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Report of the Bills Committee on Immigration (Amendment) Bill 2011

Purpose

This paper reports on the deliberations of the Bills Committee on Immigration (Amendment) Bill 2011.

Background

2. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") has been applied to Hong Kong since 1992. Article 3 of CAT provides that no State Party shall 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 (the non-refoulement protection).

3. According to the Administration, torture claims made under Article 3 of CAT have been handled by the Immigration Department ("ImmD") in accordance with a set of administrative procedures. These administrative measures have been subject to challenge in courts. In *Secretary for Security v Sakthevel Prabakar* ((2004) 7 HKCFAR 187), the Court of Final Appeal held that high standards of fairness must be demanded in the determination of CAT claims as such determination may put a person's life and limb in jeopardy and may take away from him his fundamental human right not to be subjected to torture. In *FB v Director of Immigration and Secretary for Security* ((2009) 2 HKLRD 346) ("*FB*"), the Court of First Instance ("CFI"), in considering the fairness of the procedures for dealing with torture claimants, held, *inter alia*, that the Director of Immigration's ("D of Imm") blanket policy of denying legal representation to

torture claimants was unlawful and failed to meet the required high standards of fairness.

4. Following the above court decisions, the Administration has reviewed and revised the administrative screening mechanism for torture claims. The revised mechanism, which commenced in December 2009, includes the provision of publicly-funded legal assistance to torture claimants through the Duty Lawyer Service ("DLS"), enhanced training for decision makers and a new petition procedure involving adjudicators with legal background who may conduct oral hearing if required.

The Bill

5. Introduced into the Legislative Council on 13 July 2011, the Bill seeks to provide for a statutory framework for determining claims made by persons in Hong Kong for protection under Article 3 of CAT against expulsion, return or extradition of the claimant to countries in which they would be in danger of being subjected to torture.

The Bills Committee

6. At the House Committee meeting on 7 October 2011, Members formed a Bills Committee to study the Bill in detail. The membership list of the Bills Committee is in **Appendix I**.

7. Under the chairmanship of Hon LAU Kong-wah, the Bills Committee has held 15 meetings with the Administration. The Bills Committee has also received views from organizations and individuals listed in **Appendix II**.

Deliberations of the Bills Committee

Definition of "torture" (proposed section 37U)

8. Under the proposed section 37U of the Immigration Ordinance (Cap. 115) ("IO"), "torture" is defined to mean any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from that person or a third person information or a confession; punishing that person for an act which that person or a third person has committed or is suspected of having committed; intimidating or coercing that

person or a third person; or 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. The Bills Committee notes that the proposed definition is the same as the definition of "torture" provided in Article 1 of CAT. The Bills Committee has sought clarification on the interpretation of "lawful sanctions" under the definition of "torture", and whether the use of torture in the process of investigation of crimes and questioning of suspects which are lawful acts in a country would fall within the definition of "torture".

9. The Administration has explained that Article 1 of CAT states that the term "torture" does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions". The Committee Against Torture and the Commission's Special Rapporteur on Torture pointed out that the questioning of a suspect or punishment of a criminal under the law may also constitute "torture" as referred to in CAT if the examination and punishment do not comply with the requirements for human rights protection in international law. In deciding whether a sanction constitutes "torture", the Administration will give full consideration to the circumstances of each case with reference to the comments of the Committee Against Torture and the relevant court judgments made in Hong Kong and overseas. At members' request, the Administration has agreed to affirm its interpretation of "lawful sanctions" during the resumption of the Second Reading debate on the Bill.

10. Some members have expressed concern about whether the definition of "torture" would apply to situations such as the Police's strip search of arrestees in Hong Kong. In this regard, the Administration has undertaken to state in its speech during the resumption of the Second Reading debate on the Bill that it has no intention to widen the scope of application of "torture" in Hong Kong.

11. The Bills Committee has discussed whether it is necessary to amend section 3 of the Crimes (Torture) Ordinance (Cap. 427) ("CTO") to make the elements of torture provided in that section consistent with those provided in the definition proposed in the Bill and Article 1 of CAT. According to the Administration, CTO and the Bill serve different purposes in that the provisions of section 3 of CTO give effect to Article 4 of CAT by creating a specific and separate offence of torture locally, whereas the Bill gives effect to the non-refoulement obligation concerning the removal or extradition of a person to another State under Article 3 of CAT. While the proposed definition of "torture" in the Bill follows Article 1 of CAT, there is no definition of "torture" in CTO and section 3 of the Ordinance delineates the scope of "torture" covered by the

offence. The offence covers all the key elements contained in Article 1 of CAT and the difference in form is desirable to provide for the specific offence of torture under the law of Hong Kong. As section 3 of CTO is consistent with Article 1 of CAT, the Administration therefore does not consider it necessary to amend the section.

Restrictions on persons claiming non-refoulement protection in Hong Kong (Proposed section 37W)

12. The proposed section 37W of IO provides for a person to claim non-refoulement protection in Hong Kong only if the person is subject or liable to removal; and 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. Members, The Law Society of Hong Kong ("Law Society") and the Hong Kong Bar Association ("Bar") are concerned that the proposed provision may invites claimants to overstay before they would be eligible for lodging torture claims and seeking legal assistance. In their view, the Administration should not restrict claims to be lodged only when claimants are subject to removal. Some members have pointed out that overstaying in Hong Kong is an offence. Should a person's torture claim be determined as unsubstantiated, the person would be subject to prosecution.

13. The Administration has responded that non-refoulement protection under Article 3 of CAT only applies to a person who is subject to removal. The Court of Appeal confirmed in *BK & CH v the Director of Immigration* (CACV 59 & 60/2010) that such application is in compliance with CAT. On the issue of prosecution, the Administration has informed members that the "Prosecution Policy towards Refugees, Asylum Seekers and Torture Claimants" issued by the Secretary for Justice in March 2007 states, *inter alia*, that where a torture claimant committed an immigration offence relating to his claim (e.g. overstaying, illegal remaining, etc.), the decision on whether to prosecute the claimant will be deferred. As at 30 April 2012, among the 1 717 cases determined as unsubstantiated, a total of 100 claimants were prosecuted for overstaying or illegal remaining after their claims were finally determined. In considering whether to prosecute a torture claimant whose claim is unsubstantiated, ImmD will have regard to the circumstances of the case (e.g the duration of and circumstances leading to overstaying) and consult the Department of Justice when necessary. Of the 85 claimants[1] who were convicted of overstaying in Hong Kong, 80 were sentenced to one to 12 months' imprisonment and the penalty imposed on the other five were one to two months' imprisonment

[1] Claimants who were prosecuted for overstaying had overstayed in Hong Kong for two months or more at the time of arrest.

suspended for two to three years. The 15 claimants who were convicted of illegal remaining in Hong Kong were sentenced to nine to 15 months' imprisonment.

Submission of torture claim form (proposed section 37Y)

14. Under the proposed section 37X(1) of IO, 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. The proposed section 37Y(1) requires a claimant, on written request by an immigration officer, to complete a torture claim form stating the grounds of the claim and the facts supporting the claim including such other information as required by the form. The claimant must return the completed torture claim form to an immigration officer within 28 days after the written request together with all documents supporting the claim that are readily available to the claimant.

15. The Bills Committee, the Law Society, the Bar and DLS are concerned whether the time limit of 28 days is sufficient for a claimant to return the completed torture claim form, in particular when the supporting documents need to be collected from the claimant's country of origin for genuine reasons. Having regard to its current statistics, DLS considers the 28-day timeframe unrealistic and impracticable. In the view of the Law Society and the Bar, the 28-day period is insufficient for average claims. The minimum should be at least 48 days, but given the complexity of many claims a more realistic period should be given, namely 90 days. Some members are of the view that the 28-day timeframe should be extended by four weeks. Members have also suggested stating clearly in the torture claim form the claimant's right to provide supplementary documents at a later stage.

