THE LAW SOCIETY OF HONG KONG 香港律師會

IMMIGRATION (AMENDMENT) BILL 2011

Joint Submissions of the Law Society and Bar Association

A. 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 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. Generally speaking, refugees are persons who flee their own country because of persecution by the state, organs of the state or non-state actors and cannot get protection from the state. Persecution may take many forms, including physical abuse amounting to torture. Although there is significant overlap in the concepts relating to refugees and torture, the definition of torture is different.

3. The *UN Refugee Convention* ("*Refugee Convention*") governing states' responsibilities to persons fleeing from persecution has not been extended to the HKSAR (despite being ratified by China and extended to Macau). The HKSAR does not remove persons who seek protection from the UNHCR until such claims are dismissed.

4. From 1992 to 2004, the Administration did not conduct independent screening of claimants under CAT, relying instead on determinations by the UNHCR that such persons were or were not genuine refugees. In *Prabakar v Secretary for Security* (*Prabakar*) [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* (*FB*) [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)
- The failure to provide for an oral hearing on a petition and the lack of provision for legal representation at that oral hearing
- The failure to provide an independent avenue of appeal

Pilot Scheme

6. On 3 February 2009 the Deputy Secretary for Security indicated that the Administration intended to introduce a legislative framework by the end of 2009 in order to address the findings in *FB*. The Administration originally failed to consult the Joint Profession on the Pilot Scheme ("Scheme") which involves issues of fundamental human rights, the rule of law, procedural fairness and professional duties of legal practitioners. The Joint Profession highlighted several areas of concern including the lack of training for lawyers and continuing procedural unfairness. The Administration subsequently signed an agreement with the Duty Lawyer Scheme ("DLS") to introduce the Scheme which came into operation in late December 2009. Even though the Administration has been aware of the Joint Profession's interest in the proper administration of the Scheme it did not seek the Joint Profession's views and has since signed an agreement to extend the Scheme for two more years as of November 2010.

Refugee Status Determination (RSD)

7. The Law Society and the Bar Association repeat their observations on the procedural deficiencies and potential for abuse in having a separate assessment process for 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. Various UN Expert Committees have been calling on the HKSAR to legislate and carry out RSD for a number of years.[1] Indeed the UNHCR itself calls on the HKSAR

[1] See for example United Nations, Report of the Committee against Torture, Hong Kong (CAT/C/HKG/4) (21 November 2008):

to carry out RSD and unify the screening process. We note the *South China Morning Post* reported the following in 2009:

"*Choosin Ngaotheppitak, the head of UNHCR's Hong Kong office, believes there is a need for a unified screening process. 'Basically the procedures are the same for torture claimants and asylum seekers [for refugee claims] .....When we have to do two processes it takes a lot of time. Secondly, the long process leaves cases open to abuse. So I think the best way is to combine the procedures.' Ngaotheppitak suggested that Hong Kong gets 'directly involved in the determination of refugee status' - something the government is reluctant to do.*"[2]

8. The Administration only proposes to introduce a scheme for CAT claims and has refused to conduct a complete review of the system to include asylum seekers. The Administration has adopted the view that "*Hong Kong's relative economic prosperity and its liberal visa regime makes it vulnerable to possible abuse if the Refugee Convention is extended to Hong Kong*".

9. This approach is short-sighted and will not achieve the goal of effectively processing the claims of CAT claimants. It is also one that results in unnecessary duplication and waste of resources and taxpayers' funds. CAT Panel Lawyers are aware that there have been many cases where claimants have made refugee ***and*** CAT claims, or where claimants have made a CAT claim first, and when this fails launched a refugee claim. The increase in the number of such claims and the lack of resources of the Hong Kong Sub-office of the UNHCR, which is responsible for handling refugee claims, increases the burden on UNHCR. It also gives such claimants "2 bites at the cherry" which is not in the best interests of Hong Kong. The failed CAT claimants cannot be removed from Hong Kong because they immediately put in an application to the UNHCR and prolong their presence in Hong Kong. The Administration should reconsider its position regarding the extension of the *Refugee Convention* so as to speed up the RSD process.

10. Given that the HKSAR has an obligation to screen CAT claimants, and by its own numbers there are far more persons availing themselves of that process than the procedurally unfair UNHCR process, and given the similarity in the nature of the processes, the Law Society and the Bar Association urge the Administration to use this opportunity to put in place comprehensive legislation for RSD and CAT screening as undoubtedly the majority of applicants will claim both.

11. 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 based on

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"(7) While the Committee appreciates the cooperation of HKSAR authorities with UNHCR to ensure respect for the principle of non-refoulement and protection of refugees and asylum-seekers, it is still concerned that there is no legal regime governing asylum and establishing a fair and efficient refugee status determination procedure. The Committee is also concerned that there are no plans to extend to the HKSAR the 1951 United Nations Convention relation to the Status of Refugees and its 1967 Protocol.

