

The Fourteenth to Seventeenth Report of the
Hong Kong Special Administrative Region of the People's Republic of China under the
Convention on the Elimination of All Forms of Racial Discrimination

**Hong Kong Bar Association's Submission to
the Committee on the Elimination of All Forms of Racial Discrimination**

(At the 96th Session, 6 August 2018 to 30 August 2018)

I. Summary of Concerns and Recommendations

1. The HKBA remains concerned with the deficiencies of the Race Discrimination Ordinance ("RDO") in terms of its limited scope of protection. The RDO does not cover the Government in all its exercise of functions and powers, fails to prohibit discrimination on a number of grounds, and provides for certain wide exemptions.
2. The HKBA is concerned with the overall workability and integrity of the Unified Screening Mechanism ("USM") for determining *non-refoulement* claims. The HKBA is particularly concerned with the low number of substantiated claims, which, at less than 1%, falls well below the averages for other countries screening asylum claims and are at a level where the fairness of the system can be called into question. The Government is also proposing a number of worrying amendments to the USM that may run counter to the high standards of fairness required of the USM.
3. The HKBA remains concerned with the "two-week rule" and the "live-in requirement" maintained by the Government in respect of foreign domestic workers, as well as constant complaints from foreign domestic workers as to abuses of their rights.
4. The HKBA is concerned that the current legal framework does not provide adequately for the care of pregnant foreign domestic workers and their children, and about the ongoing incidence of discrimination in housing and education. The Committee on the Rights of the Child has also recommended establishing an independent Children's Commission/Commissioner, and the need for such is the most acute in relation to ethnic minority children and children of migrants.
5. The HKBA considers that the Government should review the RDO and its current policy and measures for Chinese education for non-Chinese speaking students.

II. Legal Framework against Race Discrimination - Deficiencies of the RDO

6. The legal framework prohibiting race discrimination in Hong Kong is the Race Discrimination Ordinance (“RDO”) and the non-binding Code of Practice on Employment, both of which came into effect in 2009.
7. HKBA remains concerned that the RDO:
 - (a) does not cover the Government in the exercise of all its functions and powers. The Government has only issued non-statutory administrative guidelines to its bureaux and departments and other public authorities to promote racial equality and ensure equal access by ethnic minorities to public services in certain areas;
 - (b) excludes acts done on the ground of a person’s immigration status (i.e. not being a HKSAR permanent resident), length of residence, nationality, citizenship or resident status;
 - (c) does not outlaw discrimination against newly arrived immigrants from Mainland China;
 - (d) provides exemptions for immigration legislation (section 55) and for acts done for the purpose of complying with a requirement of an existing statutory provision (section 56).
8. In March 2016, the Hong Kong Equal Opportunities Commission (“**EOC**”) concluded its Discrimination Law Review and made specific recommendations to the HKSAR Government for amending the RDO. In March 2017, the HKSAR Government proposed to follow up on 9 out of a total of 73 recommendations proposed by the EOC. While some of the follow-up items are relevant to the RDO, none of them remedies the above deficiencies of particular concern to the HKBA.
9. In particular, one of the deficiencies of the RDO is highlighted in the first judicial case decided under the RDO by the District Court of the HKSAR in May 2016, *Singh Arjun v Secretary for Justice* (DCEO 9/2011, 30 May 2016). In this case, a locally born Indian boy of Punjab ethnicity complained against discrimination by the police by way of, *inter alia*, racial profiling and failure to provide assistance and investigation of his complaint on the ground of race. One of the bases on which the case failed was that the exercise

of such police powers does not constitute the provision of “services” under section 27 of the RDO, and the RDO does not otherwise cover discrimination in the exercise of government functions and powers. This case sheds light on the limited applicability of the current RDO, as well as reveals shortcomings in the training and practice of police constables, such as the administering of the police caution only in Cantonese to suspects including non-Cantonese speaking suspects.

10. HKBA highlights below other, related areas of particular concerns.

III. Asylum Seekers and Refugees

11. The HKSAR Government maintains its position not to extend the 1951 Refugee Convention and its 1967 Protocol to the territory. However, the HKSAR Government is a party to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

12. The HKSAR Government has implemented a Modified Unified Screening Mechanism (USM) to determine *non-refoulement* claims, by agreeing to assess whether the claimants face a real risk of persecution, torture and/or cruel, inhuman or degrading treatment or punishment, and/or violations of other absolute and non-derogable rights such as the right to life.

13. HKBA urges the Committee to find that, whilst the Unified Screening Mechanism (“USM”) is undoubtedly an improvement on the pre-2014 regime with regard to *non-refoulement* protection, the mechanism still faces a number of challenges.

14. HKBA is concerned with the overall workability and integrity of the mechanism. The USM is not, despite its moniker, ‘unified’ but an amalgamation of three different mechanisms based on the assessment of four applicable grounds for non-refoulement protection. It is both statutory and administrative and involves a number of different standards of proof and thresholds. Particularly problematic is how the stringent procedural requirements and serious consequences for non-compliance are simply assumed to apply to the administrative aspects of the mechanism without any statutory underpinning. Legislating the administrative mechanism to bring it into line with the statutory framework would be a desirable starting point in creating a more cohesive yet delineated approach with the aim of providing increased transparency and clarity as to how each applicable ground should be properly assessed and determined.

