香 港 人 權 監 察
HONG KONG HUMAN RIGHTS MONITOR
香港上環孖沙街二十號金德樓4樓
4/F Kam Tak Building, 20 Mercer Street, Sheung Wan, Hong Kong
電話 Phone: (852) 2811-4488　傳真 Fax: (852) 2802-6012

Submission to the LegCo Panel on Constitutional Affairs on Hearing of the Report of the Hong Kong Special Administration Region under the International Convention on the Elimination of All Forms of Racial Discrimination

December 2009

1. The Hong Kong Government has submitted its report to the United Nations (UN) Committee on the Elimination of Racial Discrimination (the Committee) as part of China's report on the implementation of ICERD in 2008. The report was considered by the Committee in August 2009. A number of local NGOs and organizations, including the Hong Kong Human Rights Monitor, have submitted shadow reports to the Committee and observed the consideration of the Hong Kong Report in August 2009. After the hearings, the Committee has issued its Concluding Observations, which expressed concerns and made recommendations on a number of issues regarding Hong Kong. The Hong Kong Human Rights Monitor was delighted that most of our concerns were covered in the Concluding Observations.

Hong Kong Government's Initial views on recommendations of the Committee

2. It is clear to us that the Government is not receptive to the recommendations of the Committee. In its initial response, the Government mainly repeats its position in the areas the Committee was concerned about. The Monitor would like to remind the Government that the Committee is composed of experts in human rights, especially in the area of racial discrimination. Although the Concluding Observations are not legally binding, they can be regarded as authoritative interpretation of the ICERD and the Government should seriously take the recommendations of the Concluding Observations into account.

(A) Definition of racial discrimination in the RDO (paragraph 27)

3. According the ICERD General Comments (the Committee's interpretation of the content of the ICERD) No. 8 on interpretation and application of article 1(1) and (4) (identification with a particular racial or ethnic group), the principle of "self-identification by the individual concerned" should be adopted to identify individuals as being members of a particular racial or ethnic groups, if no justification exists to the contrary.[1]

4. ICERD General Comments No. 30 on non-citizens also states that "the legal provisions of States parties must not discriminate against any particular nationality" and "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim".

5. The definition of indirect discrimination in the Race Discrimination Ordinance (RDO) as well

[1] See http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/3ae0a87b5bd69d28c12563ee0049800f?Opendocument.

as other 3 anti-discrimination ordinances is based on former UK legislation, which has been proved ineffective to combat indirect racial discrimination. First, the concept of "requirements or conditions" is too narrow to exclude "criteria" or "practice". Second, the definition of indirect discrimination under 4 anti-discrimination ordinances requires for statistical evidence to prove the discriminatory actions, which is very difficult to achieve. The former UK legislation was seriously criticized and was replaced with a broader definition based on the European Union (EU) Directive on Racial Discrimination. The Government should consider amending the RDO in accordance with the EU Directive on Racial Discrimination.

6. The Monitor considers the overly broad and unjustified exemptions to exclude nationality, citizenship, length of residence and residential or immigration status among the prohibited grounds of discrimination violates the requirements under the ICERD, because individuals with these grounds can self-identify as a particular ethnic or racial group. Similarly language can be a factor for individuals to perform the same self-identification. Such exclusions make new mainland arrivals or foreign domestic workers even more vulnerable. The Monitor urges the Government to amend such provisions to provide adequate protections to the victims of discrimination on the grounds just mentioned.

(B) Coverage of Government functions and powers in the RDO (paragraph 28)

7. The Monitor would like to highlight the fact that unlike other 3 anti-discrimination ordinances, the RDO does not cover "the performance of Government's functions" or "the exercise of Government's powers", which means that the RDO has limited application to the Government. As a result, the police, correctional services, immigration and other law enforcement authorities and their officials are not bound by the RDO in the exercise of their powers. Similarly, the Education Bureau is not bound by the RDO when it implements its primary and secondary school places allocation exercise.

8. The Basic Law and the Hong Kong Bill of Rights Ordinance are the only mechanisms to prohibit the Government from practicing racial discrimination in its performance of functions or exercise of powers. However, it is not effective since bringing cases to the courts is expensive and time-consuming, which is not easily affordable.

9. During the scrutiny of the Race Discrimination Bill, the Government claimed in March 2008 that "to expand the scope of the Bill (Race Discrimination Bill) to cover all government functions would place uncertain and potentially far-reaching adverse implications on the Government's ability to make and implement policies" which "could render the Government vulnerable to an influx of litigations".[2] Such a statement reflects the Government lacks commitment to combat racial discrimination within the Government.

10. The Monitor again urges the Government to show its commitment to combat racial discrimination, especially discrimination within the Government, by amending the RDO to cover "the performance of Government's functions" and "the exercise of the Government's powers".

