

LCQ 2: Implementation of the International Covenant on Economic, Social and Cultural Rights in Hong Kong

Following is a question by the Hon Lee Cheuk-yan and a reply by the Secretary for Home Affairs, Dr Patrick Ho, in the Legislative Council today (April 6):

Question:

Regarding the implementation of the International Covenant on Economic, Social and Cultural Rights (the Covenant) through the laws of the Hong Kong Special Administrative Region (HKSAR), will the Government inform this Council:

(a) given that, in response to the issues presented by the United Nations Committee on Economic, Social and Cultural Rights (the UN Committee) in May last year, the HKSAR Government stated in September last year that almost all Covenant provisions had been provided for in Hong Kong statutory law, of the Covenant provisions which have not yet been provided for in the laws of Hong Kong and the reasons for that; whether legislation will be enacted to provide for such provisions; and

(b) as the UN Committee recommended in May 2001 that the HKSAR Government should legislate to implement certain provisions of the Covenant, whether the Administration will give effect to such a recommendation?

Reply:

Madam President,

Both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant of Civil and Political Rights (ICCPR) are entrenched at the constitutional level by virtue of Article 39 of Basic Law. Article 39 provides that:

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region..."

The measures undertaken to include the provisions of the ICESCR into the domestic law of

the HKSAR are listed in the Annex to this reply.

As we stated in paragraph 2.3 of our second report under the Covenant (which forms part of China's initial report), it is true that there is no single law - corresponding to the Hong Kong Bill of Rights Ordinance in relation to the ICCPR that incorporates the ICESCR into Hong Kong's domestic law. However, ICESCR provisions are incorporated into our domestic law through several Articles of the Basic Law (for example Articles 27, 36, 37, 137, 144 and 149), and through provisions in over 50 Ordinances. Those laws were listed in Annex 3 to our initial report, and we updated that list at Annex 2A of the second report, which we have reproduced at the Annex to this reply. We consider that specific measures of this kind more effectively protect Covenant rights than would the mere re-iteration in domestic law of the Covenant provisions themselves.

Thus, turning to the second part of the question, neither the ICESCR itself, nor the General Comments of the Committee on Economic, Social and Cultural Rights (the Committee), require the comprehensive incorporation of the Covenant into domestic law. Article 2 of the ICESCR requires the Administration to take steps with a view to achieving progressive full realisation of the rights recognised in it by all appropriate means. According to General Comment No. 3 of the Committee, each State Party must decide for itself which means are most appropriate under the circumstances with respect to each of the rights, to achieve progressively the full realisation of those rights. This process is an ongoing one, and the possibility of enacting further legislative provisions for this purpose is always kept in mind, recent examples being the enactment to raise the age of criminal responsibility and the current exercise to legislate against race discrimination.

In the second part of his question, Mr Lee asks whether we will act on the legislative proposals that the Committee recommended in its concluding observations of May 2001. The position is that the Committee recommended that the HKSAR should consider legislation or review its policies in the following six areas:

(a) race discrimination in the private sector (in paragraph 30): we announced our intention to do so in June 2003. We recently completed public consultations on our legislative proposals and the law drafting process is underway;

(b) discrimination on the grounds of sexual orientation and age (in paragraph 31): as we have explained to the Committee, both in our report and - in the case of age discrimination - our reply to its list of issues, our position is as follows:

(i) in regard to discrimination on the ground of sexual orientation: as we stated in paragraph 2.8 of our report, this is a sensitive issue that impinges on deeply ingrained values and notions of morality. Our considered view is that, at this stage, self-regulation and education, rather than legislation, are

the most appropriate means of addressing discrimination in this area. For this reason, we have sought to address discriminatory attitudes through public education and administrative means, with a view to fostering in the community a culture of greater objectivity, tolerance and mutual respect. Inevitably, these measures will need time to take effect as we cannot expect public attitudes to change overnight.

