

**Submission to the Constitutional and Mainland Affairs Bureau
On Hong Kong Special Administrative Region's upcoming review under the
Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or
Punishment**

Justice Centre Hong Kong

March 2021

Justice Centre Hong Kong ("Justice Centre") appreciates this opportunity to provide submissions on the proposed outline on Hong Kong Special Administrative Region ("Hong Kong")'s sixth report to the Committee against Torture ("the Committee"), under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT").

1. Article 3: Torture as a ground for refusal to expel, return or extradite

We are concerned that Hong Kong's non-refoulement policy and the Unified Screening Mechanism ("USM") falls short of international human rights standards, including rights guaranteed under UNCAT.

1.1 Removal of potential asylum seekers on arrival

We encourage the Government to provide information on the following:

- (1) The existing policy on handling individuals who expressed a wish to seek non refoulement protection at border control points; specifically, whether immigration officers are instructed to remove or deny entry to potential asylum seekers at border control points¹. If the existing policy is to remove all potential asylum seekers, we invite the Government to comment on whether this policy is compatible with obligations under Article 3 of the UNCAT.**
- (2) Yearly statistics on the number of individuals who were refused entry upon arrival and removed, disaggregated by their age, sex, nationality, place of entry and reason for denial of entry/ removal.**

We are concerned that people who wish to seek international protection, including survivors of torture and/or cruel, inhuman or degrading treatment or punishment ("CIDTP"), are summarily removed from Hong Kong upon arrival without the opportunity to assert their right not to be returned to a country where they may face serious human rights violations.

First-hand accounts from our service users suggest that people who seek asylum at border control points are refused permission to land. They are told by immigration officers that Hong

¹ The Government stated in its reply to the Committee on Elimination of All Forms of Discrimination Against Women's list of issues for Hong Kong's last review under the Convention on Elimination of All Forms of Discrimination Against Women that its policy is to remove potential asylum seekers. See Committee on Elimination of Discrimination Against Women, "List of issues and questions in relation to the combined seventh and eighth periodic reports of China: Replies of China" (15 August 2014). UN Doc. CEDAW/C/CHN/Q/7-8/Add.1 at [30] – [31], p. 37/53

Kong does not recognise refugees and they must return to their home countries. Moreover, people are interrogated by immigration officers and/or instructed to sign documents without the assistance of interpreters. Some individuals also report that they have been subjected to strip searches, including cavity searches, in humiliating and degrading circumstances. Examples include insensitive and disrespectful remarks made by immigration officers about women with visible scarring caused by sexual and gender-based violence (“SGBV”) and multiple cavity searches being performed on survivors of sexual violence. Whilst some individuals eventually managed to halt their removal and lodge USM claims, there is no information on the number of asylum seekers who have been removed without the opportunity to seek assistance.

1.2 Low substantiation rate

We encourage the Government to provide yearly statistics on the number of substantiated claims under the Unified Screening Mechanism (“USM”), disaggregated by the stage of substantiation i.e. before the Immigration Department or before the Torture Claims Appeal Board/ Non-refoulement Claims Petition Office (“TCAB/ NRCPO”).

We encourage the Government to respond to the Committee against Torture (“the Committee”)’s comment that the low substantiation rate is “indicative of a distinctly high threshold for granting protection”².

Hong Kong’s substantiation rate for non-refoulement claims remains at less than 1%, which is among the lowest in the developed world. We have observed that even claimants from high risk countries, such as Somalia, Yemen and the Central African Republic are routinely rejected for protection. The low recognition rate is also indicative of systematic failures of the USM discussed below, including poor quality decisions, a general lack of substantive and procedural fairness, and a lack of legal representation.

² Committee against Torture, “Concluding observations on the fifth periodic report of China with respect to Hong Kong, China” (3 February 2016) UN Doc. CAT/C/CHN-HKG/CO/5 at [6].

Year	2014	2015	2016	2017	2018	2019	2020
No. of claims determined at first instance	826	2339	3218	4182	5467	1344	857
No. of claims substantiated at first instance	1	14	28	19	16	5	2
Substantiation rate at first instance	0.12%	0.6%	0.87%	0.45%	0.29%	0.37%	0.23%
No. of claims determined at appeal stage	236	385	584	2825	4000	4354	2268
No. of claims substantiated at appeal stage	0	3	2	19	26	33	52
Substantiation rate at appeal stage	0	0.78%	0.34%	0.67%	0.65%	0.76%	2.29%
Cumulative substantiation rate	0.094%	0.62%	0.79%	0.54%	0.44%	0.46%	1.73%

 Table 1: USM substantiation rate in the period 2014 – 2020 September³

³ Immigration Department, “Statistics on Non-refoulement Claim”. Available at: <https://www.immd.gov.hk/eng/facts/enforcement.html>. Security Bureau, “TCAB Statistics” (October 2017). Available at: https://accessinfo.hk/zh_HK/request/tcab_statistics#incoming-652; Security Bureau, “Torture Claims Appeal Board- Q4, 2017” (March 2018). Available at: https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q4_2; Security Bureau, “Torture Claims Appeal Board- Q1, 2018” (April 2018). Available at: https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q1_2; Security Bureau, “Torture Claims Appeal Board- Q2, 2018” (July 2018). Available at: https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q2_2; Security Bureau, “Torture Claims Appeal Board- Q3, 2018” (October 2018). Available at: https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q3_2; Security Bureau, “Torture Claims Appeal Board- Q4, 2018” (January 2019). Available at: https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q4_2_2; Security Bureau, “Torture Claims Appeal Board - Q1 2019” (April 2019). Available at: https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q1_2_2; Security Bureau, “Torture Claims Appeal Board - Q2 2019” (July 2019). Available at: https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q2_2_2; Security Bureau, “Torture Claims Appeal Board - Q3 2019” (December 2019). Available at: https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q3_2_2; Security Bureau, “Torture Claims Appeal Board - Q4 2019” (January 2020). Available at: https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q4_2_3; Security Bureau, “Torture Claims Appeal Board - Q1 2020” (April 2020). Available at: https://accessinfo.hk/en/request/torture_claims_appeal_board_q1_2_3#incoming-1339; Security Bureau, “Torture Claims Appeal Board - Q2 2020” (July 2020). Available at: https://accessinfo.hk/en/request/torture_claims_appeal_board_q2_2_3#outgoing-792; Security Bureau, “Torture Claims Appeal Board - Q3 2020” (October 2020). Available at: https://accessinfo.hk/en/request/torture_claims_appeal_board_q3_2_3#incoming-1465

1.3 Lack of legal representation

We encourage the Government to provide yearly statistics on:

- (1) the number of TCAB/NRCPO appeals concluded with publicly funded legal assistance (“PFLA”)**
- (2) the number of TCAB/ NRCPO appeals substantiated with PFLA**
- (3) the number of claimants who were declined PFLA**
- (4) the number of claimants who requested a second opinion upon being declined PFLA**
- (5) the number of claimants who were provided with PFLA upon requesting a second opinion**

We encourage the Government to clarify whether claimants are informed of their right to request a second opinion if their applications for PFLA before the TCAB/NRCPO were refused.

Access to legal services for protection claimants throughout the screening process is crucial to maintaining the high standards of fairness required by law following *Secretary for Security v Sakthevel Prabakar*⁴.

We are concerned that most claimants at the appeal stage of the USM are not provided with publicly-funded legal assistance (“PFLA”). The continuance of PFLA at the appeal stage depends upon the opinion of the handling duty lawyer regarding the merits of the claim or appeal. Statistics from 2014-2020 shows that only 8% of claimants are provided with PFLA at the appeal stage⁵. Although claimants who are rejected for PFLA at the appeal stage are entitled to request a second opinion by a fresh duty lawyer as to the merits of their case, this option is not published anywhere and there is no apparent requirement for claimants to be informed of this option. Less than 1% of claimants requested a second opinion in the said period, which suggests most claimants are not aware of their right to request this⁶.

Year	No. of TCAB appeals concluded	No. of TCAB appeals concluded with PFLA	% of TCAB appeals concluded with PFLA
2014	399	85	21.3%
2015	604	67	11%
2016	926	99	10.7%
2017	3394	192	5.6%
2018	4807	301	6.2%
2019	4924	339	6.8%
2020 (as at June)	1449	117	8%
Total	16503	1200	7%

Security Bureau, “Torture claims appeal board – Q4 2020” (27 January 2021). Available at: https://accessinfo.hk/en/request/torture_claims_appeal_baord_q4_2#outgoing-899

⁴ [2005] 1 HKLRD 289

⁵ Security Bureau, “Publicly funded legal representation at TCAB 2014-2020” (September 2020). Available at: https://accessinfo.hk/en/request/publicly_funded_legal_representa#incoming-1431

⁶ Ibid

Table 2: Number of TCAB appeals with PFLA⁷

Year	No. of people declined PFLA	No. of people requesting a second opinion	No. of people provided with PFLA after requesting second opinion	% of people requesting second opinion	% of people provided with PFLA after requesting second opinion
2014	845	12	5	1.42%	41.6%
2015	2003	50	19	2.49%	38%
2016	2455	13	5	0.52%	38.46%
2017	3063	20	10	0.65%	50%
2018	4820	19	11	0.39%	57.89%
2019	1146	31	24	2.7%	77.4%
2020 (as at June)	370	2	2	0.54%	100%
Total	14702	147	76	0.99%	51.7%

Table 3: Number of claimants requesting a second opinion upon being declined PFLA⁸

We are also concerned that PFLA is not available to claimants at the initial registration stage of the USM. Pursuant to Section 37X of the Immigration Ordinance, people wishing to instigate a USM claim must first provide the Immigration Department with a written signification setting out a “general indication of the person’s reasons for claiming non-refoulement protection in Hong Kong”. If the written signification is deemed inadequate, the claim will be considered to not have been made and detention or refoulement may result⁹. An understanding of the relevant grounds for protection is clearly required to put together a written signification and not least to determine the relevancy of information to be provided. Claimants who are illiterate, speak minority languages, suffer from mental or physical health difficulties, or are traumatised due to torture and/or persecution will face additional difficulties in preparing a satisfactory written signification¹⁰.

1.4 Low quality of decision-making

We encourage the Government to respond to concerns that the quality of decision-making within the USM is low, and provide information on steps taken to train decision makers and monitor the quality of decisions.

⁷ Security Bureau, “Publicly funded legal representation at TCAB 2014-2020” (September 2020). Available at: https://accessinfo.hk/en/request/publicly_funded_legal_representa#incoming-1431

⁸ Ibid

⁹ Immigration Department, “Notice to Persons Making a Non-refoulement Claim” at [23]. Available at: https://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf

¹⁰ See *R v Director of Immigration and Another* HCAL 152/2017; [2020] HKCFI 1308

We encourage the Government to respond to the Committee’s comments that decisions of the TCAB/NRCPO are not published, which impedes claimant’s effective preparation of their cases¹¹.

Justice Centre observes that USM decisions are routinely of a low standard. Basic mistakes are frequently noted, including mistaking claimants’ countries of origin, using unverified information from Wikipedia as evidence to determine claims¹², or using outdated, substandard or otherwise non-credible sources as country of origin information.

In addition to basic errors, decision makers display an overall poor grasp of non-refoulement law and key legal and factual concepts. For instance, there is an overall lack of gender sensitivity in cases involving sexual and gender-based (“SGBV”) violence:

- (1) Decision makers almost always dismiss accounts of SGBV as private acts. In cases involving private actors, there is little recognition that violence against women, such as domestic violence, rape, forced marriages, trafficking or female genital mutilation, can constitute torture and/or CIDTP where violence against women is tolerated by the State.

Even in cases where the perpetrators were state actors, decision makers routinely conclude that they are not acting upon state orders or control. As a result, they fail to recognize the significance of previous acts of violence, and with this the degree to which they are indicative of future risk of persecution or other violations. In one case surveyed by Justice Centre, a woman’s rape by police officers was dismissed as follows:

“The ‘Rape Incident’ in no doubt was the most serious crime your wife encountered from some CID officers... They did it out of impulse and out of their own evil will but not under [State] consent or acquiescence.”

- (2) Decision makers frequently dismiss evidence of past SGBV for not reaching a level of severity or frequency to justify future risk of harm. This is a misapplication of relevant principles, as past harm is not a prerequisite for justifying future risk of harm; where past harm has occurred, its severity or frequency is equally not determinative of future risk. Even in cases where the claimant’s past experiences of violence, considered objectively, is severe, their evidence is still dismissed for not reaching the required level of severity.

For example, in a case where a woman experienced persistent sexual harassment by members of the majority clan which culminated in the abduction and gang rape of the woman and the murder of her daughter, the decision-maker assessed the woman’s future risk of harm to be low as “there is no indication that [members of the majority clan] had exerted intense and continuous efforts to locate [you] with a view to causing further harm or killing [you]”.

¹¹ 2016 Concluding Observations at [6]

¹² See for example *Md Nazir Ahmed Sarkbar v Torture Claims Appeal Board* [2018] HKCFI 801, available at:

http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=114733&QS=%2B&TP=JU

In another case where a woman was starved by her trafficker, the decision maker said:

"Despite your Auntie [trafficker] did not provide you with food and water, she has an ability and opportunity to starve you to death if she so wished. Her behaviour clearly indicates that she had no real intention to kill you."

- (3) Decision makers often make adverse credibility findings based on late disclosure of SGBV and other traumatic events, peripheral or minor inconsistencies, speculative plausibility arguments and the claimant's behaviour (such as their demeanour when giving evidence) without any regard to the complex role trauma, cultural differences, shame, gender and other compound factors may affect claimants' capacity to present their cases.
- (4) The excessively high threshold for granting protection is contrasted by the low bar for establishing safety when decision makers consider internal flight options. Weak states with generalised violence, or states with entrenched and institutionalized patriarchy where violence against women is rampant, are often considered safe. For example, in a case concerning a Somali claimant, the decision maker considered internal relocation viable as: "the [Somali] government is aware of the problems of impunity and sexual violence and is striving to improve state protection of civilians."

