

Re: The Immigration (Amendment) Bill 2020

A. Introduction

1. This paper sets out the views of the Hong Kong Bar Association (“**HKBA**”) on the Immigration (Amendment) Bill 2020 (“**the Bill**”), set out in Annex A to Legislative Council Brief **SB CR 10/3221/15** (“**the LC Brief**”).¹
2. While §26 of the LC Brief states that the Government received comments from the Hong Kong Bar Association on its proposals, this is the first occasion on which the HKBA has had the opportunity to comment on the proposed amendments to the Immigration Ordinance (Cap. 115) (“**the Ordinance**”).²

B. General Observations

B1. Scope and Effect of the Amendments in the Bill

3. The purpose of the Unified Screening Mechanism (“**USM**”) is to give effect to Hong Kong’s legal obligations, under both international and domestic law, not to remove a person in circumstances that would breach their fundamental rights. A person may not be removed from Hong Kong where they face a real risk of:
 - (i) torture contrary to the UN Convention Against Torture;³
 - (ii) a breach of any of their absolute and non-derogable rights under the Hong Kong Bill of Rights (“**HKBOR**”),⁴ including, among others, article 2 (the right to life) or article 3 (the prohibition against torture and other cruel, inhuman or degrading treatment or punishment); and/or
 - (iii) persecution as defined in the Refugee Convention.⁵
4. Where a person facing removal raises a claim that they would be at risk if removed to a specific place, the claim will be screened on all available grounds.
5. So far, the screening arrangements only in respect of category (i) above – i.e. a risk of torture as defined in the UN Convention Against Torture – are provided for in the Ordinance.⁶ The screening arrangements for categories (ii) and (iii) do not have any statutory basis. They are carried out on a purely administrative footing. The statutory

¹ https://www.legco.gov.hk/yr20-21/english/bills/brief/b202012041_brf.pdf

² HKBA in 2018 made submissions in respect of proposed amendments to the Immigration Ordinance to streamline the Unified Screening Mechanism but the proposals in the LC Brief contain many proposed amendments which are completely new and not considered before.

³ United Nations Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984.

⁴ Section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383).

⁵ Article 1 of the 1951 Convention Relating to the Status of Refugees 189 UNTS 150, 22 April 1954 and its 1967 Protocol 606 UNTS 267, 4 October 1967. Hong Kong is not a party to the Refugee Convention or Protocol.

⁶ Section 37ZU of the Ordinance defines “*non-refoulement protection (免遣返保護)*” to mean: “*protection under Article 3 of the [UN Convention Against Torture] against expulsion, return or extradition of the claimant to a torture risk State*”.

screening for torture risk is carried out at the same time as the administrative screening for HKBOR and persecution claims, under what is referred to as the USM).

6. Since the Ordinance deals only with the screening of torture claims under the UN Convention Against Torture, and not with HKBOR and persecution claims, it follows that the amendments under consideration will be of limited effect. The revised arrangements, if adopted, will not apply to the screening arrangements for HKBOR or persecution claims. Insofar as parallel administrative arrangements may be adopted in relation to these latter claims, those measures will not have any statutory force or authority.

B2. *Fairness as an Overriding Consideration*

7. The HKBA recognizes that the Government is eager to ensure that *non-refoulement* claims under the USM are processed in an efficient manner, and to remove in a timely manner those whose claims have failed and who have exhausted the legal processes open to them. This goal is itself unobjectionable. However efficiency must not come at the expense of fairness, which is an overriding consideration. As the Court of Final Appeal has said:⁷

“The determination of the potential deportee’s torture claim by the Secretary in accordance with the policy is plainly one of momentous importance to the individual concerned. To him, life and limb are in jeopardy and his fundamental human right not to be subjected to torture is involved. Accordingly, high standards of fairness must be demanded in the making of such a determination.”