16. According to the Administration, at present, claimants are required to return the completed torture claim form to ImmD within 28 days after they have received the form. Where necessary, they may apply to ImmD for an extension of time for returning the form. In general, applications for extension with reasonable grounds will be approved. In the first three months of 2012, it takes on average 40 days for claimants to return the torture claim form. Based on experience, duty lawyers providing assistance to claimants will usually request ImmD to provide all personal data of the claimants held by ImmD in accordance with the Personal Data (Privacy) Ordinance (Cap. 486). During the first three months of 2012, ImmD can complete processing the requests and provide the relevant data within 14 days.

17. The Administration has advised the Bills Committee that having considered the average time taken for claimants to return the torture claim form being 40 days, of which 14 days were spent on obtaining their personal data, ImmD has decided to enhance its internal procedures for handling personal data requests. Specifically, ImmD will, with claimants' consent, provide them with their personal data on the same day when the torture claim form is served. Such administrative measure will greatly reduce the amount of time claimants would spend on waiting for their personal data, thus enabling them to make flexible and full use of the 28-day timeframe to complete the torture claim form. Moreover, ImmD will revise the guidance notes for completion of torture claim form to state that claimants may submit supplementary documents after returning the torture claim form. At the same time, claimants may still exercise their right to apply to ImmD with reasonable grounds for extension of time for returning the torture claim form.

18. The Administration has stressed that the content of the torture claim form covers mainly claimants' personal information and account of their personal experience which they should know well. Drawing reference to overseas experience, no other signatory State of CAT allows claimants more than 28 days for submission of the completed claim forms. For instance, in the United Kingdom and Canada, torture claimants are required to return the completed torture claim forms within 10 days[2] and 28 days respectively. With the above enhancement administrative measures introduced, the Administration takes the view that the 28-day timeframe is reasonable and should be maintained.

19. Notwithstanding the Administration's explanations, some members still consider the 28-day timeframe inadequate. In the light of members' concern, the Administration has re-considered the issue but maintains its stance that the 28-day timeframe is reasonable and appropriate. The Administration has explained that about 70% of the torture claimants returned the completed torture claim forms within 42 days from January to March 2012. With the implementation of the enhanced procedures in which torture claimants are provided with their personal data on the same day when the torture claim forms are served (instead of 14 days), claimants would have the full use of the 28 days timeframe. Moreover, claimants may still exercise their right to apply for extension of time for returning the torture claim forms. Noting from the Administration that out of the 1 717 determined cases, 1 234 claimants had applied for extension of time, Dr Hon Margaret NG and Hon Emily LAU have expressed objection to the proposed 28-day timeframe for returning the

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[2] Prior to the streamlining of screening procedures in the United Kingdom in 2007.

completed torture claim forms. Dr Hon Margaret NG has indicated that she will propose Committee Stage amendments ("CSAs") to extend the proposed timeframe to allow sufficient time for claimants to return their torture claim forms.

20. The Bills Committee has enquired about the special circumstances referred to in the proposed section 37Y(3)(b) based on which a claimant may be allowed an extension of time to return a torture claim form, and asked the Administration to consider setting out these special circumstances in the Bill.

21. According to the Administration, an immigration officer may grant an extension of time for a claimant to return a torture claim form if there exist circumstances under which it would be unjust not to allow such further period having regard to the merits of a particular case. In considering a request for extension of time, an immigration officer will take into account all the relevant circumstances, e.g. whether it is beyond the control of the claimant, any serious illness which may prevent the claimant from returning the torture claim form in time, etc. Given that what amount to special circumstances may vary in different cases and each case will be considered on its own merits, the Administration considers that it is not practical or appropriate to set them out in the Bill.

22. As regards the reasons given to support applications for an extension of time to return the torture claim form, the Administration has informed members that some claimants indicated that their requests for personal data from ImmD took time, whilst some indicated that they were waiting from their home country such documents as letters from relatives, records of police case reports and newspaper reports, etc. Others did not give any particular reason for the application.

Effect of making a torture claim (proposed section 37Z)

23. The proposed section 37Z(3)(a) of IO provides that a claimant may be removed to a specified country that is not a torture risk State. The Bills Committee is concerned that the proposed section as presently drafted seems to suggest that after the making of a torture claim, a claimant may be removed to another country that is not a torture risk State before the claim is finally determined. The Bills Committee has sought clarification on whether this is the Administration's policy intent.

24. The Administration has confirmed that it is the Government's obligation under Article 3(1) of CAT not to expel, return or extradite a person to a torture risk State where there are substantial grounds for believing that the person would

be in danger of being subjected to torture in that State. Such non-refoulement protection does not extend to the removal of the claimant to another country where there is no torture risk and thus a claimant may be so removed under the proposed section 37Z(3)(a).

Power to require information (proposed section 37ZB)

Consequences for not providing information or attending interviews

25. Under the proposed section 37ZB(1)(b) of IO, after a claimant has returned his completed torture claim form, an immigration officer may require the claimant to attend an interview to provide information and answer questions relating to his torture claim. The Bills Committee has sought clarification on whether a claimant could refuse to provide information or answer questions on the ground that the information or answers are protected by privilege, such as the privilege against self-incrimination, and whether the refusal to provide such information or answers based on the ground of privilege would be taken as failure to provide information, etc., and hence behaviour damaging the claimant's credibility under the proposed section 37D. Some members are concerned that claimants may conceal information for fear of self-incrimination.

26. The Administration has explained that all information provided by a claimant for the purpose of establishing his torture claim will be treated by ImmD in confidence. No such information provided, whether in a torture claim form or during screening interviews, will be used against the claimant in subsequent criminal proceedings of any nature (except for claimant's attempt to pervert the course of justice or the making of false reports). As such, the claimants will not be at risk of prosecution even if self-incriminating statement is made in the screening process. Under the existing enhanced screening mechanism, a torture claimant will be informed of this position by way of a notice served at the commencement of the screening process and such practice will continue under the statutory scheme. With respect to a torture claim, the burden is upon the claimant to establish that there are substantial grounds for believing that he would be subject to the risk of torture upon return to the alleged torture risk State. In this regard, failure by the claimant to provide the required information may jeopardize his chance of establishing the claim since the immigration officer will not be able to take into account all relevant considerations for a proper assessment to be made; and where such failure is without reasonable excuse, it may also be a ground taken as damaging the claimant's credibility.

27. Members have suggested that a provision be added to the Bill to the effect that information provided by a torture claimant will not be used against him in

any subsequent criminal proceedings, having regard to a similar provision in the "Guidelines for Completion of Torture Claim Form" for persons who have made torture claims. The Administration has assured the Bills Committee that this protection will continue under the statutory scheme. In its view, the inclusion of such a provision in the Bill is not necessary.

Screening interview

28. On the interview arrangements for torture claimants, the Administration has advised the Bills Committee that after receiving the torture claim form, ImmD will arrange for an interview with the claimant and his duty lawyer, in order to clarify or request supplements to information provided in the form in most cases. So far, ImmD has not arranged interviews for five cases where it was not necessary to seek further clarifications or supplementary information. Among the interviews arranged in 2010 and 2011, about 30% were not completed as scheduled. Out of the 822 interviews arranged in the first three months of 2012, 486 (about 60% of the interviews) were not completed as scheduled for the reasons that claimants indicated sickness shortly before or during the interview; claimants failed to show up as scheduled; duty lawyer or interpreters were unable to attend the scheduled interview shortly before the interview; or other reasons. For interviews that cannot be completed as scheduled, ImmD will need to re-arrange for them. If a claimant does not turn up at an interview twice without any reasonable excuse, the claimant will be informed that an assessment on his claim will be made based on information provided in his torture claim form and any other relevant information available to ImmD.

