

Submission of Labour Party
to the Committee on Economic, Social and Cultural Rights (CESCR)
on the implementation of the
International Covenant on Economic, Social and Cultural Rights (ICESCR)
in the Hong Kong Special Administrative Region, China

Introduction

1. Labour Party was established in December 2011. We are committed to promoting democracy, justice, sustainability and solidarity in Hong Kong. We campaign for the provision of adequate means and conditions to all, for making the most of their lives and participating in political, economic, social and cultural affairs. Labour Party has secured 4 seats in the Legislative Council elections in 2012.

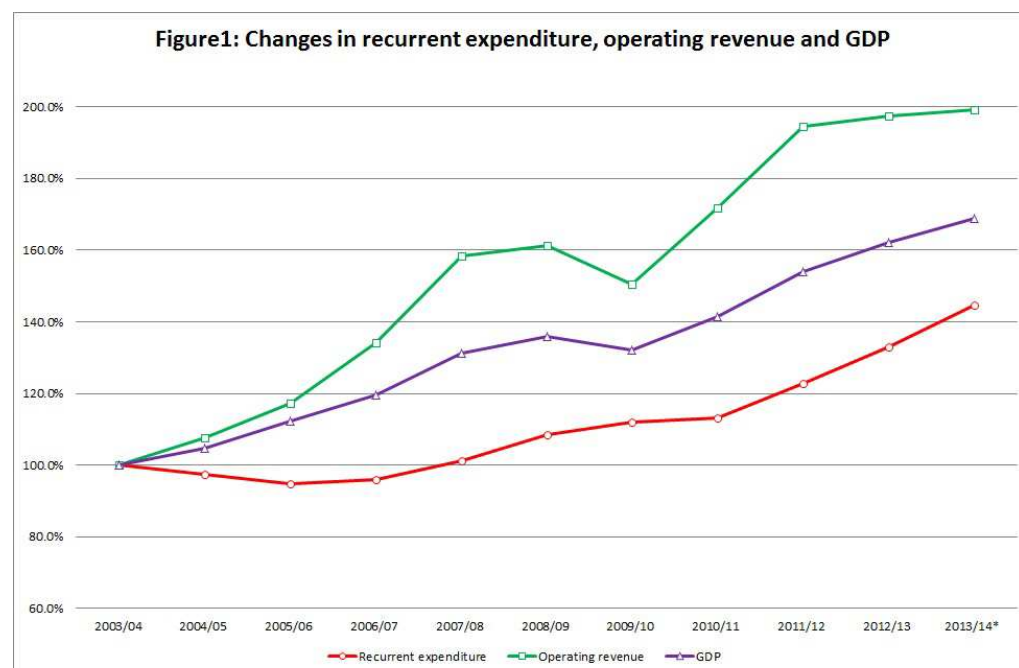
Article 2: Factors impeding the realization of economic, social and cultural rights
(Fiscal policy as a major hindrance)

2. The Government's conservative fiscal policy has over the years been a major hindrance to Hong Kong people's full enjoyment of economic, social and cultural rights as enshrined in the Covenant. We submit that the Government's deliberate policy choice of limiting public expenditure to the provision of essential social services is not in line with Article 2(1) of the Covenant, under which the Government is obliged to make use of its maximum available resources to achieve progressively the full realization of the rights recognized in the Covenant.

3. Hong Kong's social spending is among the lowest in advanced economies. In financial year 2012 – 13, the total recurrent and capital expenditure on education, welfare, health and housing was just over HKD 200 billion, less than 10% of GDP. The Government's refusal to spend where spending is due has resulted in chronic shortage in the provision of essential social services.

4. Public hospitals, schools and welfare facilities are, for example, strained and fast deteriorating. Medical personnel, teachers and social workers have been constantly overburdened due to staff shortage. The median waiting time for psychiatric specialist out-patient service in public hospitals has increased from 3 weeks in 2000 to 7 weeks in 2012, and the waiting list for subsidized public housing has exceeded 240,000 at the end of 2013, 60% more than the historic peak in the mid-1990s. Even more disgraceful is the fact that, every year, nearly a quarter of the elderly passed away while waiting for places in care homes.

5. This Budget austerity is by no means one compelled by economic necessity; but rather is a deliberate policy choice of the Government. Since the economy recovered from the Asian financial crisis and the outbreak of the Severe Acute Respiratory Syndrome, Hong Kong's GDP has gone up by nearly 70%, and Government operating revenue has almost doubled. Yet, the corresponding growth in public spending has lagged behind, with Government recurrent expenditure having increased by only 45% over the same period (see Figure 1 below).



6. As a result, in the past 10 years, the Government has accumulated a net fiscal surplus of over HKD 470 billion, even though it has already lowered the profit and salary tax rates by 1 percentage point in 2008 and been handing out “one-off” reliefs in tax and rates in every

financial year since 2008 – 09. As of the end of January 2014, Government’s fiscal reserve was over HKD 800 billion, equivalent to 38% of GDP in 2013.

7. All of these point to the fact that Hong Kong’s public finance is healthy enough to support a higher social expenditure; yet the Government, though able, has been unwilling to do so and deliberately chooses to tighten the public purse.

8. We therefore invite the Committee to

(i) **express grave concern** at the Government’s fiscal conservatism, which has overall negative impacts upon the full enjoyment of economic, social and cultural rights by residents in Hong Kong, and

(ii) **urge** the Government, as a matter of high priority, to formulate its fiscal policy such as to make use of its maximum available resources to achieve progressively the full realization of the rights recognized in the Covenant.

Article 2: Factors impeding the realization of economic, social and cultural rights
(Discrimination in electoral system of Hong Kong)

9. It is submitted that the system in Hong Kong for selecting the head of the territory, the Chief Executive, contravenes Articles 2(2), 4, 5(1) and 5(2) of the Covenant, since, both currently and in the foreseeable future, only people with business interests or professional status are allowed to enjoy the right to nominate candidates and to vote in elections. Not only is the franchise restricted, even among the already “privileged” the values of each ballot in different sectors are different.

Relevant articles of the Covenant

10. Article 2(2) of the ICESCR requires State Parties to undertake to guarantee that the rights conferred by the Covenant “will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin,

property, birth or other status”.

11. Article 4 requires State Parties to recognise that in the enjoyment of those rights provided by the State in conformity with the covenant, “the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.

12. Article 5(1) further stipulates that nothing in the Covenant “may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant”.

Electoral system for Hong Kong’s Chief Executive

13. Under Hong Kong law, nevertheless, the right to nominate candidates for elections of the Chief Executive, and the right to vote in such elections, has since the handover of Hong Kong to China been restricted to a small circle of people,¹ the “Election Committee”, for which in 2012 (based on the electoral roll compiled in late 2011) only 249,499 people were eligible and registered to elect (out of a total of 3,560,535 registered voters in that year).²

14. Elections of members of the “Election Committee” were carried out within 4 sectors, which were further divided into 38 subsectors. The electorates of the subsectors included business chambers, manufacturers’ groups, companies in certain industries, and people with professional backgrounds, a system, effectively, reserved only for an extremely small proportion of Hong Kong citizens, on the basis of their social, economic and property backgrounds (or class).

15. In addition, each subsector would be assigned a certain number of seats in the “Election

¹ 1,200 in 2012, 800 in 2002, 2005 and 2007.

² See Registration and Electoral Office, <http://www.voterregistration.gov.hk/eng/statistic20114.html>, Retrieved 7th March, 2014.

Committee”, not according to the size of the electorate of that subsector but in an entirely arbitrary fashion. It is in this sense that, even among the “privileged”, the right to vote was not equal. For example, the “Agriculture and Fisheries” subsector, comprised of representatives of farmers’ and fishermen’s organisations and with merely 159 registered voters, was assigned 60 seats, whereas the “Education” subsector, comprised of educators at all levels and numbering 86,618 registered voters, was assigned only 30 seats.³

Electoral system for Hong Kong’s Legislative Council

16. There are 70 members in the Legislative Council of Hong Kong, of which 35, i.e., 50%, are returned through 5 geographical constituencies, with the largest remainder method and hare quota.

17. Another 35 members are returned through functional constituencies, 30 of which are returned through 28 sectors with similar electorates to the subsectors of the Election Committees in Chief Executive elections, namely electorates for which only 240,735 voters are eligible and registered to vote (out of a total of 3,466,201 registered voters in the territory). Similarly to those subsectors of the Election Committee, the size of the electorates of these 28 sectors varies markedly. For example, there are 92,957 voters, but with only 1 seat, for the “Education” sector; whereas the “Agriculture and Fisheries” sector, with only 159 voters, is also allocated 1 seat; and the “Labour” (with voting rights restricted to heads of trade unions) sector comprised of 646 voters is for no apparent justification allocated 3 seats.⁴

18. The remaining 5 members are members of any of the 18 district councils in the territory, chosen by voters ineligible for, or not registered to vote in, other functional constituencies, with the largest remainder method and hare quota.

