

SUBMISSIONS FOR THE 2018-19 POLICY ADDRESS CONSULTATION

October 2018

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

Introduction

Justice Centre Hong Kong (Justice Centre) appreciates the opportunity to provide a submission to the 2018-2019 Policy Address and its consultation process. As an invaluable way for civil society to express its opinions and provide insight and feedback, Justice Centre supports the Policy Address consultation process and hopes that our concerns will be considered and incorporated into beneficial policy outcomes.

Justice Centre has grown increasingly concerned with the consultation process that has accompanied this Policy Address, and its previous edition. Justice Centre is also worried that the current approach towards consultation in the development of policy excludes civil society and is inconsistent with international best practice principles, in similar common law jurisdictions and according to the United Nations.

In relation to the rights of asylum seekers and refugees and the issue of human trafficking, we continue to urge the Hong Kong Government to ensure the fairness of the Unified Screening Mechanism (the USM) to handle non-refoulement claims and strengthen prosecution, protection and prevention to combat human trafficking. It is of concern that, many of the recommendations made by the Committee against Torture (the CAT Committee) in its Concluding Observations on Hong Kong in 2016 have still not been addressed. Of key importance to Justice Centre is the extension of the Convention relating to the Status of Refugees and its 1967 Protocol to Hong Kong. We also recommend the Government request extension of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children to the United Nations Convention against Transnational Organized Crime for Hong Kong, as well as introduce a comprehensive anti-human trafficking bill.

Consultation and engagement with civil society

Civil Society Concerns about insufficient consultation for the Policy Address

Concerns remain that the government is not engaging with civil society during the Policy Address consultation process in a meaningful and considered way. As with recent years, this process only began in July, leaving just three months for the Government to meet with and gather data from relevant actors in society.¹

Furthermore, while the Government has met with political parties and specific sectors of its choosing, many civil society organisations, including Justice Centre, have not been invited to these meetings during Chief Executive Lam's period in office. This is despite consistent attempts through letters address to the Chief Executive, Chief Secretary for Administration and the Financial Secretary.

While we have received assurances through direct correspondence with the office of the Chief Executive that over 40 consultation sessions have been held since last year's Policy Address, this has been accompanied by an assessment that not all relevant community organisations have been covered within these forums.

Unfortunately, civil society has also been sidelined through other engagement processes. For example, in the Chief Executive's Question and Answer Session at the Legislative Council on 3 May 2018 many of the human rights-related issues expressed by civil society organisations were not addressed.² Instead in the months since the Policy Address time and effort has been spent focusing on the implementation of initiatives that while possibly beneficial, do not provide sufficient .

¹ See *Policy Address consultation launched*, Press Release, <https://www.info.gov.hk/gia/general/201807/01/P2018070100491.htm> and *Policy Address consultation launches*, https://www.news.gov.hk/eng/2018/07/20180701/20180701_134027_421.html

² For example, human trafficking, forced labour, etc. See *The Chief Executive's Question and Answer Session at the Legislative Council, The Chief Executive's Written Statement (3 May 2018)*, available at http://gia.info.gov.hk/general/201805/03/P2018050300541_282857_1_1525347091847.pdf

The addition of social media, in particular Facebook and Instagram,³ as avenues for political engagement is noteworthy and a positive step in informing a larger portion of the public. However, it is so far unclear how this will lead to greater access for NGOs and civil society for direct consultation or increased incorporating of views for policy development. It is also noteworthy that some of these forums have not been put in Hong Kong's official languages. For example, the following Facebook pages are in Chinese only; Chief Executive, Chief Secretary for Administration Office, Home Affairs Bureau, Buildings Department, Civil Service Bureau, Development Bureau, Financial Services and the Treasury, Labour and Welfare Bureau, and Youth Gov HK. In addition, Justice Centre notes that the principal website for the Policy Address remains bare and is not regularly updated with records of meetings or other consultation activities.⁴ This limits the overall transparency of the consultation process.

It is therefore possible that while there have been efforts to involve more of the Hong Kong population in the Policy Address consultation process, the lack of positive action towards civil society actors and management of the Government's online presence limits to the degree to which engage civil society in a meaningful and impactful way.

Justice Centre's challenges in engaging with Government

Engaging with the Government has always been a challenge for civil society in Hong Kong. When attempting to communicate by email or letter, many civil society organisations, particularly those involved in human-rights based work such as Justice Centre, receive vague replies which provide no substantive information. In many instances, attempts at reaching out have been ignored. Justice Centre's recent experiences illustrate this challenge.

