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**Replies of Hong Kong, China to the list of issues in relation to  
its fourth periodic report\***

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## **Replies of the Hong Kong Special Administrative Region of the People's Republic of China to the List of Issues in relation to the Fourth Periodic Report**

### **Item 1**

1. The Hong Kong Special Administrative Region (“HKSAR”) is established by the National People’s Congress (“NPC”) of the People’s Republic of China (“PRC”) pursuant to the “one country, two systems” policy under which the “one country” is the premise and basis of the “two systems”. Since the PRC is a unitary state, the HKSAR is a local administrative region of the PRC coming directly under the Central People’s Government (“CPG”).

2. The systems instituted in the HKSAR are prescribed by the Basic Law of the HKSAR (“Basic Law”) which is adopted by NPC in accordance with the Constitution of the PRC. In line with Article 67 of the Constitution which provides that the Standing Committee of NPC (“NPCSC”) may interpret laws, Article 158 of the Basic Law provides that the power of interpretation of the Basic Law is vested in NPCSC. Given the principle of “one country” and the fact that the PRC is a unitary state, the ultimate authority to interpret the Basic Law is vested in the NPCSC even though the HKSAR courts (including the Court of Final Appeal (“CFA”)) are authorised, in adjudicating cases, to interpret the relevant provisions of the Basic Law in accordance with Article 158 of the Basic Law. The CFA<sup>1</sup> has consistently held that the interpretation by NPCSC is valid and binding on HKSAR courts. As part of our constitutional order and in line with the “one country, two systems” policy, the ultimate power to interpret the Basic Law is vested in the NPCSC but it does not undermine judicial independence in the adjudication of cases by the HKSAR courts.

3. The co-location arrangement of the Hong Kong section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (“XRL”) is a matter within the HKSAR’s high degree of autonomy, complies with the Basic Law and has been adopted through the signing of the Co-operation Arrangement between the HKSAR and the Mainland, the approval of the Arrangement by the NPCSC of the PRC; and the enactment of local legislation. As a clearance port, the Mainland Port Area of the XRL West Kowloon Station in Hong Kong is mainly used for completion of customs, immigration and quarantine (“CIQ”) procedures, and the area involved is minimal. More importantly, travellers can freely decide if they wish to take advantage of the XRL and benefit from the co-location arrangement which is not unprecedented when CIQ clearance is required. There is no question that the co-location arrangement is inconsistent with the provisions of the International Covenant on Civil and Political Rights (“ICCPR”).

4. Since the previous hearing in 2013, there has only been one interpretation of the Basic Law by NPCSC. The NPCSC’s interpretation on 7 November 2016 (“the Interpretation”) concerns Article 104 of the Basic Law which provides that when assuming office, certain public officers must, in accordance with law, swear to uphold the Basic Law and swear allegiance to the HKSAR of the PRC. The Interpretation explains clearly the meaning of Article 104. The Court<sup>2</sup> has held that, independent of the Interpretation of Article 104, the laws of Hong Kong as set out in the relevant provisions of the Oaths and Declarations Ordinance (Cap. 11), when properly construed by applying common law principles of construction and authorities, carry effectively the same meanings and legal effects as Article 104 as interpreted by NPCSC.

5. All the provisions of the Basic Law (including Article 39 which refers to the ICCPR) are interrelated and should be understood as a whole. The NPCSC has a duty to oversee HKSAR’s implementation of the Basic Law and to protect the high degree of autonomy enjoyed by HKSAR. The exercise by the NPCSC of the power of interpretation of Basic Law

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<sup>1</sup> See *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, *Vallejos v Commissioner of Registration and Another* (2013) 16 HKCFAR 45 and *Leung Chung Hang, Sixtus & Others v President of Legislative Council* [2019] 1 HKLRD 292.

<sup>2</sup> See *Yau Wai Ching v Chief Executive of the HKSAR* (2017) 20 HKCFAR 390.

is conducive to maintaining the rule of law and the successful implementation of “one country, two systems”.

## Item 2

6. As President Xi Jinping said at the China-Germany-European Union Leaders’ Meeting on 14 September 2020, “there is no one-size-fits-all path for human rights development in the world. There is no best way, only the better one.” Human rights are fully protected by law in Hong Kong. The Basic Law, which serves as the constitutional document of the HKSAR, provides constitutional guarantee for fundamental rights and freedoms, including the right to equality before the law, and is buttressed by the rule of law and an independent judiciary. Article 39 of the Basic Law further provides, amongst others, that the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

7. The provisions of the ICCPR as applied to the HKSAR have already been incorporated into local law by the Hong Kong Bill of Rights Ordinance (Cap. 383) (“HKBORO”). The protection of human rights is further strengthened by the four anti-discrimination ordinances and other relevant legislation.

8. There is also an existing institutional framework of statutory organisations which help promote and safeguard various rights, including the Equal Opportunities Commission (“EOC”), the Office of the Privacy Commissioner for Personal Data (“PCPD”) and the Ombudsman. The HKSARG’s efforts in promoting and safeguarding human rights are open to public scrutiny of the Legislative Council of the HKSAR (“LegCo”), the media and various non-governmental organisations (“NGOs”), and through regular reports to the United Nations. The HKSARG maintains the view that the existing mechanism has worked well and that there is no need to establish an additional human rights institution.

## Item 3

### Protection of Rights and Freedoms

9. Adopting legislation to safeguard national security is an inherent right of every sovereign state and falls within the internal affairs of a sovereign state. The Law of the PRC on Safeguarding National Security in the HKSAR (“NSL”)<sup>3</sup> is enacted not only to safeguard national security and to prevent, suppress and impose punishment for offences endangering national security, but also to maintain prosperity and stability of HKSAR and to protect the lawful rights and interests of HKSAR residents. Although the human rights guarantees have been provided in Chapter III of the Basic Law, Article 4 of the NSL clearly stipulates that human rights shall be respected and protected in safeguarding national security in the HKSAR, and reaffirms that the rights and freedoms which HKSAR residents enjoy under the Basic Law and the provisions of the ICCPR and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall be protected in accordance with the law. Any measures or enforcement actions taken under the NSL must observe this principle.

10. In order to maintain the constitutional order of the HKSAR under the Constitution and the Basic Law, Article 2 of NSL stipulates that the provisions in Articles 1 and 12 of the Basic Law on the legal status of the HKSAR are the fundamental provisions in the Basic Law. No person in the HKSAR shall contravene these provisions in exercising their rights and freedoms. Indeed, many rights and freedoms recognised by the ICCPR are not absolute. For instance, the rights and freedoms under Articles 12, 13, 14, 17, 19, 21 and 22 of the ICCPR may be restricted for the protection of national security and/or public order (*ordre public*).

11. In addition to Article 4 of the NSL, the notions of constitutionality, legality, legal certainty, respect for human rights, presumption of innocence, prohibition of double jeopardy

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<sup>3</sup> The text of NSL can be accessed from the link below -  
<https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf>

and right to defence are incorporated in Article 5 of the NSL, which mandates that the principle of the rule of law shall be adhered to in safeguarding national security. The NSL also does not have retrospective effect. In line with Article 14 of the ICCPR, Article 41 of the NSL provides that the trial must be conducted in an open court unless State secrets or public order is involved. Under Article 42 of the NSL, law enforcement and judicial authorities must ensure that the cases are handled in a fair and timely manner. The requirement to take an oath to uphold the Basic Law and swear allegiance to HKSAR when standing for election or assuming public office is reasonable and consistent with Article 25 of the ICCPR.

### **Definitions of “secession”, “subversion” and “terrorist activities”**

12. The elements of the offences of secession, subversion and terrorist activities are set out in Chapter III of the NSL. The burden is on the prosecution to prove beyond reasonable doubt that the accused has the *actus reus* and *mens rea* of the offence with which he is charged, for example, by showing that he committed one of the specified acts knowingly or intentionally with a view to committing secession, subverting the State power, or coercing the CPG or the HKSARG in order to pursue political agenda.

13. For the four categories of offences that seriously endanger national security and are punishable under the NSL (i.e. secession, subversion, terrorist activities and collusion with a foreign country or with external elements to endanger national security), the specific manifestations of the relevant offences are clearly defined, and the boundary between what is an offence and what is not is very clear:

(1) Secession – “*Undermining national unification*” is an expression in the PRC Criminal Law. For specific historical reasons, the Chinese people have a profound and clear understanding of “national unity”; “*altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People’s Republic of China*” refers to altering the status of the HKSAR or any other part of China under the PRC Constitution and laws in violation of the provisions of the PRC Constitution and laws; and “*surrendering the Hong Kong Special Administrative Region or any other part of the People’s Republic of China to a foreign country*” is aimed against elements pushing for “Hong Kong independence” and other people who seek to surrender the HKSAR or any other part of China to a foreign country.

(2) Subversion – The offence of subversion of State power is a dangerous crime, but it is still one for which there is a requirement of certain behaviour. Mere verbal expression cannot constitute the offence. However, if a private individual with the specific intention of bringing harm to society actively encourages others to carry out criminal acts, thus going beyond the bounds of freedom of speech, such action may constitute the offence of inciting subversion of State power.