The HKSAR should:
(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;

...
(f) Consider the extension of the 1951 Refugee Convention and the 1967 Protocol to Hong Kong."

[2] Phyllis Tsang, '*HK asked to unify screenings for torture, asylum*', *South China Morning Post*, 29 November 2009

the same interview process, which happens in most 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.

12. But the problem identified in the preceding paragraph can be addressed if the Administration were to simply recognize the principle of *non-refoulement* of refugees, independent of the other obligations that arise under the *Refugee Convention*. The principle pre-dates the Convention and operates as an established principle of international law. This would mean there would be one decision-making process only where a person would be recognized either as (a) a torture victim; (b) a refugee or (c) neither a torture victim nor a refugee. (A person could be a victim of torture and a refugee because the apprehended torture amounts to persecution, but it is possible for a torture victim not to be a refugee and vice versa.)

13. We note that the system in Hong Kong is unique among other overseas jurisdictions. According to the research report of the Legislative Council "*Mechanisms for handling torture claims in selected jurisdictions*" dated 4 July 2011:

    "*In most of the overseas jurisdictions, torture claims are lodged under the refugee/asylum programme with 'risk of torture' being a ground for lodging claims, and there is no separate mechanism for handling torture claims.*" (at para. 1.2.2)

14. The current system of duality of process is inefficient, not cost-effective, and easily subject to abuse. It prevents a holistic approach to deal with the issue. As stated, some claimants exploit weaknesses between the two systems and exploit poor decision-making by making legal challenges.

15. The Administration has not provided any rational explanation on the benefits of and/or justification for maintaining separate systems for refugee and CAT claims

B. Immigration (Amendment) Bill 2011 (Bill)

16. In spite of the above, the Joint Profession notes the Bill will introduce a statutory framework for CAT claims only based on the Scheme and makes the following submissions:

17. **37W: Restrictions on persons claiming non-refoulement protection in Hong Kong**

17.1 This clause states a person may claim *non-refoulement* protection in Hong Kong only when that person is subject or liable to removal, namely that person must breach his immigration status and become an overstayer. This invites the claimant to break the law *before* any claim under the CAT be made. The Joint Profession submits it would be rational for the legislation to provide for "temporary

permission to stay" which would end on determination of the CAT application including any appeals.

18. **37Y(2):Requires claimants to return the completed torture claim form within 28 days after a written request**

18.1 We note that if the CAT claimant fails to return the completed torture claim form within the 28-day period, the clause as drafted provides for a "deemed withdrawal by the claimant". The prescribed 28 days time limit in the primary legislation is simply unrealistic and harsh. Legal representatives do not wish to enter into an argument with the Immigration Officer in every case and be at the mercy of their discretion for extension of time. We consider this clause does not comply with the requirements outlined in *FB* and should be removed.

19. **37ZC: Medical Examination**

19.1 The Joint Profession has expressed its concerns to the Security Bureau on the current arrangements for the handling of medical examinations. The concerns are not allayed by the proposals in the Bill, which seem to perpetuate the existing unsatisfactory process. Currently, the Director of Immigration handles requests from CAT claimants under the Scheme for medical examinations, not the claimant's lawyer. It is the case officer (an Immigration Department officer) who makes the final decision on whether a medical examination should take place. If the claimant is granted permission, it is the Immigration Officer ("IO") who assigns the medical examiner.

19.2 It is a condition precedent to the medical examination taking place that the physical or mental condition "is in dispute". It is possible to imagine some cases where the physical condition may not be in dispute, but it would be safer to assume – given the onus on the claimant – that all claimed conditions will be disputed or at least not accepted by the examiner.

19.3 The Claimant must submit to a medical examination at the request of the IO or Appeal Board. Additionally, any requests by the Claimant (or his advisors) for medical examinations must be channeled through an immigration officer. All arrangements are to be made by or through an IO – subsection (2).

19.4 It is notable that the provision only anticipates medical reports on a clearly defined medical or psychological issue. This may not always be the case. There may be several reasons why a medical examination is required - the legal advisor considers it necessary to obtain a medical report prior to submission of the Questionnaire. For example, a claimant who appears to be suffering from a condition hampering effective instruction-taking such as PTSD, it may be vital to obtain a report. Depending on the findings from such a report, the claimant may be someone with "special needs" requiring particularly sensitive handling – see paragraph 26 of the Guidelines as to the handling of such cases.

