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Your Ref:
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2 February 2021

Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Attn: Clerk to Bills Committee on Immigration (Amendment) Bill 2020

By Fax (2185 7845) and By Email (bc_53_20@legco.gov.hk)

Dear Sir/Madam,

Re: Submission by Daly & Associates on Immigration (Amendment) Bill 2020 ("the Bill")

We refer to the captioned matter.

We understand that the Bills Committee is inviting public submissions regarding Immigration (Amendment) Bill 2020 ("**the Bill**"). Daly & Associates, as a law firm with experience in handling non-refoulement claims under the Unified Screening Mechanism ("**USM**"), expresses great concerns on the Government's proposed amendments to the existing Immigration Ordinance (Cap. 115). In brief, we are of the view that the proposed amendments may not only undermine the procedural fairness in assessing USM claims, but also breach common law principles governing detention of non-refoulement claimants. Specifically, we wish to highlight, *inter alia*, the following issues arising from the proposed amendments:-

(1) Adding administrative factors justifying prolonged detention, contrary to the *Hardial Singh* principles;
(2) Depriving a non-refoulement claimant of his/her right to information and interpretation by allowing screening interviews and hearings before the Torture Claims Appeal Board/Non-refoulement Claims Office ("**the Board**") to be conducted in a language other than the most proficient language of the claimant;
(3) Restricting the extension of time for completing a Non-refoulement Claim Form and submitting new evidence before the Board;
(4) Notifying the risk countries of the claimants for arranging deportation when their claims are rejected at first instance notwithstanding their ongoing appeals and judicial proceedings;

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(5) Authorizing immigration officers at the detention centre to possess weapons, arms or ammunition.

For a detailed review, please refer to our attached submission dated 2 February 2021. We are also concerned about the limited timeframe for public submissions given that a public hearing, which is meant to address the above issues from relevant stakeholders, has been denied. To ensure a fair legislative-making procedure and to protect the right to information of the public, we urge the Bills Committee to extend the time limit for submissions and to conduct public hearings regarding the Bill.

Yours faithfully,

Daly & Associates
Encl.

Submission by Daly & Associates

Submission to the Bills Committee on Immigration (Amendment) Bill 2020

2 February 2021

Background

1. On 2 December 2020, the Security Bureau released a Legislative Council Brief ("**the Brief**") on Immigration (Amendment) Bill 2020 ("**the Bill**"), which was gazetted on 4 December 2020 and introduced into the Legislative Council ("**LegCo**") for the First and Second Reading on 16 December 2020.

2. We express our great concerns with regard to the Bill as substantial parts of the proposed amendments were not raised in the LegCo papers submitted by the Security Bureau in July 2018[1], November 2018[2] or January 2019[3], and were only known to the public on the date of its publication in the Gazette. Notwithstanding that the Bills Committee on Immigration (Amendment) Bill 2020 ("**the Bills Committee**") are now inviting public submissions, we request a public hearing for the views of stakeholders including the Law Society of Hong Kong, Hong Kong Bar Association, Duty Lawyer Service – CAT Claim Office and civil society groups before the Bill can be debated among LegCo members.

3. We refer to and maintain our previous submissions to the LegCo Penal on Security dated 18 October 2018 and 28 March 2019. We also refer to the Hong Kong Law Society's submission dated 26 February 2019.

4. This Submission focuses on the following issues:
    a. Problems arising from the statistics of non-refoulement claims in light of the historical development of Unified Screening Mechanism ("**USM**"); and
    b. Concerns on the proposed amendments to the existing Immigration Ordinance (Cap. 115) ("**IO**").

A. Understanding the statistics of non-refoulement claims with the historical context of USM and its current issues

5. Except for the Vietnamese refugees since 1980s, there were no screening mechanisms at all for asylum seekers in Hong Kong until the occurrence of the landmark case of

[1] LC Paper No. CB(2)1751/17-18(01)
[2] LC Paper No. CB(2)307/18-19(01)
[3] LC Paper No. CB(2)529/18-19(03)

Prabakar[4], which established the basis of a screening mechanism for claimants under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**CAT**"). While systematic errors were revealed by various milestone case law including the absence of legal representatives during screening interviews, lack of training for decision-makers and other irregularities[5], the USM commenced on 3 March 2014 has been developed to assess claims for non-refoulement protection inclusive of torture, cruel, inhuman or degrading treatment or punishment and/or persecution.