In cases involving families, women and children are not always able to have their claims considered meaningfully with regard to gender and child specific needs for non-refoulement protection, which may be independent from the claims of their male family members. In cases involving spouses, the Immigration Department tend to assume that the husband is the lead claimant, and spouses are often not provided with the option of a separate interview. There is no guidance on whether the claims of women, children and other members of a family should be considered jointly or individually in cases involving families¹³.

There is also a worrisome trend of adjudicators displaying cynicism or hostility toward claimants. For example, in the case of *Villarico Louterliz Talag*, the adjudicator insisted that the heavily pregnant claimant's TCAB hearing continue despite her going into labour; the High Court found that the adjudicator failed to adhere to the high standard of fairness, erred in law, and that the decision was tainted with procedural irregularity¹⁴. The Court commented:

"What is unacceptable is [the adjudicator's] clear cynicism. Despite her obvious pregnancy, he undoubtedly assumed that a complaint of pain was an excuse to adjourn the hearing. He did not stop to consider the complaint may have been genuine. She at one point can clearly be heard on the audio recording drawing in a deep long breath as

¹³ In the recent decision of *Fabio Arlyn Timogan*, the Court of Appeal affirmed that non-refoulement claims by children are separate claims from claims advanced by their parents, and that separate consideration should be given to each claimant's personal circumstances even if the claims were based on the same set of primary facts. *Fabio Arlyn Timogan and Others v Evan Ruth and Another* CACV 32/3030 [2020] HKCA 971 (27 November 2020)

¹⁴ *Villarico Louterliz Talag v. Torture Claims Appeal Board* [2018] HKCFI 468; HCAL 179/2017. Available at: <http://hklii.hk/eng/hk/cases/hkcfi/2018/468.html> at [19]

if in pain yet if he had any doubts, he still made no enquiry of her situation to ascertain if it is genuine”¹⁵.

In another case involving a gay Egyptian man, the adjudicator concluded that the claimant had failed to “prove” his homosexuality and dismissed the claimant’s appeal for these reasons: (1) none of the psychiatric expert reports submitted by the claimant contained a “diagnosis” of homosexuality; (2) the claimant did not dress, speak or act like a homosexual man; and (3) the claimant did not consent to or enjoy being raped by other men, with the implication that gay men must enjoy all sexual acts with other men regardless of whether the acts were consensual¹⁶.

Despite repeated calls from civil society, TCAB/NRCPO decisions are not published in contrast to other common law jurisdictions, such as the UK¹⁷, Canada¹⁸ and Australia¹⁹. Moreover, TCAB/ NRCPO hearings are convened in private. These arrangements make it challenging to monitor the decision-making of adjudicators, and limits the system’s transparency and accountability.

1.5 Lack of procedural safeguards

We encourage the Government to elaborate on whether decision makers are provided with procedural guidance or directions to assist them in making USM decisions.

We are concerned that there is an overall lack of training, resources and guidance for decision makers on the adjudication of USM claims.

People seeking protection who have suffered torture, CIDTP and other forms of human rights violations may be too traumatised to articulate their experiences and require special measures to assist them through the asylum process to ensure fairness²⁰. Regrettably, as far as we are aware there is no practical guidance on how people at heightened vulnerabilities or other special needs, such as survivors of torture and children, should be approached during interview or at appeal hearings.

The only form of procedural guidance available is the TCAB’s *Principles, Procedures and Practice Direction of the Torture Claims Appeal Board* and the NRCPO’s *Practice and Procedure Guide for the Administrative Non-refoulement Claims Petition Scheme*, which provide that claimants should indicate their special needs in their Notice of Appeal or Petition,

¹⁵ Ibid at [7]

¹⁶ Kelly Ho, “Hong Kong’s ‘bigoted, discriminatory’ LGBT refugee decision shows gov’t bill to speed up court cases won’t fix surge of legal challenges, NGO says” *Hong Kong Free Press* (22 October 2020). Available at: <https://hongkongfp.com/2020/10/22/hong-kongs-bigoted-discriminatory-lgbt-refugee-decision-shows-govt-bill-to-speed-up-court-cases-wont-fix-surge-of-legal-challenges-ngo-says/>

¹⁷ See the UK Government, “Immigration and asylum tribunal appeal decisions”. Available at: <https://www.gov.uk/immigration-asylum-appeal-decisions>

¹⁸ See Immigration and Refugee Board of Canada, “Decisions”. Available at: <https://irb-cisr.gc.ca/en/decisions/Pages/index.aspx>

¹⁹ See Australasian Legal Information Institute, “Refugee Review Tribunal of Australia”. Available at: <http://www6.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/RRTA/>

²⁰ See for example, UNHCR, Guidelines on International Protection No.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (7 May 2002).

and that the appeal board “will take steps to accommodate such special needs as far as practicable”²¹.

The lack of policy and practical guidance on vulnerable claimants significantly hampers the fairness of the USM. For example, we have assisted claimants who were re-traumatised by the USM process, including a woman who was aggressively questioned by the Government’s lawyers about her SGBV experiences at her TCAB hearing, and a child with a severe psychological condition who was made to testify at her family’s TCAB hearing despite the family’s requests that the experience would be harmful to her. Subsequent to the hearing the child’s mental health deteriorated and she attempted suicide.

1.6 Medico-legal evidence/ training on Istanbul Protocol

The lack of funding from the Duty Lawyer Service means that claimants often have no means of procuring an independent medical report, including psychiatric reports, scarring reports and general medical reports. We also note that very few lawyers, decision makers and health care professionals are trained on the Istanbul Protocol.

1.7 Rehabilitation services for torture victims

We encourage the Government to respond to the Committee’s concerns that potential victims of torture need to wait until their permission of stay has expired before they are eligible to be registered with the USM and gain access to rehabilitation and humanitarian assistance²².

The Government should also respond to the Committee’s recommendations that all individuals should have unhindered access to the USM regardless of immigration status, and that Hong Kong should develop mechanisms for early identification of torture victims and ensure their priority access to the USM and redress²³.

Section 37W(1) of the Immigration Ordinance provides: “A person may claim non-refoulement protection in Hong Kong only if the person is subject or liable to removal [...]”. In effect, this means protection claimants who entered Hong Kong with a valid visa must first overstay – hence become liable to removal – to be eligible to lodge non-refoulement claims. While people are waiting for their permission of stay to expire, they are unable to access the International Social Service (“ISS”)’s humanitarian assistance, including food, shelter, or medical care. Depending on the claimant’s national origin the permission to stay varies from 2 weeks to 3 months²⁴. Similarly, after filing a written signification, it could take several weeks for protection claimants to be registered at the ISS, during which they have no access to humanitarian assistance.

²¹ Security Bureau, “The Principles, Procedures and Practice Directions of the Torture Claims Appeal Board” (Sixth Edition, 28 August 2019) and “The Practice and Procedure Guide of the Administrative Non-refoulement Claims Petition Scheme” (Fifth Edition, 28 August 2019) at [24.1] and [30.1] respectively. Available at <https://www.sb.gov.hk/eng/links/tcab/index.htm>

²² 2016 Concluding Observations [6]

²³ 2016 Concluding Observations [6] and [7(a)], [7(b)]

²⁴ Immigration Department, “Visit Visa / Entry Permit Requirements for the Hong Kong Special Administrative Region”. Available at: <https://www.immd.gov.hk/eng/services/visas/visit-transit/visit-visa-entry-permit.html#notes>

Although some assistance is available via civil society organisations, many claimants experience hardships, including homelessness, during this period. Further, people's inability to access critical social welfare can be dangerously detrimental to their wellbeing. For instance, claimants with chronic diseases or medical complications are unable to access public health services unless they can pay for the charges as non-eligible persons²⁵; we have assisted protection claimants who were not able to access medication for epilepsy and HIV while they waited for their visas to expire or for their claims to be registered at the ISS.

1.8 Lack of durable solutions

We encourage the Government to address the Committee's concerns that Hong Kong's refusal to grant refugee status to substantiated claimants deny them access to legal work and compel them to live below the poverty line for long periods of time, which may constitute degrading treatment²⁶.

Non-refoulement claimants, including those with substantiated claims, are perpetually classified as illegal. This policy of enforced and perpetual illegality hinders non-refoulement claimants' access to an array of rights, such as access to medical services, access to education and an adequate standard of living. For details, see Refugee Concern Network, "Parallel report to the Committee on Economic Social and Cultural Rights complementing the fourth periodic report submitted by Hong Kong, China", December 2020²⁷.

With regard to the right to work, we appreciate that the number of permissions to work approved by the Immigration Department has increased steadily since 2014, from an approximately 20% approval rate in 2014 to 100% in 2020²⁸.

Despite these positive developments, the process of applying for permission to work remains onerous to refugees. Refugees are required to have a job offer from an employer before they are eligible to apply for permission, and it takes on average 3 - 4 weeks for the Immigration Department to process the permission. The permission to work is only granted for a six-month period, which means people need to reapply frequently. These requirements make hiring refugees a protracted and cumbersome process for employers. Moreover, the need to reapply for permission every six months and the time needed for processing the permission mean that some refugees may experience gaps between their contracts, during which they are not eligible for social welfare assistance from the ISS. This means refugees may go for several weeks without any income or support while they are waiting for their new contract to be processed.

1.9 Xenophobia and discrimination

We encourage the Government to provide information on steps taken to combat racism, discrimination and xenophobia against non-refoulement claimants.

²⁵ Hospital Authority, "Public Charges – non-eligible persons". Available at: https://www.ha.org.hk/haho/ho/cs/238767_en.pdf

²⁶ 2016 Concluding Observations [6], [7(d)]

²⁷ Available at: <https://www.justicecentre.org.hk/framework/uploads/2020/12/Refugee-Concern-Network-ICESCR-parallel-report.pdf>

²⁸ Secretary for Security, "LCQ9: Non-refoulement claims" (20 May 2020). Available at: <https://www.info.gov.hk/gia/general/202005/20/P2020052000659.htm> .

The Government’s categorisation of people seeking non-refoulement protection in Hong Kong as “illegal immigrants”, “overstayers” or “foreigners who smuggled themselves into Hong Kong” reinforce false constructions of refugees and asylum seekers as criminals. This categorisation is disingenuous, as pursuant to section 37W of the Immigration Ordinance, people seeking protection must overstay their visas – and henceforth become officially “illegal” – before they are eligible to lodge non-refoulement claims. Article 31 of the 1951 Convention Relating to the Status of Refugees also recognises that people seeking protection may have legitimate reasons to enter a territory unlawfully, and that they should not be criminalised if they present themselves without delay and show a good cause for their unlawful entry.

This language feeds into discrimination and xenophobia. Since 2015, civil society have observed the use of xenophobic terms such as “fake refugees”, “toxic tumours” and “Southeast Asian thieves” by the media and some politicians with increasing frequency²⁹. The Human Rights Committee³⁰, the Committee on the Rights of the Child³¹ and Special Mandate holders³² have all expressed concerns over discrimination and the use of negative and stigmatising rhetoric towards refugees, migrants and ethnic minorities in Hong Kong.

1.10 Proposals to amend the Immigration Ordinance

We encourage the Government to provide detail justifications for each of the proposals under the Immigration (Amendment) Bill 2020; in particular, the Government should comment on whether these proposals comply with Hong Kong’s obligations under UNCAT and other human rights treaties applicable to Hong Kong.

For our detailed comments on proposals under the Immigration (Amendment) Bill 2020, see Refugee Concern Network, “Submissions to the Bills Committee on Immigration (Amendment) Bill 2020, February 2021³³, attached as Annex 1.

We are also disappointed that the Government did not meaningfully engage with civil society and stakeholders, including non-refoulement claimants and immigration detainees, during the Bill’s consultative process. The Bills Committee on Immigration (Amendment) Bill 2020 repeatedly refused to convene a public hearing for members of the public to make oral representations on the Bill apparently due to Covid-19 concerns, and the Bills Committee also refused to entertain the possibility of convening virtual public hearings.

2. Article 6: Powers of detention

2.1 Lack of data transparency

²⁹ Isabella Ng, Sharice Fungyee Choi and Ales Lihshing Chan, “Framing the Issue of Asylum Seekers and Refugees for Tougher Refugee Policy—a Study of the Media’s Portrayal in Post-colonial Hong Kong”, *Journal of International Migration and Integration* 20, 593-617 (2019)

³⁰ E/C.12/CHN/CO/2 at [41]

³¹ CRC/C/CHN/CO/3-4 at [29] – [30]

³² Communication No. CHN 14/2016. Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=22905>

³³ Available at: <https://www.legco.gov.hk/yr20-21/english/bc/bc53/papers/bc53cb2-741-8-e.pdf>

We encourage the Government to provide yearly statistics on the immigration detainee population at all places of detention, disaggregated by the place of detention, sex, age, nationality and immigration status.

If this information is not maintained, the Government should provide justifications and elaborate on steps taken to maintain data on the detainee population.

The Immigration Department detains more than 10,000 individuals annually on average³⁴. Despite this high number, there is very little publicly available information about the detainee population, the duration of detention, and detention condition. The lack of information makes it incredibly difficult for civil society to monitor the prevalence of immigration detention. In this regard we would like to draw the Government's attention to Objective 1 of the UN Global Compact on Migration, which provides that the collection and utilization of accurate and disaggregated data is crucial to evidence-based policy-making and well-informed public discussions on migration issues³⁵.

2.2 Proposals to increase the use of immigration detention

We encourage the Government to provide justifications for (1) plans to detain more non-refoulement claimants at the newly renovated Tai Tam Gap Correctional Institute³⁶, and (2) proposals under the Immigration (Amendment) Bill 2020 which would expand the Authorities' power to detain people under Section 32 and Section 37ZK of the Immigration Ordinance³⁷.

The Government should explain how these proposals comply with the common law *Hardial Singh* principle³⁸.

