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**Panel on Security**

**Background brief prepared by the Legislative Council Secretariat  
for the special meeting on 29 September 2009**

**Review of the torture claim screening mechanism**

**Purpose**

This paper provides background information and summarizes past discussions of the Panel on Security (the Panel) on the Administration's review of the torture claim screening mechanism.

**Background**

Torture claims made under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

2. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) has been applied to Hong Kong since 1992. Torture claims made under Article 3 of CAT are dealt with by the Immigration Department (ImmD), and the Government of the Hong Kong Special Administrative Region (HKSAR) has put in place a set of administrative procedures for handling torture claims.

3. For a torture claimant who has failed to establish his claim, he will be removed from Hong Kong in accordance with the law. For a torture claimant who has established his claim, he will not be removed to the country where there are substantial grounds for believing that he would be in danger of being subjected to torture. However, his removal to another country to which he may be admitted without the danger of being subjected to torture will be considered. Furthermore, if country conditions subsequently change such that a torture claim established earlier in respect of a particular country can no longer be substantiated, removal to that country will be considered.

4. The administrative procedures allow a screened-out torture claimant to appeal against refusal decision made against him, and the Secretary for Security will consider the appeal. As legal proceedings are not involved in the screening and appeal

processes, no legal aid is available. However, the decision on a torture claim, including the decision on appeal, is subject to judicial review, and legal aid may be available for the judicial review proceedings. Similarly, if a deportation or removal order is made against a torture claimant, he may seek judicial review against the decision to deport or remove, and legal aid may again be available for such judicial review proceedings.

#### Number of torture claims lodged

5. According to the information provided by the Administration to the Panel in July 2009, only a small number of torture claims were lodged pursuant to Article 3 of CAT in the past. From 1992 to 2004, the HKSAR Government received 44 claims in total.

6. In June 2004, the Court of Final Appeal decided in a judicial review case that the procedures for screening torture claims should meet high standards of fairness and allow every reasonable opportunity for the claimant to establish his claim. Thereafter, the number of torture claims has surged. The number of claims received were 186, 541, 1 583 and 2 198 respectively from 2005 to 2008, and 1 212 claims were received in the first five months of 2009. The majority of claimants are South Asians, mostly from Pakistan, India, Bangladesh and Sri Lanka. About half of the claimants are illegal immigrants (IIs) and the other half overstayers. According to the Administration, about 90% of the claimants lodged their claims upon arrest or when facing repatriation by the law enforcement agencies, and their claims were lodged after remaining in Hong Kong for a long time in order to prolong their stay.

#### The Court of First Instance's judgment

7. The HKSAR Government advised that it had been reviewing the torture claim screening mechanism from time to time, with a view to achieving effective screening, ensuring procedural fairness and preventing abuses. Nevertheless, the Court of First Instance (CFI) decided in December 2008 in another judicial review case that the screening procedures put in place by the Administration were unable to meet the high standards of fairness, for reasons including the following -

- (a) the Administration had not provided publicly-funded legal assistance to needy claimants;
- (b) the officer who decided whether a claim was substantiated was not the one who interviewed the claimant; and
- (c) the Administration had not arranged for oral hearings of the petitions lodged by claimants who were dissatisfied with the result of the screening.

8. The screening process has thereupon been suspended following the CFI's judgment. As at mid-June 2009, there were some 5 000 claims pending screening. To deal with the backlog of claims, the Administration saw a need to resume

screening as soon as possible. Against this background, the Administration has further reviewed the torture claim screening mechanism having regard to the experiences of other common law jurisdictions, with an aim to enhance the existing mechanism by implementing a series of improvement procedures in the fourth quarter of 2009.

### **Discussions by the Panel**

9. At the Panel meeting on 6 July 2009, the Administration briefed members on the progress of its review of the torture claim screening mechanism.

10. The Administration informed members that it planned to implement the enhanced screening procedures and resume the screening process in September or October 2009. Among others, it would revise the relevant procedures and guidelines to allow legal representatives of claimants to be present at screening interviews. It would also allow attendance of legal representatives at petition hearings. Besides, the Administration was actively exploring the provision of publicly-funded legal assistance to the claimants who did not have such means. It was discussing with relevant service providers, including the Duty Lawyer Service, on possible provision of such services. If an agreement was reached, the Administration would, through subvention to the relevant service providers under a pilot scheme, provide legal assistance to those claimants who had such a need during the screening process, including the provision of legal advice, as well as legal representation of the claimants in petition hearings.

11. The Administration further advised that it planned to introduce legislation on the screening procedures, such that the procedures would be based on clear statutory provisions. The Administration undertook to consult the Panel on the relevant legislative proposals by the end of 2009, with a view to introducing a bill into the Legislative Council within the 2009-2010 legislative session.

12. Noting that the Administration had already started discussions with the Duty Lawyer Service regarding the provision of legal representation for CAT claimants, and it was the intention of the Administration to establish a program of such representation through an extension of the existing Duty Lawyer Scheme (DLS), some members expressed concern about the suitability of DLS to provide such a service. These members had reservations about the ability and experience of the lawyers on the panel to undertake such work, when few had knowledge and experience in the areas of refugee law, procedural fairness and management of clients with special needs. In their view, necessary training should be provided to lawyers participating in the proposed legal representation scheme. They also sought information about the operation of the proposed legal representation scheme, including the duty lawyer fees.

