principle of "One Country, Two Systems", the socialist system and policies are not practised in the HKSAR and Hong Kong's previous capitalist system and way of life will remain unchanged for 50 years. A copy of the Basic Law is at **Annex 1**.

3. To fully realise the principle of "One Country, Two Systems", the Basic Law sets out the broad framework of the relationship between the Central Authorities and the HKSAR (Chapter II); the fundamental rights and duties of Hong Kong residents (Chapter III); the political structure (Chapter IV); the economic, financial and social systems of the HKSAR (Chapters V and VI); the conduct of the HKSAR's external affairs (Chapter VII); and the interpretation and amendment of the Basic Law (Chapter VIII).

4. Among other matters, the Basic Law provides that:

- (a) the HKSAR shall exercise a high degree of autonomy except in matters such as defence and foreign affairs and enjoy executive, legislative and independent judicial power, including that of final adjudication. The power of final adjudication of the HKSAR shall be vested in the Court of Final Appeal established in the Region;
- (b) the executive authorities and legislature of the HKSAR shall be composed of permanent residents of Hong Kong;
- (c) the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravenes the Basic Law, and subject to any amendment by the legislature of the HKSAR;
- (d) national laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law and that the laws listed therein shall be applied locally by way of promulgation or legislation by the Region. The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting the Committee for the Basic Law of the HKSAR and the HKSAR Government;
- (e) the HKSAR is authorised to conduct relevant external affairs on its own. The HKSAR may on its own, using the name "Hong Kong, China", maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organisations in the appropriate fields, including the economic,

- trade, financial and monetary, shipping, communications, tourism, cultural and sports fields;
- (f) the HKSAR remains a free port, a separate customs territory and an international financial centre. There shall be free flow of capital. The HKSAR issues and manages its own currency;
  - (g) the HKSAR formulates its own policies on the development of education, science, culture, sports, labour and social services, and Hong Kong residents have the freedom of religious belief;
  - (h) Hong Kong residents enjoy a wide range of freedoms and rights and this will be further dealt with under the section of “General Legal Framework Within Which Human Rights Are Protected”; and
  - (i) the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

## **System of Government**

### **Constitutional Development**

5. The Basic Law prescribes a blueprint for the HKSAR’s constitutional development. It provides that the ultimate aim is the election of the Chief Executive and Members of the Legislative Council by universal suffrage.
6. The Chief Executive of the HKSAR is the head of the Region, and is accountable to the Central People’s Government and the Hong Kong Special Administrative Region in accordance with the provisions of the Basic Law. The Executive Council assists him in policy-making. The Legislative Council of the HKSAR is the legislature of the Region - it enacts, amends or repeals laws, approves taxation and public expenditure, and raises questions on the work of the government. District Councils - established in accordance with Articles 97 and 98 of the Basic Law - are consulted on district administration and other affairs. There is an independent judiciary.

### **Chief Executive**

7. The Basic Law provides that the Chief Executive of the HKSAR shall be selected by election or through consultations held locally and be appointed by the Central People’s Government. 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.



8. Annex I to the Basic Law further provides that:

“If there is a need to amend the method for selecting the Chief Executive for the terms 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 for approval.”

### **Executive Council**

9. The Executive Council assists the Chief Executive in policy-making. Under Article 56 of the Basic Law, except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council. The Chief Executive in Council also determines appeals, petitions and objections under those ordinances that confer a statutory right of appeal. If the Chief Executive does not accept a majority opinion of the Executive Council, he shall put the specific reasons on record.

10. The Council normally meets once a week, and its proceedings are confidential, although many of its decisions are made public. It is presided over by the Chief Executive. As provided for in Article 55 of the Basic Law, Members of the Executive Council are appointed by the Chief Executive from among the principal officials of the executive authorities, Members of the Legislative Council and public figures. They are Chinese citizens who are permanent residents of the HKSAR with no right of abode in any foreign country. Their appointment or removal is decided by the Chief Executive. Their term of office shall not extend beyond the expiry of the term of office of the Chief Executive who appoints them.

### **Legislative Council**

11. Article 68 of the Basic Law provides that the Legislative Council of the HKSAR shall be constituted by election. The method for its formation 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 the members of the Legislative Council by universal suffrage. Annex II to the Basic Law and the relevant decision of the National People's Congress at its Third Session on 4 April 1990 prescribe the composition of the Legislative Council during its first three terms as follows –

| <b>Membership</b>   | <b>First term</b><br>1998-2000<br>(two years) | <b>Second term</b><br>2000-2004<br>(four years) | <b>Third term</b><br>2004-2008<br>(four years) |
|---|---|---|--|
| (a) elected by geographical constituencies through direct elections | 20  | 24  | 30   |
| (b) elected by functional   | 30  | 30  | 30   |

|                                      |    |    |    |
|--------------------------------------|----|----|----|
| constituencies                       |    |    |    |
| (c) elected by an election committee | 10 | 6  | -  |
| <hr/>                                |    |    |    |
| Total                                | 60 | 60 | 60 |

12. The third Legislative Council Election was held on 12 September 2004. The turnout rates for the geographical constituency and functional constituency elections were 55.6% and 70.1% respectively. The present (third term) Legislative Council assumed office on 1 October 2004.

13. Annex II of the Basic Law provides that, if there is a need to amend the method for forming the Legislative Council after 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive. And they shall be reported to the National People's Congress for the record.

14. The powers and functions of the Legislative Council are specified in Article 73 of the Basic Law. These include enacting, amending or repealing laws in accordance with the provisions of the Basic Law and legal procedures; examining and approving budgets introduced by the government; approving taxation and public expenditure; receiving and debating the policy addresses of the Chief Executive; raising questions on the work of the government; debating any issue concerning public interests; endorsing the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court; and receiving and handling complaints from Hong Kong residents.

### **District Councils**

15. The first District Council election was held on 28 November 1999. The total turnout rate for this election was 35.8%. The 18 District Councils came into being on 1 January 2000 by virtue of the District Councils Ordinance. The Councils advise the Government of the HKSAR on district affairs and promote recreational and cultural activities, and environmental improvements within their respective districts. District Councils comprise both elected members and appointed members. Additionally, in the case of District Councils in rural areas, the local Rural Committee Chairmen serve as ex-officio members. The HKSAR is divided into 390 constituencies, each returning one elected member. There are 102 appointed members and 27 ex-officio members.

16. Consequent to the District Councils Review conducted in 2001, the Administration has implemented recommendations to enhance both the role and functions of the District Councils as Government's key advisers on district affairs and their ability to influence the provision, delivery and management of district services and facilities. This helps to ensure that the Government remains responsive to the changing needs of the community.

17. In the light of increase in population in three districts, the number of elected seats in the District Councils were increased from 390 to 400 for the second term District Council commencing on 1 January 2004.

### **Abolition of the Municipal Councils**

18. The two Provisional Municipal Councils were dissolved after the terms of office of the members expired on 31 December 1999, pursuant to the Provision of Municipal Services (Reorganization) Ordinance, which was passed by the Legislative Council in December 1999. With a view to improving co-ordination and efficiency, the Government set up new dedicated agencies to be responsible for food safety, environmental hygiene and leisure and cultural services with effect from January 2000.

19. In a Judicial review of the Ordinance, the High Court ruled that the Provision of Municipal Services (Reorganization) Ordinance (Chapter 552) was consistent with the Basic Law and the ICCPR as applied to Hong Kong.

### **The structure of the Administration**

20. The Chief Executive is the head of the Government of the HKSAR. If the Chief Executive is not able to discharge his duties for a short period, such duties shall temporarily be assumed by the three Secretaries of Departments, namely the Chief Secretary for Administration, the Financial Secretary, or the Secretary for Justice, in that order of precedence. The Government of the HKSAR comprises a Department of Administration, a Department of Finance, a Department of Justice, and various bureaux, divisions, and commissions.

21. There are currently 11 bureaux, each headed by a Director of Bureau, which collectively form the Government Secretariat. With certain exceptions, the heads of government departments are responsible to the Secretaries of Departments and Directors of Bureaux. The exceptions are the Commissioner of the Independent Commission Against Corruption and the Director of Audit, who function independently and are accountable to the Chief Executive.

22. Following the implementation of the accountability system for principal officials on 1 July 2002, the Chief Secretary for Administration, the Financial Secretary, the Secretary for Justice, and the 11 Directors of Bureaux are no longer civil servants. They are directly responsible to the Chief Executive and are accountable to him for the success or failure of matters falling within the portfolios as assigned to them. They are appointed to the Executive Council. Together with the non-official members of the Executive Council, they assist the Chief Executive in policy-making. Under the accountability system, the civil service continues to remain permanent, meritocratic, professional and politically neutral.