³⁴ Immigration Department, "Appendix 13 – Enforcement Branch Statistics", Annual Report 2018. Available at: https://www.immd.gov.hk/publications/a_report_2018/en/appendices-13.html

³⁵ Global Compact for Migration, "Global Compact for Safe, Orderly and Regular Migration – Intergovernmentally Negotiated and Agreed Outcome" (13 July 2018). Available at: https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf

³⁶ Mandy Zheng "Tai Tam prison to reopen for asylum seekers" *The Standard* (20 January 2021). Available at: <https://www.thestandard.com.hk/section-news/section/4/226731/Tai-Tam-prison-to-reopen-for-asylum-seekers>

³⁷ Clauses 5 and 16

³⁸ See *Ghulam Rbani v Secretary for Justice for and on behalf of The Director of Immigration* (2014) 17 HKCFAR 138. The *Hardial Singh* principles provides the following:

- (i) The Director of Immigration must intend to deport the pers. on and can only use the power to detain for that purpose;
- (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
- (iii) If before the expiry of the reasonable period, it becomes apparent that the Director of Immigration will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
- (iv) The Director of Immigration of State should act with the reasonable diligence and expedition to effect removal.

Further, the Government should justify how these proposals comply with the established international human rights principle that immigration detention must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose³⁹.

Proposals under the Immigration (Amendment) Bill 2020 allow the following factors to be taken into account when deciding whether the period of detention is reasonable and lawful:

- (a) The number of other persons pending removal from Hong Kong or final determination of their USM claims
- (b) Manpower and financial resources allocated to the removal of persons from Hong Kong or determination of USM claims
- (c) Whether the person's removal or the determination of their USM claims is directly or indirectly prevented by the person's actions or lack of actions
- (d) Other factors that directly or indirectly prevent or delay the persons' removal or the determination of their USM claims not within the Immigration Department's control, including the time required for the issue of travel authorizations
- (e) The extent to which it is possible to make arrangements to effect the person's removal
- (f) Whether the person poses, or is likely to pose, a threat or security risk to the community

There are already broad discretionary powers to detain under the Immigration Ordinance (Cap. 115). We are concerned that these proposals are not compliant with the *Hardial Singh* principle and may result in arbitrary and unlawful detention. Considerations such as administrative and bureaucratic inefficiency, factors beyond the Immigration Department's control or factors beyond the detainee's control are not matters that can provide cogent justification for immigration detention.

2.3 Lack of safeguards afforded to immigration detainees

We encourage the Government to provide details on the following:

(1) Existing screening mechanisms to determine whether an individual is suitable for immigration detention.

We are concerned that no effective screening or assessment on suitability for detention is currently being performed, and as a result survivors of torture and/or CIDTP and other people with vulnerabilities, such as mental ill health, are routinely being detained.

Justice Centre estimates that about 60% of our clients who were detained during their non-refoulement claims were survivors of torture and/or CIDTP, and as such should not have been detained in the first place.

³⁹ Human Rights Council, Report of the Working Group on Arbitrary Detention (2 July 2018) at [12]. Available at: <https://undocs.org/A/HRC/39/45>.

Period of detention	No. of Justice Centre service users detained since 2018	No. of detained service users who are survivors of torture and/or CIDTP
1-30 days	27	11
31-50 days	16	11
More than 51 days	21	17
Unspecified period	7	3
Total	71	42

Table 4: Number of Justice Centre service users detained since 2018⁴⁰.

(2) Existing mechanisms to ensure detainees are not detained unlawfully and/or arbitrarily.

The Immigration Department’s policy for detention merely states that: “Detention will be kept under regular review and will be reviewed when there is a material change of circumstance”⁴¹, but we are concerned this exercise is insufficient to guarantee the rights of detainees are protected. Apart from this internal review process there are no additional procedural safeguards, such as a bail application process or an independent review mechanism, to review the cases of immigration detainees. Limited judicial oversight is available via *habeas corpus*, but to our knowledge there has been no successful application in the immigration context.

(3) Interpretations services provided to individuals arrested and/or detained by immigration officers.

Hong Kong’s previous report to the Committee states that “[t]he ImmD has been issuing the ‘Guidance to an arrested person on arrest and detention’ since January 2010 to help an arrested person understand the legal authority for his arrest and detention”⁴². However, there are reports that people arrested by immigration officers and/or immigration detainees are often not provided with interpretation services, and as a result these individuals often do not understand the reasons for their arrest, interrogation or detention. The Government should also respond to reports that arrestees and/or detainees with limited English or Chinese proficiency are instructed to sign documents by immigration officers without the assistance of interpreters.

(4) Yearly statistics on the number of unlawful detention claims brought by former immigration detainees against the Immigration Department, and the outcome of these claims.

⁴⁰ This set of statistics only includes service users who have been screened in by Justice Centre for individualised assistance and as such could slightly underrepresent the situation.

⁴¹ Immigration Department, “Policy for detention pending final determination of the claimant’s torture claim”. Available at: https://www.immd.gov.hk/pdf/Detention_policy_en.pdf and Immigration Department, “Detention Policy”. Available at: <https://www.sb.gov.hk/eng/special/pdfs/Detention%20policy-e.pdf>

⁴² Para 6.2

Statistics provided by the Department of Justice reveals that 731 unlawful detention claims were brought against the Immigration Department and settled out of court in the last 5 years⁴³. While we accept that settlement does not imply liability, this volume of settled unlawful detention cases is highly suggestive of systematic issues within Hong Kong’s immigration detention regime.

3. Article 11: Review of interrogation rules, instructions, methods and practices for custody and treatment of persons arrested or detained

3.1 Data on strip search, body cavity search and solitary confinement

We encourage the Government to provide statistics on the following:

- (1) Yearly statistics on the number of strip search performed on immigration detainees, disaggregated by the detainee’s sex, the detainee’s age, location of search, justification(s) for conducting the search, the type of search (e.g. lifting of underwear, partial removal of underwear, complete removal of clothing, and other categories as appropriate), the number of complaints submitted related to such searches and the outcome of such complaints**
- (2) Yearly statistics on the number of body cavity search performed on immigration detainees, disaggregated by the detainee’s sex, the detainee’s age, location of search, justification(s) for conducting the search, the type of search (e.g. intrusion of the rectum, vagina and other categories as appropriate), the number of complaints submitted related to such searches and the outcome of such complaints**
- (3) Yearly statistics on the number of immigration detainees held in solitary confinement, disaggregated by the detainee’s sex, the detainee’s age, the location of detention, the period of solitary confinement (1 – 7 days), justification(s) for solitary confinement, the number of complaints submitted related to such searches and the outcome of such complaints**

There are alarming reports of human rights violations at immigration detention centres, including the Castle Peak Bay Immigration Detention Centre (“CIC”). Allegations made by former detainees include excessive use of force, verbal abuse, the punitive use of prolonged periods of solitary confinement and the degrading use of strip search⁴⁴. Whilst the Government

⁴³ “CIC detainees kept naked in detention & received only diapers. Lawyers suspect torture. (青山灣有羈留者須赤裸僅獲尿片如廁 律師質疑屬酷刑)”, *RTHK News*, 14 December 2020. Available at: <https://news.rthk.hk/rthk/ch/component/k2/1565171-20201214.htm>.

⁴⁴ “Subdued during strip-search and medications withheld: CIC detainees allege abuse (遭赤裸制服、被拒提供藥物青山灣中心羈留人士控訴受虐)”, *Stand News*, 8 June 2020. Available at: <https://www.thestandnews.com/society/遭赤裸制服-被拒提供藥物-青山灣中心羈留人士控訴受虐/>; “CIC detainees allege inhuman treatment. Concern group accuses Immigration of distorting facts, suppressing the fourth estate CIC (羈留人士稱被不人道對待 關注組斥入境處歪曲事實、打壓第四權)”, *Independent Media*, 19 August 2020. Available at: <https://www.inmediahk.net/node/1076597>

states that the Immigration Department does not perform body cavity searches, our service users maintain that they were subjected to multiple cavity searches when they land in Hong Kong⁴⁵. In light of these serious allegations, which may amount to CIDTP and/or torture⁴⁶, the Government should provide relevant statistics to the Committee; if such information is not maintained, the Government should provide justifications and elaborate on steps taken to maintain relevant data.

3.2 Internal guidelines for immigration officers

We also encourage the Government to specify whether immigration officers are provided with internal guidelines on (1) use of force, including whether immigration officers are instructed to prioritise preventive, defusing and non-violent conflict management strategies; (2) use of body searches, including cavity search and strip search; and (3) use of solitary confinement, in addition to the Immigration (Treatment of Detainees) Order (Cap. 115E) and the Immigration Service (Treatment of Detained Persons) Order (Cap. 331C).

Hong Kong's previous report to the Committee states that internal guidelines are issued for body search, but the content of these guidelines are not available to the public and it is not possible to ascertain whether these guidelines are adequate⁴⁷. There is limited information on whether immigration officers are provided with internal guidelines on use of force or the use of solitary confinement. While the Immigration (Treatment of Detainees) Order (Cap. 115E) and the Immigration Service (Treatment of Detained Persons) Order (Cap. 331C) contain provisions on searches and solitary confinement, they do not specify circumstances under which immigration officers may deploy force or arms in dealing with immigration detainees⁴⁸.

3.3 Proposals to allow immigration to more readily bear arms

Given unresolved allegations of rights violations and concerns about the effectiveness of existing complaints and monitoring mechanisms discussed below, we invite the Government to justify the need to amend the Weapons Ordinance (Cap. 217) and the Firearms and Ammunition Ordinance (Cap. 238) under the Immigration (Amendment) Bill 2020 to allow immigration officers, including those stationed at detention centres, to routinely carry firearms and offensive weapons.

Statistics provided by the Immigration Department suggests that the security situation at the CIC remained relatively stable since 2010: there are on average 22 cases of physical confrontations at the CIC per year, the majority of which are detainees-on-detainees assaults which account for 21 cases per year on average. In terms of the type of force used, immigration officers mostly rely on empty-hand control and pepper sprays (deployed in 2011 and 2016-

⁴⁵ Reply to CAT LoI at [18.3] JCHK CEDAW Report, p.3

⁴⁶ For example, in the case of *Abid Saeed v Secretary for Justice and Others* [2015] 1 HKLRD 1030, the court ruled that repeated and unnecessary strip searches performed on the detainee amounted to cruel, inhuman or degrading treatment contrary to Article 3 of the Hong Kong Bill of Rights Ordinance (Cap. 383): at [255]

⁴⁷ At [11.13], [11.14]

⁴⁸ In contrast, Rules 237 – 238 of the Prison Rules (Cap. 234A) stipulates situations under which force or arms may be used by correctional services officers.

2020); importantly, officers have never deployed the 37-mm single shot launcher. It appears that in the past 10 years, immigration officers managed to police the CIC with their existing weaponry, which in our opinion casts doubt on the need to allow officers to more readily bear arms and weapons. We are concerned that proposals to militarise the immigration services will result in more human rights violations.

Year	No. of physical confrontations			Types of force used (Deployed “Y”/ Not deployed “N”)			No. of injuries
	Detainee-on-detainee assault	Detainee-on-staff assault	Total no. of physical confrontations	Empty-hand control	Use of pepper spray	Use of 37-mm single shot launcher	No. of ImmD staff injured
2010 (since 15 April)	11	3	14	Y	N	N	/
2011	24	3	27	Y	Y	N	/
2012	23	1	24	Y	N	N	/
2013	19	2	21	Y	N	N	0
2014	15	0	15	Y	N	N	0
2015	26	0	26	Y	N	N	1
2016	37	1	38	Y	Y	N	5
2017	24	0	24	Y	Y	N	0
2018	14	1	15	Y	Y	N	/
2019	13	1	14	Y	Y	N	/
2020	25	0	25	Y	Y	N	6

Table 5: Physical confrontation and use of force at the CIC 2010 – 2020⁴⁹

3.4 Covid-19 measures at places of detention

We encourage the Government to provide details on measures taken to prevent the spread of Covid-19 at immigration detention centres and the number of detainees who tested positive for Covid-19.

⁴⁹ Immigration Department, “Physical confrontations and use of force at CIC” (11 February 2021). Available at: https://accessinfo.hk/en/request/physical_confrontation_and_use_of_force_at_cic; Security Bureau, “LCQ19: Handling of non-refoulement claims” (7 February 2018). Available at: <https://www.info.gov.hk/gia/general/201802/07/P2018020700716p.htm> Bills Committee on Immigration (Amendment) Bill 2020, “Minutes of first meeting held on Wednesday, 20 January 2021, at 9:00 am in Conference Room 3 of the Legislative Council Complex” (23 February 2021). Available at: <https://www.legco.gov.hk/yr20-21/english/bc/bc53/minutes/bc5320210120.pdf> The number of immigration staff injured in 2010, 2011, 2012, 2018 and 2019 is subject to clarifications from the Immigration Department.

We are concerned that the hygiene situation at detention centres is poor, that it is not possible for detainees to practice social distancing due to overcrowding, and that detainees have limited access to hygiene products such as facemasks, soaps and sanitizers⁵⁰.

4. Article 13: Right of Complaint

4.1 Detainees' access to information about their right of complaint

We encourage the Government to provide details on how immigration detainees can access information about their right of complaint, and whether interpretation services are provided to immigration detainees with little or no English or Chinese proficiency.

We note that the “Notice to Persons Detained” which must be displayed prominently at places of detention makes no mention of how to make a complaint⁵¹. Further, as stated above, there are reports that immigration detainees are often not provided with interpretation services, and as a result have limited understanding of their situation or access to information.

4.2 Statistics and information about the existing complaints mechanism

We encourage the Government to provide yearly statistics on the number of complaints made against the Immigration Department, disaggregated by the nature of the complaint (e.g. excessive use of force, verbal abuse, strip search, cavity search, unlawful detention and other categories as appropriate) and the outcome of the complaint.

We encourage the Government to respond to the Committee's comments and recommendations that Hong Kong failed to provide information on existing monitoring mechanisms within immigration detention facilities, and that Hong Kong should establish an independent body to carry out effective unannounced visits at all places of detention⁵².