However, we are putting more resources into this area and recently, as a first step, established a Sexual Minorities Forum. In 2005/06, we will establish a Gender Identity and Sexual Orientation Unit on a two-year pilot basis. The Unit will promote equal opportunities for persons of different sexual orientation and transgender persons, and will maintain a hotline for enquiries and complaints. We are in the process of recruiting the Unit's staff. An additional initiative - that we will implement in 2005-06 - is to conduct a survey on public attitudes towards these issues; and

(ii) in regard to age discrimination: legislation against age discrimination in employment would have potentially far-reaching implications for the local economy. Given the diversity of jobs that may genuinely require workers of specific attributes that are related to age (for example, number of years of experience), such legislation could impose rigidities on recruitment. To avoid being held liable for breaching the law, businesses would have to maintain comprehensive records of all recruitment exercises. This could increase business costs, especially for small and medium sized enterprises, which constitute some 98% of all enterprises in Hong Kong. Moreover, as the sensitive issue of mandatory retirement age has yet to be fully deliberated in the community, let alone consensus reached, legislation at this juncture would be difficult.

Indeed, an opinion survey conducted in 2002 clearly indicated that there was no consensus in the local community as to the effectiveness of, or need for, such legislation. We believe that the most effective way of addressing age discrimination is to nurture a culture of respect and equality. To this end, we will continue to promote equal employment opportunities through education and publicity;

(c) unfair dismissal, minimum wages, paid weekly rest time, rest breaks, maximum hours of work and overtime pay rates (in paragraph 34): for the most part, our position is as stated in paragraph 7.6 of our report. That is, our Employment Ordinance confers on employees a comprehensive set of employment rights and benefits in wage protection, rest days, holidays with pay, annual leave with pay, sickness allowance, maternity protection, severance payment, long service payment, termination of employment contract, protection against anti-union discrimination, and employment protection including unreasonable dismissal. Remedies for unreasonable dismissal include orders for reinstatement/re-engagement subject to the mutual consent of the parties, or awards of terminal

payment.

Terms and conditions of employment such as wage levels, hours of work, and rates of overtime pay are not governed by statute. They are matters for negotiation between employers and employees. Nevertheless, the Labour Department actively promotes the adoption of good people management practices that are employee-oriented and fair. Employers are encouraged to adhere to these principles when they set their employees' terms and conditions of employment.

Recently, trade unions and some members of the Legislative Council have called for a statutory minimum wage and standard working hours, including compulsory overtime pay. The community's views on the issues are divided. Given the far-reaching implications of the proposal on the economy and the labour market, the Government has put the matter to the Labour Advisory Board for discussion;

(d) enact legislation on equal pay for work of equal value (paragraph 35): first, and with every respect to the Committee, I must point out that, the concept of equal pay for work of equal value is, in fact, addressed in the Sex Discrimination Ordinance. There is therefore no need to enact separate or further legislation for that purpose.

That said, and as we advised the Committee in our response to question 11 of its list of issues, an Equal Opportunities Commission Task Force has examined the findings of Phase I of the consultancy study entitled 'Equal Pay for Work of Equal Value', which concerned public sector jobs and public education programmes. Those findings will shortly be made public and the Commission is considering the launch of consultations. It is also formulating a strategy for taking this complex subject forward;

(e) amend the Public Order Ordinance to ensure freedom of trade union activities as provided for under article 8(c) of the ICESCR (paragraph 37): as we advised the Committee in paragraph 8.7 of our report, the Ordinance provides adequate safeguards against arbitrary interference with the rights guaranteed in Article 27 of the Basic Law and in the ICCPR. Its provisions reflect a proper balance between the individual's right to freedom of expression and peaceful assembly, and the broader interests of the community. For example, the Commissioner of Police may only impose conditions on - or disallow the holding of - public meetings and processions on grounds of national security, public safety, public order and protection of the rights and freedoms of others, if he reasonably considers it necessary. Organisers who are aggrieved by a Police decision have recourse to an independent appeal board. The board is chaired by a retired judge and its members are not public officers. There is no evidence to suggest that the Ordinance has impeded lawful trade union activities. As such, we do not consider that the Ordinance requires amending; and

(f) raise the age of criminal responsibility (paragraph 43): as we advised the Committee in paragraph 10.39 of our report, the Law Reform Commission published its Report on "The Age of Criminal Responsibility in Hong Kong" in May 2000. The Commission recommended, inter alia, that we raise the minimum age of criminal responsibility from seven years to 10, and as Members know, the Juvenile Offenders (Amendment) Ordinance 2003 raised the age to 10 with effect from July 1, 2003.