13. The Administration responded that apart from discussing with the Duty Lawyer Service on the possible provision of legal representation for CAT claimants, it had also discussed the matter with the Law Society of Hong Kong and the Hong Kong Bar Association. The Administration advised that it had entered into a Memorandum of Administrative Arrangement (MAA) with the Duty Lawyer Service in implementing the existing DLS which provided legal representation by qualified lawyers in private practice to eligible defendants appearing in all Magistrates Courts, Juvenile Courts and Coroners Courts. If an agreement was reached on the provision of legal services to CAT claimants, the Administration would draw up a new MAA to set out the details of all relevant arrangements, including the lawyer fees proposed for different forms of professional services, the qualification and experience required for lawyers participating in the scheme, and the specialized training to be provided for lawyers undertaking such work.

14. In the course of discussion, members also expressed concern about the lengthy procedures and time required for determination of torture claims. They called on the Administration to speed up the process of determining torture claims.

15. The Administration advised that the time needed for assessing each case varied with factors such as the individual circumstances of the case. Statistics of the assessed torture claim cases showed that it took about 14.8 months on average to complete the processing of a case. The Administration stressed that it attached great importance to improving the torture claim screening mechanism. In reviewing the procedures under the existing mechanism, reference would be made to the experiences of other common law jurisdictions with a view to achieving effective screening and ensuring high standards of procedural fairness.

16. Some members noted with concern that there were cases where the claimants had made both refugee and torture claims. They sought information on the number of these cases, and considered that if a considerable number of asylum seekers lodged both refugee and torture claims, the Administration should consider introducing a coherent and comprehensive system for contemporaneous assessment of both torture claims made under CAT and claims for refugee status filed with the United Nations High Commissioner for Refugees (UNHCR) under the 1951 United Nations Convention relating to the Status of Refugees (the Refugee Convention).

17. The Administration responded that among the torture claim cases received over the years, about 43% of the claimants had made both refugee and torture claims, with 57% of them having only lodged torture claims. Regarding the application of the Refugee Convention, the Administration advised that the HKSAR Government's established position on the Refugee Convention remained unchanged, i.e., the Convention did not apply to Hong Kong and the Government had no obligation to admit persons seeking refugee status or to handle refugee status determination. Despite the non-application of the Refugee Convention to Hong Kong, asylum seekers might approach the Hong Kong Sub-office of UNHCR to lodge asylum/refugee claims. The HKSAR Government had all along been supporting the operation of UNHCR's Hong Kong Sub-office through provision of office accommodation at nominal rent.

18. Some members asked why the Refugee Convention, to which China and Macao had already ratified, was not extended to Hong Kong. They held the view that the Administration should reconsider its position regarding the extension of the Convention so as to speed up the refugee status determination process, since UNHCR was in lack of resources to assess the refugee claims speedily. These members suggested that the Administration should provide manpower resources, as a part of government recurrent expenditure, to UNHCR to assist the latter in refugee status determination.

19. In response, the Administration advised that ImmD had entered into a Memorandum of Understanding with UNHCR to enhance cooperation. Under the existing cooperation framework, a number of ImmD officers were seconded to the Hong Kong Sub-office of UNHCR.

20. Expressing concern that HKSAR lacked a clear asylum policy, some members sought information on how people who sought refugee status or made torture claim came to Hong Kong. They questioned whether the refugee or torture claim lodged by a person should be processed by the country/place of his first landing.

21. The Administration advised that a great majority of torture claimants were South Asians, mostly from Pakistan, India, Bangladesh and Sri Lanka. About half of the claimants were IIs and the other half overstayers. Most of these IIs came to Hong Kong en route from the Mainland and many of them did not lodge any claim, including claim for refugee status, until after having arrived Hong Kong. The Administration explained that the People's Republic of China (PRC) was a State Party to CAT. It was understood that under CAT, PRC and HKSAR were regarded as one single country and there was no clear definition for the term "place of first landing". Notwithstanding this, the HKSAR Government would explore with the Mainland authorities as to whether IIs sneaked into the territory from the Mainland and making refugee or CAT claims afterwards should be sent back to the Mainland, such that their refugee or CAT claims could be processed by the Mainland, which was the place of their first landing. The Administration noted that some countries in Europe, as well as the United States and Canada, had entered into agreements on refugee status determination which stipulated that claims for refugee status had to be dealt with by the country where the claimants first landed. The Administration would make reference to overseas practices in considering whether similar arrangements might be applied locally.

22. Members in general considered that the Administration should expedite its study regarding the introduction of a legislative regime for handling torture claims. In their view, the procedures should meet the high standards of fairness as decided by the courts. The legislative framework to be introduced for handling torture claims should also dovetail with the enhancement measures to be put in place.

23. In response, the Administration assured members that it would consider all practicable measures to enhance the torture claim screening mechanism. The

legislative framework to be introduced for handling torture claims would be ready for consideration by the Panel by the end of 2009.

24. Some members were also concerned about the livelihood of torture claimants. They requested the Administration to provide more detailed information on humanitarian assistance currently provided to torture claimants and asylum seekers released on recognizance, including the nature, level and form of support for these people.

### **Latest developments**

25. To allow sufficient time for the Administration to discuss with the two legal professional bodies and to finalize the arrangements for the legal representation scheme, members agreed at the meeting on 6 July 2009 that the Panel should hold a special meeting in late September 2009 to continue discussion with the Administration on its review of the torture claim screening mechanism.

### **Relevant papers**

26. Members may wish to refer to the following documents for details of the relevant discussions of the Panel on Security -

- (a) Administration's paper for the meeting of the Panel on Security on 6 July 2009 [LC Paper No. CB(2)2054/08-09(01)];
- (b) Background brief prepared by the Legislative Council Secretariat for the meeting on 6 July 2009 [LC Paper No. CB(2)2054/08-09(02)]; and
- (c) Minutes of the meeting of the Panel on Security on 6 July 2009 [LC Paper No. CB(2)2495/08-09].