

**Joint submission of the Law Society of Hong Kong and the Hong Kong Bar Association to the LegCo Panel on Security**

**on Framework for Legal representation of Convention Against Torture Claimants and Asylum seekers**

**Introduction**

1. Since the Convention Against Torture (“CAT”) was extended to Hong Kong in 1992, thousands of people have come to Hong Kong to seek protection from persecution and torture. They are continuing to arrive regularly. They come from many different countries but their needs are the same, which is a procedurally fair determination of their cases under the law. Specifically, these persons, whether fleeing persecution or torture, are entitled to a decision as to whether they are entitled to protection from forced return or “*refoulement*”.
2. Refugees are persons who flee their own country because of persecution by the state or organs of the state. Persecution may take many forms, including physical abuse amounting to torture. Torture, on the other hand, may not be inflicted in order to persecute. Although very many refugees have experienced torture, not every refugee is a torture victim and vice versa.
3. Although the HK Government is not bound by the UN Refugee Convention governing states’ responsibilities to persons fleeing from persecution, it does not remove persons who seek protection from the UNHCR until such claims are dismissed. (The issue as to whether the Administration is required to conduct screening of asylum claimants because of customary international law independent of the UN Convention is a matter that is the subject of an appeal to the Court of Appeal – *C & Others v Director of Immigration* – to be heard in October 2009.)
4. The position with CAT is much clearer. Between the extension of CAT in 1992 and 2004, the Administration did not conduct independent screening of claimants under CAT, relying instead on determinations of the UNHCR that such persons were or

were not genuine refugees. In *Prabakar v Secretary for Security* [2005] 1 HKLRD 289, the Court of Final Appeal rejected this approach as insufficient, and found that CAT required the Administration to conduct its own enquiry on the facts, in accordance with a process that ensured “high standards of fairness”.

5. Between 2004 and 2008, the Administration implemented a screening process that fell well short of such high standards. The process involved the completion of a “Questionnaire” and a series of interviews leading to a decision by a senior Immigration officer on the merits of the case. Negative decisions were able to be appealed to the Chief Executive in Council. On 5 December 2008, Saunders J declared, in *FB v. Director of Immigration* [2009] 2 HKLRD 346, that the CAT assessment process was unfair and unlawful in a number of respects, including:
  - The practice of not permitting the presence of a legal representative during the completion of the Questionnaire or during the interviews
  - The practice to refuse to provide, at public expense, legal representation to a Convention claimant
  - The systemic anomaly in which the examining Immigration officer and the officer making the decision on the claim are not the same person
  - The fact that the decision-makers are insufficiently trained (at the first level and on petition/appeal) and
  - The failure to provide for an oral hearing on a petition and, as before, the lack of provision for legal representation at that oral hearing
6. At the Opening of the Legal Year on 12 January 2009, the then President of the Law Society, Mr. Lester Huang, expressed concerns given the “*momentous importance*” of the decision for the individuals concerned and urged the Administration to address the “issues stemming from these cases” and called for legislation to ensure high standards of fairness. It is in the interests of all participants for the screening process to identify as efficiently and speedily as possible genuine claimants and provide them with protection.
7. On 3 February 2009, at the last meeting of this LegCo Panel, the Deputy Secretary for Security Mr. Ngai Wing-chit said the Government would submit a “*legislative framework*” for a regime to assess the CAT claimants by the end of the year. Whether or not the framework would provide for contemporaneous screening of such persons as refugees – as we contend it should – is not known. The Bar and the Law Society raised this issue with the Security Bureau, together with other issues of concern, in a Joint Position Paper dated 31 March 2009, a copy of which is attached.
8. Since that time, the Law Society and the Bar have been made aware that negotiations on an interim or “pilot” program for the provision of legal representation have been conducted by the Security Bureau with the Duty Lawyer Service. Given the nature of the proposals, such negotiations should have taken place directly with the two branches of the profession.

### **Wasted resources of screening under the old system**

9. The effect of the 5 December 2008 judgment in *FB* was to declare unlawful the screening of the applicants in the six cases before the Court. The case had a wider effect though. The Administration has stopped the screening of all other persons and has agreed to the quashing of decisions made under the flawed system.
10. The non-compliance with high standards of fairness in the screening of CAT claimants has resulted in considerable delay for the claimants. They are in limbo (they cannot work, cannot leave HK, and cannot acquire any residency rights). It has also very probably resulted in massive wasted resources on the part of the Administration.