29. In response to members' suggestion to require an immigration officer to arrange an interview after a claimant has returned his torture claim form, the Administration will introduce the necessary CSAs.

30. Some members consider that the Bill should provide for the attendance of the claimant's legal representative in an interview. The Administration has responded that at present, the arrangement for a person having an interview with officers of ImmD to be accompanied by his legal representative is not provided in IO. However, based on the CFI judgment in *FB*, D of Imm must allow a claimant's legal representative to attend the interview in order to ensure fairness. By virtue of the CFI judgment, claimants' right has been sufficiently protected under the law. Further, ImmD has already fully implemented the CFI judgment by allowing claimants to be accompanied by their legal representative at interviews with their consent. The Administration therefore does not consider it necessary to include such a provision in the Bill.

Medical examination (proposed section 37ZC)

31. The proposed section 37ZC(1) of IO provides that if the claimant's physical or mental condition is relevant to the consideration of the torture claim and is in dispute, an immigration officer or (on an appeal) the Torture Claims Appeal Board ("Appeal Board") to be established under the Bill may require the claimant to undergo a medical examination to be conducted by a medical practitioner arranged by an immigration officer. Under the proposed section 37ZC(3), a claimant must disclose to an immigration officer or the Appeal Board the medical report of any examination arranged for the claimant under the proposed section 37ZC. Some members, the Law Society and the Bar are concerned whether medical examinations would be conducted by ImmD or government doctors. In their view, to require a person who may have suffered torture to attend an examination by a medical practitioner who is unknown in advance is grossly inappropriate, and particularly indelicate when medical examination is arranged by ImmD which is the authority to determine torture claims, but not through DLS or the duty lawyers of the claimants. It is important that duty lawyers should be able to communicate directly with the medical practitioners on a fully confidential basis without involving ImmD. With the enactment of the proposed section 37ZC(3), the Law Society and the Bar are concerned that there will be statutory override of doctor and patient confidentiality. Further, they consider that it should not be a condition precedent that the physical or mental condition of the claimant is in dispute before a medical examination could be conducted.

32. According to the Administration, in the consideration of a claim, if ImmD or the Appeal Board and the claimant have no dispute over the claimed physical or mental condition, i.e., ImmD or the Appeal Board has accepted a claimant's description as fact, it is not necessary to arrange a medical examination for the claimant. Under the existing arrangements, the medical practitioner responsible for the medical examination must be a specialist approved by the Medical Council of Hong Kong and appointed by the Department of Health or the Hospital Authority. Medical practitioners who conduct examination on claimants possess the relevant professional qualifications (forensic pathology or psychiatry, etc.) and are qualified to act as expert witnesses in court. If a claimant (or his duty lawyer) has any query on the report prepared by the expert and requests for a review, ImmD will seriously consider the relevant reasons and may arrange another expert to re-assess the case. ImmD neither participates in selecting the medical practitioner to perform the examination nor involves in the process of the medical examination to ensure procedural fairness. Unless with the claimant's consent, ImmD will not request the medical practitioner performing the examination to disclose the examination results. On whether a claimant may

choose his own doctor, the Administration has advised members that claimants may submit medical reports issued by private medical practitioners at their own cost or other qualified persons who provide the service voluntarily to support their claims.

Credibility of claimant (proposed section 37ZD)

33. The proposed section 37ZD of IO sets out the kinds of behaviour of a claimant that may be considered as damaging the claimant's credibility. The Bills Committee has sought clarification on whether a claimant's claim would be rejected if there is evidence showing that the claimant's behaviour falls within the kinds of behaviour specified in the provision, and whether it is the Administration's policy intent that a claimant's credibility is only one of the factors to be taken into account in considering a torture claim.

34. The Administration has explained that an immigration officer or the Appeal Board will take into account all relevant considerations in deciding whether to accept a torture claim as substantiated. The proposed section 37ZD provides that certain behaviours of a claimant may be taken into account as damaging his credibility, but that does not imply that the claim will be rejected upon the finding of these behaviours. Whether or not a claimant's credibility in a claim has been damaged would depend on an overall assessment of the relevant circumstances of the case.

35. The Bills Committee notes that one of the behaviour considered as damaging to the claimant's credibility is 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 CAT applies. Members have sought information on how cases where claimants make a torture claim in Hong Kong having routed through and stayed at another place before arriving in Hong Kong are dealt with.

36. According to the Administration, a torture claimant is required to provide information on the route of travel of his recent journey to Hong Kong. Up to the end of October 2011, 63% of the claimants reported that they had travelled to a country or place other than his place of origin before arriving in Hong Kong. Among them, 86% routed through the Mainland. Others include routing through Macao, Thailand, Bangladesh and Singapore (which is not a party to CAT). In the consideration of a torture claim, if an immigration officer is satisfied that the claimant has not taken advantage of a reasonable opportunity to make a torture claim before arriving in Hong Kong, he may consider this behaviour damaging to the claimant's credibility. This will not apply to cases where no such reasonable

opportunity exists, e.g. if the torture risk does not arise or is not known to him before, or if non-refoulement protection under CAT is not available to him, *en route* to Hong Kong.

37. Regarding members' concern about the handling of cases where claimants enter Hong Kong through the Mainland, the Administration has explained that a person who lands in Hong Kong unlawfully through the Mainland will be repatriated by ImmD according to the mechanism established with the frontier inspection authority in the Mainland. Should there be a torture claim lodged by a person not of Chinese nationality, ImmD will suspend repatriation and assess his claim. If his claim is not substantiated, he will be repatriated to his place of origin.

38. The Law Society and the Bar have raised concern that if a decision is made by an immigration officer in a skewed manner or in the absence of balancing procedural safeguards, e.g. without calling for any explanation of such behaviour from the claimant, it would result in injustice. In their view, the proposed section 37ZD should be deleted.

39. According to the Administration, the circumstances under which immigration officers may consider as damaging to the credibility of a claimant are set out in the proposed section 37ZD to enhance transparency in the process of making such considerations. In general, ImmD will request claimants to provide reasons for their behaviour. As provided in the proposed section, an immigration officer will only take the prescribed behaviour as damaging the claimant's credibility if the claimant cannot provide a reasonable excuse.

40. The Bills Committee has queried what constitute "reasonable excuse" for failure to produce or provide information or documentary evidence referred in the proposed section 37ZD(2)(b) and (d) to (f). The Administration has given some examples which include where the claimant is not in possession of the documents or evidence at the earlier material time, or where the claimant is unaware of the existence of relevant information before the date fixed for the first interview.

<u>Withdrawal of torture claim (proposed section 37ZE)</u>

41. The proposed section 37ZE(1) of IO provides that a claimant may, before a torture claim is decided, withdraw the claim by notifying an immigration officer in writing. Under the proposed section 37ZE(2)(b), a torture claim that has been withdrawn may be re-opened if the person who made the claim provides sufficient evidence to satisfy an immigration officer that by reason of special circumstances, it would be unjust not to re-open the claim. The Bills Committee

has sought information on the special circumstances referred to in the proposed provision, and whether the Administration would consider setting them out in the Bill.

42. According to the Administration, the proposed section 37ZE(2)(b) to allow an immigration officer to re-open a claim if it would be unjust not to do so under special circumstances is to ensure that the procedures will meet the required high standards of fairness. For example, there are significant changes in the conditions of the torture risk State which will increase the torture risk after the withdrawal. Given that what amount to special circumstances may vary in different cases and each case will be considered on its own merits, the Administration considers it not practical or appropriate to set them out in the Bill.