³ See Registration and Electoral Office, <http://www.voterregistration.gov.hk/eng/statistic20114.html>, Retrieved 7th March, 2014; Registration and Electoral Office, <http://www.elections.gov.hk/ecss2011/eng/figure.html>, Retrieved 7th March, 2014.

⁴ See Registration and Electoral Office, <http://www.voterregistration.gov.hk/eng/statistic20123.html>, Retrieved 7th March, 2014.

19. For the passage of all motions and bills introduced by members of the Legislative Council, including motions with no legislative effect, amendment motions, and amendments to bills, a double majority is required: they have to be passed by more than half of the sitting members in both geographical constituencies and functional constituencies.

20. Such a system gives a considerably bigger voice and larger representation to people with business interests or professional qualifications, which is but an extremely small proportion of Hong Kong citizens with advantaged social, economic and property backgrounds. Ironically, even among the “privileged”, some are more “privileged” in terms of their voting rights.

Proposed reform to the electoral system for the Chief Executive and the Legislative Council

21. The Standing Committee of the National People’s Congress (SCNPC) stated in its “decision” in December 2007 that the Chief Executive and the Legislative Council shall not be elected by universal suffrage in 2012. The “decision” also sought to freeze the 50%-50% ratio between the geographical and functional constituencies in the Legislative Council, and the double majority requirement.

22. The SCNPC stated in the preamble to its “decision” that “the election of the fifth Chief Executive of the Hong Kong Special Administrative Region in the year 2017 may be implemented by the method of universal suffrage; that after the Chief Executive is selected by universal suffrage, the election of the Legislative Council of the Hong Kong Special Administrative Region may be implemented by the method of electing all the members by universal suffrage”.

23. The current Government, led by Chief Executive Mr Leung Chun Ying, who assumed his office in July 2012, launched the public consultation exercise in December 2013 on the electoral methods. The public consultation exercise is led by a group of three secretaries, the Chief Secretary, the Secretary for Justice, and the Secretary for Constitutional Affairs, on the basis of a consultation document prepared by the Government.

24. Regarding the electoral method for the Chief Executive in 2017, according to Article 45(2) of the Basic Law, the constitution of the territory promulgated by Beijing's National People's Congress (NPC) in 1990 and taking effect upon the transfer of sovereignty in 1997, “[t]he 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”.

25. The Government have repeatedly stated that part of the 2007 “decision” of the SCNPC bindingly – even though it only, at the highest, constitutes an obiter dictum of the “decision” – provides that “[t]he nominating committee may be formed with reference to the current provisions regarding the Election Committee”; the Government also asserts that the phrase “with reference” is “binding while at the same time allowing appropriate adjustment to be made in light of the actual situation”.⁵

26. Based on this interpretation, the Government and Beijing authorities have insisted the establishment of a “Nominating Committee” mirroring the composition of the Election Committee, and thereby rejected the public calls for nominating Chief Executive candidates by popular nomination (nomination by signatures of the registered voters) and nomination by political parties, these alternative nomination channels having been dismissed by the Government and Beijing officials as “outside the Basic Law”.

27. By adapting the “Nominating Committee” from the previous Election Committee, the rights of citizens to nominate candidates, to choose from among candidates, and to stand in elections, are, as in the previous elections, restricted to a small proportion of the citizens of the territory. Only people with advantaged social, economic and property background will be able to nominate candidates.

28. The pre-selected candidates, sifted through by the “Nominating Committee”, will then be put forward to the general electorate. In other words, voters may “choose”, in a rubberstamp manner, only from among these candidates “blessed” by the Beijing authorities.

⁵ Footnote 3, Methods for Selecting the Chief Executive in 2017 and for Former the Legislative Council in 2016 Consultation Document, December 2013, Hong Kong Government.

29. Yet unlike the Election Committee, where candidacy could be secured by getting the nominations from one-eighth of the members of the Election Committee (150 out of 1,200 in 2012), the “Nominating Committee” will be bound to nominate candidates collectively, as according to Li Fei, deputy secretary-general of the SCNPC. In other words, it will be more difficult for Hong Kong’s pro- democracy camp to nominate any candidate.

30. In the consultation document the Government also suggested the introduction of a cap on the number of candidates eventually put forward to the general electorate. The Chief Secretary, Mrs Carrie Lam, as well as Beijing officials such as the Chairman of the National People's Congress Zhang Dejiang, amongst others, have indicated that Chief Executive candidates have to “love the State and love Hong Kong”.

31. Mrs Lam has also indicated that it would not be in line with the Basic Law if the “Nominating Committee” is constituted by all eligible and registered voters in the territory, citing the principle of 'balanced participation', that is, the need of “balanced participation among all sectors of the society”.

32. The composition of the “Nominating Committee” is seen as a mechanism for pre-screening according to Beijing's preference. Both Hong Kong and Beijing officials, and as explicitly revealed by the consultation document, have indicated that the Central People’s Government’s “power” to appoint the winner in the election as Chief Executive is a “substantive power”, although the words “substantive powers” are found nowhere in Article 45(1) of the Basic Law, which merely reads “[t]he Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government”.

33. Because of all these preconditions, the Chief Executive election in 2017 is not going to be one in line with the principles of universal and equal suffrage, which perforce underlie the Covenant.

34. As of March 2014, there has yet to be any official proposal from the Government on the proposed amendment to the electoral method for the Legislative Council in 2016 according to principles of universal suffrage. The consultation document only touched on the number of

seats of the legislature, the number of geographical constituencies and the maximum number of seats returned by each constituency, and whether the electorate base of the functional constituencies should be enlarged.

Concluding remarks

35. There is no sign that the electoral methods for the Chief Executive in 2017, and the Legislative Council in 2016, will follow the principles under the Covenant, in particular Articles 2(2), 4, 5(1) and 5(2), as well as those enunciated by the Human Rights Committee in accordance with Article 25 of the International Covenant on Civil and Political Rights both generally and in the specific context of Hong Kong.⁶ The Hong Kong Government, therefore, have failed their obligations under the ICESCR on respecting political rights of all citizens regardless of social, economic and property background.

36. There is no sign that the electoral methods for the Chief Executive in 2017, and the Legislative Council in 2016, will follow the principles under the Covenant, in particular Articles 2(2), 4, 5(1) and 5(2), as well as those enunciated by the Human Rights Committee in accordance with Article 25 of the International Covenant on Civil and Political Rights both generally and in the specific context of Hong Kong.⁷ The Hong Kong Government,

⁶ See Human Rights Committee, 'General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)' (7 December 1996) UN Doc CCPR/C/21/Rev.1/Add.7; 'Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (Hong Kong)' (9 November 1995) UN Doc CCPR/C/79/Add.57 para 19; 'Concluding observations of the Human Rights Committee: Hong Kong Special Administrative Region' (15 November 1999) UN Doc CCPR/C/79/Add.117 para 12; HRC, 'Concluding Observations of the Human Rights Committee: Hong Kong Special Administrative Region (HKSAR)' (21 April 2006) UN Doc CCPR/C/HKG/CO/2 para 18; 'Concluding observations on the third periodic report of Hong Kong, China' (26 March 2013) UN Doc CCPR/C/CHN-HKG/CO/3 (2013 Concluding Observations) para 6.

⁷ See Human Rights Committee, 'General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)' (7 December 1996) UN Doc CCPR/C/21/Rev.1/Add.7; 'Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (Hong Kong)' (9 November 1995) UN Doc CCPR/C/79/Add.57 para 19; 'Concluding observations of the Human Rights Committee: Hong Kong Special Administrative Region' (15 November 1999) UN Doc CCPR/C/79/Add.117 para 12; HRC, 'Concluding Observations of the Human

therefore, have failed their obligations under the ICESCR on respecting political rights of all citizens regardless of social, economic and property background.

37. This also has the broader effect of rendering other fundamental rights of ordinary citizens, the “non-privileged commoners”, less considered and safeguarded in the political process.

38. For these reasons, we invite the Committee to

(i) **express alarm** over the decision of the Government and Beijing authorities to perpetuate the institutionalisation of discrimination based on social, economic or property background in Hong Kong’s electoral laws;

(ii) **express deep concern** over the plan of the Hong Kong Government and the Beijing authorities to restrict the right to nominate candidates, the right to choose from among candidates, and the right to stand in the Chief Executive election in 2017;

(iii) **express deep regret** at the non-fulfilment by the Government of its obligations under the covenant in promoting and guaranteeing a democratic system whereby economic, social and cultural rights are adequately protected;

(iv) **strongly urge** the Government to take all necessary steps to progress towards a truly democratic system of governance, including by, as a matter of priority, ensuring that all citizens, regardless of social, economic or property status, have equal electoral rights in elections.

