Hong Kong Bar Association's comments on Consultation paper on proposed amendments to the High Court Ordinance (Cap.4) to facilitate the more efficient handling of cases, including those relating to non-refoulement claims

1. It is evident that the justification for the amendments to the HCO is based on the surge in case load between in 2017 and 2018 of applications for leave to apply for judicial review and subsequent appeals to the CA and CFA.

2. Whilst it is agreed that it is desirable that cases are handled as expeditiously as possible, the question is whether the proposed amendments are appropriate in the case of non-refoulement claimants and/or necessary, generally.

Special considerations for non-refoulement cases

3. Whilst the proposed amendments propose to apply all judicial reviews and not just those concerning non-refoulement claimants, cases involving 'life and limb' must be dealt with according to the 'high standards of fairness' required by law following *Security for Security v Sakthevel Prabakar* [2005] 1 HKLRD 289. This means that any amendments which have the potential to lower the standard of fairness must be closely scrutinised.

4. Whilst it is difficult to specifically criticise each of the proposed amendments for being unfair (or less fair), it must be the case that such streamlining, which is to the benefit of the judiciary will be to the detriment of the litigant - after all, there is a reason why the CA is meant to be composed of three, not two judges.

5. Whilst expedience and good administration may tip the balance in favour for a two-judge bench for general judicial reviews, the judiciary ought to consider whether expedience outweighs the 'high standards of fairness' required in non-refoulement cases and whether such amendments would, accordingly, be in line with *Prabakar*.

Are the amendments necessary?

6. According to the Annex to the Consultation Paper, there was a sharp rise in judicial reviews on account of a significant increase in applications for leave to apply for judicial review by non-refoulement claimants in 2017 and 2018 - from 60 applications in 2016 to 2,851 applications in 2018.

7. It is self-evident that such a sudden increase has caused a great deal of pressure on the courts. However, it is not clear whether this is a trend that is set to continue, necessitating amendments to the HCO.

8. Annexed to these comments are the statistics provided by the Immigration Department as to non-refoulement claims[1]. From these figures, it is clear that there was a sharp rise in non-refoulement claims in 2014, leading to the number of outstanding cases reaching a high of 10,922 in 2015.

[1] https://www.immd.gov.hk/eng/facts/enforcement.html

9. However, this rise was not wholly due to a sudden increase in claims, but rather, due to the introduction of the USM in March 2014, which meant that as well as screening new claims, a large volume of Torture Claims which had already been determined under the Immigration Ordinance had to be re-screened under all applicable grounds other than torture. This caused a significant bottleneck.

10. Between 2015 and 2017/18, this glut of non-refoulement cases moved through the system to be heard by the TCAB/Non-refoulement Petitions Office. It is likely that it was this unusually large cohort of claimants who began to file applications for leave for judicial review in 2017 and 2018 upon the refusal of their appeals to the TCAB/Non-refoulement Petition Office.

11. By 2018, the bottleneck at first-tier was cleared and the number of outstanding non-refoulement cases fell to 546 and as of March 2019, only 275 outstanding cases remain. The real effect of the reduction in non-refoulement claims at first-tier is evident from closure of more than half of the Duty Lawyer CAT Offices and a significant reduction in staffing as well as the end of the Pilot Scheme in 2019.

12. That being the case, whilst the effects of the backlog in 2014/15 may continue to be felt for some time by the courts (and indeed may worsen over short-term as the greatest number of cases were determined in 2017/18), it should be considered whether an extreme measure such as amending the HCO is really necessary when there is every indication that the surge in judicial reviews is not a permanent trend but one that will likely fall back to pre-2017 levels in due course.

Are the proposed amendments the only way to deal with the rise in judicial reviews?

Increase in manpower the obvious solution

13. When the bottleneck occurred at first-tier, the Security Bureau responded by introducing the Pilot Scheme which expedited the claims through immigration screening. Once the bottleneck hit the TCAB, the response was to significantly increase the number of panel members (some 50 to 100 new adjudicators were appointed). Both these measures, which were essentially an increase in manpower, were effective in expediting cases through the system. Ultimately, the only permanent solution would be to increase judicial manpower.

