

**Legislative Council Bills Committee on
Immigration (Amendment) Bill 2011
Implementation of the Torture Claim Screening Mechanism**

Purpose

This paper provides supplementary information on the implementation of the torture claim screening mechanism, in particular on areas which Members had raised concerns about.

Overall situation

2. When the enhanced screening mechanism came into operation in late December 2009, there were 6 340 outstanding claims. From the launch of the enhanced screening mechanism to 31 March 2012, the Immigration Department (ImmD) has received 3 508 other new claims.

3. The majority of claimants came from South Asian countries such as Pakistan, India, Bangladesh, Indonesia (these four countries account for a total of 70% of the claimants). Separately, 85% of the claimants made their claims after being arrested for breaching the Immigration Ordinance or other ordinances. When making the claims, 55% of the claimants were overstayers and 40% were illegal immigrants. In recent years, the number of claims lodged by foreign domestic helpers (FDHs) has clearly increased. Among the claims received in 2010 and 2011, 30% of the claimants were former FDHs¹.

4. From December 2009 to end of March 2012, the ImmD commenced the screening process for 2 615 claimants by serving on them the torture claim form. Among them, 98% received assistance through the Duty Lawyer Service (DLS)². The ImmD made decisions on 1 610 of these claims, none substantiated. Petitions were subsequently lodged for 699 claims. Adjudicators decided on 640 of these petitions, all rejected. As at 31 March 2012, there were 5 994 outstanding claims yet to be processed.

¹ The ImmD revised the Visa Application Form for Domestic Helper from Abroad in January 2011, requiring applicants to declare that they are not aware of any circumstances in their home countries that may prevent them from returning there and to undertake that they will depart Hong Kong within two weeks after completion or termination of contract. Moreover, any person applying for a visit or transit visa or an employment visa is required to make a similar declaration.

² At present, 260 barristers and solicitors are providing such assistance through the DLS. The number of claimants referred by the ImmD to the DLS was initially two per day, which increased to four in July 2010 and six in June 2011. We are exploring with the DLS on gradually increasing the caseload further for clearing the outstanding claims more efficiently.

Return of torture claim forms

5. The ImmD requires claimants to return torture claim forms within 28 days upon receipt of the forms. Where necessary, claimants may apply for an extension of time. In the past, most of the extension applications with reasonable grounds were approved. In the first three months this year, the average time for returning the torture claim forms is 40 days. Duty lawyers providing assistance to claimants would generally make a data access request (DAR) to the ImmD for the claimants' personal data in accordance with the Personal Data (Privacy) Ordinance when handling the case. Starting from January 2012, the ImmD can complete processing of such DARs in 14 days.

Interview arrangements

6. The ImmD will arrange for an interview with claimants and their duty lawyers immediately after receiving the torture claim form in most cases³. Among the interviews arranged in 2010 and 2011, about 30% were not finished as scheduled. Out of the 822 interviews arranged in the first three months this year, 486 (about 60%) were not finished as scheduled for the following reasons:

(a) claimants indicated sickness shortly before/during the interview	243	(50%)
(b) claimants failed to show up as scheduled	119	(24%)
(c) lawyers or interpreters were unable to attend the scheduled interview shortly before the interview	86	(18%)
(d) other reasons	38	(8%)

For interviews that cannot be finished as scheduled, the ImmD will need to re-arrange for them. If a claimant is absent for an interview for two times without any reasonable excuse, the ImmD will inform him that an assessment on his claim will be made based on his information provided in the torture claim form. There were 80 such cases in the past.

³ The ImmD have not arranged interviews for five cases where there was no need for further clarifications or supplementary information. None of these cases is substantiated. Petition was not lodged in three of them while the petitions of two cases were rejected.

Withdrawal of claims by claimants

7. From December 2009 to the end of March 2012, a total of 2 270 claimants withdrew their claims on their own. Among them, 413 claimants requested to re-open their claims before they were removed from Hong Kong. All these requests were acceded to.

Repeated or subsequent claims

8. 46 persons whose torture claim was unsubstantiated⁴ raised another claim while they were pending to be removed from Hong Kong. 45 of them were refused and the other request was withdrawn.

Processing priority

9. The ImmD had reminded all claimants pending screening in 2010 and 2011 that they might ask for their claims to be processed first if there was a need. At present, all claimants may ask for their claims to be processed first when making their claims. Moreover, the ImmD will accord priority to claimants under detention, claims that have been lodged earlier on, as well as other special cases (e.g. cases involving children).

Petition

10. Among the 699 petition cases lodged, most of them were filed within 14 days after the ImmD's decision. 81 of them were assisted by duty lawyers⁵.

11. At present, there are eight adjudicators (who are former judges or magistrates) handling petition cases. Out of the 640 completed petition cases, oral hearing was conducted for 40 cases. Cases requiring an oral hearing took about two to three months to complete, where others were completed within three to four weeks.

12. Since the implementation of the enhanced screening mechanism, there were three cases of judicial review initiated against the decisions made at petition stage. Leave for judicial review was not granted for one of them.

⁴ For 16 cases, no petition was lodged. For the other 30 cases, petition lodged was rejected.

⁵ After assessment by duty lawyers, petitions without reasonable justifications will not be provided with publicly-funded legal assistance. Claimants may request the DLS to arrange for re-assessment by another duty lawyer.

For the other two cases, hearing is pending for one and the Court of First Instance has dismissed the other (now pending for appeal).

Detention of claimants

13. Under the Immigration Ordinance, a claimant who has unlawfully landed or overstayed in Hong Kong will generally be put under temporary detention for investigation after being intercepted or arrested. The ImmD will then consider releasing them on recognizance having regard to the circumstances of each case⁶. As at 31 March 2012, most of the claimants (98%) were released on recognizance.

Removal of claimants

14. As at the end of March 2012, among the 1 610 cases already determined by the ImmD (out of which 64 petitions lodged were still being processed), 656 claimants have been removed from Hong Kong.

Other matters

15. Some Members were concerned that claimants may conceal information for fear of self-incrimination. It is set out clearly in the torture claim form that information provided by the claimants will be not used against them in any subsequent criminal proceedings (except for an attempt to pervert the course of justice or the making of false reports).

16. Some Members were concerned about claimants who entered Hong Kong through the Mainland. A person who lands in Hong Kong unlawfully through the Mainland will be repatriated by the ImmD according to the mechanism established with the frontier inspection authority in the Mainland. Should there be a torture claim lodged by a person not of Chinese nationality, the ImmD will suspend repatriation and assess his claim. If his claim is not substantiated, he will be repatriated to his place of origin.

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⁶ The Court of Appeal pointed out in the judgment of *A v Director of Immigration* (CACV 314/2007) that reasons for detention must be sufficient, clearly defined and made open. In this regard, the Administration has drawn up a clearly spelt out detention policy (including considering the subject's likelihood of abscondance or committing crimes, prospect of removal within a reasonable time, personal factors, e.g. medical condition)