Article 2: Direct applicability of the Covenant in domestic law

39. With much good sense, the Committee has explained that State parties have an area of discretion in choosing ‘the precise method by which Covenant rights are given effect in national law’.⁸

40. Nevertheless, this margin of discretion, however wide it might be, should not mask the general principle that ‘legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals’.⁹

41. The apparent width of this margin must, furthermore, be considered in the light of the Committee’s strong encouragement of ‘formal adoption or incorporation of the Covenant in national law’, which, inter alia, ‘provides a basis for the direct invocation of the Covenant rights by individuals in national courts’.¹⁰ Indeed, such an approach is only consonant with the justiciable character of economic, social and cultural rights, especially those of the most vulnerable and disadvantaged groups in society.¹¹

⁸ Committee on Economic, Social and Cultural Rights (CommESCR), ‘General comment No. 9: The domestic application of the Covenant’ (3 December 1998) UN Doc E/C.12/1998/24 para 5.

⁹ CommESCR, ‘General comment No. 9’ para 4.

¹⁰ CommESCR, ‘General comment No. 9’ para 8.

¹¹ CommESCR, ‘General comment No. 9’ para 10. See also CommESCR, ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Libyan Arab Jamahiriya’ (25 January 2006) UN Doc E/C.12/LYB/CO/2 para 9; ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Austria’ (25 January 2006) UN Doc E/C.12/AUT/CO/3 paras 8, 20; ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada’ (22 May 2006) UN Doc E/C.12/CAN/CO/4 paras 11(a), 11(b); ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Liechtenstein’ (9 June 2006) UN Doc E/C.12/LIE/CO/1 para 9; ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco’ (4 September 2006) UN Doc E/C.12/MAR/CO/3 para 14; ‘Draft concluding observations of the Committee on Economic, Social and Cultural Rights: Costa Rica’ (4 January 2008) UN Doc E/C.12/CRI/CO/4 para 12; ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium’ (4 January 2008) UN Doc E/C.12/BEL/CO/3 para 12; ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: The former Yugoslav Republic of Macedonia’ (15 January 2008) UN Doc E/C.12/MKD/CO/1 para 10; ‘Concluding observations of the

Committee on Economic, Social and Cultural Rights: San Marino' (4 January 2008) UN Doc E/C.12/SMR/CO/4 para 9; 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Hungary' (16 January 2008) UN Doc E/C.12/HUN/CO/3 para 7; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Netherlands Antilles' (31 January 2008) UN Doc E/C.12/NLD/CO/3/Add.1 para 9; 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: India' (8 August 2008) UN Doc E/C.12/IND/CO/5 para 9; 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Nations Interim Administration Mission in Kosovo (UNMIK)' (1 December 2008) UN Doc E/C.12/UNK/CO/1 para 9; 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kenya' (1 December 2008) UN Doc E/C.12/KEN/CO/1 para 9; 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sweden' (1 December 2008) UN Doc E/C.12/SWE/CO/5 para 13; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Philippines' (1 December 2008) UN Doc E/C.12/PHL/CO/4 para 12; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories' (12 June 2009) UN Doc E/C.12/GBR/CO/5 para 13; 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia' (12 June 2009) UN Doc E/C.12/AUS/CO/4 para 11; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Cambodia' (12 June 2009) UN Doc E/C.12/KHM/CO/1 para 12; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Poland' (2 December 2009) UN Doc E/C.12/POL/CO/5 para 8; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of the Congo' (16 December 2009) UN Doc E/C.12/COD/CO/4 para 8; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Chad' (16 December 2009) UN Doc E/C.12/TCD/CO/3 para 9; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Madagascar' (16 December 2009) UN Doc E/C.12/MDG/CO/2 para 8; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea' (17 December 2009) UN Doc E/C.12/KOR/CO/3 para 6; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Algeria' (7 June 2010) UN Doc E/C.12/DZA/CO/4 para 5; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Afghanistan' (7 June 2010) UN Doc E/C.12/AFG/CO/2-4 para 13; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Kazakhstan' (7 June 2010) UN Doc E/C.12/KAZ/CO/1 para 7; 'Concluding observations of the Committee on Economic, Social and Cultural Rights Mauritius' (8 June 2010) UN Doc E/C.12/MUS/CO/4 para 7; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Dominican Republic' (26 November 2010) UN Doc E/C.12/DOM/CO/3 para 6; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Switzerland' (26 November 2010) UN Doc E/C.12/CHE/CO/2-3 para 5; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Uruguay' (1 December 2010) UN Doc E/C.12/URY/CO/3-4 para 4; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka' (9 December 2010) UN Doc E/C.12/LKA/CO/2-4 para 6; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: The Kingdom of the Netherlands' (9 December 2010) UN Doc E/C.12/NDL/CO/4-5 para

42. In this connection, the Third Report of the Government does not contain any reference at all to these principles or clarify how the Hong Kong authorities have otherwise given effect to the Covenant in domestic law.

43. In its conjoined Reports in 2004, the Government did explain, in reaction to the disappointment and regret previously expressed by the Committee at the exclusion of the Covenant from the domestic law of Hong Kong,¹² that provisions of the Covenant had been ‘incorporated into [the] domestic law [of Hong Kong] through several articles of the Basic Law ... and through provisions in over 50 ordinances.’ The Government went as far as to claim that ‘specific measures of this kind [would] more effectively protect Covenant rights than would the mere reiteration in domestic law of the Covenant provisions themselves.’¹³ Appearing before the Committee in 2005, the Government again contended that there were ‘more than 50 pieces of domestic legislation putting into effect various parts of the Covenant and that legislation was enforced through the courts, although no reference was made to the origin of the rights.’¹⁴

6; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic of Moldova' (12 July 2011) UN Doc E/C.12/MDA/CO/2 para 5; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Germany' (12 July 2011) UN Doc E/C.12/DEU/CO/5 para 7; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Turkey' (12 July 2011) UN Doc E/C.12/TUR/CO/1 para 7; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Israel' (16 December 2011) UN Doc E/C.12/ISR/CO/3 para 6; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Estonia' (16 December 2011) UN Doc E/C.12/EST/CO/2 para 6; 'Draft concluding observations of the Committee on Economic, Social and Cultural Rights: Cameroon' (23 January 2012) UN Doc E/C.12/CMR/CO/2-3 para 7; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Ethiopia' (31 May 2012) UN Doc E/C.12/ETH/CO/1-3 para 5; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand' (31 May 2012) UN Doc E/C.12/NZL/CO/3 para 9.

¹² See CommESCR, 'Concluding observations of the Committee on Economic, Social and Cultural Rights United Kingdom of Great Britain and Northern Ireland (Hong Kong)' (6 December 1996) UN Doc E/C.12/1/Add.10 para 14(a); 'Concluding observations of the Committee on Economic, Social and Cultural Rights: China: Hong Kong Special Administrative Region' (21 May 2001) UN Doc E/C.12/1/Add.58 para 15.

¹³ CommESCR, 'Initial reports submitted by States parties under articles 16 and 17 of the Covenant: People's Republic of China' (4 March 2004) UN Doc E/1990/5/Add.59 para 349.

¹⁴ CommESCR, 'Summary Record of the 9th Meeting' (4 May 2005) UN Doc E/C.12/2005/SR.9 para 28.

44. With this explanation the Committee seemed to have been content, as it did not pursue the matter any further in its Conclusion Observations on Hong Kong in 2005.¹⁵

45. We have, regrettably, to point out that the full picture has not been presented before the Committee, and that the Covenant is far from being effectively given effect in Hong Kong. In particular, recent jurisprudence of Hong Kong courts has shown that Covenant is directly invocable neither in its own right, nor as an aid to interpreting the Basic Law, the ‘mini-constitution’ of Hong Kong, or ordinary legislations.

46. Notwithstanding the learning and efforts of Justice Bokhary, a justice of the highest court of Hong Kong who has been deservedly described as ‘the conscience of the court’ and ‘an iconic figure in the territory's legal profession for his dedication to safeguarding human rights’,¹⁶ in construing statutes in their ‘widest sense’ by praying the Covenant ‘powerfully in aid’¹⁷, and in regarding what the Committee says in its Concluding Observations as ‘directly relevant’,¹⁸ the constitutional backing given to the Covenant in Article 39 of the Basic Law has not prevented the courts of Hong Kong from refusing to meaningfully enforce Covenant rights.

47. For example, it has been held that the Covenant does not by itself ‘have the force of law’,¹⁹ nor does it ‘directly confer enforceable personal rights’ as ‘no domestic legislation has been enacted in Hong Kong to give effect to the application of the [Covenant]’.²⁰

48. What, as a matter of Hong Kong law, appears to be the last word on the matter is found in the Court of Final Appeal decision in *GA v Director of Immigration* (in which, incidentally, the Court’s constitution did not include Justice Bokhary, now a Non-Permanent Justice), handed down on 18 February 2014. There the Court firmly rejected the argument that a

¹⁵ CommESCR, ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: People’s Republic of China (including Hong Kong and Macao)’ (13 May 2005) UN Doc E/C.12/1/Add.107.