6. Bearing in mind the above historical context, we find the statistical findings in the LegCo Brief misleading. First, regarding claims received and determined by the Immigration Department ("**ImmD**") since the commencement of USM, it is noted in Annex C of the LegCo Brief that "*since the commencement of USM to end 2015, ImmD received 9 687 claims, an average of 440 claims per month*" as compared to an average of 102 per month from 2012 to 2013 (see Note 1). The Security Bureau has wrongly attributed the surge of non-refoulement claims to the commencement of USM. The fact is that the claims before the implementation of USM, which were not subject to a proper and fair assessment, have to be re-assessed under the more comprehensive system. The average number of non-refoulement claims returns to pre-USM level since 2016 as new claims no longer need to be re-assessed, rather than the alleged positive result of the measures implemented by the Government in restricting the claims (Annex B of LegCo Brief).

7. Second, it is also noted in Annex C of the LegCo Brief that up to October 2020, only 1.17% of the non-refoulement claims determined under USM were substantiated (including those determined by TCAB) (see Note 2), which purports to collaborate the allegation of abuse of the screening mechanism. According to our experience, however, the question arises whether this low substantiation rate is reflective of an unfairly high threshold for granting protection or effective screening. We are concerned about the quality of first instance decisions and the decisions of Torture Claims Appeal Board/Non-refoulement Claims Petition Office ("**TCAB**") as we note that previous TCAB decisions have been based upon grossly negligent errors[6]. This is especially the case given the

[4] *Secretary for Security v Sakthevel Prabakar* [2004] HKCFA 43 at [51]-[55]

[5] C & Ors v Director of Immigration and Anor [2013] HKCFA 21

[6] For example, in **HCAL 78/2017**, a case involving a claimant from the Central African Republic who claimed protection due to, among other things, his active involvement in the former Government and support for the ousted president which had fallen during a coup d'état. The CFI granted leave to apply for judicial review on all grounds (i.e. the adjudicator: (1) applied the wrong legal test in assessing persecution risk; (2) failed to take proper approach in assessing persecution risk arising from political opinion and failed to take into account relevant evidence with respect to the same; (3) erred in requiring corroborating evidence; (4) failed to take into account relevant COI; and (5) failed to take into account relevant factors in assessing the possibility of internal relocation in the country). Similarly, in **HCAL 367/2017** and **HCAL 394/2017**, cases involving claimants from the minority Ahmadi religion in Pakistan, the CFI granted leave to apply for judicial review on all grounds (i.e. the adjudicator: (1) failed to take proper approach in assessing persecution risk for Ahmadis; (2) improperly cherry-picked COI; (3) erred in his

statistics on increases in the number of legal aid applications for judicial review of non-refoulement claim decisions in around the same timeframe as a corresponding increase in TCAB decisions[7]. Without publication of TCAB decisions, the Government is unable to give cogent explanation as to the low substantiation rate of the non-refoulement claims.

B. Concerns on the proposed amendments to IO

a) Factors justifying prolonged detention

8. Proposed amendments to sections 32 and 37ZK add the following administrative factors in justifying detention of persons pending removal or final determination of their non-refoulement claims:-
    a. the number of claims or appeals pending screening or appeals;
    b. the manpower and financial resources allocated for the removal and final determination of the claims;
    c. the time required for the issue of the authorization from the relevant authorities of a foreign country for the claimant/person's entry to that country.

9. Administrative detention is a draconian power which infringes upon important fundamental rights including the right to liberty and security of person and freedom of movement. These rights are set out in major human rights instruments[8] as well as the Basic Law of Hong Kong[9]. Accordingly, in determining the parameters of administrative detention, the starting point is to construe this power narrowly. The Government of HKSAR in exercising its power to detain individuals under the IO must comply with the *Hardial Singh* principles in tandem with the Court of Final Appeal's judgment in *Ghulam Rbani v. Secretary for Justice* (FACV 15/2013), the latter of which holds, *inter alia*, that the Director of Immigration should not seek to exercise the power of detention if it becomes apparent that the purpose for said detention, such as removal, cannot be effected within a reasonable period of time.

