

26 July 2013

**Submission to the LegCo Panel on  
Security on the Proposed Unified Screening Mechanism<sup>1</sup>**

**Introduction**

1. The government's announcement that it will establish a Unified Screening Mechanism (USM) to assess a broader range of claims for *non-refoulement* protection is a welcome development.
2. According to the Security Bureau's paper dated June 2013, the government will base the new system on the current statutory Convention against Torture (CAT) mechanism. While this provides an appropriate starting point, the current system has a number of unresolved problems that need to be addressed. These include significant protection gaps and concerns that the procedures may not function according to the high standards of fairness required by the courts.
3. The introduction of the new USM presents an opportunity to address these issues and improve on existing procedures as well as expand the scope of *non-refoulement* protection. The stakes are extremely high. Claimants could face serious human rights violations in the event of an incorrect decision and Hong Kong has moral and legal obligations to afford adequate protection. The government must ensure that the mechanism complies with international human rights law and high standards of fairness. These should serve as the primary guiding principles when drafting the relevant legislative and administrative provisions.
4. This paper highlights a few of the factors that the government should consider when creating the new system in accordance with these principles.

**Refer to “best practices” from jurisdictions with experience with refugee protection mechanisms and strong human rights records**

5. Effective *non-refoulement* protection systems in other jurisdictions with similar, unified mechanisms may serve as useful models for reference when developing the new USM.<sup>2</sup> At the same time, however, the government should

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<sup>1</sup> Portions of this submission are based on the results of a study conducted by Kelley Loper on comparative models of legal services for asylum seekers and refugees in five jurisdictions supported by a grant from the Research Grants Council of the Hong Kong Special Administrative Region (Project Code: HKU 7008-PPR-09). The results were presented at a CCPL seminar on 15 May 2013.

<sup>2</sup> There is a wealth of comparative material available including legislation, case law, guidelines, training manuals, academic literature, etc. that could serve as useful resources.

critically analyse these systems based on solid research and reference to human rights and fairness principles when deciding whether to adopt any particular procedures. Courts in these other jurisdictions have scrutinized - and are scrutinizing - a number of questionable practices that may not fully comply with international standards.

6. In the interests of fairness, the Hong Kong system should also allow for greater procedural flexibility in favour of the claimants when needed. For example, the strict application of deadlines for the submission of documents that might apply in other jurisdictions with more experience in refugee adjudication may not be appropriate in the Hong Kong context. Decision-makers and practitioners in other jurisdictions have had more time to build up a body of knowledge and experience in the field.

**Ensure protection from *refoulement* to the full range of harm required by international and domestic law.**

7. The government has proposed to screen claims based on Article 33 of the Refugee Convention and Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (Article 3 of the Bill of Rights (BOR)) in addition to CAT Article 3. While this represents a significant improvement on the current system, it does not fully implement Hong Kong's *non-refoulement* obligations.

8. The system should also incorporate Article 6 of the ICCPR (Article 2 of the BOR) (the right to life). Article 6, like Article 7, is non-derogable. The non-derogable nature of Article 7 (Article 2 of the BOR) was a key factor in the Court of Final Appeal's decision that section 11 of the Bill of Rights Ordinance – the “immigration exception” – did not apply when considering relevant *non-refoulement* claims.<sup>3</sup>

9. In General Comment No. 31 on the nature of states' general obligations under the ICCPR, The Human Rights Committee has indicated that states parties to the Covenant are obligated:

**not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant**

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<sup>3</sup> *Ubamaka Edward Wilson v Secretary for Security and Director of Immigration*.

obligations in such matters.<sup>4</sup>

### **Ensure quality legal services**

10. The importance of quality legal representation cannot be overstated. Quality legal representation enhances the fairness of the system by assisting the claimant in presenting her claim as clearly, completely, and relevantly as possible. This helps the decision maker reach a more accurate determination which is critical in light of the potential serious, possibly irreversible, consequences of an incorrect decision. This conclusion is borne out by several studies that have consistently found that legal representation has a significant impact on the outcome of refugee claims.<sup>5</sup>

11. This can be achieved through training, accreditation, reliance on existing expertise, encouraging multiple forms of service delivery, facilitating access to information, and encouraging specialization. Some of these points are further elaborated below:

### **Encourage the development of a mixed model of legal services delivery to ensure choice and enhance quality**

12. In other jurisdictions, a variety of legal service delivery models exist and operate simultaneously. These include 1) legal aid for refugee and protection claimants seeking advice from lawyers who are accredited and included on a relevant “list” or panel, 2) pro bono services provided by not-for-profit entities, 3) community law/legal centres or clinics that may at least be partially funded by the government but are governed by independent boards, 4) distinct refugee divisions staffed within legal aid departments, and 5) clinical legal education programmes at universities.

