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## INFORMATION NOTE

### Overview of mechanisms for handling torture claims in selected jurisdictions

#### 1. Introduction

1.1 In Hong Kong, torture claims made under Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") are handled by the Immigration Department according to a set of administrative procedures. At the meeting of the Panel on Security ("the Panel") held on 2 November 2010, members noted that the Administration had indicated its intention to brief the Panel on its legislative proposal on statutory mechanism for handling torture claims in the later part of the 2010-2011 legislative session. To facilitate the Panel's discussion on the subject matter, members agreed that the Research Division be requested to undertake a research on the mechanisms for handling torture claims in overseas jurisdictions. While the research is in progress, this information note aims to provide an overview of the mechanisms for handling torture claims in the selected jurisdictions.

1.2 The research studies the mechanisms for handling torture claims in five selected jurisdictions, namely, the United States ("the US"), Australia, the United Kingdom ("the UK"), Switzerland and Japan. Each of these jurisdictions has certain distinctive features in the mechanisms for handling torture claims.

1.3 It should be noted that in most of the overseas jurisdictions, torture claims are lodged under the refugee/asylum programme with "risk of torture" being a ground for lodging claims, and there is no separate mechanism for handling torture claims. The 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention") forms the basis of the international refugee regime. Nevertheless, the Refugee Convention does not apply to Hong Kong. Although there are administrative procedures for assessing torture claims made under CAT in Hong Kong, the Administration has adopted a firm policy of not granting asylum.

1.4 The fundamental protection provided by the Refugee Convention is the prohibition on returning refugees to countries where they would face persecution. Article 33 of the Refugee Convention sets forth this principle of "non-refoulement" in that: "No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Nevertheless, the non-refoulement principle may not apply to refugees "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

1.5 Article 3 of CAT prohibits return of a person to a country where he is likely to be subject to torture. It provides that "No state party shall expel, return ("refouler") 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." The non-refoulement principle is affirmed in CAT, which contains an absolute prohibition against torture. That is to say, unlike the non-refoulement provision of the Refugee Convention, the CAT prohibition on refoulement is not subject to any exceptions for criminality or national security, and thus may provide greater protection. The **Table** below covers the major features of the mechanisms for handling torture claims in the five selected jurisdictions.

**Table – Mechanisms for handling torture claims in selected jurisdictions**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Background</b>					
Major relevant legislations	<ul style="list-style-type: none"> <li>• <i>Foreign Affairs Reform and Restructuring Act of 1998;</i></li> <li>• <i>Immigration and Nationality Act;</i> and</li> <li>• <i>Code of Federal Regulations.</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Migration Act 1958;</i> and</li> <li>• <i>Migration Regulations 1994.</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Nationality, Immigration and Asylum Act 2002;</i> and</li> <li>• <i>Human Rights Act 1998.</i></li> </ul>	<i>Asylum Act of 1998.</i>	<i>Immigration Control and Refugee Recognition Act.</i>
Responsible authorities	<ul style="list-style-type: none"> <li>• US Citizenship and Immigration Services ("USCIS") under the Department of Homeland Security ("DHS"); and</li> <li>• Executive Office of Immigration Review ("EOIR") under the Department of Justice ("DOJ").</li> </ul>	Department of Immigration and Citizenship ("DIAC").	UK Border Agency ("UKBA") of the Home Office.	Federal Office for Migration ("FOM").	Immigration Bureau of the Ministry of Justice ("MOJ").

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Lodging of torture claims</b>					
Whether torture claims can be lodged under CAT directly	Yes, but such application should be filed in the same manner as those seeking asylum.	No.	No, but applicants may make human right claims under the European Convention on Human Rights ("ECHR") <sup>(1)</sup> during the asylum process.	No.	No.
How to lodge claims	Applicants may initiate a claim for CAT relief by either requesting such relief before an immigration judge during the removal proceeding, or by presenting evidence or information contained on Form I-589 to the Immigration Court to indicate that he may be tortured in the country of removal.	Applications for refugee status are lodged with DIAC by completing Form 866.	Applicants can apply for asylum to the immigration officer on arrival at the port of entry. If the applicants are in the UK, they should book an appointment to meet with the Asylum Screening Unit of UKBA.	There are no requirements on how an application is submitted. It may be submitted orally or in writing to a Swiss mission abroad, to a border post, to the border control at a Swiss airport, or to a Reception and Procedure Centre of FOM.	An asylum seeker is required to submit, in person, a written application and evidentiary documents to a Regional Immigration Bureau.

Note: (1) Article 3 of the European Convention on Human Rights provides a prohibition on torture and of inhuman or degrading treatment or punishment, which is similar to that of CAT.