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assertion that the test in assessing persecution risk is "virtually the same" as that of BOR 3; and (4) erred in its credibility findings).

[7] LC Paper No. CB(4)1386/16-17(03)

[8] See for example: Articles 9, 12, UN General Assembly, *International Covenant on Civil and Political Rights ("**ICCPR**")*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[9] Articles 28, 31, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Hong Kong (1997).

10. Presently, non-refoulement claimants awaiting decisions on their claims and/or appeals have been detained for prolonged and unspecified durations solely on the basis that their cases are undergoing determination. The administration now proposes to take into account additional factors which are outside of the detained individual's responsibility and/or control to further expand its detention powers. We submit that the consideration of these additional factors to justify the deprivation of liberty amounts to an unlawful and unreasonable exercise of power.

11. As emphasized by the United Nations Working Group on Arbitrary Detention [10], administrative detention risks the erosion of fundamental human rights to liberty and security of person under Article 9(1) of the ICCPR. As such, any measures that would infringe upon such rights must be subject to intense scrutiny to ensure their implementation is strictly necessary and proportionate. In this connection, the administration already has less restrictive but nonetheless effective legal alternatives to detention. For example, under section 36 of the IO, the administration has the power to release non-refoulement claimants under conditions on recognizance and require them to report to the immigration authorities on a regular and ongoing basis, such as every two weeks, and to confirm in writing any change of address. This ensures that the presence, whereabouts, and general activities of such claimants in Hong Kong are known. Ultimately, the current proposal strays dangerously away from the principle that detention should be implemented as a last resort measure only.

12. Separately, seeing as the administration intends to expedite the screening process for non-refoulement cases, this proposal is counterproductive. In our experience, detention serves to delay the screening process by creating a myriad of problems including difficulties in arranging for interpreters, seeking legal advice (for claimants), seeking instructions (for legal representatives), accessing necessary documentation, and gathering evidence. Moreover, an Australian study reveals that detaining asylum seekers costs more than 3 times that of the cost of allowing them to live in the community pending determination of their claims[11]. In any case, fundamental rights should not be sacrificed on the altar of expediency or convenience for the administration.

13. Finally, detention laws must conform to the principle of legal certainty. This requires *inter alia* the law and its legal consequences to be foreseeable and predictable. The proposal does not afford non-refoulement claimants, the detaining authorities, or any entity reviewing the legality of the detention certainty as to the length of detention.

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[10] Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, Report of the Working Group on Arbitrary Detention, A/HRC/22/44, 24 December 2012: < https://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf >

[11] UNSW Sydney, Andrew & Renata Kaldor Centre for International Refugee Law, *The cost of Australia's refugee and asylum policy: A source guide*, 5 May 2020 < https://www.kaldorcentre.unsw.edu.au/publication/cost-australias-asylum-policy>

b) Impact on USM

(i) Restricting the extension of time for completing a Non-refoulement Claim Form ("**NCF**")

14. The proposed section 37Y(3) of the Bill requires a claimant to show that he/she has exercised all due diligence to return a completed NCF within the 28-day statutory limit but are nonetheless unable to do so due to circumstances beyond the claimant's control. Similar requirement is imposed in the amended section 18(2)(b) of Schedule 1A which applies to submission of evidence before the Board relating to matters occurred before the decision of ImmD, as well as the proposed sections 37ZT(3) and (4) in relation to late filing of notice of appeal.

15. Imposing such conditions unnecessarily and unreasonably fetters the discretion of the decision-maker to extend time for claimants to return NCFs. Members of the LegCo are invited to appreciate the difficulties faced by the claimants in completing the NCF and submissions thereto, including the time needed for the handling duty lawyer to take detailed instructions (usually with the assistance of interpreters), collecting evidence from the claimants' home countries and subsequent translation of the said evidence. The requirement that a claimant show *"all due diligence"* in complying with the statutory limit puts the claimant and his/her legal representative in the untenable position of being expected to disclose potentially privileged information to the decision-maker.