(3) Terrorist activities – The NSL does not go beyond the definition of terrorism of the United Nations Security Council. The provisions of Article 24, items (3) and (4), of the NSL do not address general property damage, but damage to specific public infrastructure and equipment that affect public safety, and there are strict limits on the types of public infrastructure and equipment in question. Damage to such public infrastructure and equipment is quite likely to lead to serious consequences that endanger public safety. In addition, the second paragraph of this article establishes that causing “significant loss of public or private property” is a factor to be taken into account in sentencing after conviction, and not in the conviction itself.

### **Designation of Judges**

14. Under Articles 85 to 92 of the Basic Law, judges are appointed by the Chief Executive (“CE”) on the recommendation of the independent Judicial Officers Recommendation Commission chaired by the Chief Justice of the Court of Final Appeal (“Chief Justice”), and they enjoy security of tenure. Members of the judiciary are chosen on the basis of their judicial and professional qualities, and are immune from legal action in the performance of their judicial functions. The courts also exercise judicial power independently, free from any interference.

15. Article 44 of the NSL only stipulates that the CE shall designate, at different levels of courts, a list of judges from existing judges to hear cases concerning offences endangering national security, and she may consult the Committee for Safeguarding National Security of the HKSAR (“the HKSAR Committee on National Security”) and the Chief Justice before doing so. To form a list of judges to hear cases in a particular area is something that we have already had in place in Hong Kong for a long time. It has served us well because the judges become more expert in the particular area that they are sitting as a list judge.

16. Contrary to what seems to be suggested in the issue raised in item 3, the CE is not choosing which judge to preside over which case. The question of which judge is assigned to hear a particular case still rests with the Judiciary, not the CE or the Government. As explained by the Chief Justice on 2 July 2020, “the listing and handling of cases [and] the assignment of which judge or judges are to handle cases or appeals will be determined by the court leader at the relevant level of court. These are matters within the sole responsibility of the Judiciary.”

17. The NSL does not undermine judicial independence at all. All judges have taken the Judicial Oath by which they swear that they will uphold the Basic Law, serve the HKSAR conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit. Judges are always free to decide each of the cases in accordance with the law and evidence before them. Articles 85 to 92 of the Basic Law provide the constitutional guarantees for judicial independence, and the courts exercise judicial power independently, free from any interference. As decided by the Court in *Tong Ying Kit v. HKSAR*<sup>4</sup>: “There is no proper or sufficient basis to contend that, in relation to cases concerning offences under the NSL, the CE or the Government is in a position ‘to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists’, or that the liberty of any member of the Judiciary in Hong Kong ‘in adjudicating individual disputes and in upholding the law and values of the constitution’ is, or will be, interfered with by the CE exercising her power under Article 44 [of the NSL].” The mere fact that a case concerning offences endangering national security is handled by a judge designated under Article 44 would not render the court not independent<sup>5</sup>. The right to a fair hearing by a competent, independent and impartial tribunal established by law under Article 14 of ICCPR remains well protected.

### **Jury Trial**

18. Although Article 86 of the Basic Law provides that the principle of trial by jury previously practised in Hong Kong shall be maintained, the Court has held that there is no right to jury trial in Hong Kong.<sup>6</sup>

19. Article 46 of NSL stipulates that the Secretary for Justice (“SJ”) may issue a certificate directing that the case be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of the personal safety of jurors and their family members. These are legitimate grounds for not having a trial by jury. The NSL does not provide that the principle of trial by jury shall not be practised in Hong Kong. Even for cases concerning offence endangering national security, not all of them are to be tried without a jury. Rather, the SJ would issue a direction based on specific circumstances. The reasons for making such provisions are that offences under the NSL such as secession and subversion often involve State secrets, which may be divulged if the cases concerned are tried by jury; the offence of collusion with a foreign country or with external elements to endanger national security involves foreign factors, and hence greater complexity and sometimes involves inter-state relations, rendering trial by jury inappropriate; and the offence of terrorist activities is often an organised crime involving violence, and the personal safety of jurors and their family members may be threatened by terrorist organisations. In order to prevent divulgence of State secrets, properly handle cases involving foreign factors

<sup>4</sup> See *Tong Ying Kit v HKSAR* [2020] HKCFI 2133.

<sup>5</sup> [2020] HKCFI 2133, paras 55 and 64.

<sup>6</sup> See *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208.

and protect the personal safety of jurors and their family members, it is necessary to restrict the use of jury trial in cases concerning offence endangering national security.

20. In cases where the SJ so certifies, the defendant shall be tried in the Court of First Instance by a panel of three judges and, as do defendants in other criminal cases, he is entitled to the right to a fair trial by an independent and impartial tribunal in which the judge is required to give a fully reasoned judgment as well as the right of appeal to a higher tribunal on both conviction and sentence. The procedural safeguards in the laws of the HKSAR continue to apply as required by Article 41 of the NSL.

#### **Process of Adoption of the NSL**

21. As national security concerns the core interests of a State and the fundamental interests of its people, it is always a matter within the purview of the Central Authorities and does not fall within the autonomy enjoyed by HKSAR under the “one country, two systems” principle.

22. The HKSAR has a duty to enact laws for safeguarding national security under Article 23 of the Basic Law but it has failed to do so despite a lapse of 23 years since reunification. Given the political situation in Hong Kong, this task cannot be completed in the foreseeable future, leaving a gap in the security of China that needs to be filled urgently. Meanwhile, protestors have become more violent with growing signs of separatism and terrorism, seriously affecting the lawful rights and interests of Hong Kong residents.

23. It is therefore necessary for the Central Authorities to take immediate steps to introduce measures for safeguarding national security in HKSAR. As the highest organ of State power with authority to oversee the implementation of the Constitution and to decide on the systems to be instituted in HKSAR under Article 62 of the Constitution, the NPC adopted on 28 May 2020 the *Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the HKSAR to Safeguard National Security*, entrusting NPCSC to formulate relevant laws on establishing and improving the legal system and enforcement mechanisms for the HKSAR to safeguard national security, in order to effectively prevent, suppress and impose punishment for secession, subversion, and organising and carrying out terrorist activities, etc. As the NSL is a national law, the legislative process has to be in compliance with the Legislation Law of the PRC.

24. Before adopting the NSL, the NPCSC had, through different channels, gauged the views of the HKSARG and various sectors of the community in Hong Kong. Hence, the NPCSC has fully taken into account the views of HKSAR, including its residents. As there was a pressing need to address the national security threats in HKSAR and by reason of the consensus that the draft law should be introduced soonest, the NSL was passed on 30 June 2020 after the draft law had been considered by NPCSC in two sessions pursuant to Article 30 of the PRC Legislation Law. As a result, the enactment of the NSL underwent a process that is transparent, the views of Hong Kong residents have been taken into account, and the process is in compliance with the Legislation Law.

#### **Item 4**

##### **Cases over which jurisdiction is exercised by the Office for Safeguarding National Security of the CPG in the HKSAR**

25. The mandate of the Office for Safeguarding National Security of the CPG in the HKSAR (“the Office”) is set out in Chapter V of NSL, which includes exercising jurisdiction over cases concerning offences endangering national security under the NSL in the exceptional circumstances specified in Article 55, that is:

- (a) the case is complex due to the involvement of a foreign country or external elements, thus making it difficult for the HKSAR to exercise jurisdiction over the case;
- (b) a serious situation occurs where the HKSARG is unable to effectively enforce the NSL; or
- (c) a major and imminent threat to national security has occurred.

In various countries around the world, national security is within the purview of the Central Authorities and is a matter falling within their “reserved jurisdiction”. Given the “One country, Two systems” principle and their full trust in the HKSAR as well as respect to the independent judicial power (including that of final adjudication) enjoyed by the HKSAR, the Central Authorities authorise the HKSAR to exercise jurisdiction over the vast majority of cases, and only reserve direct jurisdiction to deal with cases concerning offence endangering national security which could not be handled by the HKSAR in very limited specific circumstances. Moreover, very stringent approval procedures must be complied with. This is a significant manifestation of the Central Authorities’ exercise of comprehensive jurisdiction over the HKSAR, is conducive to ensuring that the operation of “One country, Two systems” principle is on the right track, and is both constitutional and lawful.

26. Since the Central Authorities bear the primary and ultimate responsibility for safeguarding national security in the HKSAR, they have reserved jurisdiction and law enforcement powers to deal with cases concerning offence endangering national security in order to safeguard national security. However, only an extremely small number of cases will come under the Office’s jurisdiction, while the vast majority of cases will still be subject to the jurisdiction of the HKSAR. When exercising jurisdiction, the Office must strictly adhere to enforcement procedures. The Central Authorities fully respect the high degree of autonomy enjoyed by the HKSAR.

27. Even in those specific circumstances, a request must first be made by the HKSARG or the Office and then approved by the CPG before the Office may exercise jurisdiction over the case.

