

SUBMISSION IN RESPONSE TO THE PUBLIC CONSULTATION DOCUMENT

Discrimination Law Review of the Equal Opportunities Commission – October 2014

Justice Centre Hong Kong is a non-governmental organisation serving to protect the rights of Hong Kong's most vulnerable forced migrants, including refugees, other people seeking protection and survivors of modern slavery. We welcome the Equal Opportunities Commission (EOC)'s public consultation on the discrimination law review. Asylum seekers, refugees and other people seeking non-refoulement protection (henceforth collectively called "protection claimants") in Hong Kong's new "Unified Screening Mechanism" (USM)¹ are one of the most marginalised and vulnerable groups here in Hong Kong. This is in large part due to their lack of any legal status in Hong Kong, and is further exacerbated by fact that most of them are ethnic minorities of a different race than the majority of people in Hong Kong, largely coming from African, South Asian and Middle Eastern countries of origin.

Perhaps the biggest barrier they face in enjoying their human rights is that during the entirety of their stay in Hong Kong, they are unable, under the Immigration Ordinance (Cap. 115), to obtain any legal status that distinguishes them from "overstayers" or "illegal immigrants" and due to the lack of any legislative provisions specifically addressing the status or rights of refugees in Hong Kong - stemming from the fact that the 1951 Convention Relating to the Status of Refugees has not been extended to the HKSAR territory.² Instead, people seeking protection are issued "recognizance papers"³ which serve, on a policy level, to avoid forcible removal procedures; such papers do not give them any legal immigration status, irrespective of their duration of stay or status of their claim. Our feedback responds to Consultation Questions 11 -16, 35, 51 and 60.

¹ The Unified Screening Mechanism, which commenced on 3 March 2014 is a new screening procedure that brings under one process claims based on risk of return to persecution (refugee claims); torture; or cruel, inhuman or degrading treatment or punishment claims (CIDTP). These are now collectively known as "non-refoulement" claims which are assessed "in one go". To learn more, please see: HKSAR, "Notice to Persons Making a Non-refoulement Claim", http://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf, Justice Centre Hong Kong, "Meeting the Bare Minimum: Hong Kong's New Screening Process for Protection: A stocktake of the first months of implementation of the unified screening mechanism for non-refoulement claims", May 2014; UNHCR Sub-Office Hong Kong, "USM Procedures and Other Relevant Information", https://www.unhcr.org.hk/files/unhcr/USM/USM_%20Procedures_and_Other_Relevant_Information_21Oct2014.pdf

² In this respect, the HKSAR Government has recently stated, "Hong Kong's unique situation, with its small geographical area, dense population and easy access from different parts of the world, makes us vulnerable to possible abuses if the 1951 Convention were to be extended to Hong Kong. We maintain a firm policy of not granting asylum and have no obligation to admit individuals seeking refugee status under the 1951 Convention. Applications for refugee status lodged in Hong Kong are handled by the Hong Kong Sub-office of the United Nations High Commissioner for Refugees.", HKSAR Government, Combined Seventh and Eighth periodic reports of States parties to CEDAW, UN Doc.: CEDAW/C/CHN-HKG/7-8, 17 January 2013, para. 473.

³ Recognizance papers serve as an alternative to administrative detention for people who are technically removable from Hong because of their immigration status. According to the Government, "The Director of Immigration may detain illegal immigrants and over-stayers or release them on recognizance under the Immigration Ordinance, having regard to the circumstances of each case, including likelihood of abscondance or committing crimes, prospect of removal within a reasonable time and other personal factors (e.g. medical condition)." HKSAR Government, Legislative Council Bills Committee on Immigration (Amendment) Bill 2011: Follow-up to the Fourth Meeting on 9 December 2011, LC Paper No. CB(2)598/11-12(01), <http://www.legco.gov.hk/yr10-11/english/bc/bc59/papers/bc591216cb2-598-1-e.pdf>

Questions 11 – 16: DISCRIMINATION BASED ON IMMIGRATION AND RESIDENCY STATUS

As the EOC Consultation Document points out in para 1.23, there is no protection from discrimination based on Hong Kong residency status, immigration status or regional origin in China, and there are express exceptions to make clear that several of these attributes do not fall within the protected characteristics of race. The Race Discrimination Ordinance (Cap. 602) (RDO) excludes certain acts from the protection provided under this ordinance. Any act done on the ground of any matter specified in section 8(3) does not constitute an act done on the ground of the race, colour, descent or national or ethnic origin of a person. Under section 8(3)(b), this includes whether the person (i) is a Hong Kong permanent resident; (ii) has the right of abode or the right to land in Hong Kong; (iii) is subject to any restriction or condition of stay imposed under the Immigration Ordinance (Cap 115); or (iv) has been given the permission to land or remain in Hong Kong under the Immigration Ordinance (Cap 115). We submit that the breadth of this exclusion allows discriminatory government policy and conduct which have an unjustifiable negative impact on protection claimants, and which in some instances brings the HKSAR Government into non-compliance with its international obligations.