16. In addition, if an extension of time can only be granted due to "*circumstances beyond the claimant's control"*, there is a substantive risk of causing unfairness to the claimants. Consider a scenario where an extension is requested due to the lack of availability of a female interpreter for a vulnerable claimant who is a victim of gender-based violence (albeit a male interpreter is available). Under the proposed amendments, the decision-maker may form the view that the inability to complete the NCF was merely due to the claimant's preference as to the gender of the interpreter instead of any circumstances out of his/her control, which may run the risk of disregarding the need to accommodate the claimant's vulnerabilities as a survivor of sexual violence in accordance with the high standards of fairness required in assessing non-refoulement claims, as established in the landmark case *Prabakar*[12].

17. The current provisions for extension of time are already sufficiently stringent to deter abuses and allow the decision-maker sufficient discretion to consider the claimant's

[12] *Secretary for Security v Sakthevel Prabakar* [2004] HKCFA 43 at [51]-[55]

particular circumstances as well as the reasons justifying an extension. Section 37Y(3)(b) of IO specifies that the immigration officer *may* grant an extension if he/she is "*satisfied that, by reason of special circumstances, it would be unjust not to allow a further period for the claimant to return the completed form*". The existing provisions illustrate a balance between the strict requirement of filing a NCF within statutory timeframe and adequate safeguard to the claimants in accordance with high standards of fairness.

(ii) <u>Allowing screening interviews and/or hearings to be conducted in a language that the immigration officer or the TCAB reasonably considers the claimant is able to understand and communicate in</u>

18. The new section 37ZAC allows screening interviews to be conducted in a language the immigration officer "*reasonably considers the claimant is able to understand and communicate in*". Section 11(2) of Schedule 1A is similarly amended in respect of oral hearings before TCAB.

19. The proposed provisions effectively allow screening interviews and/or hearings to be conducted in an alternative language to the claimant's most proficient language, which is contrary to the well-established international law on procedure fairness with respect to asylum seeking process. The European Union Directive on common procedures for granting and withdrawing international protection ("**the Directive**")[13] emphasizes the importance of providing interpretation to asylum seekers if interviewed by the authorities. In particular, the Directive confirms the right of the claimants to be informed of their legal position and the decision-making procedure "*in a language which he or she understands or is reasonably supposed to understand*"[14], as opposed to what the immigration officers reasonably consider the claimant should understand and communicate. It is a fundamental right and tenet of the principles of natural justice that claimants have the opportunity to comprehend the issues relating to their claims and be able to respond to the same. It is plain that a claimant, who cannot understand the language spoken to him/her during a screening interview and/or oral hearing and cannot present his/her case and respond to a decision-maker due to a language barrier, will be denied his/her basic right to know the case and respond. As such, failing to provide an interpreter in accordance with a claimant's fluency and language capacity will breach the high standards of fairness required in conducting the screening process.

20. The importance of availability of interpreters in assessing non-refoulement claims has been elaborated in case law. In *M.S.S. v Belgium and Greece* [GC], 30696/09, ECHR

[13] Directive 2013/32/EU of The European Parliament and of the Council of 26 June 2013 on procedures for granting and withdrawing international protection. Available at: < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>
[14] Ibid, paragraph (25) of the Preamble and Article 12

2011 at §181[15], the European Court of Human Rights observed that due to an insufficient provision for interpretation for asylum seekers arriving in Greece, the first interview is usually conducted in a language an asylum seeker does not understand and "the interviews are superficial" without addressing the risk country conditions at all. The Australian Refugee Review Tribunal further ruled that if an asylum seeker who cannot understand English is provided with no interpreter, it is deemed a jurisdictional error in depriving the asylum seeker of an opportunity to give evidence at hearing[16].