We are concerned that the existing complaints mechanism is not effective to safeguard the rights of detainees. Section 15 of the Immigration (Treatment of Detainees) Order (Cap. 115E) provides that a detainee may complain to the Superintendent or other officers authorized to receive complaints, who shall investigate that complaint; and Section 13 of the Immigration Service (Treatment of Detained Persons) Order (Cap 331C) provides that complaints made by a detainee shall be brought to the attention of an officer not below the rank of Assistant Principal Immigration Officer. This arrangement casts serious doubts on the impartiality and

⁵⁰ Anna Tsui, “Organising for change: how we supported covid-19-stuck and hunger striking detainees in Hong Kong” *COVID-19 impacts on immigration detention: global responses* at p.24. Available at: <https://idcoalition.org/wp-content/uploads/2020/10/COVID-19-Impacts-on-Immigration-Detention-Global-Responses-2020.pdf#page=24> and Westbrook, Laura, “Coronavirus: Hong Kong lawyers, lawmakers flag hygiene issues at detention centre, but Immigration says health measures in place” *South China Morning Post*, 16 April 2020. Available at: <https://www.scmp.com/news/hong-kong/health-environment/article/3081544/coronavirus-hong-kong-lawyers-lawmakers-flag>

⁵¹ See Section 17, Immigration (Treatment of Detainees) Order

⁵² 2016 Concluding Observations, [16] – [17]

effectiveness of the complaint mechanism. There is no guarantee that complaints made by detainees are confidential, and in any event, the imbalance of power between detainees and immigration officers means that detainees are unlikely to make complaints for fear of retaliation.

Statistics from 2010 – 2020 adds weight to concerns about the complaints mechanism’s ineffectiveness. In the last 10 years, the Immigration Department detained more than 10,000 individuals annually, yet the number of complaints relating to immigration detention is extremely low relative to the detainee population. Most importantly, none of the complaints received in this period were substantiated.

Year	No. of individuals detained by ImmD	No. of complaints relating to detention	No. of substantiated complaints
2010	11,705	0	0
2011	9782	1	0
2012	9791	4	0
2013	10,123	1	0
2014	10,045	0	0
2015	10,097	4	0
2016	10,749	10	0
2017	10,948	18	0
2018	11,510	6	0
2019	n/a	14	0
2020 (as at 15 Nov)	n/a	23	0

Table 6: The number of complaints received by the Immigration Department relating to immigration detention from 2010 - 2020⁵³

Likewise, visits conducted by Justices of the Peace (“JP”) are not effective as a monitoring mechanism. Legislators and civil society organisations have long noted that visits conducted by JPs at places of detention were not unannounced, and detainees often refrained from lodging

⁵³ Immigration Department, “Immigration Department Complaint Mechanism“ (November, 2020). Available at https://accessinfo.hk/en/request/immigration_department_complaint#incoming-1499 ; Immigration Department, “Appendix 13 - Enforcement and Removal Assessment Branch Statistics“ (2015). Available at https://www.immd.gov.hk/publications/a_report_2015/en/appendices-13.html ; Immigration Department, ”Appendix 13 - Enforcement and Removal Assessment Branch Statistics” (2012). Available at https://www.immd.gov.hk/publications/a_report_2012/en/appendice/appendices-13.htm

complaints to JPs for fear of reprisals⁵⁴. There is also no established mechanism for civil society organisations to regularly access detention facilities to monitor the situation⁵⁵.

⁵⁴Cheng Tsing-yi 鄭靖而, “JP visits not unannounced, organisations ask for review of prisons complaints mechanism 太平紳士巡倉非突擊 團體促檢討監獄投訴機制”, Citizen News (8 March 2019). Available at: https://www.hkcnews.com/article/18939/懲教署-囚權-立法_會-18939/太平紳士巡倉非突擊-團體促檢討監獄投訴機制

⁵⁵ For best practice on this, see UNHCR, “Monitoring Immigration Detention: Practical Manual” (June 2015) Available at: <https://idcoalition.org/wp-content/uploads/2015/06/Monitoring-Immigration-Detention-Practical-Manual.pdf>



Submissions to the Bills Committee on Immigration (Amendment) Bill 2020
Refugee Concern Network
February 2021

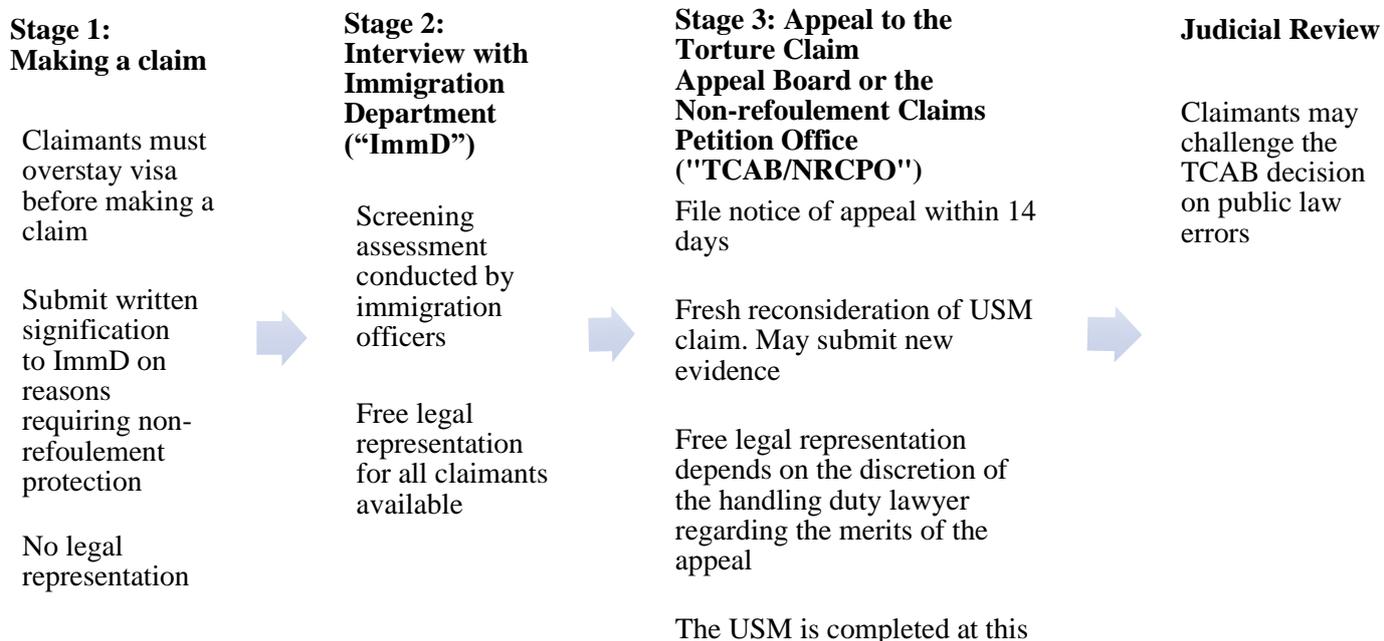
The Refugee Concern Network appreciates this opportunity to provide submissions to the Bills Committee on Immigration (Amendment) Bill 2020 (“the Bills Committee”). Part 1 of this submission details our concerns with the Immigration (Amendment) Bill 2020 (“the IO Bill”).

We are disappointed that the Bills Committee refused to convene a public hearing due to Covid-19. It is important that people who are directly affected by the IO Bill – refugees, asylum seekers and immigration detainees – are represented and heard in this debate. Part 2 of this submission is therefore a collection of oral testimonies from this community about their lived experiences of seeking non-refoulement protection in Hong Kong, as well as their views on the proposals under the IO Bill.

Part 1: Submissions on the IO Bill

1. The Unified Screening Mechanism (“USM”)

To provide context, we briefly outline the USM below:



2. Proposals relating to immigration detention

We are alarmed by proposals under the IO Bill to expand powers to detain people and allow immigration officers to routinely carry weapons and arms. In a recent blog post, the Secretary for Security John Lee stated that the Government plans to utilise the newly renovated Tai Tam Gap Correctional Institute to detain more non-refoulement claimants⁵⁶.

It is unclear what purpose these proposals serve. Expanding powers to detain more people clearly goes against the established principle of international human rights law that immigration detention must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose⁵⁷. Moreover, international examples demonstrate that immigration detention comes with great financial and human costs⁵⁸.

The existing detention regime already suffers from an array of unresolved issues, including allegations of rights violations, lack of transparency, lack of adequate procedural safeguards, lack of any effective complaints and monitoring mechanism and substandard conditions of detention. Various judicial review challenges as well as civil claims for unlawful detention have been brought by detainees, and expanding powers to detain without addressing these issues only risk creating more potential legal actions against the authorities.

2.1 Clause 5 and 16: Expanding powers of detention

Proposed amendments to Section 32 (p.C959) and Section 37ZK (p.C975) of the Immigration Ordinance (“IO”) allow the following factors to be taken into account when deciding whether the period of detention is reasonable and lawful:

- (g) The number of other persons pending removal from Hong Kong or final determination of their USM claims
- (h) Manpower and financial resources allocated to the removal of persons from Hong Kong or determination of USM claims
- (i) Whether the person’s removal or the determination of their USM claims is directly or indirectly prevented by the person’s actions or lack of actions
- (j) Other factors that directly or indirectly prevent or delay the persons’ removal or the determination of their USM claims not within the ImmD’s control
- (k) The extent to which it is possible to make arrangements to effect the person’s removal

These proposals are incompatible with the common law *Hardial Singh* principle, which has been accepted by Hong Kong Courts, most notably by the Court of Final Appeal (“CFA”) in *Ghulam Rbani v Secretary for Justice for and on behalf of The Director of Immigration*⁵⁹. The *Hardial Singh* principles

⁵⁶ “修例強化免遣返聲請措施 增大潭峽懲教所作羈留設施 (Chinese only)” (19 January 2021). Available at: https://www.sb.gov.hk/chi/articles/articles_2021_01_19.html.

⁵⁷ Human Rights Council, Report of the Working Group on Arbitrary Detention (2 July 2018) at [12]. Available at: <https://undocs.org/A/HRC/39/45>.

⁵⁸ See for example, National Immigration Forum, “The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply” (9 May 2018). Available at: <https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-multiply/> and Asylum Seeker Resource Centre, Save the Children and GetUp, “At what cost? The human and economic cost of Australia’s offshore detention policies 2019”. Available at: <https://asrc.org.au/wp-content/uploads/2013/04/1912-At-What-Cost-report.pdf>

⁵⁹ *Ghulam Rbani v Secretary for Justice for and on behalf of The Director of Immigration* (2014) 17 HKCFAR 138. The *Hardial Singh* principles provides the following:

provides that given the fundamental importance of the right to liberty any interference by way of immigration detention is only justifiable for a **reasonable** period for the purpose of deportation, and the authorities must act with **reasonable diligence and expedition** to effect removal. Justifying prolonged detention on the basis of administrative and bureaucratic inefficiency, or factors beyond the authorities or the person concerned’s control, is thus potentially arbitrary and unlawful.

Further, under the existing statutory regime the Immigration Department already has broad powers to detain. There are limited procedural safeguards, such as a bail application process or an independent review mechanism, to review the cases of immigration detainees. The Immigration Department’s policy for detention provides: “Detention will be kept under regular review and will be reviewed when there is a material change of circumstance”⁶⁰, but in our experience this is insufficient to guarantee the rights of detainees are protected.

Limited judicial oversight is available via *habeas corpus*, but to our knowledge there has been no successful application in the immigration context. This is due to not least the fact that detainees have limited access to legal advice and representation. Statistics from 2009 – 2019 show that the number of legal aid applications (“LA”) made relating to *habeas corpus* applications were few and far between, and since 2017 all applications were refused.

Year	No. of LA applications	No. of LA granted	No. of LA refused
2009	0	0	0
2010	0	0	0
2011	0	0	0
2012	0	0	0
2013	0	0	0
2014	0	0	0
2015	4	4	0
2016	0	0	0
2017	2	0	2
2018	1	0	1
2019	3	0	3

Table 1: The number of legal aid applications relating to *habeas corpus* applications granted and refused in the period 2009 - 2019⁶¹

-
- (v) The Director of Immigration must intend to deport the pers. on and can only use the power to detain for that purpose;
 - (vi) The deportee may only be detained for a period that is reasonable in all the circumstances;
 - (vii) If before the expiry of the reasonable period, it becomes apparent that the Director of Immigration will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
 - (viii) The Director of Immigration of State should act with the reasonable diligence and expedition to effect removal.

⁶⁰ Immigration Department, “Policy for detention pending final determination of the claimant’s torture claim”. Available at: https://www.immd.gov.hk/pdf/Detention_policy_en.pdf

⁶¹ Email exchange between Justice Centre Hong Kong staff and the Department of Legal Aid under the Access to Information Code (14 August 2020). Note that these applications refer to all applications of *habeas corpus*, including for example in criminal law contexts, and are not solely related to immigration detention. The Legal Aid Department advised that they do not maintain statistics on *habeas corpus* applications made by persons detained under the Immigration Ordinance.

In the past 5 years, 731 unlawful detention claims were brought against the Immigration Department, all of which were settled out of court⁶². While we accept that settlement does not imply liability, this volume of settled unlawful detention cases is highly suggestive of systematic issues within Hong Kong's immigration detention regime.

2.2 Clause 27 -28: Allowing immigration officers to carry arms and weapons

The proposed amendments to the Weapons Ordinance (Cap.217) and Firearms and Ammunition Ordinance (Cap. 238) allow immigration officers, including those stationed at immigration detention centres, to routinely carry firearms and offensive weapons.

2.2.1 Existing concerns about rights violations

There are already alarming reports of human rights violations at immigration detention centres, including the Castle Peak Bay Immigration Detention Centre (CIC). Allegations made by former detainees include excessive use of force, the punitive use of solitary confinement and the degrading use of strip search⁶³.

These allegations are independently verified by the courts. For instance, in *Abid Saeed v Secretary for Justice and Others*⁶⁴, which is a successful civil action brought by a Pakistani asylum seeker against the Immigration Department and the Commissioner of Police for unlawful detention, handcuffing and strip searches, the District Court found that the repeated strip searches of the plaintiff when he was being transferred between the CIC and various police stations were unnecessary and unlawful. The Court further ruled that the repeated strip searches violated the plaintiff's constitutional rights, including the right not to be subject to cruel, inhuman or degrading treatment contrary to Article 3 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO")⁶⁵:

" 244. In my view, the repeated strip searches done on the plaintiff would amount to degrading and inhumane treatments. I agree that the repeated taking off his clothes in front of others was not only undignified, it amounts to a mental torture to the plaintiff. I find in particular the incident at the Yuen Long Police Station was distasteful in which the plaintiff was required to take off all his clothes (including underwear) at the same time as 10 other detainees and were searched by standing stark naked in a straight line together."

