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Panel on Security

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 6 July 2009**

Review of the torture claim screening mechanism

Purpose

This paper summarizes past discussions by the Panel on Security (the Panel) regarding the assessment of torture claims.

Background

Torture claims made under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

2. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) applies to Hong Kong. Torture claims made under Article 3 of CAT are dealt with by the Immigration Department (ImmD), and the Government has put in place a set of administrative procedures for handling torture claims.

3. For a torture claimant who has failed to establish his claim, he will be removed from Hong Kong in accordance with the law. For a torture claimant who has established his claim, he will not be removed to the country where there are substantial grounds for believing that he would be in danger of being subjected to torture. However, his removal to another country to which he may be admitted without the danger of being subjected to torture will be considered. Furthermore, if country conditions subsequently change such that a torture claim established earlier in respect of a particular country can no longer be substantiated, removal to that country will be considered.

4. The administrative procedures allow a screened-out torture claimant to object to the refusal decision made against him, and the Secretary for Security (S for S) will consider the appeal. As legal proceedings are not involved in the screening and appeal processes, no legal aid is available. However, the decision on a torture claim (including the decision on appeal) is subject to judicial review, and legal aid may be

available for the judicial review proceedings. Similarly, if a deportation or removal order is made against a torture claimant, he may seek judicial review against the decision to deport or remove, and legal aid may again be available for such judicial review proceedings.

Number of torture claims lodged

5. According to information provided by the Administration to the Panel in June 2008, the number of torture claims lodged in Hong Kong increased eightfold between 2005 and 2007. ImmD received 186 claims in 2005, 514 in 2006, 1 583 in 2007 and 1 017 in the first five months of 2008. As at late May 2008, there were 3 092 torture claimants in Hong Kong.

Deliberations of the Panel

6. The Panel discussed the mechanism for assessing torture claims in the following context -

- (a) concluding observations of the United Nations Committee Against Torture (the CAT Committee) on the second periodic report of the Hong Kong Special Administrative Region (HKSAR) under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- (b) situation of asylum seekers, refugees and claimants against torture in Hong Kong.

The major concerns of members are summarized in the following paragraphs.

Time required for determination and period of detention

7. Members were concerned about the lengthy procedures and time required for determination of torture claims. They called on the Administration to take concrete actions to speed up the determination process of torture claims. Noting that some torture claimants had been detained, members asked about the offences committed by detained torture claimants and the length of period, especially the longest period, for which such persons had been detained.

8. The Administration responded that the Government had put in place administrative procedures for assessing torture claims made under CAT. In view of the complexity of the cases involved and the court judgment that torture claims should be handled with a high standard of procedural fairness, the processing would inevitably take a considerable amount of time. The Administration would consider redeploying resources and increasing manpower, with a view to speeding up the processing of torture claims.

9. Some members sought information on the number of asylum seekers who had made both refugee and torture claims. They considered that if a considerable number of asylum seekers lodged both claims, the Administration should consider developing a joint determination procedure with the United Nations High Commissioner for Refugees (UNHCR), with a view to speeding up the process.

10. The Administration advised that HKSAR had a firm policy of not granting asylum and did not have any obligation to admit individuals seeking refugee status under the 1951 United Nations Convention relating to the Status of Refugees. Claims for refugee status lodged in Hong Kong were dealt with by UNHCR, and ImmD maintained close liaison with UNHCR Hong Kong Sub-office to ensure persons whose claims for refugee status had been denied and who had no permission to remain in Hong Kong left the territory in accordance with the law. Similarly, a torture claimant who had failed to establish his claim after assessment by ImmD would be removed from Hong Kong in accordance with the laws.

11. Regarding the detention of torture claimants, the Administration advised that the fact that a person being a refugee, asylum seeker or torture claimant would not itself lead to that person's prosecution or detention in Hong Kong. Enforcement actions would be made only if the person concerned had breached the laws of Hong Kong, such as undertaking illegal employment or overstaying.

