



## HONG KONG BAR ASSOCIATION

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10<sup>th</sup> March 2014

Committee on Economic, Social and Cultural Rights (CESCR)  
CESCR Secretariat  
8-14 Avenue de la Paix  
CH 1211 Geneva 10  
Switzerland.

Dear Sirs/Madame,

### Submission of the Hong Kong Bar Association

The Hong Kong Bar Association has prepared a Submission to the United Nations Committee on Economic, Social and Cultural Rights ("the Committee") to assist its consideration of the Third Periodic Report (E/C.12/CHN-HKG/3) at its 52<sup>nd</sup> Session on 28<sup>th</sup> April to 23<sup>rd</sup> May 2014 to be held in Geneva.

I enclose a total of **20 hard copies** of the Submission of the Hong Kong Bar Association dated 10<sup>th</sup> March 2014 for the consideration of the Committee at its 52<sup>nd</sup> Session.

Yours sincerely,

Paul Shieh SC  
Chairman

Encl.

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**Hong Kong Bar Association's Submission to**  
**the United Nations Committee on Economic, Social and Cultural Rights**  
**(At the 52<sup>nd</sup> Session, 28 April–23 May 2014, Geneva)**

1. The Hong Kong Bar Association (“HKBA”) makes the following submissions to the United Nations Committee on Economic, Social and Cultural Rights (“the Committee”) to assist its consideration of the Third Periodic Report (E/C.12/CHN-HKG/3) at its 52<sup>nd</sup> Session on 28 April – 23 May 2014.

**Part I: Domestic Enforceability of ICESCR**

2. The HKBA notes that the Committee has since 2001 taken an interest in the status and enforceability of the ICESCR in Hong Kong. Although Article 39 of the Basic Law states that the provisions of the ICESCR as applied in Hong Kong shall remain in force in Hong Kong, there has been no domestic legislation incorporating the provisions of the ICESCR into the laws of Hong Kong in the manner that has been applied to the provisions of the ICCPR as applied to Hong Kong.
3. On 18 February 2014, the Hong Kong Court of Final Appeal handed down its judgment in *GA & Ors v Director of Immigration* (FACV 7, 8, 9, 10/2013), which, in para 58, interpreted Article 39 of the Basic Law to mean that the provisions of the ICESCR referred to in the article are not directly enforceable in Hong Kong by any individual unless implemented by domestic or municipal law. Reference has been made in the judgment of the Court of Final Appeal to para 5 of General Comment No 19 (E/C.12/1998/24) of the Committee, which is said to confirm that the ICESCR does not stipulate the specific means of implementation in the national legal order and contains no provision obligating its comprehensive

incorporation or requiring it to be accorded by any specific type of status in national law. The *GA* judgment is accessible at: [http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2013/FACV000007\\_2013.doc](http://legalref.judiciary.gov.hk/doc/judg/word/vetted/other/en/2013/FACV000007_2013.doc).

4. The Court of Final Appeal also rejected the argument of incorporation of the relevant provision of the ICESCR into Hong Kong's domestic law, notwithstanding that the argument relied on the statement made by the HKSAR Government in para 349 of the Initial Report submitted by the People's Republic of China (E/1990/5/Add.59). The Court of Final Appeal considered that "where it is said that a particular Convention or a provision of that Convention has been incorporated into domestic legislation, it is important to analyse that piece of domestic legislation to see whether it has actually done so and to what extent. This becomes then largely a matter of statutory construction." And the legislation claimed by the HKSAR Government to have incorporated the relevant provision of the ICESCR did not bear such analysis; see paras 59-61 of the *GA* judgment. The Court of Final Appeal's examination in the *GA* judgment undermines the claim by the HKSAR Government in its periodic reports to the Committee that the ICESCR is incorporated in several provisions of the Basic Law and 50 different pieces of legislation in Hong Kong.
5. The Court of Final Appeal further rejected the argument seeking a Convention or treaty-compliant interpretation of the relevant provisions of domestic legislation on the ground that since the ICESCR has not been incorporated into domestic legislation, there is no constitutional or fundamental right in place for the principles of interpretation to apply; see paras 62-63 of the *GA* judgment.
6. On the other hand, the Hong Kong courts have given protection to several social rights in the Basic Law that have corresponding provisions in the

