

SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

On the third report of the Hong Kong Special Administration Region, China
as part of the fourteenth to seventeenth reports of China

July 2018

Justice Centre Hong Kong ('Justice Centre') makes the following submissions to the Committee on the Elimination of Racial Discrimination ('the Committee') on the third report of the Hong Kong Special Administration Region, China ('Hong Kong') as part of the fourteenth to seventeenth reports of China. The submissions relate to the rights of asylum seekers and refugees and the victims of human trafficking.

RIGHTS OF ASYLUM SEEKERS AND REFUGEES

Developments in the policy relating to asylum seekers and refugees

Since the last review of the Committee of Hong Kong in 2009, Hong Kong has introduced a Unified Screening Mechanism ('USM') in 2014 to screen claims for international protection made on the following grounds:

- Torture defined under the Immigration Ordinance;
- Absolute and non-derogable rights under the Hong Kong Bill of Rights; and
- Persecution risk with reference to the 1951 Convention relating to the Status of Refugees ('Refugee Convention').¹

Hong Kong only offers non-refoulement protection but not access to the right of abode or an alternative status to non-refoulement claimants.² Claimants are stuck in limbo in Hong Kong as illegal immigrants. Only those who made a claim on Refugee Convention grounds will be assisted by the United Nations High Commissioner for Refugees (UNHCR) to be resettled to a third country. Only four claimants have been resettled from 2014 to March 2018.³

In February 2016, the Hong Kong Administration started a 'comprehensive review' of the strategy of handling non-refoulement claims. The objective is to reduce the overall number of non-refoulement claimants to 'tackle all related

¹ Immigration Department, Hong Kong, "Notice to Persons Making a Non-refoulement Claim", 4 September 2017, available at: https://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf

² Immigration Department, Hong Kong, "Making a Claim for Non-refoulement Protection in Hong Kong", available at: https://www.immd.gov.hk/eng/useful_information/non-refoulement-making-claim.html, accessed on 12 July 2018.

³ Statement made by Fung Ngai-wa, Assistant Director of Immigration (Removal Assessment and Litigation), in the meeting of the Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims of the Legislative Council of Hong Kong on 27 March 2018.

PROTECTING FORCED MIGRANTS' RIGHTS

issues, including crimes, at its root'.⁴ The 'comprehensive review' is focused on (a) pre-arrival control, (b) screening procedures, (c) detention; and (d) enforcement and removal.⁵ On 6 July 2018, as part of the comprehensive review, the Administration announced it is considering proposing a number of legislative amendments, including:

- (i) Shortening the time permitted for claimants to complete and submit a Non-refoulement Claim Form;
- (ii) Reducing the time allowed for the inclusion of supporting documents and for the filing of a notice of appeal to the Torture Claims Appeal Board (TCAB);
- (iii) Allowing the Immigration Department to conduct a screening interview in a language other than the claimant's mother-tongue (against the express intentions of the applicant/claimant); and
- (iv) Allowing immigration officers to possess arms and ammunition.⁶

It is unclear what the problems and legitimate aim/s these proposals are purporting to address, and why the impact upon procedural fairness has not been considered.⁷ It appears that most of the proposals are aimed at reducing delays which the Government apparently maintains are deliberately caused by non-refoulement claimants.⁸ However, there is no publicly available data to track whether there are delays within the USM. Moreover, the Administration does not provide information that can reasonably support the conclusion that delay is predominantly deliberately caused by non-refoulement claimants.⁹ There is no publicly available data on conviction to show a correlation between the number of non-refoulement claims and crime either.

Neither the consideration of Hong Kong's reports by *the Committee*, the *Committee against Torture (CAT)*, the *Human Rights Committee (HRC)*, the *Committee on Economic Social and Cultural Rights (CESCR)*, or the *Committee on the Rights of the Child (CRC)* in relation to asylum seekers and refugees; nor these treaty bodies'

⁴ 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>

⁵ *Ibid.*

⁶ Security Bureau and Immigration Department, "An Update on the Comprehensive Review on the Strategy of Handling Non-refoulement Claims: Proposals to Amend the Immigration Ordinance (Cap. 115)", LC Paper No. CB(2)1751/17-18(01), 9 July 2018, available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/papers/se20180710cb2-1751-1-e.pdf>

⁷ See Security Bureau and Immigration Department, "An Update on the Comprehensive Review on the Strategy of Handling Non-refoulement Claims: Proposals to Amend the Immigration Ordinance (Cap. 115)".