In the past couple of years Justice Centre's has faced several challenges in obtaining meetings with the Department of Justice, Hong Kong Police Force, Constitutional and Mainland Affairs Bureau, Security Bureau, Legal Aid Department and Immigration Department. Securing a meeting can often take many months of effort, with emails and letters going unanswered for extended periods. While some departments have been more open to engaging with civil society, in general the degree of openness is not conducive to positive policy engagement.

³ Facebook: www.facebook.com/carrielam.hksar ; Instagram: www.instagram.com/carrielam.hksar

⁴ Policy Address main website: www.policyaddress.gov.hk

In the months preceding and as part of the Policy Address 2018 Consultation,, Justice Centre sought meetings with senior Government officials on several occasions but was generally advised either officials were “unable to accept”, without explanation, or that they were schedules were too busy . Instances include Chief Executive Carrie Lam, Chief Secretary for Administration Matthew Cheung Kin-chung, and Financial Secretary Paul Chan Mo-po.

Furthermore, queries sent to the Policy Address Secretariat in the last year have been made pertaining to which individual civil society organisations were consulted as part of 2017’s Policy Address. However, no response has been received despite Justice Centre’s continued efforts to establish communication. This is a further sign of a worrying disconnect between Government and civil society that we hope will be addressed.

Justice Centre is, however, happy that the Government has chosen to continue its Human Rights Forum with the latest meetings taking place on 20 December 2017 and 18 April 2018 respectively. This has given civil society organisations a platform from which to state their concerns clearly and directly to government officials. Justice Centre is pleased to have been involved in both instances. However, we still have concerns about the structure and irregular operation of the meetings. For example, as noted in the Hong Kong UPR Coalition’s 2018 submission to the Constitutional and Mainland Affairs Bureau, the Human Rights Forum is only held shortly before or after treaty body and UPR sessions, making it difficult for civil society organisations to effectively prepare and raise issues of concern during the meetings.⁵ Additionally, representatives largely stuck to talking about pre-agreed points, explicitly ruling out certain topics that would have benefitted the consultation process.

The reluctance to engage with civil society is particularly concerning given the importance with which the Government places on the rule of law as part of Hong Kong’s success. Civil society and human rights defenders play an integral role in the promotion of human rights, democracy and the rule of law.⁶ Special emphasis should be given to measures to assist in the strengthening of a pluralistic civil society through policy development.

Proper consultation delivers better outcomes

⁵ Hong Kong UPR Coalition Submission to the Constitutional and Mainland Affairs Bureau (CMAB) for Universal Periodic Review, 7 May 2018, available at <http://www.justicecentre.org.hk/framework/uploads/2018/03/Hong-Kong-UPR-Coalition-Submission-to-CMAB-for-UPR-Consultation.pdf>

⁶ See *Declaration on Human Rights Defenders*, available at <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

Justice Centre agrees with Chief Executive Lam that public engagement is necessary, as affirmed in her election manifesto:

To govern effectively, politically appointed officials and civil servants at all levels must interact and communicate effectively with the Legislative Council and District Council members of all political groups, professional bodies, NGOs, Government committees and the general public. We also need to allow different stakeholders to participate in public affairs, and resolve major issues in society through public engagement.⁷

Justice Centre, along with many other Hong Kong civil society organisations, has valuable experience in service provision and conducts robust research studies that play an important role in developing informed policies. One key example of this is Justice Centre's 2016 report: '*Coming Clean: The prevalence of forced labour and human trafficking for the purpose of forced labour amongst migrant domestic workers in Hong Kong*' (Coming Clean).⁸ Coming Clean was the first study of its kind in Hong Kong to employ quantitative methods to look at forced labour and link it to policy and law reform.