21. In relation to hearings before TCAB, the said proposed amendment may further infringe the right of asylum seekers to address the Board or testify in any language required by the Hong Kong Legislation. According to section 5 of the Official Languages Ordinance (Cap. 5)[17], a party to any proceedings may address the court or testify in any language, while section 2 defines the "court" as including "*any board, tribunal or person having by law the power to hear, receive and examine evidence on oath*", which is applicable to TCAB. In addition to the breach of procedural fairness, the proposed amendment will also be inconsistent with the requirements under Cap. 5.

22. In any event, it is unclear on what basis and how the decision-maker will determine this alternative language as opposed to the first language of the claimant. Take English as an example. Some claimants may be able to communicate in simple conversational English, but they should not be expected to explain their claims in full, answer questions put to them regarding their credibility or other complex issues raised during interviews or hearings especially under the legal context. Another glimpse into how a decision-maker may interpret or apply this provision is with reference to the official languages of their country of origin. This is problematic as it would disproportionately affect claimants especially those from African countries (as there is very limited number of court registered interpreters in Hong Kong from these countries). For instance, whilst Hausa is spoken by over 40 million people globally[18] (and is spoken as a first language by approximately 20 million people), it is not necessarily the national language of a claimant's country of origin and indeed the claimant may not be fluent in the national language. In a similar vein, whilst French is a national language of Rwanda, the majority speaks Kinyarwanda (another national language of Rwanda) and may not be fluent in French. To our knowledge, there are no qualified Kinyarwanda interpreters in Hong Kong and at most, one Hausa interpreter in Hong Kong.

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[15] *M.S.S. v Belgium and Greece* [GC], 30696/09, ECHR 2011. Available at: <https://www.refworld.org/cases,ECHR,4d39bc7f2.html>

[16] *Perera v MIMA* (1999) FCR 6 (Kenny J, 28 April 1999) at §18-23. Available at: <https://www.refworld.org/cases,AUS_FC,3ae6b75c0.html>

[17] Available at: <https://www.elegislation.gov.hk/hk/cap5?xpid=ID_1438403279710_002 >

[18] See Encyclopedia Britannica at: <https://www.britannica.com/topic/Hausa-language>

23. In the claim forms, claimants are required to indicate their first language and any other languages they can speak or write. Insofar as the claimant is sufficiently fluent in another language to proceed in a language that is not their first language, there is no grave issue. However, we see no need for an amendment to the Immigration Ordinance as arrangements can be made by agreement between the claimant and the decision-maker in such circumstances. As such, we submit that the ImmD should instead be focusing on ensuring the quality of interpretation and the timely recruitment of interpreters.

(iii) <u>Disputed physical or mental condition(s) of claimants may not be taken into account by the ImmD/TCAB if the claimants fail to give consent to arranged medical examination, decline to undergo the said examination or disclose medical reports following the said examination</u>

24. Section 37ZC(1A) will be added to mandate the claimant's consent to medical examinations arranged by the ImmD/TCAB. The proposed amendments to sections 37ZC(2) and (3) further require the claimant to undergo the specified examination and submit medical reports resulting from the arranged examination. Failure to comply with the above may not only allow the ImmD/TCAB to disregard the disputed physical or mental condition(s) as stated in the proposed section 37ZC(3), but also attract adverse credibility findings against the claimant as proposed in section 37ZD(2)(g).

25. While section 37ZD(2)(g)(ii) of IO already provides that a failure to disclose a medical report without a reasonable excuse may result in adverse credibility findings (which can include a rejection of the claimant's medical condition), this new proposal would allow a decision-maker to dispense with his/her duty to consider the medical condition(s) and any other evidence relevant to the said condition(s) in one fell swoop. To accord high standards of fairness, the Court of Appeal ("**CA**") ruled that the decision-maker should adopt an active role in screening a non-refoulement claim, which includes, *inter alia*, seeking clarifications or elaboration on the claimant's case, decision of the Director and other matters which are material to the determination of the claim, drawing attention to factual or legal issues which have not been adequately dealt with or at all, further probing, questioning or inquiring on materials to which the adjudicator can draw an adverse inference by adopting his or her common sense in the absence of such probing[19].

