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Immigration Department
The Government of the Hong Kong
Special Administrative Region

21 May 2012

Mrs Sharon Tong
Principal Council Secretary 2
Council Business Division
Legislative Council Secretariat
Legislative Council Complex
Central
Hong Kong

Dear Mrs Tong

**Immigration (Amendment) Bill 2011
Implementation of Torture Claim Screening Mechanism**

In respect of some Members' concerns on the implementation of torture claim screening mechanism, I would like to provide supplementary information to facilitate the Committee to conclude the scrutiny of the Bill.

Latest screening progress

2. As at 30 April 2012, the Immigration Department (ImmD) has commenced screening of 2,740 cases, in which 1,717 cases were determined. There are still about 5,900 cases to be processed. ImmD has set the target of processing at least 1,500 cases in the year 2012-13.

Notice to claimants and guidelines for completion of torture claim form

3. To ensure that claimants clearly understand the screening procedure, immigration officers would, with the assistance of an interpreter, serve claimants with a notice to claimants making a torture claim (at Annex) and a torture claim form. It is stated clearly in paragraphs 4, 14, 25 and 33 of the notice and paragraphs 2, 3 and 7 of the “Guidelines for Completion of Torture Claim Form” that claimants have a duty to substantiate their claim and to submit all important facts and documents relevant to their claims. The torture claim form can be referred to at the paper CB(2)517/11-12(01).

Personal data

4. As mentioned in the paper CB(2) 1859/11-12(02), ImmD has implemented the measure to provide claimants, with their consent, with their personal data on the same day when the torture claim form is served.

5. Before that, ImmD needed on average 20 days to provide the documents to claimants. Between April 2011 and March 2012, 1,160 (96%) out of 1,208 determined cases had made data access requests and a breakdown in time for the provision of information to claimants is as follows –

Time required (days)	0-14	15-28	29-40	Total
Number of cases	544	316	300	1160

Supplementary documents

6. As at 30 April 2012, among the 1,717 determined cases, there are 386 cases in which applications for extension of time for submission of the questionnaire had been made on the ground of waiting for supplementary documents. The documents stated in the applications were submitted in

about 35% of these cases. Documents were only partly submitted in about 15% of these cases and for the remaining 50% of these cases, the purported documents were not submitted at all. The average time required for submission of documents is around 2 to 3 months. The categories of the documents submitted include the following –

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|-----|--|-------|
| (a) | Letter from family members and relatives | (38%) |
| (b) | Report issued by the local police | (19%) |
| (c) | Medical report | (19%) |
| (d) | Local newspaper clippings or
country information | (13%) |
| (e) | Other documents (e.g. land deeds,
marital status certificate) | (11%) |

There were 110 applications where the application for an extension of time for submission of the claim form was eventually refused due to absence of sufficient grounds. Besides, section 37Y(1)(b) of the Bill provides that claimants must return all documents supporting the claim that are readily available to the claimant when the torture claim form is returned. This allows claimants to provide at a later stage other supporting documents which are not readily available. As mentioned in document CB(2)1859/11-12(02), ImmD will also revise the guidelines for completing the torture claim form to state that claimants can submit supplementary documents after the return of torture claim form.

Medical Examination

7. On medical examination, we have explained the relevant arrangement in documents issued earlier, including the Administration's response to deputations' views (Annex 1 to CB(2)1972/11-12(01)). Being a factor of consideration for torture claims, if ImmD (or the Appeal Board) does not have any dispute on the physical or mental condition of a claimant, i.e. ImmD or the Appeal Board accepts the fact as described by the claimant, there is no need to arrange for a medical examination. Under the existing arrangement, in order to ensure procedural fairness, ImmD neither participates in the selection of medical practitioners who would be responsible for conducting the medical examination nor involves in the

process of the examination. Unless there is consent from the claimant, ImmD will not request medical practitioners to disclose the examination result.

Credibility

8. On credibility of claimants, as set out in Annex 1 to CB(2)1972/11-12(01), situations where claimant's credibility may be damaged are set out in section 37ZD of the Bill. This enhances transparency in the process of making such consideration. ImmD will invite claimants to explain for his actions, and it is clearly set out in the Bill that ImmD will only take the prescribed behaviour as damaging the claimant's credibility if the claimant "cannot provide reasonable excuses".