⁸ See, for example, the claim of the Security Bureau and the Immigration Department that there have been 'delay tactics' in paragraph five of its paper "An Update on the Comprehensive Review on the Strategy of Handling Non-refoulement Claims: Proposals to Amend the Immigration Ordinance (Cap. 115)".

⁹ See note 7 above.

recommendations¹⁰ have been mentioned in any of the Administration's papers relating to the comprehensive review¹¹ or in the third report of Hong Kong to the Committee (CERD/C/CHN-HKG/14-17).¹²

¹⁰ 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/Treaties/CAT/Shared%20Documents/HKG/CAT_C_CHN-HKG_CO_5_22478_E.docx](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhslsns7vAyg8M3uDZ7rn5ZZMwNSoob1triCGW07VBTbuBExOLleVFNbfuAUhMHpiqtKB062fDp6YJHzZXeMalk75JhuEFgBRVIm2a0I5LX7SmFpNtIBaluGsUxZt7hHMMuA%3d%3d;Committee%20against%20Torture,%20Concluding%20observations%20on%20the%20fifth%20periodic%20report%20of%20China%20with%20respect%20to%20Hong%20Kong,%20China', CAT/C/CHN-HKG/CO/5, 3 February 2016, available at: <a href=); 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

¹¹ The papers are: Security Bureau and Immigration Department, 'An Update on the Comprehensive Review on the Strategy of Handling Non-refoulement Claims: Proposals to Amend the Immigration Ordinance (Cap. 115)'; Security Bureau and Immigration Department, 'Legislative Council Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims: Screening and Appeal Procedures of the Unified Screening Mechanism', LC Paper No. CB(2)1426/17-18(01), May 2018, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420180521cb2-1426-1-e.pdf; Security Bureau, 'Legislative Council Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims: Pre-arrival Control', LC Paper No. CB(2)1250/17-18(01), April 2018, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420180424cb2-1250-1-e.pdf; 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>

¹² 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:

Creating illegality for persons in need of international protection, barring access to rights

A non-refoulement claim can only be made when a person is liable to removal.¹³ In other words, a claimant has to breach the law, for example, by overstaying, to be able to make a claim. As such, all claimants are not considered to be 'ordinarily resident' and never have access to the right of abode.¹⁴ They continue to be considered by the Administration as 'illegal immigrants' even after their non-refoulement claims are substantiated.¹⁵ Claimants have no access to the right to work or the freedom of movement, raising concern over compliance with Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR). Children of non-refoulement claimants have the same 'illegal' status even if they are born in Hong Kong.

Only claimants whose claims have been substantiated can apply for permission to work.¹⁶ Each permit is issued on an exceptional and discretionary basis by the Director of Immigration and has to be renewed every six months.¹⁷ A claimant has to secure a contract before applying for the permission. From the commencement of the USM in 2014 to 2017, only 9 claimants have been granted the permission to work.¹⁸ From our experience, the Administration does not proactively inform claimants of the possibility of getting such permission. No information about the application process or factors considered by the Immigration Department is available publicly. Justice Centre only obtained the factors considered after two attempts under the Code of Access to Information. These factors are:

- Details of the intended employment and the prospective employer;
- Personal circumstances and health conditions of the applicant;
- Security concerns (if any) to the community;
- Impact on the relevant local employment sector;
- Impact on the maintenance of effective immigration control in Hong Kong;
- Any strong compassionate or humanitarian reasons;
- Other special extenuating circumstances.¹⁹

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CERD%2FC%2FCHN-HKG%2F14-17&Lang=en

¹³ Immigration Department, Hong Kong, 'Notice to Persons Making a Non-refoulement Claim'.

