

**For discussion on
12 April 2011**

Panel on Security of the Legislative Council

**Torture Claim Screening Mechanism:
Current Practice and Legislative Proposal**

Purpose

This paper reports to Members the progress of the administrative scheme to screen torture claims, and briefs Members the key legislative proposals to underpin the screening mechanism for determining torture claims.

Background

2. At the meetings of the Panel on Security held on 29 September 2009 and 1 December 2009, we briefed Members on the enhancements to the administrative screening mechanism for torture claims. Major measures included making immigration officers who conduct interviews of claimants the decision makers, appointing persons with a legal background to handle petitions, providing publicly-funded legal assistance to claimants, and strengthening training of decision makers. We also briefed Members on our plan to put in place a statutory regime to underpin the procedures after we have gained necessary practical experience under the enhanced administrative scheme.

Progress

The Administrative Screening Mechanism

3. The enhanced screening mechanism commenced on 24 December 2009. Under the scheme, publicly-funded legal assistance is provided to claimants through a pilot scheme under the Duty Lawyer Service (DLS). The actual operation of the pilot scheme has been run smoothly with over 260 lawyers (comprising both barristers and solicitors) under the duty roster. The Administration has reached an agreement with DLS to continue the scheme for another two years until December 2012.

4. Retired judges and magistrates are appointed as Adjudicators (Torture Petitions) to handle petitions. Specialized training, with the support of overseas experts, is conducted for decision makers of the Immigration Department (ImmD) as well as the Adjudicators (Torture Petitions).

5. As at 31 March 2011, the ImmD has commenced processing 1,045 torture claims (with 98% of claimants receiving legal assistance by duty lawyers under the DLS scheme), and among them decisions were made on 402 cases. Of the 402 cases, 167 claimants did not lodge a petition against ImmD's decision. For the other 235 claimants who have lodged petition, Adjudicators have decided on 182 cases. Up to now, none of the claims has been substantiated.

6. While according priority to claimants under detention and cases involving vulnerable claimants, the ImmD would handle claims which have been lodged for a substantial period of time. We aim to increase the case output to over 1,000 in 2011/12, and further review the feasibility of a higher output thereafter. We have reported previously to Members that we have over 6,000 outstanding torture claims to handle (there are around 6,740 outstanding claims as at 31 March 2011), and aimed to process around 400 claims in the first year of the operation of the scheme and increase output to over 1,000 claims annually thereafter.

Legislative Proposal

7. Since the procedures on assessing torture claims are closely related to immigration matters (e.g. removal, deportation), the Immigration Ordinance (Cap. 115) would be amended to prescribe the procedures for screening torture claims. Key features of our legislative proposals are highlighted below.

Claims for non-refoulement

8. Under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the HKSAR has an international obligation not to remove a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. We will make reference to the definition of torture as provided under Article 1 of CAT in our statutory framework.

9. Under current arrangements, once a person has made a torture claim under the administrative regime, the execution of the removal or the deportation of that person from Hong Kong to the state in respect of which the torture claim was made will be temporarily withheld until the claim has been

determined. Nevertheless, a torture claimant will not be treated as ordinarily resident in Hong Kong during any time he or she remains in Hong Kong as a claimant.

Handling of Torture Claims

10. Once ImmD has decided on whether a claim is substantiated, the claimant will be notified of the ImmD's decision in writing. For a substantiated case, the Director of Immigration (the Director) may review the situation from time to time, and may revoke the substantiated claim if the torture risk giving rise to the claim is found to have ceased to exist.

11. Claimants may appeal against the ImmD's decision on their torture claims. We will set up a statutory Torture Claim Appeal Board and empower it to determine the appeals. The Board, comprising members (Adjudicators) who have the necessary legal background, will be appointed by the Chief Executive. The Adjudicator may decide whether an oral hearing will be required depending on the circumstances of the case.

12. By way of background, over 98% of the claimants are currently released on recognizance. This notwithstanding, the Director will be given the power to decide whether to detain a claimant while a decision on the claimant's claim is pending. Such decision will be made having regard to the past records of the claimants (e.g. criminal offences, abscondance history), the risks posed to the community, and other personal circumstances of the claimants (e.g. medical conditions).

13. Under the proposed statutory screening procedures, claimants will be provided with publicly-funded legal assistance.

Other procedural requirements

14. Torture claimants should submit their claim to the Director in writing. Only those claims alleging a risk of torture falling within the definition of torture will be handled under the statutory procedures. Similar to other overseas jurisdictions, claimants will be required to provide necessary personal particulars, including photographs and fingerprints in the process. Claimants should provide grounds and available supporting documents within a prescribed timeframe to support their claims.

15. Making reference to overseas practice, we propose that the prescribed timeframe be provided for under subsidiary legislation after the passage of the main Bill.

16. Similar to other overseas jurisdictions and to avoid abuse of the procedures, certain behaviour of claimants may need to be taken into account in assessing the credibility of claimants, e.g. making claim only after being arrested, not attending interviews without giving reasonable excuse, etc.

17. A brief comparison of the provisions with overseas jurisdictions is at **Annex**.

Security Bureau
April 2011

Immigration (Amendment) Bill 2011
Statutory Provisions for Non-refoulement Protection in Selected Countries

Provision	Similar Provisions in Selected Countries			
	Australia	Canada	New Zealand	United Kingdom
“Torture” as defined in Article 1 of the Convention	x	✓	✓	x
Suspension of removal once a claim is made	✓	✓	✓	✓
Handling of claims – authority & procedures	✓	✓	✓	✓
Revocation of substantiated claim	✓	✓	✓	✓
Independent statutory board to handle appeals	✓	✓	✓	✓
Detention pending final determination	✓	✓	✓	✓
Duties of claimant – provision of personal information, fingerprinting, etc	✓	✓	✓	✓
Credibility of claimant	✓	✓	✓	✓