立法會
Legislative Council

立法會CB(2)370/09-10(04)號文件

檔 號：CB2/PL/SE

保安事務委員會

立法會秘書處就2009年12月1日會議
擬備的背景資料簡介

酷刑聲請審核機制檢討

目的

本文件就政府當局進行的酷刑聲請審核機制檢討提供背景資料，並綜述保安事務委員會過去就此所作的討論。

背景

根據《禁止酷刑和其他殘忍、不人道或有辱人格的待遇或處罰公約》提出的酷刑聲請

2. 聯合國《禁止酷刑和其他殘忍、不人道或有辱人格的待遇或處罰公約》(下稱"《禁止酷刑公約》")自1992年起適用於香港。根據《禁止酷刑公約》第3條提出的酷刑聲請由入境事務處(下稱"入境處")處理，而香港特別行政區(下稱"香港特區")政府已訂立一套處理酷刑聲請的行政程序。

3. 酷刑聲請人若無法確立其聲請，均會依法被遣送離港。至於酷刑聲請獲得確立的人士，則不會被遣送到有充分理由相信他們有可能遭受酷刑危險的地方。然而，當局會考慮把他們遣送到不會有遭受酷刑危險而又會接收他們的地方。此外，如地方情況其後有所改變，導致之前就該地確立的酷刑聲請已不再成立，當局會考慮把聲請人遣送到該地。

4. 有關的行政程序容許聲請遭到拒絕的酷刑聲請人就當局的決定提出上訴，而其上訴將由保安局局長考慮。由於審核及上訴過程並不涉及法律程序，因此將不設任何法律援助。然而，對

於當局就酷刑聲請所作的決定(包括就上訴所作的決定)，將可作出司法覆核，而進行司法覆核的法律程序則可獲得法律援助。同樣地，如對酷刑聲請人發出遞解離境令或遣送離境令，有關人士可就作出遞解離境或遣送離境的決定尋求司法覆核，而進行有關的司法覆核程序亦可獲得法律援助。

所提出的酷刑聲請數目

5. 根據政府當局在2009年9月向事務委員會提供的資料，過往根據《禁止酷刑公約》第3條提出的酷刑聲請並不多，由1992年至2004年，香港特區政府只曾共接獲44宗此類聲請。

6. 2004年6月，終審法院在一宗司法覆核案件中裁定，酷刑聲請審核程序須符合高度公平的準則，並讓聲請人有充分合理的機會確立其聲請。自此，酷刑聲請的數目急劇增加。在2005至2008年的4年間，所接獲的聲請數目分別有186、541、1 583及2 198宗，而在2009年首8個月則接獲2 132宗聲請。大部分酷刑聲請人屬南亞裔人士，他們主要來自巴基斯坦、印度、孟加拉和斯里蘭卡，其中非法入境者和逾期逗留者約各佔一半。據政府當局表示，約有90%聲請人是在被執法機關拘捕或面臨遣返時才提出聲請，而他們往往在逗留香港一段長時間後，為了延長其留港期才提出聲請。

原訟法庭的判決

7. 政府當局表示，當局一直有不時檢討酷刑聲請審核機制，以達致進行有效審核、確保程序公平及防止濫用的目的。然而，原訟法庭於2008年12月在另一宗司法覆核案件中裁定，政府當局訂立的審核程序未能符合高度公平的準則，原因包括 ——

(a) 政府當局沒有為有需要的聲請人提供以公帑資助的法律支援；

(b) 決定聲請是否獲得確立的人員，與會見聲請人的人員並非同一人；及

(c) 當聲請人不滿審核結果而提出呈請時，政府當局並沒有安排進行口頭聆訊。

8. 自原訟法庭作出上述判決後，審核工作已暫時中止。截至2009年8月底，有待審核的聲請有5 638宗。為處理積壓的聲請，政府當局認為有需要盡快恢復進行審核工作。基於此一背景，政府當局已因應其他普通法司法管轄區的經驗進一步檢討酷刑聲請審核機制，目的是盡早實施一系列改善程序，從而改進現行機制。

