

To:

Chairperson of the Panel on Security
Members of the Panel on Security
Legislative Council
Legislative Council Complex
1, Legislative Council Road
Central, Hong Kong

28 February 2015

RE: One year anniversary of the Unified Screening Mechanism: concerns about the Security Bureau's "proposals to enhance the USM" for consideration at 3 March 2015 LegCo Panel on Security meeting

Esteemed Chairperson and Members of the Panel on Security:

Justice Centre Hong Kong files this letter for the Panel on Security's 3 March 2015 meeting - a date that also coincides with the one-year anniversary since the Unified Screening Mechanism to process non-refoulement claims was first introduced by the Hong Kong Administration.

It came to our attention earlier this year that the Security Bureau has developed "proposals to enhance the unified screening mechanism" in December 2014. We regret that this process has not been open to consultation with civil society, particularly as Justice Centre has requested such consultation ever since the intention to introduce the USM was first announced on 3 June 2013. We understand that the Security Bureau had sought views from limited parties within the legal profession by 23 January 2015. However, as a leading organisation providing legal and psychological support to and defending the rights of protection claimants, Justice Centre made a submission to the Security Bureau on 13 February 2015 (provided as an annex to this letter). Ourselves and other parties who made submissions express great concerns that the proposals to "streamline" and make the USM system more "sustainable" could also negatively impact on claimants' rights to procedural fairness. As an organisation that works with some of the most vulnerable and traumatised refugees and other protection claimants, Justice Centre is particularly concerned about the impact the proposals would have on them.

We urge the Panel on Security to request that the Security Bureau share with your members their "proposals to enhance the unified screening mechanism", and that an agenda item on this topic be included at a forthcoming meeting of the Panel on Security, with presence from members of the Security Bureau and open to public depositions. We believe that in the spirit of good governance, the Administration should report to LegCo before taking any action to amend the USM procedures. We urge the Panel on Security to inquire of the Hong Kong Administration on what it is doing to take the legal profession and civil society views on the proposals into consideration. Lastly, we urge the Panel on Security members to request that the Immigration Department provide regularly updated and publicly available statistical tables (as is common practice in other jurisdictions) on substantiated and unsubstantiated claims, with disaggregated figures by demographic details such as nationality, age and gender, so as to make the USM system more transparent and monitoring and evaluation more feasible.

Submission by Justice Centre Hong Kong to the Security Bureau on the “Proposals to Enhance the Unified Screening Mechanism”

13 February 2015

Introduction

Justice Centre Hong Kong (**Justice Centre**) is a non-governmental organisation (**NGO**) whose mandate is to protect the rights of Hong Kong's most vulnerable forced migrants – including refugees, other people seeking protection and survivors of human trafficking and modern slavery. Justice Centre was formerly Hong Kong Refugee Advice Centre (**HKRAC**), which over the course of its seven years of operation, provided service to more than 2,000 refugee men, women and children seeking asylum before the United Nations Refugee Agency Sub-Office in Hong Kong (**UNHCR**).

In 2014, Justice Centre provided assistance to 741 claimants going through the Unified Screening Mechanism (**USM**), including 192 women, 131 children and 76 families. Justice Centre also provided individualised legal and mental health support to 88 particularly vulnerable protection claimants. They include survivors of torture, survivors of sexual and gender based violence (**SGBV**), unaccompanied minors, those suffering from serious psychological and medical concerns, and single female heads of households. We recognise that these vulnerable protection claimants face a number of challenges upon their arrival in Hong Kong and, without adequate support at the beginning of the process, may not even be able to access the USM or basic services such as housing, health and education for young children. It is with this in mind that we seek to work with the Duty Lawyer Service (**DLS**) and duty lawyers themselves, to use our expertise to support these very vulnerable claimants. Working with our in-house team of international law specialists, psychologists and our social worker, alongside our pro-bono legal partners, we assist the most vulnerable claimants to tell their stories, a process that can take a long time for people who are traumatised. We also research country of origin information; provide social welfare advice, make referrals and help arrange medical and other psychological reports to support refugees' claims and ensure that the most vulnerable have the best chance of a fair process in the USM.

