

SUBMISSIONS TO THE COMMITTEE AGAINST TORTURE

On the follow-up information of the HKSAR
on the Concluding Observations of the Committee on the third periodic report of the HKSAR

April 2018

Justice Centre Hong Kong thanks the Committee against Torture ('the Committee') for the extensive remarks and recommendations made about the Hong Kong Special Administrative Region, China ('Hong Kong') in the Concluding Observations of the fifth reporting cycle (CAT/C/CHN-HNK/CO/5/Add.1) ('Concluding Observations'). Justice Centre's submissions on the follow-up information of the Hong Kong Administration submitted to the Committee on the Concluding Observations are as follows:

A lack of commitment to obligations set forth in human rights treaties

The Hong Kong Administration introduced a 'comprehensive review' of the strategy of handling non-refoulement claims in February 2016, just after the Committee's session on Hong Kong in November 2015. The Administration stated that its objective is to reduce the overall number of non-refoulement claimants to tackle all related issues, including crimes, at its root.¹ The 'comprehensive review' is focused on (a) pre-arrival control, (b) screening procedures, (c) detention, and (d) enforcement and removal.² Measures the Administration have taken or planned to take include the following:

- Proposing amendments to the Immigration Ordinance, Cap. 115 to 'improve the screening procedure for non-refoulement claims';
- Collaboration with the Mainland Chinese Government to combat illegal immigration;
- Stepping up patrol and examination at boundary control points;
- Heavier penalties on syndicates for smuggling;
- Online pre-arrival registration for Indian nationals;
- Strengthening contact with major source countries of claimants;
- Expediting screening of pending claims;
- Expanding membership of the Torture Claims Appeal Board (TCAB);
- Detaining more illegal immigrants;
- Timely removal of rejected claimants; and

¹ Secretary for Security, Reply to Joint Letter from HON Leung Che-cheung, Dr HON Elizabeth Quat and Dr HON Chiang Lai-wan in the Panel on Security of the Legislative Council, LegCo Paper No. CB(2)623/17-18(01), 29 December 2017, available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/papers/secb2-623-1-e.pdf>, accessed on 22 January 2018.

² *Ibid.*

- Stepping up enforcement against unlawful employment.³

Neither the consideration of Hong Kong's reports by the Committee against Torture; the Human Rights Committee; the Committee on Economic Social and Cultural Rights; and the Committee on the Rights of the Child; nor these treaty bodies' recommendations⁴ have been mentioned in Government papers relating to the comprehensive review.⁵ The Committee's recommendations were not mentioned in the Administration's report to the Committee on the Elimination of Racial Discrimination in January 2017 (CERD/C/CHN-HKG/14-17) either, although the Administration dedicated a whole page to the policy relating to non-refoulement claimants in the report.⁶ The Administration should have acknowledged and considered treaty body recommendations in any proposed review that relates directly to these recommendations, demonstrating their commitment to international human rights treaty body mechanisms.

³ Security Bureau, 'An update on the comprehensive review of the strategy of handling non-refoulement claims', paper for the Panel on Security of the Legislative Council, LC Paper No. CB(2)1533/16-17(03), June 2017, available at: <http://www.legco.gov.hk/yr16-17/english/panels/se/papers/se20170606cb2-1533-3-e.pdf>, accessed on 22 January 2018.

⁴ Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, CCPR/C/CHN-HKG/CO/3, 29 April 2013, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCHN-HKG%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, 13 June 2014, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCHN%2fCO%2f2&Lang=en, and 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: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCHN%2fCO%2f3-4&Lang=en, all accessed on 22 February 2018.

⁵ The papers are Security Bureau, 'An update on the comprehensive review of the strategy of handling non-refoulement claims', paper for the Panel on Security of the Legislative Council, LC Paper No. CB(2)1533/16-17(03), June 2017, available at: <http://www.legco.gov.hk/yr16-17/english/panels/se/papers/se20170606cb2-1533-3-e.pdf>, Security Bureau, 'Comprehensive review of the strategy of handling non-refoulement claims', paper for the Panel on Security of the Legislative Council, LC Paper No. CB(2)110/16-17(06), November 2016, available at: <http://www.legco.gov.hk/yr16-17/english/panels/se/papers/se20161111cb2-110-6-e.pdf>, Security Bureau and Immigration Department, 'Comprehensive review of the strategy of handling non-refoulement claims', paper for the Panel on Security of the Legislative Council, LC Paper No. CB(2)648/15-16(05), January 2016, available at: <http://www.legco.gov.hk/yr15-16/english/panels/se/papers/se20160202cb2-648-5-e.pdf>, accessed on 22 January 2018.