15. Further, there is continued concern that decisions of the Torture Claims Appeal Board (“TCAB”) are not published. Published decisions are essential not only in building jurisprudence but to ensure that decisions are fair, transparent and consistent. The HKBA is concerned that poor quality TCAB decisions are not only failing to reach the high standards of fairness required by law but are contributing to a proliferation of judicial reviews.
16. The HKBA is particularly concerned with the low number of substantiated claims, which, at less than 1%, falls well below the averages for other countries screening asylum claims and are at a level where the fairness of the system can be called into question.
17. Other concerns include the lack of access to legal representation when non-refoulement claimants make their Written Signification (which is necessary to trigger the mechanism), the inadequate time allowed for filing non-refoulement claim forms, the lack of proper protocol in handling cases involving minors and the lack of protection under the statute against chain refoulement.
18. The issue of delay is one that has been raised time and again by the Security Bureau to justify changes ‘streamlining’ the mechanism. One such effort is the Security Bureau’s newly implemented Pilot Scheme on Provision of Publicly-funded Legal Assistance to Non- refoulement Claimants under the Unified Screening Mechanism (“**Pilot Scheme**”). The Government’s plan of the pilot scheme is intended to run in parallel to the existing scheme run by the Duty Lawyer Service (“**DLS**”) for the purpose of meeting the policy target to step up the number of determination of non-refoulement claims to 5,000 or above per year beginning 2017/18. The HKBA has observed that the existence of these two schemes which differ in terms of the provision of services but running in parallel is likely to generate arguments which will end up in the courts, and such proceedings are likely to prolong the process of assessment of USM claims.
19. On account of such alleged delay, the Government commenced a comprehensive review of the handling of non-refoulement claims in 2016. In the Legislative Council Panel on Security’s “Proposals to Amend the Immigration Ordinance (Cap.115) LC Paper No. CB(2)1751/17-18(01) despite the fact that non-refoulement claims have now dropped significantly by 80% with only 2997 claims pending as of June 2018 (representing a drop of 70% from peak), the Security Bureau is proposing a number of worrying amendments to further streamline the mechanism.

20. These include, amongst others, reducing the already inadequate period to return a non-refoulement claim form, reducing the statutory timeframe for lodging an appeal, narrowing the scope for granting extensions, disallowing further evidence or documents to be produced in support of the claim after the submission of the claim form, narrowing the scope for applying for adjournments of screening interviews and appeals and requiring claimants to conduct screening interviews and appeals in a language other than their mother tongue against the express wish of the claimant.
21. The HKBA expresses concern that these measures conceived to alleviate alleged delay are disproportionate and unnecessary when set against the sharp reduction in non-refoulement claims and without any clear evidence of systematic delay in the last two years, are lacking in terms of a legitimate aim. Further, there is concern that such proposed measures will run counter to the high standards of fairness required by law in accordance with principles set down by the courts.
22. The HKBA is concerned with the policy and practice of the Immigration Department Removal Assessment Section to require claimants attending Screening Interviews, but not their legal representatives or other persons, to undergo security screening through metal detectors and to submit to bag searches. Such policy and practice is divisive and assumes without objective justification that refugees are somehow suspect or criminally-inclined.

IV. Foreign domestic workers

23. Concerning the working conditions and requirements of foreign domestic workers in Hong Kong, the HKBA notes that notwithstanding the Committee's concerns and recommendations:
- (a) The HKSAR Government maintains the "two-week" rule and the live-in requirement for foreign domestic workers, including in its response to the recommendations contained in paragraph 30 of the Concluding Observations in July 2010. The latter requirement is associated with a higher risk of abuse or exploitation by employers.
 - (b) Although foreign domestic workers sign contracts that provide for a minimum wage, that wage is one that is lower than the statutory minimum wage.

- (c) In that regard, there have been constant complaints from foreign domestic workers through NGOs supporting them that they have not been receiving even that wage from employers or that employment agencies have, with impunity, made arrangements to charge them agency fees or commissions, or other expenses well above the prescribed levels and taking sums for such excessive fees, commissions or expenses from their wages.