### **The judicial system of the HKSAR**

23. The legal system is firmly based on the rule of law and a Judiciary, which is independent of the executive authorities and the legislature.

24. Article 19 of the Basic Law provides that the HKSAR shall be vested with independent judicial power, including that of final adjudication. The courts of the HKSAR shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. The courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on

questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

25. The courts of justice comprise the Court of Final Appeal, the High Court (which consists of the Court of Appeal and the Court of First Instance), the District Court, the Magistrates' Court, the Lands Tribunal, the Labour Tribunal, the Small Claims Tribunal, the Obscene Articles Tribunal and the Coroner's Court. The courts hear and determine all criminal trials and civil disputes, whether between individuals or between individuals and Government of the Region.

26. Article 82 of the Basic Law provides that the power of final adjudication of the HKSAR shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal. Article 83 further provides that the structure, powers and functions of the courts of the HKSAR at all levels shall be prescribed by law.

27. All judges and judicial officers must have qualified as legal practitioners in Hong Kong or in a common law jurisdiction and have substantial professional experience. Article 88 of the Basic Law provides that "Judges of the courts of the HKSAR shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors."

28. Judges have security of tenure. Article 89 of the Basic Law provides that "A judge of a court of the HKSAR may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges. The Chief Justice of the Court of Final Appeal of the HKSAR may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law."

## **General legal framework within which Human Rights are protected**

### **Rule of Law**

29. The fundamental basis for the protection of human rights is the rule of law maintained by an independent judiciary (see paragraphs 23 to 28 above). The principles that inform the rule of law are -

- (a) **the supremacy of the law:** no individual is punishable or can lawfully be made to suffer personally or financially except for a breach of law established before the independent courts. Where, under the law, an official or an authority has discretion to make a decision, that discretion must be exercised legally, fairly and reasonably. Where it does not do so, the decision must be capable of successful challenge before the courts. The Basic Law guarantees the right of Hong Kong residents to institute

legal proceedings in the courts against the acts of the executive authorities and their personnel; and

- (b) **equality before the law:** Article 25 of the Basic Law provides that all Hong Kong residents shall be equal before the law. Article 22 provides that all offices set up in the HKSAR by departments of the Central People's Government, or by provinces, autonomous regions, or municipalities directly under the Central Government and personnel of these offices shall abide by the laws of the Region. Article 14 provides that members of the garrison shall, in addition to abiding by national laws of the PRC, abide by the laws of the HKSAR. Article 35 also provides that Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel. No government authority or official, and no individual, is above the law. All persons, regardless of race, rank, politics, religion or sex, are equal before the law and subject to the same law. Individuals and the HKSAR Government have the same access to the courts to enforce legal rights or defend an action.

### **Human rights guarantees in the Basic Law**

30. Article 4 of the Basic Law provides that the HKSAR shall safeguard the rights and freedoms of residents of the HKSAR and of other persons in the Region in accordance with law. The Basic Law guarantees a wide range of freedoms and rights, including -

- (a) equality before the law;
- (b) freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike;
- (c) freedom of the person; freedom from torture; freedom from arbitrary or unlawful arrest, detention or imprisonment; freedom from arbitrary or unlawful search of the body; and right against arbitrary or unlawful deprivation of life;
- (d) freedom from arbitrary or unlawful search of, or intrusion into, one's home or other premises;
- (e) freedom and privacy of communication;
- (f) freedom of movement within the HKSAR and freedom of emigration to other countries and regions and freedom to travel and to enter or leave the Region;
- (g) freedom of conscience; freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public;
- (h) freedom of choice of occupation;
- (i) freedom to engage in academic research, literary and artistic creation, and other

cultural activities;

- (j) right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies; right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel;
- (k) right to social welfare in accordance with law; and
- (l) freedom of marriage and right to raise a family freely.

Persons in Hong Kong other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed by Chapter III of the Basic Law. In addition, permanent residents of the HKSAR enjoy the rights to vote and to stand for election in accordance with law.

### **Effect of other human rights instruments in HKSAR law**

31. According to Article 39 of the Basic Law -

“The provisions of the ICCPR, the ICESCR and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

32. In general, and as is usual in common law systems, treaties that apply to Hong Kong (including human rights treaties) do not themselves have the force of law in the domestic legal system of Hong Kong. They cannot directly be invoked before the courts as the source of individual rights. However, the courts will, when possible, construe domestic legislation in such a way as to avoid incompatibility with international treaties that apply to Hong Kong. The usual method of giving effect in local law to treaty obligations (when these require some change in existing laws or practice) is to enact specific new legislation<sup>9</sup>. Where this results in the creation or definition of specific legal rights and where these rights are denied or interfered with (or there is the threat of such action), a remedy will be available in the courts through the ordinary procedures of civil litigation; or the law may provide criminal sanctions.

### **Bill of Rights Ordinance**

33. The Hong Kong Bill of Rights Ordinance (BORO) (Chapter 383 of the Laws of the

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<sup>9</sup> An example is the Crimes (Torture) Ordinance (Chapter 427 of the Laws of the HKSAR) which was enacted to give effect in Hong Kong to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

HKSAR) was enacted in June 1991 specifically to give effect in local law to the provisions of the ICCPR as applied to Hong Kong. It achieves this by setting out a detailed Bill of Rights, the terms of which are almost identical to those of the ICCPR.

### **Adoption of laws: effect on the BORO**

34. Article 160 of the Basic Law provides that the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the NPC declares to be in contravention of the Basic Law. In February 1997, the Standing Committee considered that three sections of the BORO (relating to the interpretation and application of the Ordinance<sup>10</sup>) had an overriding effect over other laws, including the Basic Law. As such, they contravened the Basic Law and could not be adopted.

35. The non-adoption of these sections has no effect on the protection of human rights in the HKSAR in view of the constitutional guarantee in Article 39 of the Basic Law. The substantive protections in Part II of the Ordinance (which are almost identical to the provisions of the ICCPR) are unchanged. So too are the remedies provided under section 6 for contravention of the Ordinance and the binding effect on the Government and all public authorities under section 7. The full text of the BORO as it now stands is at **Annex 2**.

### **Legal aid**

36. Eligible applicants receive legal aid through the provision of the services of a solicitor and a barrister in court proceedings, as necessary, to ensure that any person who has reasonable grounds for pursuing or defending a legal action is not prevented from doing so by lack of means. Publicly funded legal aid services are provided through the Legal Aid Department and the Duty Lawyer Service.

### **Legal Aid Department**

37. The Legal Aid Department provides legal representation to eligible persons in both

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<sup>10</sup> The three sections were -

- (a) Section 2(3): “In interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and connected matters.”
- (b) Section 3: “Effect on pre-existing legislation -
  - (1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.
  - (2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.”
- (c) Section 4: “Interpretation of subsequent legislation - All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.”

civil and criminal cases heard in the Court of Final Appeal, the Court of Appeal, the Court of First Instance, the District Court and the Magistrates' Court (for committal proceedings). Civil legal aid is available to proceedings covering major areas of livelihood of the community ranging from family disputes to immigration matters and coroner's inquests. Applicants must satisfy the Director of Legal Aid of their financial eligibility (the means test) and of the justification for legal action (the merits test). The grant of legal aid is not subject to a residence requirement. In criminal cases, the Director has discretion to waive the upper limits of the means test if he considers it in the interest of justice to do so. He also has the same discretion in meritorious applications where a breach of the BORO or the ICCPR as applied to Hong Kong is an issue. Subject to the means test (unless waived by a judge), it is mandatory to grant legal aid to an applicant charged with murder, treason or piracy with violence. For other offences, provided the applicant passes the means test, a judge may grant legal aid notwithstanding that legal aid has been refused on merits by the Director.

### **The Duty Lawyer Service**

38. This Service complements the legal aid services provided by the Legal Aid Department. It operates three schemes that respectively provide legal representation (the Duty Lawyer Scheme), legal advice (the Legal Advice Scheme) and legal information (the Tel Law Scheme). The Duty Lawyer Scheme offers legal representation to virtually all defendants (juvenile and adult) charged in the Magistracies who cannot afford private representation. It also provides legal representation to persons who are at risk of criminal prosecution as a result of giving incriminating evidence in Coroner's inquests. Applicants are subject to a means test and merits test, based on the "interest of justice" principle in accordance with Article 14 of the ICCPR and Article 11 of the Hong Kong Bill of Rights. The Legal Advice Scheme and the Tel Law Scheme respectively provide members of the public with free legal advice through individual appointments and taped information on the legal aspects of everyday problems.