¹⁶ http://www4.hku.hk/hongrads/index.php/archive/graduate_detail/313.

¹⁷ *Ho Choi Wan v Hong Kong Housing Authority*, FACV1/2005 (21 November 2005) para 68 per Bokhary PJ.

¹⁸ *Kong Yunming v Director of Social Welfare*, FACV2/2013 (17 December 2013) para 178 per Bokhary NPJ.

¹⁹ *Comilang Milagros Tecson v Commissioner of Registration*, HCAL28/2011 (15 June 2012) para 54 per Lam J.

²⁰ 律政司司長 對 廖榮光, HCA5120/2001 (2 July 2013) paras 112-113 per Deputy High Court Judge Marlene Ng.

domestic legislation could, beyond the common law's traditionally restrictive dualist conception of international law within the domestic legal system, be relied upon as having impliedly and partially incorporated the Covenant into domestic law, thereby giving direct applicability of the Covenant.²¹

49. Relevantly, the Court of Appeal, the second-highest appellate court in Hong Kong, in the same case held that 'it would ... be reading too much into the annex [to the Initial Report of the Government of Hong Kong in 2004] to suggest that it was thought that BL39 recognised that all provisions of the ICESCR were to be implemented immediately'.²²

50. It follows inevitably that, contrary to the Government's claims, Covenant rights cannot be said to have been incorporated in the domestic legal order with the consequence that the citizens can directly invoke the rights contained in the Covenant before domestic courts.

51. We accordingly invite the Committee to

(i) **express deep concern** that, despite a wide range of laws providing for an element of economic, social and cultural rights and the fact that Article 39 of the Basic Law accords constitutional status to the Covenant, economic, social and cultural rights are not enshrined on an equal footing with civil and political rights, which are, through the Hong Kong Bill of Rights Ordinance, directly invocable and enforceable in domestic courts;

(ii) **regret** that the Government persistently adopts a restrictive interpretation of its binding international law obligations incurred under the Covenant, in particular its position that it may implement the legal obligations set forth in the Covenant in the absence a legal framework for the specific protection of economic, social and cultural rights, and the consequent lack of awareness of the public authorities, including the courts, of the legal obligations under the Covenant;

(iii) **regret** the lack of judicial and legal remedies available to individuals when public authorities fail to implement the Covenant, as a result of the insufficient coverage in domestic legislation of the rights enumerated in the Covenant and the lack of effective enforcement

²¹ See *GA v Director of Immigration*, FACV8/2013 (18 February 2014) per Ma CJ paras 58, 60(2).

²² *GA v Director of Immigration*, CACV45/2011 (27 November 2012) para 129 per Fok JA.

mechanisms for these rights;

(iv) **express deep disappointment** that court decisions in Hong Kong, including those made at the appellate level, have failed to confirm the direct applicability, in practice, of the provisions of the Covenant;

(v) **strongly urge** the Government to take all appropriate and necessary steps to guarantee the full effect of the Covenant provisions in its domestic legal order, with a view to ensuring that the Covenant rights are capable of being directly invoked and enforced by all before the courts, by enacting a comprehensive legislation incorporating all economic, social and cultural rights into Hong Kong law which prevails over other domestic laws in case of conflict, and

(vi) **recommend** that human rights training programmes which take full account of and promote the justiciability of all Covenant rights are provided for lawyers, public officials and all other actors responsible for implementing economic, social and cultural rights;

Article 2: Discrimination on the grounds of sexual orientation and gender identity

52. Sexual orientation and gender identity are beyond doubt prohibited grounds of discrimination within the meaning of Article 2 of the Covenant.²³ In harmony with, but with commendably more elaborateness than, the interpretation of the Human Rights Committee in relation to the non-discrimination clause in the International Covenant on Civil and Political Rights (ICCPR),²⁴ the Committee has authoritatively construed Article 2 of the Covenant as

²³ See CommESCR, 'General Comment No. 14: The right to the highest attainable standard of health' (11 August 2000) UN Doc E/C.12/2000/4 para 18; 'General Comment No. 15: The right to water' (20 January 2003) UN Doc E/C.12/2002/11 para 13; 'General comment No. 18: The Right to Work' (6 February 2006) UN Doc E/C.12/GC/18 para 12(b)(i); 'General Comment No. 19: The right to social security (art. 9)' (4 February 2008) UN Doc E/C.12/GC/19 para 29; 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc E/C.12/GC/20 paras 11, 32.

²⁴ In its 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, the Human Rights Committee authoritatively stated, with regard to the ICCPR, at paras 7-8,

Article 2 [of the ICCPR] requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations ...

... In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected

imposing a duty upon State Parties to ‘adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.’²⁵

53. This the Committee has been at pains to emphasise in its General Comment No. 20:²⁶

Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds.

54. The Government of Hong Kong indicates in its Report that it considers anti-discrimination legislation is not, at this stage, ‘the most appropriate means of addressing discrimination’ on grounds of sexual orientation, relying upon survey results released in March 2006, which found 35.4% of the respondents opposed to the introduction of legislation to outlaw discrimination on grounds of sexual orientation and only 28.7% in favour of it.²⁷

55. In our view, the Government’s position is incompatible with its binding international law obligations under the Covenant.

from discrimination within the meaning of article 26.

²⁵ CommESCR, ‘General Comment No. 20’ para 11. See also CommESCR, ‘General Comment No. 14’ para 35 (enjoining State Parties to ‘adopt legislation or to take other measures ensuring equal access to health care’); ‘General Comment No. 15’ para 23 (enjoining State Parties to ‘[adopt] the necessary and effective legislative and other measures to restrain ... third parties from denying equal access to adequate water’); ‘General Comment No. 18’ para 25 (enjoining State Parties to ‘adopt legislation or to take other measures ensuring equal access to work’); ‘General Comment No. 19’ para 45 (enjoining State Parties to ‘[adopt] the necessary and effective legislative and other measures ... to restrain third parties from denying equal access to social security schemes operated by them or by others and imposing unreasonable eligibility conditions’).

²⁶ CommESCR, ‘General Comment No. 20’ para 37. See also, to similar effect, CommESCR, ‘General Comment No. 3 : The nature of States parties’ obligations’ (14 December 1990) UN Doc E/1991/23 para 3.

²⁷ CommESCR, ‘Third periodic reports submitted by States parties under articles 16 and 17 of the Covenant: Hong Kong, China’ (6 July 2012) UN Doc E/C.12/CHN-HKG/3 paras 2.13-2.14.

56. We are emboldened in this view by the consistent and uniform observations of the Committee in this respect.²⁸

57. Indeed, in successive Concluding Observations on Reports from Hong Kong, the Committee has repeatedly highlighted the inadequacy of Hong Kong law in this regard:

(i) in 1996, the Committee was concerned that the Sex Discrimination Ordinance did not protect those individuals whose right to work was ‘violated by inappropriate account being taken of their private sex lives’;²⁹

(ii) in 2001, the Committee expressed its regrets that the Government failed to give effect to the Committee’s Concluding Observations of 1996. The Committee reiterated that the ‘the failure of HKSAR to prohibit discrimination on the basis of sexual orientation’ was at odds with the Covenant, and accordingly urged the Government ‘to prohibit discrimination on the

²⁸ See, for example, CommESCR, ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Trinidad and Tobago’ (17 May 2002) UN Doc E/C.12/1/Add.80 paras 14, 37; ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia’ (12 June 2009) UN Doc E/C.12/AUS/CO/4 para 14; ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: Poland’ (2 December 2009) UN Doc E/C.12/POL/CO/5 para 12; ‘Concluding observations of the Committee on Economic, Social and Cultural Rights Republic of Korea’ (17 December 2009) UN Doc E/C.12/KOR/CO/3 para 9; ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Uruguay’ (1 December 2010) UN Doc E/C.12/URY/CO/3-4 para 7; ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic of Moldova’ (12 July 2011) UN Doc E/C.12/MDA/CO/2 para 7; ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Peru’ (30 May 2012) UN Doc E/C.12/PER/CO/2-4 para 5; ‘Concluding observations of the Committee on Economic, Social and Cultural Rights: Ethiopia’ (31 May 2012) UN Doc E/C.12/ETH/CO/1-3 para 8; ‘Concluding observations on the initial to third reports of the United Republic of Tanzania’ (13 December 2012) Un Doc E/C.12/TZA/CO/1-3 para 5; ‘Concluding observations on the fifth periodic report of Denmark’ (17 May 2013) UN Doc E/C.12/DNK/CO/5 para 7; ‘Concluding observations on the third and fourth periodic report of Jamaica’ (17 May 2013) UN Doc E/C.12/JAM/CO/3-4 para 8; ‘Concluding observations on the second periodic report of the Islamic Republic of Iran’ (10 June 2013) UN Doc E/C.12/IRN/CO/2 para 7; ‘Concluding observations on the combined second, third and fourth periodic report of Egypt’ (29 November 2013) UN Doc E/C.12/EGY/CO/2-4 para 8; ‘Concluding observations on the initial report of Gabon’ (27 December 2013) UN Doc E/C.12/GAB/CO/1 para 12.

