Security Bureau's Proposals to Enhance the Unified Screening Mechanism

Submission of the Hong Kong Bar Association

1. The Security Bureau wrote on 23 December 2014 to the Hong Kong Bar Association ("HKBA") and the Law Society of Hong Kong ("LSHK") to seek the legal profession's view on proposals of the Administration in respect of the Unified Screening Mechanism ("USM") for screening claims for non-refoulement protection on all applicable grounds including Article 3 of the Convention Against Torture, Article 3 of the Hong Kong Bill of Rights and persecution risks by reference to the Convention on the Status of Refugees.

2. The Security Bureau makes the proposals in the light of the claimed situation that as at the end of November 2014, there were about 9,600 outstanding non-refoulement claims with new claims coming in at more than 300 per month since early 2014. The Bureau expects that there will be an accumulating backlog in outstanding non-refoulement claims and the claimant will have to wait longer before his claim can be attended to. The Bureau also notes a continuing increase in the budget for operating the publicly funded legal representation scheme ("the Scheme") for non-refoulement protection claimants. The annual expenditure of the Scheme, administered by the Duty Lawyer Service ("DLS"), has increased from $76 million in 2013/14 to an estimated figure of $90 million in 2014/15.

3. The Security Bureau's proposals are said to be aiming at improving the efficiency of the USM to address the continuing rise in costs and the increasing backlog of claims. The proposals include (a) simplifying the claim form substantially; (b) providing screening bundles to claimants/duty lawyers at the commencement of the screening process; (c) pre-scheduling screening interviews for more efficient case

management; (d) standardizing legal fees; and (e) reviewing duties of court liaison officers ("CLOs") to avoid unnecessary duplication of work.

Segregating Basic Information from Basis of Claims

4. Paragraphs 9 to 13 of the Security Bureau's letter set out the Administration's proposal regarding simplifying the claim form. The Administration suggest that the Non-refoulement Claim Form ("NCF") be simplified by segregating the basic information from the basis of claims to achieve a 70% reduction in the number of questions that needs to be in the NCF. The basic information, which has been considered to be capable of collection without legal assistance, would be collected through a separate data form from claimants direct at the briefing session at the beginning of the screening process with the assistance of qualified interpreters. The Administration suggest that this proposed change would enable claimants to make the best use of the available time between a claim form is served and the deadline for returning the completed form in setting out the basis of their claim with the publicly-funded legal assistance through the DLS.

5. The HKBA is of the view that this proposal lacks proper justification, can lead to duplication of work and no saving of time, places at risk the fundamental and procedural rights of the claimant and hence the fairness of the screening process, and may unwittingly jeopardize the claim for non-refoulement protection of claimants. The HKBA is also of the view that this proposal is put forward as a pretext for the more critical proposal of cutting the costs of legal fees of duty lawyers.

6. Claimants who may have been subjected to torture, ill-treatment and/or persecution are vulnerable persons. As a matter of fairness and humanity, the taking of personal data and information of a claimant should be taken in an environment other than an office of the authority and by a person who represents the claimant, who has gained his trust and is acting solely in his interest. The claimant ought to be advised by his own legal representative of the possible adverse inferences on credibility and consequences of criminality that may arise due to inconsistent and/or untruthful

provision of information. The fact that this proposal envisages the taking of data without prior sight of any documents held by the Immigration Department of the claimant makes it especially worrying. (The flowchart in Annex D to the Security Bureau's letter does not suggest that the claimant would have access to the screening bundle at the stage of the briefing session when he is required to complete the data form.) Even if the legal representative is able to amend the information on the data form, it is unclear what position the immigration officer would take on any such amendments, particularly in respect of the claimant's credibility. Even if the immigration officer holding the briefing session might inform claimants that they should provide truthful, accurate and complete information, this is advice coming from the department that assesses their claims and prosecutes them in the event of a contravention of a statutory provision and is no substitute of independent and impartial legal advice.