28. Article 56 of NSL provides that in exercising jurisdiction over the cases pursuant to Article 55, the Office shall initiate investigation into the case, the Supreme People’s Procuratorate shall designate a prosecuting body to prosecute it, and the Supreme People’s Court shall designate a court to adjudicate it. Article 57 further provides that the Criminal Procedure Law of the PRC and other related national laws shall apply to procedural matters, including those related to criminal investigation, examination and prosecution, trial, and execution of penalty, in respect of those cases, and that the relevant authorities shall exercise powers in accordance with the law.

29. The Criminal Procedure Law contains many procedural safeguards. For example, Article 52 of the Law prohibits the extortion of confessions by torture and the collection of evidence by unlawful means, and prohibits compelling any person to provide evidence that incriminates him. Article 58 of NSL also stipulates that a suspect has the right to retain a lawyer to represent him, a defence lawyer may provide legal assistance to a suspect or defendant, and an arrested person is entitled to a fair trial before a judicial body without undue delay. There is no significant difference between the human rights standards followed by the Office and the relevant national law enforcement and judicial bodies when they exercise jurisdiction over cases concerning offence endangering national security in the three specific circumstances, and those followed by the relevant authorities of the HKSAR when they exercise jurisdiction. Such standards include the prohibition of torture and other cruel or inhuman treatment; no deprivation of liberty except on such grounds and in accordance with such procedure as are established by law; persons charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law; prompt notification of charges brought against a defendant; the provision of adequate time and facilities for the preparation of defence and to communicate with counsel of his own choosing; access to legal assistance; the right to examine witnesses; the provision of free interpretation services; the right not to incriminate oneself; the use of special procedure in the case of juvenile offenders; and a right of appeal. It can be said that, in principle, the laws of Mainland China and the laws of the HKSAR are consistent with the United Nations standards for the protection of human rights in criminal justice.

30. Article 50 of the NSL stipulates clearly that the Office shall perform its mandate in strict compliance with the law and shall not infringe upon the lawful rights and interests of any person. Although the acts performed in the course of duty by the Office and its staff in accordance with the NSL shall not be subject to the jurisdiction of the HKSAR, its staff must abide by the laws of the HKSAR as well as national laws, and are subject to the supervision

of the national supervisory authorities in accordance with law, which is set out in Section 7 of Chapter III of the Constitution.

### **Scope of Application and Extraterritorial Effect**

31. According to Articles 36 to 38 of the NSL, the Law applies to: (a) offences under the NSL which are committed in the HKSAR by any person: an offence is taken to have been committed in the HKSAR if an act constituting the offence or the consequence of the offence occurs in the HKSAR [Art. 36]; (b) a person who is a Hong Kong permanent resident or an incorporated or unincorporated body set up in the HKSAR if the person or the body commits an offence under the NSL outside HKSAR [Art. 37]; and (c) offences under the NSL committed against the HKSAR from outside the HKSAR by a person who is not a Hong Kong permanent resident [Art. 38].

32. The above provisions are based on the following international law principles: (a) the nationality principle – jurisdiction is assumed by virtue of the nationality of the crime perpetrator; (b) the passive personality principle – jurisdiction is prescribed for acts abroad which are harmful to the nationals of the forum state; and (c) the protective principle – jurisdiction is assumed for overseas acts that threaten the integrity or security of the forum state or endanger or undermine its essential government institutions or functions, or public interests.

33. Those provisions are not uncommon in the national security laws of other countries. Although an act committed by a foreigner against the HKSAR outside of China in contravention of the NSL would be caught by Article 38, it is well established that a foreigner who has committed an offence endangering the national security of a particular country is subject to the jurisdiction of that country if and when he enters that country.

### **Meaning of “Collusion with a Foreign Country”**

34. The word “collusion” only appears in the sub-heading of Articles 29 and 30 of the NSL. The elements of the offences constituting the crime of “collusion with a foreign country or with external elements to endanger national security” are set out in the two articles. Under Article 29, a person who steals, spies, obtains with payment, or unlawfully provides State secrets concerning national security for a foreign country shall be guilty of an offence. Further, a person who requests or conspires with a foreign country or receives instructions, control or support from a foreign country to commit any of the following acts shall be guilty of an offence: (a) waging a war against the PRC, or using or threatening to use force to seriously undermine the sovereignty, unification and territorial integrity of the PRC; (b) seriously disrupting the formulation and implementation of laws or policies by the HKSARG or the CPG, which is likely to cause serious consequences; (c) rigging or undermining an election in the HKSAR, which is likely to cause serious consequences; (d) imposing sanctions or blockade, or engaging in other hostile activities against the HKSAR or the PRC; or (e) provoking by unlawful means hatred among Hong Kong residents towards the CPG or the HKSARG, which is likely to cause serious consequences. Whether a person would be guilty of an offence under the NSL shall be decided on the facts, circumstances and evidence available in a particular case.

### **Enforcement**

35. The NSL is mainly enforced by the department for safeguarding national security of the Hong Kong Police Force. Police officers would have to discharge their duties in accordance with the laws of HKSAR.

36. Article 43 of the NSL makes provisions for the measures that the department for safeguarding national security of the Police may take when handling cases concerning offences endangering national security, including existing measures that law enforcement authorities may apply in investigating serious crimes and the seven measures listed in paragraph 1 of Article 43. In July 2020, the CE, in conjunction with the HKSAR Committee on National Security, made seven sets of implementation rules (“the Rules”) pursuant to paragraph 3 of Article 43 for the purpose of applying those measures. Hence, measures that may be applied by the Police have a legal basis either in existing law or in the Rules.



37. The powers provided for in the Rules are generally in line with existing police powers which contain the necessary safeguards. For example, the *Rules Relating to Search of Places for Evidence* require the Police to apply to a magistrate for a search warrant unless it would not be reasonably practicable to obtain a warrant, which is in line with existing legislation such as the Police Force Ordinance (Cap. 232) and relevant case law. Under the *Rules Relating to Restriction on Persons under Investigation from Leaving Hong Kong*, a notice requiring a suspect to surrender his travel documents has to be issued by a magistrate, which is modelled on the Prevention of Bribery Ordinance (Cap. 201). Further, both the *Rules Relating to Freezing, Restraint, Confiscation and Forfeiture of Property* and the *Rules Relating to Requirement to Furnish Information and Produce Materials* make provisions for judicial supervision which are in line with those in the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (“UNATMO”) and the Organized and Serious Crime Ordinance (Cap. 455).

38. No special immunity has been given to the Police. Insofar as the exercise of police powers are concerned, police officers follow the law and their actions may be subject to judicial review or other judicial challenges.

### **The HKSAR Committee on National Security**

39. The HKSAR Committee on National Security is responsible for affairs relating to safeguarding national security in the HKSAR. Its main duties are to formulate policies for safeguarding national security in HKSAR, to advance the development of the legal system and enforcement mechanisms of HKSAR for safeguarding national security, and to coordinate major work and significant operations for safeguarding national security in HKSAR. Although its decisions are not amenable to judicial review, the Committee is under the supervision of and accountable to the CPG. As to whether acts and activities of institutions or individuals executing such decisions are amenable to judicial review, the facts and circumstances of the case have to be taken into account.

### **Local Laws of the HKSAR**

40. The HKSAR has a constitutional duty to implement Article 23 of the Basic Law which provides that the HKSAR shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the CPG, or theft of state secrets, to prohibit foreign political bodies from conducting political activities in the Region, and to prohibit political bodies of the Region from establishing ties with foreign political bodies. The HKSAR also has a duty under the NPC Decision of 28 May 2020 and Article 7 of NSL to complete, as early as possible, legislation for safeguarding national security as stipulated in the Basic Law and to refine relevant laws.

## **Item 5**

41. The Emergency Regulations Ordinance (Cap. 241) (“ERO”) provides that on any occasion which the Chief Executive-in-Council (“CE-in-C”) may consider to be an occasion of emergency or public danger, he may make any regulations whatsoever which he may consider desirable in the public interest. These regulations may or may not derogate from the Hong Kong Bill of Rights (“BOR”).

42. The ERO must be read with section 5 of HKBORO which is underpinned by Article 39 of the Basic Law. Section 5(1) of HKBORO, like Article 4(1) of ICCPR, prescribes two conditions that must be met before measures derogating from BOR may be taken: the situation must amount to a “public emergency which threatens the life of the nation”, and the existence of such emergency must be “officially proclaimed”. Any derogating measures must also be strictly required by the exigencies of the situation, thus reflecting the principle of proportionality. Section 5(2) further provides that derogating measures must not be inconsistent with any obligation under international law that applies to Hong Kong, involve discrimination solely on the prohibited grounds which are the same as those enumerated in Article 4(1) of ICCPR, or derogate from Articles 2, 3, 4(1) and (2), 7, 12, 13 and 15 of BOR which correspond to the non-derogable provisions specified in Article 4(2) of ICCPR.

43. Regulations made under ERO are subsidiary legislation and have to be laid before LegCo for negative vetting in accordance with section 34 of the Interpretation and General Clauses Ordinance (Cap. 1). LegCo may by resolution amend or repeal such regulations. The exercise of power under ERO and emergency regulations is also amenable to judicial review.