### **Legal Aid Services Council**

39. The Legal Aid Services Council, an independent statutory body, was established in 1996. Its role is to oversee the provision of legal aid services by the Legal Aid Department and advise the Chief Executive on legal aid policy.

### **Office of The Ombudsman**

40. The Ombudsman - formerly known as the Commissioner for Administrative Complaints (COMAC) - is an independent authority, established under The Ombudsman Ordinance (Chapter 397)<sup>11</sup>. The Ombudsman investigates and reports on grievances arising from maladministration. "Maladministration" includes such things as inefficient, bad or improper administrative decisions, acts, recommendations or omissions. Members of the public can complain directly to The Ombudsman, who can also initiate investigations on her own volition and may publish investigation reports of public interest. Additionally, The

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<sup>11</sup> Formerly known as the COMAC Ordinance.



Ombudsman is empowered to investigate complaints of non-compliance with the Code on Access to Information.

41. The enactment of The Ombudsman (Amendment) Ordinance 2001 enables the independent status of The Ombudsman and enables her to carry out her functions more effectively. The Ombudsman is entrusted with full autonomy and statutory powers to conduct its own administrative and financial business. The Ordinance also makes it clear that The Ombudsman is not a servant or agent of the Government.

42. Subject to The Ombudsman Ordinance, The Ombudsman may obtain any information and documents from such persons as she thinks fit. She may summon any person to provide information relating to her investigations and may enter any premises of the organisations under her jurisdiction to conduct investigations. She also has sufficient means with which to ensure that her recommendations are heard and acted upon.

43. After investigating a complaint, The Ombudsman is empowered to report her opinion and reasons, together with a statement of any remedy and recommendation that is considered necessary, to the head of the organisation affected. If the recommendation is not acted upon within a reasonable timeframe, The Ombudsman may report the matter to the Chief Executive. She may also do so if she believes that there has been a serious irregularity or injustice done. Such reports are bound by law to be laid before the Legislative Council.

44. With the exceptions of the Police and the Independent Commission Against Corruption (ICAC), The Ombudsman has jurisdiction over all Government departments of the HKSAR and major statutory bodies. Complaints against these two departments are handled by discrete, dedicated bodies (see paragraphs 47 and 48 below). However, complaints of non-compliance with the Code on Access to Information by the Police and the ICAC are still subject to The Ombudsman's jurisdiction.

### **Equal Opportunities Commission**

45. The Equal Opportunities Commission (EOC) was established under the Sex Discrimination Ordinance (SDO) in May 1996 and started full operation in September that year. The Commission is responsible for conducting formal investigations, handling complaints, encouraging conciliation between parties in dispute, providing assistance to aggrieved persons in accordance with the SDO, the Disability Discrimination Ordinance (DDO) and the Family Status Discrimination Ordinance (FSDO). It undertakes research programmes and public education to promote equal opportunities in the community. The Commission is also empowered to issue codes of practice to provide practical guidelines to facilitate public compliance with the laws on equal opportunities. Accordingly, it issued Codes of Practice on Employment in relation to the SDO and the DDO in December 1996. It issued a similar code in relation to the FSDO in March 1998. The Code of Practice on Education under the DDO was issued in July 2001 to assist educational establishments in fulfilling the requirements of the DDO.

### **Privacy Commissioner for Personal Data**

46. The Personal Data (Privacy) Ordinance (PDPO) provides for statutory control of the

collection, holding and use of personal data in both the public and private sectors. Its provisions are based on internationally accepted data protection principles. It applies to personal data to which access is reasonably practicable whether they are in computerised, manual (for example, paper file), or audio-visual form. To promote and enforce compliance with its provisions, the Ordinance provides for an independent statutory authority - the Privacy Commissioner for Personal Data - with appropriate powers of investigation and enforcement. His responsibilities also include promoting awareness and understanding of the Ordinance, publishing codes of practice on how to comply with the Ordinance, and examining proposed legislation that may affect the privacy of individuals in relation to personal data.

## **Complaints and investigations**

### **The Police**

47. The Complaints Against Police Office (CAPO) investigates complaints about the conduct and behaviour of members of the police force. The CAPO's investigations are monitored and reviewed by the Independent Police Complaints Council (IPCC). The IPCC is an independent civilian body comprising non-official members appointed by the Chief Executive from a wide spectrum of the community and include Members of the Legislative Council and the Ombudsman or her representative.

### **The ICAC**

48. The Independent Commission Against Corruption Complaints Committee - established in 1977 - monitors and reviews the handling by the ICAC of non-criminal complaints against the ICAC and officers of the ICAC. Again, this is an independent committee appointed by the Chief Executive. The Committee comprises mainly of members of the Executive and Legislative Councils and a representative of the Ombudsman. Complaints against the ICAC or its officers can be made direct to the Committee as well as the ICAC at any of its offices. The investigation of such complaints is handled by a special unit of the Operations Department of the ICAC. When the unit has completed its investigation of a complaint, its conclusions and recommendations are submitted to the Committee for consideration.

### **Other disciplined services**

49. Other disciplined services departments maintain clear guidelines and procedures for handling complaints. For example, the Correctional Services Department (CSD), which runs HKSAR's prisons, has a Complaints Investigation Unit to manage its internal grievance redress system for staff, prisoners, and members of the public. These persons may also direct their complaints to the Ombudsman. The existing complaint channels are considered effective in view of the number and the nature of complaints handled.

50. The Immigration Department applies complaints procedures set out in the Immigration Service Standing Orders made by the Director of Immigration under the authority of the Immigration Service Ordinance. Complaints about abuse of authority or maltreatment by service members can be made to the Director of Immigration and are investigated promptly in

accordance with the procedures in the Standing Orders. To ensure that all complaints are properly handled, a Complaints Review Working Party examines the results of investigations, conduct reviews and recommends follow-up action whenever necessary. Persons who consider that they have been improperly treated or that their cases have been mismanaged also have access to the Ombudsman. If there is prima facie evidence that a member of the Immigration Service has committed a criminal offence, the Immigration Service will immediately report the matter to the police for further investigation. Disciplinary procedures against Immigration Service staff are also governed by the Immigration Service Ordinance and the Immigration Service Standing Orders. Under section 8 of the Immigration Service Ordinance (Chapter 115), unlawful or unnecessary exercise of authority resulting in loss or injury to any person is a disciplinary offence.

## **Information and publicity**

### **Promotion of public awareness of the human rights treaties**

51. The Home Affairs Bureau of the HKSAR Government is responsible for promoting public awareness of the rights and obligations stipulated in the human rights treaties applicable to Hong Kong. Following the enactment of the BORO in 1991, the Committee on the Promotion of Civic Education (CPCE) under the Home Affairs Bureau established a Human Rights Education Sub-Committee to promote public understanding of the BORO and respect for human rights as set out in the various treaties. Human rights have been one of the major emphases of the CPCE's work. Recently, the CPCE has increased its efforts to promote a public understanding of the Basic Law, which provides the constitutional guarantees for human rights protection in the Region. A Basic Law Promotion Steering Committee - chaired by the Chief Secretary for Administration - was established in January 1998 to guide promotional strategy.

52. In 2002, the Bureau established a joint NGO/Government forum, the Committee on the Promotion of Racial Harmony, to advise Government on the promotion of inter-racial respect and tolerance and matters relating to the International Convention on the Elimination of All Forms of Racial Discrimination. The Committee is serviced by the Race Relations Unit, also established in 2002 under the auspices of the Home Affairs Bureau.

### **Government publications**

53. The Central People's Government of the People's Republic of China is obliged to submit reports in respect of the HKSAR under various human rights treaties (but see paragraph 54 below in relation to the ICCPR). Draft reports are prepared by the Home Affairs Bureau and the Health, Welfare and Food Bureau of the HKSAR Government. The Bureaux consult the Legislative Council and non-governmental organisations on the state of the implementation of these treaties in Hong Kong. They address their views in the reports, which they table before the Legislative Council - and publish in bound, bilingual format - after the Central People's Government has submitted them to the United Nations. Copies are deposited in public libraries and posted on the Internet for public inspection.

## **Reports of the HKSAR in the light of the ICCPR**

54. In November 1997, the Central People's Government of the People's Republic of China announced that, in line with the Joint Declaration and the Basic Law, and considering that China was not yet a signatory to the two Covenants, it would make reference to the provisions of the two Covenants as applied to Hong Kong and transmit reports on the HKSAR to the United Nations. China subsequently ratified the ICESCR in 2001 and the HKSAR's reports form part of China's reports under that Covenant<sup>12</sup>. The Government of the HKSAR is responsible for preparing the reports on the Region in relation to the ICCPR for transmission to the United Nations.

