

SUBMISSIONS TO THE PANEL ON CONSTITUTIONAL AFFAIRS

On the hearing of the Report of Hong Kong by the United Nations Committee on the Elimination of Racial Discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination

23 November 2018

Justice Centre Hong Kong ('Justice Centre') makes the following submissions to the Panel on Constitutional Affairs of the Legislative Council of the Hong Kong Special Administrative Region ('Hong Kong') for the agenda items 'Outcome of the hearing of the Report of the Hong Kong Special Administrative Region by the United Nations Committee on the Elimination of Racial Discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination' ahead of its meeting on 19 November 2018.

Legal, institutional and public policy framework for combating racial discrimination

Despite several calls from international bodies and civil society organisations (Justice Centre included) in recent years,¹ Hong Kong continues to lack a human rights institution that is fully compliant with the Paris Principles.² This continues to be a major concern when considering the city sells itself as "an open society where social freedoms are cherished".³ The Equal Opportunities Commission (EOC), is graded C, the lowest rating, by the Global Alliance of National Human Rights Institutions reflecting an urgent need to change.⁴

¹ Institutions include: the 45 civil society organisations (CSOs) that make up the Hong Kong UPR Coalition (see http://www.justicecentre.org.hk/framework/uploads/2018/UPR/HKUPRC_Submission_MARCH2018.pdf) and the Hong Kong Bar Association (see <https://www.hkba.org/sites/default/files/Committee%20on%20the%20Elimination%20of%20All%20Forms%20of%20Racial%20Discrimination%20%28webpage%29.pdf>). International bodies include: Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, CCPR/C/CHNHKG/CO/3, 29 April 2013, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCHN-%2014%20HKG%2fCO%2f3&Lang=en, Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China, E/C.12/CHN/CO/2, Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of China, CRC/C/CHN/CO/3-4, 29 October 2013, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCHN%2fCO%2f3-%204&Lang=en, all accessed on 22 November 2018.

² *Principles relating to the Status of National Institutions*, adopted by General Assembly resolution 48/134 of 20 December 1993, available at: <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx>, accessed on 22 November 2018.

³ *What is Brand Hong Kong?* – available at

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Justice Centre is disappointed to read the government's response to the Committee.⁵ In paragraph two the government states that "the EOC largely follows the Paris Principles..." without committing to fully follow these internationally recognised human rights standards.⁶ Further, if the responses is that the EOC "largely follows", there is no mention of why it does not "fully follow" or what actions will be undertaken to ensure it does.

Additionally, the Committee has raised concern over the lack of data and statistics regarding "racial discrimination-related administrative and civil complaints submitted to the EOC" indicating both a lack of adequate funding and adequate powers of investigation; two necessities for adherence to the Paris Principles. Justice Centre is disappointed to see that neither of these issues are addressed in the government's response.

Particularly worrying, especially considering the government's commitment to connecting with all areas of Hong Kong society,⁷ is the lack of response to the Committee's fourth theme calling for "information on collaboration with non-governmental organizations (NGOs) fighting against racial discrimination".⁸ As Justice

<https://www.brandhk.gov.hk/html/en/BrandHongKong/WhatsBrandHongKong.html>, accessed on 23 November 2018

⁴ EOC's Global Alliance of National Human Rights Institutions rating available at: <https://nhri.ohchr.org/EN/Contact/NHRIs/Lists/National%20Institutions/DispForm.aspx?ID=86>, accessed on 22 November 2018.