11. Instead of the Committee's recommendation to adopt a race equality plan to ensure effective implementation of the law, the Government has drawn up a set of proposed Administrative Guidelines (Guidelines) on promotion of racial equality within bureaus, departments and

[2] Constitutional and Mainland Affairs Bureau, "The Administration's further response to the major issues raised by the Committee", March 2008.

public bodies. This set of Guidelines is not legally-binding. The voluntary nature and the narrow scope of bureaus, departments and public bodies of the set of Guidelines seriously undermine its effectiveness. No additional manpower and resources are allocated to bureaus, departments and public bodies to implement the Guidelines.

12. To make the Guidelines effective, the set of Guidelines must spell out the consequences for failing to comply with it and state clearly that disciplinary actions or other sanctions would follow any violation or omission. Bureaus, departments and public authorities should be required instead to encourage the designation of an officer to coordinate the implementation of the Guidelines. Adequate manpower and resources are allocated to bureaus, departments and public bodies. Moreover, the Guidelines should cover all Government bureaus, departments and public bodies, especially the law enforcement agencies which provide key services seriously affecting rights and other entitlements of the ethnic minorities.

13. While the Government is finalizing the Guidelines, the Monitor urges the Government to disclose its timeline to finalize and implement the Guidelines, and actively consult the stakeholders and concerned parties. To facilitate the consultation, the Government should provide documents on the evaluation of the present gender mainstreaming measures and overseas experience of racial equality plan.

14. The Monitor welcomes the Government to provide extra resources to the EOC for the implementation of the RDO. However, more should be done to strengthen the EOC. The Government should ensure EOC enjoys independent and comprehensive powers to lodge formal investigation and make rulings. Moreover, we urge the Government to reform EOC's structure and practices in line with the Paris Principles. To ensure the pluralistic composition of the EOC as well as an independent committed and capable chairperson and commissioners, the Government should establish a panel consisting of users of the EOC's services, NGOs, representatives from underprivileged groups and their service providers and other related professional bodies to formulate the qualifications and requirements for appointing its chair and commissioners and for their nomination. Public involvement should be adequate in the whole appointment process. Appropriate candidates for nominations as the chairs and commissioners of the EOC should be selected in an open recruitment exercise involving town hall meetings for the shortlisted candidates to face public scrutiny before any final nomination for the Chief Executive's formal appointment. On the other hand, the EOC should adopt a more proactive attitude in protecting and promoting equal opportunities. It should take necessary measures like opening its meetings to improve its transparency, accountability and performance.

(C) Refugees and torture claimants (paragraph 29)

15. The Committee "recommends the adoption of a law on refugees, with a view to establishing a comprehensive procedure for the screening of individual asylum claims. It furthermore recommends that the rights of asylum-seekers to information, interpretation, legal assistance and judicial remedies be guaranteed. The Committee also encourages the renewed consideration of the ratification of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol."[3]

16. While the Government will put forth administrative enhancements to the torture claimant

[3] Concluding observations of the Committee on the Elimination of Racial Discrimination: The People's Republic of China (including Hong Kong and Macau Special Administrative Regions) CERD/C/CHN/CO/10-13, 28 August 2009, para. 29.

screening procedures and will present a legislative framework handling the claims within the 2009/10 legislative session, the Monitor would like to remind the Government several important elements in a fair, efficient and comprehensive legal framework to screen torture claimants. These elements include independent appeal mechanism, adequate training to immigration and other relevant officers, rich information sources, and appropriate legal representation as well as interpretation. It is also important that the standard of prove should be in line with international jurisprudence and not improperly high. No improper measures for exclusion of applicants or claimants would be incorporated into our system. For example, we should not refuse to deal with the claims or applications of North Korean refugees who have come to Hong Kong through Mainland China on the grounds that they could have applied for refugee status in Mainland China. This is because the Committee has concluded that "asylum-seekers from the Democratic People's Republic of Korea continue to be systematically refused asylum and forcibly returned [by the Mainland authorities]"[4] and therefore such asylum seekers simply have no chance to have their torture or refugee claims properly determined there. The Monitor urges the Government to actively consult stakeholders and concerned groups to come up a fair, efficient and comprehensive legal mechanism to screen torture claimants.

17. It is clear that the key reason for the large number of illegal immigrants is the slow screening procedure of the applications of CAT claimants and asylum seekers. The lack of a fair, efficient and comprehensive refugee status determination procedure (RSD) has led to and will continue to engender abuses of the system. A system devoted solely to handle torture claims by the Hong Kong authorities leaving other refugee applications to be conducted by the UNHCR. Even after a CAT claims is determined by the HK Government, there remains the possibility of the refugee claim to the UNHCR being re-raised. The processing of cases through the UNHCR Hong Kong sub-office is very slow, which enables non-genuine claimants to perpetuate their stay in Hong Kong, while depriving genuine claimants of the benefits of an efficient and speedy processing of their claims. Moreover, the UNHCR's screening process and any of its problematic decisions are not subject to judicial oversight due to UNHCR's diplomatic immunity.

