

SUBMISSIONS FOR THE 2017-18 POLICY ADDRESS CONSULTATION

September 2017

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 2017-2018 Policy Address and its consultation process. Justice Centre considers that the Policy Address process provides valuable opportunities to seek feedback from civil society and hopes that our concerns will be considered and incorporated into beneficial policy outcomes.

Justice Centre is concerned with the limited consultation process that accompanies this Policy Address, in contrast to past Policy Addresses. Justice Centre is also concerned that the current approach towards consultation in the development of policy actively 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 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. In particular, we recommend the Government accept and implement the recommendations made by the Committee against Torture (the CAT Committee) in its Concluding Observations on Hong Kong in 2016. Justice Centre requests the extension of the Convention relating to the Status of Refugees and its 1967 Protocol to Hong Kong. Furthermore, we 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

Justice Centre is concerned that the Government has refused to conduct a full-scale consultation exercise for the Policy Address. The Government's justification is that with "only three months to go, it is hard to conduct a full-scale public consultation exercise for the Policy Address" as the Policy Address will now be

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advanced from January 2018 to October 2017.¹ Additionally, the press release notes that Chief Executive Mrs Carrie Lam already contacted various sectors when she was Chief Executive-elect. However, for the past few years the consultations for the Policy Address commenced only three months before the Policy Address was delivered.

Moreover, while the Government has met with political parties and specific sectors, the majority of civil society organisations, including Justice Centre, have not been invited to these meetings either before or after Chief Executive Lam took office. It is also noteworthy that the Government website for the Policy Address has not been updated.² The Government's decision not to resume regional consultation forums for the public and failure to update related sections of the website raises concerns about the Government's sincerity in being informed of the views of all members of the public instead of a selected few.

Justice Centre's challenges in engaging with Government

Engaging with the Government has always been a challenge for civil society in Hong Kong. Many civil society organisations, particularly those that take a human rights-based approach, including Justice Centre, receive replies to letters or emails with no substantive information. It is also quite common for requests for meetings or policy questions to be ignored. Justice Centre's recent experience illustrates this challenge. For example, Justice Centre's attempts to seek a meeting with the Department of Justice have seen specific questions responded to with information copied from a website and requests for a meeting ignored. Similarly efforts to obtain a meeting with the Constitutional and Mainland Affairs Bureau have been ignored, with Government officials taking weeks to respond to emails. Similar attempts to engage with the Security Bureau and the Immigration Department, have also not led to meetings.

The only way Justice Centre has been able to obtain a meeting, which has happened on one occasion in the last decade, has been through a Government official meeting in an off-the-record basis in a café. This form of engagement is not conducive to building a positive and constructive relationship with civil society. Nor is it a good approach towards policy development for the Government, given that civil society organisations, such as Justice Centre, have access to a wide range of information that could ensure more effective policy implementation.

The Government's Human Rights Forum, which it cites in reports to United Nations treaty bodies to show civil society has been consulted previously took place at least once or twice a year. However, it has not taken place since July 2016. The notes of the July 2016 meeting are still unavailable on the Government's

¹ Hong Kong Government, 'Policy Address study starts', 17 July 2017, available at: http://www.news.gov.hk/en/categories/admin/html/2017/07/20170717_211731.shtml.

² See: <https://www.policyaddress.gov.hk/2017/index.html>.

website.³ Justice Centre supports its reintroduction, given it is one of the few occasions civil society organisations can meet someone from the Government in an official capacity.

With the decline in the Government's commitment to public participation in policy, many civil society organisations have lost confidence and trust in these consultation exercises, expressing to Justice Centre that these exercises are only formalities with no genuine interest on behalf of Government to engage. Those that still participate often do so just to avoid the Human Rights Forum ceasing, however this does not appear to have been effective.

The lack of willingness 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. 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

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.⁴

Justice Centre, along with many other Hong Kong civil society organisations, has valuable experiences in service provision and conducts robust research studies that play an important role in developing informed policies. For example, our research report titled '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).⁵ 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.

³ See: http://www.cmab.gov.hk/en/issues/human_forum.htm.

⁴ 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.

⁵ 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/>.

Similar common law jurisdictions to Hong Kong acknowledge the valuable role consultation plays in policy development through their guides to regulation. In particular, Justice Centre notes the Australian Government Guide to Regulation (the Guide), which recognises that proper consultation delivers better policy outcomes.⁶ According to the Guide, benefits include:

- Understanding the attitudes and likely reactions of the people affected
- Making sure every practical and viable policy alternative has been considered
- Confirming the accuracy of the data on which your analysis was based
- Ensuring there are no implementation barriers or unintended consequences
- Affected groups will feel you have listened and considered their views

Transparency encourages genuine dialogue and builds trust in the policy process. For a consultation process to be credible and effective, the Government should engage with stakeholders in a way that is relevant and convenient.⁷ Consultation should not be presented as an afterthought and should complement well established lines of communication and existing relationships. As noted above, the refusal by Government officials to meet with Justice Centre makes this particularly difficult, as there is no existing relationship which we can draw upon to contribute on an ongoing basis.

Justice Centre recommends that full public consultation should be adopted as the default form of consultation. The advantage is that it increases trust and ensures that there are no unintended consequences following implementation. Examples of full public consultation include:⁸

- Public meetings and briefings
- Calls for submissions
- Sectorial meetings or briefings
- Direct communication to affected entities
- Media and advertising
- Social media activities

One of the particular 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.

⁶ 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.