### **Principal issues on legal representation**

11. The following are, as we see it, the principal questions to be addressed in setting up an interim system affording legal representation to CAT claimants/asylum-seekers:
  - (1) How should publicly-funded legal representation be arranged i.e. through the Legal Aid Department or the Duty Lawyer Service or some other Department or body?
  - (2) Should there be means and merits tests and how should they operate?
  - (3) Who should be on the "panel" of lawyers available to be instructed, including issues of training and experience, and minimum years of qualification?
  - (4) What kind of training should take place for such lawyers, including who will supply such training?
  - (5) Is it possible/reasonable (having regard to *Prabakar* and *FB*) for the Administration to impose limits on the extent of work to be provided by the claimant's lawyers in any given case and if so, how are such limits to be determined?
  - (6) What conditions or limits, if any, can be placed on legal representation, including the conduct of lawyers during an interview, and how should such conditions or limits be drafted and agreed upon?

### **Duty Lawyer Service**

12. We are aware that the Security Bureau began discussions with the Duty Lawyer Service, on condition of strict confidentiality, as to the provision of legal representation for CAT claimants, within a few days of the judgment in *FB*.
13. It is now clear that the Security Bureau intends to establish a program of such representation through an extension of the existing Duty Lawyer Scheme.

14. The Duty Lawyer Scheme at present provides representation in the Magistrates Courts, Juvenile Courts and Coroners Courts, and in extradition proceedings. It also covers hawker appeals to the Municipal Services Appeal Board.
15. We have concerns as to the suitability of the DLS to provide such a service. These include the ability and experience of the lawyers on the panel to undertake such work, when few, if any, have experience in the area. Moreover, those who have sufficient skills, experience and knowledge are, we would suggest, unlikely to be satisfied with duty lawyer rates, particular in representing such clients on petitions to the Security Bureau against negative decisions of the Director of Immigration. Although it may be that a special separate panel of suitable lawyers could be set up for the purpose of providing representation of CAT claimants, it is unclear how DLS was aiming to recruit lawyers with the necessary skills.

### **Training**

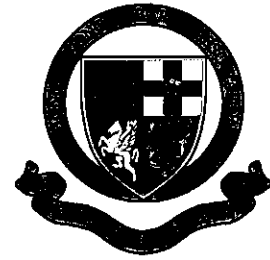
16. There is, as yet, no system in place to train those lawyers assigned to represent CAT claimants. It is our view that such persons should have or acquire during training knowledge in a number of key areas, including procedural fairness, refugee law, and management of clients with special needs e.g. unaccompanied minors, victims of mental or physical trauma.
17. Such training will have to encompass numerous key elements: the methodology involved in assessment of torture claims, including burden and standard of proof, and objective/subjective tests.
18. The Law Society and the Bar Association are ready to assist in this process. However, a word of warning needs to be sounded. Such training cannot be undertaken lightly, or with some pre-conceived idea that a week or two of part-time training will be sufficient to provide the necessary experienced lawyers for such work. Again, the Law Society and the Bar Association note that, as a matter of common sense, lawyers are unlikely to undertake such specialized training, involving considerable time (and hence lost income), if such work is to be remunerated at Duty Lawyer rates.

### **The lack of a comprehensive and holistic approach**

19. The lack of an overall scheme to deal with asylum-seekers/CAT claimants who arrive in Hong Kong adds to the difficulty likely to face lawyers who undertake such work.
20. We have already noted the fact that the Administration does not consider itself bound by the customary international law principle of *non-refoulement* of asylum-seekers, and will not undertake screening of asylum-seekers, whether under the Refugee Convention or at all. The Law Society and the Bar Association note that the Refugee Convention has been extended to Macau SAR which has legislation for the assessment of asylum seekers.