## **Part II**

### **Information in relation to each of the Articles in Part I of the Convention**

#### **Article 1: defining "torture"**

55. The position is as explained in paragraphs 1 to 6 of the initial report, where we discussed the definition of 'torture' in section 3 of the Crimes (Torture) Ordinance (Chapter 427)<sup>13</sup>.

56. In paragraph 33 of the concluding observations of May 2000, the Committee expressed the concern that "the reference to 'lawful authority, justification or excuse' as a defence for a person charged with torture, as well as the definition of a public official in the Crimes (Torture) Ordinance, (Chapter 427), are not in full conformity with article 1 of the Convention". And, in paragraph 37, the Committee recommended that "the necessary steps be taken to ensure that torture, as defined in article 1 of the Convention, is effectively prosecuted and appropriately sanctioned".

57. The position is as explained in paragraphs 4 to 6 of the initial report, where we advised the Committee that, for the purpose of the Ordinance (section 3(5)), "lawful authority, justification or excuse" meant –

- (a) in relation to pain or suffering inflicted in Hong Kong, lawful authority, justification or excuse under the law of Hong Kong;
- (b) in relation to pain or suffering inflicted outside Hong Kong –
  - (i) if it was inflicted by a public official acting under the law of Hong Kong or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;

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<sup>12</sup> China's first report was submitted to the United Nations in June 2003 and was heard in April 2005.

<sup>13</sup> Chapter 427 gives effect in domestic law to the relevant provisions of the Convention.

- (ii) in any other case an authority, justification or excuse which is lawful under the law of the place where it is inflicted.

58. We went on to address local concerns about the consistency of this defence with Article 1.1 of the Convention. Thus, we considered that they were so consistent as they were simply an attempt to give effect to the second sentence of Article 1.1

“[Torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.

That is, the defence was intended to cover matters such as the reasonable use of force to restrain a violent prisoner. It was not intended - nor would the courts be asked to interpret them as authorising - conduct intrinsically equivalent to torture as defined in Article 1.1<sup>14</sup>.

59. That remains our position and, with respect to the view taken by the Committee, we find it difficult to see how a provision that is essentially a paraphrase of the Article 1.1 might be considered inconsistent with the Convention. NGOs and other commentators have attempted to point out where the alleged deficiency lies but their objections have not sustained analysis<sup>15</sup>. That said, we have taken due note of the Committee’s concerns and are continuing our dialogue with local commentators with an open mind as to the outcome.

60. Section 2(1) of the Crimes (Torture) Ordinance defines ‘public official’ as including “any person holding in Hong Kong an office described in the Schedule”. The Schedule lists the following -

- “1. An office in the Hong Kong Police Force. (Amended L.N. 362 of 1997)
2. An office in the Customs and Excise Department.
3. An office in the Correctional Services Department.
4. An office in the Independent Commission Against Corruption
5. An office in the Immigration Department. ”

But section 3 of the Interpretation and General Clauses Ordinance (Chapter 1) uses instead the term ‘public officer’ which it defines as including -

“...any person holding an office of emolument under the Government, whether such office be permanent or temporary”.

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<sup>14</sup> We reiterated this explanation in paragraph 12 of our initial report (in relation to Article 2 of the Convention), adding that neither "exceptional circumstances" nor "superior orders" could be invoked in the law of Hong Kong as a justification for torture.

<sup>15</sup> For example, the Law Society of Hong Kong pointed to the distinction between the test for torture in Article 1.1 -“...severe pain or suffering...” (our emphases) – and the final sentence of the article “...It does not include pain or suffering...” Thus the exclusion in the final sentence is of pain or suffering that is not severe and therefore not torture as defined in the Convention. But that distinction is clearly incorporated in the Ordinance through section 3(5).

Effectively, therefore, the term ‘public officer’ includes all civil servants and is therefore wider in scope than ‘public official’. Commentators have asked why the Crimes (Torture) Ordinance does not use the more inclusive term.

61. The aim of the Ordinance is to cover the officials normally involved in the custody or treatment of individuals under any form of arrest, detention or imprisonment. It is vastly unlikely that, for example, clerks, swimming pool attendants, or landscape architects would find themselves in a position to commit acts of torture (as defined in Article 1) in the course of their duties. That said, the use in the section 2(1) definition of the word ‘includes’ means that the term does *not* prevent the courts from holding other persons, such as a nurse in a government mental hospital, to be a ‘public official’ (or a "person acting in an official capacity") according to the circumstances.

### **Article 2: legislative, administrative, judicial or other measures to prevent acts of torture**

62. The situation remains essentially as explained in paragraphs 7 to 18 of the initial report. Since then, there have been no more reports of torture as defined in the Crimes (Torture) Ordinance. However, there have been some related developments that are discussed below.

#### **Instances of the alleged use of torture**

63. In paragraph 34 of the 2000 concluding observations, the Committee expressed the concern that –

“...there are as yet no prosecutions under the Crimes (Torture) Ordinance, despite circumstances brought to the attention of the Committee justifying such prosecutions.”

The reasons for the lack of prosecutions are those that we have explained on previous occasions. The position remains that torture is a particularly serious offence that carries a maximum sentence of life imprisonment. For an act to qualify as torture, there must be evidence that severe pain and suffering were intentionally inflicted by the authorities acting in their official capacities. So far, no cases have met those criteria on the strength of the evidence. And, as indicated above, there have been no cases where torture has even been alleged since 1998 (see paragraphs 14 to 16 of the initial report).

64. The Government does not condone or tolerate the use of any excessive force by Police officers, who are trained to treat all persons - including detainees and arrested persons as individuals - with humanity and respect, and to act within the law at all times. Officers who fail to comply with these requirements will be subject to disciplinary action and/or criminal proceedings as appropriate.

### **Article 3: torture as a ground for refusal to expel, return or extradite**

65. In paragraph 36 of the 2000 concluding observations, the Committee noted with

concern that “the practices in the Hong Kong Special Administrative Region relating to refugees may not be in full conformity with article 3 of the Convention”. In paragraph 40, it recommended that “laws and practices relating to refugees be brought into full conformity with article 3 of the Convention”. At the time, we found this perplexing as the issue had not been discussed at the hearing and the concluding observations did not indicate where the deficiency lay. However, there have since been several claims involving Article 3.1. And, in 2004, our Court of Final Appeal (CFA) had the opportunity to consider the standards applicable in the screening of such claims in the case of *Secretary for Security vs Sakthevel Prabakar*<sup>16</sup>.

66. Following the CFA judgment in that case, we put in place administrative procedures for assessing torture claims under Article 3.1 and are confident that those procedures will fully meet the high standards of fairness laid down by the CFA. As at 31 March 2005, some 58 Article 3-related claims were under consideration. These involved 73 persons who could be subject to deportation/removal cases and one person who could be subject to surrender. These claims are being assessed in accordance with the new procedures.

### **Removal and deportation**

67. It should be noted that Hong Kong’s obligations under Article 3.1 will only arise where persons who do not enjoy the right to stay in Hong Kong are to be removed or deported to places where there are substantial grounds for believing that they would be in danger of being subjected to torture. Where they are to be removed or deported to places to which no claims of torture relate, Article 3.1 will not be engaged.

68. Claimants who have failed to establish their claims will be removed from Hong Kong in accordance with our laws. Claimants whose claims are established will not be removed to places where there are substantial grounds for believing that they would be in danger of being subjected to torture. However, removal to places where they may be admitted without the danger of being subjected to torture may be considered. If subsequent changes in conditions of a place are such that a claim of a person established earlier in respect of that place can no longer be substantiated, his removal to that place may be considered.

### **Surrender of fugitive offenders**

69. The position as explained in paragraphs 19 to 20 of the initial report is essentially the same. As at end 2004, we had signed a total of 13 bilateral agreements on the surrender of fugitive offenders.

70. Where claims are made by fugitives under Article 3.1 in respect of their surrender to the requesting jurisdictions concerned, their claims will be assessed to ascertain whether their surrender would entail any breach of the CAT. The Chief Executive shall take into account the determination of such claims and other relevant factors when considering whether the fugitives concerned should be surrendered to the requesting jurisdictions.

### **Remaining Vietnamese refugees and migrants**

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<sup>16</sup> [2005] 1 HKLRD 289, CFA.