Justice Centre has considered the Security Bureau's proposals to enhance the USM in its letter dated 23 December 2014 (**the Letter**), along with the Hong Kong Bar Association's (HKBA) submission dated 26 January 2015 (**HKBA's Submission**).¹ Justice Centre shares the HKBA's concerns and is in agreement with its position that the proposed changes will not result in a more efficient process, but rather, will restrict non-refoulement protection claimants' (**protection claimants**) access to justice and procedural fairness. Moreover, the rationale for these "enhancements" contained in the Letter relies on numerous erroneous or unfounded assumptions.

In order to properly monitor and evaluate the implementation of the USM, it is critical that the present exercise involves the range of stakeholders who play a role in the protection claimants' experience in Hong Kong. Paragraph 5 of the Letter appears to imply that the Administration has an open channel of communication and has consulted with different stakeholders over the course of the USM being designed and implemented. This is not the case. Justice Centre (and earlier as HKRAC) made several submissions requesting consultation in relation to the design and implementation of the USM, both before and after it was commenced.² The HKBA noted in its submission on the Unified Screening Mechanism for Non-refoulement Claims dated 14 February 2014 that the "*Security Bureau had never consulted with the legal profession on the operational details of the USM.*"³

The Letter proposes changes to the operation of the USM that could potentially have a significant impact on the fairness of the system. However, the Administration only invited two selected parties to give views on the proposals. It is important that a broad range of perspectives be heard, not just the views of the legal profession through the Law Society and the HKBA. Non-governmental entities such as Justice Centre, which deal on a daily basis directly with the practical concerns of protection claimants navigating their way through the USM, are in a strong position to provide feedback on the implementation of the USM. We therefore urge the Administration to open a regular channel of consultation on the USM with all stakeholders, including the HKBA, the Law Society and NGOs. We also urge the

¹ HKBA, *Submission on the Security Bureau's Proposals to Enhance the Unified Screening Mechanism*, 26 January 2015: [http://www.hkba.org/whatsnew/misc/Unified%20Screening%20Mechanism%20-%20Proposals%20to%20enhance%20the%20Unified%20Screening%20Mechanism%20-%20Final%20\(2\)%20-%20\(webpage\).pdf](http://www.hkba.org/whatsnew/misc/Unified%20Screening%20Mechanism%20-%20Proposals%20to%20enhance%20the%20Unified%20Screening%20Mechanism%20-%20Final%20(2)%20-%20(webpage).pdf)

² <http://www.legco.gov.hk/yr12-13/english/panels/se/papers/se0702cb2-1669-2-e.pdf>

<http://www.legco.gov.hk/yr13-14/english/panels/se/papers/se0318cb2-1063-1-e.pdf>

<http://www.legco.gov.hk/yr13-14/english/panels/se/papers/se0603cb2-1621-7-e.pdf>

³ HKBA, *Unified Screening Mechanism for Non-refoulement Claims*, 14 February 2014: <http://www.hkba.org/whatsnew/misc/img-214175157.pdf>

Administration to disclose how it will take into consideration the views provided in response to these proposed enhancements outlined in the Letter.

Further, as a matter of good governance, we recommend that the Administration not make any changes to the scheme without reporting to members of the Legislative Council, particularly members of the Panel on Security, who have had several meetings on the USM.

Based on our comparative experience and expertise in working with the most vulnerable protection claimants, Justice Centre raises the following points of concern and recommendations in respect of the Letter for the Administration's attention:

1. The Administration's rationale for "streamlining measures" due to an "increasing backlog of claims"⁴

The Letter asserts that the proposed measures to "*streamline*" the screening procedures are to improve the efficiency of the USM and find a more sustainable way forward, particularly in light of an increasing backlog of cases and costs to the public purse for the DLS. The HKBA noted that, rather than improving efficiency, the proposals in the Letter are simply a "*pretext for the more critical proposal of cutting the costs of legal fees of duty lawyers.*"⁵ Justice Centre agrees with the view of the HKBA. Moreover, nothing in the Letter suggests the Administration has conducted a thorough examination as to what **caused** the backlog of cases. If the Administration's objective is to improve the efficiency of the USM and reduce the backlog of cases, then the Administration ought to conduct a thorough investigation in conjunction with all stakeholders to examine the causes of the backlog before implementing changes. Moreover, any improvements to efficiency and reduction of the backlog of cases must be done without compromising the high standards of fairness in the decision making process.