44. In December 2020, the CFA in its judgment<sup>7</sup> stemming from a number of judicial review applications upheld the compatibility of the ERO with the Basic Law. The CFA acknowledged that the very nature of the ERO requires the giving of wide and flexible legislative powers to the executive to deal with an occasion of emergency or public danger quickly and adequately. Given the situations concerned are one of emergency or public danger, it should be left to the judgment of the CE-in-C to make regulations which she may consider desirable in the public interest. Such legislative powers are necessary, in particular when the LegCo may not be able to function and respond promptly enough or at all to the occasion of emergency or public danger in terms of passing the requisite legislation. The CFA held that although an occasion of “emergency” or “public danger” is not by nature capable of exhaustive definition, there should be some margin of discretion accorded to the CE-in-C in determining whether an occasion of emergency or public danger exists. Such determination must be a reasonable one in the public law sense, and section 2(1) of the ERO imports a requirement of good faith on the CE-in-C’s part which is judicially reviewable. The ERO is compatible with Article 4 of the ICCPR. We have no plan to amend or repeal the ERO.

## **Item 6**

45. The adoption of the NSL is without prejudice to the HKSAR’s duty under Article 23 of the Basic Law (“BL23”), which stipulates that the HKSAR shall enact laws on its own to prohibit the specified acts that endanger national security. The HKSAR still has the obligation to implement BL23 as soon as possible. Hence, we consider that the offences of treason and sedition and the definition of “foreign political organizations or bodies” should more appropriately be dealt with in the context of the legislative exercise for BL23 when it is launched in future.

46. The definition of “terrorist act” under the UNATMO was modelled on the United Kingdom Terrorism Act 2000. It is in line with the definition in anti-terrorism laws of many jurisdictions. The HKSARG has given due regard to human rights implications throughout the legislative process, and is satisfied that the provisions in UNATMO are consistent with human rights protection under the BOR.

47. There has been no prosecution under UNATMO since enactment. The court only convicts when it is satisfied that the prosecution has proven beyond reasonable doubt that a defendant is guilty of the relevant offence.

## **Item 7**

48. The four anti-discrimination ordinances mentioned protect equal opportunities in respective areas, and are enforced by the EOC, an independent statutory body. Any person subject to discrimination may lodge a complaint to the EOC and undergo conciliation with the EOC’s assistance. If conciliation fails, the aggrieved person may seek assistance from the EOC to make civil claims in court.

49. The Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020, enacted by the LegCo in June 2020, enhances protection from discrimination and harassment under the four anti-discrimination ordinances.

50. The HKBORO prohibits the HKSARG from discriminating a person on the ground of, amongst others, sexual orientation. In respect of private sectors, our society is divided on whether legislation should be introduced to prohibit discrimination on grounds of sexual orientation and gender identity. The HKSARG has reported salient findings on the experience

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<sup>7</sup> See Kwok Wing Hang and Others v Chief Executive in Council and Another [2020] HKCFA 42.

of other jurisdictions in tackling discrimination against sexual minorities to the LegCo, and will be engaging stakeholders to consider anti-discrimination proposals suitable for Hong Kong in the light of the findings.

### **Application of Race Discrimination Ordinance (“RDO”) to Government and Public Authorities**

51. The HKSARG and public authorities have always been prohibited from practising racial discrimination under the HKSAR’s legal framework. The HKBORO prohibits the Government and public authorities from discrimination on a wide range of grounds, including race, colour, descent and national or ethnic origin. The RDO binds the Government and expressly renders it unlawful to discriminate against a person on the ground of race in prescribed areas, including employment, education, provision of goods, facilities or services, and disposal or management of premises. It is also unlawful to racially harass another person in the prescribed areas.

52. The HKSARG will study EOC’s recommendation of bringing all Government functions and powers within the scope of the RDO. Our goal is to inform the public of the way forward within this term of Government.

53. From 2011 to 31 August 2020, the EOC has received 19 complaints under RDO against the Police and the Correctional Services Department (“CSD”). 18 cases were discontinued on the grounds of lacking in substance, no unlawful act was found or the complainants have no desire to pursue further.

## **Item 8**

54. The prevailing marriage system in Hong Kong is based on the institution of monogamy and heterosexual marriage. As there are ongoing judicial proceedings on the matter of same-sex marriage/partnership, it is inappropriate for the HKSARG to respond substantially to the issue. The issue is complex and controversial in nature and various sectors of the community have different opinions towards same-sex marriage.

55. Insofar as the recognition of transgender persons is concerned, the HKSARG’s Inter-departmental Working Group on Gender Recognition (“IWG”) has received more than 18,000 responses to its public consultation referred to in Annex 26D of the periodic report. The responses give divided and opposite views on a whole range of issues from different perspectives. Also, there are ongoing judicial proceedings related to the human rights implications of the HKSARG’s policy that requires sex reassignment surgery (which would deprive reproductive ability) in order to amend the sex entry on a transsexual person’s Hong Kong Permanent Identity Card. The public feedback and the litigation results are important considerations that the HKSARG must take into account in formulating its policy. The HKSARG is fully cognisant that the impact of any reform on the rights and concerns of potential applicants for gender recognition, as well as the wider public, must be carefully and comprehensively considered in going forward.

56. The HKSARG is committed to promoting equal opportunities for people of different sexual orientations and gender identities. The measures outlined in Annex 26C of the periodic report aside, the Government will provide training resources for the Government disciplined services to enhance the frontline officers’ knowledge of and sensitivity to sexual minorities. Please refer to paragraph 50 above on the subject of legislative measures.

57. All arrangements for detainees/persons in custody (“PICs”) are made according to relevant laws and guidelines to ensure that they are treated fairly and properly. Examples of measures taken by law enforcement agencies (“LEAs”) are set out below-

### **Immigration Department (“ImmD”)**

58. If the detainee claims to have undergone surgical operation to modify his/her body feature and sexual organs to the opposite sex and requests a male or female officer to conduct body search, the request will be met with written consent secured from the detainee/person in custody. An officer of the same sex as the searching officer will be present as witness.

**Correctional Services Department**

59. Single accommodation may be arranged for PICs with homosexual or transgender orientation at night. The CSD sets up the Transgender Unit specifically to cater for the special needs of transgender PICs, and to ensure fair treatment in compliance with the law.

**Hong Kong Police Force**

60. Police officers will search detained persons with special needs (including transgender persons) in a practical and reasonable manner having due regard to dignity and privacy with a witnessing officer present for each search. The Police endeavours to adopt the principle of single-cell occupancy when handling detained persons with special needs.

**Customs and Excise Department (“C&ED”)**

61. Customs officers will conduct body search on a detained person (including a transgender person) in a practical and reasonable manner having due regard to privacy. The C&ED endeavours to apply the principle of single-cell occupancy for detained persons.

**Item 9**

62. The Social Welfare Department (“SWD”) or subvented NGOs provide a wide range of preventive, supportive and specialised services, including family and child protective services, refuge centres for women, family crisis support services, multi-purpose crisis intervention and support services, for victims of domestic violence and families in need. From January 2010 to June 2020, the court had granted a total of 352 injunctions under the Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189), which may contain a provision requiring the abuser to attend mandatory programmes, with a view to changing the abuser’s attitude and behaviour.

63. The Police investigate child abuse cases through multi-agency approach and assist in formulating welfare plans for victimised children. Frontline officers are reminded to accord top priority to the safety and welfare of victims and their children by conducting risk assessment and considering the need to make referral to the SWD. The scene of every domestic violence report is attended by a police officer of the rank of Sergeant or above and serious domestic violence cases are investigated by designated crime teams.

64. When handling domestic violence cases with an injunction granted under the Domestic and Cohabitation Relationship Violence Ordinance, and is accompanied by an “Authorization of Arrest”, the Police may enter the premises to execute the authorization and arrest any person who is reasonably suspected of breaching the injunction.

**Item 10**

65. It is the statutory duties of the Police to take lawful measures for preserving the public peace, preventing and detecting crimes and offences, preserving public order, as well as safeguarding people’s life and property.

66. The Police have clear guidelines on the use of force which are consistent with the international human rights norms and standards. Police officers may use minimum force as appropriate only when such an action is necessary and there are no other means to accomplish lawful duties. Before force is used, police officers shall, where circumstances permit, give warnings to the gathering crowd and give the person(s) involved every opportunity, whenever practicable, to obey police orders prior to the use of force. Once the purpose for which the force is used has been achieved, the use of force shall cease.

67. There has been no case or arrest under the Crimes (Torture) Ordinance (Cap. 427) since the submission of previous report in 2011.

68. On 12 November 2019, some radical protestors set barricades and obstructed the major thoroughfares near the City University of Hong Kong. Some even threw bricks and hard objects from height, posing severe threat to public order and public safety. Upon

repeated warnings, the Police took actions (including the use of rubber baton rounds) to disperse rioters.

69. The Police will, in light of the prevailing circumstances, make assessments and exercise professional judgment to take appropriate actions, including using the minimum force as necessary, to ensure public safety and public order.