43. Some members have suggested that if an immigration officer decides to refuse a claimant's request to re-open a withdrawn claim, the claimant should be allowed a review of the decision by the Appeal Board which will make the final decision. The Administration has advised members that for claims withdrawn in the course of the process, screening has not yet been completed. As such, the Administration has agreed to amend the proposed section 37ZE, 37ZG and other provisions relating to the functions and procedures of the Appeal Board to give effect to the suggestion.

Order in which claims are processed (proposed section 37ZH)

44. Under the proposed section 37ZH of IO, D of Imm may decide the order in which torture claims are to be processed. The Bills Committee has queried how D of Imm would decide the order in processing torture claims, and whether priority would be given to claimants under certain circumstances.

45. The Administration has advised members that at present, all claimants may request their cases to be handled with priority when lodging their claims. ImmD has set out in its internal guidelines that priority should be given in processing claims from persons under detention, persons involved in criminal proceedings or those who may constitute a threat to the general public, claims which have been lodged for a longer time, and person with special needs (e.g. minors or persons who has been subjected to violence abuse).

Decision on torture claim (proposed section 37ZI)

46. The Bill provides that a person who meets the criteria specified in the proposed section 37W of IO may claim non-refoulement protection on the ground of a torture risk under the proposed section 37X. Under the proposed section 37U, "non-refoulement protection" means protection under Article 3 of CAT. The Bills Committee and the Hong Kong Human Rights Monitor are concerned about the factors to be considered by ImmD in determining a torture claim.

47. According to the Administration, during the assessment of a torture claim, an immigration officer must take into account all relevant considerations in accordance with the requirements set out in Article 3 of CAT. Key considerations in deciding a torture claim are covered by the Bill, including whether the grounds provided by the claimant fall within the definition of "torture" as stipulated under CAT (proposed section 37U); whether the claimant is credible (proposed section 37ZD); and whether the claimant may be internally relocated within his country of origin (proposed section 37ZI(5)). On the basis of operational experience, factors taken into account by ImmD in considering individual cases include -

(a) whether the case falls within the definition of "torture" in CAT - for example, whether the case involves public officials or other persons acting in an official capacity, treatment inflicting severe pain or suffering, and acts not committed for purposes or reasons set out in the definition (such as obtaining a confession, discrimination of any kind, etc.);

(b) claimants' credibility - for example, self-contradictory reason and evidence; claim made only after being arrested or detained, concealing information, misleading or delaying the processing of a claim, and not taking advantage of a reasonable opportunity to make a claim when routing through a third country or territory; and

(c) internal relocation - the claimant can be relocated to another region in his place of origin without having to face the danger of being subjected to torture[3].

[3] The judgment of CFI in *TK v Jenkins* in 2011 pointed out that if the claimant alleges relocating to another region in his home country infeasible, the burden of furnishing evidence to substantiate this point falls on the claimant.

48. The Bills Committee notes that under the statutory procedure for raising a torture claim in the United States, there is an express provision providing that in assessing whether it is more likely than not that an applicant would be tortured if removed to the proposed country, all evidence relevant to the possibility of future torture is required to be considered. Examples of such evidence are also specified in the provision. These include -

(a) evidence of past torture inflicted upon the applicant;

(b) the possibility of relocating the applicant to an area of the country of removal where he is not likely to be tortured;

(c) where applicable, evidence of gross, flagrant, or mass violations of human rights committed within the country in question; and

(d) any other relevant information about conditions in the country of removal.

The Bills Committee has queried why the relevant factors are not set out in the Bill.

49. The Administration has explained that under Article 3 of CAT, in determining whether to provide such protection, authorities should take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. As such, in determining whether a claim is substantiated under the proposed section 37ZI and hence non-refoulement protection is granted to the claimant, an immigration officer and the Appeal Board must, having regard to the individual circumstances of each case, take into account all relevant factors in compliance with Article 3 of CAT and the requirement of high standards of fairness laid down by the court. These factors include the grounds and evidence provided by a claimant and such other information as country conditions and background of the claimant's place of origin, as well as case law and other relevant materials applicable at the material time, including General Comment No. 1[4] and decisions on individual cases made by the United Nations Committee Against Torture. Given that case law and other materials are subject to updates from time to time, it is unnecessary and difficult to set out in the Bill all the factors for consideration. Regarding the United States' approach, the Administration is of the view that the relevant factors referred to in paragraph 48 (a) to (d) above fall short of the list of relevant matters in General

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[4] In 1996, the Committee Against Torture issued General Comment No. 1 to provide guidelines in relation to the implementation of Article 3 of CAT.

Comment No. 1.

50. Drawing reference to Article 3(2) of CAT, members have suggested that an immigration officer should be required under the Bill to take into account all relevant factors for determination of a torture claim, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. The Administration has agreed to introduce the relevant CSAs.

Detention of claimants (proposed section 37ZK)

51. Regarding members' concern about the detention of claimants under the proposed section 37ZK, the Administration has advised the Bills Committee that under IO, a claimant who has unlawfully landed or remained in Hong Kong will generally be put under temporary detention for investigation after being intercepted or arrested. ImmD will consider releasing them on recognizance having regard to the circumstances of each case. The Court of Appeal pointed out in its judgment in *A v Director of Immigration* (CACV 314/2007) that the reasons for detention must be sufficient, clearly defined and made open. In this regard, ImmD has drawn up a detention policy taking into consideration, among others, the subject's likelihood of abscondance or committing crimes, prospect of removal within a reasonable time and personal factors (e.g. health condition). As at 31 March 2012, about 98% of the claimants were released on recognizance.

Revocation of decision to accept torture (proposed section 37ZL)

52. The proposed section 37ZL of IO empowers an immigration officer to revoke a decision accepting a torture claim as substantiated. The Bills Committee has queried whether a time limit within which such power to be exercised should be provided in the Bill.

53. According to the Administration, an immigration officer will accept a torture claim as substantiated if he is satisfied that there exists a real torture risk for the claimant if he is removed to the torture risk State. On the other hand, if there are changes in circumstances or improvements in the conditions of the State concerned, the torture risk may cease to exist and the non-refoulement protection should no longer be applicable. Substantiated torture claims will hence be regularly reviewed (usually every six to 12 months), such that if and when the conditions of the torture risk State or the personal circumstances of the claimant have changed, and the relevant torture risk is no longer found to exist, an immigration officer may revoke the previous decision and the claimant may be removed. There is no applicable time limit after which such regular review may cease.

54. The Bills Committee has raised query about the justification for revocation of substantiated claims, and the appropriateness for an immigration officer to revoke a decision made by the Appeal Board to accept a torture claim, as provided in the proposed section 37ZL(1)(b). Members consider that if there is a change in circumstances after the Appeal Board has made a decision to accept a torture claim, the revocation of that decision should be made by the Appeal Board.

55. The Administration has explained that non-refoulement protection under Article 3 of CAT does not require State parties to grant resident status to claimants. As such, where circumstances set out in the proposed section 37ZL(2) exist, revocation of substantiated claims should be considered. Under the Bill, before a decision is made to revoke a substantiated torture claim, claimants will be given written notice of the proposed revocation with detailed reasons. The claimant concerned may, within 14 days, raise objection and provide the reasons for the objection for consideration by ImmD. If ImmD decides to revoke the substantiated claim, ImmD should give the claimant a written notice stating the detailed reasons and the right to appeal.

56. Having considered members' views, the Administration has agreed to amend the proposed section 37ZL and other provisions relating to the functions and procedures of the Appeal Board to provide for the Appeal Board to revoke its original decision if there exists substantial changes in the circumstances of torture claimants.