⁶ Committee on the Elimination of Racial Discrimination, 'Consideration of reports submitted by State parties under article 9 of the Convention, Fourteenth to seventeenth periodic reports of States parties due in 2015: Hong Kong, China', CERD/C/CHN-HKG/14-17, 5 April 2017, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCHN-HKG%2f14-17&Lang=en, accessed on 22 January 2018.

In a meeting of the Panel on Security of the Legislative Council on 6 June 2017, the Security Bureau was asked about the Committee's recommendation that redacted decisions of the TCAB be published. The Bureau only responded that the TCAB is considering the recommendation without giving any information on the factors they are considering or the timeframe.⁷ The Chairperson of the TCAB issued directions to the effect that the TCAB is an independent body. However, that should not be a reason for not reporting on the progress of the consideration of the Committee's recommendations.⁸ Publishing redacted TCAB decisions will enhance transparency and allow civil society to monitor the quality of the decision-making process of the TCAB. Similar decisions are published in common law jurisdictions including the United Kingdom, Australia, Canada and New Zealand.

The need for greater transparency of the decision-making process of the TCAB has been highlighted in a judicial review challenge brought by a client of Justice Centre. The pregnant asylum seeker was compelled by the Torture Claims Appeal Board to go ahead with her hearing, despite going into labour.⁹ Improper and unfair decisions like this will unlikely be known to civil society or the public at large if judicial review challenges are not launched. There is also little transparency about the appointment of TCAB adjudicators, including any application procedures and selection criteria.¹⁰

Moreover, the Hong Kong Administration has not conducted a formal consultation on the review to proactively and systematically seek the views of non-refoulement claimants, civil society and the wider public. Civil society organisations, such as Justice Centre, who work directly with non-refoulement claimants have relevant expertise that could greatly assist the review process.

Proposals for detention camps

The Administration is considering whether legislative amendments are needed to introduce closed camps for non-refoulement claimants. In the meeting of the Panel on Security of the Legislative Council on 6 June 2017, the Security

⁷ Minutes of the meeting of the Panel on Security on 6 June 2016, available at: <https://www.legco.gov.hk/yr16-17/english/panels/se/minutes/se20170606.pdf>, accessed on 30 April 2018.

⁸ Betty Kwan, Chairperson of the Torture Claims Appeal Board, *Principles, Procedures and Practice Directors of the Torture Claims Appeal Board*, 12 September 2016, available at: <http://www.sb.gov.hk/eng/links/tcab/PPP.pdf>, accessed on 25 April 2018.

⁹ Villarico Louterliz Talag v. Torture Claims Appeal Board [2018] HKCFI 468; HCAL 179/2017, available at: <http://hklii.hk/eng/hk/cases/hkcfi/2018/468.html>, accessed on 3 April 2018.

¹⁰ The Immigration Ordinance, Cap. 115 provides for the eligibility for membership of the Torture Claims Appeal Board but not the selection criteria and procedure. The Principles, Procedures and Practice Directors of the Torture Claims Appeal Board does not provide for the selection or appointment of members. See division 3, part VIIC of the Immigration Ordinance, available at: [http://www.blis.gov.hk/blis_pdf.nsf/CurAllEngDoc/ED717360D64A043E482575EE003DBF1A/\\$FILE/CAP_115_e_b5.pdf](http://www.blis.gov.hk/blis_pdf.nsf/CurAllEngDoc/ED717360D64A043E482575EE003DBF1A/$FILE/CAP_115_e_b5.pdf), accessed on 25 April 2018 and Betty Kwan, Chairperson of the Torture Claims Appeal Board, *Principles, Procedures and Practice Directors of the Torture Claims Appeal Board*.