**Table –Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Preliminary screening</b>					
Whether there is preliminary screening before full hearing/ interview	No.	No.	Yes. Applicants will go through a screening process before they are allocated to case owners.	Yes. A preliminary interview is conducted before the applicants are allocated to the cantons.	No.
Screening procedure	Not applicable.	Not applicable.	<ul style="list-style-type: none"> <li>Applicants will be interviewed briefly and expected to produce either passports or travel documents to establish their identity and nationality and to support their application.</li> <li>Applicants are assigned to one of five "segments" that determines the future pathway of their claim.</li> </ul>	Applicants will have to provide personal data and information on their travel route to Switzerland.	Not applicable.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Hearing/interview to determine torture/asylum claims</b>					
Form of the determination procedure	Adversarial (courtroom-like) hearing.	Non-adversarial interview.	Non-adversarial interview.	Non-adversarial interview.	Non-adversarial interview.
Who will conduct the hearing/interview	Hearing is presided over by an immigration judge who is appointed by the Attorney General. The immigration judge will hear arguments from both parties (i.e. the applicant and the US government).	The case manager, who is a trained officer of DIAC, will conduct the interview.	The case owner, who is an officer of the Home Office, will conduct the interview.	Interview is conducted by FOM officer with the presence of a representative of a non-governmental organization ("NGO"), who functions as a neutral observer to verify whether the rules of procedure are respected during the interview.	Refugee Inquirer ("RI") who is an Immigration Inspector designated by MOJ, will conduct the interview.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Hearing/interview to determine torture/asylum claims (cont'd)</b>					
What will happen during the hearing/interview	Both parties will present the merits of the case to the immigration judge. The DHS attorney may cross-examine the applicant and other witnesses.	The case manager will ask the applicant questions about the claims.	The applicant will be asked to explain the reasons for seeking asylum in the UK. The applicant should give as much detail about the asylum application as possible and may submit additional evidence.	The applicant will have to justify his application and explain the reasons for requesting asylum.	RI often takes a statement from the applicant or requests additional documents. RI will ask questions based on the statement.
Whether legal representation is allowed during the hearing/interview	Yes, but at no expense to the government.	No, but DIAC may allow the applicant's friend, relative or migration agent to attend the interview.	No, the applicant must respond in person to questions, but he may bring a legal representative to the interview if he wishes.	No, the applicant must respond in person to questions, but lawyers may attend all interviews.	No, the applicant is not entitled to have a lawyer or anyone else present to assist or advise.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Hearing/interview to determine torture/asylum claims (cont'd)</b>					
Burden of proof	The applicant has the burden of proving that it is more likely than not he would be tortured if removed to the proposed country of removal. In making such assessment, all evidence relevant to the possibility of future torture is required to be considered.	The applicant is required to give the case manager all the information necessary to make a decision on the application within the timeframe specified.	The interview is the only chance for the applicant to tell the case owner why returning to his country may lead to himself being tortured. It is vital that the applicant gives the case owner all the information he wishes to be considered.	Asylum seekers must prove or at least credibly demonstrate their refugee status.	The applicant is expected to prove that he is a refugee by substantial evidence or by testimony of persons concerned.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Hearing/interview to determine torture/asylum claims (cont'd)</b>					
Decision maker	The immigration judge.	The case manager.	The case owner.	FOM officer who conducts the interview.	Preliminary assessment by RI, after endorsement by the Regional Director General, is forwarded for final assessment by the Refugee Recognition Section ("RRS") of the Immigration Bureau. The RRS Director submits a recommendation to the Minister of Justice who makes the final decision.
Time limit for making decision	Unlike asylum claims, claims under CAT are not subject to the 180-day timeframe. In any event, applicants applying for both asylum and CAT relief will be subject to the 180-day expedited docket.	Most applications will be decided within 90 days.	The case owner aims to give the applicant the decision within about 30 days from the date on which the application has been made.	Decisions should be made within 20 working days of the filing of application if no further investigation is required.	While there is no statutory provision on the duration, the Ministry of Justice officially states its target of making the decision within six months.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Hearing/interview to determine torture/asylum claims (cont'd)</b>					
How the decision is reached	If the immigration judge determines that the applicant would more likely than not be tortured in the country of removal, he is entitled to protection under Article 3 of CAT.	The case manager assesses applications against Australian migration law and the Refugee Convention, and may also refer to current information about the conditions of the country in which the applicant fears persecution.	The case owner assesses each application on its merits. He will make the decision based on information provided by the applicant, and the information that UKBA has about the applicant's country of origin.	In making the decision, FOM determines whether the applicant meets the criteria for refugee status under Article 3 of the <i>Asylum Act</i> and verifies that there are no legal grounds for refusing asylum.	Recognition of refugee status will be based on the materials submitted by the applicant.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Appeal procedures</b>					
Time limit for lodging appeals	An appeal must be filed within 30 days of an immigration judge's decision.	An appeal must be lodged within 28 calendar days after notification of the decision by DIAC if the applicant is not in immigration detention. The timeframe for lodging appeal is seven working days if the applicant is in immigration detention.	The appeal form must reach the First-tier Tribunal of the Tribunals Service within five working days from the day when the applicant receives the notice of decision if he is in detention, or within 10 working days from the day when the applicant receives the notice of decision if he is not in detention. Asylum seekers with "clearly unfounded claim" or those came from "safe" countries <sup>(2)</sup> will only be able to appeal after they have left the UK.	An appeal must be submitted within 30 days after notification of the negative decision by FOM.	An appeal must be filed by submitting to MOJ an Appeal Application Form within seven days from the date when the applicant receives the notice of refusal of refugee status.

