



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 email: cedaw@ohchr.org) and by mail

10th January 2014

Secretariat

Committee on the Elimination of Discrimination Against Women (CEDAW)

Human Rights Treaties Division (HRTD)

Office of the United Nations High Commissioner for Human Rights (OHCHR)

Palais Wilson – 52, rue des Paquis

CH-1201, Geneva

SWITZERLAND.

Dear Sir/Madam,

Submissions of the Hong Kong Bar Association to the UN Committee on the Elimination of Discrimination Against Women (“Committee”)

The Hong Kong Bar Association has prepared a Submission to the UN Committee on the Elimination of Discrimination Against Women dated 10th January 2014.

We are enclosing **30 hard copies** of the Submission for the consideration of the UN Committee to assist its consideration of the Second Part of the Combined Seventh and Eighth Periodic Report of the People’s Republic of China concerning the Hong Kong Special Administrative Region (“HKSAR”) at its 59th Pre-Sessional Working Group in **March 2014** and at its 59th Session in **October and November of 2014**.

Thank you.

Yours sincerely,

Paul Shieh SC
Chairman

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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龔靖晴

**Submissions of the Hong Kong Bar Association to the UN Committee on the
Elimination of Discrimination Against Women (“Committee”)**

1. The Hong Kong Bar Association (“**HKBA**”) makes the following submissions to the Committee to assist its consideration of the Second Part of the Combined Seventh and Eighth Periodic Report of the People’s Republic of China concerning the Hong Kong Special Administrative Region (“**HKSAR**”) at its 59th pre-sessional working group in March 2014 and at its 59th session in October and November 2014.

Justiciability of CEDAW

2. In Hong Kong, international treaties must be incorporated into domestic law by way of legislation before the rights embodied therein can be directly enforceable in local courts. As Hong Kong does not have legislation incorporating the provisions of CEDAW, Hong Kong courts cannot grant relief on the sole basis that the obligations arising therefrom have been breached.
3. Courts are nevertheless to construe the words of statutes in a manner that is consistent with the international obligations that are extended to Hong Kong by way of ratification, so far as is possible (*EOC v Director of Education* [2001] 3 HKLRD 690 at para 90). As was held in *EOC v Director of Education*, “the words of the [*Sex Discrimination*] Ordinance are to be construed...as intended to carry out the obligations contained in CEDAW rather than being inconsistent with them”.
4. The HKBA asks the Committee to question the HKSAR Government on whether it would propose to incorporate or otherwise make judicially enforceable the provisions of CEDAW.

Domestic Law in the Protection of Rights Guaranteed under CEDAW

Sex Discrimination Ordinance (“SDO”)

5. The SDO includes provisions that exempt specific entities from actionable unlawful discrimination under the ordinance. A few examples of these exemptions are:
 - (1) Section 22 exempts religious bodies where the preference for a person of a particular sex for certain duties is based on religious doctrine.
 - (2) Section 61(b) provides that the SDO shall not render unlawful any act done in connection with the operation of the New Territories Ordinance (Cap 97) (“NTO”) and the New Territories Leases (Extension) Ordinance (Cap 150), which, *inter alia*, empower the courts to recognize and enforce Chinese custom or customary rights affecting land in the New Territories (see section 13 of the NTO), which generally favour indigenous male inhabitants.
 - (3) Part 2(2) of Schedule 5 provides for an exception to the “small house policy”, which renders not unlawful the arrangement where only male indigenous persons are entitled to apply to the government for the building of a three-storey village style house as a residence.
6. The examples above show that the SDO may have the effect of positively preserving past discriminatory practices to enable male domination to persist in certain domains. The HKBA asks the Committee to question the HKSAR Government as to whether it plans to review whether the exemptions are justifiable in this day and age, through examining whether the conventions on which the exemptions are based are themselves justifiable. The HKBA notes that the Committee had urged the HKSAR Government in 2006 to repeal all discriminatory provisions from the “small house policy”.