¹⁴ Section 2(4), Immigration Ordinance, Cap. 115, available at: <https://www.elegislation.gov.hk/hk/cap115>

¹⁵ Director of Immigration, 'Panel on Security: Follow-up to meeting on 7 July 2015', 24 August 2015, LC Paper No. CB(2)2048/14-15(01), available at: <https://www.legco.gov.hk/yr14-15/english/panels/se/papers/se20150707cb2-2048-1-e.pdf>

¹⁶ Section 37ZX, Immigration Ordinance, Cap 115.

¹⁷ *Ibid.*

¹⁸ Immigration Department, Hong Kong, response to access to information request 'Permission to work for non-refoulement claimants and refugees', 31 May 2018, available at: https://accessinfo.hk/en/request/permission_to_work_for_non_refou#incoming-754

¹⁹ *Ibid.*

Claimants receive about 400USD a month from the Administration as humanitarian assistance, covering food, transportation and accommodation to 'avoid destitution'.²⁰ Some claimants may need to work informally to support themselves. This raises concern over potential human trafficking or exploitation of victims. Threat of denunciation to authorities and abuse of illegal status are identified by the International Labour Organization as human trafficking indicators.²¹

The right to freedom of movement is restricted under the current system. The Administration considers a non-refoulement claim to be withdrawn once the claimant leaves Hong Kong. In 2018, a child non-refoulement claimant who had the opportunity to take part in a musical competition in Japan could not go for this reason.²²

For education, a child is permitted to go to school only if the Immigration Department has no comment on the matter.²³ They may have to self-fund university education, which is very challenging because neither they nor their parents may be permitted to work and often have no income.

Accessibility, transparency and fairness of the USM

Poor quality of decision-making

From Justice Centre's experience of providing legal and psychosocial assistance to non-refoulement claimants, we observe significant problems in the evaluation of non-refoulement claims of the Immigration Department and the TCAB. Basic mistakes are frequently noted including such matters as the country claimants come from (in more than one case); and TCAB adjudicators using information from Wikipedia as country of origin evidence to determine claims.²⁴

²⁰ Security Bureau, Education Bureau, Food and Health Bureau, Immigration Department, Social Welfare Department, Department of Health, Leisure and Cultural Services Department, Hospital Authority, Hong Kong, 'Subcommittee on Children's Rights: List of follow-up actions arising from the discussion at the meetings on 24 July 2017', LC Paper No. CB(4)1642/16-17(01), September 2017, available at: https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs101/papers/hs10120170724cb4-1642-1-e.pdf

²¹ International Labour Organization, 'Operational indicators of trafficking in human beings', September 2009, available at: https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-declaration/documents/publication/wcms_105023.pdf

²² Wong Jing-mei, 'Child refugee in Hong Kong wants to represent his/her school at a music competition in Okinawa and petitions to Carrie Lam(港難民兒童向林鄭吶喊 渴望代表學校赴沖繩音樂比賽)', *HKOI*, news report in Chinese, 5 November 2017, available at: <https://bit.ly/2NJwrAT>

²³ Security Bureau, Education Bureau, Food and Health Bureau, Immigration Department, Social Welfare Department, Department of Health, Leisure and Cultural Services Department, Hospital Authority, Hong Kong, 'Subcommittee on Children's Rights: List of follow-up actions arising from the discussion at the meetings on 24 July 2017'.

²⁴ See, for example, *Md Nazir Ahmed Sarkbar v Torture Claims Appeal Board* [2018] HKCFI 801, available at: http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=114733&QS=%2B&TP=JU

These problems raise concerns over fairness within the USM, and with it the risks of claimants being returned to situations where they face persecution, torture and/ death. The substantiation rate of non-refoulement claims in Hong Kong, 0.8%, is one of the lowest in the developed world.²⁵ In quarter 1 of 2018, the Immigration Department substantiated none of the 1,352 claims it determined.²⁶ In contrast, the substantiation rates in the United Kingdom, Germany and Canada are 28%, 25% and 62% respectively.²⁷