Note: (2) Under Section 94 of the *Nationality, Immigration and Asylum Act 2002*, the Secretary of State can deem a country to be "safe" and certify claims from that country as "clearly unfounded".

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Appeal procedures (cont'd)</b>					
Review authorities	The Board of Immigration Appeals ("BIA"), an administrative appellate tribunal within DOJ.	The Refugee Review Tribunal ("RRT"), an independent statutory body.	First-tier Tribunal Immigration and Asylum Chamber of the Tribunals Service, an independent judicial body.	The Federal Administrative Court, an independent court.	The Adjudication Section of the Immigration Bureau of MOJ, a government agency.
Who will hear the appeal	Mostly one but sometime a panel of three Board members of BIA, who are attorneys appointed by the Attorney General.	A sole RRT member, who is not necessarily a lawyer and is appointed by the Minister for Immigration and Citizenship, hears the appeal and makes the decision.	Appeals are heard by one or more immigration judges who are sometimes accompanied by non legal members of the Tribunal.	In general, three judges of the Federal Administrative Court conduct the review of a case.	The applicant may request MOJ to hold a hearing with the immigration officers and independent Refugee Examination Counsellors who are appointed by the Minister of Justice "from among persons of reputable character who are capable of making fair judgements and have an academic background in law or current international affairs". Nonetheless, their conclusions are not binding. The final decision still rests with the Minister of Justice. For those who do not request for a hearing, the Counsellors and immigration officers will review the case on paper.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Appeal procedures (cont'd)</b>					
Form of the appeal procedure	Paper review.	Non-adversarial hearing.	Non-adversarial hearing.	Paper review.	Paper review or non-adversarial hearing.
Appeal process	The applicant may file a written brief in support of his appeal, while DHS may file a brief in opposition to the applicant's appeal.	No representative for DIAC will attend the hearings. The applicant will present his case.	At the full hearing, the applicant and his representative are provided with opportunities to present their case. UKBA will also have a legal representative at the hearing.	The appeal should contain a clear request or petition, and the appellants should state the reasons for their request and provide documentary proof if possible.	The applicant answer questions of the Refugee Examination Counsellors. The applicant's friends or other third parties may attend the hearing and provide their opinions for the Counsellors' consideration.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Appeal procedures (cont'd)</b>					
Whether legal representation is allowed during the appeal procedure	Yes, the applicant may be represented by an attorney or an accredited representative.	Yes, the applicant should contact RRT prior to the hearing or raise the matter with RRT at the start of the hearing if he requires legal representation.	Yes, the applicant will usually attend the hearing with his legal representative.	Yes, NGOs may assist asylum seekers in submitting an appeal, or write the appeal themselves as representatives of the asylum seeker.	Yes, lawyers can be present on behalf of asylum seekers as a representative.
Whether the appeal has suspensive effect <sup>(3)</sup>	Yes, removal of the applicant cannot be effectuated while the appeal is pending before BIA.	Yes. A person must be removed from Australia as soon as reasonably practicable when an application rejection decision is no longer subject to review by RRT.	Yes. The appellant cannot be removed while the appeal is pending. However, applicants with "clearly unfounded claim" or from "safe" countries will not have the right to make an appeal in the UK. They will be removed and will have to pursue any appeal from outside the UK.	Yes, the removal order is not carried out while the appeal is pending.	Yes, deportation procedures will only be resumed when an appeal has been dismissed or rejected.

