

**Committee on the Elimination of Racial Discrimination**  
**Consultation with Civil Society (23<sup>rd</sup> November 2016)**  
**Response of the Hong Kong Bar Association**

1. The Committee on the Elimination of Racial Discrimination (“the Committee”) has invited written responses from civil society for its consultation to be held on 23<sup>rd</sup> November 2016.
2. The Hong Kong Bar Association (“HKBA”) submits this response to inform and update the Committee as to the key challenges and issues of racial discrimination in the Hong Kong Special Administrative Region (“HKSAR”).
3. The HKBA refers to the Committee’s concluding observations on the HKSAR adopted on 25<sup>th</sup> August 2009 (the “Concluding Observations”), but is obliged to inform the Committee that most of them still require follow-up actions.

Race Discrimination Ordinance (“RDO”)

4. The RDO and its Code of Practice on Employment came into full effect on 10 July 2009. The HKBA remains concerned that:
  - (1) The RDO 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.
  - (2) It excludes acts done on the ground of a person’s immigration status (not being a HKSAR permanent resident), length of residence, nationality, citizenship or resident status.
  - (3) It does not outlaw discrimination against newly arrived immigrants from Mainland China.
  - (4) It 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).
5. In March 2016, the Hong Kong Equal Opportunities Commission concluded its Discrimination Law Review and made specific recommendations to the Government for amending RDO. The Government’s response made in May 2016 was limited to studying the content of the report and considering how to follow up on the recommendations.

6. The first judicial case under the RDO was decided by the District Court of the HKSAR in May 2016 (*Singh Arjun v Secretary for Justice* (DCEO 9/2011, unreported, 30 May 2016), in which a locally born Indian boy of Punjab ethnicity failed to establish discrimination against the police under section 27 of the RDO (on the provision of “services”) by, *inter alia*, racial profiling, and failure to provide assistance and investigation of his complaint on the ground of race). This case sheds light on the limited applicability of the current RDO to the Government, as well as reveals shortcomings in the training and practice of police constables, such as administer the police caution only in Cantonese, including for non-Cantonese speaking suspects.

#### Foreign Domestic Helpers

7. Concerning the working conditions and requirements of foreign domestic helpers in Hong Kong, the HKBA notes that notwithstanding the Committee’s concerns and recommendations:
  - (1) The HKSAR Government maintains the the “two-week” rule and the live-in requirement for foreign domestic helpers, 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.
  - (2) Although foreign domestic helpers sign contracts that provide for a minimum wage, that wage is one that is lower than the statutory minimum wage. More importantly, there have been constant complaints from foreign domestic helpers through NGOs supporting them that they have not been receiving even that wage from employers or that employment agencies have 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.

#### Asylum Seekers and Non-refoulement Claimants

8. The HKSAR Government has recently implemented a Modified Unified Screening System (USM) to determine non-refoulement claims, by agreeing to assess real risk to the claimant’s right to life, as one applicable ground under the category of “absolute and non-derogable rights under the Hong Kong Bill of Rights Ordinance”. However, it is unclear what other rights, if any, this category may also encompass. Both the Security Bureau and the Immigration Department of the HKSAR Government have constantly declined to provide the legal profession with an exhaustive list of applicable grounds that the Government would assess under the USM to enable the lawyers advising and assisting claimants to better their efforts in taking instructions and presenting the claims.

9. Insofar as asylum seekers are concerned, the HKSAR Government has maintained its position not to have the 1951 Convention relating to the Status of Refugees and its 1967 Protocol extended to Hong Kong. At present, a well-founded fear of persecution is regarded as a relevant humanitarian consideration for non-refoulement under the USM, independent of any refugee status determination by the United Nations High Commissioner for Refugees.
10. The USM has been run in a less than satisfactory manner. Only part of the USM scheme, namely the determination of claims under the UN Convention Against Torture, is underpinned by statute. The Immigration Department does not share with the legal profession the country of origin information it has gathered on field trips to such countries. Decisions of the appeal board/adjudicator that hears and determines appeals from screening decisions are not published.

#### Chinese Education for Ethnic Minorities

11. 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.
12. 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.
13. 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 22 November 2016

Hong Kong Bar Association