²⁹ CommESCR, ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland (Hong Kong)’ (6 December 1996) UN Doc E/C.12/1/Add.10 para 15.

basis of sexual orientation',³⁰

(iii) in 2005, the Committee had again to regret the failure of the Government to implement the recommendations contained in its Concluding Observations of 2001, underlining the fact that '[t]he present anti-discrimination legislation does not cover discrimination on the basis of ... sexual orientation'.³¹

58. Bearing in mind that 'the vulnerable members of society can and indeed must be protected' in all circumstances,³² the purported lack of societal consensus in Hong Kong cannot, in principle, be invoked in justification for refusing to enact legislation to outlaw discrimination on the grounds of sexual orientation and gender identity, in accordance with obligations under the Covenant.

59. Even if assuming, which we do not accept, a majority consensus might in a principled approach be relevant in assessing whether there is a need to enact legislation to protect minorities within society, it should be noted that the 2006 survey results have become outdated already and, as such, cannot provide a reliable guide to the public attitudes.

60. The Committee might wish to note that, in October 2013, the Honourable Cyd Ho Sau-lan, legislator of Labour Party, commissioned the Public Opinion Programme of the University of Hong Kong to conduct a survey on the very same issue, namely whether the general public of Hong Kong support the introduction of legislation to protect persons of different sexual orientations from discrimination.³³

61. The results of the 2013 survey return a very different picture from that which the 2006 survey results appeared to paint, demonstrating that an overwhelming majority of the

³⁰ CommESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: China (Hong Kong Special Administrative Region)' (21 May 2001) UN Doc E/C.12/1/Add.58 paras 15, 31.

³¹ CommESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao)' (13 May 2005) UN Doc E/C.12/1/Add.107 para 78.

³² CommESCR, 'General Comment No. 3, The Nature of States Parties' Obligations' (14 December 1990), UN Doc E/1991/23 para 12.

³³ The survey (in Chinese) can be accessed at: http://cydho.org.hk/download/Cyd_Ho_LGBT2013_freq_report_v1_POP.pdf (in particular [Q4]).

respondents (65.8%) now consider that an anti-discrimination legislation aimed at protecting persons of different sexual orientations is necessary.

62. In the light of these considerations, we invite the Committee to

(i) ***regret*** the continued refusal of the Government of Hong Kong to implement the previous recommendations of the Committee (as referred to in para 57 above) to prohibit discrimination on the basis of sexual orientation; and

(ii) ***urge*** the Government of Hong Kong to introduce anti-discrimination legislation which prohibits discrimination on the grounds of sexual orientation and gender identity.

Articles 6 – 8: Labour Rights

Committee's previous recommendations not implemented

63. The Committee recommended in its Concluding Observations of 2001 the Government to 'review its policy in relation to unfair dismissal, minimum wages, paid weekly rest time, rest breaks, maximum hours of work and overtime pay rates, with a view to bringing such policy into line with the HKSAR's obligations as set forth in the Covenant'. With the exception of the introduction of a statutory minimum wage in 2011, the Government has failed to implement the Committee's recommendations.

64. In this connection, we ask the Committee to

(i) ***express deep regret*** at the Government's failure to implement the Committee's recommendations, and

(ii) ***urge*** the Government, as a matter of high priority, to make provisions for regulating working time, overtime pay rate, paid rest days and rest breaks.

Minimum wage fails to lift workers out of poverty

65. We welcome the introduction of a statutory minimum wage (SMW) in May 2011, but regret that the SMW has failed to lift low-paid workers and their families out of poverty.

66. Under the Minimum Wage Ordinance (MWO), the Minimum Wage Commission (MWC), the statutory body entrusted to recommend the SMW rate, is required in performing that task to consider the need to sustain Hong Kong's economic growth and competitiveness, with no regard whatever given to the costs of living of workers and their families. The Secretary for Labour and Welfare, speaking on the second reading of the Minimum Wage Bill, stated clearly the Government's disagreement with the view that the SMW should be sufficient to meet the livelihood needs of employees and their families.³⁴ The Secretary also urged Members of the Legislative Council to oppose an amendment to the bill, which stipulates that the MWC should take into account the needs of workers and their families in recommending the SMW rate.³⁵

67. The Government's stance is in our submission not in line with Article 7(a)(ii) of the Covenant under which the Government is obliged to ensure all workers with remuneration which provides them, as a minimum, with a decent living for themselves and their families.

68. A study by the Hong Kong Council of Social Service revealed that the poverty rate in 2011 was reduced by 0.8 percentage point to 17.1% after the introduction of the SMW. But the SMW effect began to recede in the first half of 2012, and the poverty rate rose subsequently back to 17.6%.

69. The modest impact of the SMW on poverty alleviation is attributable to the extremely low level of the rate the Government fixed. The first SMW rate, effective from 1 May 2011, was fixed at HKD 28 for each hour worked. Assuming a 44-hour working week, this translates into a monthly income of about HKD 5,300, an amount not sufficient even to meet the basic needs of a 2-person family, let alone a typical family of 4 (the official poverty lines

³⁴ See Legislative Council, *Official Record of Proceedings* (15 July 2010) p 11688.

³⁵ See Legislative Council, *Official Record of Proceedings* (16 July 2010) p 12210.

for a 2-person and 4-person family in 2011 were HKD 7,500 and HKD 13,000 respectively). In annualized terms (see Table 1 below), the first SMW rate represents less than a quarter of per capita GDP, a level which is well below the “norm” of 40 – 50% in comparable economies, and is lower than that of the United States, where the level of minimum wage is the lowest among advanced countries.

Table 1: Ratio of annualized minimum wage to per capita GDP

Country	Hong Kong		USA	Canada	Japan	Australia	S. Korea	UK
Year	2011	2013	2012	2012	2012	2012	2012	2012
Ratio	23.4%	23.2%	30.2%	39.7%	41.5%	46.4%	47.7%	51.6%

Source: OECD.StatExtract (http://stats.oecd.org/Index.aspx?DataSetCode=MW_CURP)

70. Moreover, the adjustment of the SMW has failed to keep pace with rising prices. Under the MWO, the SMW rate is reviewed every two years. The second SMW rate, effective from 1 May 2013, was fixed at HKD 30, with a nominal increase of 7.1%. Yet, inflation over the same period was 8.4%, meaning that, in fact, the purchasing power of the SMW in May 2013 is 1.1% less than that in May 2011 when the SMW was first introduced. Given that the price level is forecast to rise by 4 – 4.5% a year, workers on minimum wage could be 10% worse off when the SMW rate is to be adjusted in May 2015.

71. In the light of these factors, we invite the Committee to

(i) **express concern** at the Government’s failure to fulfil its obligations under Article 7(a)(ii) of the Covenant, and

(ii) **urge** the Government to take fully into account the needs of workers and their families in fixing the SMW rate.

Workers on non-standard contracts not adequately protected

72. Under the Employment Ordinance (EO), ‘continuous contract employees’ are entitled to

such benefits as rest days, paid holidays and annual leave, maternity leave and pay, sickness allowance, severance and long service payments, subject to the satisfaction of the qualifying periods stipulated therein. ‘Continuous contract employees’ are defined as meaning those who had been employed under a contract of employment by the same employer for 4 weeks or more and had worked for 18 hours or more each week (the “4 – 18” requirement).

73. A survey conducted by the Census and Statistics Department in 2009 found that there were 56,300 private sector employees working for less than 18 hours per week, more than double what there were 10 years ago. These employees do not fall within the statutory definition of ‘continuous contract employees’ and are therefore not entitled to ‘continuous contract’ benefits.

74. It is our worry that, as the statutory provisions now stand, it is open to unscrupulous employers to adopt odd patterns of working hours in order to evade their statutory responsibilities. In this regard, we highlight that the Hong Kong Jockey Club has in fact been accused of employing workers on a 17-hour-a-week basis, and a fast food chain of arranging its employees to work for 3 consecutive 48-hour weeks followed by a 1-week break.

75. We are also concerned about possible strategies designed to circumvent the statutory ‘continuous contract’ benefits, for instance by way of a series of fixed-term contracts and a short break between each contract. It is pertinent to recall that in 2006, the Court of Appeal sounded its dismay that ‘[t]he situation is clearly unsatisfactory when employers are able to adopt devices which relieve them of their obligation towards their employees’,³⁶ and suggested that changes should be introduced to the EO ‘along the lines of ‘*The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002*’ of the United Kingdom which implemented the *European Union Directive on Fixed Term Work (1999/70/EC)*’.³⁷ Regrettably, 8 years after the Court of Appeal ruling, the Government has failed to introduce any measures to plug the loopholes.