## **Item 11**

70. The two-tier police complaints mechanism operates effectively under the Independent Police Complaints Council (“IPCC”) Ordinance (Cap. 604). When the Complaints Against Police Office (“CAPO”), the operation of which is independent of other Police units, has completed the investigation of reportable complaint, it must submit a detailed investigation report for the scrutiny of IPCC. If the IPCC, an independent statutory body, considers that there is any deficiency in the CAPO’s handling and investigation, it may request the CAPO to make clarification or further investigation.

71. In 2017-19, the IPCC endorsed the investigation results for 3 144 cases involving 5 338 allegations. Among the 1 867 queries raised by the IPCC to the CAPO, 662 queries were about the classification of investigation results and consequently, the investigation results of 360 allegations were reclassified. In 2017-19, disciplinary proceedings or internal actions were taken against 212 defaulting police officers. The IPCC Observers also monitor the CAPO’s investigation, by attending any interviews or observing collection of evidence in connection with the CAPO’s investigation of reportable complaints on a scheduled or surprise basis to ensure that these processes are conducted fairly and impartially. In 2017-19, the IPCC observers conducted 3 873 observations.

72. The Police regularly review their guidelines and orders on the use of force with due regard to the principles of proportionality and necessity. The use of force by the Police must be lawful and the degree of force used should be proportionate and necessary having regard to the circumstances of the case.

73. The IPCC has published in May 2020 the “Thematic Study Report on the Public Order Events arising from the Fugitive Offenders Bill since June 2019 and the Police Actions in Response”, which sets out the IPCC’s detailed review on the large-scale public order events and the corresponding Police actions since June 2019, as well as recommendations in improving Police practices and procedures made in accordance with the IPCC Ordinance. The IPCC has made recommendations regarding the use of force.

74. A Task Force has been established to follow up the IPCC’s recommendations. It will regularly submit work progress reports to the CE.

75. The Police have put in place guidelines governing the production of warrant cards. In general, uniformed police officers on duty would display their unique identification numbers or identifiable operational call signs. When plainclothes police officers deal with the public and exercise police powers, they would identify themselves and produce warrant cards.

76. Every arrested person will, as soon as possible, be informed that he/she is under arrest and the reasons for the arrest. A notice listing the rights of a detained person will also be served on each and every detained person.

## **Item 12**

### **Deaths in custody**

77. Updated information on the deaths in custody is as follows -

(a) in 2019, a person died while in custody of the ImmD. The case is currently being investigated by the Police and inquest into the death is yet to be held by coroner with a jury.

(b) between 2011 and 2019, 126 persons died in the custody of the CSD. As at June 2020, the Coroner’s judgment for 19 cases (out of the above 126 cases) were still

pending. The CSD had studied the judgements and recommendations of the Coroner and followed up as appropriate. Besides, the CSD would analyse the self-harm cases of PICs with a view to improving the relevant preventive and management strategy.

(c) between 2011 and 2019, 20 died in the custody of the Police. The Coroner has examined 19 cases. None of them was found to be caused by unlawful killing. Six of the deceased were found to have committed suicide, seven to have died by natural causes, three by accident, two related to drugs and one was concluded as an open verdict case. The remaining one is pending the Coroner's inquest. The Police have also been continuously upgrading the detention facilities to eliminate potential danger points.

(d) in 2017, an arrested person was found sick and then lost consciousness while in custody of the C&ED. Certified dead afterwards, the person was found to have died by natural causes at Coroner's inquest.

78. For the CSD, PICs who feel aggrieved at their treatments may lodge complaints via various channels. Between 2011 and 2019, there were 246 cases relevant to ill treatment or torture of PICs, including "use of unnecessary force" (129 cases), "abuse of authority" (103 cases), and "grievance on Institutional policy / procedure" (14 cases), all entailing investigation by the CSD's Complaints Investigation Unit. Among these cases, 4 were eventually found substantiated. The CSD had followed up on the investigation results and relevant recommendations.

79. For the ImmD, the CAPO and the C&ED, no torture or ill treatment complaints have been received.

80. The complaint mechanisms for persons in places of detention and the measures taken to mitigate COVID-19 are listed at Annex.

### **Item 13**

81. The Immigration Ordinance (Cap. 115) empowers the ImmD to detain a person pending removal and during screening of non-refoulement claim. The ImmD exercises the detention powers and determines each case in accordance with detention policies formulated according to relevant legal principles established by the court, and taking into account the relevant factors and circumstances of the particular case. Regular and timely review will be conducted to determine whether an individual should be released or further detained, and will notify the person the results with justifications. Any detainee dissatisfied with the decision has the right to access to the courts.

82. Non-refoulement claimants are illegal immigrants, overstayers or persons who were refused entry upon arrival in Hong Kong. They have no legal status to remain in Hong Kong. A child whose parents are non-refoulement claimants cannot obtain permanent resident status or lawful stay by virtue of his/her birth in Hong Kong.

83. Non-refoulement claimants have no right to work in Hong Kong. In February 2014, the CFA upheld that substantiated claimants and mandated refugees recognised by the United Nations High Commissioner for Refugees ("UNHCR") have no constitutional or legal rights to work in Hong Kong. Nevertheless, the Director of Immigration may exercise his discretion exceptionally to consider, on a case-by-case basis, an application for permission to take employment or establish or join a business.

84. In 2016, the HKSARG launched a comprehensive review of the strategy for handling non-refoulement claims, including putting forward proposals for further amending the Immigration Ordinance to improve the screening procedures for non-refoulement claims and related matters. The Government has consulted the LegCo on the proposed amendments, and exchanged views with relevant stakeholders.

85. The HKSARG has been handling matters of right of abode and split families in accordance with the Basic Law, the HKBORO, and relevant local legislation and policies, which are consistent with the ICCPR provisions as applied to Hong Kong. The latter does not impose an obligation on the HKSARG to grant persons not having the right to enter and remain in Hong Kong (including non-refoulement claimants) or persons not satisfying the

requirement of relevant immigration policies the permission to remain in Hong Kong for reunion with their family members.

#### **Item 14**

86. The Unified Screening Mechanism (“USM”), the procedures of which are published on the ImmD’s website, was established following court decisions, ensuring that claimants would have every reasonable opportunity to substantiate their claims with sufficient procedural safeguards. Each claimant is also provided with publicly-funded legal assistance and professional interpretation services. Claimants aggrieved by the ImmD’s decision may lodge an appeal without any merits test, and the appeals are considered by an independent Torture Claims Appeal Board or the Non-refoulement Claims Petition Office (collectively “TCAB”). Whether a claim is substantiated or not depends entirely on the particular facts and merits of the case. The low substantiation rate reflects that most of the claimants in Hong Kong do not have sufficient justifications to substantiate their claims.

87. The TCAB must observe strict confidentiality and the publications of appeal decisions may potentially put the claimants or their families in grave danger, even if the decisions are anonymised. The proposal of publishing the TCAB decisions must be carefully considered.

88. Case officers have received training courses on non-refoulement claims conducted by relevant experts, covering topics such as the Istanbul Protocol, the UNHCR Procedural Standards, psychological evidence of violence, and handling of survivors of violence and minors with special needs, hence ensuring all case officers are well trained to attend to the special needs of vulnerable claimants as necessary.

#### **Item 15**

89. Given the liberal visa regime and the unique circumstances of Hong Kong, the HKSARG is mindful of the adverse implications to our effective immigration controls and possible abuses by overstayers and illegal migrants if the Palermo Protocol, in particular the provision to permit victims of trafficking-in-persons (“TIP”) to remain in the territory, is applied to the HKSAR. We have no plan to extend the Palermo Protocol to the HKSAR.

90. Hong Kong has all along been making proactive, and multi-pronged efforts to combat TIP. In March 2018, the HKSARG established a Committee, chaired by the Chief Secretary for Administration, to provide high-level policy steer on actions against TIP. The Committee swiftly promulgated an Action Plan, comprising 14 new and 20 on-going measures which cover victim identification, investigation, enforcement, prosecution, victim protection and support, prevention and partnership building with different stakeholders. By end-2019, the Action Plan was fully implemented, with all initiatives firmly in place.

91. Hong Kong has a well-established legal framework to tackle different aspects of TIP. There are over 50 legal provisions against various TIP conducts that form a comprehensive package of safeguards comparable to composite TIP laws found in other jurisdictions. Some of the offences attract penalty of up to life imprisonment.

92. Induction and specialised trainings are provided to frontline law enforcement and judicial officers to enhance their awareness, sensitivities and skills on handling TIP cases. Between 2017 and 2019, over 5 500 government officials have received local / overseas anti-TIP training.

93. Between 2017 and 2019, nearly 20 000 initial TIP victim screenings (4 710 in 2017, 7 554 in 2018 and 7 576 in 2019) were conducted by the LEAs and the Labour Department (“LD”), with only 30 victims of TIP (9 in 2017, 18 in 2018 and 3 in 2019) identified. The small number and percentage of victims reinforce our observation all along that TIP has never been a prevalent problem in Hong Kong. There is also no case involving public officials as perpetrators or accomplices.