In particular, the current protected characteristics of race in the RDO fail to take into account the specific situation and the discrimination faced by protection claimants, who receive less favourable treatment and are left vulnerable to discriminatory policies and conduct due in large part to their lack of legal immigration status. Many protection claimants report that upon presenting their "recognizance paper" - their only form of identification as their passports are confiscated and they are not issued with a Hong Kong ID card - they often receive subpar services at healthcare, education and other services for which they are eligible compared to other local residents or foreign visitors. Often, frontline workers are not familiar with recognizance papers in the first place and have little to no understanding of the changes in the system with the introduction of the USM. Protection claimants also report feeling highly embarrassed by having to produce these documents. Many state that they are frequently stopped by the police in the streets and asked for their papers, which raises concern about potential use of racial profiling. Many protection claimants report that tenants in Hong Kong might decline renting accommodation to them upon learning that they are protection claimants. Frequently, particularly for new arrivals, they face steep language barriers in English and Cantonese, and interpretation services are not always readily available in the languages they speak when they access public services.

The EOC's consultation document states in para. 2.71 that "it is legitimate and proportionate to have an exception (as currently contained in the RDO) concerning immigration functions and legislation relating to those immigration functions. States are entitled to manage the numbers and types of immigrants and visitors to its territory as part of their national sovereignty." However, the assumption that discriminatory immigration policy is *always* legitimate and proportionate, as suggested, is false. We submit that there may be instances where the application of government policy or legislation has a discriminatory effect on protection claimants which is not legitimate (for example, in breach of international law obligations) or not proportionate (for example, having an excessive or unreasonable negative impact on protection claimants which cannot be justified by immigration concerns). For example, if the government were to implement or apply immigration policy in a manner which amounts to inhumane or degrading treatment or punishment, it will be unlawful⁴ and there should be no exception under the

⁴ *Udamaka v Secretary for Security* (2012) 15 HKCFAR 743, at paras 106 to 116, 133. And *GA, PA, FI, and JA v Director of Immigration*, FACV 7,8,9 & 10/2013, at para 43-44.

RDO which *automatically* validates such discrimination. Also, while section 55 of the RDO quarantines "immigration legislation governing entry into, stay in and departure from Hong Kong" from the ambit of the protection provided under the RDO, this phrase itself is uncertain and capable of being interpreted in multiple ways.⁵

Furthermore, immigration concerns largely dictate government policies which are aimed at providing assistance to protection claimants in Hong Kong, often at the cost of disregarding the HKSAR's international human rights obligations. The government has, for example, asserted that "the in-kind assistance provided to torture claimants, asylum seekers and mandated refugees is not welfare assistance provided to eligible Hong Kong residents. Its aim is to provide support which is considered sufficient to prevent them from becoming destitute, while at the same time not creating a magnet effect which could have serious implications on the sustainability of our current support systems and on our immigration control".⁶ The government, however, has never provided empirical evidence to support the "magnet effect" and relies on assumptions that confuse these claimants' reasons for coming to Hong Kong with their needs once they are here. The extremely low assistance that claimants are forced to depend on thrusts them under the poverty line,⁷ forces them into dependency and has been criticised by several local and international media outlets, as well as by the UN treaty bodies which have expressed concern about the situation of refugees in Hong Kong.⁸ While the HKSAR Government justifies the existing low protection policies in order to have a deterrent effect, Justice Centre is alarmed that policies give little regard to legal obligations for the fulfilment of human rights in a context of vulnerability, and is also concerned that they may even have the effect of "constructive refoulement" - putting refugees in an

⁵ See a recent negative judgment handed down by the Court of Final Appeal regarding the right to work for mandated refugees and successful torture claimants in *GA, PA, FI, and JA v Director of Immigration*, FACV 7,8,9 & 10/2013, at para 39. "The basic inquiry in the present case is really to pose the following question: does the relevant act or omission complained of originate from immigration legislation governing entry into, stay in and departure from Hong Kong? As I have said earlier, the precise ambit of this phrase should be determined on a case by case basis. In the present case, for the reasons given, the legislation giving the DOI the discretion whether or not to allow the Applicants to work in Hong Kong clearly comes within these words."