Processing priority

9. As at 30 April 2012, ImmD has commenced screening process of 2,740 cases. Priority in processing claims was already explained in papers issued earlier (CB(2)1859/11-12(01)). Since the implementation of the enhanced torture claim screening mechanism, ImmD has set out internal guidelines that priority should be given in processing the following cases: persons under detention (973); persons involved in criminal proceedings or those who may constitute a threat to the general public (405); claims lodged earlier on (181); and persons with special needs (e.g. minors or persons who had been subjected to violence abuses) (52), etc.

Detention Authority and Policy

10. Sections 32(1)(a), 32(2A)(a) and 32(3A) of the Immigration Ordinance (the "Ordinance") empower the Director of Immigration to detain a person pending the decision as to whether or not a removal order should be made or pending removal. Section 37ZK of the Bill empowers the Director to detain a person pending final determination of the claimant's torture claim. The detention policy of implementing section 32 of the Ordinance has been uploaded and can be found here – <http://www.sb.gov.hk/eng/special/pdfs/Detention%20policy-e.pdf>.

11. In exercising the detention power under section 37ZK of the Bill,

the Director will carefully consider merits of each case, including whether there is any risk of that person's absconding and/or (re)offending; whether the person's removal is going to be possible within a reasonable time; whether there is any personal factors such as his condition of health etc.

12. As at 30 April 2012, 124 of all 5,916 claimants were being detained.

Revocation decision

13. Section 37ZL(3)(a) of the Bill provides that immigration officers must give claimants written notice of a proposed revocation. In the notice, the reasons for the proposed revocation must be stated. Claimants may raise an objection to the proposed revocation and the reasons in 14 days.

Transitional provisions

14. Regarding transitional provisions, as we have explained at the meeting on 30 April and in the letter of 10 May (CB(2)1972/11-12(01)), any decision on a torture claim under the existing administrative scheme or after enactment and commencement of the Bill will be subject to a claimant's right to apply for leave for judicial review if a decision is reached in an unfair manner procedurally or otherwise. This position will not be affected by transitional provisions in Schedule 4. On the contrary, transitional provisions will ensure that claimants' rights will be protected under the statutory scheme after enactment and commencement of the Bill, and that all claims will be processed in a fair and effective manner under the statutory scheme by reducing procedural abuses.

Statutory Screening Mechanism and Effective Immigration Control

15. The Bill provides for a statutory framework to process claims for non-refoulement protection made under Article 3 of the Convention against Torture (the "Convention"). It requires that reasons for making a claim must be related to an act falling within the definition of torture in the Convention. For claimants whose claim is substantiated, non-refoulement protection will be granted. Otherwise, claimants will be removed from Hong Kong after the claim is finally determined as rejected. We consider that enactment of the Bill and implementation of the statutory screening mechanism will strike an

appropriate balance between fair screening and effective immigration control.

Self-incrimination

16. Regarding the concern that claimants may conceal information due to the fear of self-incrimination, it has been stated in paragraph 32 of the Notice (Annex) and paragraph 6 of the "Guidelines for Completion of Torture Claim Form" that information provided by the claimant will not be used against him in any subsequent criminal proceedings except an attempt to pervert the course of justice or the making of false reports. This protection will continue under the statutory scheme.

Relevant Expenditure

17. We have provided information on our relevant expenditure in papers issued earlier (CB(2)710/11-12(01), CB(2)803/11-12(01) and CB(2)922/11-12(01)). The estimated annual budget for the ImmD, Department of Justice and the Security Bureau is about \$75, \$20.6 and \$6.7 million respectively. The annual expenditure for the provision of legal assistance to claimants is around \$67.5 million. As regards in-kind humanitarian assistance to claimants (and asylum seekers), the annual expenditure is about \$159 million.

Yours sincerely



(LEUNG Kwok-hung)
for Director of Immigration

c.c. Secretary Bureau
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**Notice to Person Making a Claim under
Article 3 of the Convention against Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment**

Purpose

This notice gives a brief overview of the screening process and what you can expect while we are considering your claim. It also tells you about your rights and responsibilities as a torture claimant.

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 (the “Convention”) applies to the Hong Kong Special Administrative Region (the “HKSAR”). According to Article 3 of the Convention, the HKSAR Government will not expel, return or extradite a person to another state where there are substantial grounds for believing that he / she would be in danger of being subjected to torture.