76. Within the statutory framework in Hong Kong, access to employment rights depends to a large extent on whether an individual is employed as an employee. While it may be

³⁶ *Wong Man Sum v Wonderland Seafood Restaurant* [2007] 1 HKC 365 para 6 per Cheung JA.

³⁷ *Wong Man Sum v Wonderland Seafood Restaurant* [2007] 1 HKC 365 para 9 per Cheung JA.

justifiable that the EO and the Employee Compensation Ordinance (the ECO) do not apply to the self-employed under contracts for service as these contracts do not involve an employment relationship, problems arise when the status of individuals is so unclear that they cannot be easily classified as employees or persons in self-employment. This problem becomes more acute as the existing classifications fail to reflect recent growth of certain flexible or non-standard forms of employment, in particular casual work, zero-hours contracts, fixed term and task employment, agency work, freelancing and ‘dependent self-employment’.

77. In particular, the ‘dependently self-employed’, who are self-employed but not in business on their own account and who contract to provide their personal services to another (and usually contract exclusively to a single person or company at a time), abound in the construction and transportation industries. They are among the principal groups whose employment status is currently in doubt, and are urgently in need of some forms of protection, especially those relating to occupational health and safety.

78. Depriving workers on non-standard terms of certain labour rights and benefits is in breach of Article 7 of the Covenant. We invite the Committee to **urge** the Government to review the existing EO and ECO with a view to extending their coverage to include all workers under non-standard forms of work arrangements, including casual workers, zero-hours contract workers, fixed term and task workers, agency workers, freelancer and the ‘dependently self-employed’.

Union rights denied

79. The right of individuals to form trade unions and join the trade union of their choice as guaranteed by Article 8 of the Covenant is not only an end in itself in democratic societies. It is also a means of facilitating the enjoyment of rights under Articles 6 and 7. It is a means of ensuring conflict resolution, social equity and effective policy implementation. It is the means by which rights are defended, employment promoted and work secured.

80. In October 1997, the Government repealed 3 pieces of labour legislation the main objects of which are:

- removing unreasonable provisions that hamper self-administration of trade unions,
- strengthening the protection of employees against all forms of anti-union discrimination by providing victims the rights to claim for civil remedies, and
- granting employees the right to be covered by a collective agreement negotiated by their union which has authorisation from employees in the enterprise.

81. The Committee on Freedom of Association (CFA) of the International Labour Organization (ILO) ruled in 1997 that Government's reason for repealing the above-mentioned labour laws contradicted the obligation incumbent upon the Government under Article 4 of the Right to Organise and Collective Bargaining Convention, 1949 (i.e. ILO Covenant No. 98). The CFA requested the Government,

- to take the necessary steps to repeal provisions in Trade Unions Ordinance which institutes a blanket prohibition on the use of union funds for any political purpose,
- to review the Employment Ordinance with a view to ensuring that provision is made in legislation for protection against all acts of anti-union discrimination; and
- to give serious consideration to the adoption of legislative provisions laying down objective procedures for determining the representative status of trade unions for collective bargaining purposes which respect freedom of association principles.

82. It is a matter of regret that, to this date, 15 years after the CFA rulings, Government has failed to respond to the recommendations listed above. Indeed the Government has never demonstrated any serious efforts to encourage union participation and collective bargaining since the ratification of ILO Covenant No. 98 in 1975. We cannot but observe that the Government's active discouragement and refusal to provide legal protection for collective bargaining have resulted in the marginal representation of trade unions in Hong Kong with very few workers covered by collective agreements. This hinders the enjoyment of the right of individuals to form trade unions and join the trade union of their choice for the promotion and protection of their economic and social interests stipulated in Article 8 of the Covenant.

83. We invite, for the reasons above, the Committee to **urge** the Government to make legal provisions for civil remedies for all forms of anti-union discrimination, and legislate for

objective procedures for determining the representative status of trade unions for the purposes of collective bargaining.

Article 9: Right to social security

84. The social security system set up by HKSAR Government has for years been criticized for being too restrictive. Nonetheless, not only does the Government continue to refuse to establish universal retirement pension, it has also limited its commitment to provide a social safety network, purportedly due to the constraint of regular budget required by the Basic Law.³⁸ Elderly who need subvented home services have now to wait for more than 3 years³⁹ on average, while 5000 of them passed away before being given the subsidized services these years⁴⁰. For the disabled, the average waiting time even extends to more than 6 – 7 years.⁴¹

85. As such, the right of Hong Kong residents to have social security is seriously affected. For those who choose or forced to use the subvented community care service, elderly have to wait for 9 months. According to the Government statistics, one in three of HK elderly (297 000 persons) are living below the Poverty Line⁴². The impoverished elderly can only rely on the Comprehensive Social Security Assistance Scheme (CSSA) in order to maintain their lives, but the rates of CSSA – on the basis of a basic and essential needs expenditure assessment – have not been adjusted since 1996, falling well behind inflation. Not being prioritized by the Government, the basic livelihood of a substantial portion of the general public is at stake.

86. We therefore invite the Committee to

(i) **regret** that Article 9 is not fully complied with by the Government, and

(ii) **urge** the HKSAR to recognize the right to social security and social insurance by:

(a) establishing universal retirement pension;

³⁸ But on this see paras 2-8 above.

³⁹ [http://www.swd.gov.hk/doc/elderly/ERCS/LTC%20statistics%20HP-Eng\(201401\).pdf](http://www.swd.gov.hk/doc/elderly/ERCS/LTC%20statistics%20HP-Eng(201401).pdf)

⁴⁰ http://gia.info.gov.hk/general/201302/27/P201302270287_0287_107685.pdf

⁴¹ <http://www.info.gov.hk/gia/general/201302/27/P201302270287.htm>

⁴² Carrie Lam , http://www.povertyrelief.gov.hk/eng/pdf/20130930_article.pdf

- (b) immediately conducting a study on basic and essential needs, and adjusting the CSSA rates based on the findings of the study, and
- (c) immediately conducting a study specifically on elderly and disabilities' needs, increasing the subvented services, subsidies and staff establishment based on the findings of the study.

Article 11: Right to adequate housing

87. Article 11 guarantees the right of everyone to adequate housing, a right recognised to be 'of central importance for the enjoyment of all economic, social and cultural rights.'⁴³

88. We recall the authoritative expositions of the Committee in its General Comment No. 4, which lays down the proper approach to the understanding the right to housing. In the first place, the Committee warns that the right should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.⁴⁴

89. The Committee has also helpfully detailed, non-exhaustively, the content of 'adequate housing' as necessarily entailing, *inter alia*,⁴⁵

■ '[a]vailability of services, materials, facilities and infrastructure ... essential for health, security, comfort and nutrition',

■ '[a]ffordability',

■ '[h]abitability ... in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and

⁴³ CommESCR, 'General Comment No. 4: The Right to Adequate Housing' (13 December 1991) UN Doc E/1992/23 para 1; see also para 9. The interconnections between the right to adequate housing and other economic, social and cultural rights have been made unmistakably evident, for example, in the Committee's General Comment No. 14, in which the Committee articulates the right to the highest attainable standard of health in terms of 'an inclusive right extending ... to the underlying determinants of health, such as ... an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions': CommESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) UN Doc E/C.12/2000/4 para 11.

⁴⁴ CommESCR, 'General Comment No. 4' para 7.

⁴⁵ CommESCR, 'General Comment No. 4' para 8.

disease vectors’,

■ ‘[a]ccessibility’, in that ‘[d]iscernible governmental obligations need to be developed aiming to substantiate the right of all [including and prioritising disadvantaged groups] to a secure place to live in peace and dignity, including access to land as an entitlement.’⁴⁶

90. With the full realization of the right to adequate housing in view, the Covenant clearly obliges State Parties to ‘take whatever steps are necessary’ to provide assistance to citizens to satisfy their basic housing needs.⁴⁷

91. Unfortunately, the Government of Hong Kong has clearly failed to discharge its duties and obligations arising from Article 11.

92. It has been estimated that, as of 2013, at least⁴⁸ 66 900 domestic households, totalling at least 171 300 persons, were living in ‘Subdivided units’ (SDUs), commonly understood as meaning individual living quarters having been subdivided into two or more smaller units for rental.⁴⁹

93. SDUs are often found in old buildings with crowded living environment, poor hygiene conditions and a lack of fire prevention facilities.⁵⁰ They are also typically inhabited by persons on low incomes, who by reason of their limited financial resources have no real free choice as to where they live, and in what conditions.⁵¹

94. The poor living conditions in which SDU residents have to live are decidedly akin to the

⁴⁶ See also CommESCR, ‘General Comment No. 4’ para 11 (‘ States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.’).

⁴⁷ CommESCR, ‘General Comment No. 4’ para 12.

⁴⁸ These figures have been criticised as an underestimate of the total number of SDU residents: see for example http://rthk.hk/rthk/news/expressnews/20131112/news_20131112_55_963230.htm.

