

**Panel on Constitutional Affairs
Meeting on Monday, 20 May 2013**

Hearing of the United Nations Human Rights Committee (UNHRC) on the Third Report of the Hong Kong Special Administrative Region (HKSAR) in the light of the International Covenant on Civil and Political Rights (ICCPR) and the related Concluding Observations

SUBMISSION BY AMNESTY INTERNATIONAL HONG KONG

A) Protection from Discrimination on Grounds of Sexual Orientation and Gender Identity (Articles 2, 26)

1. As a party to the International Covenant on Civil and Political Rights (ICCPR), Hong Kong has an international legal obligation to protect and fulfil the right to equality and non-discrimination. This entails taking necessary measures to ensure that all Covenant rights are enjoyed by all on an equal basis, and that the law shall prohibit discrimination on grounds such as sexual orientation.¹
2. Within the existing government structure, the functions of The Gender Identity and Sexual Orientation Unit (GISOU) under the Constitutional and Mainland Affairs Bureau are impeded by its restrictive mandate. For example, the 'hotline for enquiries and complaint' operates from a complaint-driven and conciliatory approach, without any comprehensive, enforceable follow-up mechanism. It is stated in an official document that '[if] a complaint 'involves individuals or private organizations', the GISOU has 'no statutory power to direct individuals or private organisations to act in accordance with [its] request or suggestion.'² The Sexual Minorities Forum has appeared inactive for over two years since its last meeting of December 2010.³
3. It is by far evident that the policy of 'self-regulation and education', which the HKSAR Government promotes as 'the most appropriate means of addressing discrimination in this area',⁴ has been proved insufficient and inadequate in eliminating discrimination and in promoting equality and diversity.⁵

¹ *Secretary for Justice v Yau Yuk Lung Zigo & Anor* (FACC 12/2006) §11.

² Constitutional and Mainland Affairs Bureau, Gender Identity and Sexual Orientation Unit, "Enquiries and Complaints Hotline - Guide to Complaint Procedures" (http://www.cmab.gov.hk/doc/en/documents/public_forms/racedoc/Complaint_Form_guide_e.pdf) p. 2

³ http://www.cmab.gov.hk/en/issues/equal_forumdoc.htm Cf. HKSAR Common Core Document (http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/iccpr3/Core-document-e.pdf) §85-86.

⁴ *Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights* §26.10. Also Administration's Response to the UNHRC List of Issues, LC Paper No. CB(2)882/12-13(01) (27 March 2013) <http://www.legco.gov.hk/yr12-13/english/panels/ca/papers/ca0218cb2-882-1-e.pdf>, §§5.2-5.4; CMAB, Press Release, 'HKSAR Government welcomes constructive dialogue with UN Human Rights Committee' (28 March 2013) http://www.cmab.gov.hk/en/press/press_3146.htm.

⁵ See e.g. Public Opinion Programme, The University of Hong Kong, "Survey on Hong Kong Public's Attitudes Towards Rights of People of Different Sexual Orientations" (Sponsored by Hon Cyd Ho Sau-lan), Legislative Councillor – Report (in Chinese) http://hkupop.hku.hk/english/report/LGBT_CydHo/content/resources/report.pdf

4. Institutional monitoring, protection and redress mechanisms for discrimination are also lacking. Contrary to the Government's claim that the three existing human rights institutions 'already cover the core human rights issues of common concern'⁶, it is doubtful whether any of these institutions, each bound by their prescribed mandates, may be sufficiently empowered and competent to tackle issues of sexual orientation and gender identity discrimination in a systematic manner.
5. While we appreciate the Government's position that sexual orientation and may be "a highly controversial issue" on which public opinion is divided,⁷ it is helpful to reiterate that the apparent lack of 'consensus' reflects a real need for the Government to address the human rights issue in a progressive and systematic manner. The Government's continued failure to conduct any form of consultation on legislation⁸ is wholly inconsistent with HKSAR's obligations under the ICCPR.
6. Indeed, in its latest Concluding Observations, the UN Human Rights Committee (HRC) expressed concerns over the "absence of legislation explicitly prohibiting discrimination on the basis of sexual orientation and reported discrimination against lesbian, gay, bisexual and transgender persons in the private sector".⁹
7. The Committee laid down detailed recommendations in this regard, urging the HKSAR Government to, among other things:
 - 'consider enacting legislation that specifically prohibits discrimination on ground of sexual orientation and gender identity;
 - 'take the necessary steps to put an end to prejudice and the social stigmatization of homosexuality and send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation or gender identity; and
 - 'ensure that benefits granted to unmarried cohabiting opposite-sex couples are equally granted to unmarried cohabiting same-sex couples, in line with article 26 of the Covenant'.¹⁰
8. We hereby urge the Government to take immediate and concrete steps towards implementing the Committee's recommendations in full, starting with a comprehensive public consultation on legislation against discrimination on grounds of sexual orientation and gender identity, enabling meaningful and inclusive participation from all members of the public and interested stakeholders.

