

*Submission to the Legislative Council Bills Committee  
Immigration (Amendment) Bill 2011*

## RECENT DEVELOPMENTS IN HONG KONG'S TORTURE SCREENING PROCESS

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### **Introduction**

On 8 July 2011, a bill to provide a statutory framework for the determination of torture claims was tabled before the Legislative Council. If enacted, the Immigration (Amendment) Bill 2011<sup>1</sup> will incorporate into domestic law the principle of *non-refoulement* applicable to Hong Kong by virtue of Article 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>2</sup> The incorporation of this non-derogable treaty obligation is of some legal

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<sup>1</sup> The present draft of the Immigration (Amendment) Bill 2011 (hereinafter referred to as the Bill) is available at: <http://www.legco.gov.hk/yr10-11/english/bills/b201107082.pdf> (visited 18 April 2012).

<sup>2</sup> The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), GA Res A/RES/39/46 was adopted by the General Assembly on 10 December 1984, entered into force on 26 June 1987 and has applied to Hong Kong since 1992. Article 3(1) requires that

significance, as the Government presently relies on discretionary, policy-based procedures to determine claims for protection made by persons who fear being subject to torture if returned to their countries-of-origin.<sup>3</sup>

In essence, the new Bill will seek to underpin recent reforms in this area by amending the Immigration Ordinance (IO) to include provisions for a specialised torture screening mechanism.<sup>4</sup> The proposed legal framework will feature: an initial decision-making process administered by the Director of Immigration; an unimpeded merits review to a new Torture Claims Appeal Board; and a range of auxiliary measures designed to regulate torture claimants' liability to detention, right to take up employment, and immigration status whilst in Hong Kong.

Aside from the anomaly of instituting an asylum mechanism that conspicuously excludes the consideration of refugee claims,<sup>5</sup> the Government's willingness to legislate on this complex and politically sensitive topic has received a cautious welcome.<sup>6</sup> That said, a closer reading of the Bill raises several concerns. These centre on various restrictive clauses that appear to place the public policy considerations of enforcing immigration control and preventing procedural abuse above the need to honour Hong Kong's *non-refoulement* obligation under the CAT.<sup>7</sup> This underlying intent was implicit

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"No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture".

<sup>3</sup> For a basic outline of the current screening policy see the Security Bureau's letter to the Legislative Council's Panel on Security regarding Statistics on Torture Claims, 18 November 2010, LC Paper No. CB(2)754/10-11(01), available at: <http://www.legco.gov.hk/yr10-11/english/panels/se/papers/se1207cb2-754-1-e.pdf> (visited 18 April 2012).

<sup>4</sup> See the Bill's long title at n 1 above.

<sup>5</sup> The 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) has not been extended to Hong Kong. The Government refuses to entertain refugee claims, which are considered by the UNHCR under a separate screening process. For further discussion see Kelley Loper, "Toward Comprehensive Refugee Legislation in Hong Kong? Reflections on Reform of the 'Torture Screening' Procedures," (2009) 39 (2), *Hong Kong Law Journal* 253, 259.

<sup>6</sup> See for example the Hong Kong Human Rights Monitor, Submission to Bills Committee on Immigration (Amendment) Bill 2011, November 2011, LC Paper No. CB(2)335/11-12(02), para. 1, available at: <http://legco.gov.hk/yr10-11/english/bc/bc59/papers/bc591121cb2-335-2-e.pdf> (visited 18 April 2012).

<sup>7</sup> The extent to which Hong Kong is also bound by the principle of *non-refoulement* under customary international law will shortly be at issue before the Court of Final Appeal. See Yuen JA granting leave to appeal in *C v Director of Immigration*, unrep., CACV 132/2008, 14 December 2011, CA, available at: [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_frame.jsp?DIS=79522](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=79522) (visited 18 April 2012).

in the Government statement following the Bill's first reading in the Legislative Council. Secretary for Security, Mr Ambrose Lee Siu-kwong tellingly remarked that: "We have to ensure every torture claimant is dealt with in a fair and cautious manner through this legislation. We also have to ensure that the screening mechanism will not be abused".<sup>8</sup>

These sentiments are manifest in various aspects of the new Bill, notably the clauses that manufacture a set of statutory presumptions against the credibility of claimants and restrict claimants in their freedom to obtain corroborative medical evidence. Through an analysis of these clauses, this article argues that the Bill in its present form will do little to expand the scope of protection currently afforded to persons fleeing torture. This is because these restrictive clauses affirm a "refusal mindset"<sup>9</sup> by focusing the attention of the deciding authority on immaterial considerations, hence denying individual claims the appropriate level of scrutiny that is warranted given the unique matrix of facts that each case represents.

Before analysing the likely impact of these disappointing, if hardly unexpected clauses, this article begins with a brief background to the present Bill, recalling the indifference successive Governments have shown towards implementing Hong Kong's CAT *non-refoulement* obligation. In so doing, it documents the important role a burgeoning domestic jurisprudence has played in terms of acting as a catalyst for reform.<sup>10</sup>

## **Implementing Article 3 of CAT**

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<sup>8</sup> See "Bill tabled to assess asylum-seekers' torture claims", *South China Morning Post*, 14 July 2011, available at: <http://archive.scmp.com/showarticles.php> (login required).

<sup>9</sup> A substantial body of literature has suggested that a "refusal mindset" or "culture of disbelief" plagues asylum decision-making in other jurisdictions. See for example Trevor Trueman "Reasons for refusal: an audit of 200 refusals of Ethiopian asylum-seekers in England," (2009) 23(3) *Journal of Immigration, Asylum and Nationality Law*, 281, 308.

