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Panel on Security: Hearing of the Hong Kong Special Administrative Region's third report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Submission of Daly & Associates to the Panel on Security

We have reviewed the UN CAT Committee's Concluding observations on the fifth periodic report of China with respect to the Hong Kong Special Administrative Region as well as the HKSAR's 3rd Report under CAT. We invite the Administration to consider our observations set out herein.

New Officers

We welcome the government's decision to hire 83 new officers and 9 adjudicators to assess USM claims. The inclusion of more new officers will no doubt speed up the screening process and help the Immigration Department ("ImmD") to handle the backlog of accumulated cases. An effective screening system is mutually beneficial to both the government and *non-refoulement* claimants.

Closed Containment Camp

We are concerned by suggestions urging the government to set up a closed containment camp, in the outlying islands or even in Mainland China, for *non-refoulement* claimants. Apart from the obvious concerns regarding human rights violations, the setting up of closed containment would undoubtedly result in a heavy financial burden on the administration and "alternatives are significantly cheaper than detention – 10 times cheaper" (See UNHCR, *Options Paper 2: Options for governments on open reception and alternatives to detention*, 2015). The government should learn from the negative experiences of foreign jurisdictions such as Australia. The Australian Government spent around HKD $7 billion dollars[1] annually to maintain its offshore detention facility in Papua New Guinea. It costs around HKD $2.3 million[2] to detain only ONE asylum seeker in an offshore facility every year.[3]

It is also estimated that the cost of detaining ONE *non-refoulement* claimant in an onshore facility is around $1.373 million per year while the cost providing for ONE *non-refoulement* claimant within the community during the processing year is only around HKD$ 69,000.[4]

[1] The Guardian, "Asylum seekers on Manus and Nauru won't settle in Australia, Turnbull says", 23 September 2015 http://www.theguardian.com/australia-news/2015/sep/23/asylum-seekers-on-manus-and-nauru-wont-settle-in-australia-turnbull-says
[2] http://www.refugeeaction.org.au/?page_id=3447
[3] *Ibid*
[4] *Ibid*

Delay

We would also like to respond to the accusation that *non-refoulement* claimants had intentionally delayed the process of their claim by not submitting the required documents on time or not attending screening interviews. We have in fact been seeking expedited assessments of claims since 2006 and 2009.

Many *non-refoulement* claimants had been waiting for a determination for over 3 years after the submission of their claims, living in limbo in the meantime. Many requested for medical examinations for physical injuries and scars so that they could be recorded in a timely manner, to assist in the assessment of their claims but were not entertained. Others made repeated requests for psychiatric assessment to determine suitability of attending screening interviews and/or to provide corroborating evidence in support of their claims and have waited up to 2 years for such requests to be approved and arrangements to be made.

Crimes related to Asylum Seekers and Refugees

The current process under the Immigration Ordinance and the administrative USM system, requires that *non-refoulement* claimants be liable to removal before their claims will be processed. As such, *non-refoulement* claimants who enter Hong Kong legally are compelled to breach their conditions of stay and overstay their visas *before* the ImmD will allow them to register their claims for screening under the Unified Screening Mechanism ("USM") and before they will be eligible to receive humanitarian assistance. In short, Hong Kong has a system requiring asylum seekers to be here illegally before Hong Kong will assess their claims. This is the system the Government has set up and is not the fault of *non-refoulement* claimants. . The UN Committee against Torture ("the Committee") has recommended the government to grant an "alternative immigration status" to *non-refoulement* claimants such that they can legally remain in Hong Kong when their claims are screening under the USM.

In regard to the purported criminal statistics related to non-refoulement claimants, these do not represent the full picture, for instance we have seen no statistics on the conviction rate in relation to the statistics on arrests. We welcome and await full statistics by the Hong Kong Police.

Low substantiation rate and transparency issue

The low percentage of substantiated cases under the USM (and the previous screening mechanisms) has always been held up as "evidence" to prove that there are a huge amount of "fake refugees" abusing the system. Such "evidence" is misleading. In fact, the UN Committee against Torture has specifically pointed out that the current USM system has a "distinctly high threshold for granting protection" and that the appeal mechanism is not transparent. The lack of published decisions at the appeal stage encourages inconsistent decision making and hinders claimants and their legal representatives in preparing their claims in accordance with the views expressed by the decision makers. The UN Committee urged the Torture Claims Appeal Board to publish "redacted" version of their decision to enhance transparency. We have repeatedly written to the Torture Claims Appeal Board requesting that decisions be published on a redacted basis. To our knowledge, no action has been taken so far.