21. The Law Society and the Bar Association are particularly concerned about the procedural deficiencies and potential for abuse in having a separate assessment process for refugee status determination (“RSD”). The UNHCR assessment process is not amenable to the jurisdiction of the Hong Kong Courts. If it were, it would not meet the high standards of fairness for substantially the same reasons as set out in *FB*. Having one standard for the screening of a person under CAT and another for RSD by a body immune from challenge in the Courts is a serious anomaly and one which cries out to be addressed at this critical juncture.
22. A further difficulty is the uncertainty as to what “triggers” the CAT screening process. Persons who arrive in Hong Kong cannot make an application under CAT for protection until their limit of stay has expired. Claimants who approach the Torture Claims Assessment Section (formerly the “Special Assessment Section”) will be turned away if they have an unexpired visa. As this is stated policy it is difficult to see how the Administration can complain that CAT claimants are overstayers, as the Administration *requires* them to be before they can register a claim. This provides a strong disincentive and may be one of the reasons why there is a perceived delay in registering a claim for protection with the Administration.
23. Furthermore, the Director has determined that the existence of a claim to the UNHCR or a request for protection under CAT is not sufficient reason for an extension of a limit of stay pending the outcome of such claim. CAT claimants are routinely denied extensions of stay, when their claim is still unresolved.
24. This means that a claim cannot be initiated and will not be considered until the person has broken the law – i.e. overstayed. This has obvious implications on the fairness of the existing system.
25. The Court in *FB* commented that, where a person comes to the attention of the Director of Immigration, the existence of a claim to the UNHCR by such person and statements to the effect that they would be in danger if returned to their home country should spur enquiries to be made by the Director as to whether there are circumstances that might give rise to a claim under CAT. In other words, the Director cannot wait until the magic word “torture” is spoken by the person in question. The Director maintains that the initiation of the screening process is a matter for the Director to decide. As noted, the criteria for the initiation of a claim remain vague and uncertain.

Law Society of Hong Kong  
Hong Kong Bar Association  
3 July 2009  
#126534



## **Joint Position Paper by the Law Society of Hong Kong and the Hong Kong Bar Association on the Framework for Convention Against Torture (“CAT”) Claimants and Asylum Seekers**

On the 5 December 2008, in the case of *FB & Ors v Director of Immigration & Anor (HCAL 51/2007) (FB)*, the High Court declared the CAT assessment process to be unfair and unlawful in a number of respects including:

- The practice of not permitting the presence of a legal representative during the completion of the questionnaire or during the interview;
- The practice to refuse to provide, at the expense of the Respondents, legal representation to a Convention claimant;
- The systemic anomaly in which the examining officer and the decision-maker are not the same person;
- The fact that the decision-makers are insufficiently trained (at the first level and on petition); and
- The failure to provide for an oral hearing on a petition and, as before, the lack of provision for legal representation at that oral hearing.

At the Opening of the Legal Year on 12 January 2009 the President of the Law Society expressed his concerns given the “*momentous importance*” of the decision for the individual concerned and urged the Government to address the “issues stemming from these cases” and called for a legislative or regulatory framework to ensure high standards of fairness.

On the 3 February 2009, at a meeting of the Legislative Council’s Security Panel, Deputy Secretary for Security Ngai Wing-chit said the Government would submit a “*legislative framework*” for a regime to assess the CAT claimants by the end of the year.

### ***New Information***

The Law Society, The Bar Association and the Hon. Ms. Margaret Ng (Legal Functional Constituency) have only recently (March 2009) been made aware of the following:

1. Security Bureau has already been negotiating with the Duty Lawyer Service (“DLS”) on the provision of legal services;
2. The HKSARG propose to put a system in place to assess CAT claimants by mid 2009—prior to the introduction of a “legislative framework”; and
3. Some training of immigration officers has already taken place.

### *Concerns and Questions Arising*

In addition to the developments above, the Law Society is mindful of the recent Concluding Observations of the United Nations CAT Committee (November 2008), which are only the latest in a long list of criticisms from the UN bodies and human rights advocates over the years, which express the concern that “*there is no legal regime governing asylum and establishing a fair and efficient refugee status determination procedure*” and “*The Committee is also concerned that there are no plans to extend to HKSAR the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol*”. Further, the Committee recommends that the HKSAR should:

- a) *incorporate the provisions contained in article 3 of the Convention under the Crimes (Torture) Ordinance;*
- b) *consider adopting a legal regime on asylum establishing a comprehensive and effective procedure to examine thoroughly, when determining the applicability of its obligations under article 3 of the Convention, the merits of each individual case;...*

The Law Society and the Bar Association also note that the Refugee Convention has been extended to the Macau SAR which has legislated for the assessment of asylum seekers.