Quality and transparency of TCAB decisions

14. The quality of Immigration and TCAB/Non-refoulement Petition Decisions unfortunately add to the court's caseload. Whilst there is much criticism levelled at non-refoulement claimants for abusing the system and purposely creating delay, there has been little discussion on how elementary errors in the decision-making process in the USM have necessitated involvement of the courts in exercising their supervisory jurisdiction in the first place.

15. TCAB decisions are not reported. The lack of transparency creates latitude for improper and unfair decision-making which then creates potential judicial reviews.

Inadequate Legal Aid/Duty Lawyer funding

16. Where the duty lawyer representing a claimant at first-tier is of the view that there are no grounds of appeal, no funding or legal representation is provided to the claimant for their appeal to the TCAB. With legal representation and cases properly presented and heard at the appeal level, there may be fewer applications for judicial review of TCAB decisions.

17. Likewise, the difficulty in getting Legal Aid for application for leave for judicial review (the refusal rate is over 99%) means that nearly all non-refoulement applicants for leave for judicial review are unrepresented. Inadequately prepared cases create a great deal more work for judges who have to review all the papers and get to grips with the relevant issues without the assistance of counsel and further, unrepresented clients cause delay through failure to understand and comply with court procedures. Increased legal aid funding may increase efficiency substantially.

Specific comments on the proposed amendments

18. In paragraph 6 of the consultation paper, it states, "[I]n the event of a 2-Judge CA not being able to reach an unanimous decision, under the extant section 34B(5) of Cap.4, the applicant could apply to have the case re-argued before a 3 -Judge CA." In the case of non-refoulement claimants who are often unrepresented and highly unlikely to be fluent English or Chinese speakers, an application to have the case-reargued before three judges is likely to be an obstacle and an automatic right to have the case re-argued before 3 judges would not only be more fair but more efficient.

21 June 2019

Hong Kong Bar Association

ANNEX

Torture/Non-refoulement Claim Cases
(as at End of March 2019)

Year	Made	Determined	Withdrawn or Taken No Further Action	Outstanding (Cumulative)
before 2005	**53**	0	4	49
2005	**211**	1	30	229
2006	**528**	43	54	660
2007	**1 584**	82	51	2 111
2008[1]	**2 198**	179	132	3 998
2009[2]	**3 286**	0	1 037	6 340[3]
2010	**1 809**	214	1 186	6 749
2011	**1 432**	932	802	6 447
2012	**1 174**	1 575	1 154	4 892
2013	**491**	1 813	778	2 792
2014	**8 851**[4]	1 047	978	9 618
2015	**5 053**	2 339	1 410	10 922
2016	**3 838**	3 218	1 561	9 981
2017	**1 843**	4 182	1 743	5 899
2018	**1 216**	5 467	1 102	546
2019 (Jan-Mar)	**281**	498	54	275
Total on Torture/ non-refoulement Claims	**33 848**	**21 590**	**12 076**	**275**

[1] The Court of First Instance of the High Court (CFI) held in December 2008 that the Administration should provide legal assistance to a torture claimant during the screening process and provide suitable training for the decision makers. The Immigration Department (ImmD) then suspended all screening works.

[2] The Legislative Council passed the Immigration (Amendment) Ordinance 2009 in November 2009, making it an offence for illegal immigrants to take any employment or establish or join in any business. The ImmD implemented the enhanced administrative mechanism in December 2009.

[3] This includes 93 reviewed cases.

[4] On commencement of the Unified Screening Mechanism (USM) on 3 March 2014, there were 2 501 outstanding torture claims. Separately, 4 198 persons have lodged non-refoulement claims on applicable grounds (other than torture) (in which 2 962 cases were lodged by rejected or withdrawn torture claimants), making a total of 6 699 non-refoulement claims pending determination on commencement of the USM.