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# Immigration (Amendment) Bill 2011

## Contents

Clause		Page
<b>Part 1</b>		
<b>Preliminary</b>		
1.	Short title and commencement .....	C3981
2.	Enactments amended .....	C3983
<b>Part 2</b>		
<b>Amendments to Immigration Ordinance (Cap. 115)</b>		
3.	Section 17G amended (Interpretation) .....	C3985
4.	Section 17I amended (Offence to be employer of a person who is not lawfully employable) .....	C3985
5.	Section 17J amended (Employers to inspect documents of new employee) .....	C3987
6.	Section 36 amended (Recognizance as alternative to detention) .....	C3987
7.	Part VIIC added .....	C3989
<b>Part VIIC</b>		
<b>Torture Claims</b>		
<b>Division 1</b>		
<b>Preliminary</b>		
37U.	Interpretation of Part VIIC .....	C3991

Clause		Page
37V.	When torture claim is finally determined .....	C3995
<b>Division 2</b>		
<b>Procedure Relating to Torture Claims</b>		
37W.	Restrictions on persons claiming non-refoulement protection in Hong Kong .....	C3997
37X.	How torture claim is made .....	C3999
37Y.	Submission of torture claim form .....	C4001
37Z.	Effect of making a torture claim .....	C4003
37ZA.	Duties of claimant .....	C4005
37ZB.	Power to require information etc. ....	C4005
37ZC.	Medical examination .....	C4007
37ZD.	Credibility of claimant .....	C4009
37ZE.	Withdrawal of torture claim by claimant .....	C4015
37ZF.	Deemed withdrawal of torture claim on claimant's departure .....	C4017
37ZG.	Deemed withdrawal of torture claim on failure to return completed torture claim form .....	C4019
37ZH.	Order in which claims are processed .....	C4021
37ZI.	Decision on torture claim .....	C4021
37ZJ.	Immigration officer to notify decision on torture claim .....	C4023
37ZK.	Detention pending final determination .....	C4025

Clause		Page
37ZL.	Revocation of decision to accept torture claim etc. ....	C4025
37ZM.	Limitation on subsequent claim .....	C4027
37ZN.	Processing of subsequent claim .....	C4029
<b>Division 3</b>		
<b>Torture Claims Appeal Board</b>		
37ZO.	Appeal Board established .....	C4031
37ZP.	Appeal .....	C4033
37ZQ.	Notice of appeal .....	C4033
37ZR.	Late filing of notice of appeal .....	C4033
37ZS.	Practice and procedure of Appeal Board .....	C4035
<b>Division 4</b>		
<b>Miscellaneous</b>		
37ZT.	Notices .....	C4037
37ZU.	Regulations .....	C4039
37ZV.	Claimant of substantiated claim may apply for permission to take employment etc. ....	C4039
37ZW.	Claimant not ordinarily resident in Hong Kong ...	C4041
8.	Section 38AA amended (Prohibition of taking employment and establishing business, etc.) .....	C4043
9.	Section 42 amended (False statements, forgery of documents and use and possession of forged documents) .....	C4043

---

Clause	Page
10. Section 43A added .....	C4043
43A. Disturbing proceedings of Torture Claims Appeal Board .....	C4043
11. Section 53 amended (Review of decisions of public officers) .....	C4043
12. Schedule 1A added .....	C4045
Schedule 1A Torture Claims Appeal Board .....	C4067
13. Schedule 4 added .....	C4067
Schedule 4 Transitional and Savings Provisions in respect of Immigration (Amendment) Ordinance 2011 (Torture Claims) .....	C4067

**Part 3**

**Amendment to Immigration Regulations (Cap. 115 sub. leg. A)**

14. Schedule 1 amended .....	C4095
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**Part 4**

**Consequential Amendments to Fugitive Offenders Ordinance (Cap. 503)**

15. Section 2 amended (Interpretation) .....	C4101
16. Section 6 amended (Request for surrender and authority to proceed) .....	C4101
17. Section 13 amended (Order for surrender) .....	C4101
18. Section 14 amended (Discharge in case of delay) .....	C4103

# A BILL

## To

Amend the Immigration Ordinance to provide for a process for determining claims made by persons in Hong Kong for non-refoulement protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; to provide for an appeal mechanism in relation to such claims and to establish the Torture Claims Appeal Board for this purpose; to enable any such claimant whose claim is successful to apply for permission to take employment or establish or join in a business in exceptional circumstances; to provide for conditions that may be attached to a recognizance; and to make related and consequential amendments.

Enacted by the Legislative Council.

### **Part 1**

#### **Preliminary**

**1. Short title and commencement**

- (1) This Ordinance may be cited as the Immigration (Amendment) Ordinance 2011.

Part 1

Clause 2

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(2) This Ordinance comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

**2. Enactments amended**

The enactments specified in Parts 2, 3 and 4 are amended as set out in those Parts.

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## Part 2

### Amendments to Immigration Ordinance (Cap. 115)

#### 3. Section 17G amended (Interpretation)

(1) Section 17G(2)(b)—

**Repeal**

“or”.

(2) After section 17G(2)(b)—

**Add**

“(ba) the person is a claimant who has a substantiated claim under Part VIIC and is the holder of a permission given by the Director under section 37ZV; or”.

#### 4. Section 17I amended (Offence to be employer of a person who is not lawfully employable)

(1) Section 17I(2)(a)—

**Repeal**

“or”.

(2) Section 17I(2)(b)—

**Repeal**

“employment.”

**Substitute**

“employment; or”.

(3) After section 17I(2)(b)—

**Add**

Part 2  
Clause 5

---

“(c) was the holder of a permission given by the Director under section 37ZV that permitted the employee to take employment at the time the contract of employment was entered into and the person charged had no knowledge that the permission had expired after that time.”.

**5. Section 17J amended (Employers to inspect documents of new employee)**

(1) Section 17J(1)(b)—

**Repeal**

“or”.

(2) After section 17J(1)(b)—

**Add**

“(ba) if such other person is a claimant who has a substantiated claim under Part VIIC, the Director’s permission given under section 37ZV; or”.

**6. Section 36 amended (Recognizance as alternative to detention)**

(1) Section 36(1)(a)—

**Repeal**

“or 34”

**Substitute**

“, 34 or 37ZK”.

(2) Section 36(1)—

**Repeal**

“and with such number of sureties as the Director or such police officer may reasonably require”

**Substitute**



## Part 2

Clause 7

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“, with such number of sureties and subject to such conditions as the immigration officer or police officer may reasonably require or impose”.

(3) After section 36(1)—

**Add**

“(1A) Without limiting subsection (1), the conditions of a recognizance imposed under that subsection may include a condition that the person must—

- (a) report in person at the time and intervals, and at the office or police station, specified by the immigration officer or police officer;
- (b) notify an immigration officer or police officer in writing of any change in the person’s residential or correspondence address as soon as practicable after the change;
- (c) (if the person is a claimant as defined by section 37U(1)) attend interviews scheduled by an immigration officer under section 37ZB(1)(b).

(1B) An immigration officer or police officer may vary any condition of a recognizance imposed under subsection (1).”.

(4) Section 36(2)—

**Repeal**

“or 34”

**Substitute**

“, 34 or 37ZK”.

**7. Part VIIC added**

Before Part VIII—

**Add**

## “Part VIIC

### Torture Claims

#### Division 1

#### Preliminary

#### 37U. Interpretation of Part VIIC

(1) In this Part—

*appeal* (上訴) means an appeal made under section 37ZP;

*Appeal Board* (上訴委員會) means the Torture Claims Appeal Board established by section 37ZO;

*claimant* (聲請人) means a person whose torture claim (not being a torture claim that has been withdrawn)—

(a) is not yet finally determined; or

(b) is a substantiated claim;

*Convention* (《公約》) means the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 as applied to Hong Kong;

*finally determined* (最終裁定)—see section 37V;

*non-refoulement protection* (免遣返保護), in relation to a claimant, means protection under Article 3 of the Convention against expulsion, return or extradition of the claimant to a torture risk State;

*removal* (遣離) means the removal of a person from Hong Kong under section 18 or under a removal order or a deportation order;

Part 2  
Clause 7

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**revocation decision** (撤銷決定) means a decision made by an immigration officer under section 37ZL(1);

**State** (國家) means a country other than China;

**subsequent claim** (後繼聲請) means a torture claim by a person who has previously made a torture claim that has been finally determined or withdrawn;

**substantiated claim** (已確立聲請) means a torture claim—

- (a) that is accepted as substantiated under section 37ZI(1)(a); or
- (b) in respect of which—
  - (i) a decision rejecting the claim under section 37ZI(1)(b) was made but reversed on appeal to the Appeal Board; or
  - (ii) a revocation decision was made but reversed on appeal to the Appeal Board;

