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Recipients : CERD
..... D. Obez (Encls)

HONG KONG BAR ASSOCIATION

Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
DX-180053 Queensway 1 E-mail: info@hkba.org Website: www.hkba.org
Telephone: 2869 0210 Fax: 2869 0189

By mail and e-mail (tschackel@ohchr.org)

7 May 2009

Torsten Schackel,
Acting Secretary of the Committee on the Elimination of Racial Discrimination,
UNOG-Office of the High Commissioner on Human Rights,
Palais Wilson - 52, rue des Pâquis, CH-1201, Geneva,
Switzerland.

Dear Sir/Madam,

Re: Committee on Elimination of Racial Discrimination, 75th Session: Consideration of the 10th to 13th Periodic Reports of the People's Republic of China (including Hong Kong Special Administrative Region)

I refer to the captioned session of the Committee on the Elimination of Racial Discrimination ("Committee").

The Hong Kong Bar Association submits the enclosed Submission which highlights important issues on the implementation of the Convention for the Elimination of All Forms of Racial Discrimination in Hong Kong that the Committee may wish to question the delegates from the Governments of the People's Republic of China and the Hong Kong Special Administrative Region.

I would be most grateful if you can distribute this Submission to the country rapporteur and his or her assistant, as well as all the Committee members soonest possible.

Should you have any queries, please contact me at coleslaw@templechambers.com or Mr. P.Y. Lo at pylo@pacific.net.hk. Thank you for your assistance.

Yours sincerely,

Russell Coleman SC
Chairman

PYL/al

Encl.

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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Committee on the Elimination of Racial Discrimination

75th Session (3rd to 28th August 2009)

Briefing of the Hong Kong Bar Association

1. The Committee on the Elimination of Racial Discrimination (“the Committee”) has scheduled a hearing to be held in its 75th Session in August 2009 to consider the consolidated 10th to 13th periodic reports of the People’s Republic of China on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (“the Convention”). Part Two of the consolidated reports is concerned with the Hong Kong Special Administrative Region (“HKSAR”).
2. The Hong Kong Bar Association (“HKBA”) submits this briefing to the Committee so as to inform and assist the Committee in its preparation for the upcoming hearing, including the compilation of the list of issues that the Governments of the People’s Republic of China and the HKSAR are expected to address at the hearing.

Race Discrimination Ordinance

3. The HKBA appreciates the follow-up and urgent actions taken by the Committee in August 2007 and March 2008 in respect of the Race Discrimination Bill then in the legislative process before the Legislative Council of the HKSAR.
4. The consolidated reports are not up-to-date in informing the Committee of the legislative process in the HKSAR in enacting a “Race Discrimination Ordinance”.
5. Although the Race Discrimination Ordinance (“RDO”) was enacted on 17 July 2008, only parts of the RDO were put into operation on 3 October 2008 to enable the Equal Opportunities Commission (“EOC”) to prepare codes of

practice and make rules and regulations for the implementation of the RDO. There appears to be no concrete timetable for the full operation of the RDO.

6. The HKBA suggests that the Committee should ask the HKSAR Government for a comprehensive briefing document on the provisions of the RDO, the timetable for its full operation, the administrative and budgetary provisions for its full operation, and the plan or arrangement for the review of its implementation (including timetable, topics of review and criteria for gauging the effectiveness of the implementation of the RDO).
7. The HKBA considers that the RDO remains unsatisfactory in the following areas:
 - (1) While section 3 of the RDO now states that it “binds the Government”, it remains deficient in not having provisions to outlaw racial discrimination by the Government and public authorities (1) in the carrying out of their functions; and (2) in connection with the appointment of posts and offices which are not regarded as employment. Although the HKSAR Government has undertaken to draw up administrative guidelines for government bureaux and departments to follow in their formulation and implementation of policies and measures, the deficiency has left victims of discrimination without an effective remedy. The HKBA believes that the Government should be on the same footing as private bodies when it comes to liability to compensate for acts of unlawful racial discrimination.
 - (2) Section 8 of the RDO defines, inter alia, what constitutes an act done on the ground of race, colour, descent or national or ethnic origin of a person. Sub-section 8(3)(b) to (d) *excludes* acts done on the ground of a person’s immigration status (not being a permanent resident of the HKSAR), length of residence in the HKSAR, or nationality, citizenship or resident status of another country or place from constituting as acts done on the ground of race, colour, descent or national or ethnic origin of a person. The HKSAR Government had

sought to justify the exclusion by stating that these provisions merely “are intended to make it clear that considerations such as Hong Kong permanent resident status and length of residence do not come within the definition of race”. The HKBA had expressed the view, by reference to a recent judgment of the United Kingdom Privy Council on the Bermudan Human Rights Act 1981 (namely *David Leo Thompson v The Bermuda Dental Board (Human Rights Commissioners intervening)* [2008] UKPC 33 (9 June 2008)), that provisions of such nature were not merely clarificatory but impermissibly sought to undercut the proper scope of protection of legislation intended to outlaw racial discrimination. However, the HKSAR Government had not deleted the provisions from the Bill. The HKBA notes that, recently, HKSAR residents who have become unemployed in Mainland China have returned to Hong Kong to find that they are not eligible to receive social security payments due to a minimum period of residence per year requirement (see paragraph 168 of the consolidated reports) and some have as a result become streetsleepers.