<sup>10</sup> The pivotal cases that have shaped existing policy are discussed below. For further insight also see Mark Daly, "Refugee Law in Hong Kong: building the legal infrastructure", *Hong Kong Lawyer*, September 2009, 14-30.

Of late, the Hong Kong Government has been quick to emphasise its progress in terms of implementing its *non-refoulement* obligations under Article 3 of the CAT. In particular, it has been keen to stress that its “new and enhanced”<sup>11</sup> administrative procedures provide a fairer system for determining torture claims. In this regard, the Government points to a number of recent reforms which now ensure that: publicly-funded legal assistance is granted to claimants who are without the means to pay privately for legal representation; improved training and support is given to decision-makers; and new petition (appeal) procedures are presided over by adjudicators with legal backgrounds.<sup>12</sup> The paragraphs that follow briefly narrate the journey towards these reforms, which have paved the way for the new Bill. In so doing, they illustrate how this has been a slow piecemeal affair, more the result of strongly worded criticism emanating from Hong Kong’s higher courts than proactive policymaking on part of the Hong Kong Government.

### ***Before the Handover***

The CAT was originally extended to Hong Kong (by Britain as its sovereign) on 8 December 1992, four years after the Convention was first applied to the UK’s metropolitan territory. The delayed application of the CAT has been attributed to the need to obtain Beijing’s consent to ensure the treaty would have continuing effect following reunification.<sup>13</sup> As Hong Kong’s dualist common law system does not automatically incorporate treaty obligations, implementing legislation was necessary to make the CAT directly enforceable in the local courts. This partially came in 1993 when the Crimes (Torture) Ordinance was enacted to make the act of torture an express offence under Hong Kong’s criminal law.<sup>14</sup> However, this Ordinance makes no reference at all to the CAT’s *non-refoulement* obligation.

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<sup>11</sup> See n 3 above.

<sup>12</sup> See the Legislative Council Brief to the Immigration Amendment Bill 2011, File Ref: SBCR 3/2761/09, para. 3, available at: [http://www.legco.gov.hk/yr10-11/english/bills/brief/b41\\_brf.pdf](http://www.legco.gov.hk/yr10-11/english/bills/brief/b41_brf.pdf) (visited 18 April 2012).

<sup>13</sup> See Andrew Byrnes, “Uses and Abuses of the Treaty Reporting Procedure: Hong Kong Between Two Systems”, in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000), p. 288.

<sup>14</sup> The Crimes (Torture) Ordinance (Cap. 427) entered into force on 21 January 1993 and incorporates Article 4 of the CAT.

More than simple oversight, this omission was in keeping with the colonial policy of immunising Hong Kong's immigration laws against scrutiny or challenge pursuant to the territory's international human rights obligations. A policy exemplified by the immigration exception contained within Part III of the Hong Kong Bill of Rights Ordinance,<sup>15</sup> as well as the Government's persistent refusal to extend the Refugee Convention to Hong Kong on account of the territory's "small size and geographical vulnerability to mass, illegal immigration".<sup>16</sup> Whilst the Government's past unwillingness to incorporate Article 3 has meant that the CAT *non-refoulement* obligation has not been directly justiciable,<sup>17</sup> its application to Hong Kong was nevertheless not without legal consequence. As a matter of international law, the Government came under a duty to perform this obligation in good faith.<sup>18</sup> Furthermore, pursuant to a ruling by the Court of Appeal (CA), the immigration authorities are required to take unincorporated treaty obligations into account when exercising their administrative discretion.<sup>19</sup>

The Colonial Government consequently indicated that it could meet these requirements by considering torture claims within the parameters of Hong Kong's discretionary immigration regime. In the UK's only report to the UN Committee against Torture (CAT Committee) to feature Hong Kong, the Government explained that in situations where returnees asserted that they might be subject to torture, the Director of Immigration "carefully assessed" such claims and a discretionary stay granted where an

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<sup>15</sup> See Hong Kong Bill of Rights Ordinance, (Cap. 383), s 11, which precludes persons not having the right to enter and remain in Hong Kong from invoking the rights enshrined within the Bill Of Rights.

<sup>16</sup> See the statement of Lord Trefgarne, Parliamentary Under-Secretary of State for the Armed Services, putting on record the UK Government's reasons for not extending the Refugee Convention to Hong Kong, HL Hansard, Vol. 460, Col. 968, 27 February 1985, available at: [http://hansard.millbanksystems.com/lords/1985/feb/27/refugees-third-world#S5LV0460P0\\_19850227\\_HOL\\_79](http://hansard.millbanksystems.com/lords/1985/feb/27/refugees-third-world#S5LV0460P0_19850227_HOL_79) (visited 18 April 2012).

<sup>17</sup> The Chief Justice in *Secretary for Security v Sakthivel Prabakar* (2004) 7 HKCFAR 187, para. 45 (hereinafter referred to as *Prabakar*) made clear the limited role of the courts in judicial reviews of refused CAT claims. In so doing he stated that: "It is for the Secretary to make such a determination. The courts should not usurp that official's responsibility".

<sup>18</sup> In this regard, see the Vienna Convention on the Law of Treaties, art 31.

<sup>19</sup> See *Yin Xiang-jiang v Director of Immigration* [1994] 2 HKLR 101, which considered the extent to which a stateless person in Hong Kong may rely on the unincorporated UN Convention on the Status of Stateless Persons.