Both The Law Society and the Bar Association are also aware of the procedural deficiencies and potential for abuse in having a separate assessment process for refugee status determination (“RSD”) in the HKSAR which is presently carried out by the United Nations High Commissioner for Refugees (“UNHCR”). The UNHCR assessment process, if it was amenable to the jurisdiction of the Hong Kong courts, would not meet the high standards of fairness and would most likely be declared unlawful for substantially the same reasons as in *FB*. Further, it is unfair and anomalous that the ultimate decision on the individual’s refugee status by the UNHCR is not amenable to judicial scrutiny. Indeed, the UNHCR itself has been calling on the HKSAR to legislate and carry out RSD for a number of years.

Given that the HKSAR has an obligation to screen CAT claimants and by its own numbers there are more persons availing themselves of that process than the procedurally unfair UNHCR process (3,196 vs 1,591) and given the similarity in the nature of the processes, the Law Society and the Bar Association invite the HKSAR to consider responding favourably to the recommendations of the UN CAT and put in place comprehensive legislation for refugee status determination (“RSD”) and CAT screening. Undoubtedly the majority of applicants will claim both. Since the HKSAR must interview for CAT, if increasing resources are to be spent on a complete revision of the

process, and a decision on refugee status can be made based on the same interview process (as is done in other developed jurisdictions), there does not seem to be any impediment to the HKSAR taking control, in a fair and efficient way, of the entire process and putting in place a comprehensive legislative framework. This would include, *inter alia*, basic screening legislation, including the setting up of an independent tribunal, legislation governing immigration status pending a decision and legislation for related issues such as provision of social assistance during the process. All of these are presently lacking.

The Law Society and the Bar Association note that this is a matter of great public importance and concerns. At stake are fundamental rights of the most serious kind.

The Law Society and the Bar Association are of the view that this is a critical juncture and an opportunity to implement a coherent and comprehensive system. Legislation should be passed to help prevent abuse which may affect not only CAT claimants but asylum seekers and claimants. An inadequate system will only invite abusive claims that exploit weaknesses in the system, and further poor decision-making and legal challenges. The lack of legislation or a detailed and accessible policy governing detention of CAT claimants was criticized by the Court of Appeal in *A & others and DOI* (CACV 134/2007) and may result in costing the HKSARG millions in legal fees and damages for unlawful detention.

#### ***Consultation with the Legal Profession/LegCo***

Consistent with and in furtherance of fundamental rights, rule of law and procedural fairness set out above, both the Law Society and the Bar Association are of the view that the legal profession and LegCo should be consulted at the earliest stages of development of any proposed administrative scheme. Both the Law Society and the Bar Association are concerned that they have not hitherto been consulted even though the DLS is a creation of the Law Society and the Bar Association. Not only is it important to ensure that any such proposed scheme meets the highest standards of fairness but issues such as proposed models for rendering legal advice (legal aid system or DLS?), training for the profession and selection and training for proposed Tribunal members all require input and expertise from the legal professional bodies and LegCo.

#### ***Questions for the HKSARG***

In light of the above the Law Society and the Bar Association request the HKSARG to provide as a matter of priority the following information:

- 1. Full details of the proposed scheme including any comparative research and possible models that have been considered.**
- 2. Details of the proposal to the DLS and the present status of the negotiations including any timetable.**
- 3. Details of the steps taken to implement the judgment in the case of FB including the details of the training that has taken place to date.**



- 4. What consideration has been given to the HKSARG taking on RSD and putting in place comprehensive legislation to effectively and efficiently manage the issues of status while awaiting decisions under CAT or RSD, social welfare, education for minors etc.**

Both the Law Society and the Bar Association will continue to monitor developments in this area and engage all stakeholders and look forward to the early provision of the information requested above. Both organizations can then effectively contribute its expertise and views on the early implementation of a fair and efficient administrative system in line with the HKSAR's international obligations to assist genuine claimants.

**Law Society of Hong Kong  
Hong Kong Bar Association  
31 March 2009  
123819v3**