事務委員會過往所作的商議

9. 在事務委員會2009年7月6日及9月29日兩次會議上，政府當局曾向委員簡述其檢討酷刑聲請審核機制的進度。

10. 政府當局告知委員，當局計劃在2009年9月或10月推行經改善的審核程序及恢復進行審核工作。有關的改善措施包括修訂相關的程序及指引，容許聲請人的法律代表列席審核會面，以及出席呈請聆訊。此外，政府當局亦積極探討為經濟上負擔不來的聲請人提供以公帑資助的法律支援。當局現正與相關的服務提供者(包括當值律師服務)進行商討，研究是否有可能提供此類服務。如能就此達成協議，政府當局將以先導計劃形式向有關的服務提供者提供資助，藉以為審核過程中有需要的聲請人提供法律支援，包括提供法律意見，以及在呈請聆訊中為聲請人提供法律代表服務。

11. 政府當局進一步表示，當局計劃就審核程序進行立法，令該等程序能以清晰的法例條文作為基礎。政府當局承諾於2009年年底或之前就有關的立法建議向事務委員會進行諮詢，以期在2009-2010年度立法會會期內向立法會提交條例草案。

12. 部分委員察悉，政府當局已就有關向《禁止酷刑公約》聲請人提供法律代表服務的事宜與當值律師服務展開討論，而當局的計劃是透過擴大現行的當值律師計劃，設立為聲請人提供法律代表服務的計劃。他們對於是否適宜透過當值律師計劃提供此項服務表示關注。對於名列接辦外判案件律師名單上的律師是否具備執行有關工作的能力和經驗，此等委員表示有所保留，因為當中只有少數律師具備和難民法例、程序上的公平程度及如何處理委託人的特殊需要等範疇相關的知識和經驗。他們贊同兩個法律專業團體，亦即香港律師會(下稱"律師會")及香港大律師公會(下稱"大律師公會")的意見，認為當局須為參加擬議法律代表計劃的律師提供所需培訓，並要求當局就擬議法律代表計劃的運作情況提供資料，包括當值律師的費用。

13. 政府當局回應時表示，當局已向上述兩個法律專業團體表明，由於當值律師服務是一個獨立的法律服務專業團體，而且具備相關的經驗，該機構應具備提供相關法律支援的條件。至於在新計劃下提供法律支援服務的當值律師，政府當局初步計劃把有關的酬償訂定於與現行當值律師計劃酬償相同的水平，亦即每小時670元或每半天2,710 元。政府當局進一步表示，除了與當值律師服務商討是否有可能為《禁止酷刑公約》聲請人提供法律代表服務之外，當局亦有與律師會及大律師公會討論此事。政府當局告知委員，當局與當值律師服務簽訂了行政措施備忘錄，藉以實

施現行的當值律師計劃，由合資格的私人執業律師為在所有裁判法院、少年法庭和死因裁判法庭出席的合資格被告人提供法律代表服務。若能就向《禁止酷刑公約》聲請人提供法律服務一事達成協議，政府當局會制定新的行政措施備忘錄，詳列所有相關安排的細則，包括建議就提供不同形式的專業服務收取的律師費、參加該計劃的律師所需具備的資歷及經驗，以及為執行此方面工作的律師提供的專門培訓。

14. 在討論過程中，委員亦曾就評定酷刑聲請的程序及所需時間相當冗長一事表示關注。他們籲請政府當局加快評定酷刑聲請的程序。

15. 政府當局表示，審核每宗個案所需的時間會因為各種因素而有所不同，例如有關個案的個別情況。根據業經審核的酷刑聲請個案的統計資料，完成處理一宗個案平均需時約14個月。政府當局強調，當局極為重視酷刑聲請審核機制的改善工作。在檢討現行機制所訂程序時，當局參考了聯合國難民事務高級專員署(下稱"專員署")及其他司法管轄區處理難民身份申請的程序。根據當局的計劃，審核工作的流程將會縮短，當局並會就有關程序中的各個步驟訂定明確的時限。政府當局期望在實行此等改進措施後，日後的審核過程會顯著加快。

