

Outline of the Fourth Periodic Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the Convention on the Elimination of All Forms of Discrimination against Women

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**COMMENTS OF THE HONG KONG BAR ASSOCIATION**

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**Preamble**

1. The Hong Kong Bar Association (“the HKBA”) proposes that the Preamble should also contain a snapshot of:
  - (a) which of the various deficiencies highlighted in the last Concluding Observations of the Committee on the Elimination of Discrimination against Women (CEDAW/C/CHN-HKG/CO/7-8, 14 November 2014) (“the Concluding Observations”) have been addressed; and
  - (b) for those deficiencies which have not been addressed, a concise statement of:
    - i. (i) whether the Government (“Government”) of the Hong Kong Special Administrative Region (“HKSAR”) intends to address them, the timeframe for addressing such issues;
    - ii. (ii) if there is no timeframe for addressing such issues, the reasons therefore.

## **Main Report**

### **Articles 1: Defining Discrimination**

2. The HKBA notes the proposal in para 4 of the outline prepared by the Labour and Welfare Bureau in March 2018 (“the Outline”) that the Government intends to provide updates on the various “reservations and declarations entered in respect of the Convention and their justifications”.
  
3. It is of particular concern to the HKBA that the HKSAR still retains the reservation entered in respect of article 4. The reservation reads: *“The Government of the People’s Republic of China understands, on behalf of the Hong Kong Special Administrative Region, the main purpose of the Convention, in the light of the definition contained in article 1, to be the reduction, in accordance with its terms, of discrimination against women, and does not therefore regard the Convention as imposing any requirement upon the Hong Kong Special Administrative Region to repeal or modify any of its existing laws, regulations, customs or practices which provide for women to be treated more favourably than men, whether temporarily or in the longer term. Undertakings by the Government of the People’s Republic of China on behalf of the Hong Kong Special Administrative Region under article 4, paragraph 1, and other provisions of the Convention are to be construed accordingly.”*
  
4. The HKBA calls upon the HKSAR Government to withdraw this reservation, which runs contrary to the object and purpose of the Convention (including but not limited to articles 2, 3 and 5 thereof), insofar as it serves to positively preserve measures, customs or practices which perpetuate

gender-based stereotypes and existing discriminatory practices. The Government should otherwise detail reasons for the need to continue this and other reservations.

**Article 2: Obligations of States Parties**

5. It is noted that one of the Committee has called upon the HKSAR, in paragraph 11(a) of the Concluding Observations, to fully incorporate into domestic laws the provisions of the Convention.
6. In this regard, the HKBA remains concerned with the non-justiciability of the Convention owing to the failure of the Government to incorporate the provisions of Convention in the domestic law of Hong Kong, as well as the various exemptions and exceptions in and other deficiencies of the Sex Discrimination Ordinance (Cap. 480) (“SDO”), as outlined in HKBA’s submissions to the Committee dated 10 January 2014.
7. The HKSAR Government should therefore directly address the concern of the Committee and indicate whether it would incorporate or otherwise make judicially enforceable the provisions of CEDAW. It should, in particular, indicate whether it plans to review the statutory exemptions under sections 22, 61(b), and Part 2(2) of Schedule 5 of the SDO which enable male domination to persist in certain domains in view of its obligations under the Convention.
8. It is noted that the Government intends to address the Committee, under this heading, paragraphs 50 and 51 of the Concluding Observations which raised

concerns about the “weak mandate” of the Women’s Commission (“WoC”) as well as the lack of resources committed to the WoC to undertake gender mainstreaming and other activities. HKBA invites the Government to directly address these concerns, whether the Government has since the Concluding Observations strengthened the mandate of WoC as proposed and provide financial data in respect of the funding for WoC since the Concluding Observations.

**Article 3: Appropriate Measures**

9. It is noted that Government stated, in paragraph 6 of the Outline, that it would advise the Committee on, *inter alia*, “studies, research and data collection on women including the collection of sex-disaggregated statistics, surveys and researches conducted by WoC”. HKBA invites the Government to address directly the concerns of the Committee as stated in paragraphs 50 and 51 of the Concluding Observations as to the “weak mandate” of WoC and the lack of financial resources to enable the WoC to undertake gender mainstreaming and other activities, whether the Government has since the Concluding Observations strengthened the mandate of WoC as proposed and provide financial data in respect of the funding for WoC since the Concluding Observations.