In addition, in December 2017 Justice Centre published its *Refugee-Human Trafficking Nexus Research* report focused on the connections and overlaps that occur between those seeking asylum in Hong Kong and those being trafficked. This in-depth report is an additional example of a civil society organisation providing key analysis on what is a severely overlooked and unacknowledged issue in Hong Kong with the hopes of developing new and informed policy.⁹

Similar common law jurisdictions to Hong Kong acknowledge the valuable role consultation plays in policy development through their guides to regulation. For example the "Australian Government Guide to Regulation,"¹⁰ (the "Guide") cited in our previous submission to the Policy Address, argues that proper consultation can deliver better understanding of the people affected, better consideration of possible policy

⁷ Carrie Lam, Connecting for Consensus and A Better Future: Manifesto of Carrie Lam Chief Executive Election 2017, 27 February 2017, p41, available at: https://www.carrielam2017.hk/media/my/2017/01/Manifesto_e_v2.pdf

⁸ 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: <http://www.justicecentre.org.hk/comingclean/>

⁹ *Refugee-Human Trafficking Nexus Research*, December 2017, available at http://www.justicecentre.org.hk/framework/uploads/2014/03/Report_compressed.pdf

¹⁰ Australian Government, The Australian Government Guide to Regulation, 2014, p40, available at: https://www.pmc.gov.au/sites/default/files/publications/Australian_Government_Guide_to_Regulation.pdf

alternatives, increased accuracy of data and a better relationship with any affected groups. Increased transparency and consultation along already established lines of communication and existing relationships can only benefit all stakeholders involved in the policy-making process.

Justice Centre repeats its support for full public consultation in the form of public meetings, calls of submissions, social media activities, advertising, direct communication and more as the default form of consultation to ensure the deeper levels of trust in the policy-making process and increased reliability throughout implementation.¹¹

One of the benefits for the Government in adopting this model, is that there would be less reliance on judicial reviews, which are not always a suitable platform for resolving policy issues. Furthermore, full public consultation could limit the financial impact of legal, court and other administrative costs associated with defending judicial reviews.

Best practice regulation efforts by the Hong Kong Government

As with Justice Centre's previous submission to the Policy Address, we commend the efforts made by the Government in 2007 in employing the "Be the Smart Regulator" Programme (the "Programme"), with the aim of promoting Hong Kong's reputation as a business-friendly city.¹² The Programme includes a push towards smart regulations that incorporated consultation which was "open and inclusive" and ensured that regulatory impact assessments were undertaken.¹³ However, the deterioration in practice of the Programme that has amounted to increased marginalisation has not been dealt with. Once again, we agree with the views espoused in the Hong Kong General Chamber of Commerce's (the Chamber) latest and previous submissions to the Policy Address:

¹¹ See *ibid.*, p.43 for more examples of public consultations

¹² Financial Secretary's Office, *Be the smart regulator*, 2007, p1, available at: <https://www.gov.hk/en/theme/bf/pdf/BTSRPamphlet.pdf>

¹³ *ibid.*, p.3

"Although the Programme appears to have adopted basic elements of good regulatory practices ("GRP") found in many developed countries, it is, however, of a non-binding nature and is not applied consistently to the regulatory process."¹⁴

Justice Centre supports the recommendation by the Chamber for the Government to carry out a critical and systemic review of the Programme for the purpose of putting in place a proper and effective Regulatory Impact Assessment mechanism, an instrument that has long been called one of the most important regulatory quality tools available to governments by the OECD.¹⁵ In particular, Justice Centre supports a proposal that complies with the principles of transparency, accountability, proportionality and consistency in line with the GRP employed in jurisdictions such as the UK and Australia.¹⁶ Given the challenges civil society face in engaging with the Government, enhanced emphasis should be placed on the consultation stage. Affected key stakeholders should be consulted at all stages of regulatory cycle.

International best practice standards on consulting with civil society

The United Nations Human Rights Council has consistently noted the benefits of civil society in participating in policy and legislative development. For example, Human Rights Council resolution 32/31 'Civil society space' urges States to create and maintain a safe and enabling environment for civil society, including:

"Providing for the participation of civil society actors, including by enabling them to participate in public debate on decisions that would contribute to the promotion and protection of human rights and the rule of law and on any other relevant decisions, and to provide input on the potential implications of legislation when it is being developed, debated,

¹⁴ Hong Kong General Chamber of Commerce, Policy Address Submission, 11 September 2018, p1, available at:

<https://www.chamber.org.hk/FileUpload/201809121542363027/2018-19%20Policy%20Address%20Submission.pdf>

¹⁵ See *Determinants of Quality in Regulatory Impact Analysis*, Organisation for Economic Co-operation and Development (OECD), available at <https://www.oecd.org/gov/regulatory-policy/42047618.pdf>