16. 部分委員察悉並關注到在某些個案中，有聲請人曾同時提出難民身份申請和酷刑聲請。他們要求政府當局就此類個案的數目提供資料，並認為如有大量尋求庇護者同時提出難民身份申請和酷刑聲請，當局便應考慮實行一套貫徹一致而全面的制度，用以同時審核根據《禁止酷刑公約》提出的酷刑聲請，以及根據聯合國《1951年關於難民地位公約》(下稱"《難民公約》")向專員署提出的難民身份申請。

17. 政府當局回應時表示，在過去多年所接獲的酷刑聲請個案中，約有44%聲請人已知曾同時提出難民身份申請和酷刑聲請，餘下的聲請人則只提出酷刑聲請。關於《難民公約》的適用問題，當局表示香港特區政府就《難民公約》採取的既定立場維持不變，亦即《難民公約》並不適用於香港，而政府亦無任何義務接收要求給予難民身份的人士或處理難民身份的評定工作。雖然《難民公約》並不適用於香港，但尋求庇護者可向專員署香港辦事處提出要求給予庇護／難民身份的申請。香港特區政府一直透過以象徵式租金向專員署香港辦事處提供辦公地方，來支援該辦事處的運作。

18. 部分委員詢問，已獲中國和澳門確認的《難民公約》，何以並未延展至適用於香港。他們認為政府當局應重新考慮其對於

《難民公約》延展至適用於香港的立場，以期加快進行難民身份評定程序，因為專員署缺乏迅速審核難民身份申請的資源。此等委員建議政府當局向專員署提供人力資源，作為政府經常開支的一部分，以協助專員署評定難民身份。

19. 政府當局回應時表示，入境處與專員署已簽訂了一份諒解備忘錄，以加強彼此的合作。在現行合作架構下，當局以進行職員培訓的目的安排了多名入境處人員借調到專員署香港辦事處。

20. 對於香港特區欠缺清晰的庇護政策，部分委員表示關注。他們要求政府當局提供資料，說明要求給予難民身份或提出酷刑聲請的人士如何來港，並詢問任何人所提出的難民身份申請或酷刑聲請，是否應由該人的第一停留國家／地方處理。

21. 政府當局表示，大部分酷刑聲請人屬南亞裔人士，他們主要來自巴基斯坦、印度、孟加拉和斯里蘭卡，其中非法入境者和逾期逗留者約各佔一半。此等非法入境者大多經由內地進入香港，他們在抵港之前大都沒有提出任何聲請，包括難民身份申請。政府當局解釋，中華人民共和國(下稱"中國")是《禁止酷刑公約》的締約國。據當局所理解，《禁止酷刑公約》把中國及香港特區視為單一國家，而公約內並沒有就"第一停留地"訂定任何清晰的定義。儘管如此，香港特區政府會與內地有關當局探討是否應把從內地潛入本港，然後提出難民身份申請或根據《禁止酷刑公約》提出聲請的非法入境者遣返內地，使內地可以其第一停留地的身份，處理他們的難民身份申請或根據《禁止酷刑公約》提出的聲請。當局留意到部分歐洲國家及美國和加拿大，均已就評定難民身份訂立協定，訂明難民身份申請必須由申請人的第一停留國家處理。當局考慮是否在本港採取類似安排時，會參考外地的做法。

22. 委員普遍認為，政府當局應加快進行有關實施處理酷刑聲請的法律機制的研究。他們認為有關程序應按照法庭所作裁定符合高度公平的準則，而為處理酷刑聲請而將予訂立的法律機制，亦須配合當局即將推行的各項改善措施。

23. 政府當局回應時向委員保證，當局會考慮所有能夠改善酷刑聲請審核機制的切實可行措施。為處理酷刑聲請而訂立的法律機制亦將於2009年年底或之前備妥，以供事務委員會考慮。

24. 部分委員對於酷刑聲請人的生計亦感到關注，他們要求政府當局提供更詳細資料，說明目前為獲准擔保外釋的酷刑聲請人及尋求庇護者提供何種人道援助，包括為此等人士提供何種性