⁴⁹ See Policy 21 Limited, ‘Report on Survey on Subdivided Units in Hong Kong’ (June 2013) available at <http://www.thb.gov.hk/eng/policy/housing/policy/lths/sdurpt2013.pdf>, para 1.1.1.

⁵⁰ See Policy 21 Limited, ‘Report on Survey on Subdivided Units in Hong Kong’ (June 2013) available at <http://www.thb.gov.hk/eng/policy/housing/policy/lths/sdurpt2013.pdf>, para 1.1.1.

⁵¹ See Policy 21 Limited, ‘Report on Survey on Subdivided Units in Hong Kong’ (June 2013) available at <http://www.thb.gov.hk/eng/policy/housing/policy/lths/sdurpt2013.pdf>, paras 13-16.

conditions of cage homes in Hong Kong which the Committee deplored in 1996.⁵² SDUs, by their inadequacy as a form of housing,⁵³ are as much ‘an affront to human dignity’ as are bed-space apartments or cage homes.⁵⁴

95. At the root of this lay the low housing supply during the period 2008 to 2012, with only 80,282 public housing units and 48,936 private housing units completed, compared to 187,524 and 122,544 respectively for the period from 1993 to 1997, and 209,963 and 131,010 respectively from 1982 to 1986.

96. There are in consequence as many as 118,700 general applications and 115,600 non-elderly one-person applications under the Quota and Points System on the Waiting List for public rental housing as at end-June 2013.

97. The applicants on the Waiting List are, in the nature of things, those very SDU residents who have to live in exceptionally poor housing conditions.

98. Even so, the Government has only undertaken to provide an average of about 20,000 public rental housing units per year in the next 10 years, a lethargic aim that can hardly answer the current housing demands and will only serve to further lengthen the existing Waiting List.

99. Meanwhile, the Government has placed a moratorium on the production of Home Ownership Scheme Flats since November 2002, which worsens the undersupply of public rental housing.⁵⁵

⁵² See CommESCR, ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland (Hong Kong)’ (6 December 1996) UN Doc E/C.12/1/Add.10 para 29.

⁵³ See CommESCR, ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: People’s Republic of China (including Hong Kong and Macao)’ (13 May 2005) UN Doc E/C.12/1/Add.107 para 78(g).

⁵⁴ CommESCR, ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: China (Hong Kong Special Administrative Region)’ (21 May 2001) UN Doc E/C.12/1/Add.58 para 25.

⁵⁵ The aim of the Home Ownership Scheme had been to encourage better off public rental housing tenants to upgrade themselves to home ownership, so that the public rental flats released could be allocated to families in greater need of assisted housing.

100. As such, the Government's failure to provide sufficient and suitable housing choices to those on low incomes, occasioned by the Government's policy and planning in the past and their serious shortcomings, amounts to a violation of Article 11, particularly in the light of the general principle that 'the right to [adequate] housing should be ensured to all persons irrespective of income or access to economic resources'⁵⁶

101. We therefore invite the Committee to

(i) **express concern** about the long waiting list for public rental housing and the insufficient provision of social housing in Hong Kong;

(ii) **express deep regret** that persons on low incomes, having to live in such substandard conditions as Subdivided units, are not provided with adequate housing within the meaning of Article 11;

(iii) **urge** the Government of Hong Kong to set up a detailed regulatory framework to address the problem of inadequate housing, exemplified by Subdivided units, with a view to improving the quality of accommodation;

(iv) **strongly urge** the Government to reconsider its housing policies, develop effective strategies (including but not limited to the reinstatement or improvement of the social housing programmes), and take all appropriate steps, as a matter of priority, to ensure that sufficient resources commensurate with the extent of the housing shortage are set aside for increasing the availability of affordable and adequate housing, taking into special consideration the needs of the disadvantaged and marginalised individuals and groups;

(v) **recommend** the Government to provide appropriate forms of financial support, such as access to credit and housing subsidies, for low-income families and marginalised and disadvantaged groups, and

(vi) **recommend** the Government to legislate to give specific legal enforceability to the right to affordable housing.⁵⁷

⁵⁶ CommESCR, 'General Comment No. 4' para 7.

⁵⁷ See CommESCR, 'Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories' (12 June 2009) UN Doc E/C.12/GBR/CO/5 para 29.

Article 12 : Right to the enjoyment of the highest attainable standard of health

102. The delivery of a functioning medical service is essential to safeguarding the right to good health under Article 12. In Hong Kong, however, this has not been done. For instance, the waiting times of Specialist Outpatient Clinics of the Hospital Authority are increasing, the most serious cases of persons requiring surgical services having to wait for 110 weeks.⁵⁸ On the other hand, the role of Hospital Authority, the funded public medical service authority, is problematic and allocate resources unevenly to different public hospitals.⁵⁹

103. As such, we suggest that the Committee **urge** the Government to

(i) reform its clustering arrangement so as to address the uneven distribution of resources among clusters and among hospitals within the same hospital cluster;

(ii) allocate more funding to improve the serious shortage of resources in certain hospital clusters; and

(iii) set up an independent committee comprising frontline staff and patients' groups to comprehensively review the effectiveness of the clustering arrangement.

Articles 13 and 14 –Right to education

104. Under Articles 13 and 14, as interpreted by the Committee, States parties have general positive obligations in relation to the right to education to take 'deliberate, concrete and targeted' steps and 'to move as expeditiously and effectively as possible' towards the full realization of the right to education.⁶⁰

⁵⁸ <http://www.legco.gov.hk/yr12-13/english/panels/hs/papers/hs0617cb2-1315-4-e.pdf>

⁵⁹ <http://www.legco.gov.hk/yr13-14/english/panels/hs/papers/hs0120cb2-671-5-e.pdf>

⁶⁰ CommESCR, 'General Comment No. 13: The right to education (article 13 of the Covenant)' (8 December 1999) UN Doc E/C.12/1999/10 paras 43-44, 47.

Rights to primary and secondary education

105. Specifically, there is an express, unequivocal and immediate duty for the State party, pursuant to Articles 13(2)(a) and 14, to introduce primary education that is compulsory and free of charge for all.⁶¹

106. On the other hand, secondary education shall, according to Article 13(2)(b), be made 'generally available and accessible to all'. This means that secondary education must be 'available on the same basis to all', independent of 'a student's apparent capacity or ability', the ultimate aim being the introduction of free and universal secondary education'.⁶²

107. We highlight in this respect that it had for many years been the practice of the Government of Hong Kong to provide free primary and secondary education through government aided schools. However, in recent years an increasing number of aided primary and secondary schools have joined the Direct Subsidy Scheme (DSS) proposed by the HKSAR Government to become private schools.

108. According to the Education Bureau in 2013,⁶³ the numbers of private primary schools and private secondary schools have shot up, respectively, from 8 to 21 and from 32 to 61 since 2002. The school fees of these formerly aided schools have risen rapidly as a result and thereby have the effect of undermining the opportunity of poor children to get into those schools, most of which are locally prestigious and popularly regarded to provide education of a higher quality than the other currently aided schools.

109. Even though the Government encourages schools which have joined the DSS to provide scholarships and grants to students who face financial hardship, it is difficult now to escape the impression that education in Hong Kong is on the way to becoming fundamentally aristocratic. The exorbitant fees now imposed by DSS schools leave the chances of entering

⁶¹ See CommESCR, 'General Comment No. 11: Plans of action for primary education (article 14 of the International Covenant on Economic, Social and Cultural Rights)' (10 May 1999) UN Doc E/C.12/1999/4 para 1; CommESCR, 'General Comment No. 13: The right to education (article 13 of the Covenant)' (8 December 1999) UN Doc E/C.12/1999/10 paras 6(b), 8-10.

⁶² CommESCR, 'General Comment No. 13' para 13.

⁶³ See <http://www.info.gov.hk/gia/general/201307/10/P201307100393.htm>

these schools for students determined decisively if not solely by their parents' financial ability.

110. This represents a highly regressive, 'commodifying' shift in education policies contrary to Articles 13 and 14 because, inevitably, those fees constitute disincentives, recognised as impermissible by the Committee, to the enjoyment of the right to education.⁶⁴

Right to higher education

111. Article 13(2)(c) stipulates that higher education, whilst not to be 'generally available' as being a more advanced stage of academic development, progress towards free provision, on the basis only of the capacity of students 'assessed by reference to all their relevant expertise and experience'.⁶⁵

112. Moving in the opposite direction, however, places for government funded full time Sub-degree programmes were cut sharply from 11453 in 2003⁶⁶ to 4321 in 2014⁶⁷. Meanwhile, every year thousands of students who have met the general entrance requirements for publicly-funded undergraduate programmes are not admitted to such programmes⁶⁸ and are forced to take the self-financed sub-degree and degree programmes.