10. In addition, the HKBA invites the Government to provide the criteria by which it measures the success or otherwise of measures and policies to increase women participation in public life and whether and how it disseminates such information to the public to monitor the Government’s

performance in this regard. HKBA notes, for instance, that there is a lack of information on the appointment of women relative to their male counterparts on statutory and advisory bodies and invites the Government to directly address the issue of what it has done to improve such participation.

**Article 4: Temporary Special Measures**

11. It is observed that the HKSAR Government intends to advise the Committee that the relevant position “remains unchanged” (paragraph 7 of the Outline).

12. The HKBA urges the HKSAR Government to specifically and directly address and answer whether it has implemented the Committee’s recommendations at paragraph 53 of the Concluding Observations - and if not, why - namely :-

“consider using temporary special measures in accordance with article 4 (1) of the Convention and the Committee’s general recommendation No. 25, with numerical goals and timetables, to accelerate the representation of women in decision-making positions at all levels” (paragraph 53 of the Concluding Observations).

**Article 5: Stereotyping and Prejudice and General Recommendation No.19: Violence Against Women and No.35: Gender-based Violence**

13. It is noted that the HKSAR Government plans to update the Committee as to the review of sexual offences by the Law Reform Commission, in response

to the latter's concern and recommendation in paragraphs 54-55 of the Concluding Observations.

14. In this regard, the HKBA considers it incumbent upon the HKSAR Government to:-

- (a) set out a clear and specific time frame within which to revise the relevant legislation on sexual offences, including but not limited to (i) those involving children and persons with mental impairment in respect of which a consultation paper was published in November 2016 and (ii) rape and other non-consensual sexual offences in respect of which a consultation paper was published on 17<sup>th</sup> September 2012, both of which were subject of the Law Reform Commission's Review of Sexual Offences Sub-Committee;
- (b) outline its efforts and plan to combat prejudice and stigmatization (including blaming and shaming) of victims and complainants of sexual offences, as exposed in the wake of the #MeToo campaign worldwide. In particular, the HKBA urges the Government to review the curriculum for sex education to equip younger generations with a better understanding of and respect for gender equality and diversity (see the Committee's General Recommendation No. 35 at paragraph 30(i));
- (c) address the Committee as to its actions and plans to protect the rights of, and strengthen prosecutions against abusers of, vulnerable persons and to avoid the re-occurrence of incidents such as what is commonly

known as “The Bridge of Rehabilitation Incident” which occurred in 2016: a former superintendent of a residential home for the mentally disabled was charged for sexually assaulted a young female resident, who had a mental age of an eight-year-old, in the premises of the residential home. The victim had since the alleged abuse suffered from post-traumatic stress disorder and was unfit to testify in court. Notwithstanding that the victim had been interviewed by the police through video recording, the said video-recording could not be produced and relied upon by the prosecution under the current hearsay rule.<sup>1</sup> Accordingly, the prosecution was dropped.

15. The HKBA further invites the HKSAR Government to address the Committee as to its efforts and any concrete steps taken in combatting domestic violence against women, in terms of resource allocation (paragraph 55 of the Concluding Observations) as well as legislative measures. In this regard, the HKBA reiterates its concerns as to the lack of a statutory definition of “domestic violence” and the adoption of the undefined term of “molestation” in the Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189) (“DVO”), which arguably falls short of providing comprehensive protection against psychological abuse, financial exploitation and sexual violence. Ten years have elapsed since the last amendment of the DVO in 2008. The HKBA is concerned that the Hong Kong Judiciary reports that the DVO is seldom used by victims to obtain protection and relief (on average four dozen applications per year). Legal professionals

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<sup>1</sup> On 30<sup>th</sup> November 2009, the Law Reform Commission published a report on hearsay in criminal proceedings. One of the proposed reforms suggests that “where the declarant is unfit to be a witness... at the proceedings because of his ... mental condition”, the court may consider to admit the relevant hearsay evidence in this regard. However, the said proposal has yet been accepted or implemented by the Government.

have reported that this is because of the difficulties faced by victims in obtaining legal support. The HKBA is particularly alarmed that the Legal Aid Department reports that it takes an average of 5 weeks to process applications for legal assistance, during which time victims continue to be in jeopardy. The HKBA invites the HKSAR Government to urgently conduct a review as to the effectiveness of the DVO and the substantial amendments in 2008 and 2010 in combating domestic violence as remarked in paragraph 55 of the Concluding Observations.