In its concluding observations on Hong Kong in 2016, *CAT* has commented that the low number of claims substantiated by Hong Kong indicated a distinctly high threshold for granting protection, and, on that basis, recommended Hong Kong enhance the fairness and transparency of the screening process, by:

- Ensuring that non-refoulement claims are thoroughly and individually examined; and
- Allowing sufficient time for claimants to fully indicate the reasons for their application, and obtain and present crucial evidence, including independent medical expert evidence.²⁸

HRC also urged Hong Kong not to set an inappropriately high threshold for recognising a real risk of ill-treatment on return in its concluding observations in April 2013.²⁹

Publication of appeal decisions

TCAB decisions are not made publicly available, which prevents non-refoulement claimants, civil society and the wider public from being able to monitor the quality of decision making. This is despite *CAT*'s recommendation that Hong Kong publish redacted TCAB decisions.³⁰ Similar decisions are also published in jurisdictions including

²⁵ Immigration Department, Hong Kong, "Enforcement", available at: <http://www.immd.gov.hk/eng/facts/enforcement.html>, and Hong Kong Government, "LCQ4: Torture claims", press release, 7 May 2014, available at <http://www.info.gov.hk/gia/general/201405/07/P201405070624.htm>

²⁶ Immigration Department, Hong Kong, "Enforcement", and Security Bureau, "Torture Claims Appeal Board- Q1, 2018", response to an access to information request, 27 April 2018, available at https://accessinfo.hk/en/request/torture_claims_appeal_board_q1_2#incoming-733

²⁷ See asylum tables volume one on Home Office, United Kingdom, "How many people do we grant asylum or protection to?", 21 March 2018, available at: <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2017/how-many-people-do-we-grant-asylum-or-protection-to>, United Nations High Commissioner for Refugees (UNHCR), "Country Update: Germany | Q1 2018", 13 November 2017, available at: http://www.unhcr.org/dach/wp-content/uploads/sites/27/2018/03/Factsheet_Germany_01_2018.pdf, and UNHCR, "Population Statistics", http://popstats.unhcr.org/en/asylum_seekers

²⁸ Committee against Torture, "Concluding observations on the fifth periodic report of China with respect to Hong Kong, China".

²⁹ 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)".

³⁰ Committee against Torture, "Concluding observations on the fifth periodic report of China with respect to Hong Kong, China".

Australia, Canada, New Zealand and the United Kingdom.³¹ The Security Bureau's position is that the TCAB is considering the *CAT* recommendation as an independent body. However, the Security Bureau fails to give any further information regarding the factors they are considering, or the timeframe.³² TCAB's independence should not be a reason for not reporting on the progress of the consideration of *CAT*'s recommendations.

Legal aid

Access to justice for non-refoulement claimants is limited.³³ A claimant's duty lawyer in the Immigration Department's evaluation stage decides whether to continue to represent them at the appeal stage. Only 9% of non-refoulement claimants are represented for their petitions/appeals at the TCAB.³⁴ Furthermore, in 2017, only 3% of applications for legal aid for judicial reviews were granted, compared with 20% in 2015.³⁵

Moreover, Hong Kong is one of the few common law jurisdictions that does not have community legal centres, limiting access of vulnerable groups to justice. There are publicly-funded law centres in comparable common law jurisdictions including Australia, Canada and the United Kingdom.³⁶

Detention

Unlike many other jurisdictions, there is no formal policy or mechanism for identifying persons unsuitable for detention, including potential victims of torture or human trafficking. Justice Centre is handling seven cases of potentially unlawful detention of individuals whose non-refoulement claims were substantiated subsequent to the detention.

³¹ See Administrative Appeals Tribunals, Australia, "Decisions", <http://www.aat.gov.au/decisions>, Immigration and Refugee Board of Canada, "Decisions", <http://www.irb-cisr.gc.ca/Eng/BoaCom/decisions/Pages/index.aspx>, Ministry of Justice, New Zealand, "Decisions", <https://www.justice.govt.nz/tribunals/immigration/immigration-and-protection/decisions/> and United Kingdom Government, "Immigration and asylum chamber: decisions on appeals to the Upper Tribunal", <https://tribunalsdecisions.service.gov.uk/utiac>.