8. Their Lordships went on to state that the courts will, on judicial review, subject the determination of *non-refoulement* claims to rigorous examination and anxious scrutiny to ensure that the required high standards of fairness have been met.
9. The current rate of success under the USM is only ~1%, which is among the lowest in the world. Many failed claims are taken on judicial review due in part to the very low rates of legal representation at the appeal stage, the poor quality of decision-making under the USM, and the failure of the Torture Claims Appeals Board / Non-refoulement Claims Petition Office (“TCAB/NCPO”) to publish its decisions. It is troubling that none of the proposals in the Bill seek to improve the fairness or quality of the decision-making – which would relieve pressure on the Courts – and that the focus is instead exclusively placed on further reducing the procedural protections available to claimants.
10. The HKBA is concerned that many of the proposals contained in the Bill will diminish the fairness of the screening process. Moreover, a number of the proposals seek to place form over substance, and would require decision-makers to dismiss arguable claims relating to the fundamental human rights of the claimant on minor procedural grounds. An example of this, which appears in numerous places in the Bill,⁸ is the proposal to repeal various provisions of the Ordinance that currently permit decision-makers to grant procedural extensions of time where it would be unjust not to do so, and to limit the circumstances in which an extension of time can be granted to cases in which the reasons

⁷ *Secretary for Security v Sakthevel Prabakar* (2004) 7 HKFCAR 187 at §44.

⁸ See clauses 8, 12, 14, 19 and 25.

for the delay were beyond the claimant's control. Why should a decision-maker not have the power, in the context of fundamental human rights like the right not to be tortured, to extend time where it would be unjust not to do so?

11. The efficiency gains that the proposed amendments would bring about appears to be marginal, at best. No data have been provided to show whether any of the revisions proposed in the Bill would make any real difference in practice. The HKBA considers, based on the experiences of legal practitioners across a large number of claims, that most of the proposals would bring little or no reduction in the overall processing time.
12. At the same time, some of the biggest causes of delay under the USM are not addressed at all in the Bill. For example, some claimants have had to wait between one and three years after their hearing before the TCAB/NCPO for a decision to be rendered. That sort of delay is unacceptable, and adversely affects the fairness of the proceedings. Moreover increasing rates of legal representation at the appeal stage – currently, only around 8% of claimants are represented in their appeals before the TCAB/NCPO – will assist in reducing the workload faced by adjudicators and speed up processing times.
13. The HKBA is deeply concerned by the provisions of the Bill which seek to provide for wider and more prolonged use of immigration detention. **These provisions would result in arbitrary and unjustified immigration detention in circumstances that are incompatible with fundamental human rights and long-standing common law principles.** The HKBA strongly urges the Committee to drop the proposals relating to extended use of immigration detention.

C Justifications set out in the LC Brief

14. The Justifications put forward by the Administration for the Bill are set out at §§2-6 of the LC Brief. Insofar as §2 of the LC Brief appears to imply that certain Judgments of the Court of Final Appeal have caused or contributed to an increase in *non-refoulement* claims in Hong Kong, that is an unfortunate and unfounded insinuation.
15. The data presented in the LC Brief state that:
 - The number of new non-refoulement claims quadrupled in 2014-2015;
 - As of 31 October 2020, 1700 pending appeals before the TCAB;
 - As of 28 February 2020, 5500 applications for leave to apply for JR pending before the CFI.
 - As of 28 February 2020, 116 cases pending consideration by CA and 332 by the CFA.
 - As of 31 October 2020, 8000 claimants whose application for leave for JR/application for JR are pending handling by the court.
 - 1320 unsuccessful claimants imprisoned, remanded or being prosecuted;
 - Removal being arranged for 1320 people;
 - Altogether 13,000 unsuccessful claimants remaining in Hong Kong;
 - Due to coronavirus hindering publicly-funded legal assistance to claimants, commencement of the screening procedure was hindered causing an accumulation of a few hundred claims;

- Increasing number of intercepted NECII's from 50 cases per month in the first quarter of 2020 to 110 in October 2020;
- Total public expenditure relating to handling administrative screening of *non-refoulement* claims amounts to around \$1.1. billion per year.

16. For these reasons, the Administration seeks to amend the Ordinance in order to: (1) enhance the statutory backing for screening by the Immigration Department (“ImmD”), (2) prevent the re-emergence of what are said to be “delaying tactics deployed by claimants”; (3) to improve the procedures and functions of the TCAB to enhance its efficiency and effectiveness in handling appeals; and (4) make further improvements in respect of removal, detention and law enforcement (see §6 of the LC Brief).

D HKBA’s Comments on Certain Provisions of the Bill

17. Clause 3 adds a new section 6A to the Ordinance to empower the Secretary for Security to make regulations to provide for the supply to the Director of Immigration of information relating to the passengers and crew members of a carrier

- No comments.