V. Ethnic minority children and children of migrants

24. Current laws and policies of the HKSAR do not provide adequately for the care of pregnant foreign domestic workers (FDWs) to the detriment of their children:

- (a) Pregnant FDWs who report their pregnancy to their employers to face the risk of enhanced discrimination, harassment and termination of their employment. In one recently reported case, a FDW woman was taken to a family planning clinic by her employer. The employer requested a termination of her pregnancy. When it was discovered this was not possible, the employer terminated her employment.
- (b) The procedures for access to justice and redress require FDWs to pursue their claims against employers subject to severe restrictions. Claims must be made through the Labour Tribunal which does not allow for legal representation nor is publicly funded legal advice available for such proceedings. During the litigation period, FDWs are often not able to work nor are they adequately housed, often relying upon consular 'boarding homes'. In one recent case, an FDW claimant before the Labour Tribunal was unable to remain in Hong Kong but attempted to continue her legal claim; her request for representation by a third party and her request to appear/give evidence by video link were denied.
- (c) In several recent reported cases, terminated, pregnant FDWs who remained in Hong Kong to seek legal redress were denied publicly funded medical assistance during their pregnancy on the grounds that their 'residency' had elapsed, due to their wrongful termination. This puts the lives of female FDWs and their unborn/new-born children at risk and serves to deter the filing of legitimate claims.

25. The HKBA calls upon the Government to review the current laws, mandated template employment contracts and policies regarding maternity protections for FDWs to provide clear guidance as to what should happen when an FDW is pregnant so as to ensure a happy, healthy and well-managed pregnancy, birth and maternity leave.
26. The HKBA is concerned by the current laws and practice that deny children born to FDWs the same legal residency status as children born to other migrant workers. The differential residential status of such children denies them the right to remain in Hong Kong or to live apart from their FDW parent. This causes children to be deprived of their rights to family life and protection by their parent. These typically mixed race, ethnic minority babies do not have access to documentation, healthcare, basic immunisations or welfare support, and are highly vulnerable to malnutrition, disease, abuse, neglect, abandonment, human trafficking, systemic oppression and overt discrimination.
27. The HKBA calls upon the Government to abandon the live-in requirement for pregnant FDWs and FDWs with children.
28. The HKBA is concerned by the education policies related to the children of FDW and racial and ethnic minorities. It is often reported that such children are excluded or discriminated in their choice of school by Government policy (segregating children into specific schools) and by discriminating attitudes of some schools (by directly or indirectly discouraging or refusing entry to ethnic minority children). The HKBA is also aware of several cases of discriminatory treatment directed at ethnic minority children within schools, including abusive language, bullying and exclusion. However, very few such cases of discrimination are referred to the courts or to the Equal Opportunities Commission for investigation.
29. The HKBA is also concerned by the frequently reported incidence of discrimination in housing for ethnic minorities by estate agents and landlords. Such discrimination has a disproportionate impact upon ethnic minority families with children. Although housing discrimination against non-Chinese ethnic minorities is often reported, the HKBA is concerned that there is no clear channel to activate the investigation and prosecution of housing discrimination.
30. The HKBA calls upon the Government to review, create (where currently absent), clarify, clearly communicate and enforce anti-discrimination laws, to adopt pro-active

measures to investigate systemic discrimination particularly in relation to housing and education.

31. The HKBA applauds the decision of the Government to establish the “Commission on Children”. However, the HKBA is concerned by the terms of reference and nature of this body are fundamentally inadequate. This committee will not be independent, sufficiently empowered or resourced to carry out its terms of reference. In particular, the HKBA is concerned that the committee will only meet once every 3 to 4 months.
32. The HKBA calls for the establishment of a Children’s Commission/Commissioner, as recommended by the Committee on the Rights of the Child. It is essential that a Children’s Commission/Commissioner be independent, established by statute, and in accordance with the Paris Principles. The proposal of the HKSARG to establish a non-statutory Children Affairs Commission is inadequate as it will not conform to any of those principles.
33. The need for such an independent, statutory Commission/Commissioner is most acute for ethnic minority children and children of migrants. According to the experience of our members:
 - (a) Ethnic minorities and migrant communities are underrepresented at all levels of Government;
 - (b) Ethnic minority children and children of migrants are at greater risk of growing up in poverty and therefore often require access to public services;
 - (c) Professionals are often deterred from making official reports or investigating cases involving ethnic minorities children and children of migrants;
 - (d) Ethnic minorities children and children of migrants often experience difficulty in obtaining access to public services due to discrimination and language barriers; and
 - (e) Children with uncertain or undocumented residency status often experience delay in processing of their cases (for protection, adoption, education, healthcare).

34. We urge the Government to reconstitute the Commission on Children into an independent Children's Commission/Commissioner, established by statute, and in accordance with the Paris Principles.

VI. Chinese Education for Ethnic Minorities

35. A "Chinese Language Curriculum Second Language Learning Framework" was implemented from the 2014/2015 academic year for non-Chinese speaking students. However, this falls short of an official education policy, which was the Committee's concern, and does not lead to the development of any comprehensive curriculum for Chinese as a second language.

36. In this regard, the HKBA further notes that the RDO provides exceptions for, *inter alia*, the arrangement of medium of instruction in vocational training (section 20(2)) and education (section 26(2)), which can further hinder the access to education and training by ethnic minorities who already experience language barriers.

37. The HKBA considers that the HKSAR Government should review the RDO and its current policy and measures for Chinese education for non-Chinese speaking students with a view to fully addressing the Committee's concerns and the students' learning needs.

Dated: 6th August 2018

HONG KONG BAR ASSOCIATION