³² 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>.

³³ Justice Centre Hong Kong, "Submissions to the Panel on Administration of Justice and Legal Services: Legal aid for non-refoulement claimants", LC Paper No. CB(4)1427/16-17(01), July 2017, available at: <https://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170718cb4-1427-1-e.pdf>, and Justice Centre Hong Kong, "Submissions for the 2018-19 Budget Consultation", January 2018, available at: <http://www.justicecentre.org.hk/framework/uploads/2013/08/Justice-Centre-Hong-Kong-Budget-2018-19-Consultation-Submission.pdf>.

³⁴ Access to information request, "Torture Claims Appeal Board Operations", available at: https://accessinfo.hk/en/request/torture_claims_appeal_board_oper#incoming-512

³⁵ Director of Legal Aid, 'Code of Access to Information: Request No.: 02/18', letter to Justice Centre Hong Kong, 8 May 2018.

³⁶ DLA Piper and PILnet, *This Way: Finding Community Legal Assistance in Hong Kong*, May 2017, p. 56, available at: https://www.dlapiper.com/~media/Files/News/2017/05/REPORT_THIS_WAY_31%20May%202017.pdf

There have also been calls by some political parties for detention camps for non-refoulement claimants.³⁷ The Administration is considering the proposals and has not ruled it out.³⁸ 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. Such camps may amount to arbitrary detention and violation of, *inter alia*, Article 9 of the ICCPR, 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 no information on legal safeguards, such as access to lawyers and medical services, for people detained if these camps are set up.

Under the Immigration Ordinance, the Immigration Department can detain non-refoulement claimants in prisons.³⁹ The Immigration Department is unable to provide the number of non-refoulement claimants so detained in response to an access to information request in May 2018.⁴⁰

Asylum-seeking children

An accompanied child in Hong Kong will almost always be considered as merely a dependent upon their parent/s in the consideration of his/her non-refoulement claim.⁴¹ Indeed, Justice Centre has seen no instances in which the specific rights and protection needs of asylum-seeking children have been recognised as existing in their own right. There does not appear to be any policy or guidance available, nor training given to Immigration officers, to ensure a child-centred approach is adopted within the USM. There appear to be no procedural safeguards in place to ensure sensitivity towards the factors and challenges specific to children's claims, such as: increased and various forms of vulnerability; varying levels of maturity and corresponding dependency upon adults; or child-specific forms and manifestations of persecution, for example the trafficking of children for sex work and the risks of female genital mutilation.

Consultation with non-refoulement claimants, civil society and the wider public

The Administration has not conducted a formal consultation on the comprehensive review to proactively and systematically seek the views of non-refoulement claimants, civil society or the wider public.

³⁷ Karen Cheung & Tom Grundy, 'DAB party sets up in Tsim Sha Tsui calling for "fake" refugees to be put in camp and deported', *Hong Kong Free Press*, 11 April 2016, available at: <https://www.hongkongfp.com/2016/04/11/dab-party-sets-up-in-tsim-sha-tsui-calling-for-fake-refugees-to-be-put-in-camp-and-deported/>

³⁸ Security Bureau, Hong Kong, 'An update on the comprehensive review of the strategy of handling non-refoulement claims', page 15.

³⁹ Section 35(1), Immigration Ordinance, Cap 115.

⁴⁰ Immigration Department, Hong Kong, response to access to information request 'Immigration detention at prisons', 20 June 2018, available at: https://accessinfo.hk/en/request/immigration_detention_at_prisons#incoming-764

⁴¹ Justice Centre Hong Kong, "Submissions to the Subcommittee on Children's Rights of the Legislative Council: Rights of Refugee Children", July 2017, available at: <http://www.justicecentre.org.hk/framework/uploads/2014/03/Justice-Centre-Hong-Kong-submissions-to-Subcommittee-on-Childrens-Rights.pdf>