94. As a general guiding principle, prosecutors are mandated to give due consideration to any TIP elements that may feature in any given case when deciding whether prosecution

should be instigated or continued. In appropriate cases, a witness may be granted immunity from prosecution, having regard to the established legal principles and the guidelines under the Prosecution Code. Over the past years, the Department of Justice has granted immunities to suspected TIP victims and exploited foreign domestic helpers (“FDHs”) in various cases to facilitate them to testify against their perpetrators in court.

95. The ImmD, the Police and the C&ED have been implementing a TIP victim screening mechanism. The LD also implemented the initial screening mechanism at its 10 Labour Relations branch offices across the territory in December 2019.

96. Since 2018, the LD has stepped up inspection and enforcement against employment agencies (“EAs”). The publication of conviction or warning records of EAs on the dedicated EA Portal since October 2018 enables employers and job-seekers, including FDHs, to make more informed decisions. In December 2018, the LD launched a dedicated 24-hour hotline to provide one-stop support for FDHs in making enquiries and seeking advice on their employment rights and obligations. Interpretation service is provided in seven FDH native languages.

97. In December 2019, the ImmD set up a new dedicated team to step up the checking of FDH visa applications, so as to facilitate the early identification of potential TIP victims and exploitation of FDHs.

98. The HKSARG will continue to provide necessary protection and suitable assistance (e.g. witness protection programme, shelter, medical services, psychological support and counselling, financial assistance, legal support, visa extension fee waiver, etc.) to victims in need, as well as support for them to act as witness in legal proceedings and facilitation for their return to their home country.

## **Item 16**

99. The HKSARG does not tolerate any exploitation or abuse of FDHs.

100. FDHs enjoy the same employment rights and protection as local workers under Hong Kong laws. They are further protected by a government-prescribed Standard Employment Contract which sets out the basic employment benefits that employers must provide to FDHs, including free accommodation, free food (or food allowance in lieu) and free medical treatment. Employers who fail to meet their statutory or contractual obligations may be prosecuted or given an adverse record.

101. The HKSARG proactively organises publicity activities to enhance FDHs’ awareness to their employment rights and available assistance channels. FDHs may make enquiries or lodge complaints through a dedicated 24-hour hotline or the LD branch offices.

102. In parallel, ImmD has also taken active steps to enable early identification of potential TIP victims (see para. 97 above).

103. On regulation of EAs, the Employment (Amendment) Ordinance 2018 has substantially raised the maximum penalties for the offences of EAs overcharging job-seekers and unlicensed operation from a fine of HK\$50,000 to a fine of HK\$350,000 and imprisonment for three years.

104. Furthermore, the Code of Practice for EAs sets out various requirements for operating EAs, including the requirement that EAs should not be involved in the financial affairs of job-seekers or arrange them to take up loans. Violation of the Code may lead to revocation of licence or refusal to issue/renew licence.

105. Applications for EA licence/licence renewal from persons with conviction records under the Employment Ordinance or history of non-compliance with the Code may be refused. Records on the operator, management and staff employed will be checked to prevent persons who are not fit and proper persons from operating EAs again through their associates.

106. According to the Immigration Ordinance, a person shall not be treated as ordinarily resident in Hong Kong during any period in which he remains in Hong Kong while employed as a domestic helper or contract worker who is from outside Hong Kong. As such, they cannot



fulfil the requirement as stipulated under the Immigration Ordinance for becoming a Hong Kong permanent resident, i.e. having ordinarily resided in Hong Kong for a continuous period of not less than seven years.

### **Item 17**

107. The independence of the judiciary is guaranteed under the Basic Law. The courts shall exercise judicial power independently, free from any interference. Judges and Judicial Officers (“JJOs”) shall be immune from legal action in the performance of judicial functions. Judges enjoy security of tenure and may only be removed for inability to discharge duties, or for misbehavior. JJOs must take judicial oaths and swear to safeguard the law. JJOs are required to reject any extraneous attempt to influence them and, if appropriate, report any such attempt to the Court Leader for any necessary action.

108. The financial eligibility limits for legal aid have been significantly increased by over 30% in June 2020.

109. Having examined the institutional, financial, operational and governance dimensions of the Legal Aid Department (“LAD”), the Legal Aid Services Council considered that there is no immediate need to establish an independent legal aid authority and LAD should remain a government department. The HKSARG has no plan to establish an independent legal aid authority.

### **Item 18**

110. The Interception of Communications and Surveillance Ordinance (ICSO) (Cap. 589) provides a statutory framework to regulate LEAs’ interception of communications and covert surveillance for prevention and detection of serious crimes and protection of public security. Operations authorised under the ICSO are sensitive and confidential, and are subject to the stringent safeguards provided under the ICSO.

111. A Code of Practice (“CoP”)<sup>8</sup> is issued pursuant to section 63 of the ICSO to provide practical guidance to officers of departments concerned. The CoP provides guidelines and illustrative examples in relation to the conditions for authorisation for interception of communications and surveillance.

112. Under the ICSO, authorisation for Type 2 surveillance (i.e. surveillance less intrusive to the privacy of the subject) can be issued by an authorising officer of a law enforcement agency. “Surveillance device” is defined in section 2 of the ICSO. Any protected product obtained pursuant to any authorisation under the ICSO are protected by the various safeguards stipulated in section 59 of the ICSO.

113. LEAs’ compliance with relevant requirements of the ICSO are subject to the reviews by an independent oversight authority (the Commissioner of Interception and Covert Surveillance), with an independent mechanism for handling complaints against unlawful interception of communications or covert surveillance. The CoP also requires heads of the LEAs to designate a reviewing officer to keep under review the performance by the authorizing officers of any function under the ICSO.

114. No executive authorisation was issued in 2018 and three executive authorisations were issued in 2019.

### **Item 19**

115. The Registration and Electoral Office (“REO”) has implemented a series of measures to ensure that personal data of electors are well protected in the light of the incident during the 2017 CE Election. On handling of personal data, the REO has updated its internal

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<sup>8</sup> The CoP can be accessed from the link below -  
[https://www.sb.gov.hk/eng/special/sciocs/2016/ICSO%20CoP%20-%20June%202016%20\(E\).pdf](https://www.sb.gov.hk/eng/special/sciocs/2016/ICSO%20CoP%20-%20June%202016%20(E).pdf)

guidelines and procedures which are circulated among staff on a regular basis. Briefing sessions for staff are arranged before every major election to enhance their awareness on personal data protection. The REO also ensures that its IT systems are in compliance with the latest requirements of the Government's IT security policies, procedures and guidelines. As for the general security of election venues, the REO formulates venue security plan for each election and consults different parties to put in place the necessary security arrangements.

116. The PCPD has also stepped up its education and promotion efforts. For example, in 2019, over 420 professional workshops, talks, seminars and stakeholders' meetings were conducted; and a number of guidance publications were issued or updated.

117. Between August 2017 and July 2020, the PCPD received a total of 15 157 complaints and disposed of 14 592 cases. In the same period, 167 complaints received were made against law enforcement officials and 150 cases have been completed, in which 77 cases were screened out (e.g. no prima facie cases, anonymous cases and withdrawn cases). For the remaining 73 cases, they were screened in for more detailed handling. For these 73 cases, they were resolved through, e.g. successful conciliation or investigating further. Some were also withdrawn at some stage. No enforcement notice was issued in respect of such cases. The PCPD issued a total of 44 warnings, 5 enforcement notices and referred 1 600 cases of suspected offences to the Police for investigation and consideration of prosecution.

118. In the course of carrying out their duties, LEAs may exercise the search and seizure powers conferred by the relevant legislation, and seize and examine various objects (including mobile phones or other similar devices) in connection with the suspected offence.

119. According to a judgment handed down by the Hong Kong Court of Appeal, when it is not reasonably practicable to obtain a warrant before a digital content search of a mobile phone is conducted, the police officer may, upon a reasonable belief that the conduct of an immediate search is necessary for the purpose of investigation of the offences or protection of the safety of persons, conduct the search immediately which is limited to what is reasonably believed to be directly and immediately relevant to the offence(s), the subject of the arrest. The Police have all along adhered to the applicable laws and legal principles.

## **Item 20**

120. During the social unrest commencing June 2019, there were numerous cases of assaults, illegal doxxing and cyber harassment, etc., the victims of which came from all walks of life (including police officers and their family members).

121. The Police do not maintain a breakdown of victims in crime cases by their occupation. Victims of crimes are encouraged to make a report to the Police. The Police handle all cases in a fair and impartial manner in accordance with the law, irrespective of the background, affiliation, political stance and occupation of the persons involved.

122. The HKSARG is firmly committed to protecting and respecting the freedom of the press, which is a fundamental right guaranteed by the Basic Law. The Government is also committed to maintaining a facilitative environment for the media to report news and perform its role as a watchdog over public affairs. The Government does not interfere with the editorial work of media organisations and does not exercise censorship in traditional media or over the internet.

123. In general, unless a person has the right of abode or right to land in Hong Kong, the person requires a visa or entry permit to come to work in Hong Kong.

