

To: The Legislative Council Panel on Constitutional Affairs

From: Kelley Loper, Faculty of Law, The University of Hong Kong

Re: Submission for the meeting on the “Outcome of the hearing of the Report of the Hong Kong SAR by the UN Committee on the Elimination of Racial Discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination” on 19 November 2018

For the Panel’s reference, please see the attached submission made by the Centre for Comparative and Public Law, Faculty of Law, The University of Hong Kong, to the United Nations Committee on the Elimination of Racial Discrimination in July 2018.

I have also pasted below comments made to the Panel during its meeting on 19 November 2018.

All the best,

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Comments to the Panel on Constitutional Affairs:

- Thank you for the opportunity to comment on the outcome of the hearing of the United Nations Committee on the Elimination of Racial Discrimination.
- Our Centre submitted a legal analysis to the Committee in July 2018 which details Hong Kong’s lack of full compliance with its obligations under the Convention. The Committee’s recent Concluding Observations reflect many of these concerns and also repeat most of the recommendations made in 2009 which have not yet been implemented.
- In our submission to the Committee, we noted that the Race Discrimination Ordinance (RDO) does not meet international standards. It also provides much less protection from racial discrimination than comparable laws in other common-law jurisdictions and is significantly weaker than Hong Kong’s other anti-discrimination statutes.
- In particular, the RDO does not apply to all government functions and powers. The following is a hypothetical example of what this could mean in practice. If a police officer *sexually* harasses someone in the course of making an arrest, that person would be able to make a complaint under the Sex Discrimination Ordinance and request assistance from the Equal Opportunities Commission (EOC). However, if a police officer *racially* harasses a person in similar circumstances, the EOC would not be able to assist. The government has not offered a clear explanation for these differences.
- The RDO contains other overly broad exemptions that could allow unjustifiable racial discrimination in violation of the Convention. The government’s proposed amendments do not address these issues.
- As part of its follow-up to the CERD review, we urge the administration to introduce further amendments, and other relevant policies, to comply with its international human rights obligations and ensure effective legal protection from racial discrimination for everyone in Hong Kong.

Submission to the United Nations Committee on the Elimination of all Forms of Racial Discrimination¹**The Centre for Comparative and Public Law (CCPL)²
Faculty of Law, The University of Hong Kong****July 2018****Introduction**

1. This submission highlights ongoing issues with the Hong Kong Special Administrative Region of China's (Hong Kong's) implementation of its obligations under the International Convention on the Elimination of all Forms of Racial Discrimination (the Convention). In particular, the Hong Kong government has not yet addressed the concerns raised – or adopted the recommendations made - by the Committee on the Elimination of Racial Discrimination (the Committee) in its 2009 Concluding Observations.³ The following paragraphs consider some of the continuing weaknesses of the Hong Kong Race Discrimination Ordinance (RDO)⁴ as well as government policies toward asylum seekers, refugees and migrant domestic workers.

Definition of discrimination in the Race Discrimination Ordinance

2. The RDO's definitions of direct and indirect racial discrimination unduly restrict potential claims and do not fully comply with the definition of racial discrimination expressed in Article 1 of the Convention.
3. The RDO's definition of "direct discrimination" is limited to less favourable treatment of a person *on the ground of the race* of that person. In contrast, the now defunct UK Race Relations Act of 1976 (RRA), which served as the primary model for the RDO, defines direct discrimination as less favourable treatment *on racial grounds*. This more comprehensive language might include, for example, discrimination on the grounds of the

¹ This submission is based on research conducted by students enrolled in Equality and Non-discrimination, an elective course in the Faculty of Law at the University of Hong Kong in the spring semester of 2018. Previous, related research conducted by faculty members affiliated with The Centre for Comparative and Public Law (CCPL) includes, for example: P. Kapai, "The Status of Ethnic Minorities in Hong Kong, 1997-2014", Zubin Foundation, 2015; C. Petersen and K. Loper, "Equal Opportunities Law Reform in Hong Kong: The Impact of International Norms and Civil Society Advocacy" in M. Tilbury, S.N.M. Young, and L. Ng (eds.), *Reforming Law Reform: Perspectives on Law Reform Processes in Hong Kong and Beyond* (HKU Press, 2014) 173-204; and K. Loper "One Step Forward, Two Steps Back? The Dilemma of Hong Kong's Draft Race Discrimination Legislation", 38 *HKLJ* (2008), 15-30. Please contact Kelley Loper, CCPL Director, at kloper@hku.hk with any queries.