The risk of violations and abuse is further exacerbated by the lack of any effective complaints or monitoring mechanism. Complaints against members of the Immigration Department are investigated internally by the Department. Section 15 of the Immigration (Treatment of Detainees) Order (Cap. 115E) provides that a detainee may complain to the Superintendent or other officers authorized to receive complaints, who shall investigate that complaint; and Section 13 of the Immigration Service (Treatment of Detained Persons) Order (Cap 331C) provides that complaints made by a detainee shall be brought

⁶² "CIC detainees kept naked in detention & received only diapers. Lawyers suspect torture. (青山灣有羈留者須赤裸僅獲尿片如廁 律師質疑屬酷刑)", *RTHK News*, 14 December 2020. Available at: <https://news.rthk.hk/rthk/ch/component/k2/1565171-20201214.htm>.

⁶³ "Subdued during strip-search and medications withheld: CIC detainees allege abuse (遭赤裸制服、被拒提供藥物青山灣中心羈留人士控訴受虐)", *Stand News*, 8 June 2020. Available at:

<https://www.thestandnews.com/society/遭赤裸制服-被拒提供藥物-青山灣中心羈留人士控訴受虐/>; "CIC detainees allege inhuman treatment. Concern group accuses Immigration of distorting facts, suppressing the fourth estate CIC (羈留人士稱被不人道對待 關注組斥入境處歪曲事實、打壓第四權)", *Independent Media*, 19 August 2020. Available at: <https://www.inmediahk.net/node/1076597>

⁶⁴ *Abid Saeed v Secretary for Justice* [2015] 1 HKLRD 1030

⁶⁵ [255]

to the attention of an officer not below the rank of Assistant Principal Immigration Officer. This arrangement casts serious doubts on the impartiality and effectiveness of the complaint mechanism. There is no guarantee that complaints made by detainees are confidential, and in any event, the imbalance of power between detainees and immigration officers means that detainees are unlikely to make complaints for fear of retaliation. Further, detainees may not be aware of this channel for complaint, as the “Notice to detainees”, which must be displayed prominently at places of detention, makes no mention of how to make a complaint⁶⁶. Added to this is the lack of interpretation services at detention centres, which means detainees with limited or no English or Chinese proficiency often have limited access to information.

Statistics from 2010 – 2020 adds weight to concerns about the complaints mechanism’s ineffectiveness. In the last 10 years, the Immigration Department detained more than 10,000 individuals annually, yet the number of complaints relating to immigration detention is extremely low relative to the detainee population. Most importantly, none of the complaints received in this period were substantiated.

Year	No. of individuals detained by ImmD	No. of complaints relating to detention	No. of substantiated complaints
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2017	10,948	18	0
2018	11,510	6	0
2019	n/a	14	0
2020 (as at 15 Nov)	n/a	23	0

Table 2: The number of complaints received by the Immigration Department relating to immigration detention from 2010 - 2020⁶⁷

Likewise, visits conducted by Justices of the Peace (“JP”) are not effective as a monitoring mechanism. Legislators and civil society organisations have long noted that visits conducted by JPs at places of detention were not unannounced, and detainees often refrained from lodging complaints to JPs for fear

⁶⁶ See Section 17, Immigration (Treatment of Detainees) Order

⁶⁷ Immigration Department, “Immigration Department Complaint Mechanism“ (November, 2020). Available at https://accessinfo.hk/en/request/immigration_department_complaint#incoming-1499 ; Immigration Department, “Appendix 13 - Enforcement and Removal Assessment Branch Statistics“ (2015). Available at https://www.immd.gov.hk/publications/a_report_2015/en/appendices-13.html ; Immigration Department, ”Appendix 13 - Enforcement and Removal Assessment Branch Statistics” (2012). Available at https://www.immd.gov.hk/publications/a_report_2012/en/appendice/appendices-13.htm

of reprisals⁶⁸. There is also no established mechanism for civil society organisations to regularly access detention facilities to monitor the situation⁶⁹.

2.2.2 Weapons effect

In light of these existing issues, we are concerned that allowing officers to routinely carry firearms and offensive weapons will only increase the risk of conflict, disproportional use of force and other forms of rights violations.

Research in policing suggest that the presence of weapons trigger the “weapons effect”, whereby the sight of weapons increases people’s aggressive response to police officers, who in turn respond more aggressively to challenging situations, leading to overall hostilities in police-public interactions⁷⁰. A 2018 study conducted jointly by the University of Cambridge and the City of London Police found that police officers armed with tasers used force 48% more often, and even unarmed officers accompanying armed officers on shifts experience a “contagion effect” and used force 19% more often. The study also found that officers carrying weaponry are twice as likely to be assaulted⁷¹.

A similar observation in the context of immigration enforcement was made by Reg Williams, the former Director of Immigration Enforcement in Toronto, Canada, who noted that the policy to arm border service agents puts emphasis on the use of force and firearms, rather than softer skills sets such as interviewing and counselling which are crucial to immigration cases⁷². He commented:

“[W]ith the issuance of firearms, it comes down to a show of force rather than interviewing and counseling. The dynamic has changed significantly. I would argue this has impacted the mindset of the officer in how clients are treated and in their attitude towards clients.”

This body of research and international experience suggest that allowing immigration officers to routinely carry arms and weapons does not make detention environments safer. Rather, priorities should be given to preventive, defusing and non-violent conflict management strategies consistent with

⁶⁸Cheng Tsing-yi 鄭靖而, “JP visits not unannounced, organisations ask for review of prisons complaints mechanism 太平紳士巡倉非突擊 團體促檢討監獄投訴機制”, Citizen News (8 March 2019). Available at: https://www.hknews.com/article/18939/懲教署-囚權-立法_會-18939/太平紳士巡倉非突擊-團體促檢討監獄投訴機制

⁶⁹ For best practice on this, see UNHCR, “Monitoring Immigration Detention: Practical Manual” (June 2015) Available at: <https://idcoalition.org/wp-content/uploads/2015/06/Monitoring-Immigration-Detention-Practical-Manual.pdf>

⁷⁰ See for example Waka, T. H., “Cops with guns will make us less safe“, Newsroom (24 October 2019). Available at: <https://www.newsroom.co.nz/@ideasroom/2019/10/24/874930/cops-with-guns-will-make-us-less-safe> and Yuhas, A. “Mere sight of a gun makes police and public - more aggressive, experts say“, The Guardian (5 Aug 2015). Available at: <https://www.theguardian.com/us-news/2015/aug/05/gun-police-public-more-aggressive-psychology-weapons-effect>

⁷¹ The University of Cambridge, “Carrying Tasers increases police use of force, study finds“ (20 December 2018). Available at: <https://www.cam.ac.uk/research/news/carrying-tasers-increases-police-use-of-force-study-finds>

⁷² University of Toronto Faculty of Law, “We have no rights: Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada” (2015). Available at: https://ihrp.law.utoronto.ca/We_Have_No_Rights p. 49-50

international best practice. The 2015 *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*⁷³ provides:

Rule 38: “Prison administrations are encouraged to use, to the extent possible, conflict prevention, mediation or any other alternative dispute resolution mechanism to prevent disciplinary offences or to resolve conflicts”

Rule 82 (3): “Except in special circumstances, prison staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, prison staff should in no circumstances be provided with arms unless they have been trained in their use”

Given immigration detention is administrative, not criminal or penal, in nature, a higher standard than the Nelson Mandela Rules should in fact be applied. The UN Human Rights Committee’s General Comment No. 35 provides: “Any necessary [immigration] detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons.”⁷⁴

2.2.3 Lack of guidelines for use of force on immigration detainees

We further note that there are no publicly available guidelines for the Immigration Service stipulating issues such as the circumstances under which appropriate force may be or shall be used, the types of force to be applied and the follow-up actions to be carried out after application of such force. The Immigration (Treatment of Detainees) Order (Cap. 115E) and the Immigration Service (Treatment of Detained Persons) Order (Cap. 331C) contain no provisions on the use of force or arms by immigration officers in dealing with immigration detainees. In contrast, Rules 237 – 238 of the Prison Rules (Cap. 234A) stipulates situations under which force or arms may be used by correctional services officers.

It would be rash to allow immigration officers to routinely carry arms and weapons without at least promulgating relevant rules, guidelines and regulations.

2.3 Alternative proposals

Rather than enhancing the use of detention and militarising the immigration services, we recommend that the Government address long-standing issues within the immigration detention regime, including by:

- **Transparency:** Collecting and regularly publishing statistics on the number of immigration detainees at all places of detention, disaggregated by sex, age, nationality and immigration status;
- **Complaints and monitoring mechanism:** Establish a fully independent mechanism to receive and investigate complaints in all places of detention, and establish an independent body to monitor all places of detention. Allow civil society organisations regular access to monitor detention facilities and afford assistance to detainees where necessary;
- **Guidelines:** Immediately publish the CIC Operational Manual per the Immigration’s Department’ undertaking made in 2010⁷⁵. Establish clear guidelines to reduce and regulate the

⁷³ United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (16 January 2016) Available at: <https://undocs.org/A/RES/70/175>

⁷⁴ At [18]

⁷⁵ Subcommittee on Subsidiary Legislation Relating to Transfer of Management of the Castle Peak Bay Immigration Centre “Follow-up to Meeting on 5 March 2010” (2010) LC Paper No. CB(2)1083/09-10(02). Available at: https://www.legco.gov.hk/yr09-10/english/hc/sub_leg/sc52/papers/sc520315cb2-1083-2-e.pdf

use of solitary confinement in line with international standards, and regulate the use of strip search. Develop guidance to identify detainees in situations of vulnerability or risk, such as LGBTI individuals, victims of torture, victims of trafficking, and individuals with mental or physical disabilities, who should not be detained.

3. Clause 9: Liaising with a risk state to arrange deportation when claim rejected at first instance

The proposed Section 37Z(2)(c), IO (p.C965) allows the Government to begin liaising with the claimant's country of origin ("Risk State") to arrange deportation whilst an appeal before the TCAB, which involves a *de novo* or fresh reconsideration of the claim, is still ongoing.

This proposal significantly undermines the confidentiality of the USM process and risks violating the right to privacy protected by the HKBORO. Further, this proposal is self-defeating, as communication between the Hong Kong Government and the Risk State exposes the claimant to serious risks which may give rise to *sur place* claims (that is, claimants who initially do not have viable claims may satisfy the threshold for non-refoulement protection because of this new risk created by the Hong Kong Government). Contact with the Risk State can also jeopardize the safety of the claimant's family and associates still living in the home country.

Added to these concerns is the fact that the quality of first instance decisions is poor, and less than 40% of substantiated claims are accepted at this initial stage. Commencing the deportation process at this stage therefore appears counterproductive.

3.1 Confidentiality concerns

Communication between the Hong Kong Government and the Risk State potentially violates Article 14 of the HOBORO, which guarantees the right to privacy: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." This protection entails that the sharing of personal information with a third party must not jeopardize the safety of the individual or lead to violations of their human rights.

As noted by the United Nations High Commissioner for Refugees ("UNHCR"), the right to privacy and confidentiality throughout the entire asylum process is crucial for asylum seekers, whose claims inherently supposes a fear of persecution by the authorities of the country of origin and whose situation can be jeopardized if protection of information is not ensured:

"the State that receives and assesses an asylum request must refrain from sharing any information with the authorities of the country of origin and indeed from informing the authorities in the country of origin that a national has presented an asylum claim. This applies regardless of whether the country of origin is considered by the authorities of asylum as a "safe country of origin", or whether the asylum claim is considered to be based on economic motives. Likewise, the authorities of the country of asylum may not weigh the risks involved in sharing of confidential information with the country of origin, and conclude that it will not result in human rights violations."⁷⁶

Protection claimants provide information to the Hong Kong Government on the understanding that the information will not be disclosed to the Risk State. In fact, the importance of confidentiality throughout

⁷⁶ UNHCR, UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information , 31 March 2005, available at: <https://www.refworld.org/docid/42b9190e4.htm> [4] – [5]

the USM process is recognised by the Immigration Department. Paragraph 71 of the “Notice to Persons Making a Non-refoulement Claim” provides: “As a general rule, neither the information indicating that you have made a non-refoulement claim nor any information pertaining to your claim will be provided to any government of the Risk State(s) without your express consent.”⁷⁷

Worryingly, the wording of the proposed Section 37Z(2)(c) does not preclude the Government from disclosing to the Risk State that the claimant concerned has filed an asylum claim in Hong Kong. While the legislative brief states that “ImmD *will not normally* disclose to [authorities in the claimant’s country of origin] whether the person concerned has filed a non-refoulement claim”⁷⁸, this is a mere administrative undertaking with no statutory underpinning. It would therefore be lawful under the proposed Section 37Z(2)(c) for authorities in the Risk State to be informed that the person concerned has filed a non-refoulement claim in Hong Kong.

In any event, the crux of the issue is not whether the Hong Kong Government discloses the fact that the claimant has made a non-refoulement claim to the Risk State. The disclosure of *any* personal information to the Risk State compromises the confidentiality of the USM process and jeopardises the safety of the claimant, not least because the Risk State can easily infer that the claimant has applied for asylum overseas.

3.2 Endangering safety of claimant and their associates

Communication between the Hong Kong Government and authorities in the Risk State may further expose claimants and their associates who remain in the country to risks of persecution and other human rights violations. The risk created by the actions of the Hong Kong Government may give rise to *sur place* claims, by which even claimants who initially do not meet the threshold for international protection may now satisfy the threshold due to this new risk.