**surrender** (移交) means the surrender of a person to a place outside Hong Kong under the Fugitive Offenders Ordinance (Cap. 503), and **surrender proceedings** (移交逃犯法律程序) means proceedings instituted for such surrender;

**torture** (酷刑) means an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—

- (a) for such purposes as—
  - (i) obtaining from that person or a third person information or a confession;
  - (ii) punishing that person for an act which that person or a third person has committed or is suspected of having committed; or
  - (iii) intimidating or coercing that person or a third person; or

Part 2  
Clause 7

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(b) for any reason based on discrimination of any kind,

when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity, excluding pain or suffering arising only from, inherent in or incidental to lawful sanctions;

***torture claim*** (酷刑聲請) means a claim for non-refoulement protection in Hong Kong on the ground of a torture risk made under section 37X or treated as having been made by virtue of section 37ZN(2)(b), including a torture claim re-opened under section 37ZE(2) or 37ZG(3);

***torture claim form*** (酷刑聲請表格) means the torture claim form specified by the Director under section 37Y(4);

***torture risk*** (酷刑風險) means the danger of being subjected to torture;

***torture risk State*** (存在酷刑風險國家), in relation to a claimant, means a State in respect of which the claimant has made a torture claim on the ground that the claimant would be in danger of being subjected to torture in that State;

***withdrawn*** (撤回), in relation to a claim, means withdrawn in accordance with section 37ZE or treated as withdrawn under section 37ZF or 37ZG.

(2) In this Part, a reference to this Part includes Schedule 1A and any subsidiary legislation made under section 37ZU.

**37V. When torture claim is finally determined**

(1) Subject to subsections (2), (3) and (4), a torture claim is finally determined once a decision on the claim is made by an immigration officer under section 37ZI.

Part 2  
Clause 7

---

- (2) For a torture claim rejected by a decision under section 37ZI(1)(b), the claim is finally determined—
  - (a) when the period within which an appeal may be lodged against the decision has expired (if an appeal against the decision has not been lodged within that period); or
  - (b) when the appeal has been disposed of (if an appeal has been lodged against the decision).
- (3) If a revocation decision is made in respect of a substantiated claim, the claim must, on and from the making of that decision, be treated as not yet finally determined.
- (4) For a torture claim covered by subsection (3), the claim is finally determined—
  - (a) when the period within which an appeal may be lodged against the revocation decision has expired (if an appeal against the revocation decision has not been lodged within that period); or
  - (b) when the appeal has been disposed of (if an appeal has been lodged against the revocation decision).

## **Division 2**

### **Procedure Relating to Torture Claims**

- 37W. Restrictions on persons claiming non-refoulement protection in Hong Kong**
- (1) A person may claim non-refoulement protection in Hong Kong only if—
    - (a) the person is subject or liable to removal; and

Part 2  
Clause 7

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- (b) apart from a torture risk State, the person does not have a right of abode or right to land in, or right to return to, any other State in which the person would be entitled to non-refoulement protection.
- (2) A person whose surrender is requested in surrender proceedings may claim non-refoulement protection in Hong Kong even if the person does not meet the descriptions in paragraphs (a) and (b) of subsection (1).

**37X. How torture claim is made**

- (1) A person who claims non-refoulement protection in Hong Kong on the ground of a torture risk must signify to an immigration officer in writing the person's intention to seek non-refoulement protection.
- (2) The written signification must give a general indication of the person's reasons for claiming non-refoulement protection in Hong Kong, being reasons that relate to an act falling within the meaning of *torture* as defined by section 37U(1).
- (3) On signifying an intention under subsection (1), the person must allow an immigration officer or an immigration assistant to take the person's fingerprints and photograph.
- (4) A torture claim is made when subsections (1), (2) and (3) have been complied with by the person making the claim.
- (5) A torture claim may be made only in respect of a person's removal or surrender to a place outside China.

**37Y. Submission of torture claim form**

- (1) A claimant must, on written request by an immigration officer—
  - (a) complete a torture claim form, and the completed form must—
    - (i) state the grounds of the claim and the facts supporting the claim; and
    - (ii) include such other information as is required by the form; and
  - (b) return the torture claim form so completed to an immigration officer at an address specified in the form, together with all documents supporting the claim that are readily available to the claimant when the form is returned.
- (2) The claimant must return the completed torture claim form in accordance with subsection (1)(b)—
  - (a) within the period of 28 days after a written request under subsection (1) is given to the claimant; or
  - (b) within any further period that an immigration officer allows under subsection (3).
- (3) An immigration officer may—
  - (a) on an application made by a claimant in writing before the expiry of a period for returning a completed torture claim form in respect of the claimant's torture claim; and
  - (b) on being satisfied that, by reason of special circumstances, it would be unjust not to allow a further period for the claimant to return the completed form,

Part 2  
Clause 7

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allow a further period that the immigration officer considers appropriate for the claimant to return the completed form.

- (4) The torture claim form is to be in a form specified by the Director.

**37Z. Effect of making a torture claim**

- (1) A claimant may not be removed from Hong Kong to a torture risk State.
- (2) Despite subsection (1), the making of a torture claim does not—
- (a) affect the validity of any removal order or deportation order that has been made against the claimant; or
  - (b) preclude the making of a removal order or a deportation order against the claimant.
- (3) To avoid doubt, it is declared that—
- (a) a claimant may be removed, in accordance with section 24 or 25, to a specified country that is not a torture risk State;
  - (b) a person whose torture claim—
    - (i) is withdrawn; or
    - (ii) is not a substantiated claim on final determination,may be removed, in accordance with section 24 or 25, to a specified country whether or not the specified country was alleged to be a torture risk State.



**37ZA. Duties of claimant**

- (1) It is the duty of a claimant to substantiate a torture claim, and to this end, the claimant must—
  - (a) provide to the Director and (on an appeal) to the Appeal Board all information relevant to the claim and make prompt and full disclosure of all material facts in support of the claim, including any document supporting those facts;
  - (b) comply with every requirement, procedure and condition (including any time limit)—
    - (i) prescribed by this Part; or
    - (ii) required or specified by any person under this Part.
- (2) A claimant must provide to the Director and (on an appeal) to the Appeal Board—
  - (a) the claimant's residential address in Hong Kong; and
  - (b) the claimant's correspondence address in Hong Kong (if different from the residential address),and must notify the Director and (on an appeal) the Appeal Board in writing of any change in either of those addresses as soon as practicable after the change.

**37ZB. Power to require information etc.**

- (1) After a completed torture claim form is returned by a claimant, an immigration officer may—
  - (a) require the claimant to provide the immigration officer with any information or documentary evidence related to the claimant's torture claim that the immigration officer specifies; or

Part 2  
Clause 7

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- (b) require the claimant to attend an interview to provide information and answer questions relating to the claimant's torture claim.
- (2) Information or documentary evidence required to be provided to an immigration officer under subsection (1)(a) must be provided within the time specified by the immigration officer.

**37ZC. Medical examination**

- (1) If the physical or mental condition of the claimant is in dispute and is relevant to the consideration of a torture claim—
  - (a) an immigration officer or (on an appeal) the Appeal Board may require the claimant to undergo a medical examination to be conducted by a medical practitioner as arranged by an immigration officer; or
  - (b) an immigration officer may, at the request of the claimant, arrange for a medical examination of the claimant to be conducted by a medical practitioner.
- (2) If a medical examination is arranged under subsection (1), the claimant must attend the examination at the time and place that the immigration officer notifies to the claimant.
- (3) A claimant must disclose to an immigration officer and (on an appeal) the Appeal Board the medical report of any examination arranged for the claimant under this section.

**37ZD. Credibility of claimant**

- (1) In considering a torture claim, an immigration officer or the Appeal Board may take into account, as damaging the claimant's credibility, the following behaviour of the claimant—
  - (a) 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;
  - (b) a failure to take advantage of a reasonable opportunity to claim non-refoulement protection in respect of a torture risk State while in a place outside Hong Kong to which the Convention applies (other than a torture risk State);
  - (c) if the claimant is a person who is subject or liable to removal, a failure to make the claim when, or as soon as practicable after—
    - (i) the claimant has become subject or liable to removal; or
    - (ii) the events on which the claim is based have taken place,  
whichever is later;
  - (d) if the claimant is a person whose surrender is requested in surrender proceedings, a failure to make the claim when, or as soon as practicable after—

Part 2  
Clause 7

---

- (i) it comes to the claimant's notice that the surrender proceedings have been commenced; or
  - (ii) the events on which the claim is based have taken place,whichever is later; and
- (e) a failure to make the claim before being arrested or detained under a provision of this Ordinance, unless—
  - (i) the claimant had no reasonable opportunity to make the claim before the arrest or detention; or
  - (ii) the claim relies wholly on matters arising after the arrest or detention.
- (2) Without limiting subsection (1)(a), behaviour described in any of the following paragraphs is behaviour within the meaning of that subsection—
  - (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 under section 37ZB(1)(a);
  - (e) a failure, without reasonable excuse, to—

Part 2  
Clause 7

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- (i) attend an interview scheduled by an immigration officer under section 37ZB(1)(b); 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 under section 37ZB(1)(b);
  - (g) a failure, without reasonable excuse, to—
    - (i) attend a medical examination arranged under section 37ZC; 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)—
    - (i) prescribed by this Part; or
    - (ii) required or specified by any person under this Part.
- (3) This section does not prevent an immigration officer or the Appeal Board from taking into account any other behaviour of the claimant as damaging the claimant's credibility.