² CCPL <http://www.law.hku.hk/ccpl> was established in 1995 in the Faculty of Law at the University of Hong Kong to advance knowledge on public law and human rights issues primarily from the perspectives of international and comparative law and practice; encourage and facilitate collaborative work in the fields of comparative and public law; and make the law more accessible to the community and more effective as an agent of social change.

³ The Committee on the Elimination of Racial Discrimination, Concluding Observations: China (including the Hong Kong and Macau Special Administrative Regions), CERD/C/CHN/CO/10-13, 15 September 2009, paras. 27-31. CCPL also highlighted these issues in its submission to the Committee prior to the August 2009 review. See Submission to the UN Committee on the Elimination of Racial Discrimination 75th Session, August 2009, The Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong:

http://www.law.hku.hk/ccpl/wp-content/uploads/2018/03/Updated%20Sub%20to%20Govt/CCPL_University_HK_China_cerd75.pdf

⁴ Cap 602 of the Laws of Hong Kong.

race of an associate and not necessarily treatment only on the grounds of a person's *own* race.

4. Indirect discrimination, also based on the old UK RRA, is particularly difficult to establish. According to the RDO, indirect discrimination occurs when the discriminator applies a "requirement or condition" to a person that the discriminator also applies equally to others not of the same racial group but with which a *considerably smaller proportion* of those in that person's racial group can comply.⁵ This formulation imposes a particularly high threshold. During the legislative process, the Hong Kong government opposed calls to incorporate the newer, less onerous, text of the amended Race Relations Act in 2000 (now reflected in the UK Equality Act 2010) in the RDO. Instead of the more restrictive "requirement or condition", the new UK definition refers to a "provision, criterion or practice" that puts someone at a "particular disadvantage". This definition has made indirect discrimination easier to establish in the UK and allows the courts to redress a broader range of unsustainable indirect discrimination.

Exemptions for nationality and immigration status

5. Despite the Committee's concerns,⁶ the government has not yet addressed the omission of nationality, language or immigration status as prohibited grounds of discrimination in the RDO. At the same time sections 8(2) and 8(3) remain and exempt any acts done on the grounds of nationality, citizenship, residency and length of residency, among other matters, even where these acts might otherwise amount to indirect racial discrimination. The breadth of these provisions could allow for potentially unjustifiable direct or indirect racial discrimination in contravention of the Convention.
6. The government maintains that Mainland Chinese and Hong Kong Chinese are essentially of the "same racial stock" and therefore any unfavourable treatment of Mainland Chinese immigrants on the basis of their Mainland origin, does not constitute racial discrimination. Mainland Chinese, however, have faced significant discrimination in Hong Kong, similar to other types of national origin discrimination, due to the unique history, political climate and cultural differences between Hong Kong and Mainland China.

Exclusion of government activities from the scope of the RDO

7. The RDO does not cover all government powers and functions. It only applies to the government in relation to activities that fall within the scope of the legislation, including education, employment, and the provision of goods, facilities, and services. In this sense, the RDO is much weaker than Hong Kong's other three anti-discrimination statutes that explicitly make it unlawful for the government to discriminate *in the performance of its functions or the exercise of its powers* (on the basis of sex, marital status, pregnancy, disability and family status).⁷ Despite the Committee's previous concerns,⁸ the Hong Kong government insists that the constitutional right to equality in the Bill of Rights and the Basic Law are sufficient to comply with the Convention.⁹ The Equal Opportunities

⁵ The requirement or condition must also be unjustifiable.

⁶ Para 27, State Report of Hong Kong (CERD/C/CHN-HKG/14-17).

⁷ Emphasis added. See, for example, the Hong Kong Sex Discrimination Ordinance (Cap. 480), section 21.

⁸ Para. 28 of Concluding Observations of the Committee on the Elimination of Racial Discrimination for China including Hong Kong and Macau Special Administrative Regions (CERD/C/CHN/CO/10-13)

⁹ Paras. 2.7 and 2.8 of State Report of Hong Kong (CERD/C/CHN-HKG/14-17)

Commission, however, does not have the jurisdiction to investigate or conciliate cases brought under the Bill of Rights or the Basic Law. The high costs of legal representation, the very low means test to qualify for legal aid, and other procedural difficulties, make constitutional judicial review an ineffective option for dealing with most claims of racial discrimination against government authorities.