Justice Centre has been monitoring the progress of the USM in processing claims. We note that the Administration has not published any such information and we have obtained this information only after making several Access to Information Code requests since the USM commenced on 3 March 2014. Based on our observations, we note that the current high number of unresolved claims can be attributable to various factors not addressed in the Letter. For example, such factors include the following:

⁴ Paragraphs 6-8 of the Letter.

⁵ Paragraphs 5 and 15 of the HKBA's Submission. See note 1 above.

- a. Annual changes in refugee flows are often due to factors in countries of origin rather than receiving countries. Accordingly, whilst ensuring the optimum efficiency of the determination system is necessary for many reasons, it is important to recognise that taking measures to streamline the process may not necessarily mitigate the increase in the number of protection claimants (and the resulting climb in the backlog cases). On 20 June 2014, UNHCR reported that the *“number of refugees, asylum-seekers and internally displaced people worldwide has, for the first time in the post-World War II era, exceeded 50 million people”*, with the massive increase fuelled by wars in Syria, Central Africa Republic and South Sudan.⁶ In UNHCR’s *Mid-Year Trends 2014* report, it concluded that *“during the first half of 2014, conflict continued to result in the displacement of millions of refugees and internally displaced persons (IDPs) globally causing significant changes in the trends and number of refugees, asylum-seekers, IDPs and others of concern to UNHCR. In this context, management of humanitarian crises is increasingly complex”*.⁷ UNHCR further reported that, as of mid- 2014: *“the total number of refugees under UNHCR’s mandate was 13.0 million by mid-year, the highest since 1996. This is almost 1.3 million persons more than at the start of the year (11.7 million) and 2.1 million more than in June 2013 (11.1 million)”* and *“by the middle of the year, close to 1.3 million individuals awaited decisions on their asylum claims, a figure that included applicants at any stage of the asylum process. This was the highest such number in more than 15 years. The largest backlogs of undecided cases were reported by South Africa (244,000), Germany (161,900), the United States of America (96,100), and Turkey (66,600)”*.⁸

Compared to global trends, the number of unresolved claims in the USM (approximately 9,600 according to paragraph 6 of the Letter) is only a fraction of the international flow of forced migration. The implementation of a protection screening system such as the USM must take into account that it is the *push* factors which drive forced migration flows. The predominant objective of the USM ought to be fairness and justice to the protection claimant in the context of Hong Kong’s legal obligations.

⁶ UNHCR, *World Refugee Day: Global forced displacement tops 50 million for first time in post-World War II era*, 20 June 2014: <http://www.unhcr.org/53a155bc6.html>

⁷ UNHCR, *Mid-Year Trends 2014*: <http://www.unhcr.org/54aa91d89.html>.

⁸ *Ibid.*

- b. There are delays within the system caused by a lack of allocation, or availability, of resources. For example, we have observed that a number of protection claimants were called for their briefing session and/or screening interviews only to have their briefing sessions / screening interviews delayed time and time again because there is only one available interpreter in a particular language. The lack of interpreters obviously causes delays in processing USM claims.

We appreciate the Administration's concerns regarding ensuring sustainability going forward and its interest in ensuring that the average claimant not have to wait longer and longer before their USM claim can be attended to. However we share the HKBA's view that these proposed measures will not have their stated intended effect of reducing backlogs, and therefore costs, and believe that these changes could even be prejudicial to claimants, particularly the most vulnerable. A thorough understanding of all the factors that cause inefficiencies and delays in the operation of the USM is needed before meaningful changes can be implemented to improve the USM.

- **Recommendation:** The Administration should conduct a thorough review into the operation of the USM in consultation with all relevant stakeholders in order to identify the causes of inefficiencies and delays, as well as the means to improve the USM.

2. The Administration's proposal to "abridge the USM non-refoulement claim form"⁹

Paragraphs 9-13 of the Letter proposes to segregate "*basic personal information*" from the non-refoulement claim form ("**NCF**") so that the protection claimant can complete this "*data form*" at the briefing session without the assistance of their assigned duty lawyer. For the reasons stated below, Justice Centre opposes this proposal and recommends that the Administration ensures that protection claimants have access to independent legal advice when completing all aspects of the NCF, including basic personal information.