⁶ CMAB, Press Release, 'HKSAR Government welcomes constructive dialogue with UN Human Rights Committee' (28 March 2013) http://www.cmab.gov.hk/en/press/press_3146.htm

⁷ *Policy Address 2013* §131. Also Administration's Response to the UNHRC List of Issues, LC Paper No. CB(2)882/12-13(01) (27 March 2013) <http://www.legco.gov.hk/yr12-13/english/panels/ca/papers/ca0218cb2-882-1-e.pdf>, §5.5.

⁸ *Policy Address 2013* §131.

⁹ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region (2013) §23. Also UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region (1999) §15.

¹⁰ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region (2013) §23.

B) Protection of Migrant Domestic Workers (Articles 8, 2, 26)

9. Among all migrant workers in Hong Kong, migrant domestic workers (or ‘foreign domestic helpers’ (FDHs)) are arguably most vulnerable to human rights violations and abuse due to the particular nature of their work.
10. In its latest Concluding Observations on Hong Kong, the HRC raised its concern over the ‘discriminatory and exploitation suffered by a large number of migrant domestic workers and the lack of adequate protection and redress provided for them’.
11. The Committee recommended HKSAR to ‘adopt measures to ensure that all workers enjoy their basic rights, independently of their migrant status, and establish affordable and effective mechanisms to ensure that abusive employers are held accountable’, and specifically called upon HKSAR to consider repealing the “two-weeks rule” and the live-in requirement.¹¹
12. The Government, in response, pledged its commitment to protecting the well-being of FDHs and stressed the statutory labour rights and benefits available to them.¹² In terms of redress mechanisms, it also stressed that the FDHs whose statutory or contractual rights are allegedly infringed are entitled to seek ‘advice and assistance, including free enquiry and conciliation service’ from the Labour Department, which may refer the case to the Minor Employment Claims Adjudication Board or the Labour Tribunal for adjudication.¹³ According to the Administration’s Response, the Labour Department takes ‘rigorous enforcement action against offences under the labour legislation’, and ‘[p]rosecution will be instituted *where there is sufficient evidence and the FDH concerned is willing to stand as prosecution witness*’.¹⁴
13. Nonetheless, there are practical difficulties, and we consider the existing mechanisms largely inadequate. First, the threshold of what constitutes ‘sufficient evidence’ for the purposes of such prosecution arguably fails to take into account the restrictive working conditions and employment arrangements of the (aggrieved) FDHs, which render them vulnerable and relatively disadvantaged in the complaint and redress process.
14. Second, the live-in requirement – which the Government defended as ‘the cornerstone of [the] policy on importing FDHs’ and purportedly justified by the FDHs’ prior knowledge and

¹¹ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region (2013) §21. The ‘two-week rule’ requires domestic migrant workers to leave Hong Kong within two weeks upon termination of contract).

¹² Administration’s Response to the UNHRC List of Issues, LC Paper No. CB(2)882/12-13(01) (27 March 2013) <http://www.legco.gov.hk/yr12-13/english/panels/ca/papers/ca0218cb2-882-1-e.pdf>, §§15.1-15.2; CMAB, Press Release, ‘HKSAR Government welcomes constructive dialogue with UN Human Rights Committee’ (28 March 2013) http://www.cmab.gov.hk/en/press/press_3146.htm

¹³ Administration’s Response to the UNHRC List of Issues, LC Paper No. CB(2)882/12-13(01) (27 March 2013) <http://www.legco.gov.hk/yr12-13/english/panels/ca/papers/ca0218cb2-882-1-e.pdf>, §15.3.