71. In January 1998, the issue of Vietnamese asylum seekers came to a close, following the decision to permit the remaining Vietnamese refugees and migrants – as persons who were unlikely to be accepted for overseas resettlement or for return to Vietnam – to apply for settlement in Hong Kong. The last remaining refugee centre was closed in June 2000.

#### **Vietnamese illegal migrants**

72. The position remains essentially as explained in paragraphs 35 to 36 of the initial report. As at 31 December 2004, there were 214 such migrants in the territory.

#### **Ex-China Vietnamese**

73. We explained the position of persons in this category in paragraph 37 of the initial report. In April 2000, the Court of First Instance found in favour for the Government in the judicial review proceedings initiated by 116 families against removal to Mainland China. The families appealed but the appeal was later withdrawn by consent. The Government subsequently reviewed the situation and allowed the remaining 396 Ex-China Vietnamese to apply for stay in Hong Kong. As at 31 December 2004, all except one who had gone missing had been granted stay in Hong Kong.

#### **Article 4: making acts of torture offences under the criminal law**

74. The position is essentially as explained in paragraphs 38 and 39 of the initial report, which reaffirmed the prohibition of torture under the Crimes (Torture) Ordinance (Chapter 427) and advised the Committee of the prohibition of aiding and abetting in section 89 of the Criminal Procedure Ordinance (Chapter 221). Any attempts to commit torture are prohibited under section 159G of the Crimes Ordinance (Chapter 200).

#### **Article 5: establishment of jurisdiction**

75. As explained in paragraph 40 of the initial report, section 3 of the Crimes (Torture) Ordinance provides that the offence of torture is committed, whether the conduct take place in Hong Kong or elsewhere. The nationality of the perpetrator or the victim is immaterial. The courts of the HKSAR have full jurisdiction in conformity with this Article.

#### **Article 6: powers of detention**

76. The position remains essentially as explained in paragraphs 41 to 44 of the initial report. But commentators have called on us to implement recommendations made by the Law Reform Commission in its 1992 Report on Arrest. Those recommendations concerned the introduction of legislative amendments to -

- (a) institute continuous review of the need for detention;
- (b) set a clear time limit for detention without charges;
- (c) provide for the appointment of Custody Officers; and
- (d) provide for regular review of police detention.



77. The position is that, in 1998-99, the Police, the Immigration Department, the Customs and Excise Department, and the Independent Commission Against Corruption instituted a system whereby designated Custody Officers and Review Officers ensure the proper treatment of persons in detention and keep the need for their further detention under continuous review. The recommendation concerning a statutory time limit on the length of detention without charge is under consideration. The Commission's recommendations concerning the taking of intimate and non-intimate samples, and the tape-recording and video-taping of interviews are discussed further in paragraphs 91 and 100 below, in relation to Article 11 of the Convention.

#### **Article 7: prosecution of offenders who are not to be extradited**

78. The position is as explained in paragraph 45 of the initial report.

#### **Article 8: extradition arrangements**

79. The position remains essentially as explained in paragraphs 46 to 48 of the initial report. But commentators have asked why there are as yet no formal surrender of fugitive offenders arrangements between the Mainland and the HKSAR. Formal discussions on such arrangements began in March 1999. Because of the differences between the respective legal systems and the complexity of the issues involved, the discussions must be conducted with particular care and attention to details and cannot, therefore, be expected to reach a swift conclusion. We will advise the Committee of any developments when it hears the present report.

80. In March 2000, the two sides initiated discussions on the arrangements for the transfer of sentenced persons. These have centred on the main principles and provisions enshrined in the Transfer of Sentenced Persons Ordinance and the agreements on transfer of sentenced persons that we have signed with other jurisdictions. These include, for example, the conditions for transfer, procedures for transfer, retention of jurisdiction and continued enforcement of sentence. At the time of finalising this report, the discussions were still underway, again because of the differences in the legal and judicial systems and the complexity of the issues.

#### **Article 9: mutual assistance in relation to crimes of torture**

81. The position remains essentially as explained in paragraphs 49 to 51 of the initial report. As at 31 December 2004, we had signed 17 bilateral agreements on mutual legal assistance in criminal matters.

82. Some commentators have asked why there is no agreement between the Mainland and the HKSAR on mutual legal assistance in criminal matters. The position is that - in criminal investigations - the police authorities of both sides do, in fact, provide mutual assistance in accordance with Interpol practice.

#### **Article 10: education and information on the prohibition of torture**

## **General**

83. The position remains broadly as explained in paragraphs 52 to 58 of the initial report, though there have been some developments as explained below. However, we take the opportunity to mention that the ‘Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ - issued by the Office of the United Nations High Commissioner for Human Rights (the Istanbul Protocol) – has been distributed to relevant bureaux and departments (including particularly those discussed below).

## **Police**

84. In paragraph 39 of the 2000 concluding observations, the Committee recommended “the continuation and intensification of preventive measures, including training for law enforcement officials”. The position remains largely as explained in paragraph 52 of the initial report. Additionally, however, frontline officers periodically attend induction and continuation training designed to remind them of the importance of using minimum force during arrest actions and observing the ‘Rules and Directions for the Questioning of Suspects and the Taking of Statement’s’. Examples of the topics covered include the Hong Kong Bill of Rights Ordinance, the Crimes (Torture) Ordinance, the use of force, the handling and questioning of suspects, cautioned statements, and the care and custody of prisoners.

85. Commentators have said that we should explain in this report what training, if any, Police officers receive in handling cases of domestic violence, abuse of the elderly, and child abuse. Police officers do indeed receive such training on a regular basis. However, we do not believe that the forms of violence and abuse entailed in such cases constitute torture as defined in Article 1.1 of the Convention. To the extent that they might conceivably fall within the ambit of the treaty, they might be considered as a form of cruel or inhuman treatment or punishment. We therefore address the question in paragraphs 138 and 139 below in relation to Article 16, though we have reservations about doing so because these things concern the acts of persons in their capacity as private individuals. As such, it is our view that they fall outside the scope of the Convention.

## **Correctional Services Department**

86. The Prisons Ordinance (Chapter 234) and its subsidiary legislation expressly provide that prisoners must be treated with kindness and humanity. The Department has incorporated these requirements in its ‘Vision, Mission and Value Statement’, which states that all persons in its custody have the right to correct and fair treatment with dignity. Staff training strongly emphasises the prohibitions against the cruel and degrading treatment or punishment of persons under custody. Essentially, therefore, the position is as explained in paragraph 53 of the initial report.

## **Customs and Excise Department, Immigration Department and Independent Commission Against Corruption**

87. The position is essentially as explained in paragraphs 54 to 56 of the initial report.

### **Health care professionals**

88. The position is essentially as explained in paragraphs 57 and 58 of the initial report.

### **Article 11: review of interrogation rules, instructions, methods and practices for custody and treatment of persons arrested or detained**

89. In paragraphs 59 to 84 of the initial report, we advised the Committee of our intention to improve existing practices and legislation relating to the powers of the law enforcement agencies to stop and search, arrest, and detain a person. We discussed the rules and practices of the disciplined services, including the measures taken to detect signs of physical abuse/torture, to prevent suicides by persons in custody, and the protections afforded to persons detained in mental hospitals. We explained the controlled circumstances in which health professionals administered electro-convulsive therapy to patients with severe depressive illness and as an adjunct to neuroleptic treatment when response to medication had been unsatisfactory. In this chapter, we take this opportunity to inform the Committee of the progress made since the submission of our initial report.

### **The Dangerous Drugs, Independent Commission Against Corruption and Police Force (Amendment) Ordinance 2000**

90. In paragraph 59 of the initial report, we informed the Committee of a programme of improvements – initiated in 1997 - in relation to the powers of law enforcement agencies to stop, search, arrest and detain a person. The programme was on the basis of recommendations put forward by a working group formed to examine proposals advanced by the Law Reform Commission, with a view to improving existing safeguards against possible abuses of power.

91. In this connection, the Dangerous Drugs, Independent Commission Against Corruption and Police Force (Amendment) Ordinance 2000 was enacted in June 2000 and came into operation on 1 July 2001. It empowers the Police, the Customs and Excise Department, and the Independent Commission Against Corruption to take intimate and non-intimate samples from suspects for forensic purposes, and provides for the establishment of a DNA database. Since then, these measures have contributed to the detection and investigation of serious crimes. But the Ordinance also provides for safeguards against possible abuses of power. Among others, these include the requirement that, the taking of non-intimate samples from a suspect in police detention or in custody must be authorised by officers at the rank of superintendent or above. The taking of intimate samples requires:

- a) the authorisation by officers at the rank of superintendent or above;
- b) the approval by a magistrate; and
- c) the written consent by the suspect.