13. Hong Kong should encourage a mixed model of service delivery to provide flexibility and address gaps that inevitably occur when only one model is available. Various providers can complement and supplement services, address the inevitable weaknesses of any single model, allow for greater choice for the claimants, and overall enhance the quality of representation.

### **Encourage specialization and development of expertise**

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<sup>4</sup> Emphasis added. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 12.

See: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>. This position is also supported by comments made by the Committee during reviews of state reports and its jurisprudence on individual communications.

<sup>5</sup> See, for example, Sean Rehaag, ‘The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment’, (2011) 49 Osgoode Hall Law Journal 71 and Ramji-Nogales et. al., ‘Refugee Roulette: Disparities in Asylum Adjudication’ (2007) 60 Stanford Law Review 295.

14. A consistent finding from interviews conducted in a study of models of legal services for refugees in five jurisdictions<sup>6</sup> is that governments and legal aid bodies need to create conditions that encourage specialization and development of expertise in this area of law. Adequate funding is an important piece of the puzzle, but is not sufficient on its own. Participants in the study emphasized mentorship, regular training opportunities, and development of networks of providers of refugee legal service to share information.

#### **Ensure access to research resources**

15. The government should also consider other ways to facilitate the sharing of information especially Country of Origin Information (COI) which is often critical to the outcome of a claim. For example, in New Zealand, lawyers and decision-makers alike have highly praised the Country Research Branch within the Refugee and Protection Unit that provides COI research.<sup>7</sup> The resource “is used by decision-makers and legal advisers to answer questions about the political, social, cultural, economic and human rights situations in countries of interest.”<sup>8</sup> Lawyers in Ontario have recognized the value of this type of resource and have been advocating for a similar centralized system. This model could also be usefully adopted in Hong Kong.

#### **Refer to the 1951 Convention related to the Status of Refugees and its 1967 Protocol (Refugee Convention) for guidance**

16. Whether or not the Refugee Convention is ultimately extended to Hong Kong, it is nevertheless in Hong Kong’s best interests to refer to this instrument – in addition to general human rights treaties, comparative experience, and domestic law - when developing the USM. The Refugee Convention sets out a pragmatic blueprint that balances the rights of governments to control their borders and decide who to allow into their territories with the need to protect individuals who cannot be returned to their countries of origin.

17. The Convention’s pragmatic nature is highlighted by the fact that the rights it provides to refugees are conditioned on the refugee’s “level of attachment” to the state of refuge as well as graduated standards of treatment.<sup>9</sup> In other words, states are not required to immediately grant all of the rights in the Convention to refugees or grant rights at the same standard accorded to

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<sup>6</sup> Conducted by Kelley Loper. See n 1 above. The jurisdictions included Australia, Canada, Hong Kong, New Zealand, and the United Kingdom.

<sup>7</sup> Ibid.

<sup>8</sup> <http://www.immigration.govt.nz/migrant/general/generalinformation/refugee-protection/>.

<sup>9</sup> See Generally, James C. Hathaway, *The Rights of Refugees under International Law* (CUP 2005).

nationals or permanent residents.

18. The Convention also covers situations that are unique to the refugee experience and is therefore a useful supplement to more general international human rights treaties that apply to refugees but are not specific to refugee concerns.

19. At the moment, the CAT legislation does not provide for durable solutions for successful claimants who are simply allowed to remain in Hong Kong in limbo but with no legal status. This is an unsustainable position. Eventually the government will need to secure durable solutions through resettlement, local integration or other means and the Refugee Convention can provide helpful guidance in this regard.

**Avoid terminology and statements that may create negative attitudes toward refugees and those seeking *non-refoulement* protection.**

20. The common debate about whether someone is an “economic migrant”, a “false claimant” or a “genuine” refugee is overly simplistic and generally misplaced.<sup>10</sup> People fleeing from various forms of harm may or may not be eligible for protection under international and domestic standards but often leave their countries for a set of complex reasons. When a claim is rejected it does not necessarily signify that the individual is “merely” an “economic migrant” or a “bogus” claimant. The government should take care in public statements to avoid using this type of terminology which might negatively impact public perceptions of refugees and lead to misunderstandings about the nature and purpose of the protection system and therefore undermine the system’s fairness.

21. There is no evidence that the introduction of a well-functioning, unified system is likely to serve as a “magnet” for so-called “economic migrants”. On the contrary, an efficient, fair system that protects individuals who are most in need and cannot be returned to their countries is likely to *deter* and reduce any possibly “abusive” claims. In fact, claims will likely be more expeditiously resolved than under the current dual-track system.

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<sup>10</sup> See Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007).