Subsequent claim (proposed section 37ZM)

57. Under the proposed section 37ZM of IO, a person who has previously made a torture claim must not subsequently make another torture claim, unless he provides sufficient evidence to satisfy an immigration officer that there has been a significant change of circumstances since the previous claim was finally determined or withdrawn, and 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.

58. The Bills Committee has sought clarification on whether a claimant would be subject to the limitation on subsequent claims provided in the proposed section 37ZM if he has previously made a torture claim and makes a fresh claim based on completely new grounds and supporting facts.

59. The Administration has explained that if a torture claim on completely new grounds and supporting facts is made after the final determination of the torture claim that the person has previously made, the new claim is a subsequent claim to which the proposed section 37ZM applies. Given that any illegal immigrant or overstayer will be granted non-refoulement protection once he has made a torture claim unless and until his claim is finally determined as unsubstantiated or withdrawn, it is necessary to impose limitation on the making of subsequent claims. Otherwise, any person who is subject or liable to removal may easily abuse the mechanism by making repeated claims indefinitely to avoid being removed.

60. Members have expressed concern about the possible loophole if the decision on whether a claimant could make a subsequent claim is made by an immigration officer. There is also no provision for an appeal against an immigration officer's decision on rejecting a subsequent claim. Members have suggested that claimants should be allowed to appeal to the Appeal Board against an immigration officer's rejection of a subsequent claim.

61. The Administration does not consider it necessary for the Appeal Board to review the decision of an immigration officer to reject a request by a torture claimant to make a subsequent claim before removal as in such case the screening process of his previous claim has been completed. This serves to prevent procedural abuse in case some claimants make repeated requests for subsequent claims or review.

Appeal against decisions made in relation to torture claims (proposed section 37ZP)

62. Under the proposed section 37ZP of IO, a person aggrieved by a decision of an immigration officer may appeal to the Appeal Board if the decision is made rejecting a torture claim under the proposed section 37ZI(1)(b), or revoking a substantiated claim under the proposed section 37ZL(1). The Bills Committee has sought clarification on whether, in cases where an appeal lodged by a torture claimant, the execution of any expulsion or extradition against the claimant would be suspended pending the determination of the appeal.

63. According to the Administration, if an appeal has been lodged against an immigration officer's decision on a torture claim, the claim is finally determined only when the appeal has been disposed of in accordance with the proposed section 37V(2)(b). Under the proposed definition of "claimant" in the proposed section 37U, as long as a claim is not withdrawn or not yet finally determined or is substantiated if finally determined, the person making the claim will remain a

claimant, and a claimant may not be removed from Hong Kong to a torture risk State pursuant to the proposed section 37Z(1). The consequential amendments (i.e. clause 17 of the Bill) to the Fugitives Offenders Ordinance (Cap. 503) gives similar effect to staying the execution of a surrender order against a torture claimant while the assessment of the torture claim is being processed or pending the disposal of an appeal as applicable.

Permission to take employment (proposed section 37ZV)

64. The proposed section 37ZV of IO provides for a claimant of substantiated claim to apply for permission to take employment. D of Imm must not grant permission unless exceptional circumstances exist. Members have expressed concern about the factors to be considered by D of Imm in granting permission for such a claimant to take employment in Hong Kong.

65. The Administration has advised members that torture claimants, including claimants of substantiated claims, are prohibited from taking employment under the relevant provisions of IO if they are illegal immigrants or overstayers in Hong Kong. As regards claimants of substantiated claims, D of Imm may consider each case on its individual merits and take into account any strong compassionate or humanitarian reasons or other special extenuating circumstances in deciding whether to grant them permission to work on exceptional circumstances. In *MA & Ors v Director of Immigration*, when considering the D of Imm's exercise of discretion in granting permission to work exceptionally, CFI held that the considerations that the D of Imm should bear in mind include whether the claimant has no choice but has been stranded in Hong Kong for a very substantial period of time and has little prospect of departure in the immediately foreseeable future, and that the prolonged period of enforced unemployment may be detrimental to the claimant's mental health where there are materials to suggest it to be so. Where there are exceptional circumstances which may justify the granting of permission to work in the particular circumstances of a case, D of Imm may approve the claimant's application to take employment under the proposed section 37ZV.

Claimant not treated as ordinarily resident in Hong Kong (proposed section 37ZW)

66. The proposed section 37ZW of IO provides that without limiting section 2(4) of IO, a torture claimant is not to be treated as ordinarily resident in Hong Kong during any period in which the person remains in Hong Kong only by virtue of his torture claim. The Bills Committee has sought clarification on whether a torture claimant who enters Hong Kong legally or illegally would be

regarded as ordinarily resident in Hong Kong while waiting in Hong Kong for a determination on his claim. The Bills Committee has also asked whether a torture claimant who has remained in Hong Kong for more than seven years could argue that he should be treated as "ordinarily resident" during the period, particularly when he is given the permission to take employment.

67. According to the Administration, under common law, a period of unlawful stay cannot be counted as a period of ordinary residence. The unlawful stay of a person in Hong Kong is without D of Imm's permission and cannot be counted as ordinary residence under common law. While the stay of such person may be tolerated by D of Imm, such tolerance cannot be regarded as permission to stay so as to change the nature of his presence from unlawful to become lawful. In this regard, CFI held in *Domingo Irene Raboy v Commissioner of Registration and Registration of Persons Tribunal* (HCAL 127/2010) that the constitutionality of section 2(4)(a)(ii) of IO (by which a period of unlawful stay / in contravention of condition of stay is excluded from being treated as ordinary residence in Hong Kong) cannot be challenged in the light of the common law position on the matter. In essence, torture claimants' stay in Hong Kong is tolerated by D of Imm. It is unlawful throughout the material time which cannot be counted as ordinary residence. Even if a torture claim is substantiated, the non-refoulement obligation under Article 3 of CAT does not require parties to CAT to grant resident status to the claimant. In fact, a torture claimant's stay in Hong Kong remains unlawful even after the claim has been substantiated (although the removal of the person concerned will be withheld for the time being) and as such cannot be treated as a period of ordinary residence under common law. The proposed section 37ZW clearly specifies that a claimant's stay in Hong Kong must not be treated as ordinary residence in Hong Kong, whether or not the claim is substantiated and whether or not permission to work has been given under the proposed section 37ZV where exceptional circumstances exist. Likewise, the proposed section 37ZV(6) provides for the avoidance of doubt that a permission for a claimant to work given under the proposed section 37ZV must not be taken as D of Imm's permission for the claimant to remain in Hong Kong.

<u>Practice and procedure of Torture Claims Appeal Board (proposed schedule 1A)</u>

Appointment of members and composition of Appeal Board

68. The Bills Committee is concerned whether there is sufficient qualified and experienced persons for appointment as members of the Appeal Board in handling torture claims, especially when the Appeal Board may consist of only one member selected by the Chairperson for hearing and determining an appeal as provided in the proposed section 6 of Schedule 1A. Some members and the

Refugee Concern Network have queried about the fairness when appeals are handled by only one member in the Appeal Board proceedings. Members have suggested that the composition of the Appeal Board for the purposes of appeal be revised.

69. The Administration has responded that in *FB*, CFI pointed out that persons handling claims and appeals must receive training and possess knowledge on torture claims. When appointing members of the Appeal Board, the Chief Executive will ensure that all members meet the required qualifications and possess the ability to handle appeals. At present, all the eight adjudicators handling petitions are former judges or magistrates. The Bill also specifies that the Chairperson of the Appeal Board may, having regard to the circumstances of a particular case (e.g. complexity of the case), select three members to hear and determine the appeal. In the view of the Administration, an appropriate balance between effective handling of cases and ensuring fairness has been struck in the Bill.