3. For the purposes of the Convention, torture means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Lodging a Claim

4. A person must be in the HKSAR when lodging a claim under Article 3 of the Convention. The obligation of Article 3 of the Convention

places the burden of proof on a claimant for non-refoulement to demonstrate that there are substantial grounds for believing that he / she would be in danger of being subjected to torture upon removal to the country concerned. You have an obligation to furnish true and complete information which is relevant to your claim at the earliest opportunity during the screening process. Nonetheless, the duty to ascertain and evaluate all relevant facts is to be shared between you and your case officer. Your case officer is mindful of the difficulties of proof faced by you.

5. If your dependants who are now with you in the HKSAR have claims which are different from your claim, they should make a separate application. Their claims will then be separately processed. If they do not have claims which are different from your claim, their claims will be included as being part of your claim and thus will not be separately processed. All decisions taken in relation to your claim will then apply to them if the ground(s) upon which your claim is based are also applicable to them.

Torture Claims vs Refugee Claims

6. The 1951 Refugee Convention and its 1967 Protocol do not apply to the HKSAR. The HKSAR Government has no obligation to admit persons seeking refugee status or to process refugee claims. If you wish to make a refugee claim, you should approach the United Nations High Commissioner for Refugees (the "UNHCR") direct. The correspondence address and telephone number of the UNHCR Sub-Office in the HKSAR are as follows:

Head of Sub-Office
United Nations High Commissioner for Refugees
Sub-Office in Hong Kong
P.O. Box 73887
Kowloon Central Post Office
Hong Kong
(Tel.: 2780 9271; Fax: 2770 5504; Email: chiho@unhcr.ch)

Reception

7. Your case will be processed by the Torture Claim Assessment Section (the "TCAS") of the Immigration Department (the "ImmD"). If you are in custody, arrangement will be made to brief or interview you in the

place of custody. If you are not in custody, you will be contacted / notified to attend a scheduled briefing at the TCAS office at Unit 903B - 910A, 9/F, Skyline Tower, 39 Wang Kwong Road, Kowloon Bay, Kowloon, during which the screening process will be explained. The reception staff will meet you as soon as practicable upon your arrival at the office. The reception staff will:

- explain the torture claim process to you;
- attend to any special needs in relation to the investigation / assessment of your torture claim so raised;
- tell you how we expect you to stay in contact with us;
- provide you with a questionnaire for completion; and
- provide you with an information leaflet about the publicly-funded legal assistance available.

8. You should present originals, where available, or best available copies of all identity documents or other documents that support your torture claim. You must also provide your contact telephone number and correspondence address. You should inform the reception staff if you have any special needs in relation to the investigation / assessment of your torture claim.

Questionnaire

9. You are required to complete the questionnaire in English or Chinese to provide the relevant information for the purpose of investigating, assessing and determining your claim. You should return the completed questionnaire to the TCAS within 28 days. A copy of any documentary evidence of what you say and any other document(s) in support of your claim, if readily available, should be provided to the TCAS together with the completed questionnaire. You should provide English or Chinese translation if any documentary evidence or other documents provided by you are in languages other than English and Chinese. You should request for assistance from officers of the TCAS if you do not speak or write English or Chinese and have no intention to instruct a legal representative to represent you.

10. Any request to extend the 28-day time limit should be in writing with full explanation as to why the time limit cannot be met. Each request for extension will be considered on its merits and will only be acceded to if

you can demonstrate that an extension of time is needed due to circumstances beyond your control. If you are unable to return the questionnaire due to illness, you should produce a copy of the medical certificate for verification. If you fail or refuse to return the questionnaire as required without reasonable excuse, your claim will be determined on the basis of available information and may be rejected if you have not provided sufficient material to substantiate your claim.

Case Officer

11. Upon receiving your completed questionnaire, a designated case officer from the TCAS will arrange to meet with you as soon as possible. An interpreter will be provided if you need one. In special cases, we may provide as far as practicable a male or female case officer or interpreter if you prefer one of a specific gender. If there are reasons why you would prefer to have a particular choice of a male or female case officer, you should tell us as soon as possible, and we will try to meet your request where possible. Your case officer is the point of contact on the progress of your application, both for you and your legal representative if you have one who represents you.

Screening Interview

12. Where further elaboration or clarification of the information provided by you is required, your case officer may write to you requesting such information before the interview is conducted to examine your claim in details. This is to ensure that the key issues of your claim are identified before the interview. If you do not provide the information, (including important facts and events and readily available supporting documents) upfront but only provide the same on a later occasion, for example, in a subsequent interview, without giving a reasonable explanation as to why you cannot comply with the request, this may undermine your credibility.

