

Article 1: Defining “torture”

1.1 The position is as explained in paragraphs 1 to 6 of the initial report, where we discussed the definition of “torture” in section 3 of the Crimes (Torture) Ordinance (Cap. 427 of the Laws of Hong Kong)¹.

1.2 In paragraph 5 of the Concluding Observations of 2009 (the previous Concluding Observations), the Committee recommended that “the HKSAR should consider adopting a more inclusive definition of the term “public official” in the definition of torture as to clearly include all acts inflicted by or at the instigation of or with the consent or acquiescence of all public officials or other persons acting in an official capacity”.

1.3 The position is as explained in paragraph 60 of the previous report, where we advised the Committee that, section 2(1) of the Crimes (Torture) Ordinance defines “public official” as *including* “any person holding in Hong Kong an office described in the Schedule”. The Schedule lists the following –

- “1. An office in the Hong Kong Police Force (the Police).
2. An office in the Customs and Excise Department (Customs).
3. An office in the Correctional Services Department (CSD).
4. An office in the Independent Commission Against Corruption (ICAC).
5. An office in the Immigration Department (ImmD).”

1.4 As elaborated in paragraph 61 of the previous report, the aim of the Crimes (Torture) Ordinance is to cover officials normally involved in the custody or treatment of individuals under any form of arrest, detention or imprisonment. The use of the word “includes” in the definition of “public official” in section 2(1) makes it clear that a person not holding an office described in the Schedule may nevertheless be a “public official” (or a “person acting in an official capacity”) for the purposes of the offence of torture.

¹ Cap. 427 gives effect in domestic law to the relevant provisions of the Convention.

1.5 Paragraph 5 of the previous Concluding Observations also recommended that “the HKSAR ensure that the definition comprises all the elements contained in article 1, including discrimination of any kind”. In paragraph 6 of the previous Concluding Observations, the Committee recommended that the HKSAR should consider abolishing the defence contained in section 3(4) of the Crimes (Torture) Ordinance. It proposed that this could be done, for instance, by incorporating Article 1 of the Convention into its Basic Law.

1.6 The Basic Law is the constitutional document of the HKSAR. It is more appropriate to create the offence of torture in a piece of ordinary legislation. The conduct amounting to the offence of torture under section 3(1) of the Crimes (Torture) Ordinance is wide in scope and is not limited by the purpose of the act committed by the perpetrator. Section 3(1) makes it an offence for a public official or a person acting in an official capacity to inflict severe pain or suffering on another person irrespective of its purpose and irrespective of whether the pain or suffering is inflicted for a reason based on discrimination. It would suffice for a person to have inflicted severe pain or suffering on another in the performance or purported performance of his official duties. It is therefore necessary to provide for a defence in section 3(4) by providing that the accused shall have a defence if he can prove that he had lawful authority, justification or excuse for the conduct in respect of which he is charged. The phrase “lawful authority, justification or excuse” is defined in section 3(5) to mean –

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

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

1.7 Our position remains that the provisions of section 3 of the Crimes (Torture) Ordinance are consistent with Article 1.1. The second sentence of Article 1.1 provides that the term “torture” “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”. The defence of lawful authority is intended to cover matters such as the use of reasonable force to restrain a violent prisoner or to treat a patient. It is not intended to cover – nor would the courts be asked to interpret them as authorising – conduct intrinsically equivalent to torture as defined in Article 1.1.