18. Clause 4 amends section 17I of the Ordinance to increase the penalty that may be imposed on employers of persons prohibited from taking any employment or establishing or joining in any business under section 38AA of the Ordinance. Clause 23 amends section 38AA to include overstayers in the prohibition.

- No comments.

19. Clauses 5 and 16 amend sections 32 and 37ZK of the Ordinance respectively to set out some of the factors to be taken into account in deciding whether a period of detention is reasonable and lawful. In addition to the specific circumstances of the individual case, the following factors which may justify a longer detention to be taken into account, including:

- Whether there is a large number of claims or appeals pending screening by ImmD or TCAB at the same time;
- Whether any procedure (for removal and final determination of claim) is hindered directly or indirectly by the person being detained; and
- Whether there are situations beyond the control of ImmD, e.g., some countries need more time to issue travel documents.

20. The HKBA considers that these clauses are highly problematic:

- (1) Immigration detention is an exceptional measure of last resort. It should only be used for the shortest period possible, and only if justified by a legitimate purpose applicable in a particular case.
- (2) The Court of Final Appeal considered the existing provisions relating to immigration detention under section 32 of the Ordinance in *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138. The Court held, at §§27-36, that although the power to detain was framed in wide terms, a generally-framed power

to detain persons without a trial must be subject to fundamental common law principles guarding against arbitrary or unjustified detention. The Court stated at §25 (footnotes omitted):

“25. The position at common law was summed up by Lord Hope in R (Kambadzi) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening) in terms applicable to the claim in the present case:

“I would start therefore with principle that must lie at the heart of any discussion as to whether a person's detention can be justified. The liberty of the subject can be interfered with only upon grounds that the court will uphold as lawful. In Ex p Evans (No 2) Lord Hobhouse of Woodborough said: ‘Imprisonment involves the infringement of a legally protected right and therefore must be justified. If it cannot be lawfully justified, it is no defence for the defendant to say that he believed that he could justify it.’ We are dealing in this case with the power of executive detention under the 1971 Act. It depends on the exercise of a discretion, not on a warrant for detention issued by any court. That is why the manner of its exercise was so carefully qualified by Woolf J in Ex p Hardial Singh. The power to detain must be exercised reasonably and in a manner which is not arbitrary. If it is not, the detention cannot be lawfully justified.”

- (3) The Court held that, although the immigration detention powers set out in section 32 of the Ordinance are drafted in wide terms, their exercise is subject common law principles which prohibit unlawful, arbitrary or unjustified detention.⁹
- (4) The lawfulness of any detention under the Ordinance is controlled, the Court held, by the “*Hardial Singh* Principles”.¹⁰ The *Hardial Singh* Principles require that:
 - (i) The immigration authorities must intend to deport the person 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 immigration authorities will not be able to effect deportation within that reasonable period, they should not seek to exercise the power of detention; and
 - (iv) The immigration authorities should act with the reasonable diligence and expedition to effect removal.¹¹

⁹ *Ghulam Rbani* at §§27-36.

¹⁰ So named after the seminal decision of Woolf J (as he then was) in *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704.

¹¹ *Ghulam Rbani* at §23.

- (5) Although the *Ghulam Rbani* case itself was concerned only with detention in anticipation of removal under section 32(3A) of the Ordinance, the Court confirmed that the same principles, appropriately modified, apply to the other detention powers set out in the Ordinance.¹²
 - (6) Clauses 5 and 16 of the Bill introduce new concepts that are incompatible with the *Hardial Singh* Principles.
 - (7) Clause 5 seeks to introduce policy and resource consideration as justifications for immigration detention pending removal under section 32(4A) of the Ordinance. It does so by making provision for immigration detention to be justified or prolonged by reference to (among others) the following matters: (i) the fact that others may be awaiting removal from Hong Kong; (ii) the manpower and financial resources allocated for the removal of persons from Hong Kong; and (iii) factors that directly or indirectly prevent or delay the person's removal that are not within the control of the Director of Immigration ("**the Director**").
 - (8) Clause 16 seeks to introduce similar statutory justifications for immigration detention of a *non-refoulement* claimant under section 37ZI of the Ordinance before their claim has been finally determined. It does so by making provision for such detention to be justified or prolonged by reference to: (i) the number of other torture claims pending final determination; (ii) the manpower and financial resources allocated towards the making of such determinations; (iii) whether the making of a final determination on the claim is "directly or indirectly" prevented or delayed by any action or lack of action by the claimant; and (iv) factors that or not within the control of the Director.
 - (9) Presumably these factors are sought to be introduced into the Ordinance because it is recognized that they are not matters which would be capable of providing, either alone or with other matters, cogent justification for immigration detention under the *Hardial Singh* Principles. In the HKBA's view, these are not grounds that a court would give much, if any, weight to when determining whether detention is lawful in a particular case.
 - (10) If enacted, Clauses 5 and 16 of the Bill create a very high risk of immigration detention being applied in arbitrary and unjustified circumstances. The HKBA considers that these clauses should be removed from the Bill.
21. Clause 8 amends the circumstances under which an immigration officer may extend time for the filing of the *Non-refoulement* Claim Form ("**NFC**") under section 37Y(3) of the Ordinance.
 22. Under the existing provision, an extension of time extension may be granted where it would be unjust not to allow further time for the claimant to file the NCF. Clause 8 repeals this provision and states instead that time may be extended only if the delay is due to circumstances beyond the claimant's control.