We will continue to take appropriate steps to implement the working group's recommendations. In so doing, we will take into account developments since the working group's report. In this process, we will seek to strike a careful balance between-

- a) the need to ensure that law enforcement agencies have the necessary powers to discharge their statutory duties;
- b) the need to guard against possible abuse of powers; and
- c) the rights of individuals.

### **Police**

92. The situation remains essentially as explained in paragraph 60 of the initial report.

### **Correctional Services Department**

93. In 2001, the Legislative Council enacted the Rehabilitation Centres Ordinance (Chapter 567) and its subsidiary legislation and the Department started operating rehabilitation centres in July 2002. The centres provide an additional sentencing option for the courts to deal with young offenders aged between 14 and under 21, who are in need of short-term residential rehabilitation. The Department's programme comprises a two phase process –

- (a) **phase I:** an initial detention period of two to five months' regimented training in a penal institution; and
- (b) **phase II:** a period of one to four months' subsequent accommodation in a half-way house setting. Discharged offenders are subject to one year's statutory supervision by aftercare officers of the Department.

### **The Criminal Procedure (Amendment) Ordinance 2004**

94. The Ordinance came into effect in July 2004. It provides for a revised scheme for prisoners who:

- (a) have been detained at Executive discretion;
- (b) have been serving mandatory life sentences for murder committed when the prisoner was aged under 18; or
- (c) have been serving discretionary life sentences since the commencement of, or any time before the commencement of, the provisions which previously provided for the determination of the minimum terms to be served by such prisoners.

95. The Ordinance now requires the Secretary for Justice to apply to the court for a determination by a judge in respect of each prescribed prisoner. The judge hearing such an application must determine the minimum term that the prescribed prisoner must serve for the

relevant offence. Where the prescribed prisoners are serving sentences for murder committed when they were under 18 years old, and subject to the consent of the prescribed prisoners, the judge will have discretion as to whether to –

- (a) make a determination of the minimum terms as above mentioned; or
- (b) give a determinate sentence as an alternative to determining a minimum term.

### **Prevention of suicides**

96. In early 2004, the Correctional Services Department conducted a review of the mechanism and strategies for the detection and prevention of suicide in custody. The review resulted in the institution of several improvement measures, including early screening of inmates for suicidal tendencies, enhanced supervision of those assessed as being at high risk of suicide, and modifications to the fittings in prison accommodation to make suicide attempts more difficult. The Department will review the effectiveness of these measures on a regular basis.

### **Death of an inmate at Siu Lam Psychiatric Centre**

97. In late 2001, an inmate of the Siu Lam Psychiatric Centre was found dead. A task group appointed by the Commissioner of Correctional Services to study the circumstances of the incident recommended improvements in relation to nursing practices and the control of medical drugs at all penal institutions. Out of 34 recommendations, 32 have been implemented. The remaining two recommendations were that we should conduct a review of the Centre's staffing levels and seek comments from external associations on the Centre's services. The Department is pursuing this.

98. In 2002, the Coroner's Court examining the case reached an open verdict. The Police also carried out a thorough investigation and had found no evidence of foul play. At a joint meeting of the Legislative Council Panels on Security and Health Services on 17 July 2003, independent medical experts gave their views on the probable cause of death and the needle marks found on the inmate's body. They took the view that the probable cause of death was diabetic ketoacidosis.

99. Under the present legal framework, all inmates committed to the custody of the Correctional Services Department are placed under the medical charge of officers seconded from Department of Health. In-house nursing care is provided by Correctional Services officers with nursing qualifications, under the directions of the medical officers. The system has worked well and, having considered the findings of the task group, the Coroner's Court and the independent experts, we have concluded that there is no immediate need for changes beyond those arising from the task group's recommendations.

### **Immigration Department**

100. The situation remains largely as explained in paragraphs 67 to 68 of the initial report. However, we take the opportunity to inform the Committee that the Immigration Department video-records its interviews and questioning during their investigative work subject to the

consent of the suspects. At present, all immigration investigation offices and major control points are equipped with video-recording facilities.

### **Customs and Excise Department**

101. The position is as explained in paragraph 69 of the initial report. But Customs offices are now equipped with video recording facilities, on a need basis. Such facilities will be provided in all new customs offices.

### **Persons detained in mental hospitals**

102. The position regarding the protection of the rights of persons detained in mental hospitals remains essentially as explained in paragraphs 73 to 80 of the initial report. The only developments of note have been that –

- (a) in 2001, the Judiciary and the Hospital Authority formulated administrative arrangements to ensure that mental patients could have access to a judge or magistrate, if required, before their compulsory detention in a mental hospital; and
- (b) in 2003, the Chief Executive delegated to the Secretary for Health Welfare and Food the power to order the transfer of a mentally disordered person detained in the Correctional Services Department's psychiatric centre to a mental hospital under section 52B of the Mental Health Ordinance (Chapter 136).

Neither of these developments entailed amending legislation.

103. The pattern of application in the past five years has been –

|  | <b>2000-01</b> | <b>2001-02</b> | <b>2002-03</b> | <b>2003-04</b> | <b>2004-05</b> |
|--|----------------|----------------|----------------|----------------|----------------|
| Number of Patients receiving ECT         | 194            | 175            | 153            | 110            | 137            |
| Number of treatments                     | 1 395          | 1 387          | 1 266          | 828            | 945            |
| Average number of treatments per patient | 7.2            | 7.9            | 8.3            | 7.5            | 6.9            |

### **Article 12: prompt and impartial investigation of torture**

104. As explained in paragraph 63 above in relation to Article 2, there have been no cases, or even allegations, of torture in the period under report. Any claim or suspicion of torture having occurred in Hong Kong would be subject to immediate investigation through the complaints mechanisms described in paragraphs 105 to 122 below in relation to Article

13<sup>17</sup>. Assertions of torture occurring in other jurisdictions would be handled as explained above in relation to Articles 3, 8, and 9.

### **Article 13: right of complaint**

#### **General**

105. The position is essentially as explained in paragraphs 85 to 101 of the initial report. However, we take the opportunity to update the statistical information therein and to inform the Committee of recent developments.

#### **Police**

106. In paragraph 38 of the 2000 concluding observations, the Committee recommended that “continued efforts be made to ensure that the Independent Police Complaints Council becomes a statutory body, with increased competence”. Local commentators have echoed that call. We are taking steps to convert the IPCC into a statutory body and are drafting legislation to that purpose. Inter alia, this will empower the IPCC to oblige the CAPO to submit for its examination statements and videotapes taken during investigations of complaints. Consultations conducted in March 2002 indicated that this proposal enjoyed public support.

107. We think it important to explain that our system does not, as some commentators appear to believe, rely exclusively on the good faith of serving members of the Police Force. The CAPO operates independently of all operational and support formations of the Police. And the Independent Police Complaints Council (IPCC) closely monitors and reviews CAPO’s investigations of complaints against the police. The IPCC is an independent civilian body comprising non-official members from a wide spectrum of the community, including members of the Legislative Council and the Ombudsman or her representative. It is serviced by its own full-time secretariat.

108. There are effective checks and balances to ensure that complaints are handled thoroughly, fairly and impartially. The CAPO prepares detailed investigation reports on complaints received. These are then submitted to the IPCC, which rigorously examines them. Where IPCC members have doubts about a particular investigation, they may invite the complainants, complainees, and witnesses to interviews. The Council can also ask CAPO to submit for its reference document or information relevant to a complaint. In discharging their duties, members of the IPCC may observe the CAPO’s investigations in person, on either a surprise or a scheduled basis. If the IPCC is not satisfied with the results of an investigation, it can ask the CAPO to clarify any doubts or to reinvestigate the complaint. It may also bring the case to the personal attention of the Chief Executive, together with recommendations as to its

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<sup>17</sup> Paragraphs 85 to 101 of the initial report described matters relating to complaints mechanisms under the section on Article 12, whereas they should properly have been addressed in Article 13. This was due to an editorial error in the preparation of that report.

disposition. Clearly, therefore, the IPCC has adequate means to ensure that investigations are conducted properly and effectively.

109. Over the years, we have introduced numerous measures to improve the credibility and transparency of the system. In particular, the Observers Scheme and the IPCC Interviewing Witness Scheme have improved the IPCC's ability to monitor CAPO investigations. Other measures have included the establishment of a special IPCC panel to monitor serious complaints and appointing retired members of the IPCC and other community leaders as Lay Observers of CAPO investigations.