⁶ HKSAR Government, Paper to the LegCo Panel on Welfare Services "Humanitarian Assistance for Torture Claimants, Asylum Seekers and Mandated Refugees in Hong Kong", LC Paper No. CB(2)1630/12-13(01), 22 July 2013, at para 4, available at: <http://www.legco.gov.hk/yr12-13/english/panels/ws/papers/ws0722cb2-1630-1-e.pdf>

⁷ It is difficult to quantify the assistance, since it is mostly in-kind, and there is little transparency about the package, however, some estimates put the in-kind assistance at 37% below the poverty line, previous to 1 February 2014 enhancements, and 20% after the enhancements. This is based on the combined amount for rent and food for a single person against the newly established poverty line of HKD 3,600 for a single person. See: Vision First, "Crashing through the Poverty Line", 10 January 2014. For more information on challenges with the assistance package, see Refugee Concern Network, "Improving the Living Conditions of Protection Claimants in Hong Kong: Recommendations from the field", October 2013 and Ramsden, M; Marsh, L. Refugees in Hong Kong: Developing the Legal Framework for Socio-Economic Rights Protection. *Human Rights Law Review*, 2014, 14. Oxford University Press. 2014.

⁸ For news coverage, see for example: Brown, Sophie, "The Waiting Game: Refugees live in limbo in Hong Kong", *CNN International*, 30 September 2014; Branigan, Tania, "Hong Kong's dirty secret: thousands of asylum seekers left waiting in squalor", *The Guardian*, 6 March 2014; Knowles, Hazel, "Haven of Hopelessness", *China Daily Asia*, 28 March 2014, "Asylum Seekers in Hong Kong Face Slum-Like Conditions", *Wall Street Journal*, 16 July 2013; Lai, Samuel and Tjhung, Mark, "Hong Kong's Refugee Shame", *Timeout Hong Kong*, 19 June 2013; Chan, Wilfred, "Hong Kong's 'Shameful' Treatment of Refugees Exposed", *CNN*, 18 July 2013. For treaty body recommendations, see: This recommendation has been explicitly raised in the most recent reviews of the CESCR, CEDAW, CAT, CERD, HRC, and the CRC. See: CESCR, "Concluding observations: People's Republic of China (including Hong Kong and Macao)", UN Doc.: E/C.12/1/Add.107, 13 May 2005, at para. 82 and 92; CEDAW, "Concluding comments: China", UN Doc.: CEDAW/C/CHN/CO/6, 25 August 2006, at para. 43-44; CAT, "Concluding observations: Hong Kong Special Administrative Region", UN Doc.: CAT/C/HKG/CO/4, 19 January 2009, at para. 7; CERD, "Concluding observations: China (including Hong Kong and Macao Special Administrative Regions)", UN Doc.: CERD/C/CHN/CO/10-13, 15 September 2009, at para. 29; HRC, "Concluding Observations: Hong Kong, China", UN Doc.: CCPR/C/CHN-HKG/CO/3, 29 April 2013, at para. 9; CRC, "Concluding observations: China, including Hong Kong, China and Macao, China", UN Doc.: CRC/C/CHN/CO/3-4, 29 October 2013, para. 84; CESCR, "Concluding observations on the 2nd periodic report of China, including Hong Kong, China, & Macao, China", UN Doc.: E/C.12/CHN/CO/2, 13 June 2014, para. 42.

impossible dilemma where they may feel compelled to withdraw their claims and compelled to risk the danger of returning to their country of origin before it is safe to do so.⁹ In fact, Justice Centre has seen cases of claimants withdrawing claims due to the difficult conditions, inability to work and indignity of relying and depending on assistance, and concerns about the success rate and prospects for durable solutions since the USM came into effect. Thus, the fact that tenuous immigration concerns are the primary driver that dictates almost all policies relating to protection claimants' lives in Hong Kong is not justified when they have the effect of infringing on claimants' basic human rights while they are seeking protection. HKSAR must still respect, protect and fulfill the basic human rights of all persons within its territory as recognised under international law.

For protection claimants, their language, race, nationality and immigration status are therefore inextricably linked together in their experience and treatment in Hong Kong in society and by public authorities. Article 1.2 of the UN Convention on the Elimination of Racial Discrimination states that the "Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." Nonetheless, in its General Comment No.30 on discrimination against non-citizens, the Committee on the Elimination of Racial Discrimination (CERD) has affirmed this must not be interpreted to detract in any way from the rights and freedoms recognised and enunciated in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. CERD also notes that under the Convention, "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportionate to the achievement of this aim." In fact, CERD has expressed concern that the definition of racial discrimination in the RDO is not completely consistent with Art. 1 of the Convention, recommending that HKSAR include indirect discrimination with regard to language, immigration status and nationality among prohibited grounds of discrimination in the RDO, recalling General Comment No. 30. More recently, the Committee on Economic, Social and Cultural Rights, in para. 41 of its concluding observations issued this year, also called for the HKSAR to take steps to adopt comprehensive anti-discrimination legislation in compliance with Art. 2.2 of the ICESCR, and made particular reference to asylum seekers and refugees.