26. Notwithstanding that the decision-maker can draw negative conclusions arising from the failure to disclose a medical report, the decisionmaker must nonetheless consider all the relevant evidence before him/her, including photographs of injuries, medical reports obtained from other jurisdictions (including the country of origin of the claimant) and

[19] *ST v. Betty Kwan* [2014] HKCA 309 at [39]-[43]

medical records from Hong Kong which may corroborate the claimant's condition(s) and/or how such condition(s) arose (i.e. as a result of torture or other ill-treatment). A failure by the decision-maker to consider all relevant evidence will be liable to challenge in court.

c) Impact on appeal before TCAB

(iv) Restrictions on submitting new evidence before TCAB

27. Section 19 of Schedule 1A will be amended to restrict the submission of new evidence before TCAB by imposing, *inter alia*, the following conditions:-
    d. Any new evidence must be filed with a written notice within 7 days after filing a notice of appeal;
    e. The claimant must explain how the evidence supports his/her claim in addition to the nature of the evidence;
    f. If the evidence relates to matters occurred before the ImmD decision, the claimant must explain the circumstances leading to the failure to provide such evidence earlier and the steps taken by the claimant to deal with such circumstances.

28. As observed in *Prabakar*, to comply with the high standards of fairness in determining a non-refoulement claim, the difficulties faced by claimants in obtaining supporting documents, who usually fled their countries with few personal belongings or documents, should be appreciated[20]. It is common that a piece of information central to a claimant's claim can only be available at a later stage of the USM process or even during the appeal stage due to the difficulty in collecting and retrieving documents from the country of origin where he/she fears risk. Further, as explained in paragraph 7 above, further time is required for arranging translation and seeking legal advice once the claimant receives the supporting documents.

29. In any event, while the burden of proof rests on the claimants to establish their claims, it is well established that the exercise of assessing a non-refoulement claim is one of "joint endeavour"[21]. Restricting the timeframe for submitting new evidence will inevitably place a harder burden on the claimants without acknowledging the difficulties they are facing.

(v) Shortening notice period for TCAB oral hearing

[20] *Secretary for Security v Sakthevel Prabakar* [2004] HKCFA 43 at [53]
[21] TK v Michael C Jenkins, ESQ [2013] 1 HKC 526 at [25]

30. The proposed section 13(2) of Schedule 1A effectively shortens the notice period for an oral hearing from 28 days to 7 days.

31. In practice, after the notice of appeal is issued by the TCAB, the parties (i.e. the claimant and the Director of Immigration ("**the Director**") will need to submit respective skeleton arguments, country of origin information, and/or supplementary evidence for TCAB's consideration. The Director is further required to submit hearing bundle(s) before the Board and serve to the claimants at least 5 days before the TCAB hearing unless TCAB directs otherwise. Time is needed for both the TCAB and the parties to review the documents and information contained in the hearing bundle(s), which can often be lengthy and with missing documents that need to be ratified.

32. As such, shortening the notice period to 7 days effectively deprives both the TCAB and the parties of the chance to have a thorough review of the papers relating to the assessment of the claims. It is already difficult for the claimants, who usually appear before the TCAB without legal representation, to digest such complex information relating to their non-refoulement claims (which may in a language unknown to them). The situation is even worsening for claimants who are detained while their appeals are ongoing. It is commonly reported that detainees only receive the hearing bundle(s) one day before their TCAB hearing. It will be unduly harsh for the lay claimants to review the documents in such a short period before the hearing, on which his claim of life and limb will be finally determined.

d) Arrangement of deportation after the torture claim is rejected at first instance

33. The proposed section 37Z(2)(b)(i) allows the Government to liaise with the claimant's country of origin after his/her claim is rejected by ImmD.

34. Notwithstanding that paragraph 13 of the LegCo Brief states that "*ImmD will not normally disclose to such authorities whether the person concerned has filed a non-refoulement claim*", the arrangement of repatriation in parallel with a pending appeal increases the risk of harm to claimants and/or their families.

35. First, in order to ensure a fair and safe screening, the screening process must be confidential. This proposal runs the serious risk of exposing claimants to their persecutors by identifying them as persons to be removed to the foreign government and therefore is contrary to international law (which requires the administration to protect all potential and actual refugees and/or successful USM claimants).