### **Correctional Services Department**

110. All complaints from prisoners are referred to the Department's Complaints Investigation Unit (CIU). The Unit is vested with independent investigative authority - delegated by the Commissioner of Correctional Services - to handle all complaints within its purview expeditiously, thoroughly and impartially. All allegations of criminal offence will be reported, without delay, for investigation by the Police.

111. The CIU handles cases referred to it by both internal and external stakeholders. It deals with complaints according to the Prison Rules (Chapter 234A) and the Department's Standing Orders and Procedures, in the spirit of its statement of Vision, Mission and Values<sup>18</sup>. Complainants are normally interviewed by CIU investigators on the day following receipt of their complaints. The CIU service is certified under the ISO 9001:2000 quality management system and its modus operandi - which takes full account of the United Nations Standard Minimum Rules for the Treatment of Prisoners - is governed by the Department's Complaints Handling Manual.

112. In 2004, the CIU received a total of 204 complaints from inmates and members of the public. During the year, the Department's Complaints Committee examined 199 complaints - including cases brought forward from the previous year) - of which four were substantiated.

113. All investigation reports are examined by the Department's Complaints Committee, which either confirms their findings or directs that other courses of action be taken. The Committee is chaired by a civilian directorate officer who is independent of the uniformed

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<sup>18</sup> The statement is as follows –

“Vision - Internationally acclaimed Correctional Service  
Mission - As an integral part of the Hong Kong criminal justice system, we detain persons committed to our custody in a decent and healthy environment, and provide comprehensive rehabilitative services in a secure, safe, humane and cost effective manner, so as to enhance the physical and psychological health of prisoners, protect the public and help reduce crime.  
Values - Integrity - We value honesty, humility, uprightness and personal responsibility.  
Professionalism - We take pride in our profession and are committed to continuous improvement in efficiency, competence and quality of service.  
Humanity - We recognize that all persons have the right to correct and fair treatment with dignity, whether they are members of the public, members of staff or persons in our custody.  
Discipline - We respect the rule of law, orderliness and harmony.  
Economy - We optimize the use of resources and emphasize sustainability.”



stream and its members comprise, among others, the Prison Chaplain and the Assistant Commissioner of the Quality Assurance Division. The composition of the membership is intended to ensure the impartiality and transparency of the system. This two-tier mechanism allows dissatisfied complainants the opportunity to have their complaints re-examined. Any appeals beyond the Committee are handled by the Commissioner of Correctional Services.

114. The Committee's decisions are subject to scrutiny by external bodies such as the judiciary (through judicial review or civil claims), the Ombudsman, or Justices of the Peace. Cases are expected to be completed within the target response time of 18 weeks<sup>19</sup>. The parties concerned are informed of the outcome in writing.

115. As explained in paragraph 104 of the initial report, all prisoners are informed of the avenues of complaint available to them through induction sessions, information booklets, notices posted at prominent places in institutions, and during interviews with officers of the Department. Avenues for the redress of prisoner's grievances include channels, such as members of the Legislative Council, the Ombudsman, visiting Justices of the Peace, and the Independent Commission Against Corruption. Prisoners from other jurisdictions may also complain to their respective Consulates General. Rule 47C of the Prison Rules (Chapter 234A) provides that letters from prisoners to the 'specified persons'<sup>20</sup> - as defined in Rule 1A - are not to be read.

116. The rules governing avenues of complaint remain as explained in paragraph 108 of the initial report.

### **Immigration Department**

117. The situation remains essentially as explained in paragraphs 118 and 119 of the initial report.

### **Customs and Excise Department**

118. The position remains essentially as explained in paragraph 120 of the initial report. There were 224 complaints of assault received in the reporting period of 1998 - 2004. All were found unsubstantiated after police's investigations.

### **Independent Commission Against Corruption (ICAC)**

119. In paragraph 96 of the initial report, we stated that the Independent Commission Against Corruption Complaints Committee was chaired by the convenor of the Executive Council. The then Chairman has since retired. The current incumbent is a member of the Executive Council.

120. In paragraph 98 of the initial report, we said that, in 1997, there were 30 complaints against the ICAC and its officers; 19 of those contained more than one allegation, there being a total of 76 allegations. Most (47%) alleged misconduct on the part of ICAC officers. Another 33% alleged neglect of duties. The remaining 20% alleged abuse of power or related to ICAC

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<sup>19</sup> The target is prescribed in the Department's Complaints Handling Manual.

<sup>20</sup> Rule 1A defines 'specified person' as comprising the Chief Executive, a member of Executive Council, a member of Legislative Council, a member of District Council, a visiting justice, the Ombudsman or the Commissioner of the Independent Commission Against Corruption.

procedures. Corresponding figures for the period 1998 to 2003 are as follows –

| Year | No. of complaints | Total no. of allegations | Category of allegation (%) |                |                   |                               |
|------|-------------------|--------------------------|----------------------------|----------------|-------------------|-------------------------------|
|      |                   |                          | Misconduct                 | Abuse of power | Neglect of duties | Inadequacy of ICAC procedures |
| 1998 | 25                | 54                       | 56                         | 20             | 18                | 6                             |
| 1999 | 37                | 110                      | 56                         | 23             | 21                | 0                             |
| 2000 | 44                | 116                      | 19                         | 59             | 22                | 0                             |
| 2001 | 26                | 92                       | 25                         | 48             | 24                | 3                             |
| 2002 | 38                | 111                      | 31                         | 45             | 20                | 4                             |
| 2003 | 29                | 70                       | 34                         | 25             | 10                | 1                             |
| 2004 | 21                | 53                       | 17                         | 19             | 17                | 0                             |

121. In paragraph 99 of the initial report, we explained that nine of the 32 complaints considered by the ICAC Complaints Committee in 1997 contained allegations that were found to be either substantiated or partially substantiated. The corresponding figures for the period 1998 to 2004 are as follows

| Year | No. of complaints considered | No. either substantiated or partially substantiated |
|------|------------------------------|---|
| 1998 | 26                           | 6   |
| 1999 | 30                           | 7   |
| 2000 | 29                           | 10  |
| 2001 | 26                           | 5   |
| 2002 | 26                           | 10  |
| 2003 | 35                           | 10  |
| 2004 | 22                           | 7   |

122. Commentators have called for the establishment of an independent department to handle complaints against all the disciplinary forces. Our view is that the existing systems described above work well and that there is no need to replace them.

**Avenues for complaint by mental patients**

123. The position remains as explained in paragraphs 125 to 127 of the initial report. The numbers of complaints received from mental patients by the Hospital Authority in the past five years are set out in the table below. As stated in paragraph 128 of the initial report, complainants who are dissatisfied with the outcome of the investigations conducted by the Hospital Authority may seek a review by the Public Complaints Committee of the Hospital Authority or by the Ombudsman.

| The total number of complaints received from mental patients by the Hospital Authority |         |         |         |         |
|--|---------|---------|---------|---------|
| 2000-01  | 2001-02 | 2002-03 | 2003-04 | 2004-05 |
| 204  | 168     | 150     | 132     | 182     |

**Article 14: legal redress for victims of torture and an enforceable right to fair and adequate compensation**

124. The position remains as explained in paragraphs 129 to 134 of the initial report.

**Article 15: statements made as a result of torture shall not be invoked as evidence**

125. The position is essentially as explained in paragraphs 135 to 137 of the initial report. The number of Police Video Interview Rooms has increased from 11 in 1996 to 70 as at 31 December 2004. Every major divisional police station has at least one such facility and the Customs and Excise Department has 18. These measures have served to increase the transparency of the statement taking process and the admissibility of confession statements in the courts.

**Article 16: prevention of other acts of cruel, inhuman or degrading treatment or punishment**

**General**

126. In paragraphs 140 to 158 of the initial report, we advised the Committee that, to a large extent, the legislative and administrative provisions discussed in the earlier parts of the report in relation to torture applied equally to conduct that fell short of torture but might constitute cruel, inhuman or degrading treatment or punishment. The position is essentially as explained there and it remains the case that all persons acting in a public capacity must act in accordance with the rule of law. Measures are in place to ensure that any cruel, inhuman or degrading treatment or punishment committed by, at the instigation of, or with the consent or acquiescence of, any public official - or by anyone acting in an official capacity - is subject to criminal or disciplinary sanctions.

127. However, in paragraph 35 of the 2000 concluding observations, the Committee

expressed concern that “not all instances of torture and other cruel, inhuman or degrading treatment or punishment are covered by the Crimes (Torture) Ordinance”. And, in paragraph 37, the Committee recommended that “efforts be made to prevent other acts of cruel, inhuman or degrading treatment or punishment, in accordance with the provisions of the Convention”.