¹⁴ Administration’s Response to the UNHRC List of Issues, LC Paper No. CB(2)882/12-13(01) (27 March 2013) <http://www.legco.gov.hk/yr12-13/english/panels/ca/papers/ca0218cb2-882-1-e.pdf>, §15.4. [emphasis added]

its inclusion in the Standard Employment Contract¹⁵ – further aggravates their vulnerability to abuse and exploitation. On this, an Expert at the hearing reportedly made the following remarks:¹⁶

In practical terms, it would appear these workers were prevented from making complaints because they risked being sent back home. Why could they not be given more freedom and better protection?

15. Hence, although aggrieved FDHs are ‘encouraged to come forward to lodge complaints’,¹⁷ these realities, coupled with the anticipated loss of income during the time spent on adjudication, tend to make many reluctant to lodge complaints or seek external assistance, let alone becoming a prosecution witness. In other words, abuses may go unnoticed and unpunished.
16. In response to the Committee’s concerns and recommendations on repealing the ‘two-week rule’, the Government argued that the rule is ‘required for maintaining effective immigration control and eliminating chances of FDHs overstaying in Hong Kong or working illegally after termination of contracts’.¹⁸ However, in reality, the rule, which may only be exempted at the discretion of the Director of Immigration under limited, exceptional circumstance,¹⁹ imposes unnecessary and disproportionate burdens and restrictions on the FDHs.
17. We are further concerned that the systematic exploitation of FDHs by private recruitment agencies, such as through excessive agency fees, underpayment of wages and even deception, may amount to trafficking for forced labour in some cases. Of relevance was another recommendation of the Committee that the HKSAR ‘[include] certain practices regarding foreign domestic workers in the definition of the crime of human trafficking’.²⁰
18. In light of the foregoing, we echo the Committee’s recommendations, in urging the HKSAR Government to:-
 - a. take all necessary measures to ensure that all FDHs enjoy their rights regardless of their immigration status;

¹⁵ CMAB, Press Release, ‘HKSAR Government welcomes constructive dialogue with UN Human Rights Committee’ (28 March 2013) http://www.cmab.gov.hk/en/press/press_3146.htm

¹⁶ UNOG, News & Media, ‘Human Rights Committee Considers Report of Hong Kong Special Administrative Region of China’ (13 March 2013) [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/02260CDFADFAE6F2C1257B2D004A66AA?OpenDocument#](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/02260CDFADFAE6F2C1257B2D004A66AA?OpenDocument#)

¹⁷ Administration’s Response to the UNHRC List of Issues, LC Paper No. CB(2)882/12-13(01) (27 March 2013) <http://www.legco.gov.hk/yr12-13/english/panels/ca/papers/ca0218cb2-882-1-e.pdf>, §15.4.

¹⁸ CMAB, Press Release, ‘HKSAR Government welcomes constructive dialogue with UN Human Rights Committee’ (28 March 2013) http://www.cmab.gov.hk/en/press/press_3146.htm

¹⁹ According to the Government: exceptional circumstances include cases where the ‘employer is unable to continue with the contract because of migration, external transfer, death, or financial reasons or there is evidence that the FDH has been abused or exploited.’ Administration’s Response to the UNHRC List of Issues, LC Paper No. CB(2)882/12-13(01) (27 March 2013) <http://www.legco.gov.hk/yr12-13/english/panels/ca/papers/ca0218cb2-882-1-e.pdf>, §15.4;

CMAB, Press Release, ‘HKSAR Government welcomes constructive dialogue with UN Human Rights Committee’ (28 March 2013) http://www.cmab.gov.hk/en/press/press_3146.htm

²⁰ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region (2013) §20

- b. ensure that effective monitoring is in place to regulate the licensing and charging practice of private recruitment and placement agencies;
- c. establish a fair, impartial, accessible and effective redress and accountability mechanism for aggrieved FDHs; and
- d. take immediate steps towards repealing the ‘two-week rule’ and the ‘live-in requirement’ currently applicable to FDHs in Hong Kong.