Although the ImmD has been releasing statistics online regarding USM, the data released were only simple figures regarding the cumulative numbers of claims. This has made the monitor and study of the USM system extremely difficult.

Withdrawal from Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

We are especially concerned about the statement made by the Chief Executive and other high-ranking officials in the administration regarding the possibility for HKSAR to withdraw from the Convention in order reduce the number of "fake refugees" in Hong Kong. While such claims are indicative of a blatant disregard for the rights of both *non-refoulement* claimants and Hong Kong citizens, the Convention is by no means the only instrument that offers protection to USM claimants. The Hong Kong Basic Law, the Hong Kong Bill of Rights Ordinance and case law offer protection to USM claimant against refoulement. To withdraw from the Convention, would not only be an embarrassment to Hong Kong internationally, locally it would result in further litigation and delay.

Unfair practices under the current system - USM

It has come to our attention that the ImmD has started to detain persons on arrival at the airport and engage in a pre-screening / pre-USM assessment of their claims. At this point, the claimant is generally without legal representation and without an interpreter. The ImmD reserves the right under the current system to assess whether the claim meets the threshold for screening under the USM failing which if the person's claim if refused at this preliminary stage, the person will be liable to be removed from Hong Kong. This means that the claimant – despite seeking *non-refoulement* protection on arrival – may be removed without having the benefit of legal advice and representation, and without a proper full screening under the USM procedures. It is a means by which the Government is skirting its responsibilities under both domestic and international law and which falls afoul of the high standards of fairness required and which has been recognized by the Courts in Hong Kong.

We are further concerned with detention of claimants under S.37ZK of the Immigration Ordinance, which provides that claimants may be subjected to detention pending final determination of their claim. Detention during the USM screening process, impairs the ability of claimants and their legal representatives to prepare their claims, and in particular, interferes with evidence-gathering as claimants are deprived of internet access, have limited phone calls and face considerable difficulties when arranging visits from legal representatives and/or interpreters.

Consultation with Joint Profession & Public

We urge the Administration to consult with the joint legal profession and other stakeholders, including Duty Lawyer Service, *non-refoulement* claimants, NGOs and international experts.

The Rights of Transgender and Intersex Persons

We welcome the set-up of an Inter-departmental Working Group on Gender Recognition to consider legislation and incidental administrative measures that may be required to protect the rights of transsexual persons in HKSAR.

We are concerned of the management, treatment and well-being of transgender inmates in Hong Kong. We have received numerous reports from of transgender individuals being placed in correctional

facilities in accordance to their legally recognized gender stated in their identification documents regardless their gender presentation or gender identity.

We continue to receive reports of transgender prisoners experiencing harassment during body searches by law enforcement officers. Transgender inmates are often subject to unjustified strip searches, verbal harassment and denial of basic or medical necessities including hormone treatment and vaginal dilation tools. They are not offered the option of a female or male officer in the conducting of strip searches.

The present system does not sufficiently address the needs and vulnerability of transgender prisoners and fails to ensure that they are kept in relative safety due to the fundamental lack of training, clear policies and standards for searching transgender inmates.

Comprehensive policies and mandatory training regarding transgender inmates including guidance for strip search procedures for transgender inmates, housing determinations for transgender inmates and appropriate interaction between law enforcement officers and transgender inmates should be promulgated.

Trafficking in Persons

We welcome the amendment to the prosecution code to include forced labour within the definition of human trafficking.

The government, in multiple official statements, has consistently denied Hong Kong being a destination, transit and source territory for human trafficking since 2003.

Furthermore, the government maintains that current legislation "provides a solid and proven framework to combat human trafficking", with various domestic legislation prohibiting various human trafficking conduct within the meaning of the Palermo Protocol.

However, various international reports contradict the rhetoric of the government, most notably the *Trafficking in Persons Report 2015* issued by the US Department of State, which stated that HKSAR "does not fully comply with the minimum standards for the elimination of trafficking". In particular, a recent report (*Coming Clean: The Prevalence of Forced Labour and Human Trafficking for the Purpose of Forced Labour against Migrant Domestic Workers in Hong Kong*) issued by Justice Centre Hong Kong ("JCHK") stated that 1 in 6 Migrant Domestic Workers ("MDWs") in Hong Kong the Centre has surveyed displayed all the indicators required to be identified as forced labourers, this means potentially over 50,000 MDWs face forced labour in Hong Kong.