To summarise, therefore, we do not envisage a need for a law that would do for the ICESCR what the Hong Kong Bill of Rights Ordinance does for the ICCPR. The provisions of the ICESCR are given legal effect through various articles of the Basic Law, through specific statutes, and through the evolving body of case law developed in the courts. They are also put into practical effect through a host of administrative regulations and programmes. I have no doubt that our statutory mechanisms will continue to develop in both scope and sophistication as ICESCR-related jurisprudence - both domestic and international - increasingly refines the global consensus on the implications of the Covenant and the measure that are necessary for ensuring its full and universal enjoyment.

Thank you Madam President.

Ends/Wednesday, April 6, 2005

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Constitutional guarantee and legislative measures
implementing the Covenant in the HKSAR

ARTICLE 2

- Constitutional guarantee – Article 39 of the Basic Law
- Legislative measures – Crimes Ordinance (Cap 200)
- Criminal Procedure Ordinance (Cap 221)
- Disability Discrimination Ordinance (Cap 487)
- Employment Ordinance (Cap 57)
- Family Status Discrimination Ordinance (Cap 527)
- Mental Health Ordinance (Cap 136)
- Sex Discrimination Ordinance (Cap 480)
- Rules of the High Court (Cap 4, subleg A)

ARTICLE 3

- Constitutional guarantee – Article 25 of the Basic Law
- Legislative measures – Sex Discrimination Ordinance (Cap 480)

ARTICLE 6

- Constitutional guarantee – Articles 33 and 147 of the Basic Law
- Legislative measures – Employment of Children Regulations (Cap 57 subleg B) under the Employment Ordinance
- Immigration Ordinance (Cap 115)
- Sex Discrimination Ordinance (Cap 480)
- Disability Discrimination Ordinance (Cap 487)
- Family Status Discrimination Ordinance (Cap 527)
- Employees’ Retraining Ordinance (Cap 423)

ARTICLE 7

- Legislative measures
- Boilers and Pressure Vessels Ordinance (Cap 56)
 - Builders' Lifts and Tower Working Platforms (Safety) Ordinance (Cap 470)
 - Dangerous Goods Ordinance (Cap 295)
 - Disability Discrimination Ordinance (Cap 487)
 - Employees' Compensation Ordinance (Cap 282)
 - Employment Ordinance (Cap 57)
 - Protection of Wages on Insolvency Ordinance (Cap 380)
 - Occupational Safety and Health Ordinance and a set of subsidiary legislation (Cap 509)
 - Factories and Industrial Undertakings Ordinance and 28 sets of subsidiary legislation (Cap 59)
 - Family Status Discrimination Ordinance (Cap 527)
 - Labour Tribunal Ordinance (Cap 25)
 - Mining Ordinance (Cap 285)
 - Minor Employment Claims Adjudication Board Ordinance (Cap 453)
 - Radiation Ordinance (Cap 303)
 - Sex Discrimination Ordinance (Cap 480)
 - Women and Young Persons (Industry) Regulations (Cap 57 subleg C) under Employment Ordinance (Cap 57)

ARTICLE 8

- Constitutional guarantee
- Article 27 of the Basic Law
- Legislative measures
- Hong Kong Bill of Rights Ordinance (BORO) (Cap 383), Article 18
 - Employment Ordinance (Cap 57)
 - Labour Relations Ordinance (Cap 55)
 - Trade Unions Ordinance (Cap 332)