¹⁶ See the UK's *Legislative and Regulatory Reform Act 2006* (available at

<https://www.legislation.gov.uk/ukpga/2006/51/contents>) and Australia's

Best Practice Regulation, A Guide for Ministerial Councils and National Standard Setting Bodies, October 2007 (available at

<https://www.pmc.gov.au/resource-centre/regulation/best-practice-regulation-guide-ministerial-councils-and-national-standard-setting-bodies>)

implemented or reviewed, and exploring new forms of participation and opportunities brought about by information and communications technology and social media.¹⁷

Beyond the Human Rights Council, conducting real and effective consultations is also consistent with Goal 16 of the Sustainable Development Goals (SDGs), on promoting just, peaceful and inclusive societies, by ensuring responsive, inclusive, participatory and representative decision-making at all levels. Additionally, Goal 17 of the SDGs, on revitalising the global partnership for sustainable development, calls for an increase in multi-stakeholder partnerships, including encouraging and promoting effective public and civil society partnerships.

Recommendations

Justice Centre recommends the Hong Kong Government:

- Issue public directions to all bureaus and departments which encourage face to face meetings with civil society organisations;
- Adopt a default position of full public consultation for all forms of policy and legislative development;
- Develop new forms of consultation, which are empowering, participatory and consistent with international best practice principles;
- Prior to the next Policy Address, engage in a comprehensive public consultation with civil society, including face-to-face meetings with relevant stakeholders by senior representatives from relevant bureaus and departments;
- Continue the Human Rights Forum while making an asserted effort to address the points and concerns raised by civil society organisations; and
- Implement a Regulatory Impact Assessment mechanism to enhance transparency and deliver better policy outcomes.

Asylum seekers

Ensuring the fairness and transparency of the mechanism for giving protection to asylum seekers

In February 2016, the Hong Kong Administration started a 'comprehensive review' of the strategy of handling non-refoulement claims. The objective of these reforms is to reduce the overall number of non-refoulement claimants to 'tackle all related issues, including crimes, at its root.'¹⁸ The 'comprehensive review' is focused

¹⁷ United Nations Human Rights Council, A/HRC/32/L.29, 27 June 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/132/22/PDF/G1613222.pdf?OpenElement>

¹⁸ Secretary for Security, *Reply to Joint Letter from HON Leung Che-cheung, Dr HON Elizabeth Quat and Dr HON Chiang*

principally on four key aspects: (a) pre-arrival control, (b) screening procedures, (c) detention; and (d) enforcement and removal.¹⁹

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.²⁰

While these changes appear to have been proposed as a way of combating delays currently existing in the process, there has been no explicit explanation given. There is indication that the Government believes such delays are deliberate on the part of non-refoulement claimants although without any publicly available data revealing the cause behind delays in the USM, such as claim cannot be reasonably supported at this time.²¹ Any further attempts of linking non-refoulement claims instances of crime, for example, also fall flat without the requisite data.

Furthermore, neither the consideration of the CAT Committee's report in November 2015 nor any of the recommendations of the Committee has been mentioned in Government papers relating to the comprehensive review. 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, even though the Administration dedicated one page to the policy relating to non-refoulement claimants in the report. Moreover, despite calls of lawmakers, the review has not been made open to consultation with civil society.

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>

¹⁹ Ibid.

²⁰ Security Bureau and Immigration Department, "An Update on the Comprehensive Review on the Strategy of Handling Nonrefoulement 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>

²¹ Ibid., in paragraph five the Security Bureau and the Immigration Department claim that there have been 'delay tactics'.

Given Justice Centre's work in providing free, independent legal information to all people going through the USM, we continue to be disappointed that we have not been contacted by the Security Bureau for our input. We would be able to provide detailed information on methods that could improve the efficiency of the USM and reduce the costs incurred to the Government. The 'comprehensive review' is one of many areas of policy review and development which could have benefited from a full public consultation.

Recommendations

Justice Centre recommends the Hong Kong Government:

- Request the extension of the Convention relating to the Status of Refugees and its 1967 Protocol to Hong Kong;
- Accept and implement CATs recommendations that Hong Kong should review the non-refoulement claim screening procedure to ensure that persons in need of international protection are fully protected against refoulement;
- Meet with and consult civil society on the comprehensive review; and
- Meet with and consult civil society on the pilot lawyer scheme.