70. As regards remuneration for members of the Appeal Board, the Bills Committee notes the Administration's proposal to draw reference to the remuneration level for magistrates (i.e. about $800 per hour).

Right to legal representation and provision of legal assistance

71. On whether a torture claimant may be legally represented at a hearing before the Appeal Board, the Administration has advised the Bills Committee that CFI held in *FB* that it is unlawful and in breach of D of Imm's duty to assess torture claims in accordance with high standards of fairness for not allowing the petitioner of a torture claim to be legally represented at an oral hearing. Hence, the right to legal representation of a torture claimant has been stated in the CFI's judgment.

72. The Bills Committee notes from the Administration that claimants may receive publicly-funded legal assistance through DLS. The scope of assistance includes assisting claimants in completing torture claim forms, attending screening interviews with them and explaining to them the ImmD's decisions. Claims considered meritorious by duty lawyers may continue to receive such assistance at petition stage. Members are concerned as to how decisions to provide legal assistance in the process of appeal are made and whether a claimant could seek a second legal opinion. According to the Administration, after assessment by duty lawyers, petitions without reasonable justifications will not be provided with publicly-funded legal assistance. Claimants may request DLS to arrange for re-assessment by another duty lawyer.

73. As to whether the provision of publicly-funded legal assistance should be set out in the Bill, the Administration has advised the Bills Committee that following the CFI's judgment in *FB*, ImmD has enhanced the torture screening mechanism under which publicly-funded legal assistance is available to torture claimants under a pilot scheme operated by DLS in late December 2009. At the end of 2010, considering that the pilot scheme has made a promising start during the first year, DLS has agreed to extend the scheme by two years until the end of 2012. The Administration considers it prudent and practical to accumulate necessary operational experience before deciding on the long-term arrangement.

Provision of information to appellant

74. In response to members' suggestion, the Administration will introduce CSAs to the proposed section 9 of Schedule 1A to require D of Imm to provide to the person who has lodged an appeal copies of the materials which D of Imm provides to the Appeal Board.

Evidence considered by Appeal Board

75. At the Bills Committee's request, the Administration has agreed to amend the proposed section 18 of Schedule 1A to specify that if the Appeal Board is satisfied that exceptional circumstances exist, it may consider evidence that was not previously before an immigration officer.

Handling of appeals from persons who have mental illness

76. Members have expressed concern whether claimants suffering from mental illness or trauma will be treated in an appropriate manner at the appeal stage. According to the Administration, all persons handling torture claims and appeals will receive training which includes the handling of claimants with special needs. They will process relevant cases appropriately and fairly in accordance with the guidelines. Where necessary, ImmD will make arrangements to assess claimants' mental state and provide them with suitable assistance by professionals in psychiatry or other related fields. If it is the view of a medical practitioner that a claimant is not suitable to attend the appeal hearing, the Appeal Board may obtain the relevant information by other means, e.g. written records, or it may postpone the handling of the appeal for the time being.

<u>False statements and forgery of documents (proposed section 42)</u>

77. Under the Bill, a person who makes a false statement or representation to

an immigration officer in the screening process of a torture claim commits an offence. The proposed maximum penalty for this offence is a fine of $150,000 and 14 years' imprisonment on conviction on indictment, and a fine at level 6 ($100,000) and two years' imprisonment on summary conviction. The Bills Committee notes the Society for Community Organization's ("SOCO") concern about the proposed offence in respect of claimants' making false statements due to trauma. According to the Administration, the extension of the scope of section 42 of IO to include torture claimants serves to prevent contravention of immigration control by making false statements and providing forged documents. The arrangement is consistent with ImmD's practice in exercising other statutory powers.

Disturbing proceedings of Appeal Board (proposed section 43A)

78. The proposed section 43A of IO provides that a person commits an offence if the person disturbs or otherwise interferes with the proceedings of the Appeal Board. The proposed maximum penalty for this offence is a fine at level 3 ($10,000) and six months' imprisonment. Some members and SOCO are concerned about the proposed provision, given the vague meaning of "disturbance" and "interference".

79. Having considered members' concern, the Administration has agreed to amend the proposed 43A to the effect that a person who, without reasonable excuse, disrupts the proceedings of the Appeal Board commits an offence and is liable to a fine at level 3 and to imprisonment for six months.

Recognizance as alternative to detention and recognizance form

80. The Bill proposes to amend section 36 of IO to enable conditions to be imposed and varied in relation to a recognizance entered into with a person liable to be detained (including a torture claimant) under IO, and amend the form of recognizance to be used for granting a recognizance under section 36 of IO in Schedule 1 to the Immigration Regulations (Cap. 115 sub. leg. A). The Bills Committee notes the concern of the Law Society and the Bar that non-compliance with the reporting condition in the prescribed form may result in torture claimants being in breach of their recognizance and liable to detention. Further, they are concerned that the proposed amendments may lead to prosecution of claimants for innocent reasons such as attending screening interviews on a wrong date.

81. The Administration has advised the Bills Committee that the conditions of recognizance that could be imposed by staff of ImmD are set out in the proposed section 36(1A) of IO. The Bills Committee has been assured that failure to

comply with the reporting condition imposed under the above section and set out in the recognizance form will not result in prosecution.

Transitional provisions (proposed Schedule 4)

82. The transitional provisions in the Bill, in particular the proposed sections 2 and 6 of Schedule 4 to IO, have given rise to concern of some members, the Law Society and the Bar. They consider that these provisions seek to deem things done under the existing administrative scheme as those under the Bill, but the Bill may provide greater protection and higher standards of fairness than the administrative scheme. One example of the potentially greater protection as provided in the proposed section 6(2) of Schedule 1A of the Bill is the possibility that the Chairperson of the Appeal Board may direct an appeal to be heard by three members of the Appeal Board. However, the administrative scheme does not allow for more than one adjudicator hearing a petition. There may be other differences between the procedure presently in place for the petition process and that of the Appeal Board which may be considered as fairer or at least potentially fairer than the present procedure.

83. The proposed section 6 of Schedule 4 stipulates that 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. Some members are concerned that the provision, if enacted, would have the effect of giving legal validity to a treatment or decision given or made in the determination of a torture claim under the administrative scheme even if the treatment or decision may not be regarded as fair or lawful. As such, claimants would be deprived of their right to judicial review and their protection for non-refoulement.

84. According to the Administration, screening procedures under the administrative and the statutory schemes are essentially the same. The mere fact that the statutory scheme provides further enhanced procedural safeguards does not render the protection afforded by the existing administrative scheme inadequate or ineffective. For example, in respect of the number of adjudicators/ Appeal Board members to consider a petition/appeal, CAT does not require a torture claim or a petition/appeal by an aggrieved claimant to be considered by a specific number of adjudicators. The mere fact that a petition/appeal is considered by one adjudicator/Appeal Board member does not make its procedure "less fair" to the claimant concerned.

85. The Administration has stressed that it has no intention to legalize any unfair treatment or decision by immigration officers in respect of torture claims. Any decision on a torture claim under the existing administrative scheme will be subject to judicial review if a decision is reached in an unfair manner. This position will not be affected by the proposed section 6 of Schedule 4. Any decisions on torture claims under the statutory scheme will similarly be subject to judicial review if a decision is reached in an unfair manner. Therefore, the Administration considers that there is no legalization of any unfair treatment or decision under the administrative scheme by virtue of the proposed section 6 of Schedule 4.

86. In the Administration's view, the proposed transitional provisions ensure that claimants' rights will be protected under the statutory scheme after the coming into operation of the Bill, if enacted, and that all torture claims will continue to be processed in a fair and effective manner under the statutory scheme by reducing procedural abuse.