18. The Monitor strongly urges the government to accept the extension of the 1951 Refugee Convention and its 1967 Protocol to Hong Kong and to establish a comprehensive legal framework that can simultaneously handle and review the applications of CAT claimants and asylum seekers. The government should provide adequate resources to ensure that the processing and review procedures are not over-extended. According to the UNHCR guidelines, the concerned departments should issue a preliminary decision within one month of interviewing CAT claimants or asylum seekers.

19. Employment is the key to ensure financial needs, development of work and communication skills, self-worthiness, and understanding of society of CAT claimants and asylum seekers. We urge the government refer to the practice of other governments in order to improve the visa issuance system in the HKSAR. In the United Kingdom, asylum seekers have the right to work if they have not received a preliminary decision within 12 months of their application, provided that the procedural delay was not caused by the asylum seeker. In Australia, asylum seekers are issued various temporary visas depending on their application status. If the asylum seeker faces economic difficulties or their employers have applied for permanent visas for them based on their skills, they may apply for temporary visas that have no work restrictions.

[4] Ibid., para. 16.

20. We recommend the government grant CAT claimants and asylum seekers the right to work if a preliminary decision cannot be issued within 6 months of their application, given that the procedural delays were not caused by the applicants, they should be given the right to work in Hong Kong. This recommendation protects CAT claimants' and asylum seekers' right to work while preventing the mechanism from being abused.

(D) Migrant domestic workers (MDWs) (paragraph 30)

21. The Committee called upon the repealing of the "two-week rule" and the "live-in" requirement. The Government argues that the rule applies to all MDWs and other imported workers under the Supplementary Labour Scheme. The fact is that the Government discriminates against the Filipino, Indonesian and Thai races – it just does so equally. This rule clearly places MDWs in an extremely vulnerable position vis-à-vis their employers. The possibility of forcing to leave once their contracts are terminated would effectively prevent MDWs from reporting violations of their rights under various laws, as well as, instances of discrimination and abuses against them. On the other hand**,** the mandatory live-in employment arrangement for MDWs takes away their choice, privacy and makes them prone to abusive actions. This problem, in effect, prohibits MDWs from equal access to the law and security of person. The Monitor again urges the Government to repeal the "two-week rule" and the "live-in" requirement.

22. Although MDWs and their employers are free to negotiate on and enforce the terms and conditions of their employment, they are of different bargaining power which makes MDWs vulnerable to abuses. Cases of legitimate rights of MDWs being exploited by their employers are not uncommon. The Government should remove the two-week rule to encourage MDWs to report to the Labour Department cases of abuses, and strengthen its law enforcement by active investigation and effective penalties like denial of their entitlement to hire further MDWs. In the long-term, the Monitor recommends the Government to legislate on the maximum working hours of employees, including MDWs.

23. The "minimum allowable wage" is not a transparent mechanism to adjust the amount of minimum wage earned by MDWs. The Government is now working on the Minimum Wage Bill to provide proposed territory-wide statutory minimum wage protection, which MDWs are excluded from the protection. The Monitor urges the Government to not to deny MDWs the protection under the pending minimum wage law.

(E) Chinese language education for non-Chinese speaking (NCS) students (paragraph 31)

24. The Monitor considers the introduction of Supplementary Guide to the Chinese Language Curriculum for Non-Chinese Speaking Students as a start to help NCS students to learn Chinese in a more effective way, but also believe that the position and the difficulties of the non-Chinese speaking students are not fully and properly addressed by such a Guide.

25. Adaptation of the Chinese curriculum by individual schools insisted by the Government simply does not work for most NCS students as they cannot adapt to the common required standards in public examination. Given the difficulties these children face in learning Chinese, the current assessment and secondary school placement system puts them in a vulnerable position. The Monitor continues to urge the Government to formulate an education policy for learning Chinese as a second language.

26. Incidental to the implementation of the "Chinese as a second language" policy takes time, the

Government should also provide more resources, guidelines, teaching materials and other adequate supports to those non-designated schools which admit non-Chinese speaking students, so the schools would be able to develop their own curriculum for those students. Also, the Government should consider sponsoring textbook publishers or other institutions (e.g. local universities) to publish or develop Chinese language textbooks and teaching materials and resources for the non-Chinese speaking students.

Conclusion

27. The committee's hearing provides invaluable opportunities to establish a dialogue between the Government and UN human rights experts. It allows evaluation on Government's policies in accordance with international human rights standards. The Monitor urges the Government to reform its laws and improve existing policies to promote racial equality and eliminate racial discrimination in line with international human rights standards. This can partly be done by adopting an equality plan for mainstreaming racial equality in all governmental and public bodies. This can be done by improving substantially the draft administrative guidelines on racial equality and by providing the necessary mechanism, adequate resources (including personnel ones) and proper policy initiatives for this objective.