**37ZE. Withdrawal of torture claim by claimant**

- (1) A claimant may, before a torture claim is decided under section 37ZI, withdraw the claim by notifying an immigration officer in writing.
- (2) Subject to section 37ZF(3), a torture claim that has been withdrawn under subsection (1) may be re-opened if the person who made the claim provides sufficient evidence in writing to satisfy an immigration officer that—
  - (a) since the withdrawal, there has been a change of circumstances that—
    - (i) could not reasonably have been foreseen by the person when the person gave the notification under subsection (1); and
    - (ii) when taken together with the material previously submitted for the claim, could increase the prospect of success of the claim; or
  - (b) by reason of special circumstances, it would be unjust not to re-open the claim.
- (3) If an immigration officer decides to re-open a person's torture claim under subsection (2), the immigration officer must, by written notice, inform the person of the decision.
- (4) If an immigration officer decides not to re-open the person's torture claim, the immigration officer must, by written notice, inform the person of—
  - (a) the decision; and
  - (b) the reasons for the decision.

Part 2  
Clause 7

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- (5) If a torture claim is re-opened under subsection (2), subject to subsections (6) and (7), processing of the claim is to continue in accordance with this Part as if the claim had not been withdrawn.
- (6) If the period for returning a completed torture claim form in respect of a torture claim under section 37Y(2) has not expired at the time the claim is withdrawn under subsection (1), section 37Y(2) applies to the claim as if for paragraph (a) of that section there were substituted—
  - “(a) within the period of 28 days after the notice under section 37ZE(3) is given to the claimant; or”.
- (7) If a completed torture claim form in respect of the torture claim is not returned in accordance with section 37Y(2) as read with subsection (6), the claim is to be treated as withdrawn under section 37ZG(1)—
  - (a) on the expiry of the 28-day period; or
  - (b) if a further period is allowed under section 37Y(3), on the expiry of the further period.

**37ZF. Deemed withdrawal of torture claim on claimant’s departure**

- (1) A torture claim (whether a claim pending final determination or a substantiated claim) made by a claimant who is subject or liable to removal must be treated as withdrawn if the claimant (for whatever reason) leaves Hong Kong.
- (2) A torture claim that is treated as withdrawn under subsection (1) must not be re-opened.
- (3) If a person leaves Hong Kong after the person has given notice to withdraw a torture claim under section 37ZE(1), the claim must be treated as having been withdrawn under subsection (1) and must not be re-opened.

Part 2  
Clause 7

---

**37ZG. Deemed withdrawal of torture claim on failure to return completed torture claim form**

- (1) A torture claim must be treated as withdrawn if the person who made the claim fails to return a completed torture claim form as required under section 37Y(2).
- (2) An immigration officer must give the person who made the claim a written notice stating that—
  - (a) the torture claim is treated as withdrawn under subsection (1); and
  - (b) the person may apply to re-open the claim under subsection (3).
- (3) A torture claim treated as withdrawn under subsection (1) may be re-opened if the person who made the claim provides sufficient evidence in writing to satisfy an immigration officer that due to circumstances beyond the person's control, the person had not been able to return a completed torture claim form as required under section 37Y(2).
- (4) If an immigration officer decides to re-open a person's torture claim under subsection (3), the immigration officer must, by written notice, inform the person—
  - (a) of the decision; and
  - (b) that the person is required to return a completed torture claim form in respect of the claim to an immigration officer at an address specified in the form within 14 days after the notice is given.
- (5) If an immigration officer decides not to re-open the person's torture claim, the immigration officer must, by written notice, inform the person of—



Part 2  
Clause 7

---

- (a) the decision; and
  - (b) the reasons for the decision.
- (6) If a torture claim is re-opened under subsection (3), subject to subsections (7) and (8), processing of the claim is to continue in accordance with this Part as if the claim had not been withdrawn.
- (7) Section 37Y(2) applies to the torture claim as if for paragraph (a) of that section there were substituted—
- “(a) within the period of 14 days after the notice under section 37ZG(4) is given to the claimant; or”.
- (8) If a completed torture claim form in respect of the torture claim is not returned in accordance with section 37Y(2) as read with subsection (7), the claim is to be treated as withdrawn under subsection (1)—
- (a) on the expiry of the 14-day period; or
  - (b) if a further period is allowed under section 37Y(3), on the expiry of the further period.

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

The Director may decide the order in which torture claims are to be processed, and no determination on a torture claim is to be called into question on the basis that it ought to have been processed earlier or later than any other torture claim or category of torture claims.

**37ZI. Decision on torture claim**

- (1) Unless a torture claim is withdrawn, an immigration officer is to decide whether to—
- (a) accept the claim as substantiated; or
  - (b) reject the claim.

Part 2  
Clause 7

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- (2) A decision may be made under subsection (1) even if the claimant fails to attend an interview scheduled by an immigration officer under section 37ZB(1)(b) or otherwise fails to proceed with the claim in accordance with this Part.
- (3) A torture claim must be accepted as substantiated if there are substantial grounds for believing that the claimant would be in danger of being subjected to torture if the claimant were removed or surrendered to a torture risk State.
- (4) A torture claim must be rejected in the absence of the substantial grounds for belief referred to in subsection (3).
- (5) Without limiting subsection (4), if a claimant would be in danger of being subjected to torture in a particular region in the torture risk State but would not be in danger of being subjected to torture in another region in that State, then, in so far as removal of the claimant to that other region is concerned, it must be taken that the claimant would not be in danger of being subjected to torture in that State and the torture claim must be rejected accordingly.

**37ZJ. Immigration officer to notify decision on torture claim**

- (1) After an immigration officer has decided to accept, or reject, a torture claim under section 37ZI(1)(a) or (b), the immigration officer must, by written notice, inform the claimant of the decision.
- (2) An immigration officer must, in a notice given under subsection (1) in respect of a decision rejecting a torture claim, also inform the claimant of—
  - (a) the reasons for the decision; and

- (b) the claimant's right under section 37ZP to appeal against the decision.

**37ZK. Detention pending final determination**

Without limiting any other power conferred by this Ordinance, a claimant may be detained under the authority of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration pending final determination of the claimant's torture claim.

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

- (1) An immigration officer may, on a ground specified in subsection (2), revoke—
  - (a) a decision made by an immigration officer under section 37ZI(1)(a) accepting a torture claim as substantiated; or
  - (b) a decision made by the Appeal Board under section 21(1) of Schedule 1A reversing a decision made by an immigration officer under section 37ZI(1)(b) rejecting a torture claim.
- (2) Any of the following paragraphs is a ground mentioned in subsection (1)—
  - (a) any information or documentary evidence submitted in support of the claim is false or misleading and the false or misleading information or evidence is material to the substantiation of the claim;
  - (b) information was not disclosed to an immigration officer or (on an appeal) the Appeal Board and the undisclosed information would undermine, to a material extent, the merits of the claim;

Part 2  
Clause 7

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- (c) the torture risk giving rise to the claim has ceased to exist due to changes in circumstances of the claimant or the torture risk State.
- (3) An immigration officer must give the claimant written notice of a proposed revocation, and the notice must—
  - (a) state the reasons for the proposed revocation; and
  - (b) state that the claimant may, within 14 days after the notice is given, inform the immigration officer by written notice of the claimant's objection to the proposed revocation and the reasons for the objection (*objection notice*).
- (4) If—
  - (a) the claimant has not given an objection notice in accordance with subsection (3)(b) and an immigration officer decides to make a revocation decision under subsection (1)(a) or (b); or
  - (b) after having considered the claimant's objection notice, an immigration officer decides to make a revocation decision under subsection (1)(a) or (b),the immigration officer must give the claimant written notice of the revocation decision, reasons for the revocation decision and the claimant's right under section 37ZP to appeal against the revocation decision.
- (5) A revocation decision takes effect once an immigration officer has given the claimant a written notice under subsection (4).

**37ZM. Limitation on subsequent claim**

- (1) Except as provided in subsection (2), a person who has previously made a torture claim must not subsequently make another torture claim.