7. There is no provision in the SDO specifically dealing with discrimination against homosexuals, bisexuals and the transgender community. While other statutory sources might be relied upon to found a claim, none appears to be completely satisfactory. For instance, the provisions in the Bill of Rights Ordinance (Cap 383) can only be relied on as against the government, and not against private actors. It is arguable that the Disability Discrimination Ordinance (Cap 487) (“DDO”) prohibits discrimination and harassment against transgender persons, either on the basis that gender dysphoria is a “*disorder...that affects a person’s thought processes [and] emotions*”, or that those who have undergone sexual reassignment surgery would have incurred a “*total or partial loss of a part of the body*”, both of which are included in the definition of “disability” in the DDO (section 2). It is however unsatisfactory to have to rely on the DDO, as it necessitates contending that transsexuals suffer from a disability. The HKBA asks the Committee to question the HKSAR Government as to whether it plans to introduce specific legislation to outlaw discrimination against transgender persons and to amend legislation to ensure that transgender persons enjoy civil rights such as right to marry, right of succession, and right to adopt children on the same basis as any individual in Hong Kong.

Domestic and Cohabitation Relationships Violence Ordinance (Cap 189) (“DVO”)

8. The DVO does not provide a statutory definition of “domestic violence” which expressly includes psychological abuse and sexual violence. The statute only employs the undefined term of “molestation”, which is arguably too vague and imprecise. While courts have been ready to interpret domestic violence/molestation as encompassing actual and threatened physical, psychological, emotional and sexual violence and abuse, a statutory definition would be desirable as it could go towards enhancing the awareness of the public, including victims and potential victims, of the protection of the law. The HKBA asks the Committee to question the HKSAR Government as to whether it plans to introduce such a statutory definition.
9. There are currently no legislative sanctions against stalking, which should provide needed protection for victims, and which has been recommended by the Law Reform Commission since 2000. The HKBA asks the Committee to question the HKSAR

Government as to whether it plans to introduce any legislation against stalking as part of its efforts to combat violence against women.

Human trafficking

10. The criminal law in Hong Kong only addresses human trafficking for the purpose of prostitution, and does not extend to cover instances of forced labour. This falls short of international human rights standards, as the UN Protocol on Trafficking (2000) defines human trafficking as “*a situation where the recruitment, transportation, harbouring or receipt of persons involves force, coercion, deception or abuse of power for the purpose of exploitation*”. The HKBA asks the Committee to recommend to the HKSAR Government that Hong Kong should enact anti-human trafficking laws which adopt the definition of trafficking as provided for in the UN Protocol.

Foreign Domestic Helpers

11. The HKBA considers that the Committee was justified in 2006 to express concern over the situation of foreign domestic helpers in Hong Kong “who may be subject to double discrimination on the basis of their sex and ethnic background”. However, the HKSAR Government has continued to maintain the immigration policies that contribute to their unfair treatment in Hong Kong, including the “two week rule” and the “live-in requirement”. The HKBA asks the Committee to reiterate to the HKSAR Government its serious concern over the said immigration policies.
12. Further, the HKBA draws to the attention of the Committee the situation of single parent or legal guardian families consisting of a foreign domestic helper mother or female legal guardian and a child born in Hong Kong. Although the child born in Hong Kong often acquires permanent resident status at birth by virtue of the permanent resident status of the father and enjoys the right of abode in Hong Kong, the mother or female legal guardian who is the primary carer of the child is liable to removal from Hong Kong by the immigration authorities and applications for extension of stay in Hong Kong by the mother or female legal guardian are not considered by the immigration authorities with a view to facilitate family union and

the caring of the child in Hong Kong. The HKBA asks the Committee to question the HKSAR Government on the rationale for maintaining immigration policies that fail to take account of the unity of the family and the enjoyment of the right of abode of the child in Hong Kong with the female primary carer.

Dated 10th January 2014.

HONG KONG BAR ASSOCIATION