7. The Administration may have assumed that the information to be collected in the proposed data form is all factual matters that do not require legal assistance. This assumption is erroneous. The draft data form shows that Question 7 requires the claimant to state place of residence in his "country of nationality" and where applicable "countries of nationality" and "country of habitual residence". The same question also asks him to state the risk states in respect of which he is making a non-refoulement claim. Question 12 requires the claimant to state whether he has the right of abode or right to land in or right to return to any other state in which he would be entitled to non-refoulement protection. Question 30 requires the claimant to state the particulars of all his "dependant child(ren)" and Question 33 the particulars of any other "dependants of yours". These questions elicit information from the perspective of immigration and nationality law and practice of different countries. A number of technical terms are involved and each of them needs to be properly explained to the claimant before a correct answer relevant to the context of the question can be given. To answer them correctly, a claimant would need legal assistance. This is particularly so in a complicated case of a claimant who had travelled and resided in different countries before coming to Hong Kong, or a

claimant who is of an ethnicity or national group that entitles him to nationality of a country other than his country of birth. Such a claimant may give an answer stating multiple countries of nationality, a country of habitual residence and more than one risk state.

8. The draft data form also includes questions that relate to the conduct of interview(s) and require the claimant to answer them before receiving legal assistance. They are Question 51 regarding audio recording of interview(s), Question 52 regarding interpreter, and Question 53 regarding special needs in relation to the investigation or assessment of the non-refoulement claim. The needs, choices and preferences often emerge in the course of the investigation of the non-refoulement claim of the claimant by the DLS and the assigned duty lawyer and usually after the pros and cons of different choices have been explained. It is undesirable and probably failing the high standards of fairness for the conduct of non-refoulement claim investigation and assessment to require the claimant to answer these questions before he sees the duty lawyer. Although it is probably permissible for the claimant to make changes to his answers subsequently after receiving legal assistance, the making of the change involves additional paper work on the part of the DLS and the assigned duty lawyer and may also involves giving an explanation to the Immigration Department that might be assessed as a factor in respect of the claimant's credibility.

9. The draft data form requires in Question 49 the claimant to answer whether he is willing to release information about himself to the HKSAR Government. The answer impinges upon the right of informational privacy of the claimant. The claimant may only answer this question after receiving proper legal advice.

10. The draft data form also includes questions that require the claimant to attach relevant documents, such as Question 13 regarding documents verifying identity and Question 48 regarding refugee application(s) with the UNHCR. It is unrealistic to expect a claimant to bring with him all these documents to the briefing session with the Immigration Department, and to produce them to the immigration officer so that

they can be incorporated as part of his data form. If the claimant had not brought documents or did not incorporate documents, he might be in peril of having created a factor for assessing his credibility adversely. More importantly, whether the production of certain document(s) in the claimant's possession is in his interests and/or may have adverse consequences are matters that should be decided after the claimant has received legal advice.

11. The Administration's proposal segregates work but does not overall reduce work. The DLS and the assigned duty lawyer would still have to verify the information on the data form received with the claimant. They are professionally obliged to do so. They also have to bear in mind that the burden of proof lies on the claimant, notwithstanding the Administration's description that the screening process involves a "joint endeavour". Where an incorrect entry or discrepancy (including common ones on dates and spelling) is found, the matter would have to be referred to the assigned duty lawyer who would need to take instructions from the claimant for the purpose of writing to the Immigration Department to rectify and explain the incorrect entry or discrepancy. The HKBA considers that incorrect entries or discrepancies would be likely occurrences since claimants would probably have to provide the answers from recollection (which can be fallible) without the benefit of cross-referencing or checking with documents. (The flowchart in Annex D does not suggest that the claimant would have access to the screening bundle at the stage of the briefing session when he is required to complete the data form. It must be noted that most claimants do not have photocopies of their passports or other personal identification documents, since the Immigration Department keeps the passports or travel documents of the claimants.) In the light of the potential effect on the claimant's credibility assessment an incorrect or discrepancy may have on the result of the screening, the verification exercise would have to be comprehensive and thorough. The Administration's proposal cannot possibly be described as a measure of streamlining. The HKBA therefore disagrees with and objects to this proposal.