124. Hong Kong has always adopted a pragmatic and open policy on the employment of professionals in Hong Kong, allowing those possessing special skills, knowledge or experience of value to work in the city, including journalistic work. In handling each entry or stay extension, the ImmD will consider the circumstances of the case and act in accordance with the laws and immigration policies.

125. If there is any suspected contravention of the law, the relevant authorities will deal with it according to the laws in force and the evidence gathered from investigation.

## Item 21

126. Currently, under the Broadcasting Ordinance (Cap. 562) and the Telecommunications Ordinance (Cap. 106), domestic free and pay television and sound broadcasting services are subject to cross-media ownership and foreign control restrictions. Specifically, persons or companies engaged in or associated with certain types of media business are not allowed to hold a licence, or exercise control of such a licensee, unless the CE-in-C approves otherwise. As for foreign control restrictions, the regulatory regime is formulated on the basis of residency requirement on a licensee, its directors and/or principal officers, with restrictions imposed on voting control of a licensee by non-Hong Kong residents.

127. The HKSARG has completed a legislative exercise to remove out-dated regulatory requirements to further promote our local broadcasting industry. While keeping the overall regulatory framework intact, it relaxes restrictions concerning individual and corporate ownership, cross-media ownership and foreign control over the local licensed broadcasters.

128. As an open and accountable government, it is the HKSARG's policy to make available to the public as much information as possible so that the public can better understand how the Government formulates and implements policy, and can monitor its performance more effectively. The current Code on Access to Information manifests the openness and accountability of the Government. The Access to Information Sub-committee of the Law Reform Commission of Hong Kong ("LRC") published a consultation paper on Access to Information in December 2018. The public consultation period was scheduled to end in March 2019, but extensions were granted to respondents who made reasonable requests for such. After analysing the views collected from the consultation exercise, the Sub-committee will finalise its reform proposals for consideration by the LRC. The Government will examine in detail the recommendations and consider how to further improve the access to information regime after receiving the report from LRC.

## Item 22

129. Academic freedom is protected by Article 137 of the Basic Law. The HKSARG attaches great importance to upholding academic freedom and institutional autonomy.

130. According to the Notes on Procedures of the University Grants Committee (UGC), universities enjoy a high degree of institutional autonomy. Funding for UGC-funded universities is determined in accordance with the established mechanism, and universities can decide how to make the best use of resources. Neither the government nor the UGC specifies how they allocate and deploy their resources internally.

131. The Government makes appointments to university councils on a merit and ad personam basis, having regard to the strategic directions and development needs of the universities concerned and also the needs of the higher education development of the HKSAR.

### National Anthem Ordinance

132. The principal objective of the National Anthem Ordinance ("NAO"), effective since 12 June 2020, is to preserve the dignity of and promote respect for the national anthem, which is the symbol and sign of the PRC, and provide guidance on the standard, etiquette, and occasions for playing and singing of the national anthem. The NAO is in conformity with the Basic Law and does not unjustifiably restrict the freedom of speech, and freedom of association, of assembly, of procession and of demonstration protected under the ICCPR, given the constitutional importance of the national anthem and the HKSAR's constitutional duty to implement the National Anthem Law of the PRC faithfully.

133. The NAO prohibits misuse of the national anthem, its lyrics or score as well as acts in public with intent to insult the national anthem. Commission of the proscribed acts amount to offences under the NAO is punishable with a fine up to level 5 (i.e. HK\$50,000) and to imprisonment for three years upon conviction. So far, as of end September 2020, no prosecution has been made under NAO.

**Item 23**

134. Under the Basic Law, Hong Kong residents have the rights and freedoms of assembly and procession. These rights are not absolute, and may be subject to restrictions as prescribed by law and are necessary in the interests of, for example, public safety and public order. The provisions of the Public Order Ordinance (Cap. 245) (“POO”) are consistent with the ICCPR.

135. The HKSARG respects the people’s rights to assembly and procession, and has always appealed to the public to conduct these activities in a peaceful and orderly manner. If anyone is suspected of breaching the law, the Police are duty bound to take appropriate actions. The Government currently has no plans to amend the POO.

136. Upon receipt of a notification of a public order event under the POO, the Police will carefully consider various factors before making a professional assessment. The Commissioner of Police (“CoP”) can impose condition(s) that are reasonable and proportionate in the interest of national security, public safety, public order or protection of rights and freedom of others. Organisers may appeal to the statutory Appeal Board on Public Meetings and Processions.

137. The Police would only make an arrest based on evidence and in accordance with the law. Unless there is a reasonable prospect of conviction, no prosecution should be commenced or continued.

138. The time required to process a criminal case from commencement of investigation to institution of prosecution varies and depends on a number of factors, including the nature and complexity of the case, evidence to be handled, duration for seeking legal advice and whether further follow-up is necessary pursuant to the legal advice, etc.

139. The nine defendants who assumed a leading role in the “Illegal Occupy Movement” had been convicted in April and June 2019. Four were sentenced to imprisonment from 8 to 16 months, four received suspended sentence and one was placed under a community service order. Judicial proceedings are on-going.

**Item 24**

140. Under the POO, the CoP may prohibit or object the holding of public meeting or public processions notified where he reasonably considers such prohibition or objection to be necessary in the interests of national security, public safety, public order or the protection of the rights and freedoms of others if the said public interests cannot be met by imposition of suitable conditions under the Ordinance. Upon receipt of a notification, the Police will carefully consider various factors (including the views of the organiser and other stakeholders).

141. Organisers may appeal to the statutory Appeal Board on Public Meetings and Procession. Any further challenge to the Appeal Board’s decision can be made by way of judicial review.

142. The Prohibition of Face Covering Regulation (Cap. 241K) (“PCFR”) aimed to deter masked rioters from committing violent, illegal acts under hidden identity, and to facilitate the Police’s enforcement and investigation. This measure was introduced in light of the escalating illegal and violent acts of the masked protesters in late September and early October 2019 which resulted in extensive and serious public danger. In December 2020, the CFA held that although the PCFR restricted the freedom of assembly, freedom of speech and right to privacy, which were protected rights under the Basic Law and BOR, these rights were not absolute rights and were subject to lawful restrictions including the interests of public safety, public order and the protection of the rights of others. The CFA further held that the prohibitions in the PCFR on the use of facial coverings at unlawful assemblies, unauthorised assemblies, public meetings and public processions were directed to, amongst others, the legitimate aim of the prevention and deterrence of deterioration of peaceful public gathering into violence. These restrictions were no more than reasonably necessary and struck a fair

balance between the rights of individuals and the societal benefits of the encroachment into those rights.<sup>9</sup>

143. From 9 June 2019 to 31 October 2020, the Police have arrested 10 148 persons in total in relation to the incidents relating to the anti-extradition bill. As at 31 October 2020, 2 336 arrestees had undergone or are undergoing judicial proceedings. The prosecuted offences included taking part in riot, unlawful assembly, wounding and serious assault, arson, criminal damage, assaulting a police officer, obstructing a police officer in due execution of duty, possession of offensive weapon, etc. Among those prosecuted, 603 persons have to bear legal consequences (including 372 convicted, 226 bound over and 5 subject to a care or protection order), 46 had the charges laid against them withdrawn and 77 acquitted after trial, while the rest are undergoing judicial proceedings.

144. The Police conduct arrest in accordance with the law. Depending on the circumstances of individual cases, the Police will consider laying charges against the arrestee, releasing the arrestee on bail or unconditionally. An arrestee generally will not be detained over 48 hours.

145. The Police arrested the 15 individuals in connection with the unauthorised assemblies that occurred on 18 August 2019, 31 August 2019, 1 October 2019 and 20 October 2019. All of them have been charged and the legal proceedings are on-going. The offences include “incitement to knowingly take part in an unauthorized assembly”, “making an announcement of an unauthorized public procession”, “organizing an unauthorized assembly” and “knowingly taking part in an unauthorized public assembly”. All the arrests were made based on evidence and strictly in accordance with the laws.

## Item 25

146. To disperse violent crowd and facilitate the Police in identifying the suspects, the Police may add pepper based solution and coloured water when using the Specialised Crowd Management Vehicles (“SCMVs”). These are non-toxic substances and will not cause bodily harm or pose risks to public health, and can be cleaned by using large amount of water.

147. Over the ten months or so since June 2019, rioters had committed various violent and illegal acts by using different types of lethal weapons, posing serious threats not only to the personal safety of police officers, but also other persons at scene. According to the Police’s guidelines on the use of firearms, under such life-threatening situations, officers may use firearms to protect anyone (including themselves) from the threat of death or serious injury.

148. There were many groundless and malicious accusations against the Police. For example, a female alleged being raped inside a police station while in custody in October 2019. Her allegation was found to be inconsistent with the evidence upon investigation and she was suspected of “Misleading a Police Officer”.

149. In respect of the incident involving a LegCo member, the public procession concerned held on 1 January 2020 ended up with rioters blocking the roads, hurling petrol bombs as well as setting fire in various places. As public safety and public order were endangered, the Police had to end the procession and disperse the crowd. Among the crowd, a male (later known to be a LegCo member) refused to return to the pavement as ordered and obstructed the Police’s operation. After repeated warnings, police officers used the minimum necessary force (i.e. pepper spray) to effect the dispersal operation.