“allegation was thought to be well founded”.<sup>20</sup> Tellingly, the Colonial Government failed to elaborate further on their internal decision-making procedures. Moreover, they could not point to a single case where this discretion had been exercised in favour of protecting an individual against being returned to a country where he or she was at risk of torture.<sup>21</sup>

### ***Developments Post-97***

Following the resumption of Chinese sovereignty, the CAT continued to apply to Hong Kong as a Special Administrative Region (SAR), albeit subject to the reservations entered by China upon its becoming a signatory to the treaty.<sup>22</sup> Hong Kong’s immigration and extradition laws also remained largely discretionary in nature, a fact that has undoubtedly hindered progress towards full incorporation of the CAT *non-refoulement* obligation. Despite the transfer of sovereignty, the new government initially maintained the position of its predecessor and continued to exercise its wide discretionary powers in these areas restrictively, frequently giving little or no consideration to compassionate or humanitarian circumstances.<sup>23</sup> Unfortunately, from a human rights perspective, this approach to immigration decision-making received regular judicial endorsement. For instance in *Lau Kong Yung v Director of Immigration* the Court of Final Appeal (CFA) confirmed that “the Director is under no legal duty to take

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<sup>20</sup> See UN Committee against Torture: Addendum to the Second Periodic Reports of States Parties Due in 1994, United Kingdom of Great Britain and Northern Ireland and Dependent Territories, 26 June 1995, CAT/C/25/Add.6, p. 73, available at: <http://www.unhcr.org/refworld/docid/3ae6ae344.html> (visited 18 April 2012).

<sup>21</sup> Statistics show that between 1992 and 2004 the Hong Kong Government received just 44 torture claims. See the Panel on Security, Background brief prepared by the Legislative Council Secretariat, for the meeting on 12 April 2011, Torture claim screening mechanism, LC Paper No. CB(2)1454/10-11(04), para. 5, available at: <http://www.legco.gov.hk/yr10-11/english/panels/se/papers/se0412cb2-1454-4-e.pdf> (visited 18 April 2012).

<sup>22</sup> China became party to the CAT on 4 October 1988 and on 10 June 1997, notified the UN Secretary General that the treaty would continue to apply to Hong Kong following the resumption of Chinese sovereignty. See UN Treaty Collection, Chapter 5.9 Note 6, available at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en#5](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#5) (visited 18 April 2012).

<sup>23</sup> See Johannes Chan, “The Evolution of Immigration Law and Policies: 1842–2003 and Beyond”, in Johannes Chan and Bart Rwezaura (eds.), *Immigration Law in Hong Kong: An Interdisciplinary Study* (Hong Kong: Sweet & Maxwell Asia, 2004), pp. 29–31.

humanitarian grounds into account” when considering requests to remain in Hong Kong from “illegal immigrants”.<sup>24</sup>

That said, in the year of the Handover a small step towards incorporating Article 3 was made when the Government brought the territory’s extradition laws in line with the Basic Law.<sup>25</sup> In this regard, the Fugitive Offenders Ordinance (FOO) was enacted to provide a statutory framework for implementing bilateral agreements and multilateral arrangements on the surrender of fugitive offenders.<sup>26</sup> Whilst the FOO is conspicuously silent on the prohibition against surrendering individuals to countries where they may face torture, subsidiary legislation schedules the entire CAT treaty.<sup>27</sup> The Court of First Instance (CFI) have subsequently confirmed in obiter remarks that “as a matter of discretion Hong Kong may refuse to surrender a person where that surrender may be in breach of the Convention [Against Torture]”.<sup>28</sup>

In subsequent human rights reports to UN monitoring bodies, the SAR Government has, like its predecessor, declared that the discretionary powers conferred on officials in immigration and extradition matters are exercised in conformity with Article 3 of the CAT.<sup>29</sup> Moreover, they have also stated in the course of litigation that individuals who raise torture claims during the course of FOO proceedings are entitled to free legal assistance if they are without means.<sup>30</sup> The sincerity of these public pronouncements has

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<sup>24</sup> *Lau Kong Yung & Others v Director of Immigration* [1999] 3 HKLRD 778, (CFA), para. 93, citing *R v Director of Immigration, Ex parte Chan Heung Mui*, available at: [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_body.jsp?DIS=18930&AH=&QS=&FN=&currpage=](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=18930&AH=&QS=&FN=&currpage=) (visited 18 April 2012).

<sup>25</sup> Extradition arrangements in Hong Kong are made pursuant to Articles 151 and 96 of the Basic Law. These respectively allow the Government to “maintain and develop relations and conclude and implement agreements with foreign states” and “make appropriate arrangements with foreign states for reciprocal juridical assistance”.

<sup>26</sup> See the Fugitive Offenders Ordinance, Cap 503 (No. 179 of 1997).

<sup>27</sup> See Fugitive Offenders (Torture) Order (Cap 503I), s. 2.

<sup>28</sup> See *FB v Director of Immigration* [2009] 2 HKLRD 346, para. 112, (hereinafter referred to as *FB*) available at: [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_body.jsp?DIS=63552&AH=&QS=&FN=&currpage=](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=63552&AH=&QS=&FN=&currpage=) (visited 18 April 2012).

<sup>29</sup> This was initially confirmed in the First Report of the HKSAR of the People's Republic of China in the light of the International Covenant on Civil and Political Rights (January 1999), para. 113, available at: <http://www.cmab.gov.hk/en/issues/prc.htm> (visited 18 April 2012).