Additional risks may arise in situations where the very act of fleeing the country and seeking asylum overseas attract retribution from state authorities. For example, the Democratic Republic of Congo treats claiming asylum in another country as treason, and returnees are subject to detention, torture, disappearances, rape and sexual harassment⁷⁹. In Sri Lanka, Tamil returnees are often arrested, detained and tortured to force them to confess alleged links with the Liberation Tigers of Tamil Eelam⁸⁰. In Afghanistan, returnees may be attacked based on perceived association with Western cultures⁸¹.

Moreover, the Risk State may use this information in a retaliatory manner to threaten or persecute claimants’ associates remaining in the home country, endangering their safety. The Risk State’s treatment of the claimant’s associates following disclosure of this information can also reinforce the

⁷⁷ Immigration Department, “Notice to Persons Making a Non-refoulement Claim”. Available at: https://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf

⁷⁸ [13], emphasis added

⁷⁹ Jill Alpes, Charlotte Blondel, Nausicaa Preiss and Meritxell Sayos Monras, “Post-deportation risks for failed asylum seekers” *Forced Migration Review* (February 2017). Available at: <https://www.fmreview.org/resettlement/alpes-blondel-preiss-sayosmonras>.

⁸⁰ Freedom from Torture, “Sri Lankan Tamils tortured on return from the UK”. Available at: www.refworld.org/docid/505321402.html and The UK Home Office, “Sri Lanka - Bulletin: Treatment of Returns” at paragraph 1.01. Available at: www.refworld.org/docid/50ebe8352.html

⁸¹ Danish Institute for International Studies, “Post-deportation risks” (2016). Available at: https://pure.diiis.dk/ws/files/677576/Post_Deportation_Risks_WEB.pdf p.3

claimant’s fear of facing persecution, as the experiences of one’s family, friends and associates can show that one’s fear of becoming a victim of persecution is well-founded⁸².

There concerns are echoed by the UNHCR:

“ [S]haring with the country of origin, information about the asylum seeker, including the fact itself that the person applied for asylum, may constitute an aggravation of the person’s position vis-à-vis the Government alleged to be responsible for his persecution. In a situation where the initial elements of the claim presented by the asylum-seeker would not lead to inclusion, sharing of confidential information with the country of origin, could well lead to the asylum seeker becoming a refugee *sur place*.

[...] [T]his practice may endanger any relatives or associates of the asylum seeker remaining in the country of origin and may lead to a risk for retaliatory or punitive measures by the national authorities against them.”⁸³

3.3 Quality of first instance decisions

We must also stress that the quality of decisions at first instance is poor. Basic mistakes are frequently noted, including mistaking claimants’ countries of origin, using unverified information from Wikipedia as evidence to determine claims, or using outdated, substandard or otherwise non-credible sources as country of origin information.

Since the commencement of the USM in 2014 to October 2020, only 85 out of the 208, or about 40% of substantiated claims, were accepted at first instance. In the last three years, 60 – 95% of successful claims were substantiated at the TCAB stage. It would therefore appear uneconomical to commence deportation proceedings when the USM claim is rejected at first instance by the Immigration Department.

Year	Substantiations at ImmD stage	Substantiations at TCAB stage
2014	1	0
2015	14	3
2016	28	2
2017	19	19
2018	16	26
2019	5	33
2020 (as at 31 Oct)	2	40
Total	85	123

Table 3: The number of USM claims substantiated at the ImmD and TCAB stage from 2014 - 2020⁸⁴

4. Clause 10: mandating attendance at interviews

The proposed Section 37ZAB, IO (p.C965) mandates all claimants be required to attend interviews with an immigration officer without allowing for the exercise of discretion.

⁸² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, available at: <https://www.refworld.org/docid/5cb474b27.html> [43]

⁸³ UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information [16]-[17]

⁸⁴ Available at: https://accessinfo.hk/en/body/security_bureau

There may be situations where a claimant is not suitable to be interviewed, including young children, minors who have experienced particularly traumatic events, and claimants with specific vulnerabilities, such as mental or physical health issues, rendering them unable to cope with an interview. Forcing a vulnerable claimant to attend an interview can be harmful to them. For example, we have assisted a child claimant with mental health issues who attempted suicide after they were made to testify at their family's TCAB hearing.

4.1 Alternative proposals

We recommend that this provision be amended to allow for discretion. See for example the UK's Immigration Rules, section 399NA (vii), which provides that an interview shall be omitted where the claimant is unfit or unable to be interviewed owing to enduring circumstances beyond their control⁸⁵.

We also recommend that the Immigration Department and the TCAB produce comprehensive guidance for immigration officers and adjudicators on how asylum interviews should be conducted, especially when vulnerable claimants are concerned. Currently, no publicly available guidance exists for immigration officers, and the TCAB's limited procedural guidance only provides that claimants should indicate their special needs in their Notice of Appeal/Petition, and that the Appeal Board "will take steps to accommodate such special needs as far as practicable"⁸⁶.

For examples of such guidance, see:

- (i) "Asylum interviews" (Version 7.0, 5 June 2019), UK Home Office⁸⁷
- (ii) "Children's asylum claims" (Version 4.0, 31 December 2020), UK Home Office⁸⁸
- (iii) "Joint Presidential Guidance Note No. 2 of 2010: Child, vulnerable adult and sensitive appellant guidance" (2010), UK Immigration and Asylum Tribunal⁸⁹
- (iv) "Guidelines on Vulnerable Persons" (November 2018), Australian Administrative Appeals Tribunal, Migration & Refugee Division⁹⁰

5. Clause 10 and 25: mandating language of USM proceedings

The proposed Section 37ZAC, IO (p.C967) and Section 11(2), Schedule 1A, IO (p.C993) allow first instance and appeal proceedings to be conducted in a language that the immigration officer or the appeal board "reasonably considers" the claimant or the witness "is able to understand and communicate in".

Our objections to these proposals are four-fold. Firstly, compelling a claimant to participate in proceedings in a language decided by the ImmD or TCAB undermines procedural fairness and is potentially unlawful and unconstitutional. Secondly, the ability to speak a language to a basic or even moderate standard must not be equated with the ability to participate in legal proceedings in that language. Thirdly, on a practical level, immigration officers or adjudicators do not have the expertise

⁸⁵ Available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

⁸⁶ Security Bureau, "The Principles, Procedures and Practice Directions of the Torture Claims Appeal Board" (Sixth Edition, 28 August 2019) and "The Practice and Procedure Guide of the Administrative Non-refoulement Claims Petition Scheme" (Fifth Edition, 28 August 2019). Available at: <https://www.sb.gov.hk/eng/links/tcab/index.htm> At [24.1] and [30.1] respectively.

⁸⁷ Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947812/childr-en_s-asylum-claims-v4.0ext.pdf

⁸⁸ Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947812/childr-en_s-asylum-claims-v4.0ext.pdf

⁸⁹ Available at: <https://www.judiciary.uk/wp-content/uploads/2014/07/ChildWitnessGuidance.pdf>

⁹⁰ Available at: <https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Vulnerable-Persons.pdf>

to determine claimants' fluency in a language, and this is especially true for cases in which the immigration officer or adjudicator do not themselves speak the language concerned. Lastly, these proposals go against the Administration's longstanding policy to promote racial equality and access to equal opportunities.

These proposals disproportionately interferes with fundamental principles of procedural fairness where a much simpler alternative is available: in cases involving rare languages, we recommend that the Government facilitate remote interpretation through telephone or videoconferencing technologies.

5.1 Procedural fairness concerns

The justification provided by the Administration is that certain claimants request for interpretation in rare languages to prolong their USM proceedings. We are alarmed by this suggestion, as access to interpretation is fundamental to safeguarding procedural fairness and equality before the law.

The right to participate in legal proceedings in a language of one's choice and have access to interpretation is protected under Hong Kong law. Article 11(f) of the HKBORO guarantees the right to have free assistance of an interpreter in a language which one understands in the context of criminal proceedings. This right is also enshrined in the Official Languages Ordinance (Cap. 5), which provides that a party or a witness in any proceedings may "address the court or testify in any language": Section 5(3)(b).

Similar protections for the right to interpretation exists in other jurisdictions. For example, Section 14 of the Canadian Charter of Rights and Freedoms provides:

"A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter."⁹¹

In the context of asylum proceedings, paragraph 339 ND of the UK Immigration Rules states that:

"The Secretary of State shall provide at public expense an interpreter for the purpose of allowing the applicant to submit their case, wherever necessary. The Secretary of State shall select an interpreter who can ensure appropriate communication between the applicant and the representative of the Secretary of State who conducts the interview."⁹²

Section 366C(3) of Australia's Migration Act 1958 provides:

"If the Tribunal considers that a person appearing before it to give evidence is not sufficiently proficient in English, the Tribunal must appoint an interpreter for the purposes of communication between the Tribunal and the person."⁹³

Article 12 of the European Union's Directive 2013/32/EU on common procedures for granting and withdrawing international protection stipulates:

"[asylum seekers] shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary."⁹⁴

These provisions serve to illustrate that access to interpretation is a cornerstone of due process under the law.

5.2 Language proficiency for legal proceedings

⁹¹ Available at: <https://laws-lois.justice.gc.ca/eng/Const/page-15.html>

⁹² Available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

⁹³ Available at: https://www.legislation.gov.au/Details/C2018C00337/Html/Volume_2

⁹⁴ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>

We must also stress that the ability to speak a language does not equate the ability to understand complex legal proceedings in that language. Most Cantonese speakers in Hong Kong are proficient in English as it is taught in schools. Despite this, Cantonese speakers often elect to participate in legal proceedings in Chinese, and they are provided with English-Chinese interpretation if the proceedings are conducted in English.

The Federal Court of Australia remarked the same in *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507⁹⁵, which concerns a Sri Lankan asylum seeker with some English proficiency. The court notes:

“The mere fact that a person can sufficiently speak the English language to perform mundane or social tasks or even business obligations at the person's own pace does not necessarily mean that he or she is able to cope with the added stresses imposed by appearing as a witness in a court of law [...] Those observations are relevant to the situation of an applicant for refugee status who, like Mr Perera, is able to use English for some purposes, even professional purposes, but is insufficiently proficient to give evidence before the Tribunal in support of an application vital to his or her future prospects.”⁹⁶

5.3 Role of immigration officers and adjudicators in USM proceedings and practical concerns

On a practical level, we query how an immigration officer or adjudicator can determine whether a claimant or witness is reasonably able to communicate in a particular language, especially if the immigration officer or adjudicator does not speak that language. For instance, how can an immigration officer who does not speak French or Urdu determine that a claimant from Francophone Africa or South Asia is able to communicate in these languages?

Even in cases where the immigration officer or adjudicator can speak the language, for example English, it is not their role nor do they have the expertise to determine the claimant's fluency in that language. Along the same lines, the UK Upper Tribunal (Immigration and Asylum Chambers) decided in *Mohamed (role of interpreter) Somalia v. Secretary of State for the Home Department*⁹⁷ that it is not the court interpreter's function to give “evidence” at a hearing of anything, including the witness' ability to speak a particular language or their fluency in that language⁹⁸.

5.4 Policy of racial equality

The proposal to compel claimants to testify in a particular language also goes against the Government's longstanding policy to promote racial equality and ensure equal access to public services. The Administrative Guidelines on Promotion of Racial Equality clearly states that:

“The HKSAR Government is committed to promoting racial equality and ensuring equal access to public services. [...] Public authorities should take necessary steps to identify the language service needs of the service users, introduce the availability of and proactively offer language services to service users, arrange appropriate language services to those in need taking into

⁹⁵ *Perera v Minister for Immigration & Multicultural Affairs* [1999] , FCA 507 , Australia: Federal Court, 28 April 1999, available at: https://www.refworld.org/cases,AUS_FC,3ae6b75c0.html [accessed 28 January 2021]

⁹⁶ [34] – [35]

⁹⁷ *Mohamed (role of interpreter) Somalia v. Secretary of State for the Home Department*, [2011] UKUT 00337 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 21 July 2011, available at: https://www.refworld.org/cases,GBR_UTIAC,4e8b3bb72.html [accessed 28 January 2021]

⁹⁸ [9]

account their operational circumstances, and properly document requests for / offer of and use of interpretation services by service users.”⁹⁹

5.5 Alternative proposals

In cases involving rare languages, we recommend that the Immigration Department and TCAB use telephone or videoconferencing technology to facilitate remote interpretation. In fact, we know that remote interpretation has been used previously by the TCAB. In one case assisted by the RCN, a claimant whose preferred language is Kinyarwanda was provided with a Swahili interpreter, as there were no Kinyarwanda interpreters in Hong Kong. An RCN member organisation was granted permission by the TCAB to dial in a Kinyarwanda interpreter at a remote location for the TCAB hearing.

Further, remote telephone and video interpretation is used in Hong Kong, for example in healthcare settings, through agencies such as the Centre for Harmony and Enhancement of Ethnic Minority Residents (CHEER) funded by the Home Affairs Department¹⁰⁰. With proper guidance and quality assurance, there is no reason that remote interpretation cannot be used more widely in USM proceedings.

Remote interpretation in legal proceedings is used in Australia¹⁰¹ and the UK¹⁰², for example.

6. Clause 12 and 13: mandating medical examination

6.1 Consent

The proposed Section 37ZC (1A), IO (p.C969) provides that claimants “must give any consent” to medical examinations arranged by the ImmD or TCAB.

As a matter of law, a medical professional cannot lawfully perform medical procedures on a person who does not consent to it. A medical procedure carried out without consent amounts to the tort of battery¹⁰³ and may constitute criminal offences¹⁰⁴, such as assault occasioning actual bodily harm, or even cruel, inhuman and degrading treatment or punishment and/or torture¹⁰⁵.