質、程度及形式的援助。政府當局就事務委員會2009年9月29日會議提供的相關資料載於**附錄I**。

最新發展

25. 鑒於在事務委員會2009年9月29日會議上，律師會及大律師公會的代表對法律代表計劃的擬議安排表示有所保留，委員要求政府當局繼續就各項關注事宜與該兩個法律專業團體進行磋商，包括有關計劃的指引、當值律師的培訓安排、專員署在審核根據《禁止酷刑公約》提出的聲請方面所擔當的角色，以及執行酷刑聲請相關工作的擬議收費率。已於2009年10月15日送交委員，政府當局就《禁止酷刑公約》聲請人的法律代表事宜作出回應的文件(立法會CB(2)33/09-10(01)號文件)載於**附錄II**。

相關文件

26. 委員可參閱下述文件，瞭解保安事務委員會所作有關討論的詳情 ——

(a) 政府當局就保安事務委員會2009年7月6日會議所提交的文件[立法會CB(2)2054/08-09(01)號文件]；

(b) 政府當局就保安事務委員會2009年9月29日特別會議所提交的文件[立法會CB(2)2514/08-09(01)號文件]；

(c) 香港律師會及香港大律師公會聯名提交的意見書[立法會CB(2)2524/08-09(01)號文件]；

(d) 政府當局就香港律師會及香港大律師公會於2009年9月24日聯名提交，有關《禁止酷刑公約》聲請人法律代表事宜的意見書作出回應的文件[立法會CB(2)33/09-10(01)號文件]；及

(e) 保安事務委員會2009年7月6日會議的紀要[立法會CB(2)2495/08-09號文件]。

立法會秘書處
議會事務部2
2009年11月25日

為酷刑聲請人提供人道援助

提供援助的理據

1. 基於人道理由，若酷刑聲請人在香港逗留期間未能應付基本生活需要，當局會與非政府機構合作，按個別情況為他們提供實物援助。

2. 為酷刑聲請人提供的實物援助，只是基於人道理由而作出的過渡安排，並**不是**提供予合資格香港居民的**福利援助**。目的是提供支援，讓有關人士不致陷於困境，同時又不會因此而吸引非法移民，對香港現有支援系統的長遠承擔能力造成嚴重影響。

援助範圍

<u>住屋</u>

3. 有確切需要的酷刑聲請人會獲安排臨時住屋，以及水電和其他基本設施的供應。獲提供的住屋支援包括：

(i) 香港國際社會服務社承租位於元朗的私人住宅單位。單位內設有基本的傢私、床舖、家居用品及煮食設施；
(ii) 服務使用者自行安排住所。由香港國際社會服務社直接向單位業主交付租金，而有關租約會按月續租；以及
(iii) 香港國際社會服務社羅蘭士國際庇護舍。需要社工密切留意的個案，包括婦女及未成年人士，會被安排入住此庇護舍。

<u>食物</u>

4. 服務使用者獲提供不同種類的食物，包括蔬果、肉類及嬰兒／兒童食品(如適用)。提供的食物會因應個別服務使用者的健康、文化、宗教及其他需要作出適當安排。服務使用

者在位於港島、九龍及新界各區的六間食物供應商店舖領取食物。

<u>衣履及基本日用品</u>

5. 服務使用者獲提供所需的衣履及其他基本日用品，包括個人衞生用品、家居清潔用品、女性用品和嬰兒／兒童用品(如適用)。

<u>交通津貼</u>

6. 有確切需要的服務使用者會按照行程所需的最低交通費獲發交通津貼，以應付前往入境事務處報到、求診、參與宗教聚會、與律師會面、領取食物及基本日用品和與香港國際社會服務社職員會面等的交通開支。