36. Second, given that repatriation arrangements usually involve contacting the embassy and/or consulate of the claimant's country of origin (i.e. for verification of identity), the administration may become complicit in future ill-treatment of claimants. For example, claimants may already be on a government blacklist due to their political opinions, have absconded and/or have outstanding warrants arising from false blasphemy charges, have departed their country illegally because they are a member of a minority ethnic group that was been targeted by the State and hence exiting the country via unofficial channels was the only option available. All of these factors are part and parcel of their claims for protection and hence consist information relevant to the risk of harm faced by them upon return. The notification of a foreign government, who may very well have an adverse interest in a claimant, raises a high risk of triggering further actions by the foreign government such as to conduct inquiries, placing the claimant at even higher risk of serious ill-treatment on return and potentially exposing the claimant's family in the home country to risk of harm as well. Put another way, such a proposal is akin to the administration providing advance notice to (what will be in many cases) the claimant's persecutors. The administration's stated purpose of expediency comes at a hugely disproportionate cost to the claimant and/or his/her family in the home country.

e) *Authorizing Immigration Officers at Detention Centre to possess weapons, arms or ammunition*

37. We are concerned about the proposals to amend the Weapons Ordinance (Cap. 217) and firearms and Ammunition Ordinance (Cap. 238) to allow immigration officers deployed at the Castle Peak Bay Immigration Centre ("**CIC**") to possess weapons, arms or ammunition such as pepper spray and 37mm single shot launcher.

38. We find no evidence to justify such proposal besides the alleged "security control reasons" in paragraph 15 of the LegCo Brief. If the purpose of the amendment is to enhance immigration officers' ability to handle emergency situation, the starting point would be for the administration to provide convincing and relevant statistics as to, *inter alia*, the number and type of "emergencies" that would have ostensibly been better handled with officers possessing weapons.

39. Claimants should not be treated as criminals, especially where they are detained simply on the basis that their claims are being processed and not because they have committed any crime (outside of 'overstaying' which is a *de facto* pre-requisite to lodging a non-refoulement claim). Pursuant to section 37ZK of the IO, *"…a claimant may be detained under the authority of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration pending final determination of the claimant's torture claim*". The current provisions on administrative detention are highly problematic

given that they provide for sweeping detention powers solely on the basis that non-refoulement claims are under process. There are many instances where claimants have been detained for over a year or more while their claims are being processed.

40. Administrative detention is further problematic given that it hampers the claimant's ability to gather evidence to substantiate his/her claim and causes delay in the screening process. For example, claimants detained in CIC are unable to (or at the least, must overcome numerous obstacles to) produce documents, materials and information relevant to their claims and background (or legal aid applications). CIC does not allow outside computers to be brought into CIC and lawyers making legal visits can only use computers provided by CIC (however, the computers so provided do not allow documents or data to be saved or transferred to any other storage device, or enable internet access, resulting in additional time required to prepare and finalize submissions). Detainees in CIC are allowed only very limited access to for telephone calls which can be costly (i.e. international telephone calls) and are often insufficient for them to contact persons who may be able to seek the relevant information on their behalf.

41. In addition, we are also concerned about the detrimental effects of prolonged detention on the mental health of claimants (especially those who are affected by traumatic experiences in their home country at the hands of the authorities there and then are subjected to prolonged detention by authorities in Hong Kong) which may further compromise the fairness of the screening process and cause delays. Viewed individually or in totality, it is clear that the administrative detention provisions in Hong Kong are exceedingly draconian.

42. In this connection, we have also noted a rise in tensions at CIC since ImmD replaced the Customs & Excise Department in managing CIC. We advance that it is imperative for the present arrangements to be reviewed seeing as ImmD holds conflicting duties in this respect: on the one hand, it seeks to remove/deport detained persons; on the other hand, it is responsible for impartially administering non-refoulement claims.

f) *Increasing penalties for unlawful employment*

48. We note that ImmD is proposing to amend section 38AA of the IO so that it can prosecute any persons who enter Hong Kong as a visitor and is subsequently arrested for unlawful employment upon overstaying. The alleged purpose of this amendment is to reduce the economic incentives for non-refoulement claimants to take up unlawful employment in Hong Kong.

