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**Panel on Security**

**Background brief prepared by the Legislative Council Secretariat  
for the meeting on 3 November 2015**

**Reports of the Hong Kong Special Administrative Region  
under the United Nations Convention Against Torture  
and other Cruel, Inhuman or Degrading Treatment or Punishment**

**Purpose**

This paper provides background information on submission of reports of the Hong Kong Special Administrative Region ("HKSAR") to the United Nations Committee Against Torture ("the UN Committee") under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention") and summarises past discussions of the Panel on Security ("the Panel") on the subjects.

**Background**

2. The People's Republic of China ("PRC") is a State Party to the Convention. Article 19.1 of the Convention requires State Parties to submit periodic reports on the measures they have taken to give effect to their undertakings under the Convention.

3. In July 1998, the Administration issued an outline of the topics to be included in the first report of HKSAR under the Convention (the "initial report"). The initial report was submitted in May 1999, as part of the third periodic report of PRC, to the UN Committee. The UN Committee heard the initial report on 4 and 5 May 2000 and issued its conclusions and recommendations on 9 May 2000.

4. In May 2004, the Administration issued an outline of the topics to be included in the second report of the HKSAR under the Convention (the "second report"). The second report was submitted in June 2006, as part of the fourth

and fifth periodic reports of PRC, to the UN Committee. The UN Committee heard the second report in November 2008 and issued its conclusions and recommendations on 19 January 2009.

5. In June 2012, the Administration issued an outline of the topics to be included in the third report of the HKSAR under the Convention (the "third report"). The third report was submitted in February 2015, as part of the sixth periodic report of PRC, to the UN Committee. According to the Administration, the hearing of the UN Committee on the third report will be held in November 2015.

### **Deliberations of the Panel**

6. The reports of HKSAR under the Convention had been discussed at meetings of the Panel and the deliberations are summarised in the following paragraphs.

#### Determination of torture claims and refugee claims

7. Members noted that the UN Committee recommended in its concluding observations on the second report that, among others, the Hong Kong Special Administrative Region Government should incorporate the provisions in Article 3 of the Convention (Torture as a ground for refusal to expel, return or extradite) under the Crimes (Torture) Ordinance (Cap. 427) 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 the Convention.

8. Some members expressed the view that a proper regime should be established for handling torture claims. Appeals relating to torture claims should not be determined by the Secretary for Security, but by an independent committee or the court. They were concerned about the time required for the determination of refugee status and torture claims. They considered the determination process far too long.

9. Members were advised that the Administration was considering the UN Committee's recommendation for putting in place a legislative regime for handling torture claimants and to cover the non-refoulement principle under Article 3 of the Convention.

10. Members subsequently noted that following the introduction of the Immigration (Amendment) Bill 2011 into the Legislative Council ("LegCo") on 13 July 2011 and the scrutiny by a Bills Committee, the Immigration

(Amendment) Ordinance 2012 ("the Amendment Ordinance") was enacted in July 2012 and came into operation on 3 December 2012. The Amendment Ordinance provided for a statutory process for making and determining claims, including how a torture claim was made, the time limit for a claimant to return the torture claim form, the requirements for the Immigration Department ("ImmD") to arrange screening interviews and issue written notices of decision, etc. It also provided that a claimant who was aggrieved by the decision might lodge an appeal, which would be handled by a statutory Torture Claims Appeal Board.

11. At the Panel meeting on 2 July 2013, members were advised that the Administration planned to introduce a unified screening mechanism ("USM") to assess claims for non-refoulement protection lodged by persons not having the right to enter and remain in Hong Kong on the basis that removing them to another country would expose them to a risk of torture as defined under the Convention, a risk of torture or cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights, and/or a persecution claim with reference to Article 33 of the 1951 Refugee Convention relating to the Status of Refugees. Members noted that in view of the judgment of the Court of Final Appeal in *Ubamaka and C*, ImmD would withhold removing or deporting any person to another country where the person had made such a non-refoulement claim. Where any of these claims was substantiated, ImmD would provide non-refoulement protection to the claimant.

12. According to the Administration, USM would be based on the statutory claim screening mechanism under the Convention. After a completed claim form was returned by claimants, ImmD would arrange for them to attend an interview to provide information and answer questions relating to their non-refoulement claims. Claimants must provide all information or all available documentary evidence relating to their claims for ImmD's assessment in one go. USM commenced operation on 3 March 2014.