¹² *Ghulam Rbani* at §36.

23. It is difficult to see the logic of removing the immigration officer's power to extend time where, *even though it would be unjust not to grant the extension*, the cause of the delay was not due to a "circumstance outside the claimant's control". Application of the proposed amendment would likely result in intolerable procedural unfairness. This, in turn, has the potential to generate more judicial review applications.
24. Clause 9 amends section 37Z of the Ordinance to make it clear that the making of a torture claim does not preclude the Government from liaising with any party after the claim is rejected for the purpose of making arrangements to remove the claimant.
25. This provision would make way for ImmD liaise with third parties, with a view to commencing removal arrangements, as soon as the claim is first rejected by ImmD. In some if not most cases, this will involve liaising with the Government of the claimant's nationality, for example to secure travel documents. On its face, Clause 9 would appear to allow these steps to be taken without waiting for the outcome of any appeal or judicial review, even if it had already been commenced.
26. This proposal raises safety concerns. Claimant can be placed at risk, or increased risk, if their national authorities are alerted to their whereabouts and/or the fact that they face compulsory removal, which may imply that a protection claim has been made. Contacting the national authorities before the claim has been finally disposed of risks unnecessarily creating or increasing the risk to a claimant whose claim might yet still succeed. In that connection, it should be noted that ImmD's statistics show that a majority of successful claims are rejected at first instance, and succeed only at the appeal stage.
27. Moreover the fact that a claimant's national authorities have been contacted by ImmD could, in some cases, be relied on by claimants as a factor creating or increasing the risk to them.
28. Clause 10 adds a new section 37ZAB to the Ordinance to require claimants to attend interviews, and a new section 37ZAC to enable an immigration officer to specify the language to be used by a claimant where the officer reasonably considers that the claimant is understand and communicate in. Clause 25(13) makes the same provision in relation to use of language in appeals before the TCAB.
29. In practice, ImmD has already instituted changes whereby a claimant who fails to attend an interview has only one day to produce a medical certificate. ImmD will usually re-schedule the interview if medical proof is provided but if the claimant does not attend the re-scheduled interview, the "screening interview" is conducted by way of a written Q&A. Very little latitude has been given to claimants in the last few years in terms of scheduling interviews. The observation at §9 of the LC Brief that "*the screening process was seriously delayed where uncooperative claimants failed to attend or complete scheduled interviews, sometimes repeatedly*", appears to be accurate only historically.
30. Claimants who are not fit to be interviewed should not be forced to undergo such an important part of their claim in the name of expediency. This does not meet the high standards of fairness required.
31. Further, sufficient flexibility needs to be retained to accommodate legal representatives' diaries.