150. During the protests in July to November 2019, the CAPO has received: (a) three reportable complaints concerning the use of SCMVs; (b) no reportable complaint concerning the use of live ammunition as warning shots; (c) 94 reportable complaints concerning assault (and no reportable complaint concerning sexual assault); and (d) a reportable complaint from the LegCo member relating to the said incident.

151. The CAPO handles each complaint investigation with impartiality and fairness. Upon completion of complaint investigation of each reportable complaint, the CAPO will submit the investigation report to the IPCC for examination.

<sup>9</sup> See Kwok Wing Hang and Others v Chief Executive in Council and Another [2020] HKCFA 42.

152. The Police have a statutory duty to maintain public safety and public order. When violent and illegal acts occur, the Police must take appropriate actions. The Police conduct arrest in accordance with the law, irrespective of the person's status, occupation or background.

153. All arrested persons would be brought before the Duty Officer who has the duty to ensure that the arrest and detention of any person are lawful and to fulfil the duty of care owed to them. A detained person or his/her representative could lodge a complaint to the Duty Officer or to the CAPO directly.

## **Item 26**

154. Under the Societies Ordinance (Cap. 151), a local society must apply to the Societies Officer for registration or exemption from registration within one month of its establishment. The Societies Officer may, after consultation with the Secretary for Security, refuse or cancel the registration of a society or exempt a society from registration if (a) he reasonably believes that the refusal or cancellation is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others; or (b) the society is a political body that has a connection with a foreign political organisation or a political organisation of Taiwan.

155. A society which is aggrieved by the decision of the Societies Officer may appeal to the CE-in-C, which may confirm, vary or reverse the decision. CE-in-C's decisions are amenable to judicial review.

156. According to the NSL, "national security" means the safeguarding of the sovereignty, unification and territorial integrity of the PRC; according to the Societies Ordinance, the expression of "protection of rights and freedoms of others" is interpreted in the same way as under the ICCPR as applied to Hong Kong.

157. The Registry of Trade Unions of the LD received a marked increase in the number of union registration applications during December 2019 to early May 2020. To cope with the increase in applications, the LD has redeployed additional manpower since early 2020.

## **Item 27**

158. Universal suffrage for selecting the CE and electing all LegCo members is enshrined as an ultimate aim in the Basic Law, which stipulates that "the method for selecting the CE shall be specified in the light of the actual situation in HKSAR and in accordance with the principle of gradual and orderly progress". To achieve this aim, the community needs to engage in dialogues, premised on the legal basis and under a collaborative atmosphere with mutual trust, with a view to narrowing differences. The HKSARG will assess the situation carefully to take forward constitutional development in accordance with the Basic Law and the relevant Interpretation and Decisions of the NPCSC.

159. Article 26 of the Basic Law stipulates that "Permanent residents of the HKSAR shall have the right to vote and the right to stand for election in accordance with law". The HKSARG respects and safeguards the rights enjoyed by Hong Kong residents according to law while at the same time, the HKSARG has a duty to implement and uphold the Basic Law and to ensure that all elections will be conducted in accordance with the Basic Law and relevant electoral laws.

160. Regarding the nomination procedure of LegCo elections and District Councils ("DC") elections, in accordance with the relevant laws, a person is not validly nominated as a candidate for the election unless he/she, as part of the statutory nomination procedure, makes a declaration in the nomination form to the effect that he/she will uphold the Basic Law and pledge allegiance to the HKSAR. Whether a candidate's nomination is valid or not is determined by the Returning Officer ("RO") according to the legal requirements and relevant procedures. If the RO decides that a nomination form or the nomination of a candidate is invalid, that Officer must endorse on the nomination form the decision and the reasons for it for public inspection.

161. Whether a candidate's nomination in a LegCo or DC election is valid or not is to be determined by the RO (not by the Electoral Affairs Commission) as stipulated under the law. In the judgements in connection with four election petitions arising from the 2016 LegCo General Election, 2018 LegCo By-election, and 2018 LegCo Kowloon West Geographical Constituency By-election<sup>10</sup>, the CFI confirmed that the RO has the power to determine whether the declaration made by a person seeking candidature in the nomination form that he/she will uphold the Basic Law and pledge allegiance to the HKSAR is genuine, in order to decide whether the relevant nomination is valid.

162. Upholding the Basic Law is a basic legal duty of a legislator and a DC member. If a person advocates or promotes self-determination or independence by any means, it is a direct affront to Article 1 of the Basic Law which states that the HKSAR is an inalienable part of the PRC. The person cannot genuinely uphold the Basic Law or fulfil his/her duties as a legislator or a DC member. The decisions made by ROs in the public elections referred to in the Committee's concluding observation aimed to ensure that the elections were held in strict accordance with the Basic Law and other applicable laws in an open, honest and fair manner.

163. Any prospective candidates who disagree with the decision of a RO may lodge an election petition in accordance with section 61 of the LCO or section 49 of the DCO.

### **2019 Rural Ordinary Election**

164. The RO made the decision that a candidate for the 2019 Rural Ordinary Election was not validly nominated because the candidate did not comply with section 24 of the Rural Representative Election Ordinance (Cap. 576)<sup>11</sup>.

165. Women in Hong Kong enjoy equal rights as men to vote and to stand for elections, including LegCo elections for functional constituencies ("FCs"). Under the relevant legislation, a person's gender is not a criterion, either direct or indirect, to qualify a person as an elector or a candidate in elections, including FCs elections. Indeed, a total of 129 548 female electors have registered in the 28 traditional FCs under the 2020 Final Register, making up 56% of total registered electors, whereas a total of 2.18 million female electors have registered in the DC(second)FC under the 2020 Final Register, making up 52% of total registered electors. There is no evidence that the elections for the FCs have put female candidates in a disadvantaged position.

166. Regarding the right to vote and stand for election of ethnic minorities, the relevant legislation on eligibility of a person to be nominated as a candidate in the CE, LegCo and DC elections make no specific reference to the race, colour, lineage, nationality or ethnic group required for a candidate.

<sup>10</sup> The four judgements are -

Chan Ho-tin v. Lo Ying-ki Alan (Returning Officer for New Territories West Geographical Constituency) and others (HCAL 162/2016)

Chow Ting v. Teng Yu-yan Anne (Returning Officer for Hong Kong Island Geographical Constituency) and Au Nok-hin (HCAL 804/2018)

Lau Wing-hong v. Chan Yuen-man Amy (Returning Officer for New Territories East Geographical Constituency) and Fan Gary Kwok-wai (HCAL 844/2018)

Lau Siu-lai v. Kwok Wai-fun Franco (Returning Officer for Kowloon West Geographical Constituency) and Chan Hoi-yan (HCAL 245/2019)

<sup>11</sup> Section 24 provides that "a person is not validly nominated as a candidate for an election for a Rural Area unless the nomination form includes or is accompanied by a declaration, signed by the person, to the effect that the person will uphold the Basic Law and pledge allegiance to the HKSAR."

## **Annex**

### **Complaint Mechanisms**

1. The complaint mechanisms for persons in places of detention are as follows –
  - (a) ImmD - a designated Section is responsible for receiving complaints from the public and monitoring the replies. All investigated complaints are further analysed and reviewed by the Complaints Review Working Party. If detainees have any complaint or question regarding their treatment and live-in arrangement at the detention facilities, they may lodge their complaints through different channels independent of ImmD;
  - (b) CSD - PICs may lodge complaints via various channels, including institutional management, Directorate officers of CSD Headquarters, Complaints Investigation Unit of CSD, LegCo Members, the Ombudsman, statutory bodies, other law enforcement agencies, government bureaux, or visiting JPs, etc.;
  - (c) Police - the CAPO is responsible for handling complaints lodged by members of the public (including PICs). It operates independently from other Police formations to ensure its impartiality; and
  - (d) C&ED - Complaints are handled by the Complaints Investigation Group; and the complaint handling system is monitored by the Complaints Investigation and Assessment Panel and the Complaint Appeals Committee. The former reviews and endorses the findings and recommendations of all public complaint investigations conducted by the Complaints Investigation Group, while the latter handles appeals. Such monitoring mechanism ensures that all public complaints are dealt with impartially and objectively.

### **COVID-19 preventive measures**

2. The LEAs have been in close liaison with the Department of Health to keep abreast of the latest situation of COVID-19 and take preventive measures at detention facilities. For example,
    - (a) ImmD's detention facilities will conduct COVID-19 test for all newly admitted detainees; detainees with symptoms of COVID-19 will be sent to the hospital for further treatment; each detainee will be provided with a surgical mask and have body temperature taken every day, etc;
    - (b) CSD has implemented enhanced hygienic measures for diseases prevention and disinfection measures, including requiring staff members to check body temperatures and wear masks before and when performing duties respectively, enhancing cleaning and disinfection work, making quarantine and notification arrangement, and applying technologies for epidemic prevention, etc.; and
    - (c) The Police has put in place a set of guidelines on infectious disease to protect the detained persons and maintain the environmental hygiene in detention facilities.
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