12. The Administration also advised that in the case of a person under detention in accordance with the laws who was also a refugee, asylum seeker or torture claimant, the Director of Immigration (D of Imm) might, on a case-by-case basis, exercise his discretion to grant the person release on recognizance pending the determination of his claim by the relevant authorities or, for mandated refugee, pending his resettlement elsewhere arranged by UNHCR. Considerations would normally be given to -

- (a) whether the person concerned constituted a security risk to the community;
- (b) whether there was any risk of the person absconding and (re)offending; and
- (c) whether removal was not going to be possible within a reasonable time.

13. As regards the detention period, the Administration advised that most asylum seekers and torture claimants had been detained for less than three months.

Need for establishing an independent determination mechanism

14. Some members were of the view that a proper regime should be established for handling torture claims, and appeals relating to torture claims should not be determined by S for S, but by an independent committee or the court.

15. The Administration responded that a torture claimant aggrieved of the determination of D of Imm could lodge an appeal to the Chief Executive, who had

delegated the authority for considering such an appeal to S for S. A torture claimant aggrieved of the determination in an appeal could seek judicial review.

Defence for a person charged with torture

16. Some members expressed concern about the reference to "lawful authority, justification or excuse" as a defence for a person charged with torture under the Crimes (Torture) Ordinance (Cap. 427). These members considered that a person's right of not being subjected to acts of torture and other cruel, inhuman or degrading treatment or punishment should be an absolute one. No exception to CAT should be created by legislative means. Lawful sanctions should be subject to CAT.

17. The Administration explained that for the purpose of section 3(5) of Cap. 427, "lawful authority, justification or excuse" meant -

- (a) in relation to pain or suffering inflicted in Hong Kong, lawful authority, justification or excuse under the law of Hong Kong;
- (b) in relation to pain or suffering inflicted outside Hong Kong -
 - (i) if it was inflicted by a public official acting under the law of Hong Kong or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law; and
 - (ii) in any other case an authority, justification or excuse which was lawful under the law of the place where it was inflicted.

The Administration advised that this defence was consistent with Article 1.1 of CAT which provided that "[Torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". The defence was intended, and was also necessary, to cover matters such as the reasonable use of force to restrain a violent suspect/prisoner. It was not intended, nor would the courts be asked to interpret them as such, as authorizing conduct intrinsically equivalent to torture as defined in Article 1 of CAT.

Possible abuse of the existing mechanism by torture claimants

18. Some members expressed concern about the situation of abuse of the existing mechanism by torture claimants. They asked about the number of asylum seekers and torture claimants in detention lodging refugee claims or torture claims only after being arrested for breaching Hong Kong laws, the number of persons granted refugee status by UNHCR and the number of such persons who had settled overseas.

19. The Administration advised that information provided by UNHCR had suggested that, in comparison with other countries, there was a more widespread abuse of refugee status and torture claims in Hong Kong. As at 30 April 2008, the accumulated number of torture claimants was 3 196. Among them, 1 591 were known to have lodged refugee claims. So far, UNHCR had granted refugee status to

35 of them and 14 of these refugees had settled overseas; but there had not been any successful claim among the torture claim cases. Among the cases handled up to the end of April 2008, 91% of torture claimants did not make any claim until after having arrived in Hong Kong for an average of 15.1 months. Most of these claimants, i.e. 91%, lodged their torture claims only when they were arrested for undertaking illegal employment or committing other criminal offences in Hong Kong, or when they faced imminent removal or deportation from Hong Kong. 48% of all torture claimants lodged their claims after an average of 11.5 months since lodging refugee status claims with UNHCR. These figures indicated that there was a possible abuse of the existing mechanism by illegal immigrants/overstayers who had sought employment in Hong Kong.

Humanitarian assistance to torture claimants and asylum seekers

20. Some members advised that they had received complaints about inadequate assistance to torture claimants released on recognizance. These members were of the view that the Administration should render appropriate assistance, including legal aid, to asylum seekers and torture claimants.