32. The HKBA has serious concerns about the provision to require a claimant to communicate in a language that ImmD or TCAB reasonably considers the claimant is able to understand and communicate in.
33. It is vital that all claimants are able both to understand, and also participate fully in, the proceedings. Most protection claims turn on the strength of the claimant's account. The Court of Final Appeal discussed the importance of the claimant's evidence in the screening process:

"21. UNHCR has published a Handbook on Procedures and Criteria for Determining Refugee Status (1979, re-edited 1992). It provides guidance to Contracting States and would no doubt be followed by UNHCR itself in conducting refugee status determination. It states that the relevant facts will have to be furnished in the first place by the applicant himself. The examiner, that is, the person charged with determining his status, will then have to assess the validity of any evidence and the credibility of the applicant's statements. The Handbook recognises the principle that the burden of proof lies on the person submitting a claim. But it notes that often, the applicant, as a person fleeing from persecution, may have arrived with the barest necessities, even without personal documents. So he may not be able to support his statements by documentary or other proof. The Handbook states that, while the applicant has the burden of proof, the duty to ascertain and evaluate all relevant facts is shared between the applicant and examiner. In appropriate cases, such as where statements are not susceptible of proof, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt: see paras 195 and 196 of the Handbook."¹³

(Emphasis added)

34. Given the crucial importance of a claimant's own account in the screening process, fairness demands that claimants are given the best possible opportunity to put forward their account, and to answer any questions about it. The quality of the communication between the decision-maker and the claimant is also vital for the decision-maker to discharge their function.
35. In this context, there is a significant difference between the level of proficiency required to hold a simple conversation, and that needed to participate meaningfully and effectively in legal proceedings. A claimant may be seriously disadvantaged by being required to conduct interviews, and face examination, in a non-preferred language.
36. A claimant has the right to use and be understood in the language of his or her choice when giving evidence. That right cannot be sacrificed merely on the ground that an interpreter in some other language may be available more quickly.
37. Moreover, as a practical matter, where a claimant indicates that he or she does not wish to use a given language in presenting his or her claim, it is unlikely that an immigration officer or the TCAB will be able reasonably to form the view that the claimant is able to understand and communicate in that language to the required level. Unless the decision-

¹³ *Prabakar* at §21.

maker is able to speak that language themselves, their judgment on the claimant's level of proficiency in that language will in effect be delegated to the interpreter.

38. Clause 12 amends section 37ZC of the Ordinance to provide that an immigration officer or TCAB may decide not to take into account the disputed physical or mental condition of a claimant in certain circumstances.
39. These provisions are unnecessary. Decision-makers are already able to draw relevant inferences, where appropriate, from a claimant's unreasonable failure to undergo a medical examination, or refusal consent to its release.
40. Moreover this provision inappropriately seeks to deny claimants their choice of medical practitioner. A claimant may have valid reasons for electing a particular physician they trust, as opposed to one assigned by ImmD – especially in claims involving sexual violence. As long as that medical practitioner is licensed and qualified, there is no real justification for refusing to take a claimant's own medical reports into account. A medical report from a practitioner other than that nominated by ImmD should be assessed on its own merits.
41. The requirement to give “any consent that is necessary” to enable a medical examination is too wide, especially as the scope of the medical examination is not required to be specified. This may conflict with a claimant's religion or culture, for example, examination by a doctor of the opposite gender.
42. Clause 17 amends section 37ZN of the Ordinance to revise the grounds on which an immigration officer or TCAB may, under sections 37ZL(1) and 37ZM(1) of the Ordinance, revoke a previous decision upholding a torture claim.
43. The current legislation allows protection to be revoked if the original decision is found to have been materially affected by false or misleading information or non-disclosure, or if the risk of torture has ceased to exist due to changes in the circumstances of the claimant or the torture risk state.
44. The proposal is to “clarify” that a substantiated claim may be revoked if the risk giving rise to the claim has for any reason ceased to exist, or “*if, upon review of all the prevailing circumstances, ImmD is of the view that the claim should not be accepted as substantiated.*”
45. The proposed subsection (d) is inconsistent with the principle of legal finality. It appears to provide for decisions to be revoked in cases where there has been no change of circumstances, but ImmD has simply reevaluated the original claim. This is inappropriate, particularly in cases where the original claim was found to be substantiated by the TCAB.
46. The current legislation adequately addresses the situations in which revocation may be considered.
47. Clause 18 amends section 37ZS(2) by adding “No action may be taken in relation to a notice of appeal that does not comply with subsection (2)(a) or (ab)”. Subsection (ab) requires the notice of appeal to be “duly completed and signed”.