- (3) The RDO does not outlaw discrimination against immigrants newly arrived from Mainland China, notwithstanding the Committee’s letter of 7 March 2008 urging the HKSAR Government to include in the Bill provisions intended to give effect to this purpose.
- (4) The RDO provides for exemptions in relation to immigration legislation (section 55) and acts done for the purpose of complying with a requirement of an existing statutory provision (section 56).

Foreign Domestic Helpers

8. The HKBA suggests that the Committee should question the HKSAR Government on the following matters relating to the situation of foreign domestic helpers in Hong Kong:

- (1) The continued maintenance of the “two-week” rule, the justification of this strict immigration policy, and the reason why the maintenance of this policy is not indirect racial discrimination.
- (2) The HKSAR Government’s recent proposal not to include foreign domestic helpers in the scope of protection of proposed statutory minimum wage legislation, bearing in mind that the current minimum allowable wage regime is non-statutory.
- (3) The HKSAR Government’s refusal to abolish the employment retraining levy extended to employers of foreign domestic helpers (referred to in paragraph 146 of the consolidated reports). On the other hand, the Government set the amount of the levy in 2008 to \$0 for the next 5 years, partly because there is a substantial surplus in the levies collected since 2003. The surplus seems to reflect on the arbitrary way in which the levy was set and also casts doubt that the timing of the introduction of the levy and the reduction of the minimum allowable wage in 2003 was a mere coincidence.

Asylum Seekers and Torture Claimants

9. The HKSAR Government has at present no domestic procedure for screening asylum seekers on their entitlement to refugee status. On the other hand, the HKSAR Government has since 2004 introduced a non-statutory procedure for screening torture claimants on their entitlement to non-refoulement under the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”). This procedure was found to be unlawful by the Court of First Instance in December 2008 (*FB & Ors v Director of Immigration & Anor* (HCAL 51, 105, 106, 107, 125, 126/2007)) for inter alia incorporating a policy against legal representation for every stage of that procedure (including fact-finding, first instance decision and petition), having the systemic anomaly in which the examining officer and the decision-maker are not the same person, inadequate training of decision-makers (both at the

first instance decision and petition stages), and failing to provide for an oral hearing at the petition stage.

10. The HKSAR Government has informed the Legislative Council that it is in the process of formulating a legislative framework for assessing torture claimants. In the meantime, it seems that the HKSAR Government is also in the process of changing the non-statutory procedure, including introducing the provision of legal services at some stage(s) of the procedure. However, the HKSAR Government has not informed the legal profession of the details of such changes to date in spite of a joint position paper of the professional bodies seeking such information.

11. The HKBA suggests that the Committee should question the HKSAR Government on the following matters:
 - (1) The rationale for proposing a legislative framework only for assessment of torture claimants and not one for claims for refugee status and entitlement to non-refoulement under CAT.
 - (2) The details of the legislative framework and other arrangements under consideration to implement the Court of First Instance judgment.
 - (3) The details of the changes to the torture claim assessment procedure that are to be introduced before the enactment of the said legislative framework.
 - (4) The details of the proposal for the provision of publicly funded legal services to assist torture claimants.
 - (5) The policy over asylum seekers and torture claimants working while they await determination of their claims and the administrative and legal measures to give effect to the policy position.

- (6) The policy and budgetary and administrative provision for supporting asylum seekers, torture claimants and their families, including the education of minors, while they await determination of their claims.

Immigration Policy

12. In a recent application for judicial review (which has subsequently been compromised), the question of inconsistency in the immigration policies for family reunion as between families where the family member seeking reunion was a resident of Mainland China and families where the relevant family member was not was raised. In the former case, the relevant family member must obtain a permit from the Mainland Chinese authorities in order to come to Hong Kong to settle but his or her stay in Hong Kong is not otherwise subject to any conditions. In the latter case, the relevant family member must be a genuine dependent of a HKSAR permanent resident family member who would act as sponsor. The HKBA considers that the Committee should question the Governments of the People's Republic of China and the HKSAR the rationale for maintaining two separate immigration policies on the matter of family reunion.

The Fatal Shooting of Dil Bahadur Limbu by a Police Constable

13. On 17 March 2009, a police constable shot and killed a streetsleeper who turned out to be a Hong Kong-born Nepali man named Dil Bahadur Limbu. The circumstances of the shooting appear to be that the police constable encountered Mr Limbu while investigating a complaint. Mr Limbu was said to have reacted violently using a wooden chair. The police constable used pepper spray, dropped his baton, took out his revolver pointing it at Mr Limbu, shouted words in Cantonese (and neither Nepali nor English) telling Mr Limbu to stop and drop his weapon, and ended up firing two shots, one of which hit Mr Limbu's head. The fatal shooting has led to protests by racial minority groups in Hong Kong as well as calls for an independent public inquiry.

14. The HKBA suggests that the Committee should question the HKSAR Government on the following matters:

- (1) Whether the HKSAR Government is minded to set up an independent commission of inquiry (apart from the coroner's inquest) to investigate the shooting and if not, the reasons why the HKSAR Government considers that the present police complaints procedure, where complaints are investigated by police officers, serve as an adequate and fair mechanism to address the grievances in the present case.
- (2) Whether the police force has conducted any review of the lessons learnt from the fatal shooting and the details of the initiatives adopted as a result of the review regarding policing in a multi-racial society.
- (3) Whether the HKSAR Government has conducted any review of the lessons learnt from the fatal shooting and the details of the initiatives adopted as a result of the review regarding the promotion of racial harmony through redress of grievances.

Dated 7 May 2009.

Hong Kong Bar Association