Valid consent must be freely given and informed, and the person consenting must have capacity to make the decision. Section 2 of the Medical Council of Hong Kong’s Code of Professional Conduct provides:

⁹⁹ Constitutional and Mainland Affairs Bureau, “Administrative Guidelines on Promotion of Racial Equality”, Annex B, [1]. Available at: https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/agpre/adm_guidelines.pdf

¹⁰⁰ HKCS Centre for Harmony and Enhancement of Ethnic Minority Residents, “About CHEER”. Available at: <https://hkcscheer.net/about/about-cheer>

¹⁰¹ Australia Administrative Appeals Tribunal, “Handbook for Interpreters”. Available at: <https://www.aat.gov.au/AAT/media/AAT/Files/Policies/Handbook-for-Interpreters.pdf>

¹⁰² The UK Judicial College, “Good Practice for Remote Hearings”. Available at: <https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf>

¹⁰³ *Cheng Man Chi v Tam Kai Tai* (unrep., HCPI 1094/2006, [2009] HKEC 205) and Rick Glofcheski, “Tort law in Hong Kong” (Third Edition) at [16.1]

¹⁰⁴ [2] Code of Professional Conduct.

¹⁰⁵ See for example *Nevmerzhitsky v. Ukraine* 54825/00 and *Jalloh v. Germany* 54810/00, European Court of Human Rights.

- 2.7 Consent is valid only if:-
(a) it is given voluntarily;
- (b) the doctor has provided proper explanation of the nature, effect and risks of the proposed treatment and other treatment options (including the option of no treatment); and
- (c) the patient properly understands the nature and implications of the proposed treatment.
- 2.8 After the explanation, the patient should be given reasonable time to enable the patient (or his family members in applicable cases) to make the decision properly, depending on the complexity of information, the importance of the decision and the urgency of the proposed treatment.
- 2.9 A patient's refusal of proposed investigation and treatment must be respected and documented.

The phrasing of the proposed Section 37ZC (1A) is therefore deeply problematic as mandating that claimants "must give any consent" to medical examinations essentially precludes their ability to give valid informed consent.

Moreover, the proposed Section 37ZD(2)(g), IO (p. C973) in effect punishes claimants for withholding consent to Government mandated medical examination by allowing ImmD or TCAB to make a negative credibility assessment on the basis of the claimant's failure to give consent, which again is at odds with the fundamental principle of informed consent and renders any consent given not voluntary. Credibility assessment involves the process of determining which facts presented by the asylum seeker can be believed and taken into account in the analysis of the claim, and is central to the USM process.

6.2 Alternative proposals

In practice, the challenges faced by practitioners is the lack of funding to obtain medico-legal reports to support asylum claims before the ImmD or TCAB. Rather than mandating claimants to give consent to medical examinations in situations where the physical or mental condition of the claimant is in dispute, we recommend that additional funding be allocated through legal aid to allow duty lawyers to engage independent medical professionals. For example, the UK's Legal Aid Agency funds expert medical reports relevant to asylum proceedings¹⁰⁶.

While experts engaged by the claimants' lawyers are independently instructed, they are still subject to overriding duties to the tribunal/ court. See Code of conduct for expert witness, Appendix D, the Rules of the High Court (Cap 4A)¹⁰⁷.

7. Proposals aimed at expediting the screening mechanism

¹⁰⁶The UK Legal Aid Agency, "Escape Case Electronic Handbook". Chap 14. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/830019/Escape_Cases_Electronic_Handbook.v1.12_.pdf

¹⁰⁷ The Rules of High Court (Cap.4 section 54). Available at: <https://www.elegislation.gov.hk/hk/cap4A@2018-02-01T00:00:00?pmc=0&m=0&pm=1>

We are concerned that proposals aiming at expediting the screening process risk violating the high standard of fairness required by law. A system that undermines fairness and justice for speed and efficiency may not withstand public law scrutiny. A case in point is the series of litigations in the UK successfully challenging the legality of the detained fast track system, under which asylum seekers were detained and had to go through the asylum process under accelerated procedures¹⁰⁸. Specifically, in *TN (Vietnam) and US (Pakistan) v SSHD*¹⁰⁹, the UK High Court declared rules relating to the detained fast track system in place until 2014 to be unlawful and *ultra vires*, and more than 10,000 asylum seekers can have their cases reheard¹¹⁰.

Moreover, these proposals are counterproductive as they hamper claimants' ability to submit well-prepared claims. Well-prepared cases assist immigration officers and adjudicators in reaching better and fairer decisions, which in turn reduce the volume of subsequent appeals and judicial review challenges.

We stress that resources should be spent at enhancing the overall fairness and sustainability of the screening mechanism, such as facilitating claimant's access to publicly-funded legal services and improving the overall quality of USM decisions.

7.1 Clause 8: Shortening time for claimants to complete non-refoulement claim

Proposed amendment to Section 37Y, IO (p.C963) will impose a higher threshold for claimants to apply for an extension of the period for returning their non-refoulement claim. To apply for an extension, claimants are required to show that they have exercised all due diligence to return a completed form but that they were unable to return the form due to circumstances beyond their control. By comparison, under the existing IO an immigration officer can grant an extension if they are satisfied that it would be unjust not to allow it: see Section 37Y(3)(b), IO.

There may be cases where it would be unjust to refuse an extension but the higher threshold under the proposed amendment is not met. For example, it would be difficult for child claimants or vulnerable claimants with mental health issues to demonstrate that they have exercised all due diligence to return a completed form within the already short period of time.

7.2 Clause 18, 19: Notice of appeal

Under the proposed Section 37ZC (ab) (p.C 979) the notice of appeal must be duly completed and signed. Section 37ZT(3) (p.C 981) further restricts the Board's discretion in allowing late filing of notice of appeal, by requiring that the claimant demonstrate they have exercised all due diligence but failed to file the notice due to circumstances beyond their control. Importantly, the proposed Section 37ZT(4) (p.C 981) states that multiple attempts by claimants to file notices of appeal not compliant with statutory requirements is not evidence of due diligence.

We are concerned that these proposed amendments will make it more difficult for claimants to file appeals by raising the procedural hurdle. Particularly given, and as mentioned below, the majority of claimants are unrepresented at the appeal stage and do not have access to legal advice or help.

7.2.1 Lack of legal assistance at the TCAB stage

¹⁰⁸ For a summary of these litigations see Detention Action, "DFT Legal Challenge" (17 December 2018).

Available at: <https://detentionaction.org.uk/dft-legal-challenge/>

¹⁰⁹ [2017] EWHC 59 (Admin)

¹¹⁰ See Taylor, D, "High court rules more than 10,000 asylum seekers treated unfairly", The Guardian (20 January 2017). Available at: <https://www.theguardian.com/uk-news/2017/jan/20/uk-high-court-rules-10000-asylum-seekers-treated-unfairly-detained-fast-track>

The vast majority of claimants do not have legal representation when they fill in the notice of appeals. Statistics from 2014- 2020 shows that only about 8% of claimants are represented by the Duty Lawyer Service at the TCAB stage¹¹¹. Although claimants who are rejected for publicly funded legal assistance (PFLA) at the appeal stage are entitled to request a second opinion by a different duty lawyer as to the merits of their case, this option is not published anywhere and there is no apparent requirement for claimants to be informed of this option. Less than 1% of claimants requested a second opinion in the said period, which suggests most claimants are not aware of their right to request this¹¹². 51.7% of claimants who requested a second opinion were subsequently provided with PFLA.

Unrepresented claimants wishing to file an appeal face multiple obstacles. Following a rejection by the ImmD, the appeal form is often completed under time pressure, emotional distress and anxiety. Without legal assistance, complex legal and factual issues in asylum claims are difficult to comprehend and articulate, and claimants with limited literacy or limited English proficiency with face additional difficulties in completing the appeal form.

Year	No. of TCAB appeals concluded	No. of TCAB appeals concluded with PFLA	% of TCAB appeals concluded with PFLA
2014	399	85	21.3%
2015	604	67	11%
2016	926	99	10.7%
2017	3394	192	5.6%
2018	4807	301	6.2%
2019	4924	339	6.8%
2020 (as at June)	1449	117	8%
Total	16503	1200	7%

Table 4: Number of TCAB appeals with PFLA

Year	No. of people declined PFLA	No. of people requesting a second opinion	No. of people provided with PFLA after requesting second opinion	% of people requesting second opinion	% of people provided with PFLA after requesting second opinion
2014	845	12	5	1.42%	41.6%
2015	2003	50	19	2.49%	38%
2016	2455	13	5	0.52%	38.46%
2017	3063	20	10	0.65%	50%
2018	4820	19	11	0.39%	57.89%
2019	1146	31	24	2.7%	77.4%
2020 (as at June)	370	2	2	0.54%	100%
Total	14702	147	76	0.99%	51.7%

Table 5: Number of claimants requesting a second opinion upon being declined PFLA

7.2.2 Existing concerns about procedural inflexibility

¹¹¹ Security Bureau, “Publicly funded legal representation at TCAB 2014-2020” (September 2020). Available at: https://accessinfo.hk/en/request/publicly_funded_legal_representa#incoming-1431

¹¹² Ibid

Further, the TCAB's inflexibility on procedural issues has already led to multiple successful judicial review challenges.

In *YA v Torture Claims Appeal Board*¹¹³, the Court found that the TCAB was wrong in refusing to accept the applicant's unsigned notice of appeal and should have allowed it to be filed. The applicant is an Algerian national who fears persecution due to his conversion from Islam to Christianity. He was unable to sign his notice of appeal as he had been detained at the Castle Peak Bay Immigration Centre then admitted to the Tuen Mun Hospital. Despite a letter from his legal representatives explaining his circumstances, the TCAB refused to accept the unsigned notice of appeal and treated it as a nullity.

In *J v Torture Claims Appeal Board*¹¹⁴, the TCAB refused to accept the claimant's notice of appeal as the TCAB alleged that it was 5 days out of time. The TCAB mistakenly believed that the Immigration Department's decision to reject the claimant's USM claim was served on the claimant's lawyer on 3 April 2018, when in fact the decision was sent to the claimant's lawyers on 9 April 2018 and received by them on 11 April 2018. There was in fact no late filing by the claimant. Moreover, the Court also noted that the TCAB acted unreasonably, as even if the notice of appeal had been filed 5 days late, the delay could not be said to be substantial or excessive, and the short delay should be a weighty factor in favour of the claimant¹¹⁵.

In *SE v Torture Claims Appeal Board*¹¹⁶, the Court found that the TCAB had erred in law in refusing to accept the claimant's notice of appeal when it was caused by the Immigration Department's errors. The claimant is an Afghan national who fears he would be killed by the Taliban if he were returned to Afghanistan. He did not receive correspondence from the Immigration Department as they had been sent to the wrong address. When he became aware of the Immigration Department's decision to refuse his USM claim some four months later, he filed an appeal to the TCAB within 7 days, which the TCAB refused to accept as it was out of time. The Court found that the TCAB had erred in law in finding that the claimant's filing of the notice of appeal was late¹¹⁷.

7.3 Clause 25: restrictions on submitting new evidence

The proposed amendments to Section 19, Schedule 1A (p.C1001) restrict the submission of new evidence on appeal to within 7 days after the filing of notice of appeal. Claimants must demonstrate they have exercised due diligence but failed to file the new evidence due to circumstances beyond their control if they are to file new evidence after the expiry of this period.

There are no such restrictions under the existing statutory regime, but the TCAB/ NRCPO's practice direction provides that adjudicators may consider evidence not before an immigration officer if¹¹⁸:

- (a) the evidence relates to matters that have occurred after the decision being appealed against was made;
- (b) the evidence was not reasonably available before the decision being appealed against was made; or
- (c) the Board is satisfied that exceptional circumstances exist that justify the consideration of the evidence

¹¹³ HCAL 1026/2017 [2018] HKCFI 2445

¹¹⁴ HCAL 385/2019 [2020] HKCFI 2526

¹¹⁵ At [22], [23]

¹¹⁶ HCAL 1341/2018 [2020] HKCFI 1763

¹¹⁷ [29]

¹¹⁸ [15.2] and [18.2]

Imposing a time limit and a procedural hurdle on the submission of new evidence is not compatible with the high standard of fairness required by law.

Firstly, as the CFA observed in *Secretary for Security v Sakthivel Prabakar*¹¹⁹, the high standard of fairness requires adjudicators to appreciate difficulties in obtaining supporting documents experienced by protection claimants, who usually fled their countries with few personal belongings or documents. It is common for information central to an asylum claim to only become available at a later stage of the asylum process due to the difficulty in collecting and retrieving evidence from the claimant's country of origin where they fear risks. For example, the claimant in *Jallow Tijan v Torture Claims Appeal Board*¹²⁰ is a gay Gambian national who fears persecution due to his sexual orientation. He was unable to adduce two pieces of crucial evidence to support his claim at the time of his TCAB hearing as he was serving a prison sentence. The Court found that the TCAB had been unreasonable in refusing to allow the claimant additional time to adduce the evidence, which include a police report stating that the claimant was wanted for his involvement in homosexual activities, and a newspaper article accompanied by the claimant's photograph and a quote from a Gambian police spokesperson that homosexuals providing services to European tourists might face life imprisonment.

Secondly, the process of assessing an asylum claim is one of "joint endeavour" between the claimant and the adjudicator. Restricting the timeframe for submitting new evidence will inevitably place a higher burden on the claimants without acknowledging the difficulties they face in securing evidence. Issues in dispute may only become apparent at the TCAB appeal stage following a rejection by the Immigration Department. In these cases, claimants may need to call for additional evidence on appeal, including expert evidence, documentary evidence from overseas and witness statements to respond to contentious issues. For instance, in cases where the Immigration Department refuse to accept that the claimant experienced torture in the past, the claimant may need to adduce a scarring report at the appeal stage. In cases where the Immigration Department refused to accept that the claimant is a prominent member of their religious group or social group, the claimant may need to prepare witness statements taken from their home country to support their claims. In cases where the Immigration Department disputes the relevance of country of origin information ("COI"), it may be necessary to engage country experts to provide an individualised assessment of risks for the claimant. Obtaining this additional evidence invariably takes time.