<u>醫療服務</u>

7. 根據現時減免非符合資格人士的醫療費用的做法，社會福利署的服務單位作出評估後，按個別情況批准一次過減免酷刑聲請人在公立診所或醫院的醫療費用。

<u>援助程度</u>

8. 提供的實物援助會因應有關人士的個別需要和個人情況(包括他們本身擁有和從其他途徑獲得的資源)而有所不同。每位有確切需要的服務使用者可得到的支援，**並無設定相等的金額值上限**。

The Administration's Response to the Joint Submission of the Law Society and the Bar Association to the LegCo Panel on Security on Legal Representation for CAT Claimants Dated 24.9.2009

Guidelines on the new scheme (Paras. 6 & 7)

1. Allegation that the Administration does not truly appreciate the difficulties faced by claimants, and the heavy burden on the legal practitioner to present the claimant's case.

   There is no basis for such an allegation by the legal professional bodies ("LPBs"). The fact that the Administration is willing to accept the *FB judgment* without lodging any appeal and to revise the torture claim screening mechanism to remedy those systemic flaws as declared by the court to be unlawful together with the negotiations with the Duty Lawyer Service ("DLS") in setting up a publicly-funded legal assistance scheme for torture claimants are clear indications that the Administration has every intention to conduct torture claim screening in accordance with the requirement of high standards of fairness. Indeed, the Administration's concession that there will be no cap on the number of sessions of legal service to be provided by DLS lawyers under the proposed legal assistance scheme has demonstrated the Administration's willingness to accommodate the need of torture claimants and their legal representatives where the particular facts of a case or the issues involved are complicated which would require further advice on the matter.

2. Time permitted for completion of the questionnaire is insufficient.

   The Administration has agreed to extend the time for returning the completed questionnaire from 14 days to **28 days**. We consider that it is a reasonable period that strikes a balance between the need to ensure a claimant is given a reasonable opportunity to establish his case and the requirement for early screening of a case with no undue delay. This is in line with the Canadian practice in that an asylum claimant in Canada will be given 28 days to return the specified form containing the required information in support of his claim for assessment by the relevant authority and is longer than the previous UK practice where a

claimant was given only 10 days to complete a standard form to lodge his asylum claim.

Indeed, the information required to be given in the questionnaire in a torture claim relate to personal information about the claimant himself and factual information about his past experience of having been tortured which a claimant should have personal knowledge thereof; and thus there should not be any difficulty for him to give the required information which is within his own knowledge. Neither is it necessary for a claimant or his legal representative to make data access request etc. for information from authority in Hong Kong before he is in a position to complete the questionnaire. In this respect, the submission that a misplaced word or incorrect statement would cause serious prejudice to a claimant's case as damaging his credibility is misconceived as a case officer is required to take into account all the relevant information of the case which includes objective information e.g. the relevant country of origin information etc. in deciding the credibility issue; and that mistakes made in the questionnaire may always be rectified/clarified at the subsequent interview or by way of supplementary information given in writing.

As regards the difficulties faced by a claimant in obtaining documentary proof, the fact that he has no such proof or is unable to obtain it would not necessarily cause prejudice to his claim given that the authority determining his claim is required to take into account the fact that a claimant who has fled from the country concerned would have few belongings and document with him; and that the authority could not adopt an attitude of sitting back and putting him to strict proof of his claim (CFA in *Prabakar (2004) at paras. 53 & 54*). Where necessary, a claimant may request for an extension for a reasonable period of time to submit any crucial documentary proof which is temporary unavailable.

In any case, given that there is an element of flexibility on the timing to return the completed questionnaire as a case officer may allow for a time extension on justifications (para. 16 of the draft Guidelines), the 28-day period as now allowed by the Administration for returning a questionnaire cannot be said to be grossly inadequate.

3. Prosecutions

Para. 48 of the draft Guidelines states that, "*The claimant must be informed that the information he/she provided will be treated in confidence…… In addition, nothing at all said by the claimant in either the questionnaire or at the interview will be used against the claimant in any subsequent criminal proceedings of any nature save an attempt to pervert the course of justice, **and/or making of false reports, etc. to member of Immigration Service**.*" The LPB alleges that the prosecution of torture claimant for providing false information is contrary to *FB judgment*.