Thus, Justice Centre finds that the exception to race discrimination on the grounds of permanent residency and right of abode in Hong Kong under sections 8(3) should be amended so that it is more in line with other jurisdictions in order to address the multi-faceted and diverse forms of race-related discrimination faced by people, such as protection claimants. In particular, discrimination based on immigration status should not be automatically excluded from the ambit of the protective provisions of the RDO; rather any differential treatment must be justified as being pursuant to a legitimate aim, and proportionate. We note that the proposed definition of discrimination based on residency and immigration status under para. 2.82 in the EOC's consultation paper is too narrow as it still fails to extend to the situation of protection claimants in Hong Kong. The provision should also cover those who do not have formal "legal status" in Hong Kong, as with the case of protection claimants. Ultimately, what Justice Centre and other UN treaty bodies have continued to recommend is that the 1951 Refugee Convention should be extended to the territory and that government introduce domestic refugee legislative provisions, offering protection claimants

⁹ Kao, Ernest, "I'd rather face death in Somalia than be destitute in Hong Kong", says asylum seeker", South China Morning Post, 22 April 2014. "Scholars, NGOs and the UNHCR use the term 'constructive refoulement' to describe a situation where a refugee is forced to return 'voluntarily' because of conditions that are insupportable." Mathew, Penelope, *Reworking the Relationship between Asylum and Employment*, Routledge Press: New York, 2012, at pp 97-98.

legal status for the period they are seeking asylum, and providing durable solutions to those with successful claims.

Question 35: FIELDS OF PROHIBITED CONDUCT – GOVERNMENT’S FUNCTIONS AND POWER

Racial discrimination in the exercise of all government functions and powers should be prohibited by the RDO. This will maintain consistency among the four anti-discrimination ordinances and avoid any arbitrary distinction between discrimination concerned with provision of governmental services (which is expressly covered in RDO section 27(2)(h)) and the performance of other governmental functions and powers (which is not currently covered in RDO). For protection claimants, such protection is of vital importance given that they have to interact with different government departments and personnel, in issues relating to arrests by police or immigration, treatment by immigration at regular reporting or treatment by immigration at detention centres, for example. Such coverage would also be in line with the recommendation by the UN CERD calling on HKSAR to include government functions and powers under the scope of the RDO.

Questions 51 & 60: POWERS OF THE EOC & ESTABLISHMENT OF A HUMAN RIGHTS COMMISSION

Justice Centre believes that reformed discrimination laws should expressly provide that the EOC has powers to monitor and advise the government on relevant existing and proposed legislation and policy; and on the government’s compliance with international human rights obligations relating to equality and discrimination. Nonetheless, countless UN treaty bodies and civil society groups have expressed concerns about the limited mandate of the EOC and have called on the Hong Kong Government to establish an independent national human rights institution (NHRI) with a broader mandate to protect human rights, in line with the Paris Principles. In other jurisdictions, NHRIs are able to conduct inquiries, develop materials for public education and awareness, receive complaints of discrimination and breaches of human rights, monitor and make submissions to the government and conduct research and legal gap analyses on a plethora of human rights issues. Currently there is no governmental or statutory establishment in Hong Kong with such a comprehensive and structured mandate; the EOC is limited in its scope as it is restricted to the four anti-discrimination ordinances.

Justice Centre often finds that several negative stereotyping and misconceptions exist about refugees, often evidenced in derogatory media coverage, in negative comments by politicians and among the general public’s views. When the USM rolled out, Justice Centre called on the government to take positive steps to raise awareness about the system and the situation of protection claimants, as the government has the primary obligation under international and domestic laws to promote equality and human rights, and it cannot discharge the duty by deferring the work to the NGO sector. It is worrying that not only has the Hong Kong Government not made efforts to do so, but it, at times, particularly at LegCo panel meetings, has provided disingenuous information and selective statistics, fuelling misconceptions and maligning protection claimants.¹⁰ Protection claimants report experiencing racial discrimination as well as stigma associated with being a protection claimant quite frequently in their daily lives, but are rarely informed of the avenues of legal redress available to them should they be the victim of racial discrimination or a crime, and often do not want to report incidences for fear of detention or the impact this may have on their claim process.

¹⁰ HKSAR Government, Paper for a meeting of the LegCo Panel on Security, “Implementation of the Unified Screening Mechanism”, LC Paper No. CB(2)1621/13-14(06), 3 June 2014, available at: <http://www.legco.gov.hk/yr13-14/english/panels/se/papers/se0603cb2-1621-6-e.pdf> and Chong, Tanna, “Leaked paper poses question of collusion for DAB and government”, South China Morning Post, 4 June 2014, available at: <http://www.scmp.com/news/hong-kong/article/1524776/leaked-paper-poses-question-collusion-dab-and-government>