Xenophobia

The comprehensive review of the strategy of handling non-refoulement claims operates in a context of continuing xenophobic discourse. Defenders of the rights of non-refoulement claimants have continued to be harassed on the internet.⁴² Much of such discourse also relates to the race of non-refoulement claimants.⁴³

The Administration has not taken any action to discourage such xenophobic discourse or protect the defenders of the rights of non-refoulement claimants. The Administration's manner of maintaining data is illustrative of its lack of sensitivity towards racial equality and diversity. For example, the Police maintain 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'.⁴⁴ 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 xenophobic discourse or to ensure all bureaux and departments have a correct understanding of racial issues contradicts the claim in its third report to the Committee that it believes legislation aimed at eliminating race discrimination must go hand in hand with public education and support.⁴⁵

HUMAN TRAFFICKING

Prevalence of human trafficking and exploitation, and policy developments

Based on our primary research, Justice Centre estimates that 17% of migrant domestic workers in Hong Kong are working in conditions of forced labour. Of these 14%, or about 8,000 individuals, have been trafficked into the

⁴² 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>.

⁴³ 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>.

⁴⁴ 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

⁴⁵ 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.

situation.⁴⁶ Civil society has also reported cases of human trafficking or potential human trafficking for forced labour among sex workers and for forced marriage in Hong Kong.⁴⁷

The Administration introduced the Action Plan to Tackle Trafficking in Persons and to Enhance Protection of Foreign Domestic Helpers in Hong Kong ('Action Plan')⁴⁸ in March 2018 as a welcome first step towards combatting human trafficking. However, there is no time frame for the new activities introduced with the Action Plan, except for the extension human trafficking screening to all police districts, which will happen in 2018.⁴⁹

Lack of comprehensive legislation to combat human trafficking

Without legislation for prosecution, victim identification or protection, Hong Kong remains an outlier among common law jurisdictions, such as Australia, Singapore, the United Kingdom and the United States.⁵⁰

Currently, there is no definition of 'human trafficking' in domestic legislation although this has been recommended by *CAT* for Hong Kong.⁵¹ Although China is a signatory to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ('Palermo Protocol') and the Protocol is applicable to Macau, it is not applicable to Hong Kong.⁵² *HRC* and the *Committee on the Elimination of All Forms of Discrimination against Women* have recommended Hong Kong consider taking steps that could lead to its extension to Hong Kong.⁵³

⁴⁶ Justice Centre Hong Kong, *Coming Clean: the Prevalence of Forced Labour and Human Trafficking for the Purpose of Forced Labour amongst Migrant Domestic Workers in Hong Kong*, March 2016, available at: www.justicecentre.org.hk/comingclean

⁴⁷ See, for example, *100 Stories Hong Kong*, <http://100storieshk.org/?lang=en>

⁴⁸ Hong Kong Government, *Action Plan to Tackle Trafficking in Persons and to Enhance Protection of Foreign Domestic Helpers in Hong Kong* March 2018, available at: <http://www.sb.gov.hk/eng/special/pdfs/Action%20Plan%20to%20Tackle%20TIP%20and%20to%20Protection%20FDHs.pdf>

⁴⁹ Statement made by Billy Woo, Principal Assistant Secretary, Security Bureau, Hong Kong, in a meeting with civil society on 28 May 2018.

⁵⁰ These pieces of legislation include the Commonwealth Criminal Code Act 1995 of Australia, the Prevention of Human Trafficking Act 2015 of Singapore, the Human Trafficking and Exploitation (Scotland) Act 2015, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, the Modern Slavery Act of England and Wales and Victims of Trafficking and Violence Protection Act of 2000 of the United States.

⁵¹ Committee against Torture, 'Concluding observations on the fifth periodic report of China with respect to Hong Kong, China'.

⁵² Declaration of China, United Nations Treaty Series, vol. 2652, annex A, p.51, available at: https://treaties.un.org/Pages/showActionDetails.aspx?objid=080000028027643a&clang=_en

⁵³ 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)' and Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding observations on the combined seventh and eighth periodic reports of China'.

The Court of First Instance of Hong Kong has held that without an offence against forced or compulsory labour, the Hong Kong Government has not fulfilled its obligation under Article 4 of the Hong Kong Bill of Rights.⁵⁴ The Administration is appealing against the decision.