16.As regards the HKSAR Government's response to the Committee's recommendation to intensify its efforts to combat multiple discrimination against lesbian, transsexual and transgender women in employment, education and in their access to health-care services (paragraphs 68-69 of the Concluding Observations; paragraph 8 of the Outline), the HKBA reiterates that the HKSAR should report to the Committee what steps it has taken to combat prejudice and social stigmatization based on sexual orientation and gender identity, including by enacting relevant anti-discrimination legislation and public education efforts.

#### **Article 6:      Exploitation of Women**

17.The HKBA shares the Committee's various concerns and recommendations as to the trafficking and exploitation of prostitution of women (paragraphs 56-57 of the Concluding Observations).

18.In particular, HKBA notes the Committee's concerns regarding security of women in prostitution working alone in isolated settings where they are



exposed to a higher risk of abuse, exploitation and violence (paragraph 56). In that regard, HKBA invites the Government to address the Committee on the recommendations given in paragraph 57(a) and (e) of the Concluding Observations, noting the comments of the Court of Appeal in *HKSAR v Lam Pui Fung CACC 293/2012* (unrep, 18 July 2013) at §13 where the Court of Appeal cited the observations of the sentencing judge below that:

“There is probably no section of society which is more open to robbery and violent assault than prostitutes who work on their own. They do so to avoid working in illegal brothels. Sadly, as this court knows all too well, some of the assaults on such women who work alone end in death. It is because such women are so vulnerable that the law has to pay particular regard to their protection. Unless the sanctions are very severe, others like the defendant will be tempted to use violence on unprotected victims of this kind....”

19. In that regard, there have been some high profile cases against sex workers (including foreign sex workers) in the recent period.<sup>2</sup> HKBA invites the Government to provide to the Committee data on violence against sex workers.

20. In relation to the issue of human trafficking, HKBA notes the proposed areas of update (paragraph 9 of the Outline) and urges the HKSAR Government to specifically address its obligations and the inadequacies of the existing criminal law in covering human trafficking for purposes other than prostitution, and the absence of comprehensive anti-trafficking legislation

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<sup>2</sup> For example, defendant Nadeem Razaq was convicted of murdering three sex workers in 2009; defendant Hong Tsz Yin was convicted of double murder of two sex workers in 2010; Rurik Jutting was convicted of murder of two foreign sex workers.

that prohibits slavery, servitude, forced and trafficking for such purposes and adopts a definition of human trafficking consistent with that in the Palermo Protocol.

21. In that regard, HKBA invites the Government to address the Committee in respect of the “fundamental failings and difficulties” as have been exposed and canvassed in *ZN v Secretary for Justice* [2017] 1 HKLRD 559 (paragraph 357). Although the judgment concerns a male foreign domestic worker who has fallen victim to human trafficking, it is equally applicable to female foreign domestic workers and women vulnerable to exploitation. In that connection, the Government ought to spell out to the Committee specifically:-

- (a) The Government’s approach in tackling the reported phenomenon of Hong Kong being a source, destination and transit point of human trafficking and its root causes (paragraph 290 of *ZN*);
- (b) Any steps or measures being planned or taken with a view to fulfilling its *positive* obligations under article 4 of the Hong Kong Bill of Rights (to which article 8 of the ICCPR is equivalent) to tackle slavery, servitude, and forced or compulsory labour and the human trafficking for such purposes, as found in *ZN*; and
- (c) A clear and specific time frame for introducing the necessary legislative measures for criminalising and penalising offenders, and for implementing appropriate measures for timely victim identification, protection and investigation, in accordance with international standards as reflected in the Palermo Protocol, notwithstanding that it currently does not apply to Hong Kong.

## **Article 7: Equality in Political and Public Life at the National Level**

22.HKBA urges the Government to directly and specifically address the Committee in respect of their recommendation at paragraph 59 of the Concluding Observations, namely, what “concrete measures, including the introduction of temporary special measures, in accordance with article 4 (1) of the Convention and the Committee’s general recommendation No. 25 and general recommendation No. 23” the Government has taken to “expedite the representation of women in politics” and whether the Government has undertaken any “study on the impact that the electoral system of functional constituencies has on the equal participation of women in political life” in accordance with paragraph 40 of Previous Concluding Comments (CEDAW/C/CHNCO/6, 25 August 2006) (“the Previous Concluding Comments”).