ICESCR, but have explicitly stated in their decisions that the conclusions were reached without having to take into account the ICESCR: see *Ho Choi Wan v Hong Kong Housing Authority* (2005) 8 HKCFAR 628 at para 68, *Kong Yunming v Director of Social Welfare* (FACV 2/2013, 17 December 2013) at para 173. Earlier, the Hong Kong courts have taken into account the provisions of the ICESCR in exercising supervisory jurisdiction over administrative decision-making, even though the Committee criticized in its Concluding Observations in 2001 (E/C.12/1/Add.58) the courts' opinions that the rights guaranteed under the ICESCR were "promotional" and "aspirational"; see *Mok Chi Hung & Anor v Director of Immigration* [2001] 2 HKLRD 125 and *Chan To Foon v Director of Immigration* [2001] 3 HKLRD 109.

7. The HKBA therefore urges the Committee to question closely the HKSAR Government as to –

- (a) whether the HKSAR Government would propose to incorporate the provisions of the ICESCR into domestic legislation to give full effect to the rights therein;
- (b) whether the HKSAR Government would revise Annex 2A to the Initial Report submitted by the People's Republic of China (E/1990/5/Add.59) to clarify or revise the claim that the Ordinances listed in the annex do incorporate into Hong Kong legislation provisions of the ICESCR guaranteeing effectively the rights enshrined in the provisions;
- (c) whether the HKSAR Government continues, as a matter of course or good practice, to take into account the rights guaranteed in the ICESCR in administrative decision-making affecting individuals, including the impact on the enjoyment of these rights by the affected individuals in Hong Kong;
- (d) whether the HKSAR Government regards the rights guaranteed in the ICESCR and the General Comments of the Committee as informing the

interpretation of cognate economic, social and cultural rights protected under Chapter III of the Basic Law and other Hong Kong legislation.

8. The HKBA also urges the Committee to examine the *GA* judgment, including its reliance of the Committee's General Comment No 19 (E/C.12/1998/24), its interpretation of the reservation to Article 6 of the ICESCR, and its apparent denial of any relevance of the international obligations undertaken by Hong Kong under the ICESCR and the rights guaranteed under the ICESCR in the domestic legal system for the protection of fundamental rights and freedoms (including in the proper interpretation of legislation and the proper application of statutory discretion), with a view to comment on whether appropriate means have been in place in Hong Kong for producing results that are consistent with the full discharge of Hong Kong's obligations under the ICESCR.

## **Part II: Non-discrimination**

### ***Discrimination on the ground of race, colour, descent or national or ethnic origin***

9. The Race Discrimination Ordinance (Cap. 602) has defined the concept of "race" and "racial group" in section 8 to specifically exclude acts done on the ground of "the immigration status in Hong Kong of a person", "the length of residence in Hong Kong of the person" or "the nationality, citizenship or resident status of the person" from constituting an act done on the ground of race, colour, descent or national or ethnic origin of a person. This definition not only creates loopholes in enforcement, allowing, for example, banks to discriminate against customers on the ground of them being nationals of a particular country, but also denies statutory protection to individuals who are visitors or new arrivals for settlement from Mainland China (who have different immigration statuses), bearing in

mind that the Committee had indicated in its 2005 Concluding Observations that such a definition, which would lead to the denial of protection to migrants from Mainland China in spite of the widespread de jure and de facto discrimination against them on the basis of their origin, was a matter of concern; and that the United Nations Committee on the Elimination of Racial Discrimination had raised its concern in its 2009 Concluding Observations (CERD/C/CHN/CO/10-13) that this definition, in failing to include immigration status and nationality among the prohibited grounds of discrimination, is not completely consistent with Article 1 of the Convention on the Elimination of all Forms of Racial Discrimination.

### ***Discrimination against foreign domestic helpers***

10. Notwithstanding the Concluding Observations of the Committee, the Concluding Observations of the United Nations Human Rights Committee and the Concluding Observations of the United Nations Committee on the Elimination of Racial Discrimination, no action has been taken by the HKSAR Government to abolish the two-week rule applicable to foreign domestic helpers.
11. The vulnerability of foreign domestic helpers who are required to live in the residential flats of their employers has been highlighted recently by a surge of complaints of assaults by the employer, including some cases of serious injuries to the foreign domestic helper.