⁵ *List of themes in relation to the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)*, Committee on the Elimination of Racial Discrimination, Ninety-sixth session, 6-30 August 2018, Theme 2, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhslsns7vAyg8M3uDZ7rn5ZZNkV7cd5uREolN63SA5oJ2eNIBPOyMkXyc3DGcMSckMDuQ2wDzx2aDD%2FQXq8772RRIfRZsh%2BKXEBtP9J9m9A9w6TVZ08YmlBiixlHcJwvlcYw%3D%3D>, accessed on 22 November 2018

⁶ *The Hong Kong Special Administrative Region (HKSAR) Government's Response to the List of Themes prepared by the United Nations Committee on the Elimination of Racial Discrimination in relation to the combined 14th to 17th periodic reports of the People's Republic of China*, para. 2, available at: <https://www.legco.gov.hk/yr18-19/english/panels/ca/papers/ca20181119cb2-238-3-e.pdf>, accessed on 22 November 2018

⁷ Carrie Lam, *Connecting for Consensus and A Better Future: Manifesto of Carrie Lam Chief Executive Election 2017*, available at: https://www.ceo.gov.hk/eng/pdf/leaflet_revised_EN.pdf, accessed on 23 November 2018

⁸ *List of themes in relation to the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)*, Committee on the Elimination of Racial Discrimination, Ninety-sixth session, 6-30 August 2018, Theme 4, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhslsns7vAyg8M3uDZ7rn5ZZNkV7cd5uREolN63SA5oJ2eNIBPOyMkXyc3DGcMSckMDuQ2wDzx2aDD%2FQXq8772RRIfRZsh%2BKXEBtP9J9m9A9w6TVZ08YmlBiixlHcJwvlcYw%3D%3D>, accessed on 22 November 2018

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Centre has repeatedly stated in previous submissions,⁹ consultation with civil society organisations has lacked transparency and meaning. Despite continued recommendations by international bodies and civil society, there have been no substantial changes made. For example, the government has not engaged in meaningful consultation regarding responses to, and implementation of the concluding observations, resorting to “established practice” forms of consultation, which have been consistently noted by civil society as insufficient.

Committee issues specific to Hong Kong

Justice Centre calls on the government to fully adhere to Committee’s recommendations in amending the Race Discrimination Ordinance (RDO) of Hong Kong and to ensure its compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). We welcome the efforts made thus far in including indirect discrimination as a prohibited form of discrimination. However, it is imperative that these amendments ensure criminalisation will include nationality, immigration status and language-based discrimination and be applied to all government functions in according with Article 1 of ICERD. Such concluding observations has also been made by the Committee on Economic, Social and Cultural Rights (CESCR).¹⁰

We find the government’s response to the Committee’s recommendation to repeal the “two-weeks rule”, the live-in requirement and the exclusion from the Minimum Wage Ordinance to be disappointing. Rather than serving to “prevent abuse” as the government has stated in its answers, Justice Centre’s research, as well as that of other civil society organisations, such as; Mission for Migrant Workers, Hong Kong Federation of Asian Domestic Workers and Progressive Labour Union of Domestic Workers in Hong Kong, is that these measures have heightening the risk of human trafficking and exploitation.¹¹

⁹ Most recently in Justice Centre’s submission to Chief Executive Carrie Lam’s consultation exercise for her second annual policy address available at: <http://www.justicecentre.org.hk/framework/uploads/2014/03/Justice-Centre-Hong-Kong-Policy-Address-2018-Submission-final.pdf>, accessed on 22 November 2018.

¹⁰ Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China, E/C.12/CHN/CO2, 13 June 2014, available at: https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/ICESCR_Concluding_Observation.pdf, accessed on 22 November 2018.

¹¹ For more information about policies and practices relating to migrant domestic workers and their effects, see, for example, Hong Kong UPR Coalition, ‘Joint Civil Society Submission from the Hong Kong UPR Coalition’, paragraphs 90 to 93 and 101 to 105; Justice Centre Hong Kong, Coming Clean; Mission for Migrant Workers, “[Press Statement] New Study Shows MDWs Woes On Unsuitable Accommodation, Lack Of Privacy And Insufficient Amenities”, 10 May 2017, available at: <http://www.migrants.net/press-statement-new-study-shows-mdws-woes-on-unsuitable-accommodation-lack-of-privacy-andinsufficient-amenities/>; Mission for Migrant Workers, Mission for Migrant Workers, Live-In Policy increases female FDWs’ vulnerability to various types of abuse, May 2013, available at: <http://www.migrants.net/live-in-policy>

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In addition, there is a distinct lack of inspection for the enforcement of the Standard Employment Contract (SEC) for migrant domestic workers, an issue that the Philippine government recently referred to in their United Nations Universal Periodic Review recommendations. While the SEC is referred to by the government in response to theme 36, there is no mention of how employers' conduct is monitored or relevant data provided on enforcement.