128. As we explained at the hearing of our initial report, the provisions of the Convention enjoy the force of law through –

- (a) Article 28 of the Basic Law, which prohibits the torture of any resident;
- (b) the Hong Kong Bill of Rights Ordinance (Chapter 383), Article 3 of which gives effect to Article 7 of the ICCPR on torture or cruel, inhuman or degrading treatment or punishment; and
- (c) the Crimes (Torture) Ordinance (Chapter 427): see paragraph 55 above in relation to Article 1 of the Convention.

As we also explained at the 2000 hearing, the Hong Kong Courts will construe domestic legislation in such a way as to ensure compatibility with our international obligations, including those imposed under the Convention.

129. While the overall position remains broadly as explained in paragraphs 143 to 156 of the previous report, there have been developments and innovations since then as discussed below. Essentially, and as pointed out in paragraph 143 of the initial report, acts of the kind envisaged in Article 16 are comprehensively prohibited in such statutes as –

- (a) Article 3 of the Hong Kong Bill of Rights Ordinance: per paragraph 128(b) above;
- (b) the Offences against the Person Ordinance (Chapter 212), which contains provisions on wounding or inflicting grievous bodily harm, assault occasioning actual bodily harm;
- (c) the Crimes Ordinance (Chapter 200) Parts VI and XII of which contain provisions to protect children from sexual abuse and prohibit child sex tourism by giving extra-territorial effect to 24 offences listed in Schedule 2 of the Ordinance (reproduced at **Annex 3**); and
- (d) the Criminal Procedure Ordinance (Chapter 221): Part IIIA makes special provisions for the treatment of child witnesses and other vulnerable groups ; and
- (e) the Prevention of Child Pornography Ordinance (Chapter 579), which protects children against sexual exploitation.

130. For these reasons, we respectfully maintain the view that the requirements of the Convention are fully met within the body of our laws. However, we are open to persuasion and, if the Committee is in a position to identify the specific areas where it considers that our laws are deficient as regards the Convention (the 2000 concluding observations were not specific in that regard), we will certainly review the position, acting as necessary on our findings.

### **Police disciplinary procedures**

131. The position remains essentially as explained in paragraph 142 of the initial report.

### **Ill-treatment of children**

132. In broad terms, the position remains as explained in paragraphs 143 to 147 of the initial report. However, in October 2003, in order to fulfil the obligation under Article 37(d) of the Convention on the Rights of the Child, we initiated a legal representation service for children and juveniles involved in care or protection proceedings and who were deprived of their liberty and detained in a gazetted place of refuge<sup>21</sup>. The scheme is provided through the Duty Lawyer Service<sup>22</sup> as soon as practicable after the children or juveniles in question have been taken to a place of refuge. We completed a review of the scheme in February 2005, concluding that it was generally working well. On the basis of the review, we have decided to expand the scope of service to cover more cases where children or juveniles are likely to be deprived of their liberty but are not immediately to be detained in a place of refuge.

### **Children in institutional care**

133. The position is essentially as explained in paragraph 149 of the initial report. Justices of the Peace and the Social Welfare Department's 'Agency Officers' visit homes run by NGOs on both a scheduled and surprise basis. They and the Department's District Social Welfare Officers are empowered to receive complaints and to make investigations.

### **Domestic violence**

134. Commentators have argued that domestic violence - which includes spouse battering, child abuse, and the abuse of the elderly - are forms of cruel or inhuman treatment and that the Government is obliged to address in the spirit of the Convention. We have pointed out that these forms of abuse do not fall within the scope of Article 16, which – inter alia – requires that acts of cruel or inhuman treatment (and so forth) be –

“committed by, or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.”

In response, it has been asserted that failure to provide protection is a form of acquiescence for the purposes of Article 16. We reject that view. But since the matter has been raised, we take this opportunity to put our position on record in the paragraphs that follow.

135. Our strategy for tackling domestic violence includes preventive measures (such as publicity, community education, and nurturing social capital), support services (such as family services, housing assistance, financial assistance, and child care), and specialised services and crisis intervention, such as – inter alia - Family and Child Protective Services Units, a Family Crisis Support Centre, and refuge centres for women.

136. There are laws in place that prohibit physical assault, murder, rape, and so forth, most notably the Crimes Ordinance (Chapter 200) and the Offences Against the Person Ordinance (Chapter 212), and the provisions against blackmail – which contains an element of menace and

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<sup>21</sup> Under section 34E of the Protection of Children and Juveniles Ordinance (Cap. 213) (PCJO).

<sup>22</sup> See paragraph 38 in Part I of this report.

therefore of mental violence - in the Theft Ordinance (Chapter 210). The Domestic Violence Ordinance (Chapter 189) protects married or cohabitating couples and their children from domestic violence. There is also legislation in place to protect children from abuse.

137. Of course, domestic violence does occur in Hong Kong, as it does in all societies. A particularly serious one that occurred in 2004 gave rise to considerable public concern and is discussed below for the Committee's information, though we maintain that it does not fall within the scope of the Convention.

#### **The Tin Shui Wai murder case**

138. In April 2004, a woman living in the Tin Shui Wai<sup>23</sup> and her two daughters were killed by her husband. The woman, who arrived from the Mainland in January 2004, had been admitted to a shelter prior to the tragedy. On the day of the tragedy, she left the shelter and sought help from the local police station. Commentators say that the tragedy highlights the need to provide training to social workers and the police on the handling of domestic violence and other family problems. The position is as follows -

- (a) **social welfare response:** the Social Welfare Department is well aware of the need for such training and, between April 2001 and March 2004, organised over 70 training programmes on domestic violence. Over 3,500 participants took part. Among others, the trainees included social workers, clinical psychologists, police officers, teachers, and medical staff. The programmes were in the form of workshops, seminars and lectures conducted by local overseas trainers. The trainers included experienced practitioners and academics with ample experiences in the area. The training covered risk assessment, intervention skills, case/group work techniques, and multi-disciplinary collaboration in the handling of cases involving violence. Repeated emphasis was placed on victim safety.

After the Tin Shui Wai tragedy, the Director of Social Welfare appointed a panel to review the provision and delivery process of family services in Tin Shui Wai where the deceased lived and to propose improvements. The panel submitted its report in November 2004, proposing a number of improvements, including - among others - strengthening professional training in managing family violence. In addition to the training programmes already in place, the Social Welfare Department will further strengthen this area of training, with particular emphasis on crisis management, risk assessment, gender sensitivity, early detection, and different approaches to intervention and treatment; and

- (b) **Police response:** police officers receive ongoing training on the handling of domestic violence at various stages throughout their career. Immediately after the tragedy, Police reviewed their handling procedures and made improvements to the training - and access to information - of frontline officers. The measures had regard to the need to foster better communications among the frontline officers of stakeholders departments, such as the Social Welfare Department, the Police, and local NGOs.

139. Commentators have asked why we have not made it compulsory to report cases of elderly abuse and for the abusers to seek counselling. The position is that abuse of the elderly

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<sup>23</sup> Tin Shui Wai is a new town in the Northwestern New Territories.

usually involves complex and long-term family relationship problems. The abusers are usually close relatives or family members of the victims and the latter are often reluctant to involve them in legal proceedings. We therefore think it likely that compulsory reporting could discourage elderly people from seeking help. Against this background, our priorities are to –

- raise community and professional awareness of the problems;
- facilitate the early identification of abuse;
- empower elderly people to protect themselves. By ‘empowerment’, we mean helping elderly people to understand their rights to survival, freedom and personal safety, restoring their self-esteem and ability to make their own decisions, to take better care of themselves, and so forth; and
- encourage victims of elder abuse and their family/friends to seek early assistance.

140. Abusers do, in fact, receive individual compulsory counselling if they are placed under the supervision of a probation officer by order of a court. The supervising probation officers are also social workers and provide counselling to abusers in the normal course of their duties. However, we are currently examining the feasibility and implications of adopting other modes of compulsory counselling.

#### **Removal of Mainland children under the Certificate of Entitlement Scheme**

141. We explained the scheme and the reasons for introducing it in paragraph 31 of the initial report, in relation to Article 3. Commentators have reiterated the accusation that such removals constitute cruel and inhuman treatment. This view is unfounded for the reasons given in paragraphs 31 and 32 of the initial report<sup>24</sup>.

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<sup>24</sup> In the initial report, we discussed this in relation to Article 3. But we consider it more appropriate to address the issue under Article 16 as our interlocutors have alleged cruel and inhuman treatment.