Part 2  
Clause 7

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- (2) A person may make a subsequent claim if the person provides sufficient evidence in writing to satisfy an immigration officer that—
  - (a) there has been a significant change of circumstances since the previous claim was finally determined or withdrawn; and
  - (b) the change, when taken together with the material previously submitted in support of the previous claim, would give the subsequent claim a realistic prospect of success.
- (3) In deciding whether or not a person may make a subsequent claim under subsection (2), an immigration officer may take into account any finding of credibility or fact made by an immigration officer or the Appeal Board in relation to a torture claim previously made by the person.
- (4) If an immigration officer decides that a person may make a subsequent claim under subsection (2), the immigration officer must give the person written notice of the decision.
- (5) If an immigration officer decides that a person may not make a subsequent claim under subsection (2), the immigration officer must give the person written notice of the decision, and the notice must also include the reasons for the decision.

**37ZN. Processing of subsequent claim**

- (1) Subject to subsection (2)—
  - (a) a subsequent claim must be made in accordance with section 37X but despite section 37X(4), a subsequent claim is not made unless section 37ZM(2) is complied with; and

Part 2  
Clause 7

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- (b) all of the other provisions of this Part apply to a subsequent claim as they apply to any other torture claim.
- (2) If a subsequent claim is made by a person whose removal is pending following a decision under section 37ZI(1)(b) rejecting the person's previous torture claim (including such a decision confirmed by the Appeal Board on an appeal against the decision), or following a revocation decision in respect of the person's previous torture claim—
- (a) section 37X(1), (2), (3) and (4) does not apply in relation to the subsequent claim;
  - (b) the subsequent claim is taken to be made on the day when a notice under section 37ZM(4) is given notifying the person the subsequent claim may be made; and
  - (c) for the purposes of this Part, section 37Y is taken to have been complied with in respect of the subsequent claim.
- (3) In determining a subsequent claim, an immigration officer and (on an appeal) the Appeal Board may take into account any finding of credibility or fact made by an immigration officer or the Appeal Board in relation to a torture claim previously made by the person making the subsequent claim.

### **Division 3**

#### **Torture Claims Appeal Board**

##### **37ZO. Appeal Board established**

- (1) A board to be known as the "Torture Claims Appeal Board" is established.

- (2) The function of the Appeal Board is to hear and determine an appeal made under section 37ZP.

**37ZP. Appeal**

A person aggrieved by a decision of an immigration officer may appeal to the Appeal Board if the decision is made in respect of the person under—

- (a) section 37ZI(1)(b) (decision rejecting a torture claim); or
- (b) section 37ZL(1) (revocation decision).

**37ZQ. Notice of appeal**

- (1) A person who wishes to appeal against a decision referred to in section 37ZP must file with the Appeal Board a notice of appeal within 14 days after notice of the decision is given to the person unless late filing of the notice is allowed by the Board under section 37ZR(3).
- (2) A notice of appeal must be—
  - (a) in a form specified by the Chairperson of the Appeal Board; and
  - (b) accompanied by a copy of the notice of the decision being appealed against.

**37ZR. Late filing of notice of appeal**

- (1) If a notice of appeal is filed after the expiry of the 14-day period referred to in section 37ZQ(1), it must include an application for late filing of the notice, which—
  - (a) must include a statement of the reasons for failing to file the notice within that period; and

Part 2  
Clause 7

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- (b) must be accompanied by any documentary evidence relied on in support of the reasons referred to in paragraph (a).
- (2) The Appeal Board must decide, as a preliminary decision without a hearing, whether the Board allows the late filing of the notice of appeal under subsection (3), and in doing so, the Board may only take account of—
  - (a) the statement of reasons stated in the application for late filing of the notice of appeal and any accompanying documentary evidence relied on in support of those reasons; and
  - (b) any other relevant matters of fact within the knowledge of the Board.
- (3) If the Appeal Board is satisfied that by reason of special circumstances, it would be unjust not to allow the late filing of the notice of appeal, the Board may allow the late filing of the notice and must, by written notice, inform the person filing the notice of the Board's decision.
- (4) If the Appeal Board does not allow the late filing of the notice of appeal, the Board must, by written notice, inform the person filing the notice that the Board refuses the notice as it is filed out of time.

**37ZS. Practice and procedure of Appeal Board**

Schedule 1A has effect with respect to the Appeal Board and its members and to the proceedings of, and procedural and other matters concerning, the Appeal Board.



## Division 4

### Miscellaneous

#### 37ZT. Notices

- (1) A notice or other document (howsoever described) required to be served or given (howsoever described) by the Director, an immigration officer or the Appeal Board on or to another person under this Part may be served on or given to that other person—
  - (a) personally;
  - (b) by leaving it for the person, or by sending it by post addressed to the person—
    - (i) if the person is a claimant, at the last known residential or correspondence address provided by the claimant to the Director or the Appeal Board under section 37ZA(2); or
    - (ii) if the person is not a claimant, at the person's usual or last known place of abode or business; or
  - (c) if the person is acting by a legal representative, by leaving it for the legal representative, or by sending it by post addressed to the legal representative, at the place of business or correspondence address of the legal representative.
- (2) A notice or other document served or given in the manner described in subsection (1), other than by sending it by post, is conclusively presumed to have been served or given and received at the following time—
  - (a) if it is served on or given to the person personally, when it is so served or given; or

Part 2  
Clause 7

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- (b) if it is left at a place of abode or business or an address, on the second working day after it was so sent.
- (3) A notice or other document served or given by sending it by post in the manner described in subsection (1) is presumed, in the absence of evidence to the contrary, to have been served or given and received on the second working day after it was so sent.

**37ZU. Regulations**

The Secretary for Security may by regulation provide for—

- (a) any matter in relation to—
  - (i) the making or processing of a torture claim;
  - (ii) the making of a decision on a torture claim (whether or not a subsequent claim);
  - (iii) the withdrawal or re-opening of a torture claim; or
  - (iv) a revocation decision;
- (b) the procedure for the extension of any period allowed under this Ordinance;
- (c) the practice and procedure of the Appeal Board; and
- (d) generally for the better carrying out of the purposes of this Part.

**37ZV. Claimant of substantiated claim may apply for permission to take employment etc.**

- (1) The Director may, on an application of a claimant who has a substantiated claim, permit the claimant to take employment or establish or join in a business.

Part 2  
Clause 7

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- (2) A permission must not be given under subsection (1) unless the Director is satisfied that exceptional circumstances exist that justify such a permission being given to the claimant.
- (3) A permission given under this section—
  - (a) may be given subject to a time limit and any other condition the Director thinks fit to impose; and
  - (b) must be given in writing.
- (4) A permission given under this section expires immediately on—
  - (a) the expiry of the time limit (if any); or
  - (b) the breach of any other condition, subject to which the permission is given.
- (5) The Director may, before a permission expires under subsection (4), vary any time limit or any other condition imposed under subsection (3).
- (6) To avoid doubt, a permission given under this section is not and must not be taken as—
  - (a) a limit of stay or other condition of stay imposed or varied under section 11; or
  - (b) the Director's authority under section 13 for the claimant to remain in Hong Kong.

**37ZW. Claimant not ordinarily resident in Hong Kong**

Without limiting section 2(4), a person must not be treated as ordinarily resident in Hong Kong for the purposes of this Ordinance during any period in which the person remains in Hong Kong only by virtue of the person's torture claim (whether or not the person is a claimant who has a substantiated claim and whether or not permission has been given to the person under section 37ZV).”

Part 2  
Clause 8

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**8. Section 38AA amended (Prohibition of taking employment and establishing business, etc.)**

After section 38AA(1)—

**Add**

“(1A) Subsection (1) does not apply to a person if the person has the Director’s permission under section 37ZV to take employment or establish or join in a business.”.

**9. Section 42 amended (False statements, forgery of documents and use and possession of forged documents)**

Section 42(1)(a) and (2)(b) and (c)(ii)—

**Repeal**

“or IV” (wherever appearing)

**Substitute**

“, IV or VIIC”.

**10. Section 43A added**

After section 43—

**Add**

**“43A. Disturbing proceedings of Torture Claims Appeal Board**

A person who disturbs or otherwise interferes with the proceedings of the Torture Claims Appeal Board established by section 37ZO commits an offence and is liable to a fine at level 3 and to imprisonment for 6 months.”.

**11. Section 53 amended (Review of decisions of public officers)**

(1) Section 53(8)(g)—

**Repeal the full stop**

Part 2

Clause 12

**Substitute**

“; or”.