### **Article 10: Equality in Education**

23.The HKBA invites the Government to respond to the issues raised in the Committee’s General Recommendation No. 36 on the rights of girls and women to education issued in 2017. In particular, the Government should address the right of access to education for all disadvantaged groups of women and girls, including those with disabilities, those from ethnic minorities, those who are refugees, asylum-seekers, stateless, undocumented, internally displaced or migrants, and those who are lesbian, bisexual, transgender and intersex (paragraphs 40 to 46).

## **Article 11: Equality in Employment and Labour Rights**

24. The HKBA shares the Committee's concerns with respect to inadequate maternity leave and parental leave in Hong Kong as set out in paragraph 63 of the Concluding Observations. The HKBA notes that according to the Hong Kong Women in Figures 2015 published by the Women's Commission in 2014, engagement in household duties is the major cause (40.3%) for (economically inactive) females not participating in the labour market whilst the same only accounts for 1.8% for males. Besides, the labour force participation rate for female drops steadily from 83.4% in the age of 25-29 to 76.4% and then 71% in the age groups of 30-34 and 35-39 respectively in 2014. However, for male, the participation rate for the age group of 25-29 was 93.4% and it increased 96.6% and 96.4% for the age groups of 30-34 and 35-39 respectively.

25. The tendency of women dropping out of the labour force at the age of around 30 or changing to part-time jobs (see paragraph 4.3.6 of the Hong Kong Women in Figures 2015) reflects the lack of effective measures to ensure women's equal access to and opportunity in employment in Hong Kong. Accordingly, the HKBA urges the HKSAR Government to implement effective measures to ensure gender equality in employment, including but not limited to, increasing statutory parental leave period in line with the international standards and promote and encourage flexible working arrangements in both the public and private sectors.

26. The HKBA also notes the Committee's recurrent concerns and recommendations in relation to foreign domestic workers (paragraphs 64-65 of the Concluding Observations and paragraph 42 of the Previous Concluding Comments), and urges the HKSAR Government to further explain:-

- (a) Any steps or measures taken to protect foreign domestic workers as an especially vulnerable group from risks of abuse, unfavourable working conditions, exploitation and trafficking (as exposed in *ZN* and *HKSAR v Law Wan Tung* Unrep., DCCC 651/2014, 10 February 2015), including on the basis of their sex and/or ethnic background;
- (b) Any steps or measures taken to protect foreign domestic workers from discrimination by their employers and/or their agents on the basis of their sex and/or pregnancy as illustrated in the case of *Waliyah v Yip Hoi Sun Terence* [2017] 1 HKLRD 1082;
- (c) The maintenance of the immigration reservation under s.11 of the Hong Kong Bill of Rights Ordinance, s.38(2) of the SDO and to the Convention (including but not limited to article 15(4) thereof);
- (d) The maintenance of the "two-week" rule and the "live-in" requirement in their current forms, notwithstanding the first instance ruling in *Lubiano Nancy Almorin v Director of Immigration* [2018] 1 HKLRD 1141;
- (e) Whether restrictive immigration laws such as the "two-week" rule and the "live-in" requirement discourage migrant domestic workers from reporting gender-based violence, as discussed in the Committee's General Recommendation No. 35 at paragraph 29(c)(iii); and
- (f) The exclusion of foreign domestic helpers from minimum wage

legislation and mandatory provident fund legislation.

**Article 14: Rural Women**

27. It is recalled that Committee previously urged the HKSAR to “repeal all discriminatory provisions from the Small House Policy and ensure that indigenous women have the same rights and access to property as indigenous men” (paragraphs 37-38 of the Previous Concluding Comments). The concerns remain unmet to date.

28. The HKBA invites the Government to explain:-

- (a) any progress (or the lack thereof) in implementing this specific recommendation;
- (b) the continued maintenance of the under s.61(b) of the SDO regarding the operation of the New Territories Ordinance (Cap. 97) and New Territories Leases (Extension) Ordinance (Cap. 150) and the exception provided under Part 2(2) of Schedule 5 to the SDO; and
- (c) the continued maintenance of the reservation entered under the Convention in respect of “[l]aws applicable in the New Territories of the Hong Kong Special Administrative Region which enable male indigenous villagers to exercise certain rights in respect of property and which provide for rent concessions in respect of land or property held by indigenous persons or their lawful successors through the male line”.

29. The HKBA further invites the HKSAR Government to respond to the issues

and recommendations raised in the Committee's General Recommendation No. 34 on the rights of rural women, in particular paragraphs 56 to 59 on rural women's rights to land and paragraphs 95 to 96 on the withdrawal of reservations.

Dated: 27 April 2018

Hong Kong Bar Association.