ARTICLE 9

Constitutional guarantee

- Articles 36 and 145 of the Basic Law

Legislative measures

- Employees' Compensation Ordinance (Cap 282)
- Employees' Compensation Assistance Ordinance (Cap 365)
- Occupational Deafness (Compensation) Ordinance (Cap 469)
- Employment Ordinance (Cap 57)
- Mandatory Provident Fund Schemes Ordinance (Cap 485)
- Occupational Retirement Schemes Ordinance (Cap 426)
- Pneumoconiosis (Compensation) Ordinance (Cap 360)

ARTICLE 10

Constitutional guarantee

- Article 37 of the Basic Law

Protection of Family

Legislative measures

- Adoption Ordinance (Cap 290)
- Domestic Violence Ordinance (Cap 189)
- Family Status Discrimination Ordinance (Cap 527)
- BORO (Cap 383) Article 19
- Employment Ordinance (Cap 57)

Right in Respect of Marriage

- Legislative measures – Age of Majority (Related Provisions) Ordinance (Cap 410)
- BORO (Cap 383) Articles 19(2) and 19(3)
 - Marriage Ordinance (Cap 181)
 - Marriage Reform Ordinance (Cap 178)

Maternity Protection

- Legislative measures – Sex Discrimination Ordinance (Cap 480)
- Employment Ordinance (Cap 57 Part III)

Protection of Children and Young Persons

- Legislative measures – Age of Majority (Related Provisions) Ordinance (Cap 410)
- Apprenticeship Ordinance (Cap 47)
 - Child Abduction and Custody Ordinance (Cap 512)
 - Child Care Services Ordinance (Cap 243)
 - Dutiable Commodities (Liquor) Regulations (Cap 109 subleg B) under Dutiable Commodities Ordinance (Cap 109)
 - Employment of Children Regulations (Cap 57 subleg B) under Employment Ordinance (Cap 57)
 - Employment of Young Persons and Children at Sea Ordinance (Cap 58)
 - Guardianship of Minors Ordinance (Cap 13)
 - BORO (Cap 383) Article 20
 - Matrimonial Causes Ordinance (Cap 179)
 - Matrimonial Proceedings and Property Ordinance (Cap 192)
 - Protection of Children and Juveniles Ordinance (Cap 213)
 - Separation and Maintenance Orders Ordinance (Cap 16)
 - Women and Young Persons (Industry) Regulations

(Cap 57 subleg C) under Employment Ordinance
(Cap 57)

ARTICLE 11

Right to Adequate Food

- Legislative measures – Public Health and Municipal Services Ordinance (Cap 132)
- Reserved Commodities Ordinance (Cap 296)

Right to Adequate Housing

- Legislative measures – Bedspace Apartments Ordinance (Cap 447)
- Lands Resumption Ordinance (Cap 124)
 - Estate Agents Ordinance (Cap 511)
 - Housing Ordinance (Cap 283)
 - Land Development Corporation Ordinance (Cap 15)
 - Landlord and Tenant (Consolidation) Ordinance (Cap 7)
 - New Territories Land (Exemption) Ordinance (Cap 452)
 - New Territories Ordinance (Cap 97)
 - Stamp Duty Ordinance (Cap 117)
 - Town Planning Ordinance (Cap 131)

Right to Continuous Improvement of Living Condition

- Legislative measures – Public Health and Municipal Services Ordinance (Cap 132)
- Residential Care Homes (Elderly Persons) Ordinance (Cap 459)

ARTICLE 12

Right to Health

Constitutional guarantee – Article 138 of the Basic Law

- Legislative measures – Mental Health Ordinance (Cap 136)
- Occupational Safety and Health Ordinance (Cap 509)
 - Smoking (Public Health) Ordinance (Cap 371)