(2) After section 53(8)(g)—

**Add**

“(h) to a decision made by an immigration officer—

- (i) under section 37ZE(4) or 37ZG(5) not to re-open a torture claim that has been withdrawn;
- (ii) under section 37ZI(1)(b) to reject a torture claim;
- (iii) under section 37ZL(1) to revoke a decision accepting a torture claim as substantiated;
- (iv) under section 37ZM(5) not to allow a subsequent claim to be made by a person who has previously made a torture claim; or
- (i) to any decision made in the performance of a function of the Torture Claims Appeal Board under Part VIIC.”.

**12. Schedule 1A added**

After Schedule 1—

**Add**

**“Schedule 1A** [ss. 37U, 37ZL &  
37ZS & Sch. 4]

**Torture Claims Appeal Board****1. Interpretation**

(1) In this Schedule—

*member* (委員) means a member of the Torture Claims Appeal Board established by section 37ZO.

Part 2  
Clause 12

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- (2) An expression used in this Schedule has the same meaning as is given to it in section 37U.
- (3) In this Schedule, a reference to Part VIIC includes this Schedule and any subsidiary legislation made under section 37ZU.

## **2. Appointment of members**

- (1) The Appeal Board comprises the following members appointed by the Chief Executive—
  - (a) a Chairperson;
  - (b) at least one Deputy Chairperson; and
  - (c) a panel of persons whom the Chief Executive considers suitable for selection under section 6 of this Schedule for hearing and determining an appeal.
- (2) The Chief Executive may appoint a person as a member if—
  - (a) the person was formerly a judge or magistrate;
  - (b) the person is qualified to practise as a barrister, solicitor or advocate in a court in Hong Kong or a common law jurisdiction having unlimited jurisdiction either in civil or criminal matters, and has so practised for a period of or periods totalling not less than 5 years; or
  - (c) the person, in the opinion of the Chief Executive, is suitably qualified to be a member.
- (3) Each appointment is for a term of not more than 3 years and a member may be re-appointed at the end of a term.
- (4) An appointment of a member is to be published in the Gazette.

Part 2  
Clause 12

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- (5) If a person ceases to be a member at a time when the person is involved in the hearing or determination of an appeal under section 37ZP, the person may continue to be involved in the appeal as if the person were a member until the appeal is disposed of.
- (6) A member may be paid remuneration and allowances at any rates determined by the Chief Executive.

### **3. Resignation and revocation of appointment**

- (1) A member may resign by notice in writing to the Chief Executive.
- (2) The Chief Executive may by notice in writing revoke the appointment of a member on the ground of—
  - (a) neglect of duty, misconduct or bankruptcy;
  - (b) physical or mental incapacity that precludes the member from carrying out the member's functions; or
  - (c) any other sufficient cause.

### **4. Role of Chairperson**

In addition to the Chairperson's other functions, the Chairperson is responsible for making any arrangements that are practicable to ensure that members discharge their functions in an orderly and expeditious manner.

### **5. Deputy Chairperson to act in place of Chairperson**

- (1) If the Chairperson is unable to act as Chairperson for any period by reason of illness, absence from Hong Kong or any other cause, a Deputy Chairperson is to act in the place of the Chairperson for that period.

- (2) If 2 or more persons are appointed as Deputy Chairpersons, the Chairperson may designate any one of them to act on behalf of the Chairperson during the period mentioned in subsection (1).

#### **6. Composition of Appeal Board for purposes of appeal**

- (1) For hearing and determining an appeal, the Appeal Board is to consist of 1 member (who may or may not be the Chairperson) selected by the Chairperson for this purpose, except as provided in subsection (2).
- (2) Having regard to the circumstances of a particular appeal, the Chairperson may select 3 members to hear and determine the appeal.
- (3) The members selected under subsection (2) must include either the Chairperson or a Deputy Chairperson, and for the purposes of the appeal, the presiding member is to be—
  - (a) the Chairperson; or
  - (b) the Deputy Chairperson or (if more than 1 Deputy Chairperson is selected) such Deputy Chairperson as the Chairperson may decide.
- (4) A member who has a direct or indirect interest in an appeal must not take part in the hearing and determination of the appeal.

#### **7. Order in which appeals are to be heard**

- (1) The Chairperson may decide the order in which appeals and matters are to be heard or determined generally or in any particular circumstances.



## Part 2

Clause 12

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- (2) No decision on an appeal or matter is to be called into question on the basis that the appeal or matter ought to have been heard or determined earlier or later than any other appeal or matter, or category of appeals or matters.

**8. Notice of Appeal be served on Director**

- (1) Subject to subsection (2), the Appeal Board must, as soon as practicable after receiving a notice of appeal, serve a copy of the notice on the Director.
- (2) If a notice of appeal is filed out of time, the Appeal Board is required to serve a copy of the notice on the Director only if it decides to allow late filing of the notice under section 37ZR(3), and in that event, the Board must serve the notice on the Director as soon as practicable after the decision is made.

**9. Director to provide facts**

The Director must, as soon as practicable after receiving a copy of a notice of appeal served under section 8 of this Schedule, provide to the Appeal Board—

- (a) if the decision being appealed against is a decision under section 37ZI(1)(b) rejecting a torture claim—
- (i) a copy of the completed torture claim form relating to the torture claim in respect of which the decision was made; and
  - (ii) a copy of the written record of any interview of the claimant conducted by an immigration officer in considering the torture claim; or
- (b) if the decision being appealed against is a revocation decision—

Part 2  
Clause 12

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- (i) a copy of the completed torture claim form relating to the torture claim in respect of which the decision was made;
- (ii) a copy of the written record of any interview of the claimant conducted by an immigration officer in considering the torture claim;
- (iii) a copy of the notice of the decision under section 37ZI(1)(a) accepting the torture claim as substantiated;
- (iv) a copy of the notice of proposed revocation of the torture claim given under section 37ZL(3); and
- (v) a copy of the claimant's objection notice (if any) referred to in section 37ZL(4)(b).

**10. Hearing to be in private**

A hearing is to be held in private unless the Appeal Board directs that it be held in public.

**11. Language of proceedings**

- (1) The proceedings before the Appeal Board may be conducted in the English or Chinese language, or both, as the Board considers appropriate.
- (2) Despite subsection (1)—
  - (a) a party to proceedings before the Appeal Board may address the Board in any language;
  - (b) a witness in proceedings before the Appeal Board may testify in any language; and
  - (c) a legal representative in proceedings before the Appeal Board may use the English or Chinese language, or both.

**12. Determination of appeal without a hearing**

The Appeal Board may determine an appeal without a hearing if, having regard to the material before it and the nature of the issues raised, the Board is satisfied that the appeal can be justly determined without a hearing.

**13. Notice of hearing**

If the Appeal Board decides to hold a hearing, the Board must, not less than 28 days before the date of hearing, serve on the parties notice of the date, time and place of the hearing.

**14. Documents to be served on Appeal Board before hearing**

- (1) The Director must, as soon as practicable after receiving a notice served under section 13 of this Schedule, serve on the Appeal Board, with a copy to the other party, a bundle of all the documents that will be relied on by the Director at the hearing, including submissions to be made.
- (2) The Appeal Board may require a party to file and serve on the Board, with a copy to the other party—
  - (a) statements of evidence that will be called at the hearing; and
  - (b) a list of witnesses whom the party wishes to call to give evidence.

**15. Hearing in a party's absence**

- (1) If a party to an appeal fails to attend a hearing, either in person or by a legal representative, the Appeal Board, on proof that the party has been served a notice of the hearing under section 13 of this Schedule, may proceed to hear the appeal in the

## Part 2

Clause 12

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- absence of the party and, subject to subsections (2) and (3), determine the appeal.
- (2) Before proceeding to determine an appeal after hearing the appeal in the absence of a party, the Appeal Board must—
- (a) give the party written notice of the Board's intention to do so; and
  - (b) state that the party may submit to the Board, within 7 days after the notice is given, a written explanation of the party's failure to attend the hearing together with any documentary evidence supporting the explanation.
- (3) If the Appeal Board—
- (a) has not received the party's written explanation together with supporting documentary evidence (if any) within the period specified in subsection (2)(b); or
  - (b) is not satisfied with the party's written explanation or supporting documentary evidence,
- the Board may determine the appeal by making a decision under section 21(1) of this Schedule despite the party's absence at the hearing.
- (4) If the Appeal Board is satisfied, on the basis of the party's written explanation and supporting documentary evidence (if any) submitted under subsection (2)(b), that the failure to attend was due to reasonable cause, the Board may fix a date, time and place for hearing the appeal.

**16. Chairperson may give directions**

The Chairperson may give directions, generally or in a particular case, on the practice and procedure of the Appeal Board in hearing and determining an appeal, so long as the direction is consistent with Part VIIC.

**17. Appeal Board may determine own procedure**

Subject to Part VIIC and any direction of the Chairperson, the Appeal Board may determine its own procedure in hearing an appeal.

