



透過聯合國普遍定期審議機制於香港推動人權
Advancing human rights in Hong Kong through
the UN Universal Periodic Review process

香港普遍定期審議聯盟督導委員會
香港九龍彌敦道380號1樓
Hong Kong UPR Coalition Steering Committee
c/o Justice Centre Hong Kong
Eaton Workshop, 1/F, 380 Nathan Road
Kowloon, Hong Kong

Submission to the Law Reform Commission of Hong Kong in Response to its Consultation on Access to Information

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Introduction

The Hong Kong Universal Periodic Review Coalition ('the Coalition') greatly appreciates the opportunity to provide a submission for the Law Reform Commission of Hong Kong ('the Commission') Access to Information Consultation Paper ('the Consultation Paper').¹

The Coalition consists of 45 civil society organisations and was established to advance human rights in Hong Kong through the United Nations Universal Periodic Review ('UPR') process. The Coalition has been engaging with civil society, the international community, the United Nations and the Hong Kong government for over a year. This includes a comprehensive consultation process to produce a submission to the United Nations Human Rights Council, over 200 meetings with various stakeholders, social media engagement, roundtable events and 24 fact sheets. The Coalition's work is facilitated by Justice Centre Hong Kong and guided by the Coalition's Steering Committee.²

The Coalition considers the consultative process a valuable opportunity in the development of legislative mechanisms to improve access to information in Hong Kong. The Commission's consultative measures are valuable to ensure that the views of civil society are given due consideration. However, it is from this standpoint that we are disappointed with the failure to extend the submission time frame. Given that it has taken the Commission's Sub-Committee almost 5 years to prepare and release the Consultation Paper, the refusal to grant an extension to obtain feedback demonstrates a lack of commitment to meaningful engagement with civil society.³ This is in addition to other concerns the Coalition holds with the Commission's approach, including membership of the Sub-Committee and structure of the Consultation Paper.

The Coalition's response to the Consultation Paper are centred in international human rights law, reflecting the views of our members and based upon our submission to the United Nations Human Rights Council.⁴ The Coalition refers to the importance of Article 19 of the International Covenant on Civil and Political Rights ('ICCPR'), also acknowledged in Chapter 3 of the Consultation Paper, and General Comment 34 on Article 19. Article 19 has been incorporated

¹ Access to Information Sub-Committee, Law Reform Commission of Hong Kong, 2018, available at:

https://www.hkreform.gov.hk/en/docs/accesstoinfo_e.pdf.

² More information on the work of the Coalition is available at:

<http://www.justicecentre.org.hk/policy-advocacy/universal-periodic-review/>

³ Hong Kong Free Press, Lawmakers and NGOs call for longer consultation on archives law and access to information regime, 31 January 2019, available at: <https://www.hongkongfp.com/2019/01/31/lawmakers-ngos-call-longer-consultation-archives-law-access-information-regime/>.

⁴ Hong Kong UPR Coalition, Joint Civil Society Submission from the Hong Kong UPR Coalition, March 2018, available at:

http://www.justicecentre.org.hk/framework/uploads/2018/UPR/HKUPRC_Submission_MARCH2018.pdf.



into the law of Hong Kong as Article 16 of the Hong Kong Bill of Rights in Section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383).

Law Reform Commission Approach

Whilst we welcome the opportunity to provide feedback on the Consultation Paper there are concerns the Coalition has with the Commission's approach.

Delays in the Publication of the Consultation Paper

The length of time it has taken for the sub-committee to publish this Consultation Paper is deeply concerning. Given the amount of public criticism for reforming the current regimes in Hong Kong, it is disappointing to have to wait nearly five years for the opportunity to engage. Additionally, we are equally disappointed in the limited time frame the public has been given to comment on the recommendations laid out in the consultation paper. This raises serious questions around what resources were made available to the sub-committee during the review process and what precedent this sets for any action the Administration might take in response.

The Coalition notes that some of our members have faced substantial challenges in obtaining information from the Commission on the Consultation Paper's progress. For example, the Coalition's facilitating civil society organisation, Justice Centre Hong Kong ('Justice Centre'), attempted to obtain information from Byron Leung, Deputy Secretary, from the Commission throughout 2018. Responses were often given that were not constructive and lacking in detail, such as noting that papers would be published "as soon as possible". The Commission should have a regularly updated timetable for each inquiry. This would greatly assist the value of contributions civil society can provide. As a good example, the Australian Law Reform Commission (ALRC) clearly outlines the dates when terms of reference are received, when papers will be released, deadlines for feedback and delivery of reports.⁵

Sub-Committee Membership

The Coalition notes with concern that there is no civil society representative on the sub-committee. The sub-committee includes two government officials, two barristers, one solicitor, one journalist and one academic. Civil society is crucial in ensuring that marginal members of society are represented through consultation. The lack of civil society representation within the sub-committee could explain the lack of information in the report relating to engagement with persons with a disability, the elderly and people from culturally and linguistically diverse backgrounds. These are topics which are equally important during consultative processes and deserve more attention.

