THE LAW SOCIETY OF HONG KONG 香港律師會

NON-REFOULEMENT PROTECTION: THE GOVERNMENT'S PROPOSALS TO AMEND THE IMMIGRATION ORDINANCE (CAP 115)

THE LAW SOCIETY'S SUBMISSION

1. The Law Society wishes to express views on the Government's proposed amendments to the Immigration Ordinance (Cap 115) in relation to, inter alia, the non-refoulement screening process ("**the proposed amendments**").

2. The proposed amendments by the Government are set out in the Legislative Council papers submitted in July 2018[1], November 2018[2] and January 2019[3].

3. By way of background, the proposed amendments come at a time when according to the Government's statistics, the number of outstanding non-refoulement claims has decreased dramatically.[4] Further, the number of immigration officers and adjudicators involved in the screening process has increased and the Government has increased capacity to deal with claims efficiently. [5] In earlier papers, the Government had indicated that the screening of pending USM claims may be completed in the first half of this year.[6]

4. The Law Society sets out its views on the proposed amendments as follows.

5. Many of the proposed amendments seek to fast-track the screening procedures by shortening or imposing short time frames for the process.

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[1] LC Paper No. CB(2)1751/17-18(01)
[2] LC Paper No. CB(2)307/18-19(01)
[3] LC Paper No. CB(2)529/18-19(03)
[4] LC Paper No. CB(2)581/18-19(01) at paragraph 16 "....As at the end of 2018, the number of claims pending screening by ImmD was only about 540, a drop of over 90% when compared with the peak."
[5] LC Paper No. CB(2)1426/17-18(03) at §9 -11
[6] ibid at §6

The Government claims that these proposals aim to reduce delays in the screening process, improve the procedures and the handling of appeals.

6. From the experience of our members handling non-refoulement claims, delays in the screening process could be due to various reasons. One of the main reasons is the non-availability of suitably qualified interpreters and translators whose involvement is essential in the taking of instructions, advising claimants and the preparation of the claims documents. When there are insufficient interpreters / translators, the amount of time allocated to individual claimant will be reduced and not sufficient for proper investigation. Moreover, by reason of lack of interpreters, the time to schedule interviews with claimants will necessarily be reduced. The above are matters beyond the control of claimants and unfair to the claimants, our members handling the claims, as well as interpreters working on the claims. This is not their fault. This practical issue must be addressed as soon as possible.

7. The Government should appreciate that there could be other reasons which could justifiably lengthen the screening process. For example with a vulnerable claimant experiencing psychological issues such as post-traumatic stress disorder (PTSD), it will require more time to ascertain his/her medical conditions both with respect to possibly evidence of past torture as well as with respect to the claimant's fitness to give instructions and to take instructions with appropriate sensitivity.

8. At present, both claimants and their legal representatives are bound to cooperate in the screening process and must show that there are "*special circumstances*" [7] which justify an extension of time which extension, if any, is at the discretion of the handling immigration officer. Furthermore, it is currently the case that a failure to return the claim form within the 28 day limit or any extended period will result in a "*deemed withdrawal*"[8] of the claim. Where mischievous claimants deploy tactics to delay the screening process for his/her own personal advantage, those cases should be seriously looked into. However, a "one-size-fit-all" approach (which requires that extensions of time will only be granted where claimants can show that all due diligence efforts have been taken to meet the original deadline and that there are "exceptional" and "uncontrollable circumstances" which justify the extension of time) both heightens the threshold for granting an extension of time and fetters the discretion of immigration officers to

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[7] Section 37Y of Cap. 115.
[8] Section 37ZG of Cap. 115.

consider the extension request in accordance with the high standards of fairness, given the particular situation of the claimant. The proposed amendments could dangerously ignore the circumstances unique and special to individual cases that warrant detailed investigation. To that extent the approach embraced in the legislative proposals is unfair.

9. The current proposals to shorten the screening process or place a 3 month limitation after a person becomes liable to removal could also not be justified when, according to the statistics provided by the Security Bureau, the number of non-ethnic Chinese illegal immigrants and non-refoulement claims have dropped significantly since the Government's latest review of the strategy of handling non-refoulement claims.

10. We can see no justification as to why the Government is suggesting that, notwithstanding that the persons have applied for relevant judicial review (JR) or Legal Aid for the same, the Immigration Department may remove them from Hong Kong unless leave for JR has already been granted by the Court. There is no logical basis to do so and it presumes that the JR would be doomed to fail. Our members are aware of cases at JR level where it was decided that the decision of the Torture Claim Appeal Board/Non-Refoulement Claims Petition Office ("**the Board**") should be quashed and the claims should be re-determined afresh. There is an even greater concern that removal prior to the JR being heard by the Court would pre-empt the supervisory role of the courts on JR and unlawfully frustrate the claimant's right to pursue legal proceedings and the remedies available therein and may ultimately run contrary to Hong Kong's non-refoulement obligations.

11. In our views, the Security Bureau should as well consider non-legislative enhancements to improve the screening mechanism. We invite the attention of the Bureau to the following

(a) decisions by the Board be made available on a redacted basis to the public and be published in a timely manner ;

(b) information pertinent to non-refoulement protection applications, such as Country of Origin Information ("COI") and rapporteur reports, be available on the Board's website and easily accessible to the general public;

(c) for protection of human rights and to ensure that would-be claimants are aware of their rights and responsibilities (including time limits), the Immigration Department should consider ways to disseminate, or help disseminate, in a timely manner, information on the availability of the non-refoulement protection scheme in Hong Kong;

The above serves to enhance fairness, transparency and accountability.

12. The Bureau should also focus on the continual training for the assessment of claims and the determination of appeals respectively for Immigration Officers and TCAB members. For that purpose sufficient resources must be made available.

13. In respect of the Pilot Scheme for Provision of Publicly-funded Legal Assistance for Non-refoulement Claimants" ("PFLA") which was launched last year, we have not been able to comment and/or to provide suggestions to improve the scheme, as we do not have any information or statistics on how the pilot scheme has been operating.

14. We therefore ask that at least the following be disclosed to the stakeholders, viz.

    (a) the number of cases the PFLA via the Duty Lawyer Service and/or the Pilot Scheme Office has been handling at (a) 1st stage screening by Director of Immigration; and (b) at 2nd stage on appeal to TCAB/NCPO in the past 3 years;

    (b) the success/decline rates;

    (c) case referrals from PSO to the Duty Lawyer Service at (a) 1st stage screening by Director of Immigration; and (b) at 2nd stage on appeal to TCAB/NCPO

15. The Law Society looks forward to receiving the above information and statistics, and is prepared to engage with the Security Bureau for further discussion.

The Law Society of Hong Kong
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