<sup>30</sup> See *FB*, paras. 111 and 115 at n 28 above.

recently however become the subject of some controversy. This follows revelations that implicate the Hong Kong Government in the extraordinary rendition of a Libyan dissident, named Mr Sami Al-Saadi (also known as Abu Munthir), to Tripoli in March of 2004. According to a recently uncovered Central Intelligence Agency (CIA) fax marked “secret”,<sup>31</sup> it is suggested that the SAR Government were agreeable to turning Mr Al-Saadi and his young family over to Libyan agents at Chek Lap Kok Airport on the basis of diplomatic assurances that they would be “treated humanely and in accordance with human rights standards”.<sup>32</sup>

In the event, Mr Al-Saadi claims to have been detained by the Hong Kong authorities at the airport for approximately thirteen days. During this period, he alleges that he was not told of the reasons for his detention; denied access to the legal safeguards afforded by formal transfer proceedings; and eventually handcuffed and bundled onto a flight chartered by the Libyan authorities.<sup>33</sup> On arrival in Tripoli, Mr Al-Saadi claims that he was separated from his family, imprisoned, and subject to years of torture and abuse at the hands of the Gaddafi regime.<sup>34</sup>

Aside from the alleged disregard for formal extradition procedures, the possibility that Hong Kong is, or has been, willing to accept diplomatic assurances from States well known to practice torture is disturbing. The CAT Committee consider such assurances as little more than attempts to circumvent the *non-refoulement* obligation.<sup>35</sup> Moreover, the

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<sup>31</sup> The CIA fax dated 23 March 2004 forms part of a bundle of classified documents that has recently come to light following the fall of the Gaddafi regime in Libya. See the “Tripoli files”, *The Guardian*, 9 September 2011, available at: <http://www.guardian.co.uk/world/interactive/2011/sep/09/libya> (visited 18 April 2012).

<sup>32</sup> *Ibid.*

<sup>33</sup> See “HK in frame as Libya rendition victim sues U.K.”, *South China Morning Post*, 9 October 2011, available at: <http://topics.scmp.com/news/hk-news-watch/article/HK-in-frame-as--Libya-rendition-victim-sues-UK> (visited 18 April 2012).

<sup>34</sup> For full details of Mr Al-Saadi’s allegations see the pre-action letter served on the UK Government, prepared by Leigh Day & Co Solicitors, 3 October 2011, available at: [http://www.reprive.org.uk/static/downloads/2011\\_10\\_03\\_PRIV\\_Al\\_Saadi\\_Letter\\_before\\_Action.pdf](http://www.reprive.org.uk/static/downloads/2011_10_03_PRIV_Al_Saadi_Letter_before_Action.pdf) (visited 18 April 2012).

<sup>35</sup> See the Committee’s decision in *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 20 May 2005, para. 13.4, where it was held that: “The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk [of torture]”.



UN Special Rapporteur on Torture has concluded that such assurances are unreliable and ineffective in terms of protecting persons at risk.<sup>36</sup> The personal liability of the then permanent Secretary for Security, Mr Stanley Ying Yiu-hong, who was named as the Hong Kong contact person in the CIA fax, has also come under the spotlight.<sup>37</sup> At the time of writing, the Al-Saadi case is the subject of a UK criminal enquiry,<sup>38</sup> whilst legal action in Hong Kong has not been ruled out.

### ***The Judgments in Prabakar and FB***

If substantiated, the above allegations would certainly mark a new low in terms of Hong Kong's commitment to its *non-refoulement* obligations under Article 3 of the CAT. Though, by coincidence, later that year the CFA delivered a landmark judgment that would force the Government to radically reform the procedures it employs when handling torture claims. In *Secretary for Security v. Sakthevel Prabakar*,<sup>39</sup> the court ruled that the Government was required to conduct an independent assessment of all CAT claims and in so doing, it was to apply the highest standards of procedural fairness. This was deemed necessary, given the "momentous importance" of such determinations to the persons concerned and the fact that their "life and limb" and "fundamental human right not to be subjected to torture" are at stake.<sup>40</sup>

This ruling led to the creation of a dedicated CAT screening mechanism to replace the flawed procedures that had considered torture claims solely on the basis of

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<sup>36</sup> See the interim report submitted by Manfred Nowak, then UN Special Rapporteur on Torture to the General Assembly, (UN Doc A/60/316, 30 August 2005), para. 51.

<sup>37</sup> See n 31 above.

<sup>38</sup> The Metropolitan Police have launched an investigation into the alleged involvement of British intelligence in the alleged rendition. See the Joint statement by the UK's Director of Public Prosecutions and the Metropolitan Police Service, 12 January 2012, available at: [http://www.cps.gov.uk/news/press\\_statements/joint\\_statement\\_by\\_the\\_director\\_of\\_public\\_prosecutions\\_and\\_the\\_metropolitan\\_police\\_service/](http://www.cps.gov.uk/news/press_statements/joint_statement_by_the_director_of_public_prosecutions_and_the_metropolitan_police_service/) (visited 18 April 2012).

<sup>39</sup> At n 17 above. The finer points of this seminal judgement have been discussed elsewhere. See for example: Oliver Jones, "Customary *Non-refoulement* of Refugees and Automatic Incorporation into Common Law: A Hong Kong Perspective" (2009) 58, *International and Comparative Law Quarterly* 443, 468; and Kelley Loper, "Human Rights, *Non-refoulement* and the Protection of Refugees in Hong Kong" (2010) 22(3) *International Journal of Refugee Law*, 404, 439.