Structure of the Consultation Paper

Disappointingly, the Consultation Paper is less a consultation paper and more of a final report. Instead of asking questions from interested stakeholders on certain topics, recommendations are put forward. Without obtaining submissions from stakeholders, it is notable and concerning that the sub-committee has already come up with recommendations. Such an approach also calls into question the degree to which the Commission is interested in engaging in a meaningful manner with stakeholders, especially in developing recommendations for a final

⁵ See for example, Australian Law Reform Commission, Family Law System Timetable, published on 10 January 2018 and last modified on 21 May 2018, available at: <https://www.alrc.gov.au/inquiries/family-law-system/timetable>.



report. Whilst we can assume that it is the recommendations within the report which the sub-committee is seeking feedback on, it is difficult to gauge exactly what they want to know from the public because no questions are raised. The formulation of concise questions within consultation papers is important to develop constructive dialogue with the public.

The approach by the Commission contrasts with that of the Commission's Archives Law Consultation Paper, which asks specific consultation questions.⁶ Furthermore, the Commission's approach contrasts with practices in other common law jurisdictions. For example, the ALRC commonly establishes multi-tiered approaches during public consultation. This may be in the form of a four to six step process which begins with an initial consultation paper; laid out with questions for the public to answer, followed by a discussion paper on the public submissions which the commission had received, and an interim report and/or final report.⁷

Universal Periodic Review, United Nations Human Rights Committee and Access to Information

In a first and unprecedented step, 12 countries used the United Nations Universal Periodic Review (UPR) third cycle hearing on 6 November 2018 for the People's Republic of China (PRC) to highlight their concerns with the human rights environment in Hong Kong.⁸ When the PRC's last UPR hearing was held in 2013, not one recommendation was issued on Hong Kong. This time around there were six, with six other references through questions in advance and statements, raising international attention on the deterioration of human rights in Hong Kong.

Relevant to the work of the Commission, the Coalition notes the recommendation from France, which states that the PRC should:

*"Guarantee freedom of speech, assembly and association, including in Hong Kong, and remove restrictions on freedom of information on the internet, in particular for human rights defenders."*⁹

The recommendation from France draws upon several Articles of the ICCPR, including Article 19 with respect to the right to access information. While the Hong Kong government's position with respect to the recommendation has yet to be made, it is the Coalition's understanding that the recommendation is likely to be accepted at the upcoming UPR outcomes on China plenary session in mid-March 2019.

⁶ Archives Law Sub-Committee, Law Reform Commission of Hong Kong, 2018, available at:

<https://www.hkreform.gov.hk/en/publications/archiveslaw.htm>.

⁷ Australian Law Reform Commission, Law reform process, accessed on 25 February 2019, available:

www.alrc.gov.au/law-reform-process

⁸ Hong Kong UPR Coalition, News Release, International Community Condemns Human Rights Situation in Hong Kong in Major UN UPR Review of China, 7 November 2018, available at:

<http://www.justicecentre.org.hk/framework/uploads/2018/11/Press-Release-Unprecedented-Attention-on-Hong-Kong-at-UN-Human-Rights-Review-ENG-1.pdf>.

⁹ United Nations Human Rights Council, Report of the Working Group on the Universal Periodic Review, 26 December 2018, A/HRC/40/6.



Additionally, concerns with respect to Hong Kong's approach towards access to information have also been expressed by the United Nations Human Rights Committee. In their Concluding Observations on the third periodic report of Hong Kong, China, in 2013 they stated:

*“Hong Kong, China, should, in line with the Committee’s general comment No. 34 (2011) on freedoms of opinion and expression, take vigorous measures to repeal any unreasonable direct or indirect restrictions on freedom of expression, in particular for the media and academia, to take effective steps including investigation of attacks on journalists and to **implement the right of access to information by public bodies.**”¹⁰*
[emphasis added]

It is a notable omission from the Commission's Consultation Paper that no reference is made to the above concluding observation, despite the references to Article 19 of the ICCPR, General Comment 34 and related cases in Chapter 3. The Coalition urges the Commission to consider the recommendation from France and the concluding observation from the United Nations Human Rights Committee with respect to access to information laws in Hong Kong.