Screening Bundles

12. The Administration propose that, with a view to focus stakeholders' effort and public resources only on those records that could assist claimants in establishing their claim, every claimant would be provided with a screening bundle when the screening process begins. See paragraphs 14 to 18 of the Security Bureau's letter. The provision of the screening bundle would operate in lieu of the present practice of expediting the handling of data access requests ("DAR") under the Personal Data (Privacy) Ordinance (Cap 486), which would produce each and every document in the possession of the Immigration Department that keeps or refers personal data of the claimant ("PDPO documents"). The Administration consider that the screening bundle would contain fewer number of pages and less costs would have to be spent reading them by the DLS and the assigned duty lawyer. Annex C of the Security Bureau's letter gives an example of what are envisaged to be in a screening bundle: (1) Letters or written significations by claimant lodging torture claim/non-refoulement claim; (2) Letters or documents submitted by claimant in support of claim; (3) Correspondence with claimant and/or his legal representative; (4) Documents relating to the claimant's previous claim (if any); (5) Documents or letters from the UNHCR to the claimant; (6) Photocopies of the claimant's passport; (7) Documents relating to the removal and/or deportation of the claimant, and the referral or handling of his illegal entry into or overstaying in Hong Kong; (7) Any statement(s) made by the claimant to the Immigration Department or the Police (if the Immigration Department possesses a copy), and any record(s) of interview between the claimant and the Immigration Department or the Police (if Immigration Department possesses a copy); (9) Any other document(s) that may be relied on by the Immigration Department in the determination of the claimant's non-refoulement claim.

13. The HKBA has strong reservations in respect of this proposal of the Administration. PDPO documents are prepared to fulfil a statutory obligation of accessing all personal data in the possession of the Immigration Department and provide a full picture of the personal circumstances of the claimant in Hong Kong (including his dealings with the Immigration Department). PDPO documents may afford a basis to

explore and confirm the raising of an applicable ground for non-refoulement protection, including a ground under the "other applicable ground" category. PDPO documents also are a useful resource for the claimant to seek assistance in respect of other matters concerning his status in Hong Kong, such as reviewing a removal order, a deportation order, or a decision refusing permission to remain.

14. The screening bundle is assembled by the Immigration Department based on unknown guidelines or criteria of selection of documents. There is a worrying lack of transparency. It is intrinsically unfair for the decision-maker to make qualitative judgments on what is or is not relevant for the purposes of assessing the claim. This is particularly so where the claimant has the burden of proof. The conflict of interests is inherent and clear. Legal practitioners accordingly do have the genuine concern that the Immigration Department might have missed relevant documents in the selection and preparation of the screening bundle, only for such documents to be disclosed at the screening interview by the interviewing immigration officer, after instructions had already been taken from the claimant and the NCF had been completed on the basis of the information coming from the screening bundle.

15. Although the Administration's proposal of having the Immigration Department preparing screening bundles does not preclude a claimant from making a DAR, the proposal would stop public funding generally for the expenses of the provision of the PDPO documents. The HKBA is of the view that requiring claimants to pay for PDPO documents or additional documents disclosed through the making of a DAR is unjustifiable in the light of the requirements of the high standards of fairness provided under *FB & Ors v Director of Immigration & Anor* [2009] 2 HKLRD 346. The HKBA is also of the view that the proposal that there would be no reimbursement out of the public purse of the time taken by the duty lawyer to read the additional documents disclosed via DAR is unjustifiable. This places the duty lawyer in an invidious position since there is no mechanism for a claimant to pay a lawyer instructed by the DLS directly (nor is it desirable to have such a mechanism): The duty lawyer is left with essentially a choice between acting pro bono or failing

to act in the best interests of the claimant. Again, the HKBA finds this proposal to be a pretext for the more critical proposal of cutting the costs of legal fees of duty lawyers.

16. The HKBA therefore finds the Administration's proposal of having the Immigration Department preparing screening bundles to be objectionable. The current arrangement of publicly funding the claimant's DAR is workable, vindicates the claimant's statutory right of access to personal data, and provides peace of mind to both the claimant and his legal representatives in the preparation of the claimant's case. The present practice of producing PDPO documents pursuant to DAR on public funding should be continued.