### ***Comprehensive Anti-discrimination Legislation***

12. The prohibition of discrimination by non-state actors in Hong Kong by legislation is achieved in a piecemeal manner through the enactment of the Sex Discrimination Ordinance (Cap. 480), the Disability Discrimination Ordinance (Cap. 487), the Family Status Discrimination Ordinance (Cap.

527) and the Race Discrimination Ordinance. Discrimination on the bases of age, sexual orientation, gender identity and immigration or other status has not been outlawed. The HKBA urges the Committee to recommend to the HKSAR Government the timely introduction of comprehensive anti-discrimination legislation and the strengthening of the enforcement mechanism under an Equal Opportunities Commission that enjoys institutional, financial, operational and perceptual independence.

13. The HKBA also urges the Committee to recommend to the HKSAR Government the timely review of the existing anti-discrimination legislation for the purpose of removing the existing statutory exemptions or exclusions in respect of acts of the Government or acts done pursuant to statute and for the purpose of introducing a positive duty of the Government to eliminate discrimination and promote equal opportunities in all its policy-making and administrative decision-making.

### **Part III: Right to Work (Articles 6, 7)**

14. The Minimum Wage Ordinance (Cap. 608) (“MWO”) was enacted on 17 July 2010. Taking into account the effect of inflation, the statutory minimum wage was revised from HK\$28 to HK\$30 per hour (or from US\$3.6 to US\$3.8 per hour) with effect from 1 May 2013. The MWO does not apply to foreign domestic helpers, who have a minimum allowable wage set by the HKSAR Government separately. This minimum allowable wage is currently set at a level which can be described as much lower than the statutory minimum wage, bearing in mind the possible number of hours of housework.
15. As noted above, the *GA* judgment has held that Article 6 of the ICESCR has not been incorporated into domestic law in Hong Kong and that the ICESCR in any event applies in Hong Kong subject to the reservation

entered in respect of Article 6, which would appear to have the effect of permitting the imposition of place of birth or residence related restrictions on the taking of employment for the purpose of safeguarding the employment opportunities of workers in the HKSAR. The HKBA asks the Committee to question the HKSAR Government on the rationale and need to maintain this reservation and to consider whether a reservation in these terms is compatible with object and purpose of the ICESCR and the essence of the right to work guaranteed under Article 6.

16. Also the *GA* judgment adopted a narrow interpretation to the freedom of choice of occupation of Hong Kong residents guaranteed under Article 33 of the Basic Law in terms of a freedom from conscription to work. The Court of Final Appeal had not interpreted Article 33 of the Basic Law by reference to Article 6 of the ICESCR.

17. Further, the legal consequence of the *GA* judgment is that the Director of Immigration has a statutory discretion to grant permission to work to an individual who is not a permanent resident of the HKSAR, subject to the policy that in the case of screened-in claimants of non-refoulement claimants and recognized refugees (who may have been stranded in Hong Kong for many years pending screening of their claims for protection or recognition of refugee status), such permission would only be granted in exceptional cases, with the Court of Final Appeal recognizing that one such type of cases involves applicants who can demonstrate that not permitting them to work would constitute inhuman and degrading treatment. The HKBA asks the Committee to question the HKSAR Government on how this policy of immigration control operates and whether consideration has been given in decision-making to the impact of physical and mental inactivity and dependence on in-kind humanitarian assistance to the applicants' enjoyment of their rights to an adequate standard of living and physical and mental health guaranteed under the ICESCR.



18. The HKBA is concerned that HKSAR permanent residents who are members of a non-Chinese speaking ethnic minority may not enjoy equal opportunities in employment due to, among other factors, the lack of equal opportunities to learn Chinese up to an adequate level both in ordinary schools and vocational training courses. The HKBA requests that the Committee recommends that the HKSAR Government devote sufficient resources in the provision of language training and qualifications accreditation to enable ethnic minority persons who speak Chinese as a second language would have fair, if not equal, opportunities in employment, including employment in the civil service.

#### **Part IV: Social Security (Article 9)**

19. The HKBA notes the Committee's concern in its 2005 Concluding Observations over increasing poverty, the absence of unemployment benefits, the exclusion of different particular social groups from the mandatory provident fund scheme, and the basic level of subsistence of the rates of Comprehensive Social Security Assistance (CSSA) payments. In the opinion of the HKBA, these concerns should be maintained.