21. The Administration responded that it had, in collaboration with non-government organizations and on a case-by-case basis, offered assistance-in-kind on humanitarian grounds to refugees, asylum seekers and torture claimants who were deprived of basic needs during their presence in Hong Kong pending resettlement overseas or while their claims were being processed by the relevant authorities. The type of assistance offered included temporary accommodation, food, clothing, other basic necessities, appropriate transport allowances, counselling and medical services. To facilitate better coordination and provision of services, the Administration had commissioned the International Social Service (ISS) Hong Kong Branch to provide assistance-in-kind services to mainly vulnerable asylum seekers and torture claimants. As at 31 March 2008, ISS was supporting 1 752 such clients on commission, and there were another 483 cases pending ISS's assessment and service arrangement.

22. The Administration added that the existing legal aid policy was to ensure that no one with reasonable grounds for taking or defending a legal action in the Hong Kong courts was prevented from doing so because of the lack of means. Legal aid was available to asylum seekers and torture claimants who satisfied the relevant criteria, namely the means test and the merits test.

Latest developments

23. At the Panel meeting on 3 February 2009, the Administration informed members that the CAT Committee had recommended that the HKSAR Government should incorporate the provisions in Article 3 of CAT under the Crimes (Torture) Ordinance and consider adopting a legal regime with a view to establishing a comprehensive and effective procedure to examine thoroughly the merits of each torture claim when determining the applicability of its obligations under Article 3 of CAT. The Administration was considering the CAT Committee's recommendations

to put in place a legislative regime for handling torture claimants and to cover the non-refoulement principle under Article 3 of CAT. The Administration would conduct research on the effectiveness of similar arrangements in other jurisdictions, and consider whether and how HKSAR might apply such arrangements locally. The Administration undertook to provide a framework on the subject matter for consideration by the Legislative Council (LegCo) by the end of 2009.

24. Some members considered that as a number of procedural problems were found with ImmD's screening of torture claims under CAT, the Administration should expedite its study regarding the implementation of a legislative regime for handling torture claims. They were concerned about the Administration's timetable for introducing the relevant bill, and requested the Administration to consult the legal profession and LegCo at the earliest possible opportunity before taking forward any proposals.

Relevant papers

25. A list of relevant papers available on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
30 June 2009

**List of relevant documents on
review of the torture claim screening mechanism**

Date of meeting	Meeting	Document / Paper No.
18.7.2006	Panel on Welfare Services and Panel on Security	Minutes of joint meeting (LC Paper No. CB(2)3077/05-06)
		Administration's paper entitled "Situation of refugees, asylum seekers and torture claimants in Hong Kong" (LC Paper No. CB(2)2747/05-06(01))
31.7.2006	Panel on Security	Minutes of special meeting (LC Paper No. CB(2)3163/05-06)
		Administration's paper entitled "Response to the motion of the LegCo Panel on Security on asylum seekers and torture claimants" (LC Paper No. CB(2)2994/05-06(01))
		Supplementary information provided by the Administration in relation to situation of refugees, asylum seekers and torture claimants (LC Paper CB(2)526/06-07(01))
5.12.2006	Panel on Security	Minutes of meeting (LC Paper No. CB(2)880/06-07)
		Administration's paper entitled "Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two: Hong Kong Special Administrative Region" (LC Paper No. CB(2)496/06-07(01))
		Administration's letter dated 24 June 2008 providing supplementary information relating to the Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two: Hong Kong Special Administrative Region (LC Paper No. CB(2)2429/07-08(01))
27.10.2008	Panel on Security	Minutes of meeting (LC Paper No. CB(2)348/08-09)

Date of meeting	Meeting	Document / Paper No.
		Administration's paper entitled "Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two: Hong Kong Special Administrative Region" (LC Paper No. CB(2)129/08-09(03))
		Concluding observations of the United Nation's Committee Against Torture on the Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two : Hong Kong Special Administrative Region (LC Paper No. CB(2)366/08-09(01))
		Administration's letter providing information on the composition of the delegation representing the Government of the Hong Kong Special Administrative Region to attend the hearing of the United Nation's Committee Against Torture in Geneva on 7 and 10 November 2008 (LC Paper No. CB(2)433/08-09(01))
3.2.2009	Panel on Security	Minutes of meeting (LC Paper No. CB(2)1288/08-09)
		Administration's paper entitled "Hearing of the Second Report of the Hong Kong Special Administrative Region under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (LC Paper No. CB(2)737/08-09(03))