Right to Seek and Receive Information

Freedom of Information Legislation

The Commission's recommendation to introduce legislation that will implement statutory backed access to information mechanisms is encouraging. As the Coalition recommended in our submission to the Human Rights Council:

“Access to information is difficult, with responses for information taking extensive time, even if successful. An official Code on Access to Information has been in place since 1995, but entails no legal requirement and limited coverage. HKSAR should adopt a Freedom of Information Ordinance that establishes maximum disclosure and minimal exemption requirements, within one year.”¹¹

The Commission has also highlighted their views against the formulation of legislation that would bring about elaborate mechanisms which may be seen, in their views, to be costly and difficult to administer.¹² While the Coalition agrees on the principles of efficiency and cost effectiveness, we are concerned over the lack of information on how these principles will be interpreted into the formulation of new legislation and the impact this will have on tackling the issues highlighted by the ombudsman and civil society.¹³ To this end, we support the principles proposed by one of our members, the Hong Kong Journalists Association ('HKJA'), namely:

Principle 1 – Access to Information is a constitutional right to be exercised on a fair and equal basis. It must not be compromised for costs.

¹⁰ Paragraph 13, United Nations Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013), 29 April 2013, CCPR/C/CHN-HKG/CO/3.

¹¹ Ibid n4 at p4.

¹² Ibid n1.

¹³ Office of the Ombudsmen Hong Kong, Direct Investigation Report, The Access to Information Regime in Hong Kong, 2014, available at: http://ofomb.ombudsman.hk/abc/files/DI238_full_E-20_3_2014_with_Appendix_1.pdf.



Principle 2 – Access to information must be guided by the principle of maximum disclosure, which is presumed unless rebutted by any legitimate reason under the law.

Additionally, we query why the Commission appears to be against legislated mechanisms without demonstrating a more balanced comparative analysis of other common law jurisdictions to support their position. The lack of analysis on this point in Chapter 3 prior to recommendation 1 is of concern to the Coalition. The Coalition is of the view that further research should have been undertaken on the value of a more elaborate freedom of information legislation for discussion. This approach highlights the above concerns with effective engagement with civil society and the time frames for the public to engage in the consultation process. The Coalition recommends members of the sub-committee meet with and hear from civil society organisations to learn about the linkages between public confidence in the government and comprehensive freedom of information legislation.

Proposed Fee Structure

The Coalition is concerned with the proposal from the Commission outlined in Chapter 8 to introduce an application fee for an access to information. One of the Coalition's members, Justice Centre, has expressed opposition to the charge, stating:

“Justice Centre makes more than 15 requests under the Code on Access to Information (the Code) a year to inform our policy work, research and services. We have never been charged for data obtained through these requests. Depending on the amount, the introduction of a fee may hinder the ability of our organisation and other civil society organisations to obtain information and conduct evidence-based research or policy advocacy.”¹⁴

The Coalition is concerned about the impact of any fee structure on civil society organisations who already struggle to obtain basic information at present from the government. Data is critical in preparing evidence-based law reform and policy proposals. If organisations are restricted from accessing data due to costs it will not limit the quality of advice provided to organisational stakeholders, including government departments.

Recommendations

With respect the Commission's activities, the Coalition recommends:

- further resources are provided to the Commission to ensure that they have the ability to deliver consultation papers in a timely manner;
- public timetables are developed for each Commission inquiry and made available on the Commission's website;
- greater attention is given to ensuring a broader representation on sub-committees, with attention given to civil society representatives, including those representing disadvantaged and marginalised communities;
- the Commission establishes easy-read formats based upon consultation with civil society representatives to assist accessibility for persons with a disability;

¹⁴ Justice Centre Hong Kong, Submission to the Law Reform Commission of Hong Kong in Response to its Consultation on Access to Information, February 2019, available at: <http://www.justicecentre.org.hk/framework/uploads/2019/02/Submission-to-the-Law-Reform-Commission.pdf>.



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- all future consultation papers are treated as consultation papers, with proposed questions and requests for feedback, rather than recommendations; and
- members of the sub-committee for this Consultation Paper meet a wide range of civil society stakeholders in person to gain a greater understanding of their views and inform the recommendations for the report.

With respect to the recommendations proposed in the Consultation Paper, the Coalition recommends:

- consideration is given to the recommendation issued by France in the third cycle UPR hearing and the concluding observation at paragraph 13 of the United Nations Human Rights Committee in response to the third periodic report of Hong Kong on the ICCPR;
- adoption of a Freedom of Information Ordinance that establishes maximum disclosure and minimal exemption requirements;
- withdrawal of the recommendation to charge for accessing data for reproduction of archival records and other services; and
- establishment of clear and simple procedures, with specific response time and consistent practice to ensure rapid and fair processing, such that members of the public are not deterred from making access requests.

For further information please contact Simon Henderson, Spokesperson, Hong Kong UPR Coalition and Senior Policy Advisor, Justice Centre Hong Kong (+852 3109 7359; simon@justicecentre.org.hk).