Pre-scheduling Screening Interviews

17. The Administration propose in paragraphs 19 to 24 of the Security Bureau's letter that the Immigration Department would have fixed the date for the screening interview by the time of the referral of a non-refoulement claim to the DLS so that the DLS may then assign the case to a duty lawyer who is able to attend the screening interview on that pre-scheduled date. The pre-scheduled date would be around two weeks after the deadline for submission of the NCF. The Administration consider that duty lawyers are expected to accord due priority to attend the pre-scheduled screening interview since their availability has been confirmed and reserved at the time they accept the assignment.

18. The HKBA observes that from the Administration's point of view, this proposal might have the benefit of avoiding prolongation of (if not shortening) the overall time spent in the screening process of a non-refoulement claim. For some duty lawyers, pre-scheduling of the screening interview may be helpful management of their work schedule.

19. From the claimant's point of view, this proposal would in practice limit the available pool of duty lawyer to those who are available on the pre-scheduled date of the

screening interview. This limitation would affect particularly those claimants who had previously engaged a particular lawyer to represent him in his immigration and torture claim matters.

20. From the DLS's point of view, this proposal would effectively force the DLS to assign duty lawyers by their diaries. The DLS would be largely unable to assign cases according to the complexity of the case or the experience of the lawyer. This handicap would be prejudicial to the fairness of the screening process and the interests of the claimant.

21. From the legal representative's point of view, pre-scheduling the screening interview, together with the deadline for returning the NCF, impose a strict timetable for the progress of the investigation and finalization of a claimant's claim. The HKBA repeats its previous submission that the current deadline for returning a completed NCF under the USM is well short of the time considered reasonably necessary for proper taking of instructions, NCF form filling and finalization, and case preparation. (See the HKBA's Submission on the Unified Screening Mechanism for Non-refoulement Claims dated 14 February 2014 and the Joint Letter of the HKBA and the LSHK dated 2 May 2014 to the Security Bureau on the Unified Screening Mechanism for Non-refoulement Claims.) The DLS and the assigned duty lawyer will only know whether this strict timetable can be met until relatively full instructions have been taken from the claimant. Examples of well justified incidents that necessitate devotion of time include difficulties in interpretation, difficulties in obtaining supporting documents from places outside Hong Kong, translation of supporting documents provided by the claimant, translation of the NCF into the claimant's preferred language to enable him to prepare for the screening interview, and medical or forensic examination. It is plainly unjustified to expect the DLS and the assigned duty lawyers to compromise on the quality of their legal services to meet the Immigration Department's strict timetable which was initially imposed without regard to the complexity and difficulties of a claim.

22. The HKBA is not convinced that this proposal of pre-scheduling screening interviews will work to the benefit of all stakeholders. The HKBA considers that the balance of interests discussed above points clearly towards rejection of this proposal.

23. Paragraph 22 of the Security Bureau's letter proposes that the DLS should re-assign a case to another duty lawyer if the original duty lawyer, who has worked on the case to finalize the NCF, is not available to attend the screening interview for an extended duration, presumably beyond two weeks from the pre-scheduled date. The HKBA considers this part of the proposal highly unsatisfactory. This "expectation" places departmental expediency above established client-lawyer relationship and rapport. It also puts the DLS in an invidious position. The HKBA opposes this suggestion.

Capping Legal Fees and Duplication of Work Between Court Liaison Officers and Duty Lawyers

24. Paragraphs 25 to 31 of the Security Bureau's letter are concerned with the expenditure of providing the Scheme. The Administration suggest that the support the CLOs of the DLS give to duty lawyers (as the Administration take from the duty lists submitted by the DLS for duty lawyers and CLOs) may involve duplication of work and that "[this] may lead to queries on whether this is the best use of public resources". Having referred to arrangements in overseas jurisdiction where, due to policy and other considerations that may not be relevant to the circumstances of Hong Kong, a cap has been placed on the legal aid to asylum claimants, the Administration propose to set the standardized hours that duty lawyers may render assistance for each stage of the screening process to ensure the legal fees paid by public funds are justified but not in excess (as guided by the required high standards of fairness). When the legal assistance rendered exceeds the standard, justifications should be made to the DLS for approval before reimbursement of the exceeded hours.