Environmental Hygiene

- Legislative measures – Air Pollution Control Ordinance (Cap 311)
- Air Pollution Control (Fuel Restriction) Regulations (Cap 311 subleg I) under Air Pollution Control Ordinance (Cap 311)
 - Air Pollution Control (Vehicle Design Standards) (Emission) Regulations (Cap 311 subleg J) under Air Pollution Control Ordinance (Cap 311)
 - Air Pollution Control (Motor Vehicle Fuel) Regulations (Cap 311 subleg L) under Air Pollution Control Ordinance (Cap 311)
 - Dumping at Sea Ordinance (Cap 466)
 - Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap 413)
 - Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap 414)
 - Noise Control Ordinance (Cap 400)
 - Noise Control (Air Compressors) Regulations (Cap 400 Subleg C) under Noise Control Ordinance (Cap 400)
 - Noise Control (Hand Held Percussive Breakers) Regulations (Cap 400 subleg D) under Noise Control Ordinance (Cap 400)
 - Ozone Layer Protection Ordinance (Cap 403)
 - Public Health and Municipal Services Ordinance (Cap 132)
 - Road Traffic Ordinance (Cap 374)
 - Sewage Services Ordinance (Cap 463), Sewage Services (Sewage Charge) Regulation (Cap 463 subleg A) and Sewage Services (Trade Effluent Surcharge) Regulation (Cap 463 subleg B)
 - Smoking (Public Health) Ordinance (Cap 371)
 - Town Planning Ordinance (Cap 131)
 - Water Pollution Control Ordinance (Cap 358)

- Waste Disposal Ordinance (Cap 354)
- Waste Disposal (Livestock Waste) Regulations (Cap 354 subleg A) under Waste Disposal Ordinance (Cap 354)
- Environmental Impact Assessment Ordinance (Cap 499)

Industrial Hygiene and Prevention of Occupational Diseases

- Legislative measures - Factories and Industrial Undertakings (Notification of Occupational Diseases) Regulations (Cap 59 subleg E) under Factories and Industrial Undertakings Ordinance (Cap 59)

Control of Epidemics

- Legislative measures - Quarantine and Prevention of Disease Ordinance (Cap 141)

Medical Service and Attention to All

- Legislative measures - Dentists Registration Ordinance (Cap 156)
- Hospital Authority Ordinance (Cap 113)
 - Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap 165)
 - Medical Clinics Ordinance (Cap 343)
 - Medical Registration Ordinance (Cap 161)
 - Midwives Registration Ordinance (Cap 162)
 - Nurses Registration Ordinance (Cap 164)
 - Supplementary Medical Professions Ordinance (Cap 359)
 - Chinese Medicine Ordinance (Cap. 549)

ARTICLE 13 and 14

- Constitutional guarantee - Articles 136, 137 and 144 of the Basic Law

Right to Education

- Legislative measures - Education Ordinance (Cap 279)
- BORO (Cap 383) Article 15(4)

ARTICLE 15

Constitutional guarantee – Articles 27, 34, 140 and 144 of the Basic Law

Right to Take Part in Cultural Life

Legislative measures – Hong Kong Arts Development Council Ordinance (Cap 472)

- BORO (Cap 383) Article 16
- The Hong Kong Academy for Performing Arts Ordinance (Cap 1135)
- Hong Kong Arts Centre Ordinance (Cap 304)
- Antiquities and Monuments Ordinance (Cap 53)
- Lord Wilson Heritage Trust Ordinance (Cap 425)
- review and amendment of legislation which may threaten freedom of expression

Right to Enjoy Benefits of Scientific Progress and its Application

Constitutional guarantee – Article 139 of the Basic Law

Legislative measures – Crimes (Torture) Ordinance (Cap 427)

- BORO (Cap 383) Articles 3 and 16
- Personal Data (Privacy) Ordinance (Cap 486)

Protection of Interests of Authors

Constitutional guarantee – Article 140 of the Basic Law

Legislative measures – Prevention of Copyright Piracy Ordinance (Cap 544)

- Layout-design (Topography) of Integrated Circuits Ordinance (Cap 445)
- Patents Ordinance (Cap 514)
- Trade Marks Ordinance (Cap 43)
- Copyright Ordinance (Cap 528)
- Registered Designs Ordinance (Cap 522)
- licences required by Customs for the import and export of optical disc manufacturing equipment (Import and Export Ordinance, Cap 60)