13. A substantive screening interview will be conducted by the case officer who will investigate, assess and determine your claim. You must attend the interview. It will be the principal opportunity for you to respond to any requests for clarification of your case by the case officer and to address the points of contention. Also, you must be able to satisfy the case officer about your identity, i.e. who you are and your country of origin. All relevant information and supporting documents readily available to you

should be provided before the interview. During the interview, you should not raise or submit irrelevant issues or documents whether or not the same have been raised or submitted before. New issues raised or supporting documents submitted during the interview without a reasonable explanation as to why they have not been raised or submitted at an earlier time may lead to doubts about the veracity of your claim.

14. Information gathered in the interview will be used for making the decision on your claim. You must answer the questions truthfully and as fully as you can. If you do not, it may damage the credibility of your claim. You may bring a legal representative to your interview if you consider it necessary. If you have a legal representative, he / she should inform the TCAS of his / her representation in your case. The case officer will not normally be able to postpone your scheduled interview to give you more time to get legal advice or representation. If your legal representative does not attend your interview, your case officer may proceed without him / her. Therefore, you should make any arrangement for legal representation at the interview as early as possible should you consider it necessary to do so.

15. If you fail to:

- (i) reply to the request for information made by your case officer as required;
- (ii) attend the interview; or
- (iii) contact your case officers within a period of two weeks following the date of the scheduled interview to give an explanation after your absence from the interview,

your case officer will determine your torture claim on the basis of available information and may reject your claim if you have not provided sufficient material to substantiate your claim. Non-availability of legal representative will not normally be considered an acceptable explanation for your failures mentioned above. If you are unable to attend the scheduled interview due to illness, you should produce a copy of a medical certificate for verification. If a postponement is granted, your case officer will promptly reschedule the interview to a time as early as possible.

Publicly-funded Legal Assistance

16. You may apply for publicly-funded legal assistance provided by the

Duty Lawyer Service to assist you in making your claim. The scope and eligibility criteria for assistance will be explained to you by the Duty Lawyer Service. On passing the relevant eligibility test, the Duty Lawyer Service will assign a duty lawyer who will provide legal assistance to you where appropriate. For example, you may seek the advice of the duty lawyer when completing the questionnaire or be accompanied by the duty lawyer to attend the screening interviews. At the petition stage, publicly-funded legal assistance will also be available for meritorious cases. Please refer to the information leaflet about the publicly-funded legal assistance scheme for details.

Medical Examination

17. Where a claim of past injuries is not in dispute, medical examination will not be necessary and will not be arranged. If deemed necessary and appropriate, you may be requested to undergo medical examination and to consent to the release of the results of any such examination to the HKSAR Government for the purposes of investigating, assessing and determining your claim.

18. If you consider that there is a need for you to undergo medical examination to provide medical evidence in support of your claim, you should make known such a need to the case officer without delay. The case officer will make necessary arrangement for you to undergo medical examination if the circumstances warrant. Further, you are not prevented from producing medical evidence from private practitioners at your own expense or those offering their services voluntarily in support of your case. However, a request for medical examination or the medical examination itself, if granted, does not absolve your obligation to comply with the requirements of the screening process, particularly the obligation to observe the timeframe within which you are required to furnish information or to attend the scheduled interviews.

Determination of the Claim

19. The case officer will determine, after taking into consideration all relevant factors, whether a claim under Article 3 of the Convention is established or not. You will be notified in writing of the result of your claim and the reasons in case of refusal.

20. In cases where the determination is in your favour, you are not automatically entitled to remain in the HKSAR. The Director of Immigration (the "Director") may at any time order your removal / deportation / repatriation if in the Director's view the claimed threat of torture diminishes and the claim for protection under the Convention is no longer substantiated. If at that time, or at any time, a safe alternative place where you will be received is identified, consideration will be given to removing or deporting you to that place.

Petition

21. In cases where the determination is not in your favour, you may petition against the determination to the Chief Executive of the HKSAR (the "CE") and make further written representations to this effect, if necessary. The petition to the CE will be considered by the Adjudicator (Torture Petitions) under authority delegated from the CE. You should fill in the Notice of Petition in English or Chinese. The Notice of Petition and all supporting documents, if any, should be lodged with the office of the Petition Team of the Security Bureau at Rooms 3007-10, 30/F, Immigration Tower, 7 Gloucester Road, Wanchai, Hong Kong within 14 days from the date of the notice of determination.