25. The Administration is also in discussion with the DLS in parallel "to identify the scope to rationalize the duties of CLOs to avoid unnecessary duplication of work, and the detailed mechanism for assessing and exercising discretion in allowing more time to be spent on individual cases under exceptional circumstances".

26. The HKBA is gravely concerned with these proposals. They involve a deliberate attempt to depart from the commitment the Administration had made in October 2009 to accept the suggestion of the legal profession that "no cap should be imposed on the number of sessions for a case, which will duly take into account the individual circumstances" (see LegCo Paper No CB(2)33/09-10(01), appended as Appendix II to *Background brief prepared by the Legislative Council Secretariat for the meeting on 12 April 2011: Torture claim screening mechanism* (7 April 2011) (LegCo Paper No CB(2)1454/10-11(04)) at: http://www.legco.gov.hk/yr10-11/english/panels/se/papers/se0412cb2-1454-4-e.pdf).

27. The increase in expenditure in the Scheme is plainly due to the increase in the number of persons making fresh non-refoulement claims, as well as the additional screening work that needs to be done (namely the so-called backlog) in respect of screened out or pending torture claimants who may and have now lodged non-refoulement claims on the basis of Article 3 of the Hong Kong Bill of Rights and persecution risks. As to the former trend, neither the DLS nor the legal profession bears any responsibility. As to the latter trend, it is the consequence of the implementation of the USM following the Court of Final Appeal's judgments in *Ubamaka Edward Wilson v Secretary for Security* [2013] 2 HKC 75 and *C & Ors v Director of Immigration* [2013] 4 HKC 563 and the Administration's undertaking to follow those judgments in extending screening to non-refoulement claims on all applicable grounds at high standards of fairness. Hence the adoption of the USM and the good practice of the Immigration Department to contact the screened out or pending torture claimants to find out whether they wished to lodge non-refoulement claims on other applicable grounds. The latter trend, on the other hand, is expected to subside when the non-refoulement claims by screened out or pending torture

claimants have gradually been determined. Other factors contributing to the so-called backlog include the inexplicably long time taken by immigration officers to determine non-refoulement claims, the limited pool of qualified interpreters in Hong Kong, as well as the lodging of other apparently viable "applicable grounds" by some non-refoulement claimants, such as substantial belief of arbitrary deprivation of life contrary to the non-derogable right guaranteed under Article 2 of the Hong Kong Bill of Rights.

28. The Administration has set the proposed standardized hours by first averaging the number of hours spent at different stages of the screening process from fee claim reports submitted by duty lawyers. The HKBA has strong reservations as to the efficacy of this approach of "averaging", given the varying complexity and difficulty of non-refoulement claims, which can relate to matters of fact recollection, country of origin information, medical condition, language barrier, and welfare of children.

29. The HKBA considers the Administration's proposals to be motivated by the simple and naïve objective of costs-cutting. The likely consequence of the proposals is the undermining of the quality of the legal services that the Scheme can provide and the failure of the USM (with the Scheme being one of its vital components) to meet the high standards of fairness required by the courts. It would be much more costly to the public purse for non-refoulement claimants to be forced to embark, on an en masse basis, upon a course which will lead to applications for judicial review against the USM and its application on legal aid.

30. The HKBA makes the following points to show that the current payment arrangements of duty lawyers under the Scheme, based on actual hours of work done, are rational and economical and that the status quo should be maintained. The HKBA notes that the DLS has put in place accounting arrangements to prevent and detect abusive claims of legal fees.