Strengthening prosecution, protection and prevention in relation to human trafficking

In March 2018 the Administration made the welcome move to introduce the Action Plan to Tackle Trafficking in Persons and to Enhance Protection of Foreign Domestic Helpers in Hong Kong ('Action Plan'),²² a first step in successfully combating a very serious problem that exists in the region. However, unfortunately since then there has been no development regarding a specific time plan for activities within the Action Plan other than the extension of human trafficking screening to all police districts during 2018.²³ While this move has a lot of potential, there remains many problems in Hong Kong's approach to combating human trafficking.

With no specific legislation to combat human trafficking, Hong Kong remains an outlier among common law jurisdictions across the globe including Australia, the United Kingdom and the United States. Only the Crimes

²² 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: <https://www.sb.gov.hk/eng/special/pdfs/Action%20Plan%20to%20Tackle%20TIP%20and%20to%20Protection%20FDHs.pdf>

²³ Statement made by Billy Woo, Principal Assistant Secretary, Security Bureau, Hong Kong, in a meeting with civil society on 28 May 2018

Ordinance, Cap. 200, which criminalises the bringing in and taking out of persons into and out of Hong Kong for the purpose of sex work has any relation to this major human rights-related issue.

Justice Centre's own primary research has indicated that 1 in 7 of all migrant domestic workers currently in Hong Kong have been victims of human trafficking. That the Government has not addressed the recommendations of CAT and given human trafficking a legal definition in Hong Kong law is especially concerning to Justice Centre.²⁴

Furthermore, while 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 (the 'Palermo Protocol'), the Protocol remains not applicable to Hong Kong.²⁵ Both the Human Rights Committee (HRC) and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) have recommended the Protocol's extension.²⁶

In addition, the lack of specific human trafficking offence within Hong Kong legislation has forced a situation in which law enforcement is restricted to assessing the constituent elements of human trafficking rather than the result. Because of this, a recent case involving the apparent trafficking of a migrant domestic worker to Mainland China was treated as a potential commission of the offence of conspiracy to defraud.²⁷

Finally, data regarding victim identification and the training officials receive is limited and for the most part, inaccessible. In response to an access to information request made by Justice Centre in June 2018, while the Government supplied figures regarding the number of human trafficking victims and their status as migrant domestic workers, key details regarding sex, gender, nationality and immigration status were omitted.²⁸

²⁴ Committee against Torture, 'Concluding observations on the fifth periodic report of China with respect to Hong Kong, China'

²⁵ 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

²⁶ 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'.

²⁷ 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>

²⁸ 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

This example is unfortunately not an isolated case. On 10 July 2017 the Immigration Department was unable to satisfy a data request made by Justice Centre related to children who are victims of human trafficking due to the lack of data. In a similar request made in September 2018, we were informed that statistics related to persons aged under 18 placed in immigration detention were not maintained reasoning that to do so would require substantial resources. This is at odds with recommendations made by the Committee on the Rights of the Child (CRC) made in October 2013 and counter to calls being made by civil society for a centralised data bank for the last 20 years.²⁹

Civil society has reported cases, or potential cases, of human trafficking that have not been identified by the Government. Continued inaction on the Government's part to combat human trafficking has meant that Hong Kong remains consigned to the Tier 2 Watch List in the latest United States Trafficking in Persons Report, a position that it has held since 2016 and may continue to do so.³⁰

Recommendations

Justice Centre recommends the Hong Kong Government:

- Request the extension of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children to the United Nations Convention against Transnational Organized Crime for Hong Kong;
- Introduce a comprehensive anti-human trafficking bill to strengthen prosecution, protection and prevention; and
- Meet with and consult civil society on its policies in relation to human trafficking.

I trust that this information is of assistance. Please contact Simon Henderson, Senior Policy Advisor (+852 6588 3804; simon@justicecentre.org.hk), Annie Li, Research and Policy Officer (+852 5661 6944; annie@justicecentre.org.hk) or Jake Mendrik, Policy Advisor (+852 6575 9632; jake@justicecentre.org.hk) with any questions.

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²⁹ See *Submission to the Subcommittee on Children's Rights of the Legislative Council*, available at: http://www.justicecentre.org.hk/framework/uploads/2014/03/20180404-LegCo-Subcommittee-on-Children-Speech_Final.pdf

³⁰ See Trafficking in Persons Report June 2018, United States State Department, <https://www.state.gov/documents/organization/282798.pdf>