87. Some members are still concerned whether the proposed section 6 of Schedule 4 as presently drafted could clearly reflect the Administration's policy intent. In this regard, the Administration will add a provision to Schedule 4 to make it clear that nothing in this Schedule is to be construed as giving validity to anything done otherwise than in the lawful exercise of a power or performance of a duty.

Schooling arrangements and education support to tortures claimants

88. As for the schooling arrangements, the Bills Committee has been advised that the Education Bureau allows torture claimants under the age of 18 to attend schools on a discretionary basis, taking into consideration the circumstances of each case (including age and whether removal may take place in the near future, etc.). At present, torture claimants applying for admission to school are mostly from South Asian and Southeast Asian countries, including Sri Lanka, Pakistan, Indonesia and the Philippines. As at the end of November 2011, about 130 claimants have applied for schooling and no application has been rejected. The Education Bureau makes arrangements for them to study in suitable schools, as far as possible, based on the circumstances of each case. Measures taken by schools to assist them in integrating into school life include employing non-Chinese teaching assistants, assigning "peer mentors", small group teaching, and "Big Brothers and Sisters" Scheme. The Student Financial Assistance Agency will also consider applications for tuition fee subsidy on a need basis.

Committee Stage amendments

89. Apart from the CSAs referred to in the above paragraphs, the Administration will move consequential or technical amendments to the Bill. A full set of the draft CSAs to be moved by the Administration is in **Appendix III**.

90. Dr Hon Margaret NG has indicated that she will propose CSAs to amend the proposed 28-day timeframe for return of the completed torture claim forms by torture claimants (paragraph 19 above refers).

91. The Bills Committee will not propose any CSAs to the Bill.

Resumption of Second Reading debate on the Bill

92. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 13 June 2012, subject to the moving of the CSAs by the Administration. Hon Emily LAU has expressed the view that the resumed debate on the Bill should take place after the Law Society and the Bar have reverted their views on the proposed 28-day timeframe for torture claimants to return their torture claim forms.

Advice sought

93. Members are invited to note the deliberations of the Bills Committee and the date for the resumption of the Second Reading debate on the Bill.

Council Business Division 2
Legislative Council Secretariat
31 May 2012

Appendix I

Bills Committee on Immigration (Amendment) Bill 2011

Membership list

Chairman	Hon LAU Kong-wah, JP
Members	Dr Hon Margaret NG Hon James TO Kun-sun Dr Hon Philip WONG Yu-hong, GBS Hon WONG Yung-kan, SBS, JP Hon Emily LAU Wai-hing, JP Hon Abraham SHEK Lai-him, SBS, JP Hon Cyd HO Sau-lan Hon CHAN Hak-kan Hon WONG Kwok-kin, BBS Dr Hon PAN Pey-chyou Hon Paul TSE Wai-chun, JP (Total : 12 Members)
Clerk	Mrs Sharon TONG
Legal Adviser	Ms Connie FUNG

Appendix II

Bills Committee on Immigration (Amendment) Bill 2011

A. Organizations which have made oral representation to the Bills Committee

1. Christian Action
2. Hong Kong Human Rights Monitor
3. The Law Society of Hong Kong
4. Hong Kong Bar Association
5. The Federation of Hong Kong & Kowloon Labour Unions
6. Refugee Concern Network
7. Society for Community Organization
8. Asylum Seekers' and Refugees' Voice
9. Hong Kong Construction Industry Employees General Union
10. Beyond Asylum

B. Organization and individual which/who have provided written submissions only

1. Duty Lawyer Service
2. Mr Che Singh KOCHHAR-GEORGE

Appendix III

Immigration (Amendment) Bill 2011

Committee Stage

Amendments to be moved by the Secretary for Security

Clause	Amendment Proposed
4(3)	In the proposed section 17I(2)(c), in the Chinese text, by deleting "時限屆滿"and substituting "失效".
7	In the proposed section 37U(1), by deleting the definition of ***revocation decision*** and substituting— "***revocation decision*** (撤銷決定) means— (a) a decision made by an immigration officer under section 37ZL(1); or (b) a decision made by the Appeal Board under section 37ZLA(1);".
7	In the proposed section 37U(1), in the definition of ***substantiated claim***, in paragraph (a), by adding "and in respect of which no revocation decision has been made by an immigration officer" before "; or".
7	In the proposed section 37U(1), in the definition of ***substantiated claim***, in paragraph (b)(i), by adding "and no revocation decision has been made by the Appeal Board" before "; or".
7	In the proposed section 37U(1), in the definition of ***substantiated claim***, in paragraph (b)(ii), by adding "by an immigration officer" after "was made".

7 In the proposed section 37V(1), by deleting “(3) and (4)” and substituting “(3), (4) and (5)”.

7 In the proposed section 37V(3), by adding “by an immigration officer” after “is made”.

7 In the proposed section 37V, by adding—

“(5) If a revocation decision is made by the Appeal Board in respect of a substantiated claim, the claim must be treated as finally determined on the making of that decision.”.

7 In the proposed section 37ZB(1), by deleting “may”.

7 In the proposed section 37ZB(1)(a), by adding “may” before “require”.

7 In the proposed section 37ZB(1)(a), by deleting “; or” and substituting “; and”.

7 In the proposed section 37ZB(1)(b), by adding “must” before “require”.

7 By deleting the proposed section 37ZE(4)(a) and (b) and substituting—

“(a) the decision;

(b) the reasons for the decision; and

(c) the person’s right under section 37ZP to appeal against the decision.”.

7 By deleting the proposed section 37ZG(5)(a) and (b) and substituting—

"(a) the decision;

(b) the reasons for the decision; and

(c) the person's right under section 37ZP to appeal against the decision.".

7 In the proposed section 37ZG(7), in the Chinese text, by adding "有關" after "適用於".

7 In the proposed section 37ZG(8), in the Chinese text, by adding "有關" after "如就".

7 By deleting the proposed section 37ZI(5) and substituting—

"(5) In determining whether there are substantial grounds for the belief referred to in subsection (3), all relevant considerations are to be taken into account, including, where applicable, the following matters in relation to the conditions in the torture risk State—

(a) whether there is a consistent pattern of gross, flagrant or mass violations of human rights in the torture risk State; and

(b) whether there is any region within the torture risk State in which the claimant would not be in danger of being subjected to torture.".

7 In the proposed section 37ZL, in the heading, by deleting "**decision to accept torture claim etc.**" and substituting "**immigration officer's decision to accept torture claim**".

7 By deleting the proposed section 37ZL(1) and substituting—

"(1) An immigration officer may, on a ground for a revocation decision specified in section 37ZLB, revoke a decision made by an immigration officer under section 37ZI(1)(a) accepting a torture claim as substantiated.".

7 By deleting the proposed section 37ZL(2).

7 In the proposed section 37ZL(4)(a) and (b), by deleting "(1)(a) or (b)" and substituting "(1)".

7 By deleting the proposed section 37ZL(5).

7 By adding—

"**37ZLA. Revocation of Appeal Board's decision to reverse decision rejecting torture claim**

(1) On an application made by an immigration officer, the Appeal Board may, on a ground for a revocation decision specified in section 37ZLB, revoke its decision that reversed a decision made by an immigration officer under section 37ZI(1)(b) rejecting a torture claim.

(2) Before making an application under subsection (1), an immigration officer must give the claimant written notice of the intended application, and the notice must—

(a) state the reasons for the intended application; 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 intended application and the reasons for the objection (***objection notice***).

(3) If—

(a) the claimant has not given an objection notice in accordance with subsection (2)(b) and an immigration officer decides to make an application under subsection (1); or

(b) after having considered the claimant's objection notice, an immigration officer

decides to make an application under subsection (1),

the immigration officer must make the application by filing with the Appeal Board a notice of application in a form specified by the Chairperson of the Appeal Board.