In making the proposal to have protection claimants complete the "data form" without legal assistance, the Administration assumes that basic information such as dates and addresses are easy to recollect or obtain. However, this assumption is incorrect. To give some illustration, in Justice Centre's experience working with people making asylum-protection claims over the past seven years, in many developing countries – particularly rural areas –

⁹ Paragraphs 9-13 of the Letter.

houses and streets are not marked with numbers and names. Hence writing an address may actually present difficulties. Many countries do not use the Gregorian calendar, and converting dates may also be a complicated process, often leading to errors. Therefore, mistakes with even the most “basic” information can be made easily if claimants are required to provide such information without legal assistance.

Even questions regarding identity documents (e.g. questions 13 and 35 of the proposed data form)¹⁰ can be problematic for a protection claimant to answer without legal advice. Many conflict-ridden countries do not have a functioning state that issues official identity or travel documents. Many protection claimants fleeing from those countries are forced to rely on quasi-official documents or forged identity or travel documents in order to flee. Without legal advice, a protection claimant can easily make mistakes when describing the nature of the documents in the data form.

A duty lawyer who is representing a protection claimant will necessarily be required to carefully review the details contained in the completed data form, to ascertain how those details relate to the substance of the claim and correct any mistakes. More time and costs could potentially be incurred simply to correct mistakes once protection claimants provide the information to their duty lawyers. It is unclear whether such mistakes could also potentially impact adversely on the credibility of their claim as a result. As such, it is difficult to see how the proposal would lead to any meaningful reduction in time or costs.

- **Recommendation:** To ensure fairness to claimants, as well as efficient use of the duty lawyer service, protection claimants should be able to have the assistance of a duty lawyer available to them when completing all aspects of the NCF, including basic personal information.

3. The Administration’s passing reference to protection claimants who may have “special needs”¹¹

In a footnote to the Letter, the Administration notes that for minors, the basic personal information data form may be completed by their parents, guardians or adults responsible for their welfare and that, for other protection claimants who have difficulties in completing the data form on their own or otherwise have special needs, an immigration officer who has

¹⁰ Appendix A “Abridged Non-refoulement Claim Form” of the Letter.

¹¹ Footnote 7, page 4 of the Letter.

received the necessary training may also assist them to complete the data form. We regret that the needs of vulnerable people who may fit into these categories of protection claimants have been relegated to merely a footnote mention in the Letter. We continue to echo our concerns and recommendations that we made in an earlier report on how to ensure the needs of the most vulnerable are met in this new USM system.¹²

In the *Determination of Non-refoulement Claims Note to officers of the Torture Claim Assessment Section of Immigration Department* (the “**Note**”), it is stated that “case officers should be aware of clients with ‘special needs’ and that these cases should be handled with ‘due care’”. According to the Note, people with “special needs” could include a) victims of sexual violence b) unaccompanied minors c) those suffering from mental illness or trauma d) female clients with special needs (such as those who may not wish to be interviewed by a male officer on religious or other grounds). In the NCF, protection claimants are asked in question 72 whether they have “special needs” and to provide “reasons”, implying that they must self-identify as having those needs.

Justice Centre continues to be concerned that there is little clarity as to what guidelines and procedures are in place to identify, prioritise and process people who have “special needs”. No information is publicly available in this regard. Justice Centre, in its Access to Information requests, has requested statistics on the number of people identified as having “special needs” in the USM since it commenced. However, the Immigration Department noted that it did not maintain readily available information on this matter.

As noted by the HKBA, claimants as a whole, by the fact that they are fleeing from persecution and other grave human rights abuses, are in and of themselves “vulnerable”. However, several categories of people, such as female survivors of SGBV, illiterate people, people with disabilities, torture survivors, and more, face particular challenges and thus have diverse special needs in navigating a complex legal system like the USM.

The USM process requires protection claimants to provide accurate, logical and legally relevant information about them. However, the most vulnerable protection claimants are simply unable to do so without adequate legal and mental health support. For example, many vulnerable protection claimants have experienced severe trauma, and are suffering from Post-Traumatic Stress Disorder (PTSD) or clinical depression. These protection

¹² <http://www.justicecentre.org.hk/framework/uploads/2014/03/USM-Briefing-Meeting-the-Bare-Minimum-HK-New-Screening-Process-for-Protection.pdf>

claimants can find it particularly difficult to recount their stories in a legally relevant, chronological and coherent way. Trauma memories are stored differently to normal memories in our brains. When a protection claimant is recounting traumatic experiences, their narration can appear to be inconsistent and not chronological. They may also suffer from lapses in memory and may not be even able to provide basic information as a result of the trauma they experienced. Some protection claimants can suffer from cognitive difficulties which prevent them from articulating themselves. Some women who are survivors of SGBV can often hide pertinent information about their experience of sexual violence out of shame and/or self-blame. Often, vulnerable protection claimants who have experienced repeated and systematic persecution find it difficult to trust figures of authority, including lawyers and in particular, immigration officers, and as a result withhold relevant information out of fear.