31. Although the duty lists of duty lawyers and CLOs in respect of work done at Stage 1 (completion of claim form) contain items of identical descriptions, such as perusing PDPO documents, conference with claimants, drafting and finalizing claim forms, country research, there is in actual operation a division of labour between the CLO and the duty lawyer in the process of completion of the claim form. The duty lawyer holds the first interview with the claimant to explain the USM and the steps involved in the screening process. A preliminary enquiry on the claimant's claim is also made to enable the duty lawyer to give focused directions to the CLO for the next step of taking of detailed instructions. The CLO then holds interview(s) with the claimant to take detailed instructions of personal circumstances and basis of claim and marshal documents (if any) supplied by the claimant. The CLO produces a draft NCF with the documents (if any) attached for the perusal of the duty lawyer. The duty lawyer then holds an interview to finalize the draft NCF with the claimant. Depending on the way of work of the duty lawyer, it is often at this interview that the research done on country of origin information (often done in a joint effort by the CLO and the duty lawyer but mostly by the duty lawyer after receiving the draft NCF) is explained to and accepted by the claimant. The country of origin information accepted by the claimant is then incorporated either as part of the NCF submitted to the Immigration Department or as part of a written representation prepared by the duty lawyer for submission to the Immigration Department. At all stages, the DLS and the responsible CLO of the case is the contact point for the claimant. And the duty lawyer is the professional that the claimant relies on the check the work done by others, including CLOs and the interpreters. The duty lawyer is the person ultimately responsible for the quality of the legal services provided. The division of labour illustrated above is clear, complementary, efficient and economical. The Security Bureau's allegation in paragraph 26 of its letter of "possible duplication of work done by CLOs and duty lawyers" is unfounded.

32. The current arrangement of booking the duty lawyer on a half-day or whole-day basis for attending screening interviews is mutually beneficial, efficient and economical. The Immigration Department schedules screening interviews by half-

day sessions. Usually two half-day sessions on the same day are reserved. The DLS applies a similar approach in booking and remunerating the duty lawyer given the fact that once booked, the duty lawyer is professionally obliged to be available for the booked period on the day.

33. It should be pointed out that the Stage 2 payment includes preparatory work for the screening interview, including refreshing memory by going through the NCF and all supporting documents and interviewing the claimant immediately before the interview. The duty lawyer attending the screening interview plays a vital role in the screening process. The duty lawyer is not only present to observe the fairness of the process. He or she is professionally obliged to make objections should the process become less than fair. In order to raise relevant objections, the duty lawyer has to anticipate some of the questions to be asked of the claimant during the screening interview. This also requires preparatory work and is included in the half-day or whole-day based remuneration.

34. If the Administration's proposal of pre-scheduling screening interviews is implemented, this provides another good reason for keeping the current arrangement of remunerating the duty lawyer in the half-day or whole-day based payment. The pre-scheduling demands the duty lawyer to accord priority to attendance of the screening interview well in advance. The duty lawyer will have to forgo often more remunerative instructions to appear in court on the same date or during a period that includes that date that comes later.

35. The calculations in Annex F to the letter of the Security Bureau assume that the Administration's proposals for abridging the NCF and the provision of screening bundles were implemented and would have made saving of time on the part of the duty lawyer. For the reasons stated earlier in this Submission, the HKBA considers that these assumptions to be mere wishful thinking. The calculations have no rational basis. The HKBA reiterates that the reference to the arrangements in overseas jurisdiction not only overlooks the different circumstances of Hong Kong (including

the division of the legal profession with an independent Bar operating essentially in sole proprietorships and the overheads of maintaining a legal practice in Hong Kong) but also amounts to reneging on a commitment on the part of the Administration back in 2009 not to impose a cap on the time and legal expense for the preparation of a case.

36. Therefore the HKBA objects strongly to the Administration's proposal to "standardize" legal fees paid to duty lawyers in terms by a fixed number of hours. The current legal fee arrangements are rational and efficient and should be maintained.

Conclusion

37. The HKBA objects to the Administration's proposals in respect of the USM. These proposals do not enhance the USM. The HKBA is seriously concerned that these proposals, if implemented, would cause the USM to become incapable of meeting the high standards of fairness required of non-refoulement protection assessments.

38. The HKBA, in addition, notes with regret that the Security Bureau has not responded to the Joint Letter of the HKBA and the LSHK dated 2 May 2014 and the queries and suggestions in the letter regarding the USM, including those on medical examinations/evidence, disclosure of country condition reports and information gathered by immigration officers during visits, and publication of decisions of the Torture Claims Appeal Board.

Dated 26 January 2015.

HONG KONG BAR ASSOCIATION