<sup>40</sup> *Ibid.*, *Prabakar*, para. 44.

unexplained UNHCR refugee status determinations.<sup>41</sup> However, the newly established system that purported to adhere to high standards of fairness was soon found wanting. Research carried out subsequent to *Prabakar* indicated that the Government's screening process remained riddled with procedural improprieties.<sup>42</sup> In particular, CAT claimants reported that their screening interviews were unduly long and frequently commenced without an interpreter present. One claimant was reportedly interviewed in respect of his claim on 123 occasions,<sup>43</sup> whilst other claimants recounted being verbally abused by immigration officers, told to return to their countries-of-origin, and in one case had their belongings thrown all over the floor.<sup>44</sup>

Predictably, these screening procedures soon became the subject of judicial review. In *FB v Director of Immigration*, the CFI held that the mechanism in place at that time failed in several key aspects to meet requisite high standards of fairness.<sup>45</sup> Notably, the court held that: claimants should not be denied access to legal representation during any part of the screening process; publicly funded legal representation should be made available to claimants who are without the means to pay for legal assistance; the procedural anomaly of separating the roles of examining officer and decision-maker should be reformed; all decision-makers should be adequately trained; and provision should be made for an oral hearing on petition (appeal).<sup>46</sup>

From 24 December 2009, the screening of torture claims resumed under what the Government termed an “enhanced” administrative mechanism.<sup>47</sup> This new process purported to remedy the deficiencies identified by the court in *FB* and serve as the forerunner to a new legislative regime.<sup>48</sup> From a purely immigration control perspective,

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<sup>41</sup> *Id.*, paras. 46-50, for the CFA's explanation of the dangers of this approach.

<sup>42</sup> See Francesco Vecchio, “Detention of asylum seekers in Hong Kong: an overview based on past detainee experiences” (2007), unpublished, available on file with the author.

<sup>43</sup> See n 10 above, p. 20. The repeated interview of claimants in relation to their claims is potentially problematic as it forces them to relive past traumatic events to the possible detriment of their mental health.

<sup>44</sup> See n 42 above, p. 6.

<sup>45</sup> See *FB* at n 28 above.

<sup>46</sup> *Ibid.*, para. 230.

<sup>47</sup> See n 3 above.

<sup>48</sup> These new procedures operate under detailed policy guidelines which provide the template to the new Bill. See the Security Bureau's “Guidelines for Handling Claims Made under Article 3 of the

the new mechanism has been a resounding success, a factor that has in all likelihood prompted the Government to base their new legislative framework on this regime. Thus far, of the 1800 CAT claims processed, 870 decisions have been served, of which not a single claimant has been granted protection.<sup>49</sup> The Duty Lawyer Service, which now provides free legal representation to the vast majority of CAT claimants, confirms that they have not represented a single successful claimant.<sup>50</sup> The only known person to have been “screened-in” since the CAT was extended to Hong Kong nearly two decades ago is a Sri Lankan national who was granted protection on 14 May 2008, as one of the applicants in *FB*.<sup>51</sup>

Notwithstanding the fact that the legal requirements of the CAT can be difficult to meet,<sup>52</sup> such an exceptionally low recognition rate raises legitimate concerns and questions about the quality of the current decision-making mechanism. As Eric Neumayer notes, low recognition rates are often manufactured by governments as a tool of deterrence.<sup>53</sup> This is because they send out a signal to potential claimants that their claims will be rejected and they will be returned to their countries of origin forthwith. Moreover, low acceptance rates promote a public perception that all claims for protection are “bogus”, and made by economic migrants who are simply interested in improving

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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, and “ Brief Notes for Adjudicators (Torture Petitions) on Handling Petitions Lodged by Unsuccessful Torture Claimants under Article 48(13) of the Basic Law”, available on file with the author.

<sup>49</sup> Figures as of 16 October 2011. See the Security Bureau’s PowerPoint Presentation on the Immigration (Amendment) Bill 2011, LC Paper No. CB(2)146/11-12(01), available at: <http://www.legco.gov.hk/yr10-11/chinese/bc/bc59/papers/bc591024cb2-146-1-ec.pdf> (visited 18 April 2012).

<sup>50</sup> See Letter from the Duty Lawyer Service, dated 5 December 2011, LC Paper No. CB(2) 503/11-12(01), available at: <http://legco.gov.hk/yr10-11/english/bc/bc59/papers/bc591121cb2-503-1-e.pdf> (visited 18 April 2012).

<sup>51</sup> For further details see *FB* at n 28 above, paras. 38-46. See also *MA v Director of Immigration*, unrep., HCAL 10/2010, 06 Jan 2011, CFI, para. 6, available at: [http://legalref.judiciary.gov.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=74703&QS=%2B&TP=JU](http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=74703&QS=%2B&TP=JU) (visited 18 April 2012).

<sup>52</sup> In order to qualify for protection under Article 3 of the CAT, the claimant must show substantial grounds for believing that they would be personally at risk of being subject to torture. This requires the claimant to show a level of harm above the persecution threshold of the Refugee Convention. Moreover, the harm must be perpetrated by agents of the state. The latter issue can often be problematic when the claimant has fled a failed state or civil war situation.

<sup>53</sup> See Eric Neumayer, “Asylum Recognition Rates in Western Europe: Their Determinants, Variation, and Lack of Convergence,” (2005) 49(1) *Journal of Conflict Resolution* 48.

their standard of living. This is a fact not lost on the Hong Kong Government who has been quick to resort to thinly veiled attacks on the bona fides of torture claimants.<sup>54</sup>

## **Critique of the Bill**

This part of the article examines some of the more controversial aspects of the Bill currently before the Legislative Council. Although, the proposed legislation raises a variety of ethical and legal concerns that warrant further discussion,<sup>55</sup> the following appraisal will concentrate on two specific clauses. Firstly, clause 37ZD, which sets out rules regarding credibility assessments; and secondly clause 37ZC, which restricts claimants' capacity to obtain expert medical evidence to corroborate their claims. These provisions are singled-out for analysis as they are likely to impede CAT claimants of an opportunity to have their claims recognised under the new legal framework. Furthermore, they reflect a screening process designed to ensure that grants of protection under Article 3 of the CAT will be a rare occurrence.