20. The HKBA also notes that recipients of CSSA payments also receive a rent allowance to pay for the rent of the rented accommodation of the recipient's household. In the case of CSSA recipients who live in private rented accommodation, the rent allowance is subject to household size based maximum levels which have only been adjusted three times between 1998 and 2013, including one downward adjustment in 2003. Many CSSA recipients living in private rented accommodation nowadays (namely over 40% of such recipients) have to make use of part of the basic payment they receive every month to pay the difference between the actual rent payable and the rent allowance received at the maximum level for the recipients'

households. Since the basic payment is meant to provide for the basic needs of the CSSA recipient, the difficulty of these CSSA recipients living in private rented accommodation in having to make use of part of the basic payment to pay the actual rent payable contributes to their poverty. The HKBA thus urges the Committee to question the HKSAR Government on the mechanism for adjusting the maximum levels of rent allowance for CSSA recipients and to recommend that the HKSAR Government should ensure that the maximum levels of rent allowance for CSSA recipients living in private rented accommodation should be set at levels according to households size that cover the great majority of those CSSA recipients.

#### **Part V: Housing (Article 11)**

21. The HKBA notes that the Committee had raised in the 2005 Concluding Observations its concern of the persistence of inadequate forms of housing. This situation has not improved and due to urban redevelopment and consequential gentrification, the availability in the urban area of private rented accommodation at an affordable level for low income households and CSSA receiving households has dwindled. This has not only contributed to an increase in rent levels but also the recent construction of sub-divided units (with an average living space of 6.5 square metres) in private buildings that are structurally unsafe, unhygienic and fire hazards in themselves.

#### **Part VI: Education (Art 13)**

##### ***Non-Chinese Speaking Students***

22. Although the HKSAR Government has put in place various measures to support the learning of non-Chinese speaking students, for example, by providing a supplementary guide to Chinese Language curriculum together

with a series of curriculum resources and operating a summer bridging programme etc., many commentators have doubted the effectiveness of the measures. In particular, the HKSAR Government has been unable to implement a Chinese as a Second Language Curriculum to assist non-Chinese speaking students to master the language according to their pace, thereby affecting their opportunities for further education and employment.

23. The United Nations Committee on the Rights of the Child, in its 2013 Concluding Observations (CRC/C/CHN/CP/3-4) recommended that the HKSAR Government should urgently abolish the system of “designated schools” which had led to the phenomenon of eight schools having non-Chinese speaking students accounting for over 90% of their respective student populations. Although the HKSAR Government responded with a change in the mode of funding of these schools, the fact remains that parents of many ethnic minority children have to send their children to these schools because the children cannot manage the Chinese based curriculum in ordinary schools and there is no adequate learning support or resources provided in ordinary schools to enable teachers to provide assistance to non-Chinese speaking students so that they may learn the curriculum at a suitable pace.

### ***Moral, Civic and National Education***

24. The HKSAR Government introduced the Moral and National Education Curriculum Guide for the first time in May 2011 to replace the Moral and Civic Education Curriculum, and published a refined version in April 2012. The HKSAR Government had sought to introduce the subject in primary schools in 2012 and secondary schools in 2013 but was forced to halt the comprehensive and wholesale introduction of the subject after serious objections had been raised by various civil society groups over the content of the teaching materials for the subject, some of which had been criticized

as materials for nationalistic and ideological indoctrination. Some schools have thereafter introduced their own lessons of moral and national education. Yet this educational trend advocated by the HKSAR Government appears to have marginalized civic education and human rights education (which is evidenced by the disbanding of the Committee for the Promotion of Civic Education in 2007), restricted the educational freedom of schools in conveying the subject in an unbiased and objective way respectful of the freedoms of opinion, conscience and expression, as well as undermined the parents' freedom of education in ensuring that their children are education in conformity with their own convictions.

25. The HKBA urges the Committee to question closely the HKSAR Government over its efforts in promoting human rights education in schools, as well as the place of human rights education in the general framework of ordinary education in Hong Kong.

#### **Part VII: Cultural Life (Article 15)**

26. The HKBA asks the Committee to question the HKSAR Government on its proposal to legislate in respect of parody of copyrighted works, bearing in mind that the dissemination of parody in Internet based media could be taken as a facet of the enjoyment of an individual's cultural life.

Dated: 10th March 2014.

HONG KONG BAR ASSOCIATION