**18. Evidence considered by Appeal Board**

- (1) In an appeal, the Appeal Board has the power to review the merits of the case, and accordingly it may consider—
  - (a) the same evidence that was before an immigration officer; and
  - (b) if subsection (2) applies, evidence that was not before an immigration officer.
- (2) The Appeal Board may consider evidence that was not before an immigration officer if—
  - (a) the evidence relates to matters that have occurred after the decision being appealed against was made; or
  - (b) the evidence was not reasonably available before the decision being appealed against was made.
- (3) For the purposes of subsections (1) and (2), the Appeal Board may—
  - (a) administer oaths and affirmations;

- (b) receive and consider any material by way of oral evidence (on oath or otherwise) or written statements or documents (by affidavit or otherwise).

### **19. Notice of new evidence**

- (1) A party to an appeal who wishes to present any evidence under section 18(2) of this Schedule at a hearing must—
  - (a) file with the Appeal Board a written notice to that effect; and
  - (b) serve a copy of the notice on the other party.
- (2) The notice must—
  - (a) indicate the nature of the evidence; and
  - (b) explain why the evidence was not before an immigration officer before the decision being appealed against was made.

### **20. Witnesses etc.**

- (1) The Appeal Board may, on an application by a party to an appeal, or on its own motion, direct a person—
  - (a) to attend as a witness at the hearing of the appeal at the time and place the Board specifies; and
  - (b) at the hearing to answer any questions, to give evidence on oath or otherwise or to produce any document in that person's possession, custody or power that may relate to any issue in the appeal.
- (2) Despite subsection (1), a person must not be compelled to give any evidence or produce any document that the person could not be compelled to give or produce in proceedings in a court of law.

## Part 2

Clause 12

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- (3) Subsection (2) does not entitle a person to refuse to give any evidence or to produce any document on the ground only that the evidence or document would not be admissible in a court of law and that accordingly the person could not be compelled to give or produce it.

**21. Appeal Board's decision**

- (1) On an appeal against a decision referred to in section 37ZP, the Appeal Board may confirm or reverse the decision.
- (2) The Appeal Board must give its decision with reasons in writing.
- (3) The Appeal Board's decision is final.

**22. Record of proceedings**

The Appeal Board must keep a record or summary of proceedings and of its decisions in such form as the Chairperson may determine.

**23. Correction of errors**

The Appeal Board may correct a decision made by it to the extent necessary to rectify an error of translation or transcription or a clerical error.

**24. Privileges and immunities of members and witnesses**

- (1) In the performance of their functions under Part VIIC, the Chairperson, Deputy Chairperson and other members of the Appeal Board have the same privileges and immunities as a judge of the Court of First Instance in civil proceedings in that court.
- (2) A person appearing at a hearing before the Appeal Board as a witness, a party to the appeal or a legal

Part 2

Clause 13

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representative of a party to the appeal is entitled to the same privileges and immunities to which the person would be entitled in civil proceedings in the Court of First Instance.”.

### 13. Schedule 4 added

After Schedule 3—

**Add**

## “Schedule 4

### **Transitional and Savings Provisions in respect of Immigration (Amendment) Ordinance 2011 (Torture Claims)**

#### 1. Interpretation

(1) In this Schedule—

*adjudicator* (審裁員) means an adjudicator appointed under the administrative scheme for determining petitions;

*administrative scheme* (行政機制) means the administrative measures for determining non-refoulement claims implemented by the Director between 24 December 2009 and the commencement date;

*commencement date* (生效日期) means the date of commencement of the Immigration (Amendment) Ordinance 2011 ( of 2011);

*established claim* (已確認聲請) means a non-refoulement claim in respect of which—

- (a) (for a claim determined under the administrative scheme) an immigration officer or an adjudicator;  
or



## Part 2

Clause 13

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(b) (for a claim determined before 24 December 2009) the Director,

has determined that there are substantial grounds for believing that the person making the claim would be in danger of being subjected to torture if the person were removed to the State to which the claim relates;

***non-refoulement claim*** (免遣返聲請) means a claim for protection under Article 3 of the Convention—

(a) made under the administrative scheme;

(b) made before 24 December 2009 and in respect of which the Director has informed, in writing, the person making the claim that screening of claims for such protection has been resumed on 24 December 2009; or

(c) determined as an established claim by the Director before 24 December 2009;

***petition*** (呈請) means a petition made to the Chief Executive against a determination made by an immigration officer that a non-refoulement claim is a rejected claim;

***questionnaire*** (問卷) means a form entitled “Questionnaire for Persons who have made claims under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” issued by the Immigration Department, which is required to be completed and returned to the Immigration Department by a person making a non-refoulement claim;

**rejected claim** (遭駁回聲請) means a non-refoulement claim in respect of which an immigration officer has determined that there are no substantial grounds for believing that the person making the claim would be in danger of being subjected to torture if the person were removed to the State to which the claim relates;

**Table** (列表) means the Table of Transitional Provisions included in this Schedule;

**transitional provision** (過渡性條文) means any provision appearing under Part A, or under Part B, in column 3 of the Table.

- (2) In this Schedule, a reference to Part VIIC includes Schedule 1A and any subsidiary legislation made under section 37ZU.
- (3) An expression used in this Schedule has the same meaning as in Part VIIC.

## **2. Non-refoulement claims and application of Part VIIC**

- (1) On and after the commencement date, a non-refoulement claim is taken to be a torture claim and, subject to subsections (2), (3) and (4), the claim may continue and Part VIIC applies in relation to the claim for all purposes.
- (2) For the purposes of subsection (1), on the commencement date, the transitional provision set out in Part A and (if any) Part B opposite to a non-refoulement claim described in column 2 of the Table takes effect in relation to the claim, and subject to subsection (3), the claim (which, as at the commencement date, has become a torture claim described in Part A of the transitional provision) may continue accordingly in accordance with Part VIIC on and after the commencement date.

## Part 2

Clause 13

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- (3) If a non-refoulement claim was pending determination or was an established claim when the person making the claim left Hong Kong before the commencement date, then, on and after the commencement date, the claim—
- (a) is taken to be a torture claim that has been withdrawn under section 37ZF; and
  - (b) may not continue.
- (4) If a determination rejecting a non-refoulement claim is upheld on a petition before the commencement date, then, on and after the commencement date, the rejected claim—
- (a) is taken to be a torture claim rejected by a decision under section 37ZI(1)(b) that has been confirmed by the Appeal Board; and
  - (b) may not continue.
- (5) Without limiting subsection (1), a provision of Part VIIC that—
- (a) restricts re-opening of a torture claim withdrawn under section 37ZE or 37ZG; or
  - (b) provides for a revocation decision,
- applies in relation to a non-refoulement claim that may continue as a torture claim under subsection (2), and is to continue to apply in relation to the claim even after the claim has been finally determined or withdrawn in accordance with Part VIIC.

**3. Non-refoulement claim taken as previous torture claim**

If a person seeks to make a torture claim under Part VIIC on or after the commencement date, then, for the purpose of determining whether the person may make the torture claim under that Part, a non-refoulement claim made by

the person is taken to be a torture claim previously made by the person (regardless of whether the non-refoulement claim may continue under section 2(2) of this Schedule).

**4. Persons making non-refoulement claims**

Without limiting section 2(1) of this Schedule, in applying the definition of *claimant* in section 37U(1) to a person who has made a non-refoulement claim, the definition is to be read with this Schedule and construed accordingly.

**5. Petition being heard or determined by adjudicator**

- (1) If a petition is being heard or determined by an adjudicator immediately before the commencement date, then, on and after the commencement date, the petition may continue to be heard and determined by the person who was the adjudicator as if—
  - (a) the petition were an appeal—
    - (i) made against a decision under section 37ZI(1)(b) rejecting a torture claim; and
    - (ii) pending determination by the Appeal Board; and
  - (b) the person—
    - (i) if appointed under section 2 of Schedule 1A as a member of the Appeal Board, were selected under section 6(1) of that Schedule to hear and determine the appeal; or
    - (ii) were a person referred to in section 2(5) of Schedule 1A until the petition (taken as an appeal) is disposed of.
- (2) Without limiting section 2(1) of this Schedule but subject to subsection (1), Part VIIC and the practice and procedure of the Appeal Board that apply to an

Part 2

Clause 13

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appeal lodged under that Part apply in relation to the petition (taken as an appeal) on and after the commencement date.

**6. Things done under the administrative scheme**

On and after the commencement date, anything that has been done under the administrative scheme in the hearing and determination of a non-refoulement claim (including anything that has been done in relation to a petition), in so far as such a thing may be done under Part VIIC in respect of a torture claim (including anything that may be done in respect of an appeal), is taken to have been done under that Part.