However, before delving deeper into these two issues, the general criticism surrounding the Bill's failure to cater for the screening of refugee claims should briefly be commented upon.<sup>56</sup> This issue will not be dwelt upon here, other than to briefly call attention to the shortsightedness of this omission. As Kelley Loper has commented "the continuing existence of separate refugee and torture screening procedures implemented by different decision-making bodies wastes resources and generally impedes the interests of justice and procedural fairness".<sup>57</sup> The Law Society and Bar Association have also been strong on this point, noting that the present duality of processes gives asylum-

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<sup>54</sup> See n 8 above.

<sup>55</sup> For example, Clause 37Z allows CAT claimants to be removed to specified third countries without having their claims heard, thus raising the possibility of indirect *refoulement*.

<sup>56</sup> As the Hong Kong Government maintains a policy of not entertaining refugee claims, the UNHCR carries out refugee status determination from its sub-office in the city. In terms of the procedural framework applied, the UNHCR system shares many of the similarities and challenges of the Government's CAT screening mechanism. However, UNHCR procedures are not challengeable in the local courts and recognition as a refugee confers no legal rights of residence. The passing of new protection legislation provides the ideal opportunity to reform this bifurcated system.

<sup>57</sup> See n 5 above, 259.

seekers “2 bites at the cherry”, allowing or forcing them to prolong their stay in Hong Kong.<sup>58</sup>

Given the Bill’s strong emphasis on preventing procedural abuse, the Government’s willingness to leave this loophole open is rather paradoxical. Particularly as the Administration noted in their recent Legislative Council Brief that one of the central aims of the new Bill is to prevent claimants from employing “delaying tactics”.<sup>59</sup> An explanation for this lacuna is that grants of refugee status necessitate the conferment of substantive rights,<sup>60</sup> whereas under Article 3 of the CAT, the Government’s obligations stretch no further than not returning individuals to a situation where they are exposed to a risk of torture. At the time of writing, the issue of whether the Government is obliged to take over refugee status determination from the UNHCR is pending before the CFA in the case of *C v Director of Immigration*.<sup>61</sup> Given that in granting leave to appeal the court below deemed this issue a matter of great general or public importance, it is advisable for the Government to delay pushing through the enactment of the Bill until the outcome of this case is known.

### *The Credibility Clause*

Perhaps the most troubling aspect of the new Bill is clause 37ZD, which introduces ostensibly mandatory provisions that would require all decision-makers to consider certain types of behaviour as damaging to torture claimants’ credibility. These include: various types of dishonesty;<sup>62</sup> failure to take advantage of a reasonable opportunity to

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<sup>58</sup> See the Joint Submission from the Law Society of Hong Kong and the Hong Kong Bar Association on the Immigration Amendment Bill 2011, 18 November 2011, LC Paper No. CB(2)335/11-12(03), para. 9, available at: <http://www.legco.gov.hk/yr10-11/english/bc/bc59/papers/bc591121cb2-335-3-e.pdf> (visited 18 April 2012).

<sup>59</sup> See n 12 above, para. 4.

<sup>60</sup> This may include (depending on level of attachment and relative standard of treatment) a grant of permission to remain, the right to work, the issuing of travel documents and provision for family reunion. For detailed analysis of these rights see the relevant chapters of James Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005).

<sup>61</sup> See n 7 above.

<sup>62</sup> This includes: “any behaviour that the immigration officer or the Appeal Board *considers* is designed to, or is likely to be designed to— (i) conceal information; (ii) mislead; or (iii) obstruct or delay the handling or determination of the claimant’s torture claim” [emphasis added]. The clause goes on to

claim protection in a safe third country where the CAT applies; failure to make a claim as soon as reasonably practical; and failure to make a claim before being arrested or detained.<sup>63</sup>

Although not specifically acknowledged by the Administration, this clause has been transposed directly from a highly controversial piece of UK legislation,<sup>64</sup> described in the leading practitioner's text as "extraordinarily draconian".<sup>65</sup> From a government policy rationale, the clause has two main attractions. Firstly, it allows the decision-making authorities to assert a greater degree of control over claimants' behaviour, by compelling them to conform to the procedural requirements of the screening process. Secondly, the provision ensures that credibility becomes the central facet of the decision-making exercise. In so doing, it focuses decision-makers' attention towards certain types of behaviour, which though not related to the risk of torture on return, may be taken as indicative of the claimant's general dishonesty.

The flaws inherent in such an approach become apparent when one considers that much of the behaviour listed in clause 37ZD is precisely of the type that persons at genuine risk of torture are likely to have to resort to given the hurdles they must typically

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provide a non-exhaustive list of behaviour that fits within the meaning of the above parameters. This includes: "(a) *the production of a false document as proof of the claimant's identity*; (b) a failure, without reasonable excuse, to produce a document as proof of the claimant's identity on request by an immigration officer; (c) the destruction, alteration or disposal, without reasonable excuse, of a passport, ticket or other document containing information about the route of the claimant's travel to Hong Kong; (d) *a failure, without reasonable excuse, to provide the information or documentary evidence required by an immigration officer ...*; (e) a failure, without reasonable excuse, to... (i) attend an interview scheduled by an immigration officer ...; or (ii) provide information or answer any question put by an immigration officer at the interview; (f) a failure, without reasonable excuse, to make a full disclosure of the material facts in support of the torture claim, including any document supporting those facts, before the date fixed for the first interview scheduled by an immigration officer...; (g) a failure, without reasonable excuse, to— (i) attend a medical examination ...; or (ii) disclose to an immigration officer and (on an appeal) the Appeal Board the medical report of the examination; (h) a failure, without reasonable excuse, to comply with any requirement, procedure or condition (including any time limit)..."[emphasis added]. See n 1 above, cl 37ZD (2).

