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27 June 2011

Mr Raymond Lam
Clerk to Panel on Security
Legislative Council
8 Jackson Road, Central
Hong Kong

Dear Mr Lam,

**Legislative Proposal for
Statutory Torture Claims Screening Mechanism**

At the Panel on Security meeting of 12 April 2011, Members requested that further details of our legislative proposals be provided. Salient features of the proposed statutory torture claims screening mechanism are described at Annex.

I should be grateful if you would circulate it to Members of the Security Panel for reference please.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W H CHOW'.

(W H CHOW)

for Secretary for Security

Statutory Torture Claims Screening Mechanism

The Administration plans to introduce legislation to underpin the screening mechanism for claims for non-refoulement protection made under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In devising the proposal, we aim to strike a balance between maintaining a high standard of fairness and addressing procedural abuses. Salient features of the proposed statutory mechanism and related matters are described below.

Scope and effect of claims

2. The proposed mechanism will handle torture claims for non-refoulement protection made under Article 3 of the CAT in respect of an act falling within the meaning of torture as defined in the CAT. The protection requires State parties not to expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Generally speaking, if a person subject or liable to removal (including deportation) has a right of abode or right to land in another place apart from the torture-risk State, he may not make a torture claim.

3. Under the proposed framework, once a person has made a torture claim in writing, he will not be removed or surrendered to the torture-risk State until his claim has been finally determined as unsubstantiated, or until the withdrawal of his claim. Any removal or deportation order or surrender order made against him will remain valid (i.e. he may be subsequently removed or surrendered once the torture risk is found

unsubstantiated.) Further, a claimant who is subject or liable to removal and remain in Hong Kong only by virtue of being a claimant will not be treated as ordinarily resident in Hong Kong.

Prescribed process

4. Claimants will have the duty to substantiate their claim by providing all relevant information fully and promptly and are required to submit a torture claim form within a prescribed timeframe of 28 days after the written notice is served by the Immigration Department (ImmD). The deadline may be extended if the claimant provides justifications to the satisfaction of ImmD. Failing that, their claims will be treated as withdrawn.

5. Claimants will also be required to provide certain personal particulars (e.g. photograph, fingerprints and address). Besides, ImmD may require claimants to attend interviews to provide information and answer questions relating to their claim.

6. To ensure fair and effective screening and to reduce abuse, we propose that certain behaviours of claimants, including those designed to conceal information (e.g. route of travelling to Hong Kong, right to return to another State, etc.) or to mislead or delay the handling of the claim, may be considered damaging to their credibility.

Medical examination

7. Should there be any dispute on a claimant's physical or mental condition which is relevant to the consideration of his torture claim,

medical examination of the claimant may be arranged to ascertain the condition in dispute.

Appeal Board

8. Upon being notified of ImmD's decision to reject a torture claim, the claimant may appeal within 14 days. A statutory Torture Claims Appeal Board will be appointed by the Chief Executive to determine appeals. Members of the Board should possess a legal background equivalent to a magistrate or judge. The Board may decide whether to conduct an oral hearing. The Chairperson of the Board will be empowered to determine its own detailed procedures in hearing appeals to the Board.

Reopening Withdrawn Claims and Making Subsequent Claims

9. To discourage abuse, we propose imposing certain conditions on claimants reopening withdrawn claims and making subsequent claims. If a claimant decides to withdraw his claim, he can reopen the claim only if he can prove that there is a change of circumstances which will work to increase the prospect of success of his claim. Claims deemed withdrawn on a claimant's failure to return his torture claim form within the prescribed timeframe may be reopened only if there is sufficient evidence that the delay was due to circumstances beyond the claimant's control. If a claimant who is subject or liable to removal leaves Hong Kong, his claim will also be treated as withdrawn and may not be reopened.

10. In a similar vein, a person whose torture claim was rejected may not make another torture claim, unless ImmD is satisfied that a significant

change of circumstances gives the subsequent claim a realistic prospect of success.

Revocation of decision to accept claims

11. ImmD will review substantiated claims from time to time. If it is found that the torture risk pertinent to a particular claimant has ceased to exist, ImmD may revoke its previous decision which accepted the claim as substantiated. A claimant dissatisfied with the revocation decision may appeal to the Appeal Board.

Detention and recognizance

12. Having regard to such factors as a claimant's criminal record, likelihood of abscondance, risks to the community and other personal circumstances (e.g. medical conditions), ImmD may decide whether to detain a claimant while a decision on the claim is pending. The claimant may be released on recognizance having agreed to an amount of sureties and reporting conditions. We propose that additional conditions, including requiring a person on recognizance (whether torture claimant or any other person under detention) to provide an updated address and, in the case of a torture claimant, to attend screening interviews, may be imposed.

Permission for screened-in claimants to work

13. Persons subject or liable to removal are generally prohibited from taking work under the Immigration Ordinance. Pursuant to a ruling by the Court of First Instance in January 2011, the Director of Immigration should carefully consider whether to allow a screened-in claimant to take up employment on an exceptional basis, bearing in mind that in some

circumstances, a prolonged period of enforced unemployment might amount to inhumane and degrading treatment. We would consider whether additional powers would be given to the Director to this end.

Security Bureau

June 2011