The CFI in *FB judgment* only dealt with the issue concerning a torture claimant giving incriminating answers in the questionnaire or at the interview in relation to immigration or other offences which he has committed when fleeing from his country e.g. being an overstayer, illegal immigrant etc. in Hong Kong (paras. 147-151 of the judgment). The said judgment does not appear to support a case to condone a torture claimant giving any false information to an immigration officer or the authority when lodging a claim where there is a duty on him to tell the truth and thus the court expressly mentions that the immunity is subject to the exception of "an attempt to pervert the course of justice" (para. 151).

Given the above, notwithstanding that there is no mention of any possible prosecution for making false report or information in the course of making a claim in *FB judgment*, it does not appear to have any objection to warn a claimant of any possible risks of such prosecution if he deliberately gives false information in the screening process where he is expected to tell the truth in the circumstances. Indeed, depending on the circumstances of a case, a claimant's deliberate act to give false report or information to a case officer handling his claim may be one of those facts upon which a prosecution for an attempt to pervert the course of justice may be initiated. Viewed in this light, it could not be said that the giving of any such warning to a claimant is contrary to *FB judgment*.

4. Medical examinations

Paras. 43 & 44 of the Draft Guidelines provide that a case officer may request a torture claimant to undergo medical examination if it appears to him that such may shed light on the credibility of the claim. The CFA in *Prabakar* held that the authority in the screening process should not adopt an attitude of sitting back and that it is appropriate for it to draw attention to matters which obviously require clarification or elaboration so that they could be addressed by the claimant (para. 54 of the judgment). Therefore, it seems that there is nothing wrong with the authority or a case officer in requesting a claimant to undergo a medical examination or submit medical evidence if such is relevant to the claim. On the question of drawing adverse inference (where the claimant refuses to consent to having such medical examination), any such inference may only be made after the claimant is given a chance to explain why consent is not forthcoming in the circumstances. Provided that such a safeguard is in place, it does not seem to have any objection to requesting a claimant to undergo medical examination for the purpose of verifying his claim.

LPBs' submission is effectively made on the basis that a torture claimant has a right to have private medical examination to be conducted at public expenses for the purpose of obtaining evidence in support of his claim. This is not in line with the *Prabakar judgment* as it is clear that the burden of proof is on a claimant to substantiate his claim albeit that the authority should not take an attitude of sitting back and put the claimant to strict proof thereof. While a torture claimant is not prevented from producing his own medical evidence in support of his case e.g. from private practitioners at his own expenses or those offering their service voluntarily, the Administration has no such obligation to pay for expenses incurred by him in having such private medical examination if the examination is not relevant to the decision on the claim, as we should secure that public resources be used reasonably.

Training and Commencement of screening (Paras. 8-11)

5. The Administration appreciates the arrangement of training for duty lawyers initiated by LPBs in ensuring the quality of legal services to torture claimants. It has offered to assist in liaison work with the Office of the United Nations High Commissioner for Refugees (UNHCR)/Office of the High Commissioner for Human Rights (OHCHR) for trainers or logistic arrangements relating to venue and will provide further assistance as appropriate.

6. We agree that lawyers acting for torture claimants should be competent to do the work through training or have the relevant experience for undertaking such work. That said, this does not necessarily mean that lawyers must attend the training course conducted by the Academy of Law before they may act for torture claimants. Whether a lawyer is competent to do the work depends on what training he has received or the relevant experience which he has had on the subject whether in Hong Kong or elsewhere. While it would be incumbent upon the Administration to further negotiate with the two professional bodies with a view to securing their blessing to permit a small number of lawyers with the relevant experience to take up the work before the commencement of the training by the Academy of Law in December, it is unfair for the LPBs to say that the Administration is not aware of any lawyers who are able to handle these cases competently without proper training if the training here refers to the training course to be conducted by the Academy of Law. It seems that there are some lawyers in Hong Kong who are competent to do torture claim related work without attending the forthcoming training course e.g. those who have been actively involved in the relevant torture claim litigation cases in Hong Kong etc. Indeed, it does not seem that LPBs may prevent any of their members from acting for a torture claimant (at his own expenses) or to act for him on pro bono basis, except that a member who has no such training or experience may be liable to be disciplined for misconduct if he/she acts negligently in the matter and/or not up to the required professional standard having regard to the strong views expressed by the LPBs that only members with the relevant training or experience are competent to do torture claim related work.