In fact, in our experience, many vulnerable protection claimants require psychosocial support before they are able to provide an account of their experiences. This is why mental health assessment and support is a central component of our individualised services to complement the services of a legal nature which we provide to vulnerable protection claimants.

Thus, vulnerable claimants may be adversely affected if they are asked to complete the data form without proper legal and medical support. Justice Centre would like clarification on what kind of “training” is given to immigration officers to handle people who are identified with “special needs”. Regardless, however, given that immigration officers are part of the Administration and are therefore a party of the “decision-maker”, there is a fundamental position of conflict of interest. Vulnerable protection claimants need to receive proper legal advice from a lawyer who is acting in their best interest.

Justice Centre also urges that DLS be properly trained in working with vulnerable protection claimants and note that the UNHCR can play an important role in this regard, having developed vulnerability criteria in their procedural standards. When the UNHCR conducted refugee status determination (“RSD”), its office had a social worker who acted as a focal point for this group and liaised with NGOs and other service providers who identified vulnerable people to contact. The UNHCR also employed accelerated RSD processing procedures to which applicants could be referred when there were compelling protection reasons to process the claim on a priority basis. The accelerated procedures incorporate

reduced waiting periods at each stage of the RSD procedures and shortened timelines for the issuance of decisions.¹³

- **Recommendation:** The Administration develops clear guidelines and procedures to identify, prioritise and process people who have “special needs” and make those public.
- **Recommendation:** Immigration officers and duty lawyers be provided with regular training on how to identify and work with protection claimants with “special needs”, particularly since claimants would not necessarily self-identify or understand what “special needs” means and how it applies to them.
- **Recommendation:** There is a focal point for protection claimants with “special needs” in the USM process.
- **Recommendation:** The Administration implements clear process to mirror UNHCR’s “acceleration” procedure/criteria for dealing with protection claimants with “special needs”.
- **Recommendation:** The Administration provides to the public updated statistics about protection claimants screened as having “special needs” and how their cases are handled.

4. The Administration’s proposal for the “provision of screening bundles” to protection claimants¹⁴

Justice Centre agrees with the submissions of the HKBA in respect of the proposals for the provision of screening bundles to protection claimants.

- **Recommendation:** The current arrangement of publicly funding the protection claimant’s data access requests and the practice of producing documents pursuant to those requests under the Personal Data & Privacy Ordinance should be continued.

5. The Administration’s proposal for “pre-scheduling screening interviews”¹⁵

In paragraphs 19 to 24 of the Letter, the Administration proposes to re-schedule screening interviews when the screening process commences. In principle, Justice Centre is not

¹³ UNHCR, Procedural Standards, section 4.6

¹⁴ Paragraphs 14-18 of the Letter.

¹⁵ Paragraphs 19 to 24 of the Letter.

opposed to scheduling the screening interview at the beginning of the process based on the availability of the immigration officer, interpreter, the duty lawyer and the protection claimant. However, Justice Centre shares the concerns of the HKBA as stated in paragraphs 17-23 of the HKBA Submission. In addition, Justice Centre wishes to note that these proposals have a particular detrimental effect on vulnerable protection claimants.

As noted by the HKBA, these proposals have the effect of limiting protection claimants' choice of duty lawyers based on their diaries, without taking into account other relevant factors. Vulnerable protection claimants can be at a particular disadvantage. For example, the available duty lawyer may not have the necessary training or experience in handling people suffering from PTSD or depression, and may therefore be unable to provide the level of legal representation necessary – for example, the lawyer may be ineffective in soliciting all relevant details from that protection claimant, or fail to identify circumstances where medical expertise may be usefully tendered in support of the claim. In these circumstances, the case may lead to appeals and/or judicial reviews, and therefore shift the costs down the chain. Restricting the choice of duty lawyers to be entirely based on their availability will not result in a saving of time and costs, but can prejudice the rights of the most vulnerable protection claimants. DLS ought to have the ability to assign duty lawyers to protection claimants based on all relevant factors, taking into account the vulnerability of the protection claimant.