49. The starting position of ImmD that non-refoulement claimants enter Hong Kong due to economic incentives is prejudicial and inaccurate. In our experience, the vast majority of non-refoulement claimants seek asylum in Hong Kong for the purpose of seeking protection from torture, cruel, inhuman and degrading treatment and other forms of persecution. On some occasions, they may have also experienced economic difficulty in their home country, but this is not mutually exclusive from facing danger upon return.

50. Further, there is no evidence suggesting the proposed practice is effective to achieve the intended objective. ImmD fails to provide the figures of non-refoulement protection claimants who are **convicted** for taking up unlawful employment. Additionally, it is misleading to draw any conclusion on the seriousness of the issue of non-refoulement claimants taking up unlawful employment based on the figures of **arrest** of non-ethnic Chinese persons for taking up unlawful employment. Under the common law presumption of innocence, we remind the Government that it is wrong to assume an arrested person is guilty of the offences charged. Unlike a lawful arrest which only requires the existence of reasonable suspicion, the prosecution has to prove beyond reasonable doubt before the Court for establishing conviction. In fact, we have seen in a number of cases that the non-refoulement claimants were acquitted from the charge of taking up unlawful employment. They may be simply shopping in a shop or heading to a restaurant when they were arrested for taking up unlawful employment. Therefore, without the conviction figures, it is ineffective to rely on the figures of arrest to conclude the effectiveness of the existing laws.

51. We note that the background information provided by the Security Bureau and ImmD is inconsistent with the reality on the ground. It is our understanding that ImmD will not give permission to enter Hong Kong to claimants who lodge their claims at the border control points. Even if they were previously allowed to enter Hong Kong with their valid visa, pursuant to the Court of First Instance's decision in *BK v Director of Immigration*[22], ImmD is allowed not to accept the non-refoulement protection claims before the visa of the non-refoulement claimants expire. In most of these cases, ImmD will issue a removal/ deportation order against those non-refoulement claimants within a short period of time. Therefore, we believe that section 38AA is already sufficient to cover most, if not all, of the non-refoulement claimants.

52. Compared to the laws in other common law jurisdictions, the penalty for a person taking up unlawful employment is excessive. In the England and Wales, under the Immigration Act 2016, a person who commits an equivalent offence to taking up an unlawful employment is liable on summary conviction to imprisonment for a term not exceeding 6

[22] [2010] HKEC 8

months and/or a fine[23]. In Australia, a non-citizen who is convicted for breaching the condition of stay restricting the work that the non-citizen may do in Australia will only be fined[24].

53. We also wish to draw the attention of the members of the LegCo that asylum seekers in Australia are eligible to apply for visas. With the strength of a valid visa, they would be allowed to work in Australia[25]. In New Zealand, while the asylum claims are being processed, asylum seekers can apply for a work visa to work there[26]. We urge the Government of Hong Kong to catch up with the international practice and to improve the regulations regarding the immigration status and the condition of stay of non-refoulement protection claimants, in particular those successful claimants.

Conclusion

54. Regarding the outstanding questions and issues under the USM, we once again request the ImmD to publish decisions by TCAB and to provide cogent explanation for the low substantiation rates of non-refoulement claims.

55. In light of the above concerns about the implementation of the Bill, we strongly oppose the proposed amendments as listed above which infringe the lawful rights of non-refoulement claimants and undermine the procedure fairness of the USM. We request members of the Bills Committee to hold a public hearing for addressing the controversies over the proposed amendments from stakeholders.

Dated this 2nd day of February 2021

Daly & Associates

[23] See: <http://www.legislation.gov.uk/ukpga/2016/19/section/34/enacted>
[24] See: <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ma1958118/s235.html>
[25] See: <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-protection-785>; <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/safe-haven-enterprise-790>
[26] See: <https://www.immigration.govt.nz/audiences/supporting-refugees-and-asylum-seekers/asylum-seekers>