48. The provision directly conflicts with the judgment of the High Court in *YA v TCAB* [2018] HKCFI 2445, where it was held non-compliance with the formalities set out in section 37ZS(2)(a) was only a procedural irregularity which could be cured, and did not make the notice of appeal a nullity. A requirement that the TCAB shall take no action on a notice of appeal that has a mere procedural irregularity does not make sense. This is another example of a provision of the Bill giving priority to matters of form and procedure over substance.
49. Clause 19 amends what the Board may take into account in deciding whether to allow late filing of a Notice of Appeal.
50. Under section 37ZT of the Ordinance, the TCAB when deciding whether to allow a late filing of a notice of appeal may take into account the statement of reasons for late filing AND any other relevant matters. If the Board is satisfied that by reason of special circumstances it would be unjust not to allow the late filing, the Board may allow the late filing.
51. Clause 19 removes nearly all of this, and would only permit the TCAB to take into account the reasons given for the late filing. Other matters, *even though relevant considerations*, would have to be ignored.
52. The Hong Kong Courts have repeatedly held that, even where no good reason for an extension of time is given, the decision-maker must conduct an evaluation of the merits of the case.¹⁴ The reason that this is a necessary consideration is because fundamental rights are at stake. A person does not forfeit their right not to be tortured (etc.) because they miss a procedural deadline for filing a document; and similarly, the HKSAR Government is not relieved of its obligation under international and domestic law not to return a person to face a breach of their most basic human rights just because of some minor procedural non-compliance.
53. In this context, it is difficult to understand the proposal requiring the TCAB to ignore other relevant considerations when dealing with such fundamental matters.
54. Clause 26 adds a new Schedule 5 to the Ordinance to provide for the transitional and saving arrangements for torture claims made under the Ordinance before the commencement of the Immigration (Amendment) Ordinance 2020
- No comments
55. Clauses 27 and 28 amend the Weapons Ordinance and Firearms and Ammunition Ordinance respectively to provide that the prohibition on the possession of weapons, arms and ammunition under those Ordinances does not apply to a member of the Immigration Service.
56. These clauses would supply authorisation for immigration officers to be issued with weapons. Paragraph 15 of the LC Brief states that this is to cater for use at the Castlepeak

¹⁴ See e.g. *Qasim Ali* [2019] HKCA 430 (Court of Appeal) at §26, following *The Secretary of State for the Home Department v Begum* [2016] EWCA Civ 122 (England and Wales Court of Appeal).

Bay Immigration Centre (“CIC”), although the authorisation conferred under Clauses 27 and 28 is not limited to CIC.

57. The LC Brief does not explain what factual circumstances have prompted the need for changes to be made in relation to the deployment of armed immigration officers at CIC. The Administration should state what events (if any) have occurred that justify the need for revised arrangements.
58. The issue and use of potentially lethal weapons engages Article 28 of the Basic Law¹⁵ and Article 2 of the HKBOR,¹⁶ which protect the right to life and prohibit arbitrary killings. As has been held by the High Court, Article 2 imposes the substantive obligation:
- “... not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent practicable, protect life”*¹⁷
59. In the case of the Hong Kong Police Force, for example, this obligation is given effect to through the Police General Order, which contains detailed provisions governing the circumstances in which police officers are permitted to use force, including potentially lethal force. This is further supplemented by the provisions of the Force Procedure Manual, which sets out (among other things), *“a continuum of measures which an officer might use to deal with increasing levels of resistance from a person”*.¹⁸ Police officers are legally obliged to comply with the provisions of the PGO and the FPM.
60. If immigration officers are to be issued with weapons capable of causing death or serious harm to any person, this must be subject to a proper set of written, binding procedures detailing the circumstances in which the use of such force is permissible.
61. Paragraph 15 of the LC Brief states that, to-date, immigration officers have been given permission to possess weapons, on a personal and *ad hoc* basis, by the Commissioner of Police. The LC Brief does not refer to any legally binding framework of laws, precautions, procedures and means of enforcement governing the use of such weapons. Both that arrangement, and what is now proposed in the Bill, are wholly unsatisfactory in light of the obligations under Article 28 of the Basic Law and Article 2 of the HKBOR.
62. The proposal for the ImmD to conduct its own internal training governing the use of such weapons is also unsatisfactory in the absence of a clear, binding and published set of rules and procedures discussed above.
63. Clause 25 amends Schedule 1A to the Ordinance (which deals with the members and procedures of TCAB), *inter alia* to –

¹⁵ Article 28 of the Basic Law provides: *“The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.”* Emphasis added.