Justice Centre calls on the government to make the required administrative and legislative changes to ensure the rights of migrant domestic workers and asylum-seekers are protected to the standards set out as part of ICERD and in adherence to both the Committee and Philippine UPR recommendations.

Situation of non-citizens, including migrant workers, asylum seekers and refugees

Justice Centre is of the view that the government did not accurately responded to the Committee's request regarding the provision of "statistics disaggregated by ethnicity, on stateless persons in China, Hong Kong, and Macao, China."¹²By stating that:

"The United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol have never been applicable to Hong Kong"

And;

"Only persons who are liable to be removed to his home country/ a country where he enjoys a right to enter (known as a "Risk State" in the context of [Unified Screening Mechanism (USM)]) would be

[primer-is-online-now/](#) and Hong Kong Federation of Asian Domestic Workers and Progressive Labour Union of Domestic Workers in Hong Kong. Between a rock and a hard place: The charging of illegal agency fees to Filipino domestic workers in the Philippines and Hong Kong, October 2016, available at: <https://view.publitas.com/rights-exposure/betweena-rock-and-a-hard-place-en/page/1> , all accessed on 23 November 2018

¹² *List of themes in relation to the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)*, Committee on the Elimination of Racial Discrimination, Ninety-sixth session, 6-30 August 2018, Theme 3, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhslsns7vAyg8M3uDZ7rn5ZZNkV7cd5uREoIN63SA5oJ2eNIBPOyMkXyc3DGcMSckMDuQ2wDzx2aDD%2FQXq8772RRIfRZsh%2BKXEBtP9J9m9A9w6TVZ08YmlBiixlHcJwvlcYw%3D%3D>, accessed on 22 November 2018

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eligible to make a non-refoulement claim under USM. Therefore, none of the claimants, children or otherwise, are stateless persons.”

This answer not only incorrectly applies the internationally agreed upon definition of statelessness but does a disservice to the stateless population that likely exists in Hong Kong. As Justice Centre has previously stated in its November 2018 submission to the United Nations Committee on the Elimination of Racial Discrimination,¹³ determination of a person's stateless status is dependent upon the domestic legislation of each respective jurisdiction with the majority of states applying either the principle of *jus sanguinis* or *jus soli* (citizenship/nationality based on parentage or place of birth respectively). Furthermore, while there exists in many cases an overlap between unregistered and undocumented persons and stateless persons, they are still distinct under international law.¹⁴

Hong Kong's status as a migrant destination ensures that statelessness is an issue. As such, the lack of effective identification mechanism is concerning. Persons who are victim of forced migration can quickly find themselves cut off and cast aside by their states of origin particularly if that nation has especially discriminatory policies. Due to this, it is possible that there are stateless persons seeking non-refoulement protection in Hong Kong whose status is being overlooked due to the lack of satisfactory screening mechanism and as a result, the government's duty to protect inherent human rights is not being fulfilled.

The right to nationality is enshrined as a fundamental human rights principle in international human rights law as well as customary international law. The 1954 Convention relating to the Status of Stateless Persons, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), are all conventions that apply in Hong Kong.¹⁵ Furthermore, the

¹³ Available at: <http://www.justicecentre.org.hk/framework/uploads/2018/11/Justice-Centre-Hong-Kong-CERD-HKG-replies-20181109.pdf>.

¹⁴ "Unregistered" and "undocumented" are not defined in international law. According to the Programme of Action adopted at the International Conference on Population and Development in Cairo in 1994, undocumented or irregular migrants are persons who do not fulfil the requirements established by the country of destination to enter, stay or exercise an economic activity. See United Nations Population Fund. (2014). Programme of Action adopted at the International Conference on Population and Development (20th Anniversary Edition). Available at: https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf (accessed on 23 November 2018). Unregistered persons can refer to persons who are not registered with the State or other bodies, such as the United Nations High Commissioner for Refugees, depending on the context.