19.5 We consider the procedure of channeling all such appointments through the Immigration Department ("ID") and Government doctors is simply not appropriate in most cases. When a legal advisor informs the ID that a medical report should be obtained, the ID liaises with the Hospital Authority to arrange an appointment, with a medical practitioner who is unnamed, and whose identity and experience are not disclosed. The claimant has no choice as to who is going to examine him/her. It is not difficult to envisage circumstances where it will have a discouraging and even chilling effect on claimants who by definition have fled maltreatment at the hands of their own government and may well have understandable distrust of another regime. Some cases require particular sensitivity which the current system does not allow for: e.g. a female rape victim being examined by a medical government doctor. To require a person who may well have suffered torture to attend an examination by a practitioner who is unidentified in advance and who is told to investigate and probe into delicate and traumatic events is in our view grossly inappropriate and particularly indelicate when arranged by the office of the decision-maker, not through the DLS or the assigned duty lawyer.

20. **37ZC(3)**

20.1 This clause requires the claimant to disclose to an IO, and on appeal to the Appeal Board, the medical report of any examination arranged for the claimant under this section. If the legislation is passed there will be statutory override of doctor/patient confidentiality. We also note the current practice whereby Government doctors, appointed by the ID send copies of their reports to the ID and that confidentiality issues may arise from such practice.

20.2 The Hospital Authority has its own protocol concerning the circulation and "sharing" of information obtained from patients in appointments with other hospital staff. This is a routine part of the system which from one perspective is a health tool enabling the doctor to look up the medical history of a patient and ensure appropriate treatment and medication is provided. However, it is clearly not appropriate in the context of torture claims. This does not seem to have been addressed.

20.3 The lack of confidentiality may hamper the full and necessary disclosure to the medical professional and render the examination, if not worthless then very much less effective.

20.4 The quality of a report is to a large degree enhanced by the obtaining of a full history from the patient. The DLS/assigned lawyer has a vital role in this and should be able to communicate directly with medical professional on a fully confidential basis, without notice to the ID.

20.5 There is no rationale to override medical doctor/patient confidentiality. We cannot support this policy.

20.6 The Hong Kong Medical Association has advised the Joint Profession that "*it would be unethical for any doctors to release medical reports to any third party,*

including the Immigration Department without prior consent of the CAT claimants, and hence a breach of doctor/patient confidentiality". This view also applies notwithstanding any attempt to introduce a statutory override as it will be in breach of the *World Medical Association International Code of Medical Ethics 2006* and the *Code of Professional Conduct* published by the Medical Council of Hong Kong.

21. **37ZD: Credibility of claimant**

21.1 Clause 37ZD, while it does not disturb in any way the power of determination of credibility by the decision-maker, lists out a number of situations that the decision-maker can take into account "as damaging the claimant's credibility". This provision if applied by a decision-maker in a skewed manner or in the absence of balancing procedural safeguards (such as without calling for any explanation of such behaviour from the claimant) would result in injustice. This clause should be removed from the Bill.

22. **37ZH: Order in which claims are processed**

22.1 The ID should establish a scheme which works. Clause 37ZH as drafted would be subject to challenge.

23. **37ZL: Revocation of decision to accept torture claim etc.**

23.1 We do not see any justification to revoke any decision by the ID or a decision by the Board accepting the torture claim. Sub-paragraphs (a) and (b) require a value judgment by the decision-maker. We note that as drafted, sub-paragraphs (a) and (b) would result in unnecessary satellite litigation by judicial reviews of such revocation.

24. **Division 3 - Torture Claims Appeal Board**

24.1 The Bill as drafted emphasises adversarial procedures. However, we note the process of investigating CAT claims in comparable jurisdictions is not adversarial at all. In practice the parties co-operate.

24.2 The Bill contains statutory provisions which prevent adjudicators from exploring issues which may be relevant to CAT claimants. The statutory framework should not be construed in this manner. If a CAT claimant makes an arguable case, the Director of Immigration should assist the claimant and adjudicators should build up their own knowledge of the countries involved.

25. **Part 3: Amendment to Immigration Regulations**

25.1 **New Form 8 on Recognizance**

25.2 Section (1)[(b) etc.] in the form is open-ended.

25.3 Section 36 of the Ordinance will be amended by a new clause (1A) whereby the conditions of a recognizance imposed under that sub-section may include a condition the person must: (a) report to the police station at specified times; (b) notify an immigration officer, police officer, of changes to correspondence, residential address; or (c) if a person is defined by section 37U(1) attend interviews under section 37ZB(1)(b).

25.4 Breach of this new clause could result in CAT claimants being in breach of their recognizance and liable to detention: if a CAT claimant failed to go to an interview, the sanction for breach of recognizance would result in a prosecution for innocent reasons such as oversleeping or attending on a wrong date.

The Law Society of Hong Kong and The Hong Kong Bar Association

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