Inadequate investigation, prosecution and victim identification and protection

In the absence of an offence against human trafficking or forced labour, law enforcement remains restricted to investigation and prosecution of the constituent elements of human trafficking rather than the overarching result. For example, according to media reports, a case of potential human trafficking of a migrant domestic worker to mainland China was handled by the Police as potential commission of the offence of conspiracy of defraud.⁵⁵

There are also concerns over the adequacy of investigations. Six reports of the withholding of passports and applications for loans forging the identities of victims were investigated, but all were dropped due to a lack of evidence.⁵⁶ From January to 27 November 2017, the Police received 42 potential cases of the trafficking of migrant domestic workers, but only four were confirmed to be related to criminal offences as of 27 November 2017.⁵⁷

Although victims of human trafficking may be granted immunity from prosecution under the Action Plan, the Administration provides no information on how they consider whether to grant immunity. Although there is provision in the Prosecution Code that, if a credible claim that a defendant or intended defendant is a victim of human trafficking is found, a prosecutor should appropriately deal with the case with that in mind,⁵⁸ the Administration has failed to provide data about the number of such established credible claims.⁵⁹

Policies that increase the vulnerability of migrant domestic workers and asylum seekers/refugees to human trafficking
Various existing policy measures or practices that may heighten the risk of human trafficking should also be repealed or changed. These include the live-in requirement, the 'two-week rule', forbidding the change of employers, the lack

⁵⁴ *ZN v Secretary for Justice* HCAL 15/2015, available at: http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=107415&QS=%24%28ZN%29&TP=JU.

⁵⁵ Apple Daily, '《蘋果》深圳直擊 港外傭被迫淪黑工 有人跳樓 有人橫死', available at: <https://hk.news.appledaily.com/local/daily/article/20171001/20169567>

⁵⁶ Raquel Carvalho, 'How Hong Kong failed Madagascar's domestic helpers', *South China Morning Post*, 17 December 2017, available at: <https://www.scmp.com/week-asia/society/article/2124556/how-hong-kong-failed-madagascars-domestic-helpers>

⁵⁷ *Ibid.*

⁵⁸ Department of Justice, Hong Kong, *Prosecution Code*, 2013, p. 35-36, available at: <https://www.doj.gov.hk/eng/public/pdf/2014/pdcode1314e.pdf>.

⁵⁹ Director of Administration and Development, Department of Justice, Hong Kong, reply to initial written questions raised by Finance Committee Member Dennis Kwok in examining the Estimates of Expenditure 2018-19, reply serial no. SJ033, available at: https://www.legco.gov.hk/yr17-18/english/fc/fc/w_q/sj-e.pdf.

of inspection for the enforcement of the Standard Employment Contract for migrant domestic workers and the denial of the right to work to asylum seekers and refugees.⁶⁰

Lack of transparency about anti-human trafficking policy

The Administration does not regularly publish data about victim identification and protection or trainings officials receive. In response to an access to information request made by Justice Centre in June 2018, the Administration provided the number of human trafficking victims identified and whether they were migrant domestic workers at the time of victim identification, but not the gender, nationality, age and immigration status of the victims.⁶¹ A request for data held by the Police for the number suspicious transaction reports related to human trafficking by Justice Centre Hong Kong was refused on the grounds that the information was confidential.⁶²

Recommendations

The Committee is invited to:

- Recommend Hong Kong to, immediately, implement CAT's recommendations to ensure persons in need of international protection are fully protected against refoulement, including:
 - Ensuring unhindered access to the USM to all individuals wishing to claim protection, irrespective of their immigration status;
 - Enhancing the fairness and transparency of the screening process by, inter alia, publishing redacted TCAB decisions; and
 - Developing mechanisms for the early identification of victims of torture, their priority access to the USM and their immediate access to redress.⁶³

⁶⁰ For more information about policies and practices relating to migrant domestic workers, 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-and-insufficient-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-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/between-a-rock-and-a-hard-place-en/page/1>

⁶¹ Security Bureau, Hong Kong, response to access to information request 'Human trafficking victims identified', 3 July 2018, available at: https://accessinfo.hk/en/request/human_trafficking_victims_identi#incoming-773

⁶² The pro forma for reporting suspicious transaction reports can be accessed at <https://www.jfiu.gov.hk/en/str.html#download>

⁶³ Committee against Torture, "Concluding observations on the fifth periodic report of China with respect to Hong Kong, China".