<sup>63</sup> *Ibid.*, cl 37ZD (1)(b)-(e).

<sup>64</sup> See the Asylum & Immigration (Treatment of Claimants Act) 2004, s 8. For judicial criticism of this provision see *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2008/878.html> (visited 18 April 2012).

<sup>65</sup> See Ian MacDonald and Ronan Toal, *MacDonald's Immigration Law & Practice, Seventh Edition* (London: LexisNexis, 2008), p 948.

overcome.<sup>66</sup> For instance, claimants who are in fear of the authorities in their country-of-origin are unlikely to be able to flee the country on their own passport. Equally, torture claimants who arrive in Hong Kong traumatized by their past experiences may be in no state of mind to disclose their troubles to the first immigration officer they encounter.

Whilst the Bill's credibility clause allows a claimant's credibility to remain undamaged where they can offer a "reasonable excuse" for failures to provide or produce information,<sup>67</sup> the manner in which this safeguard is likely to operate in practice remains open to question. Commentators on the operation of the analogous UK provision have noted that the "reasonable excuse" safeguard creates an unnecessary hurdle by requiring the claimant to justify certain acts or omissions before the substance of their claim is considered. This has the potential to distract the decision-maker from the underlying questions raised by the claim.<sup>68</sup> Judging by the Administration's response to a question from the Legal Service Division of the Legislative Council on what may constitute a "reasonable excuse",<sup>69</sup> it appears unlikely that Government decision-makers will adopt an expansive approach to the factors that may allow claimants to keep their credibility intact.<sup>70</sup>

However, perhaps the most worrying aspect of clause 37ZD is that it directly interferes with the well-established principle that credibility should be assessed as a

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<sup>66</sup> Over the past few decades governments in countries of asylum have sought to engineer various methods of limiting access to their asylum procedures. These include: stringent visa regimes for nationals of countries that generate large numbers of claims; the imposition of carrier liability sanctions to deter airlines from carrying insufficiently documented passengers; and even extra-territorial immigration controls that physically prevent potential asylum-seekers from boarding flights or entering national waters. For a graphic illustration of how such policies have been implemented by successive Australian governments see Savitri Taylor, "Offshore Barriers to Asylum Seeker Movement: The Exercise of Power without Responsibility?" in Jane McAdam (ed), *Forced migration, human rights and security* (Oxford and Portland, Oregon: Hart Publishing, 2008), pp. 93-129.

<sup>67</sup> See n 62 above, cl 37ZD (2)(b).

<sup>68</sup> See James Sweeney, "Credibility, Proof and Refugee Law," (2009) 21(4) *International Journal of Refugee Law* 717.

<sup>69</sup> See Security Bureau, Immigration (Amendment) Bill 2011, Reply to Questions Raised by the Legal Service Division of the Legislative Council, 15 November 2011, LC Paper No. CB(2)327/11-12(03), p. 5, available at: <http://legco.gov.hk/yr10-11/english/bc/bc59/papers/bc591118cb2-327-3-e.pdf> (visited 18 April 2012).

<sup>70</sup> *Ibid.* The Administration have stated that a "reasonable excuse" may include "where the claimant was not in possession of the document or evidence at the earlier material time, or where the claimant was unaware of the existence of relevant information before the date fixed for the first interview, etc".

whole and that no legal presumptions should be applied to the decision-making process.<sup>71</sup> This is an issue that has already concerned the CFI in *FB*, which recognised the dangers that may befall claimants where decision-makers take negative presumptions and immaterial considerations as their starting point. In *FB*, Saunders J noted that:

“It is further a matter of concern that at a very early stage in each assessment of a Convention claim the examining officer records the fact that the claimant is an overstayer or an illegal immigrant, both prejudicial factors, which are in reality quite irrelevant both to the assessment of the claim and the assessment of the credibility of the claimant”.<sup>72</sup>

Given the potential for this approach to distort the fact-finding exercise, the Government should seriously consider removing this clause from the Bill. At the very least they should further elaborate on the “reasonable excuse” safeguard so that it reflects international practice. For example, this could be achieved by emphasising that claimants should be given the benefit of the doubt,<sup>73</sup> in view of the fact that the overarching aim of the decision-making process is to ensure that claimants’ security is not jeopardised.<sup>74</sup> Such guidance would therefore make certain that decision-makers are not distracted from the primary task of determining whether claimants are actually at risk of being subject to torture upon return.

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<sup>71</sup> See for example *Sivakumar, R (on the application of) v Secretary of State for the Home Department* [2003] UKHL 14, para. 42, available at: <http://www.bailii.org/uk/cases/UKHL/2003/14.html> (visited 18 April 2012).

<sup>72</sup> See n 28 above, para. 201.

<sup>73</sup> See UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR Handbook), January 1992, para. 196. The benefit of the doubt principle was cited by the CFA in *Prabakar* in holding that high standards of fairness require that the difficulties of proof faced by CAT claimants be appreciated by decision-makers given that they may have fled from their country with few belongings and documents. See *Prabakar* at n 17 above, para. 21.

<sup>74</sup> This has been the standard response of the CAT Committee when confronted by States who are concerned that their screening procedures are the subject of abuse. See Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford and New York: Oxford University Press, 2008), p 182.



### ***Medical Evidence***

In addition to the difficulties created for claimants by the credibility clause discussed above, the new Bill also introduces a procedural hurdle, which, if enacted, is likely to prevent a great many claimants from obtaining expert medical evidence. In cases where a person claims to have been subject to torture or ill-treatment, they may wish to consult a medical expert to obtain a report that documents their physical and/or psychological injury. Medical reports submitted to decision-makers in support of torture claims can prove invaluable since they may lend weight to otherwise unsupported statements. Whilst such reports cannot prove definitively that a claimant's injuries are indicative of past torture, they can be a crucial determining factor in the outcome of claims. This is particularly so where a medical report corroborates a generally credible account from the claimant.