**7. Taking of fingerprints etc.**

In relation to a non-refoulement claim taken to be a torture claim and continuing under this Schedule, an immigration officer or an immigration assistant may—

- (a) take the fingerprints and photograph of the person making the claim; and
- (b) require the person to attend for that purpose at the place and time the immigration officer or immigration assistant specifies.

Part 2

Clause 13

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**Table of Transitional Provisions**

Item	Stage at which non-refoulement claim is being processed, or has ceased to be processed, immediately before commencement date	Transitional provision (referred to in section 2(2) of this Schedule) that takes effect on commencement date
1.	Non-refoulement claim in respect of which the person is yet to be requested by the Director to complete and return a questionnaire in support of the claim	Part A The non-refoulement claim is taken to be a torture claim made under section 37X
2.	Non-refoulement claim that has been withdrawn by the person making the claim by notice to the Director	Part A The non-refoulement claim is taken to be a torture claim withdrawn under section 37ZE(1) and, without limiting section 2(1) of this Schedule, section 37ZE applies accordingly

## Part 2

## Clause 13

Item	Stage at which non-refoulement claim is being processed, or has ceased to be processed, immediately before commencement date	Transitional provision (referred to in section 2(2) of this Schedule) that takes effect on commencement date
3.	Non-refoulement claim in respect of which the person making the claim has failed to complete and return a questionnaire in support of the claim within the period specified by the Director	<p><b>Part A</b></p> <p>The non-refoulement claim is taken to be a torture claim treated as withdrawn under section 37ZG(1) and, without limiting section 2(1) of this Schedule, section 37ZG applies accordingly</p> <p><b>Part B</b></p> <p>The questionnaire is taken to be a torture claim form</p>

## Part 2

## Clause 13

Item	Stage at which non-refoulement claim is being processed, or has ceased to be processed, immediately before commencement date	Transitional provision (referred to in section 2(2) of this Schedule) that takes effect on commencement date
4.	<p>Non-refoulement claim in respect of which—</p> <p>(a) the person making the claim is to complete and return to the Director a questionnaire in support of the claim; and</p> <p>(b) the period specified by the Director for returning the completed questionnaire (<i>specified period</i>) has not expired</p>	<p>Part A</p> <p>The non-refoulement claim is taken to be a torture claim in respect of which a torture claim form is yet to be returned under section 37Y(2)</p> <p>Part B</p> <p>(a) The questionnaire is taken to be a torture claim form; and</p> <p>(b) the unexpired portion of the specified period is taken to be the unexpired portion of the period within which the torture claim form is to be returned under section 37Y(2)</p>



## Part 2

## Clause 13

Item	Stage at which non-refoulement claim is being processed, or has ceased to be processed, immediately before commencement date	Transitional provision (referred to in section 2(2) of this Schedule) that takes effect on commencement date
5.	<p>Non-refoulement claim—</p> <p>(a) in respect of which a questionnaire has been completed and returned to the Director before the commencement date; and</p> <p>(b) pending determination by an immigration officer</p>	<p>Part A</p> <p>The non-refoulement claim is taken to be a torture claim—</p> <p>(a) in respect of which a completed torture claim form has been returned to an immigration officer under section 37Y(2); and</p> <p>(b) pending decision by an immigration officer under section 37ZI</p> <p>Part B</p> <p>The completed questionnaire is taken to be the completed torture claim form in respect of the claim</p>

## Part 2

## Clause 13

Item	Stage at which non-refoulement claim is being processed, or has ceased to be processed, immediately before commencement date	Transitional provision (referred to in section 2(2) of this Schedule) that takes effect on commencement date
6.	Non-refoulement claim is determined by an immigration officer as an established claim and, by virtue of the determination, the person making the claim has not been removed from Hong Kong	<p>Part A</p> <p>The established claim is taken to be a substantiated claim within the meaning of paragraph (a) of the definition of <i>substantiated claim</i> in section 37U(1) and, without limiting section 2(1) of this Schedule, section 37ZL applies accordingly</p>

## Part 2

## Clause 13

Item	Stage at which non-refoulement claim is being processed, or has ceased to be processed, immediately before commencement date	Transitional provision (referred to in section 2(2) of this Schedule) that takes effect on commencement date
7.	<p>Non-refoulement claim is determined by an immigration officer as a rejected claim and—</p> <p>(a) the period specified by the Director for a petition to be made against the determination (<i>petition period</i>) has not expired; and</p> <p>(b) such a petition has not been made</p>	<p>Part A</p> <p>The non-refoulement claim is taken to be a torture claim in respect of which a decision under section 37ZI(1)(b) rejecting the claim has been made</p> <p>Part B</p> <p>The unexpired portion of the petition period is taken to be the unexpired portion of the period under section 37ZQ for lodging a notice of appeal against the decision</p>

## Part 2

## Clause 13

Item	Stage at which non-refoulement claim is being processed, or has ceased to be processed, immediately before commencement date	Transitional provision (referred to in section 2(2) of this Schedule) that takes effect on commencement date
8.	<p>Non-refoulement claim is determined by an immigration officer as a rejected claim and—</p> <p>(a) the period specified by the Director for a petition to be made against the determination (<i>petition period</i>) has expired; and</p> <p>(b) such a petition has not been made</p>	<p>Part A</p> <p>The non-refoulement claim is taken to be a torture claim in respect of which a decision under section 37ZI(1)(b) rejecting the claim has been made</p> <p>Part B</p> <p>The petition period is taken to be the period under section 37ZQ for lodging a notice of appeal against the decision and, without limiting section 2(1) of this Schedule, section 37ZR applies accordingly</p>

## Part 2

## Clause 13

Item	Stage at which non-refoulement claim is being processed, or has ceased to be processed, immediately before commencement date	Transitional provision (referred to in section 2(2) of this Schedule) that takes effect on commencement date
9.	Non-refoulement claim that is a rejected claim in respect of which a petition is made and is pending determination by an adjudicator	<p>Part A</p> <p>Non-refoulement claim is taken to be a torture claim pending determination by the Appeal Board as if the petition were an appeal made to the Board against a decision under section 37ZI(1)(b) rejecting the claim</p>
10.	Non-refoulement claim has been determined by an adjudicator as an established claim and, by virtue of the determination, the person making the claim has not been removed from Hong Kong	<p>Part A</p> <p>The established claim is taken to be a substantiated claim within the meaning of paragraph (b) of the definition of <i>substantiated claim</i> in section 37U(1) and, without limiting section 2(1) of this Schedule, section 37ZL applies accordingly</p>

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Part 3  
Clause 14

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**Part 3**

**Amendment to Immigration Regulations  
(Cap. 115 sub. leg. A)**

**14. Schedule 1 amended**

Schedule 1—

**Repeal Form No. 8**

**Substitute**

“FORM NO. 8

IMMIGRATION ORDINANCE

(Chapter 115)

Section 36(1A)

RECOGNIZANCE

(1) .....

of .....

\*is detained under section 27, 32, 34 or 37ZK of the  
Immigration Ordinance:

\*is liable to be detained under section 27, 32, 34 or 37ZK  
of the Immigration Ordinance and is not now so  
detained:

Now—

(1) .....,

\* (2) ..... of ..... ; and

\* (3) ..... of .....,

Part 3

Clause 14

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hereby acknowledges/acknowledge that he/she/they severally will pay to the Government the following sum/sums—

- (1) ..... the sum of \$.....
- \* (2) ..... the sum of \$.....
- \* (3) ..... the sum of \$.....

if (1) ..... fails to comply with the \*following condition/\*any of the following conditions—

(a) report to—

(i)\* the duty officer .....  
 Police Station on every .....  
 between the hours of .....  
 and .....

(ii)\* the duty officer .....  
 Immigration Department on every .....  
 between the hours of .....  
 and .....

commencing .....  
until this recognizance ceases to have effect.

†[(b) etc. ]

Signed by—

- (1) .....
- \* (2) .....
- \* (3) .....

Part 3

Clause 14

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on the ..... day of .....  
20..... in the presence of .....

.....

Signature

\* Delete where inappropriate.

(i) complete in case of police recognizance.

(ii) complete in case of Immigration Department recognizance.

† Set out any other condition(s) imposed under section 36(1A) of the Immigration Ordinance.”

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## Part 4

### Consequential Amendments to Fugitive Offenders Ordinance (Cap. 503)

**15. Section 2 amended (Interpretation)**

Section 2(1)—

**Add in alphabetical order**

“*torture claim* (酷刑聲請), in relation to a person, means a torture claim as defined by section 37U(1) of the Immigration Ordinance (Cap. 115);

*torture claimant* (酷刑聲請人) means a person who falls within the meaning of *claimant* as defined by section 37U(1) of the Immigration Ordinance (Cap. 115);”.