Lastly, the timeframe of 7 days after the filing of notice appeal is completely arbitrary. As the UK Court of Appeal ruled in *Karanakaran v Secretary of State for the Home Department*¹²¹:

"Decision-makers, on classic principles of public law, are required to take everything material into account. Their sources of information will frequently go well beyond the testimony of the applicant and include in-country reports, expert testimony and - sometimes - specialised knowledge of their own (which must of course be disclosed). No probabilistic cut-off operates here: everything capable of having a bearing has to be given the weight, great or little, due to it. What the decision-makers ultimately make of the material is a matter for their own conscientious judgment, so long as the procedure by which they approach and entertain it is lawful and fair and provided their decision logically addresses the [Refugee] Convention issues"¹²²

¹¹⁹ (2004) 7 HKCFAR 187

¹²⁰ HCAL 2479/2018; [2020] HKCFI 1283

¹²¹ *Karanakaran v. Secretary of State for the Home Department*, [2000] EWCA Civ. 11, United Kingdom: Court of Appeal (England and Wales), 25 January 2000, available at:

https://www.refworld.org/cases,GBR_CA_CIV,47bc14622.html [accessed 1 February 2021]

¹²² [18]

7.4 Shortening notice period for appeal hearing

The proposed Section 13(2), Schedule 1A (p.C 995) allows the TCAB to shorten the notice period for hearings from 28 days to 7 days.

In practice, after the notice of appeal is issued by the TCAB, the parties (i.e. the claimant and the Director of Immigration) will need to submit respective skeleton arguments, country of origin information, and/or supplementary evidence for the TCAB's consideration. The Director is further required to submit hearing bundle(s) to the Board and serve the same to the claimants at least 5 days before the TCAB hearing¹²³. Time is needed for both the TCAB and the parties to review the documents and information contained in the hearing bundles, which can often be lengthy and with missing documents that need to be ratified.

As such, shortening the notice period to 7 days effectively deprives both the TCAB and the parties of the chance to thoroughly review relevant papers and evidence. It is already difficult for claimants, who may not be proficient in English and usually appear before the TCAB without legal representation, to digest such complex information relating to their non-refoulement claims.

The situation is even more difficult for claimants who are detained while their appeals are ongoing. Many detainees only receive the hearing bundles one day before their TCAB hearing. It would be unduly harsh to require lay claimants to review the documents in such a short period before the hearing, on which their life and limb depend.

7.5 Alternative proposals

We recommend the Government address systematic issues within the USM, including by:

- Improving the transparency and accountability of the USM by publishing redacted TCAB and NRCPO decisions in line with the practice in other common law jurisdictions, such as the UK¹²⁴, Canada¹²⁵ and Australia¹²⁶.
- Improving claimant's access to legal advice and representation at the appeal stage

¹²³ Security Bureau, "The Principles, Procedures and Practice Directions of the Torture Claims Appeal Board" (Sixth Edition, 28 August 2019) [9.4]

¹²⁴ See the UK Government, "Immigration and asylum tribunal appeal decisions". Available at: <https://www.gov.uk/immigration-asylum-appeal-decisions>

¹²⁵ See Immigration and Refugee Board of Canada, "Decisions". Available at: <https://irb-cisr.gc.ca/en/decisions/Pages/index.aspx>

¹²⁶ See Australasian Legal Information Institute, "Refugee Review Tribunal of Australia". Available at: <http://www6.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/RRTA/>

Part 2: Oral testimonies

These testimonies are collected by Refugee Concern Network members from refugees, asylum seekers and immigration detainees. The names used are pseudonyms to protect the interviewees' identity. The testimonies have been edited for clarity.

1. Jane, from East Africa

Immigration officials were not respectful in detention. I spent one week in in detention and it was a very degrading experience. I was forced to strip naked and squat in front of a female guard. Since I suffered from violence in my home country doing this was very painful for me. Not knowing if or when I would be released was very stressful.

Asylum seekers are here to seek protection, we do not pursue violence. Carrying more arms is disproportionate and would create more stress on asylum seekers.

If the Hong Kong Government contacted my home country when my claim was rejected by the Immigration, it would put my family back home at risk. Contacting my home country is like stabbing me in the back and makes all my efforts to seek protection wasted.

2. Rose, from South East Asia

I was detained for over a year in Hong Kong. I was very traumatised when I arrived in Hong Kong because I had been tortured and raped in my home country. I had no mental health support in detention which made things even worse for me. I could never sleep properly and the guards kept screaming at me that I should sleep. I did not understand why I was detained and when I would be released. No interpreter was provided. Only visiting priests and nuns were able to translate for me when they came. This is not an experience I would wish on anyone. It is just too much unnecessary pain.

3. Anny, from East Africa

When I arrived in Hong Kong I was forced to complete a form in English explaining my claim. There was no interpretation available, and the immigration officer advised me to tick certain boxes, but they were all the wrong boxes.

It would be very unfair if I cannot testify in the language of my choice. It is hard to express feelings, expressions, culture and details of the horrors you survived in a language which you cannot express yourself well. This would have affected my case in a very negative way.

What is the meaning of protection if the Hong Kong Government began contacting my home country when my claim was rejected by the Immigration? Why would the Government do this? Such a policy would simply create more risk for protection claimants.

4. Lesha, from Horn of Africa

I arrived very traumatized and scared at the Hong Kong airport and was taken straight to the CIC. I did not know what was happening. There was no interpretation at CIC and I felt very alone. I am a Muslim, and my Muslim clothes were taken away from me. I was forced to wear clothes that were not

appropriate in my religion. My hijab was also taken away, and I was given a tiny scarf instead. There was no praying mat either. My eyesight is not good, but despite that my eyeglasses were taken away. I developed heart problems because of all the stress of fleeing and being taken to detention in Hong Kong in a very strange and unknown environment where I did not understand the language. There was no female doctor to look after me, and after suffering from violence this was very hard for me. Even though today I am a recognised refugee in Hong Kong, I cannot forget the 3 weeks spent at CIC. It created a lot of unnecessary pain and stress for me on my journey to safety.

5. Ahmed, from South Asia

I did not have legal representation at TCAB and I had a feeling from the start that the adjudicator had made up his mind about my case before we even started with the hearing. The adjudicator asked only a few questions related to my case, but was not interested, and screamed at me that I was not allowed to make eye contact with my Urdu interpreter. As I had no lawyer, it was all very confusing.

In my case, having a Hindi interpreter instead of an Urdu would not make too much a difference as the languages are quite similar, but still it would be stressful if there was a misunderstanding with the interpreter. Not allowing asylum seekers to participate in their preferred language would just add more stress to an already very difficult and unfair legal process.

Contacting my home country when my claim is rejected by the Immigration Department would just be cherry on the cake and make asking protection in Hong Kong an even greater farce. It is so stressful and horrifying that the Hong Kong Government even considers such an arrangement.

6. Sony, from South East Asia

When I asked for protection, I was detained with my 2-year-old child. I was 7 months pregnant at the time. Even though I was only detained for a short period, I was heavily pregnant and forced to sleep on the floor. My 2-year-old toddler was also locked up with me. I did not get any special attention despite being pregnant and having a child with me.

7. Aisha, from Horn of Africa

I spent over 4 months in detention, and it was very, very horrible. I did not understand why I was in CIC and treated as a criminal. I was fleeing to safety and put in jail. I do not eat pork, and was mainly provided with plain rice during that time. I was very weak from what had happened to me in my home country, and one day I fainted. I woke up handcuffed to a hospital bed in CIC. Then I was taken to hospital by 3 guards, also handcuffed. I felt like there was no dignity for me in Hong Kong. Even the interpreter at the hospital was crying when I was not allowed to go to the bathroom because I had handcuffs on. I had done nothing wrong, just fainting because I was not given nutritious food in detention. Now I am one of the few substantiated refugees in Hong Kong, and I hope that no one will ever be treated like I was.

8. Akbar, from Horn of Africa

I spent more than 2 months in CIC after surviving torture and imprisonment in my own home country because of my religion. In CIC there is no compassion, no humanity. I was treated like an animal.

I was provided with a translator over skype, but he was from my home country, and this made me very scared. I did not want him to see my face as I am still worried for my family's safety as I left them behind.

Not providing claimants with a chance to explain their case in their own language might affect their case, as when you are emotional and need to explain horrible things that happened to you, you might not find the words you need in a language that you did not choose.

9. Mohammed, from Middle East

I went to the Immigration Department before my visa expired to tell them I need protection. They told me I need to come back when my visa expired. When I returned on the day my visa expired, they told me to come back the next day. Then when I returned on the next day to apply for protection, they took me to the Ma Tau Kok Detention Centre. It was hard. You cannot live there for more than one week. The officers were bad and they didn't respond to you. The food was not halal. It was very cold – they made the air conditioning very cold for punishment. There were only two blankets but there were seven people in the cell. No explanation was given to me, but I learned from other detainees that some were detained for 2 weeks, 3 weeks and 1 month, like that. I was transferred to CIC for 1 month. Yes I have problems in my country, but why did you take me to jail?

I waited for a year for my interview with the Immigration Department. I was rejected for some stupid reason. The Immigration said my country is safe. That is just crazy.

The appeal takes a long time to prepare and two weeks is not enough. There were many documents from the Immigration Department and I also needed to submit documents from my country. I waited two years for my appeal hearing. Even my lawyer didn't know why it took so long. I was constantly scared that Hong Kong Government would send me back to my country. When I was accepted it was a big victory.

Life in Hong Kong is very difficult. Hong Kong is hard for refugees. I am constantly worried, scared and anxious. I feel I am not respected and have no dignity.

10. Michael, from Southeast Asia.

When I first arrived in Hong Kong, I went to the UNHCR. I was given a small slip and had to report at the UNHCR every month. One day I was stopped by the police and they asked for my ID. I showed them the UNHCR slip but they asked me for my passport. My passport was already expired. The police officers arrested me and took me to the detention centre. I was detained for 95 days.

First, I was detained at the police station for 9-10 days. There were 10-15 people in one cell. There was no bed in the cell, only blankets on the floor. The toilet was right next to the blankets. In the morning, at 3 to 4am, the police officers woke us up for security checks. We had to strip naked and they would check us. It was ridiculous – we were in the cell for the whole time, what could we have been hiding?

Then they took me to the Detention Centre. There were too many people there. They did not physically hurt us, but they used foul language and verbally abused us. It was degrading. The immigration officers make you feel like you are nothing, like animals, although we are human beings just like them. I became depressed a few days into my detention. My English was very bad at the time. I did not really understand what was going on, and I was not able to express myself. I just tried to follow, but sometimes I was

confused and the officers would get angry at me, as if I did it on purpose. It was mental torture. You already had bad experience in your country, and the abuse continued in Hong Kong where you thought you would find safety.

For every important meeting I had an interpreter. I can't imagine how people would do without an interpreter. How can you communicate? How can you share what actually happened to you? How can you go into details?

11. David, from Middle East

I want to tell the Hong Kong Government not all the stories are fake. Who would leave his country and sit here? I was happy in my home country and then the war came and I had to leave. I am not happy in Hong Kong.

At my interview with the Immigration Department, the immigration officer did not know where my country was and asked if my country was a part of India or Pakistan. I had to indicate the location of my country on a map. The officer was mostly polite to me when I was with my duty lawyer, but the officer would lash out at me sometimes. I had constant insomnia as I was worried of being returned to my home country.

12. Claire, from East Africa

The Hong Kong Government should at least give asylum seekers fair process. We don't need much and we don't need pity. We just want a fair process.

When I arrived in Hong Kong with my children, we were told we were not allowed to enter Hong Kong. We were crying at the airport. We thought we would be deported and detained.

It is dangerous for the Hong Kong Government to communicate with my home country. You don't want your country to know where you are. In my country, the Government is killing people. If the Government knows where you are, they will find you and hurt you. It has happened before in South Africa, France and Belgium, where people seeking asylum were hunted down by their Governments.

It was hard to fill out the non-refoulement claim form. The questions are complicated and repetitive. You are asked one thing and then on another page you are asked the exact same thing. It is hard to answer the questions without any help. There needs to be better support for people with mental health issues. For example to have social workers to work with people who are struggling.

The Government needs to provide training to immigration officers and duty lawyers. In my experience, immigration officers do not know how to ask the right questions. They ask vague questions and don't elicit the information they need.

13. Sherry, from South East Asia

When my family and I entered Hong Kong via Lo Wu, we declared ourselves as asylum seekers at the passport check and we were taken into a separate room for questioning. Our lawyer was waiting for us. The officer treated us respectfully. They seemed to be very happy that I spoke English well. It made a huge difference, as another lady being questioned who did not speak English was in a difficult

situation. The immigration officer complimented my education level and asked me to help translate for another lady as they did not have a translator there.

At 11pm they said they would detain my husband but would not detain me because I have my child with me. I pleaded with them, and luckily they let my husband come with us. They gave us some directions on where to go and where we could find help. All in all that experience was not so bad.

The next morning we were asked to go back. We were scared they would send us back as they said we should bring our luggage, but they would not explain to us why. The immigration officers checked our luggage and asked a lot of questions. After that we were taken to the CIC in a van. The immigration officers did not explain anything to us and we were very stressed. We thought we were going to the airport to be sent back. The immigration officers wouldn't answer our questions. I was shaking. At the CIC, they concluded the procedures and filled out some forms. After a few hours we were allowed to go. Looking back, I wish they had just explained to us what was going on.

There is a lack of communication. Even now, when we go to report, the immigration officers do not tell us what is going on. When we are asked to come in, we just get a call saying we have to come in but no reason is given. They keep us waiting for hours, but don't tell us for what or give us a reason.

14. Choi, from East Africa

I went to the Immigration Department to apply for asylum before my visa expired. They asked me to wait until my visa expired. When I went back after my visa expired, they kept me waiting alone for 4 hours in a room. I was scared. At that time a lot of people were being detained. Eventually three immigration officers came and they asked me questions. At the end they issued the immigration papers for me.

You know when we arrived in Hong Kong, we were traumatized from our experiences in our home country. We were stressed and anxious. And if you were detained, it would have a negative impact on you and it would make it even more difficult. It would be psychological torture.

Immigration officers should have more training in human rights and international issues. If they do that people would feel better treated. My experience is that you are treated based on the immigration officers' feelings. If the officer really likes you, you have more chance to do better and be accepted. But if the officer had a bad day or is feeling bad, they will make you feel it. Some of the officers don't even go into the details of the USM claims and you feel like they are not taking their job seriously.