- Recommend Hong Kong to not set an inappropriately high threshold for granting international protection and to grant asylum seekers and refugees the right to work immediately;
- Recommend legislative amendments to provide equal rights to access permanent residency for children of asylum seekers, refugees and all migrant workers, consistent with the children of other migrants under Article 24 of the Basic Law within one year;
- Recommend that, consistent with the concluding observations of the *CAT*,⁶⁴ Hong Kong should ensure that children of migrant workers, refugee and asylum-seeking children have equal access to basic services, including health, education and other social services immediately;
- Recommend that, consistent with the concluding observations of the *CESCR*,⁶⁵ Hong Kong should ensure that all children, including asylum-seeking and refugee children, have free access to compulsory education on an equal basis immediately, and provide scholarships and resource support for education for asylum seekers and refugees immediately;
- Express opposition to the legislative amendments considered by the Administration⁶⁶ that will likely hinder access to international protection, compromise the fairness of the process of evaluation of non-refoulement claims or violate the rights of asylum seekers and refugees, particularly the right not to be subject to torture, the right to a fair hearing, the right to liberty and security, if implemented. These amendments include:
 - Shortening the time for claimants to prepare and submit a claim form/ notices of appeal and to submit evidence;
 - Allowing an Immigration Department screening interview or a TCAB hearing to be conducted in a language other than the claimant's most proficient if the Immigration Department or the TCAB can presume the claimant can communicate in the second language;
 - Limiting the opportunity for claimants to give supplementary evidence; and
 - Allowing immigration officers to possess arms and ammunition.
- Renew its recommendations made in the concluding observations based on the consideration of the tenth to thirteenth periodic reports of China as it relates to Hong Kong, in particular those in paragraph 29 on asylum seekers' right to information, interpretation, legal assistance and judicial remedies, as well as the ratification of the Refugee Convention and its 1967 Protocol;
- Recommend the adoption of comprehensive anti-human trafficking legislation that covers prosecution, protection and prevention within one year;
- Recommend the extension of the Palermo Protocol to Hong Kong within a year;

⁶⁴ *Ibid.*

⁶⁵ Committee on Economic, Social and Cultural Rights, "Concluding observations on the second periodic report of China, including Hong Kong, China and Macao, China".

⁶⁶ Security Bureau and Immigration Department, "An Update on the Comprehensive Review on the Strategy of Handling Non-refoulement Claims: Proposals to Amend the Immigration Ordinance (Cap. 115)", LC Paper No. CB(2)1751/17-18(01), 9 July 2018, available at: <https://www.legco.gov.hk/yr17-18/english/panels/se/papers/se20180710cb2-1751-1-e.pdf>

- Recommend the implementation of *CAT*'s recommendation to introduce the Palermo Protocol definition of 'human trafficking' into legislation⁶⁷ within one year;
- Recommend the publication of a clear policy for granting immunity from prosecution to human trafficking victims within six months;
- Recommend the strengthening of investigations and prosecutions for human trafficking cases immediately;
- Recommend the regular publication of data about human trafficking, including the number of human trafficking victims identified, the protection offered, the training Government officials receive and the number of suspicious transaction reports received immediately; and
- Recommend Hong Kong repeal the 'two-week rule' and the live-in requirement for migrant domestic workers, 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, increase resources for the Labour Department to establish an inspection mechanism for monitoring the implementation of the Standard Employment Contract, ensure, inter alia, a decent standard of living for migrant domestic workers and strengthen protection from abuse by recruitment agencies immediately.

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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

⁶⁷ Committee against Torture, "Concluding observations on the fifth periodic report of China with respect to Hong Kong, China".