The main criticism against current legislative framework is that there are no specific anti-human trafficking laws in Hong Kong. Section 129 of the Crimes Ordinance (Cap. 200) is the only piece of legislation that deals directly with human trafficking, however, it criminalizes, specifically, human trafficking for sexual exploitation. Other notable legislations that relates indirectly to the issue include Section 13 of the Immigration Ordinance (Cap. 115) which allows the Director of ImmD to permit illegal immigrants to remain; Section 44 of the Offences Against The Person Ordinance (Cap. 212) which essentially criminalizes the selling of possession, custody or control of persons.

The disparate pieces of legislation show that there is no centralized, comprehensive legislative framework dedicated to combating human trafficking. The definition of "human trafficking" adopted by the current framework is also extremely narrow, especially when compared with that of international

conventions. In essence, "human trafficking" is largely defined as the smuggling of persons to and from Hong Kong borders for the purposes of prostitution and the transfer of persons for valuable consideration. On the other hand, the UN Palermo Protocol Article 3 defines human trafficking much more expansively, notably, the "purpose" of trafficking is not limited to sex work, and "actions" that could constituting "trafficking" includes a much broader range of actions – for example, the mere recruitment of persons, by coercion or deception, is sufficient.

The Palermo Protocol's definition is incorporated into the Department of Justice's Prosecution Code, however, as the Committee noted, there has been no parallel change in the legislative framework. In addition, JCHK noted that no information has been provided by the HKSAR regarding how the Prosecution Code is being applied in practice to monitor and evaluate its effectiveness.

The result of the absence of anti-trafficking specific laws and that the issue is dealt with in a scattered manner across multiple legislations is that combating human trafficking lies in the discretion, practice and cooperation of multiple law enforcement agencies, such as the Hong Kong Police Force and the ImmD . However, such practices, as well as existing immigration policies in Hong Kong, are not satisfactory in handling victims of human trafficking and in fact adversely affect the effort against it.

In relation to the handling of human trafficking victims by frontline officers of both Hong Kong Police and ImmD, the process has proved to be detrimental to victims. Although there are an aide-memoire and an "action card" on how to identify and assist victims of human trafficking respectively for frontline officers of each agency, both documents only provide detailed steps in trafficking cases for sexual exploitation, while similar guidance for cases of forced labour are absent. Reports of victims having their cases juggled between different departments with no department assuming the responsibility to handle them are not uncommon. One victim of forced labour reported his case to the Hong Kong Police but was referred to the ImmD, only then to be told to return to the HKPF and ultimately sent back to the ImmD and directed to the Labour Department. Such an example highlights the disjointed and incoherent effort in the policy and practice adopted by the HKSARG in tackling human trafficking cases. Officers often lack training in sensitivity and proper conducting of interviews with victims, in turn making their approach very ad hoc.

Live-in Requirement and Forced Labour

The Committee has specifically identified the immigration policies of the "live-in requirement" and the "two week rule" with regards to MDWs are particularly worrisome and recognizes the fact that migrant domestic workers are vulnerable to forced labour.

The former requires MDWs to live in the employing household while the latter requires MDWs to leave Hong Kong territory within two weeks upon termination of their contracts. The Committee has observed that both policies operate to increase the risk of torture and ill-treatment to MDWs. The "two week rule" creates a disincentive for MDWs, who quit or are terminated, to pursue legal actions when faced with ill-treatment.

Moreover, although the Director of ImmD can exercise his discretion to allow MDWs to stay while they pursue their claims, they are not allowed to work during the period. As a result, they must depend financially on their own friends or NGOs, for food, shelter and basic necessities. Such MDWs are also not eligible for subsidized health care, rendering MDWs who have health conditions very vulnerable.

In addition, where MDWs are allowed to stay on the discretion of the Director of ImmD, they are still responsible for fees required for visa renewal. The Director again has the discretion to waive such fees and / or allow the MDW to work for a different employer, however, such discretion is mostly only exercised in cases where criminal prosecution is to be initiated against the employer. Where there is no criminal prosecution, but there may be a meritorious civil or discrimination claim, a fee waiver or permission to switch employers are often not granted.

The "live-in" requirement enforced by the HKSAR continues to contribute to multiple forms of dependency on the employer for work and non-work life, resulting in risks of forced labour. There are no statutory provision stipulating general maximum working hours, migrant domestic workers are more vulnerable to uncertainty of and excessive working hours, insufficient rest time, and poor living conditions. Domestic workers are also more susceptible to physical, sexual and verbal abuse, given the nature of their work and the "live-in" requirement.

There has been growing number of reports like 'Coming Clean' published by the Justice Centre and other NGOs raising concerns about the exploitation and abuse of migrant domestic workers in Hong Kong as a result of the impact of the "live-in" requirement and the "two-week-rule".

10 June 2016

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