Justice Centre is also concerned that the proposal to re-assign a protection claimant to a different duty lawyer half way through a case, if that duty lawyer is unavailable for an “*extended duration*” (paragraph 22 of the Letter), is too inflexible, and does not take into account the needs of the protection claimant. As noted above, vulnerable protection claimants can take a long time to build enough trust in another person before they can feel safe enough to fully recount their experiences. Such vulnerable protection claimants can find it very difficult to have to start again with a new duty lawyer. Of course there might be situations where it would be in the protection claimant's interests to receive advice from a new duty lawyer (e.g. the existing duty lawyer is negligent, or where the nature of the claim requires the specific skills or expertise of another duty lawyer). In most cases, re-assigning a case to a new lawyer halfway through the process would inevitably cause delay, redundant work and subsequent wastage of costs. Any decision to re-assign a new duty lawyer to a protection claimant should be about whether such a decision is in the best interest of the protection claimant and should be made with their consent.

Justice Centre also notes the Administration's proposal to not re-schedule an interview if a protection claimant does not show up or if they leave a scheduled interview early without

“reasonable justification” (paragraph 23 of the Letter). As a minimum, the protection claimant ought to be given reasonable opportunity to explain why they were unable to attend an interview or left the interview early before the immigration officer proceeds to make a determination without a further interview. During the interview, protection claimants are expected to recount in detail the most traumatic and/or humiliating experiences they have had. Such a process can re-traumatise them and can be extremely difficult. They may not be able to articulate a particular reason for their inability to be interviewed at the time. As such, the Administration cannot satisfy the requisite *“high standards of fairness”* without fully investigating the reasons why a protection claimant is unable to attend a scheduled interview or needs to leave the interview early.

- **Recommendation:** DLS should have the ability to assign duty lawyers to protection claimants taking into account all relevant factors, including whether a protection claimant has special needs.
- **Recommendation:** DLS should only re-assign a new duty lawyer to a protection claimant half way through a case if it is in the protection claimant's best interests to do so and with their consent, having taken into account all relevant factors.
- **Recommendation:** Procedures should be implemented to ensure that a protection claimant be given reasonable opportunity to explain why they are unable to attend a scheduled interview, or leave that interview early, before any decision is made to not re-schedule an interview. Any decision not to re-schedule an interview should be given in writing and with reasons.

6. Standardisation of legal fees¹⁶

Annex E, as well as several passages of the letter, make reference to various jurisdictions, notably Canada and the United Kingdom, with reference to caps on the amount of legal assistance and cap on hours dedicated to different stages of the screening process where legal assistance is required. Justice Centre opposes the proposal to standardise legal fees and supports the HKBA's submission in this regard.

Justice Centre urges great caution in the use of other common law jurisdictions as comparators exclusively in the context of a cap on legal aid, as these contexts are quite distinct to those in Hong Kong for several reasons.

¹⁶ Paragraph 25-31 of the Letter.

The countries mentioned are all signatories to the 1951 Refugee Convention with significantly higher acceptance rates than evidenced in Hong Kong. Those countries are dealing with a significantly more well-developed body of law and expertise in this area, able to more efficiently identify those in need of legal protection. The scope for error is less in any established system than in a new one, and thus more flexibility should be built into the USM in its early stages of commencement, rather than less. Indeed, the fact that only a couple dozen of torture claimants were ever found to be substantiated out of thousands of claims filed has raised significant warning flags about the fairness of the system, with an acceptance rate of less than 1%.¹⁷

Furthermore, the legal community in those countries is by and large significantly more experienced in dealing with claims of such nature. The members of the legal profession which deal with these claims include many specialist lawyers who have significant experience in practising in the area of refugee (and other human rights) law, and have developed the skills necessary to deal with this vulnerable population. In contrast, the USM and protection claim law in Hong Kong is very new and the members of the legal profession who assist claimants have not had the opportunity to develop this expertise. It would be vastly premature to now impose a limit on the number of hours which those lawyers can dedicate to a case. It would, inevitably, lead to a decline in the quality of legal service provided to protection claimants.