113. Private providers of higher educational programmes have against this background emerged rapidly and become the main pathways to higher education in Hong Kong,⁶⁹ providing nearly as many places as the publicly-funded universities do nowadays.⁷⁰ In 2012,

⁶⁴ See CommESCR, 'General Comment No. 11' para 7; 'General Comment No. 13' paras 45, 59.

⁶⁵ CommESCR, 'General Comment No. 13: The right to education (article 13 of the Covenant)' (8 December 1999) UN Doc E/C.12/1999/10 paras 6(b), 19.

⁶⁶ See Legislative Council Question 'LCQ8: Self-financing programmes offered by UGC-funded institutions' (7 December 2011) available at www.info.gov.hk/gia/general/201112/07/P201112070186.htm.

⁶⁷ The 2014-15 Budget, 'Head 190 — University Grants Committee', available at <http://www.budget.gov.hk/2014/eng/pdf/head190.pdf>

⁶⁸ <http://www.info.gov.hk/gia/general/201112/07/P201112070178.htm>

⁶⁹ <http://www.info.gov.hk/gia/general/201211/21/P201211210306.htm>

⁷⁰ See Education Bureau's paper submitted to the Legislative Council Panel on Education, 'Self-financing Post-secondary Education' (January 2013) LC Paper No. CB(4)279/12-13(01), available at <http://www.legco.gov.hk/yr12-13/english/panels/ed/papers/ed0111cb4-279-1-e.pdf>

no fewer than 6800 students were admitted to self-financing undergraduate programmes and 29500 students to self-financing sub-degree programmes, whereas, in comparison, 30300 places for publicly-funded undergraduate programmes and 9300 for publicly-funded sub-degree programmes were available in that year.

114. As with primary and secondary education in Hong Kong, this has in effect posed financial obstacles which deny grassroots students meaningful access to free higher educational institutions, with detrimental consequences for their upward social mobility.

115. We submit that this deepening inequality in higher education, too, represents a worrying trend of gradual erosion of the right to education of students in Hong Kong under Articles 13 and 14.

Right to human rights education

116. The right to human rights education is firmly, if impliedly, rooted in Article 13(1), which sets forth educational objectives to which education should be directed. Amongst others, those objectives include ‘the full development of the human personality and the sense of its dignity’ and ‘the respect for human rights and fundamental freedoms.’⁷¹

117. At this juncture, it is opportune to draw the Committee’s attention to the attempt of the Government in 2012 to introduce a controversial ‘moral and national education curriculum’,⁷² which was widely denounced for its use of ritualistic and emotion-laden methods of exposing students to predetermined patriotic sentiments. The very real fear was that the ‘patriotic’ indoctrination (or even manipulation) would condition the student to acquire instinctively affective predispositions towards blind acceptance of whatever the nation would do.

⁷¹ See also CommESCR, ‘General Comment No. 13’ paras 4, 6(c); Committee on the Rights of the Child, ‘General Comment No. 1: The Aims of Education’ (17 April 2001) UN Doc CRC/GC/2001/1 para 3.

⁷² See United States Department of State, *Country Reports on Human Rights Practices for 2012*, p 116, available at <http://www.state.gov/documents/organization/204409.pdf>; United States Department of State, *Country Reports on Human Rights Practices for 2013*, p 112 available at www.state.gov/documents/organization/220402.pdf.

118. Although the curriculum was shelved following strong and large-scale protests from no fewer than 120,000 students and parents alike, its replacement – ‘moral and civic education’ – remains far from human-rights-inspired despite its inclusion of a paltry human rights element.⁷³

Conclusion on Articles 13 and 14

119. For these reasons, we invite the Committee to

- (i) **express regret** about the increasing commodification of education in Hong Kong and the disproportionately negative effects of income disparities on the realisation of the right to education;
- (ii) **remind** the Government that the Covenant requires that education at all levels be equally accessible to all and without discrimination on the ground of financial capacity;
- (iii) **express deep regret** that the Government attempted to impose upon student education that is incompatible with Article 13(1) of the Covenant;
- (iv) **express concern** that the school curricula in Hong Kong do not provide for adequate human rights education;
- (v) **strongly urge** the Government to ensure free primary education for all children and gradually reduce the costs of secondary education, such that primary education is available on a free and compulsory basis, and that secondary education is accessible;
- (vi) **recommend** the Government to offer financial assistance, including but not limited to subsidies for textbooks, school kits and aids, and increased scholarships, to low-income families to cover the associated expenses of education;
- (vii) **urge** the Government to increase the number of places of first year entrance for publicly-funded undergraduate and publicly-funded sub-degree programmes;

⁷³ See

http://www.edb.gov.hk/attachment/tc/curriculum-development/4-key-tasks/moral-civic/mce%20across%20curr%20expected%20learning%20outcomes_stage%204.doc.

(viii) **recommend** the Government to introduce a reduction of fees in higher education with a view to abolishing them, and by all other appropriate means, in particular through a comprehensive system of adequate study grants, to guarantee for applicants from lower-income families access to higher education;

(ix) **urge** the Government to make increased efforts to ensure that human rights education cultivating values of respect, social inclusion and participation is provided, both as a subject and as a methodology of instruction, in schools at all levels, and that it attends sufficiently to economic, social and cultural rights, and

(x) **recommend** the Government to provide extensive human rights training for members of all professions and sectors with a direct role in the promotion and protection of human rights, including judges, lawyers, civil servants, teachers, law enforcement officers, migration officers, the police and all other agents of public authorities.

Article 15: Cultural rights

120. Cultural rights guaranteed under Article 15, as acknowledged by the Committee, are integral to the celebration of human dignity and interactivity within society.⁷⁴

121. Fluid as it is, culture in any society is expressed through, and constantly reconstructed by, the mass media, which plays a central role in shaping the aggregated opinions, norms and values ultimately constituting culture. Modern advances in technology have allowed people now not only to passively consume culture but to, more than ever before, directly contribute to and enact it.

122. In this respect, television, as a familiar means of mass communication and entertainment in the intimacy of the home, has an immediate, powerful and synchronous impact on the audience, ‘conveying through images meanings which the print media are not able to impart’⁷⁵. Television is thus one of the most important conduits through which individuals

⁷⁴ CommESCR, ‘General comment No. 21: Right of everyone to take part in cultural life’ (21 December 2009) UN Doc E/C.12/GC/21 para 1.

⁷⁵ *Jersild v Denmark*, App No. 15890/89 (European Court of Human Rights, Grand Chamber, 23 September 1994) para 31; *Animal Defenders International v United Kingdom*, App No. 48876/08 (European Court of Human Rights, Grand Chamber, 22 April 2013) para 119.

participate in creative activity and wider cultural life.

123. As a logical corollary, the right of everyone, without discrimination, to access to the television market is essential if the Government is to fulfill its duties to respect the right and freedom to undertake creative activity and contribute to cultural life,⁷⁶ and to create and promote a conducive environment within which cultural participation can take place.⁷⁷

124. Nonetheless, recent events have cast significant doubt on whether the Government has duly discharged its obligations pursuant to Article 15.

125. On 15 October 2013, the Government rejected the application of Hong Kong Television Network Limited, which was widely expected, once in operation, to gain a foothold in the local free television market. The rejection was accompanied by no reasons to support it, and was therefore clearly arbitrary and contrary to the principles, distilled from international human rights law, of objectivity and transparency.⁷⁸

126. As a result, the free television market in Hong Kong continues to be dominated by two privately owned television broadcasting companies, their creativity stifled and their productions increasingly mundane, much to the distaste of both members in the industry and the audience.⁷⁹

127. In so restricting the free television market, the Government has, we submit, been unjustifiably and impermissibly regressive in approach in relation to the rights enshrined in Article 15⁸⁰.

⁷⁶ See Article 15(3) of the Covenant; CommESCR, 'General comment No. 21' paras 15(a), 15(c), 49(c).

⁷⁷ CommESCR, 'General comment No. 21' para 55.

⁷⁸ See *Glas Nadezhda EOOD and Elenkov v Bulgaria*, App No. 14134/02 (ECtHR, 5th Section, 11 October 2007) paras 48-53; *Meltex Ltd and Mesrop Movsesyan v Armenia*, App No. 32283/04 (ECtHR, 3rd Section, 17 June 2008) paras 81-85. See also Human Rights Committee, 'General Comment No. 34: Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 para 39; *Marcel Granier et al v Venezuela*, Report No. 112/12, Case 12828 (IACHR, Merits Report, 9 November 2012) para 123.

⁷⁹ See, for example, the speech of Labour Party legislator Cyd Ho, in *Legislative Council Official Record of Proceedings* (7 November 2013) at p 2213 available at <http://www.legco.gov.hk/yr13-14/english/counmtg/hansard/cm1107-translate-e.pdf>.

⁸⁰ See CommESCR, 'General comment No. 21' para 46.

128. We accordingly invite the Committee to

(i) **express concern** that the Government has not opened up the free television market in Hong Kong, and

(ii) **recommend** the Government to issue more free television licences and allow new entrants to the free television market in Hong Kong.