#### Police's handling of searches of detainees

13. With reference to the UN Committee's concluding observations on strip search and body cavity search, some members queried the need for conducting Level III searches by the Police, which involved the complete removal of clothing, on all detainees. They considered that the scope of search should be no more than what was rational and proportionate, and the Police should establish reasonable suspicion before conducting a search on any detainee. A right balance should be struck between the protection of human rights and the Police's discharge of its statutory functions and fulfilment of its duty of care to all persons detained in custody. There was a suggestion that a senior ranking Police officer at the Assistant Commissioner level should be appointed to conduct sample checking of records filed in the Police's Communal Information

System ("CIS") to ensure that all the searches were conducted with strong justifications.

14. According to the Administration, the Police had a duty at common law to take all reasonable measures to ensure that detainees did not escape or assist others to do so, did not injure themselves or others, did not destroy or dispose of evidence, and did not commit further crime. The Administration's legal advice had confirmed that the search of a detainee, if properly conducted, with the scope of the search on each occasion to be determined having regard to the prevailing circumstances and on a case-by-case basis, would not be an unlawful or arbitrary interference with the detainee's privacy or personal integrity as the purpose of the search was legitimate. Under the Police's new arrangements for the handling of searches of detainees implemented on 1 July 2008, a Duty Officer should determine the scope of the searches on a case-by-case basis having regard to the prevailing circumstances. The scope of each search should be no more than what was rational and proportionate. Details of the searches, including the reasons for and the scope of the searches, were required to be properly recorded in CIS.

15. Members noted that with effect from 1 January 2009, the Police had sub-categorised custody searches involving removal of underwear (i.e. Level III searches) into three sub-categories, namely "looking into underwear" (sub-category (a)), "partial removal of underwear" (sub-category (b)) and "full removal of underwear" (sub-category (c)). Frontline officers were required to specify, in respect of any Level III search conducted on a detainee, the sub-category involved in CIS. All Assistant Divisional Commanders (Operations), in the capacity of reviewing officers of the circumstances surrounding the detention or continued detention of all detainees in the police stations concerned, were required to personally review all Level III(c) custody searches recorded in CIS in the stations under their charge. Further enhancement had also been made in supervisory control by adding an automatic function in CIS to bring all Level III(c) custody searches conducted to the attention of the Operation Support Sub-unit Commander and the Assistant Divisional Commander (Operations) concerned for review. At the request of members, the Administration provided the Panel with quarterly statistics on Level III(c) searches and the most recent statistics were issued vide LC Paper No. CB(2)85/15-16(01) on 22 October 2015.

#### Prosecution of persons arrested for assaulting police officers

16. Some members were concerned that the Police could initiate prosecution against persons who participated in public order events and arrested for assaulting Police officers engaged in public duty by applying the relevant provisions in the Offences Against the Person Ordinance ("OAPO") (Cap. 212) or the Police Force Ordinance ("PFO") (Cap. 232). These members pointed

out that a person convicted of such an offence under OAPO could be imprisoned, while conviction of an offence under the latter might only result in a fine. Concern was raised as to whether the Police had issued internal guidelines setting out the circumstances whereby offenders should be charged for assault on Police officers, and whether the Department of Justice ("DoJ") had any prosecution policy on whether an offender should be prosecuted in accordance with OAPO or PFO.

17. According to the Administration, the Police had consulted DoJ in relation to the prosecution of cases involving assault on police officers and issued internal guidelines in August 2010 based on legal advice. The guidelines required all frontline officers to seek legal advice from DoJ beforehand, if they intended to proceed with a charge pursuant to section 36(b) of OAPO.

### **Relevant papers**

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

Council Business Division 2  
Legislative Council Secretariat  
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## Appendix

**Relevant papers on reports  
of the Hong Kong Special Administrative Region  
under the United Nations Convention Against Torture  
and other Cruel, Inhuman or Degrading Treatment or Punishment**

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Home Affairs	13.3.2000 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Home Affairs	11.6.2004 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Security	5.12.2006 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Security	27.10.2008 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Security	3.2.2009 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Subcommittee on Police's Handling of Sex Workers and Searches of Detainees	--	<a href="#">Report</a>
Panel on Security	6.7.2009 (Item III)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Security	11.11.2010 (Item III)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Bills Committee on Immigration (Amendment) Bill 2011	--	<a href="#">Report of the Bills Committee to the Legislative Council</a>

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Security	2.7.2013 (Item II)	<a href="#">Agenda</a> <a href="#">Minutes</a>

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