¹⁵ 1954 Convention relating to the Status of Stateless Persons, available at: <https://www.unhcr.org/uk/protection/statelessness/3bbb25729/convention-relating-status-stateless-persons.html> ,

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2013 United Nations Secretary General report to the Human Rights Council as well as Resolution 32/5, adopted by the Human Rights Council in 2016, both affirm the obligation of states to avoid statelessness.¹⁶

Recommendations

Justice Centre makes the following recommendations for the administration:

- Establish a human rights institution that has a broad mandate in line with the Paris Principles and is provided with adequate financial and human resources;
- Ensure that the Equal Opportunities Commission (EOC) is compliant with the Paris Principles;
- Consistent with the concluding observations of the Human Rights Committee (HRC), CESCR and CERD,¹⁷ Hong Kong should amend the Race Discrimination Ordinance (RDO) so that it applies to government functions and powers, and covers the grounds of nationality, citizenship, residence status, and language;
- Consistent with concluding observations of HRC, CESCR, CERD, CEDAW and Convention Against Torture (CAT), Hong Kong should repeal of the "two-week rule" and the live-in requirement and adopt a comprehensive law ensuring migrant domestic workers enjoy the same conditions as other workers regarding remuneration, protection against unfair dismissal, rest and leisure, limitation of working hours, social security and maternity leave protection,¹⁸

International Covenant on Civil and Political Rights, Art.24, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> and Convention on the Elimination of All Forms of Discrimination against Women, Art.9, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>, all accessed on 23 November 2018

¹⁶ UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28, available at: <https://www.refworld.org/docid/52f8d19a4.html> (accessed 23 November 2018); Human Rights Council. (15 July 2016). Resolution 32/5. Resolution adopted by the Human Rights Council on 30 June 2016. A/HRC/RES/32/5. Retrieved from <https://documents-ddsny.un.org/doc/UNDOC/GEN/G16/154/27/PDF/G1615427.pdf>, accessed 23 November 2018

¹⁷ 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)", CCPR/C/CHN-HKG/CO/3, 29 April 2013, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/CHN-HKG/CO/3&Lang=En; Committee on Economic, Social and Cultural Rights, "Concluding observations on the second periodic report of China, including Hong Kong, China and Macao, China"; and Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination: China (including Hong Kong and Macau Special Administrative Regions)", CERD/C/CHN/CO/10-13, 15 September 2009, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/CHN/CO/10-13&Lang=En, all accessed on 23 November 2018

¹⁸ Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China,

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- Increase resources for the Labour Department to establish inspection mechanism for monitoring implementation of the Standard Employment Contract;
- Establish an identification mechanism for stateless persons. The mechanism should operate in tandem with, but not be limited to, the Unified Screening Mechanism process; and
- Establish a database of treaty body and UPR recommendations and a transparent central monitoring and evaluation mechanism for their implementation, following meaningful consultation with civil society, within one year.

I trust that this information is of assistance. For further information please contact Jake Mendrik, Policy Advisor (jake@justicecentre.org.hk) with any questions.

About Justice Centre Hong Kong

Justice Centre Hong Kong is a non-profit human rights organisation working to protect the rights of Hong Kong's most vulnerable forced migrants: refugees, other people seeking protection, and survivors of torture, human trafficking and forced labour.

For more information please visit: www.justicecentre.org.hk

CCPR/C/CHNHKG/CO/3, Committee on Economic, Social and Cultural Rights, Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China, E/C.12/CHN/CO/2, Committee on the Elimination of Racial Discrimination, Concluding observations, Consideration of reports submitted by China (including Hong Kong and Macau Special Administrative Regions) under Article 9 of the Convention, CERD/C/CHN/CO/10-13, and Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of China, CEDAW/C/CHN/CO/7-8 and Committee against Torture, Concluding observations on the fifth periodic report of China with respect to HKSAR, China, CAT/C/CHN-HKG/CO/5.

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