Note: (3) Appeal with suspensive effect means that the applicant will not be removed while the appeal is pending.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Appeal procedures (cont'd)</b>					
Whether the review decision is further reviewable	Yes. A BIA decision ordering removal is reviewable in the US Court of Appeals that serves the territory in which the hearing before the immigration judge takes place. If unsuccessful before the Court of Appeals, the applicant may file a petition for certiorari with the US Supreme Court.	Yes. Where there is a perceived error of law in the decision of RRT, it is possible to appeal the decision to the Federal Court or the Federal Magistrates Court for judicial review of the decision.	Yes. The applicant may be able to challenge a decision made by the First-tier Tribunal by applying to the Upper Tribunal of the Tribunals Service on a point of law. A decision of the Upper Tribunal may be further appealed to the Court of Appeal.	No. The judgments of the Federal Administrative Court are final and absolute.	Yes. The applicant may file an action for judicial review with the court.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Humanitarian considerations to grant protection to applicants with the risk of torture</b>					
Availability of protection under humanitarian considerations	Not applicable.	The Minister for Immigration and Citizenship may exercise discretionary power to substitute the decision of RRT for one that is more favourable to the applicant.	Human rights claims can be made under ECHR at any stage of the asylum process, and such applications will be considered by UKBA as an asylum claim.	Switzerland may grant temporary protection to persons in need of protection as long as they are exposed to a serious general danger.	MOJ may provide Special Permission to Stay to those who do not meet the refugee criteria but are unable to return to their country of origin for compelling reasons.
Criteria for granting protection	Not applicable.	Australia's international obligation under CAT is one of the relevant factors that the Minister for Immigration and Citizenship would consider in exercising such discretionary power.	It is sufficient for an applicant to show that there are substantial grounds for believing that returning to home country will expose the applicant to a real risk. Where the real risk test is met, protection will be granted.	Temporary admission is granted if expulsion is: unreasonable (due to war), inadmissible (violation of ECHR), or impossible (journey back not possible for technical reasons).	The criteria for granting the Permission are not disclosed. Nevertheless, Article 3 of CAT may be one of the considerations.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Legal aid and other support</b>					
Whether publicly-funded free legal assistance is provided	No. Applicants may seek legal representation at their own expense.	Yes, free legal assistance is available through the government's Immigration Advice and Application Assistance Scheme ("IAAAS").	Yes, free legal assistance is available to asylum seekers who have either no income, or very low income.	Yes, publicly-funded legal aid is available to those applicants who are unable to afford counsel.	No, state-sponsored legal aid is not available to asylum seekers.
Whether free legal assistance is provided by private organizations	Yes. EOIR maintains a list of free legal service providers who meet the qualifications specified in the regulations. This list is updated quarterly and is provided to applicants in immigration proceedings. It is also available on EOIR's website.	Yes. If applicants want to seek immigration assistance from someone who is not an IAAAS provider, they may arrange it at their own cost. Nevertheless, some migration agents may offer "pro-bono" or free services.	Yes. There are NGOs to provide free legal assistance and representation to the most vulnerable asylum seekers in their asylum applications to UKBA and all stages of appeals to the Tribunal, Court of Appeal and beyond.	Yes. There are NGOs in almost all the cantons, providing free legal advice and/or representation for asylum seekers. These legal advisory services are coordinated by the Swiss Refugee Council.	Yes. Limited legal assistance is provided by the United Nations High Commissioner for Refugees and private foundations. There are also some lawyers working on a pro bono basis while others for reduced fees or a nominal charge to help asylum seekers.

**Table – Mechanisms for handling torture claims in selected jurisdictions (cont'd)**

	<b>The United States</b>	<b>Australia</b>	<b>The United Kingdom</b>	<b>Switzerland</b>	<b>Japan</b>
<b>Legal aid and other support (cont'd)</b>					
Whether applicants are allowed to work	Applicants cannot apply for work authorization when applying for asylum. They can apply for work authorization if 150 days have passed since they filed asylum application, and no decision has been made on the application.	Generally, permission to work is available to applicants who are on a bridging visa and actively engaged with DIAC to resolve their immigration status.	The majority of asylum applicants are not permitted to work while their application is being considered. However, if they have waited longer than 12 months for UKBA to make an initial decision on the asylum application, they may request permission to work.	Applicants receive work permits after three to six months have passed since application, depending on the canton and the circumstances.	For those asylum seekers who hold valid visas at the time of application, their status of residence will be changed into "Designated Activities", and after more than six months since the submission of application, the Immigration Bureau will issue a work permit.
Economic and social support	No social benefits, like housing and food, is provided by the US government.	Asylum Seeker Assistance Scheme provides limited financial assistance, health care and other services to applicants who are identified as vulnerable.	The case owner will assess applicants' circumstances and decide if they meet the requirements to receive support. Applicants may qualify for help with housing and living costs. If housing is provided, the applicant will not be able to choose where to live.	Applicants are assigned to cantons where they may be housed in shelters and receive social benefits or emergency aid if needed.	The government provides financial assistance for applicants in serious need through the Refugee Assistance Headquarters, a quasi-governmental organization.

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## Australia

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## The United Kingdom

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