C) *Non-refoulement Protection and Refugee Status Determination (Articles 2, 6, 7, 13)*

19. Under Article 7 of the ICCPR, the HKSAR has an obligation to protect and fulfil the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment (CIDTP).²¹
20. In its General Comment No. 20, the HRC stated that states parties ‘must not expose individuals to the danger of torture or [CIDTP] upon return to another country by way of their extradition, expulsion or *refoulement*’.²²
21. The absolute and non-derogable nature of the right has been affirmed by the Court of Final Appeal (CFA) in *Ubamaka*, where it was held that even the immigration reservation to the ICCPR as applied to Hong Kong on which the Government has relied²³ cannot operate to exclude the application of this right.²⁴ Accordingly, deportation orders must not be proceeded with, where it could expose the individuals to genuine risks of CIDTP (or torture).²⁵ This is supported by the Committee’s most recent recommendation that the HKSAR ‘recognise the absolute character of prohibition of return to a location where the individual faces a real risk of torture or CIDTP’, which included express reference to the CFA judgment in *Ubamaka*.²⁶
22. In this light, we remain concerned that the ‘enhanced’ torture claim screening mechanism for determining claims for *non-refoulement* protection under Article 3 of the United Nations Convention Against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (CAT)²⁷ is inherently incapable of identifying comprehensive *non-refoulement* protection needs of individuals, especially those facing CIDTP and persecution risks upon return.
23. This has been a recurrent concern of the HRC. In 2006, the Committee already raised its concern over ‘the absence of adequate legal protection of individuals’ against deportation to locations where they might be subjected to torture or CIDTP, and recommended that the HKSAR ‘establish an appropriate mechanism to assess the risk faced by individuals expressing fears of being victims [of such human rights violations]’.²⁸

²¹ Also section 5(2)(c), BORO (Cap. 383); Article 3 BOR.

²² CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (10 March 1992) §9.

²³ *Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights* §7.9. Such reservation is reflected in section 11 of the Hong Kong Bill of Rights Ordinance (HKBORO): ‘As regard persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.’ Also *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480 at §§21-22.

²⁴ *Ubamaka Edward Wilson v Secretary for Security and Director of Immigration* (FACV15/2001), §§2, 115.

²⁵ *Ibid.* §§142, 145, 160.

²⁶ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region (2013) §9. Cf. Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region CCPR/C/HKG/CO/2 (21 April 2006) §10.

²⁷ Part VIIC, Immigration Ordinance (Cap. 115).

²⁸ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region CCPR/C/HKG/CO/2 (21 April 2006) §10.

24. In 2013, the Committee expressly *regrets* that ‘persons facing deportation proceedings are not always covered by safeguards established in the Covenant’, and ‘expresses concern about allegations that deportation operations are not properly monitored by the relevant oversight bodies’.²⁹
25. Regarding *non-refoulement* protection of refugees, the Committee further *regrets* that Hong Kong, China maintains a position not to seek the extension of the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol.³⁰
26. The principle of *non-refoulement* of refugees (as enshrined in the Refugee Convention³¹) has evolved into a norm of customary international law (CIL), imposing upon States the obligation not to expel or return a refugee to where his life or freedom would be threatened on grounds of race, religion, nationality, membership of a particular social group or political opinion.³²
27. In the recent judgment of *C & Ors v Director of Immigration & Anor*, the CFA held that under the current policy, the exercise of the Director of Immigration’s power to remove a refugee claimant to the country of putative persecution must satisfy the high standards of fairness required, and that the Government must make its own independent determination as to whether the fear of persecution is well-founded, and give its reasons for any adverse determination – mere deference to or reliance on UNHCR’s refugee status determination (RSD) is insufficient.³³
28. It should be added that the Law Society of Hong Kong and the Hong Kong Bar Association (HKBA) have, after the ruling in *Ubamaka*, respectively called upon the Administration to implement a combined, comprehensive and fair screening system to assess claims for protection.³⁴ The HKBA specifically urged the HKSAR to immediately rectify the relevant screening standard and procedure in accordance with the [*Ubamaka*] ruling and ‘take immediate steps to cease the repatriation of persons inadequately and

²⁹ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region (2013) §9.