8. The 2016 case of *Singh Arjun v Secretary for Justice* – involving an ethnically Indian boy who alleged discriminatory treatment and unlawful arrest by the police on the basis of his race - illustrates these limitations. The District Court held that, as a matter of construction, the RDO does not apply since not all government “activities” constitute “services”.¹⁰ This is the only case that has been brought before the courts under the RDO since the law’s enactment ten years ago, also suggesting the limits of sole reliance on the courts as an effective enforcement mechanism and avenue for victims seeking remedies for racial discrimination.¹¹

Review of the RDO

9. In 2014, the EOC reviewed Hong Kong’s anti-discrimination laws, including the RDO, and launched a public consultation exercise (the Discrimination Law Review). It made 73 recommendations to the government, prioritizing 27.¹² In 2017, the government decided to consider 9 of these recommendations. In relation to the RDO in particular, it considered extending the law’s protection by allowing claims of discrimination on the basis of the race of a person’s associate (at the moment it is possible to claim discrimination on the basis of the race of a person’s “near relative”). While this development is certainly welcome, it has not yet been implemented and most of the EOC’s recommendations have been ignored.

Refugees and asylum seekers

10. Although the Hong Kong government established a Unified Screening Mechanism (USM) in March 2014 to consider *non-refoulement* claims,¹³ the system does not provide adequate protection for, and perpetuates discrimination against, asylum seekers and refugees. Problems include: 1) the extremely low USM substantiation rate (less than 1% of claimants are successful, in stark contrast with other developed jurisdictions that more comprehensively screen refugee and complementary protection claims); 2) redacted decisions are not publicly available, therefore the reasons for rejection and the decision-makers’ legal analysis cannot be openly discussed or scrutinized; 3) even successful claimants are not granted legal status or re-settled locally and therefore technically remain illegal immigrants in Hong Kong, are not granted the right to work, and are provided only

¹⁰ *Singh Arjun by his next friend Singh Anita Guruprit v Secretary for Justice for and on behalf of the Commissioner of Police and another* [2014] HKDC 199.

¹¹ The failure to provide easy access to justice for the victims of racial discrimination may not comply with CERD General Recommendation No. 16. See para. 17, UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005, available at: <http://www.refworld.org/docid/48abd56dd.html>.

¹² Equal Opportunities Commission, “Discrimination Law Review: Report on Responses to the Public Consultation”, March 2016, available at: <http://www.eoc.org.hk/eoc/upload/DLR/20163241415549215158.pdf>

¹³ Including claims based on Article 3 of the Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment, Articles 6 and 7 of the International Covenant on Civil and Political Rights, and Article 33 of the 1951 Convention relating to the Status of Refugees.

substandard housing and limited food subsidies; 4) rhetoric about “bogus” or “fake” refugees has perpetuated negative attitudes and discrimination against USM claimants who generally come from minority racial and ethnic communities; and 5) the central government has still not extended the 1951 Convention relating to the Status of Refugees to Hong Kong.

11. In the past few years, xenophobic rhetoric against asylum seekers and refugees has increased in the media. The government’s inaction in the face of the alarmingly racist attacks sponsored by political parties against refugees may engage Article 4 of the Convention which requires that the government condemn all propaganda and racial hatred and Article 7 which requires adoption of immediate and effective measures to combat “prejudices which lead to racial discrimination and to [promote] understanding, tolerance and friendship among nations and racial or ethnical groups”.

Migrant domestic workers

12. The Hong Kong government continues to apply the “live-in” and “two-week” rules that require migrant domestic workers to live with their employers and leave within two weeks after termination of their employment, despite the Committee’s concerns and recommendations to abolish these policies in its 2009 Concluding Observations. Recent reports¹⁴ suggest that abuse and discrimination against migrant domestic workers on multiple grounds, including national origin, continues to be a serious problem.

Conclusions

13. The RDO remains weak and does not effectively protect individuals in Hong Kong from racial discrimination. Its overly broad exemptions allow unjustifiable racial discrimination in contravention of the Convention. The RDO also does not provide sufficient redress or avenues for victims of discrimination to obtain effective remedies.
14. Hong Kong’s policies toward asylum seekers, refugees, migrant domestic workers, and other categories of migrants and immigrants fail to provide sufficient human rights protection. Coupled with the weaknesses in the RDO, these policies can encourage the proliferation of discriminatory attitudes.

¹⁴ See, for example, Lili Kuo, “Hong Kong Country Club Bans Domestic Helpers from Pool”, The Guardian, 23 April 2018, available at: <https://www.theguardian.com/world/2018/apr/23/hong-kong-country-club-bans-domestic-helpers-from-pool>.