Bearing in mind the critical evidentiary value of such reports, clause 37ZC seeks to restrict a claimant's freedom to obtain a publicly-funded medical report by making the decision-making authorities responsible for determining whether or not a report should be commissioned. In so doing, the clause will grant immigration officers, or (on appeal) the Appeal Board a wide discretion as to whether or not to refer a CAT claimant to a medical expert for examination.<sup>75</sup> The clause also makes it the responsibility of immigration officers to arrange and escort claimants to an examination with a medic of the Government's choosing. Moreover, claimants are compelled to attend such examinations and must disclose any report produced if their credibility is to remain intact.<sup>76</sup>

These arrangements are objectionable for a number of reasons. Firstly, they fail to give proper guidance as to when, and in what circumstances, a medical report should be sought. The clause simply states that the claimant's condition must be "in dispute".<sup>77</sup> Whilst on the surface, this appears to be a very low threshold, the Law Society and Bar Association point out that: "It is possible to imagine some cases where the physical

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<sup>75</sup> See n 1 above, cl 37ZC (1).

<sup>76</sup> *Ibid.*, cl 37ZC (2)-(3).

<sup>77</sup> *Id.*, cl 37ZC (1).

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”.<sup>78</sup> Moreover, in situations where a claimant’s physical or psychological condition is not contested, an expert report may nonetheless be of probative value, if only to detail how their condition may impede their ability to give evidence or answer questions.

By way of guidance in terms of determining whether a medical report should be obtained, the ruling of the European Court of Human Rights in *RC v Sweden* may be of some assistance.<sup>79</sup> In this case, the Strasbourg court held that decision-making authorities should commission a report where a *prima facie* case has been made out that scars or injuries have been caused by way of torture or ill treatment. Also of assistance is the CAT Committee’s decision in *Bouabdallah Ltaief v Tunisia*, where it was said that a refusal to order a medical examination on the grounds that the claimant showed no obvious traces of harm was no answer, given that torture, as defined under the CAT may leave “non-obvious but real traces of violence”.<sup>80</sup> These international authorities have regrettably not been taken into account in the drafting of the present clause.

Additionally, the power that will be vested in immigration officers to arrange and escort CAT claimants to medical examinations raises all sorts of ethical concerns. Firstly, claimants who have experienced torture or other ill-treatment at the hands of the authorities in their countries-of-origin may understandably feel apprehensive about accompanying an immigration officer to an unknown government doctor.<sup>81</sup> Secondly, these arrangements have the potential to place medical experts in a compromising position, as they may feel unspoken pressure to carry out their examination in a spirit of skepticism. Furthermore, this aspect of the clause is dangerously at odds with the doctor-

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<sup>78</sup> See n 58 above, para. 19.2.

<sup>79</sup> See *RC v. Sweden* [2010] ECHR 307, para. 53, available at: <http://www.bailii.org/eu/cases/ECHR/2010/307.html> (visited 18 April 2012).

<sup>80</sup> *Bouabdallah Ltaief v. Tunisia* (CAT 189/2001), UN Doc CAT/C/31/D/189/2001, para. 10.5, accessible at <http://www1.umn.edu/humanrts/cat/decisions/tunisia189-2001.html> (visited 18 April 2012).

<sup>81</sup> See UNHCR Handbook at n 73 above, para. 198.

patient relationship, which, from a normative perspective, should be based on trust and confidence.<sup>82</sup>

To alleviate these concerns, there is a strong case for deleting this clause altogether. By so doing, the commission of medical reports should be left as a matter to be arranged between the claimant and their legal representative. This is the approach favoured in other jurisdictions, such as the UK, where the cost of any expert medical report is met by funding disbursements payable through the local legal aid scheme.<sup>83</sup> There is no reason why such an arrangement could not be put in place in Hong Kong under the current Duty Lawyer Scheme.

## **Concluding Remarks**

From the foregoing analysis of the Immigration (Amendment) Bill 2011, there are legitimate concerns that the proposed legislation may create as many problems as it solves. From a transparency and rule of law standpoint, the Government's decision to finally incorporate Article 3 of the CAT into domestic law and introduce a statutory mechanism is undoubtedly a welcome development. However, the assumption that legislation will provide a fairer system that offers greater levels of protection to persons at risk of torture appear unfounded if the Bill is eventually enacted in its present form. The two clauses that have been the focus of this article give particular cause for concern as they are likely to lead to poor quality decisions which risk claimants being returned to torture. They also confirm that the Government is intent on continuing to pursue a restrictive fulfilment of its Article 3 obligations.

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<sup>82</sup> This type of working relationship is indicative of a trend that has seen medical professionals co-operate in ever-closer quarters with the immigration authorities. For example medics in Hong Kong currently assist the Immigration Department at control points to identify pregnant mainland women. See Government press release, "New measures on obstetric services and immigration control announced", 16 January 2007, available at: <http://www.info.gov.hk/gia/general/200701/16/P200701160184.htm> (visited 18 April 2012).

<sup>83</sup> For further details of this arrangement in the UK see the Legal Services Commission, Payment of Expert Witnesses Funding Guidance, April 2010, available at: [http://www.legalservices.gov.uk/docs/cls\\_main/ExpertsCostswhopaysforwhat\\_v2.pdf](http://www.legalservices.gov.uk/docs/cls_main/ExpertsCostswhopaysforwhat_v2.pdf) (visited 18 April 2012).