Furthermore, Justice Centre notes that in the other jurisdictions referred to, mixed modes of legal aid service delivery are possible, such as the existence of legal clinics or public interest NGOs, which are able to provide direct legal representation to claimants. As such, the rights of the most vulnerable claimants in those jurisdictions are somewhat better protected as they are able to receive proper legal assistance from relevant NGOs even if they are unable to obtain sufficient assistance from public funded legal aid.

A properly funded legal aid system which makes available to claimants lawyers with sufficient expertise in the areas of law relevant to persecution, torture and CIDTP is critical to the high standards of fairness which are required for determining these claims.¹⁸ However, in those other jurisdictions, where lamentable (and widely criticised) cuts in publicly funded legal aid have been implemented, the reliance on these other modes of pro bono legal

¹⁷ <http://www.justicecentre.org.hk/framework/uploads/2014/11/Second-Access-to-Information-Request-Response.pdf>

¹⁸ See Asylum Aid, *Rethinking Asylum Legal Representation*, January 2013, available at: <http://www.refworld.org/docid/54080e334.html>.

services has been critical in backstopping the system.¹⁹ Refugee law clinics, with specialised pro bono refugee lawyers, for example, are able to supplement (or provide an alternative to) legal aid lawyers. This is not the case in Hong Kong. Regulations governing the legal profession prevent lawyers within NGOs from providing expert legal representation to claimants. Protection claimants are therefore wholly reliant on the legal representation from the DLS.

- **Recommendation:** Based on the existing framework in Hong Kong, there ought to be no caps on the amount of legal assistance the DLS can provide to protection claimants.

Recommendation: NGOs have the ability to provide direct legal representation to protection claimants.

Conclusion

Justice Centre is alarmed by the lack of transparency in the USM, which is below par when benchmarked to other jurisdictions (including the ones listed in the Letter). Those jurisdictions have accessible information systems around their asylum process, and regularly publish statistics on the number of claims and acceptance rates. Justice Centre is of the view that publishing statistics is a basic requirement of a fair and efficient system, particularly one that is new and where monitoring is crucial. Currently, the only available tool is the Access to Information Code. This is unsatisfactory, as data provided is selective and often out-of-date, and it is only sent to the individual who filed the request, rather than being made available to the public.

Justice Centre also urgently requests that the Administration provides greater clarity on long-term solutions that will be available for successful USM claimants. On the few occasions where the USM has been discussed publicly and in the government's written documents, the issue about what long-term solutions will be available to successful claimants (those with substantiated claims) in the USM has largely been skirted. "Non-refoulement" protection merely protects the claimant from being returned to their country so long as they face a risk of harm, but it does not confer any additional rights to the individual nor does it grant them any legal status in Hong Kong.

¹⁹Catherine Dauvergne, "Refugee rules the end of Canada's humanitarian tradition" *Global and Mail*, 29 January 2014: <http://www.theglobeandmail.com/globe-debate/refugee-rules-the-end-of-canadas-humanitarian-tradition/article7937115/>; and Jane McAdams, "Scrapping legal aid for refugees will cost Australia more than it saves" *The Guardian*, 1 April 2014: <http://www.theguardian.com/commentisfree/2014/apr/01/scrapping-legal-aid-for-refugees-will-cost-australia-more-than-it-saves>

The Administration has stated that substantiated claims on persecution grounds will be referred to the UNHCR which will seek to find a durable solution for that person, but the procedure for the referral process is unknown. For the other two grounds, torture and CIDTP, which fall out of the scope of the UNHCR's mandate, the Administration has alluded that successful claimants will be able to be resettled to a third country, but has provided no details about how. Most likely, substantiated protection claimants will be in a position similar to the few successful torture claimants in the CAT system previous to the USM – legal limbo.

- **Recommendation:** Publicly available statistical tables, released on a quarterly basis, as is common practice in most countries with comparable protection screening systems.
- **Recommendation:** Clear long-term outcomes for all categories of protection claims.

Finally, whilst Justice Centre agrees that the USM ought to become more efficient and that the backlog of unresolved claims ought to be reduced, we do not believe the proposals set out in the Letter can achieve these objectives. We believe that our recommendations as set out in this submission can help to make the USM a fairer and more efficient system for protection claimants. We urge the Administration to consider our views, as well as those of the HKBA and other stakeholders, before implementing any changes to the USM.