¹⁶ Article 2 of the HKBOR provides: *(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”*

¹⁷ *Sony Rai v Mr William Ng, Esq., The Coroner of Hong Kong* [2011] 2 HKLRD 245, §18. Emphasis added.

¹⁸ *Sony Rai* at §39.

- (i) enable TCAB to give less than 28 days' notice of an appeal hearing if it considers appropriate to do so in a particular case (Clause 25(15)); and
 - (ii) address situations in which the claimant is absent from the hearing (Clause 25(21)). The TCAB may only fix another hearing date if the claimant applies for this within 3 working days after the original hearing, with no provision made for this period to be extended. The TCAB has power to fix a new hearing only if the claimant is able to show that he missed the original hearing due to circumstances outside his control, notwithstanding exercising due diligence.
64. It is infeasible to hold an appeal hearing with less than 28 days' notice. The parties and their legal representatives need sufficient time to prepare. In cases where the legal representative has taken over the case from another lawyer, further witness statements may need to be taken and other evidence adduced. Time is also required to arrange conferences with the appellant which is also subject to interpreters' availability. This amendment would seriously compromise the quality of legal representation at appeal stage.
65. As to Clause 25(21), under the current legislation, in the event that both the claimant and, if they have one, their legal representative, do not appear at the TCAB hearing, the TCAB will issue a notice under section 15 of Schedule 1 informing the appellant of the TCAB's intention to determine the appeal in their absence, allowing seven days for the appellant to submit an explanation. Further, the Board can re-fix a date if satisfied that the failure to attend was due to "*reasonable cause*".
66. Clause 25(21) would remove the requirement to give notice to the appellant of the intention to determine the appeal without a hearing, would limit the time within which to apply for a new hearing to just 3 working days, and would prevent the TCAB from fixing a new hearing, *even if there was reasonable cause for the claimant's absence*, unless the claimant was absent due to circumstances beyond their control.
67. Experience shows that there are numerous reasons why a claimant may miss a hearing, some valid and some invalid. The TCAB should be left with discretion to fix a new hearing where it considers that there is reasonable cause for the absence.
68. Data suggests that only 8% of appellants are legally represented. Unrepresented claimants who are not prompted by a notice of the TCAB's intention to proceed without an oral hearing will be seriously disadvantaged. An unrepresented appellant will not be aware of the Ordinance or the requirement to submit an explanation within a very short timeframe and it is reasonably foreseeable that appeals will be determined without oral hearings in many cases. There is no good reason to dispose of a safeguard and/or the requirement to provide adequate information to allow (especially unrepresented) appellants from properly exercising their right to be heard.
69. The proposed amendment does not merely streamline the TCAB procedures, it creates a situation that is inherently unfair by depriving the appellant from access to relevant information as it relates to the law and/or procedure in the conduct of the appeal.

E Additional Comments

70. The Bill appears to place at the feet of claimants exclusive blame for the delays that have, in the past, beset the USM. It is worth remembering however that the past backlog of cases in the USM was largely caused by the need to carry out re-screening of large numbers of cases, which in turn was a problem entirely of the Director's own making. The screening system adopted by the Director was repeatedly found to be legally defective, at a systemic level, either because the procedures adopted were inherently unfair, or because the Director had not been screening for all applicable grounds,¹⁹ resulting in thousands upon thousands of cases having to be re-screened.
71. The salutary lesson to be learned from the history of the USM is that adopting unfair procedures, supposedly in the name of efficiency, is in fact a false economy.
72. As matters stand, the number of new cases coming into the USM is low. While there are many cases now before the Courts, amending the procedures at first tier and at appeal stages will not change the situation now faced by the Courts. On the contrary: adopting unfair procedures will only lead to more judicial review applications. The caseload faced by the Courts can be better addressed by increasing manpower at the judicial level, and by ensuring wider access to legal representation, which greatly decreases the Court's workload compared to dealing with unrepresented litigants.
73. The number of cases now before the Courts is also directly attributable to poor quality decision-making, the failure of the TCAB to publish its decisions, and the low rate of legal representation in the TCAB.

Hong Kong Bar Association
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¹⁹ See e.g. *Prabakar, FB v Director of Immigration* [2009] 2 HKLRD 346, *Ubamaka v Secretary of Security* (2012) 15 HKCFAR 743, and *C & Others v Director of Immigration and Anor (UNHCR Intervening)* (2013) 16 HKCFAR 280.