³⁰ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region (2013) §9. Cf. *Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights* §7.11.; HKSAR Government, Press Release, ‘Response to statements issued by Hong Kong Bar Association and Law Society of Hong Kong’ (18 February 2013) <http://www.info.gov.hk/gia/general/201302/18/P201302180596.htm>; Administration’s Response to the UNHRC List of Issues, LC Paper No. CB(2)882/12-13(01) (27 March 2013) <http://www.legco.gov.hk/yr12-13/english/panels/ca/papers/ca0218cb2-882-1-e.pdf>, §11.7.

³¹ Article 33(1)

³² See e.g. *C & Ors v Director of Immigration & Anor* [2011] 5 HKC 118; FACV18/2011.

³³ *C & Ors v Director of Immigration & Anor* FACV18/2011.

³⁴ Law Society of Hong Kong, Statement ‘Court of Final Appeal Judgment on the case of *Ubamaka Edward Wilson v Secretary for Security and Director of Immigration*’ (18 February 2013) http://www.hklawsoc.org.hk/pub_e/news/societyupdates/20130218.pdf, §12; Hong Kong Bar Association, Press Release, ‘The *Ubamaka v Secretary for Security & Anor* Case’ - Statement of the Hong Kong Bar Association (18 February 2013) <http://hkba.org/whatsnew/misc/20130218%20-%20Ubamaka%20v%20Secretary%20for%20Security%20&%20Anor%20Case.pdf> §5

incompletely screened'.³⁵ In its subsequent judgment in *C*, the CFA considered that such suggestion 'merits careful consideration'.³⁶

29. Most recently, the HRC also recommended that the HKSAR 'ensure that all persons in need of international protection receive appropriate and fair treatment at all stages, in compliance with the Covenant', and urged the HKSAR 'not to set an inappropriate high threshold for recognizing a real risk of ill-treatment on return'.³⁷
30. However, we regret that apart from the short press releases,³⁸ to date, we are unaware of any further, concrete plan or action on part of the Government in view of the Committee's recommendations, and the Government has yet to advise of its views on the CFA ruling in the *C* case.
31. On this, it is necessary to reiterate that the Committee's views and recommendations must be given due weight and regard, and ought not be downplayed for being 'of an exhortatory nature rather than legally-binding'.³⁹ In particular, sheer notions such as 'feasibility' and 'practicality' in light of 'Hong Kong's unique circumstances' cannot sufficiently justify their non-implementation.⁴⁰
32. We hereby call upon the HKSAR Government to demonstrate genuine commitment and to act promptly towards fully implementing the relevant recommendations of the Committee and giving effect to the relevant CFA rulings. This would include, but not limited to, establishing a comprehensive, transparent and integrated mechanism for determining claims for *non-refoulement* protection from torture, CIDTP and persecution risks, with high standards of fairness and reasonable access to judicial redress.

³⁵ Hong Kong Bar Association, Press Release, 'The *Ubamaka v Secretar for Security & Anor* Case' - Statement of the Hong Kong Bar Association (18 February 2013) <http://hkba.org/whatsnew/misc/20130218%20-%20Ubamaka%20v%20Secretary%20for%20Security%20&%20Anor%20Case.pdf> §§6-7.

³⁶ *C & Ors v Director of Immigration & Anor* FACV18/2011 §§50, 66.

³⁷ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region (2013) §9. Cf. Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region CCPR/C/HKG/CO/2 (21 April 2006) §10.

³⁸ See HKSAR Government, Press Release, 'Response to statements issued by Hong Kong Bar Association and Law Society of Hong Kong' (18 February 2013) <http://www.info.gov.hk/gia/general/201302/18/P201302180596.htm>; CMAB, Press Release, 'HKSAR Government welcomes constructive dialogue with UN Human Rights Committee' (28 March 2013) http://www.cmab.gov.hk/en/press/press_3146.htm

³⁹ CMAB, Press Release, 'HKSAR Government welcomes constructive dialogue with UN Human Rights Committee' (28 March 2013) http://www.cmab.gov.hk/en/press/press_3146.htm

⁴⁰ CMAB, Press Release, 'HKSAR Government welcomes constructive dialogue with UN Human Rights Committee' (28 March 2013) http://www.cmab.gov.hk/en/press/press_3146.htm