22. If you are illiterate and are not represented by a legal representative, officers of the Petition Team will arrange to meet with you in the presence of an interpreter and deliver the document(s) to you at the meeting(s). If you are represented by a legal representative, the Petition Team will arrange to send all correspondence to your legal representative direct. If you are literate but do not understand English or Chinese and do not have a legal representative, the Petition Team's correspondence with you will be accompanied by a translation in your native language.

23. If the circumstances of your case so warrant, the Adjudicator (Torture Petitions) may conduct an oral hearing with you and representative(s) from the ImmD. You will be informed of the date, time and place of the hearing. You can bring your legal representative to the oral hearing if necessary. You must inform the Petition Team of any change of your legal representative or witness(es) at least five working days before the date of the hearing. You cannot bring any other persons to the hearing without the prior consent of the Adjudicator (Torture Petitions).

24. Whether or not a hearing is required, the Adjudicator (Torture Petitions) will, having regard to the information available and the circumstances, review the merits of the decision made by the case officer and determine whether or not to allow your petition. You will be informed in writing of the final decision at your last known address you have provided or your legal representative (if you have one) will be so informed. The determination of the Adjudicator (Torture Petitions) shall be final.

Responsibility of Claimants

25. It is your responsibility to tell the truth and cooperate with the ImmD and the Petition Team of the Security Bureau. Any behaviour designed to mislead, conceal information, obstruct or delay the handling of claim / petition will be treated as damaging to your credibility.

26. You must attend any interview / meeting / oral hearing punctually and provide relevant information to support your claim promptly. If you are unable to attend a scheduled interview / meeting / oral hearing, you must immediately inform your case officer or the Petition Team of the Security Bureau, as appropriate. Your case officer or the Adjudicator (Torture Petitions) will determine your case based on available information if you fail to attend the interview or oral hearing without giving any reasonable explanations. You must produce a copy of medical certificate for verification on grounds of illness.

27. All correspondence will be sent to you at your last known address or your legal representative if you have one who represents you. You must immediately inform the case officer or the Petition Team of the Security Bureau, as appropriate, of any change of your contact telephone number, correspondence address or legal representative.

28. You should inform your case officer or the Petition Team of Security Bureau, as appropriate, in writing immediately if you decide to withdraw your claim / petition. If you leave the HKSAR prior to the final determination of your claim / petition, your claim / petition is deemed to be abandoned. Your case will not be proceeded with further.

Making of Removal Order and Deportation Order

29. The determination of a claim under Article 3 of the Convention,

whether or not in your favour, shall not preclude the making of a removal order or deportation order against you if you are liable to be removed or deported under the Immigration Ordinance.

30. However, where the determination of the claim under Article 3 of the Convention is in your favour, execution of the removal or deportation order will be suspended. The decision to withhold action to remove or deport you to the country concerned in the circumstances however should not be construed as granting you permission to stay in the HKSAR, as you would still be liable to be repatriated, removed or deported, as the case may be, to another country or back to the country concerned if the claimed threat of torture subsides or the claim is no longer substantiated due to changes in country conditions.

31. In this context, the country concerned refers to the country to which you may be removed or deported and in which you fear that you will be subjected to torture upon return.

Confidentiality

32. The information provided by you for the purpose of your claim under the Convention will be treated in confidence. It will only be used for the purpose of assessing your claim or in the investigation of other claims made under Article 3 of the Convention where a claimant is related to you or where the claim is in some way linked to you. Under no circumstances will this information be disclosed to the authorities of the country from which you claim a fear of torture without your express consent. Notwithstanding this, the information may be disclosed to other HKSAR government departments / bureaux, agencies, international organisations or other bodies where necessary for immigration and nationality purposes or to enable them to carry out their functions, or to secure entry facilities for repatriation. However, neither the information indicating that you have made a claim under Article 3 of the Convention nor any information pertaining to your claim will be provided to any government or country from which you claim a fear of torture. In addition, nothing at all said by you in either the questionnaire or at the interview will be used against you in any subsequent criminal proceedings of any nature except an Attempt to pervert the course of justice, or the Making of false reports, etc. to a member of the Immigration Service.

Important Notes

33. The provision of information by you either by way of information given in the questionnaire, during the interview / meeting / oral hearing, or arising from your medical examination and your consent given, if any, on the release of the result of any such medical examination to the HKSAR Government are on voluntary basis. However, you are reminded that failure to provide sufficient details relating to your identity and the claim may jeopardize the assessment of your claim / petition. You should also be aware of this and any failure to answer questions of importance to your claim may jeopardize your credibility.

**Immigration Department
December 2011**