Bureau stated that there would always be economic incentives for people to come to Hong Kong to work illegally and deterrence was needed.¹¹ When the Security Bureau was asked about the lawfulness of such camps in the same meeting, the Bureau responded that it had to make policy considerations as well as legal ones; the Bureau was aware of opposition to such camps and the importance of ensuring the lawfulness of their policies, and at some point they would need to make a decision. A former official of the Immigration Department also advocated for detention camps for asylum seekers in a recent media interview.¹²

The possibility of the imminent introduction of such detention camps is very concerning, especially when asylum seekers and refugees can be detained in prisons¹³ and access for NGOs like Justice Centre to host surgeries for asylum seekers and refugees presently in detention centres or prisons is hindered.¹⁴ There are also concerns about unlawful detention. Justice Centre is currently handling 7 cases of potentially unlawful detention of individuals whose non-refoulement claims were substantiated subsequent to the detention.

There is a lack of publicly available information on the possible scale and location of the detention camps the Administration is considering or whether vulnerable groups such as children will be placed in the camps. It raises concern that detention in such camps may amount to arbitrary detention and violation of, *inter alia*, Article 9 of the International Covenant on Civil and Political Rights, which provides for the right to liberty and security of person, and the Detention Guidelines of the United Nations High Commissioner for Refugees. There is also no information on legal safeguards, such as access to lawyers and medical services, for people detained if these camps are set up.

Moreover, unlike many other common law jurisdictions, there is no formal policy or mechanism for identifying persons unsuitable for detention, including potential victims of torture or human trafficking for this purpose. As

¹¹ Security Bureau, 'An update on the comprehensive review of the strategy of handling non-refoulement claims', paper for the Panel on Security of the Legislative Council, LC Paper No. CB(2)1533/16-17(03), June 2017, available at: <http://www.legco.gov.hk/yr16-17/english/panels/se/papers/se20170606cb2-1533-3-e.pdf>, accessed on 22 January 2018.

¹² Headline Daily, " 難民潮再現 入境處前高官倡設禁閉營 ", 3 July 2017, available at: <http://hd.stheadline.com/news/realtime/hk/942708/>, accessed on 22 January 2018.

¹³ Paragraphs 2 and 3, Immigration (Places of Detention) Order, Cap. 115B, available at: <https://www.elegislation.gov.hk/hk/cap115B>, accessed on 25 April 2018. According to paragraph 3, persons detained under Immigration Ordinance, Cap.115 receive the same treatment as that accorded to a person committed to prison for safe custody

¹⁴ Broadly, rules 48 to 54 of Prison Rules, Cap. 234A provide that a prisoner and by extension a person in immigration detention may receive 'friends and relatives' and visitors including legal advisers. NGO staff is not included in the list. 'Legal adviser' is undefined. It is unclear whether it includes NGO staff providing legal support to persons in detention. See Prison Rules, Cap. 234A, available at: <https://www.elegislation.gov.hk/hk/cap234A>, accessed on 25 April 2018. Under the protocol for legal advice visits agreed between the Hong Kong Law Society and the Immigration Department as set out in the Law Society circular 17-838(PA) dated 9 October 2017, legal visits may be conducted by lawyers. There is no mention of the possibility of NGOs conducting legal visits.

mentioned above, the Administration has stated that its objective is to reduce the number of non-refoulement claimants. Detention camps, if set up, may deter individuals from pursuing their non-refoulement claims and are not in line with the Committee's recommendation in para. 7(a) of its Concluding Observations that Hong Kong should ensure unhindered access to the unified screening mechanism for individuals in need of protection.

Pre-arrival control

Since the Committee's session on Hong Kong in November 2015, legislative amendments have been introduced to stiffen penalties for smuggling entrants from certain countries in May 2016. In its justification for proposing such legislative amendments, the Administration makes it clear that tough action against 'non-ethnic Chinese illegal immigrants' is a linchpin in its strategy in 'containing the number of non-refoulement claimants'.¹⁵ This policy objective is in contradiction to the Committee's recommendation in its 2016 Concluding Observations on Hong Kong that the Administration should ensure unhindered access to the Unified Screening Mechanism to all individuals wishing to claim protection, irrespective of their immigration status.