⁷ *Ibid*, p41

⁸ *Ibid*, p43.

Best practice regulation efforts by the Hong Kong Government

Justice Centre Hong Kong notes efforts by the Government through the “Be the Smart Regulator” Programme (the Programme), with the aim of promoting Hong Kong’s reputation as a business-friendly city.⁹ The Programme includes a push towards smart regulations that incorporated consultation which was “open and inclusive” and ensured that regulatory impact assessments were undertaken.¹⁰ However, in Justice Centre’s experience there has been a deterioration in the practice of the Programme. Justice Centre agrees with the views of the Hong Kong General Chamber of Commerce (the Chamber) that:

“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”¹¹

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.¹² In particular, Justice Centre supports a proposal that complies with the principles of transparency, accountability, proportionality and consistency. 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, implemented or reviewed, and

⁹ Financial Secretary’s Office, Be the smart regulator, 2007, p1, available at: <https://www.gov.hk/en/theme/bf/pdf/BTSRPamphlet.pdf>.

¹⁰ *Ibid*, p3.

¹¹ Hong Kong General Chamber of Commerce, Policy Address Submission, 5 September 2017, p1, available at: http://www.chamber.org.hk/FileUpload/201709061138241428/policy_address_submission2017.pdf.

¹² *Ibid*.

*exploring new forms of participation and opportunities brought about by information and communications technology and social media*¹³

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.

In the next two years, the Government will be under greater scrutiny by the United Nations, particularly through the forthcoming Third Cycle Universal Periodic Review (UPR). Issues such as, the refusal to meet with civil society organisations and the failure to implement considered consultation processes, will be raised in civil society submissions. Justice Centre encourages the Government to substantially reform its consultation models to provide greater capacity for civil society to participate in policy and legislative development.

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;
- resume the Human Rights Forum to ensure that the views of civil society are incorporated into the policy making process; and
- implement a Regulatory Impact Assessment mechanism to enhance transparency and deliver better policy outcomes.

Asylum seekers

¹³ 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>.

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

In February 2016, the Government introduced a 'comprehensive review' of the strategy of handling non-refoulement claims on four aspects, namely pre-arrival control, screening procedures, detention; and enforcement and removal.¹⁴ The Government has proposed to introduce a pilot scheme in parallel with the existing duty lawyer service scheme to increase the number of claims that qualified lawyers can handle and thereby increase screening capacity.¹⁵ Little information has been given on the bureau(x)/department(s) in charge of various aspects of the scheme, whether the Government bureau(x)/department(s) will establish measures to avoid potential conflicts of interest and technical details such as indemnity insurance for participating lawyers. The fairness of the USM to handle non-refoulement claims and the rights of the claimants has not been mentioned in the review.¹⁶

Specifically, 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.¹⁷ 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.¹⁸

¹⁴ 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>.

¹⁵ 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, p.6, available at: <http://www.legco.gov.hk/yr16-17/english/panels/se/papers/se20170606cb2-1533-3-e.pdf>.

¹⁶ Security Bureau, 'An update on the comprehensive review of the strategy of handling non-refoulement claims', 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>.

¹⁷ *Ibid.*

¹⁸ See for example Hon Alvin Yeung's concern about whether the Government had conducted public consultation on the Unified Screening Mechanism raised in the meeting of the Panel on Security of the Legislative Council on 11 November 2016, as stated on p.15 of the minutes of the meeting, available at: <http://www.legco.gov.hk/yr16-17/english/panels/se/minutes/se20161111.pdf>.

Given Justice Centre's work in providing free, independent legal information to all people going through the USM, we were disappointed not to be contacted by Security Bureau for our input. We would have been 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 the recommendation of the CAT Committee 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

Justice Centre is concerned that there is currently no specific legislation to combat human trafficking in Hong Kong other than the Crimes Ordinance, Cap. 200, which criminalises bringing/taking another person into/out of Hong Kong for the purpose of sex work. This is despite there being strong evidence of human trafficking for a wider range of purposes in Hong Kong. Justice Centre's primary research finds that 1 in 6 migrant domestic workers surveyed display all the indicators required to be counted in forced labour and 1 in 7 of these migrant domestic workers have been trafficked into it.¹⁹

Civil society has reported cases, or potential cases, of human trafficking that have not been identified by the Government.²⁰ Inadequate action on the Government's part to combat human trafficking has led to the downgrading of Hong Kong to Tier 2 Watch List in the United States Trafficking in Persons Report in 2016. Since then, positive initiatives such as an enhanced victim identification and referral mechanism, a Code of Practice for Employment Agencies and proposals to amend the Employment Ordinance to impose heavier penalties on employment agencies for operating without a licence or overcharging have been introduced. These are positive developments and are appreciated; however, we would encourage the Government to

¹⁹ 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/>.

²⁰ See for example the cases reported on the '100storiesHK' platform, available at: <http://100storieshk.org/who/>.

undertake a full public consultation prior to such initiatives being introduced so as to ensure civil society organisations with relevant expertise can contribute.

The lack of comprehensive anti-human trafficking legislation in Hong Kong means that there is inadequate prosecution, protection and prevention. The responsibility of each Government bureau/department in combatting human trafficking is not clear to victims and organisations assisting them either. Justice Centre urges the Government to request the extension of the Palermo Protocol to Hong Kong, including introducing an anti-human trafficking bill to comprehensively strengthen prosecution, protection and prevention.

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) or Annie Li, Research and Policy Officer (+852 5661 6944; annie@justicecentre.org.hk) with any questions.

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