**16. Section 6 amended (Request for surrender and authority to proceed)**

After section 6(2)—

**Add**

“(2A) For the purposes of subsection (2), the fact that the person concerned is a torture claimant at the time the request for surrender is received is not to be taken into account in deciding whether or not an authority to proceed is to be issued.”.

**17. Section 13 amended (Order for surrender)**

After section 13(2)—

**Add**

## Part 4

## Clause 18

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- “(2A) An order for surrender must not be made for the surrender of a torture claimant to a prescribed place if the claimant’s torture claim is made in respect of that prescribed place.
- (2B) If after an order for surrender has been made for the surrender of a person to a prescribed place, the person makes a torture claim in respect of the prescribed place, then, the order for surrender is suspended until the torture claim is finally determined or withdrawn under Part VIIC of the Immigration Ordinance (Cap. 115) and—
- (a) if the torture claim is accepted as substantiated on final determination under that Part, the order for surrender must be taken as rescinded at the time of the final determination; or
- (b) in any other case, the order for surrender resumes its effect as from the final determination or withdrawal.”.

**18. Section 14 amended (Discharge in case of delay)**

- (1) Section 14(2)(b)—

**Repeal**

“of a person”

**Substitute**

“of—

- (i) a person”.

- (2) Section 14(2)(b)(i)—

**Repeal the full stop****Substitute a semicolon.**

- (3) After section 14(2)(b)(i)—

Part 4

Clause 18

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**Add**

- “(ii) a person who makes a torture claim after an order for surrender has been made, the period expiring 1 month after the torture claim is finally determined or withdrawn under Part VIIC of the Immigration Ordinance (Cap. 115); or
  - (iii) a person who falls within both subparagraphs (i) and (ii), whichever of the periods referred to in those subparagraphs expires later.”.
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### Explanatory Memorandum

This Bill amends the Immigration Ordinance (Cap. 115) (*the principal Ordinance*) and miscellaneous enactments. The main object of the Bill is to provide for a statutory scheme for determining claims (*torture claims*) made by persons in Hong Kong for protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment against expulsion, return or extradition of the claimant to countries in which they would be in danger of being subjected to torture. The Bill also deals with other matters in respect of persons making torture claims (*torture claimants*) and provides for conditions that may be imposed in granting a recognizance.

2. Clause 1 sets out the short title and provides for commencement.
3. Clause 2 introduces the enactments that are amended by the Bill.
4. Clauses 3 to 13 set out the amendments to the principal Ordinance.
5. Clauses 3, 4, 5, 7 (by adding the new section 37ZV to the principal Ordinance) and 8 pave the way for a person whose torture claim has been substantiated to apply to the Director of Immigration for permission to take employment or establish or join in a business—
  - (a) clauses 3, 4 and 5 amend sections 17G, 17I and 17J of the principal Ordinance so that a person holding such a permission (*permitted person*) is a lawfully employable person within the meaning of section 17G of the principal Ordinance and an employer who employs a permitted person does not commit an offence;

Explanatory Memorandum  
Paragraph 6

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- (b) the Director of Immigration may give such permission in exceptional circumstances under the new section 37ZV, which is added to the principal Ordinance by clause 7;
  - (c) clause 8 amends section 38AA of the principal Ordinance. That section prohibits illegal immigrants and persons against whom removal orders or deportation orders have been made to take employment or establish or join in a business. The amendment excludes permitted persons from the offence.
- 6. Clause 6 amends section 36 of the principal Ordinance. Currently, under that section, a recognizance may be entered into in such amount and with such number of sureties as may be required. There is no power to impose any other conditions in relation to the recognizance. The new section 36(1A) and (1B) enables other conditions to be imposed and varied.
- 7. Clause 7 adds a new Part VIIC (the new sections 37U to 37ZW) to the principal Ordinance (*Part VIIC*).
- 8. New sections 37U and 37V (Division 1 of Part VIIC) define a number of expressions for the purposes of Part VIIC. The new sections 37W to 37ZN (Division 2 of Part VIIC) spell out how a torture claim is processed from the time when a torture claim is made to the determination of the claim. It also provides for other matters with respect to the processing of torture claims—
  - (a) the new section 37X prescribes the manner in which a torture claim is to be made;

Explanatory Memorandum  
Paragraph 8

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- (b) a person must meet the descriptions in the new section 37W(1) before the person may make a torture claim. The effect is that a person who is remaining in Hong Kong lawfully is not allowed to make a torture claim. However, the descriptions do not apply to a person whose surrender is requested in surrender proceedings under the Fugitive Offenders Ordinance (Cap. 503);
- (c) the new section 37Y requires a torture claimant to complete a torture claim form (in a form specified by the Director of Immigration) to provide information to an immigration officer in support of the claimant's claim. Non-compliance with this requirement will lead to the claim being treated as withdrawn under the new section 37ZG;
- (d) the new section 37Z prohibits the removal from Hong Kong of a claimant of a torture claim. A claimant refers to a person whose torture claim is pending determination or substantiated;
- (e) the new sections 37ZA to 37ZC provide for certain duties and powers in relation to the process of a torture claim. In particular, section 37ZA provides that the claimant is under a duty to provide to the Director of Immigration all relevant information to substantiate the claimant's torture claim;
- (f) the new section 37ZD lists out certain kinds of behaviour of a claimant that may be considered as damaging the claimant's credibility;
- (g) the new sections 37ZE, 37ZF and 37ZG respectively provide for withdrawal of a torture claim by notice and deemed withdrawal of a torture claim in the circumstances specified in the provisions. In some cases, a claim withdrawn may be re-opened;

Explanatory Memorandum  
Paragraph 9

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- (h) the new section 37ZI prescribes the criteria for accepting or rejecting a torture claim. A torture claim is substantiated if there are substantial grounds for believing that the claimant would be in danger of being subjected to torture if the claimant were removed or surrendered to the country in respect of which the torture claim is made. Pursuant to the new section 37ZJ, notice of the decision of the claim must be given to the claimant;
  - (i) the new section 37ZK spells out the power to detain a torture claimant pending final determination of the claimant's torture claim;
  - (j) a decision accepting a torture claim as substantiated may be revoked in accordance with the new section 37ZL;
  - (k) the new sections 37ZM and 37ZN relate to circumstances where a person who previously made a torture claim may be allowed to make another torture claim.
9. The new sections 37ZO to 37ZS (Division 3 of Part VIIC) concern the Appeal Board—
- (a) the new section 37ZO establishes the Torture Claims Appeal Board;
  - (b) the new section 37ZP confers on a claimant a right to appeal against a decision made by an immigration officer to reject a torture claim or to revoke a decision accepting a torture claim as substantiated. The new sections 37ZQ and 37ZR deal with notice of appeal. The new section 37ZS is to be read with the new Schedule 1A added to the principal Ordinance to provide for the practice and procedure of the Appeal Board.

Explanatory Memorandum  
Paragraph 10

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10. The new sections 37ZT, 37ZU and 37ZV (Division 4 of Part VIIC) contain miscellaneous provisions that relate to notices, regulation-making power and the new power of the Director of Immigration to permit claimants of substantiated torture claims to take employment or establish or join in a business.
11. The new section 37ZW (Division 4 of Part VIIC) declares explicitly that a person who remains in Hong Kong only by virtue of the person's torture claim must not be treated as being ordinarily resident in Hong Kong.
12. Clause 9 amends section 42 of the principal Ordinance to the effect that acts of misrepresentation by a person during the torture claim screening processing, such as the making of false statements and using and possessing of forged documents, is guilty of an offence.
13. Clause 10 provides that a person commits an offence if the person disturbs or interferes with the proceedings of the Torture Claims Appeal Board.
14. Clause 11 amends section 53(8) of the principal Ordinance so that a person may not lodge with the Chief Secretary for Administration an objection against certain decisions made under Part VIIC.
15. Clause 12 adds a new Schedule 1A to the principal Ordinance, which has effect with respect to the Torture Claims Appeal Board and its members and to the proceedings of, and procedural and other matters concerning, the Appeal Board.
16. Clause 13 adds a new Schedule 4 to the principal Ordinance to provide for the necessary transitional and savings provisions.



Explanatory Memorandum

Paragraph 17

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17. Clause 14 amends Schedule 1 to the Immigration Regulations (Cap. 115 sub. leg. A), which prescribes the form of recognizance to be used for granting a recognizance under section 36 of the principal Ordinance.
18. Clauses 15 to 18 relate to consequential amendments to the Fugitive Offenders Ordinance (Cap. 503). In particular, clause 17 adds a new subsection (2A) to section 13 of that Ordinance to the effect that an order for surrender must not be made for the surrender of a torture claimant if the torture claim is made in respect of the place to which the claimant is sought to be surrendered and is pending final determination or accepted as substantiated.