Xenophobia

The 'comprehensive review' and policy initiatives mentioned above operate in a context of continuing xenophobic discourse. Defenders of the rights of non-refoulement claimants have continued to be harassed on the internet.¹⁶ Much of such discourse also relates to the race of non-refoulement claimants.¹⁷

The Administration has not taken any action to discourage such xenophobic discourse or protect the defenders of the rights of non-refoulement claimants specifically, let alone educate the public on the rights of non-refoulement claimants. There is a lack of leadership from senior government officials to counteract the xenophobic discourse or unfounded criticisms of non-refoulement claimants. For example, in a meeting of the Panel on Security of the Legislative Council in 2016, remarks were made by a Legislative Council member that the non-refoulement mechanism was being abused, simply because an African claimant was found having remained in Hong Kong illegally

¹⁵ The list of countries is as follows: Afghanistan, Bangladesh, India, Nepal, Nigeria, Pakistan, Somalia and Sri Lanka. Security Bureau, "Immigration Ordinance (Chapter 115) Immigration (Unauthorized Entrants) (Amendment) Order 2016", Legislative Council Brief, 18 May 2016, available at: http://www.legco.gov.hk/yr15-16/english/subleg/brief/2016ln066_brf.pdf, accessed on 22 January 2018.

¹⁶ See for example a post on the Facebook page 'the Alliance calling for the deportation of refugees' on 18 June 2017 ridiculing Fernando Cheung, available at: <https://www.facebook.com/nomorerefugees/photos/a.669783026372759.1073741828.656592101025185/1742104749140576/?type=3&theater> and another post on the same page on 16 December 2016 ridiculing Alvin Yeung, available at: <https://www.facebook.com/nomorerefugees/posts/1485566604794393>, both accessed on 3 April 2018.

¹⁷ See, for example, the comments on a Facebook post of non-governmental organisation Hong Kong Unison on a South Asian receiving the Good Citizen Award from the Police, available at: <https://www.facebook.com/HongKongUnison/posts/2145707575462024>, accessed on 3 April 2018.

for eight years, while claimants are in fact only allowed to make non-refoulement claims after they overstay and become an illegal immigrant. The Secretary for Security did not refrain from rebutting the remark and even agreed that the mechanism was being abused.¹⁸

The Administration's categorisation of data does not show sensitivity towards racial equality and diversity. For example, the Police maintains data about the number of 'non-ethnic Chinese arrested persons' that are disaggregated into 'Pakistani', 'Indian', 'Sri Lankan', 'Nepalese', 'Vietnamese', 'Indonesian', 'Thai', 'Filipino', 'Bangladesh' and 'Other African'.¹⁹ The use of 'Other African' as a data category is particularly problematic. There should be consistency in the data collection process, with each African country referred to individually as required.

The Administration's lack of action to combat the xenophobic discourse or to ensure a correct understanding of racial issues of all its bureaux and departments is in contradiction with the Administration's claim in its State Report to the United Nations Committee on the Elimination of Racial Discrimination that it believes legislation aimed at eliminating race discrimination must go hand in hand with public education and support.²⁰

Recommendations

It is important to ensure the Hong Kong Administration is held accountable to its international human rights commitments. The Committee is invited to:

- Show concern over the lack of commitment of the Hong Kong Administration to the obligations set forth in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Renew its recommendations made in the Concluding Observations of the fifth reporting cycle, in particular those in paragraph 7(b) in relation to the fairness and transparency of the process of screening claims for non-refoulement protection; and
- Emphasise the role civil society plays in the treaty body monitoring process and the benefits available to the Hong Kong Administration of meaningful and considered engagement with civil society.

For further information, please contact Annie Li, Research and Policy Officer (+852 5661 6944; annie@justicecentre.org.hk).

¹⁸ Panel on Security, Legislative Council, minutes of meeting held on 11 November 2016, available at: <https://www.legco.gov.hk/yr16-17/english/panels/se/minutes/se20161111.pdf>, accessed on 26 January 2018.

¹⁹ Hong Kong Police Force Mong Kok District, "Refugee crime statistics for Mong Kok District", response to a data request, 6 October 2016, available at: https://accessinfo.hk/en/request/refugee_crime_statistics_for_mon#incoming-350, accessed on 25 April 2018.

²⁰ Committee on the Elimination of Racial Discrimination, 'Consideration of reports submitted by State parties under article 9 of the Convention, Fourteenth to seventeenth periodic reports of States parties due in 2015: Hong Kong, China', CERD/C/CHN-HKG/14-17.

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.

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