Role of the UNHCR (Paras. 12-16)

7. Given that the Refugee Convention does not apply to Hong Kong, and subject to the outcome of the appeal in "C" (CACV 132/2008) which will soon be heard by the Court of Appeal, the Administration has no obligation to conduct asylum screening in Hong Kong and that refugee matters will remain the responsibility of UNHCR - Hong Kong Office. It remains the Administration's firm policy not to conduct any asylum screening in Hong Kong or to extend the application of the Refugee Convention to Hong Kong.

8. Subject to those procedural safeguards and the requirement of fairness, and also with consent from the claimant, it seems that the "interface" with the UNHCR and use of their materials (in the asylum screening process) by a case officer in CAT screening is permissible in those circumstances as sanctioned by the CFA in *Prabakar (at paras. 56-60 of the judgment)* which is reflected in paras. 41 & 42 of the draft Guidelines. As such, it does not seem that the relevant guidelines are in breach of the requirement of high standards of fairness.

9. Secondment of officers from Immigration Department to work in the UNHCR - Hong Kong Office under the Memorandum of Understanding signed between the HKSARG and the UNHCR is solely for the purpose of staff training. As such, the fact that government officers are seconded to work in UNHCR - Hong Kong Office should not be taken as a factor which will undermine the Administration's position that the HKSARG will not conduct asylum screening as it has no such obligation to do so.

Fees (Paras. 17-22)

10. The LPBs' submission is focused on the contention that remuneration paid to lawyers doing torture claim related work should be sufficient to attract lawyers of the calibre and experience that is needed to competently handle the claims and that a comparison with overseas rates is unrealistic as Hong Kong practitioners have higher overheads costs.

11. Nevertheless, we consider that the adoption of the current duty lawyer rate (i.e. around $677 per hour) is appropriate based on the following reasons:-

    The legal assistance is available to virtually all torture claimants, whether or not their claims involve legal issues or facts disputed. The assistance to be provided in the screening process is not of the same nature as litigation work in High Court/District Court cases.

    Having due regard to the views of the LPBs as well as DLS, the Administration has stretched reasonable flexibility and accepted the suggestion from the profession that no cap should be imposed on the number of sessions for a case, which will duly take into account the individual circumstances. In this regard, the package proposed by the Administration compares favourably to the remuneration in other countries for lawyers assisting asylum seekers.

    The proposed fee rates have been endorsed by the DLS Council after full deliberations and its meeting with legal profession.

    The arrangements are made under a pilot scheme, which will last for 12 months. A review will be conducted to make necessary adjustments in the light of practical experience. The fees may be reviewed in that context, including the issue about sufficient attraction for lawyers with relevant qualifications to provide service as highlighted by the legal profession.

12. Basing on the existing duty lawyer rates and the proposed scope of assistance agreed by the LPBs, we estimate that the legal cost alone to assist a torture claimant in making their case up to the petition stage is in the region of $51,000 for a simple case (apart from other incidental expenses, e.g. interpreter's cost and translation). Bearing in mind the current influx of 300 new claims per month and we have over 5 600 cases pending determination as at end August 2009, the proposed adoption of duty lawyer rate would already pose a great financial burden to the public purse. If the rates for civil cases (ranging from $1,600 to $4,000 per hour depending on the years of practice) proposed by the LPBs are to be applied, the legal cost would shoot up

to $120,000-$300,000 per case, which we believe, will not be viable and sustainable in the long term.

13. Last but not least, for meritorious cases, claimants who have been refused at the petition stage will still be able to put forward their cases to the court through judicial review. Civil litigation fee rates ($1,600-$4,000 per hour) will be applicable upon granting of legal aid.

Security Bureau
9 October 2009