(4) As soon as practicable after the filing of a notice of application, an immigration officer must serve on the claimant a copy of the notice of application.

37ZLB. Grounds for revocation decision

A ground specified in any of the following paragraphs is a ground for a revocation decision mentioned in section 37ZL(1) or 37ZLA(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;

(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.".

7 By deleting the proposed section 37ZO(2) and substituting—

"(2) The function of the Appeal Board is to hear and determine—

(a) an appeal made under section 37ZP; and

(b) an application for a revocation decision under section 37ZLA.".

7 By adding before the proposed section 37ZP(a)—

"(aa) section 37ZE(4) or 37ZG(5) (decision not to re-open a torture claim);".

7 In the proposed section 37ZP(b), by adding "made by an immigration officer" after "decision".

7 In the proposed section 37ZT(2), in the Chinese text, by deleting "經" and substituting "在以下時間".

7 In the proposed section 37ZW, in the Chinese text, by deleting "為施行本條例，任何人不得只憑藉其酷刑聲請，而視為在該人留在香港的任何期間屬通常居於香港" and substituting "就本條例而言，任何人在只憑藉其酷刑聲請而留在香港的任何期間內，不得被視為通常居於香港".

7 By adding—

"**37ZX. Savings and transitional arrangements**

Schedule 4 provides for the savings and transitional arrangements that apply on, or relate to, the commencement of the Immigration (Amendment) Ordinance 2012 (of 2012).".

10 By deleting the proposed section 43A and substituting—

"**43A. Disrupting proceedings of Torture Claims Appeal Board**

A person who, without reasonable excuse, disrupts 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.".

12 In the proposed Schedule 1A, by deleting "[ss. 37U, 37ZL" and substituting "[ss. 37U".

12 In the proposed Schedule 1A, in section 1(1), by adding—

"***appeal*** (上訴) means—

(a) an appeal made under section 37ZP; or

(b) an application for a revocation decision under section 37ZLA;".

12 In the proposed Schedule 1A, in section 2(5), by deleting "under section 37ZP".

12 In the proposed Schedule 1A, in the Chinese text, in section 2(5), by deleting "訴。" and substituting "訴，".

12 In the proposed Schedule 1A, in the Chinese text, in section 8(1), by deleting "在第(2)款的規限下" and substituting "除第(2)款另有規定外".

12 In the proposed Schedule 1A, in section 8(1), by adding "filed under section 37ZQ(1)" after "notice of appeal".

12 In the proposed Schedule 1A, in section 8(2), by adding "under section 37ZQ(1)" after "notice of appeal".

12 In the proposed Schedule 1A, by renumbering section 9 as section 9(1).

12 In the proposed Schedule 1A, in section 9(1), by adding "and the person who has lodged the appeal" after "provide to the Appeal

Board".

12 In the proposed Schedule 1A, in section 9(1)(a)(ii), by deleting "or".

12 In the proposed Schedule 1A, in section 9(1)(b), by adding "of an immigration officer under section 37ZL(1)" after "revocation decision".

12 In the proposed Schedule 1A, in the Chinese text, in section 9(1)(b)(ii), by adding "該" after "考慮".

12 In the proposed Schedule 1A, in the Chinese text, in section 9(1)(b)(iii), by adding "該" after "接納".

12 In the proposed Schedule 1A, in the Chinese text, in section 9(1)(b)(iv), by adding "該" after "撤銷".

12 In the proposed Schedule 1A, in section 9(1)(b)(v), by deleting the full stop and substituting a semicolon.

12 In the proposed Schedule 1A, in section 9(1), by adding—

"(c) if the decision being appealed against is a decision under section 37ZE(4) not to re-open a torture claim withdrawn by the person who made the claim—

(i) a copy of any completed torture claim form relating to the torture claim;

(ii) a copy of the written record of any interview of the person conducted by an immigration officer in considering the torture claim;

(iii) a copy of the person's notice withdrawing the claim; and

(iv) a copy of any evidence in writing provided by the person under section 37ZE(2); or

(d) if the decision being appealed against is a decision under section 37ZG(5) not to re-open a torture claim treated as withdrawn on a person's failure to return a completed torture claim form—

(i) a copy of the written notice under section 37ZG(2) informing the person that the claim is treated as withdrawn; and

(ii) a copy of any evidence in writing provided by the person under section 37ZG(3).".

12 In the proposed Schedule 1A, in section 9, by adding—

"(2) The Director must, as soon as practicable after filing with the Appeal Board a notice of application for a revocation decision under section 37ZLA(3), provide to the Appeal Board and the claimant—

(a) a copy of the completed torture claim form relating to the torture claim in respect of which the application is made;

(b) a copy of the written record of any interview of the claimant conducted by an immigration officer in considering the torture claim;

(c) a copy of the written notice under section 37ZJ(1) informing the claimant of an immigration officer's decision rejecting the torture claim;

(d) a copy of the written decision given under section 21(2) of this Schedule reversing an immigration officer's decision rejecting the torture claim;

(e) a copy of the written notice under section 37ZLA(2) informing the claimant of an intended application for a revocation decision to be made by the Board; and

(f) a copy of the claimant's objection notice (if any) referred to in section 37ZLA(2)(b).".

12 In the proposed Schedule 1A, in the Chinese text, in section 14(1), by deleting everything after "送達" and before "的副本" and substituting "載有處長將會在聆訊中倚據的所有文件的文件冊(包括將會作出的陳述)，且須將該文件冊".

12 In the proposed Schedule 1A, in section 18, in the heading, by adding "**in an appeal under section 37ZP**" after "**Board**".

12 In the proposed Schedule 1A, in section 18(1), by adding "under section 37ZP" after "an appeal".

12 In the proposed Schedule 1A, in section 18(2)(a), by deleting "or".

12 In the proposed Schedule 1A, in the Chinese text, in section18(2)(b), by deleting "按理並不可" and substituting "並非可在合理情況下".

12 In the proposed Schedule 1A, in section18(2)(b), by deleting "made." and substituting "made; or".

12 In the proposed Schedule 1A, in section 18(2), by adding —

"(c) the Board is satisfied that exceptional circumstances exist that justify the consideration of the evidence.".

12 In the proposed Schedule 1A, by deleting section 18(3).

12 In the proposed Schedule 1A, by adding —

"**19A. Evidence considered by Appeal Board in an application for revocation decision**

In an application for a revocation decision under section 37ZLA, the Appeal Board—

(a) has the power to review the merits of the case; and

(b) may consider any evidence that the Board considers relevant.

19B. Evidence on oath etc.

For the purposes of sections 18 and 19A of this Schedule, 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).".

12 In the proposed Schedule 1A, in section 21, by adding—

"(1A) On an application for a revocation decision under section 37ZLA, the Appeal Board may allow or refuse the application.".

13 In the proposed Schedule 4, by deleting "**Schedule 4**" and substituting—

"**Schedule 4** [s. 37ZX]".

13 In the proposed Schedule 4, in section 1, by adding—

"(4) To avoid doubt, nothing in this Schedule is to be construed as giving validity to anything done otherwise than in the lawful exercise of a power or performance of a duty.".

13 In the proposed Schedule 4, in the Chinese text, by deleting section 2(4)(a) and substituting—

"(a) 須視為符合以下說明的酷刑聲請：該酷刑聲請遭根據第37ZI(1)(b)條作出的決定駁回，而該決定獲上訴委員會確認；及".

13 In the proposed Schedule 4, in the Chinese text, in section 7, by deleting "就視為根據本附表提出及繼續的酷刑聲請" and substituting "就根據本附表視為酷刑聲請並得以繼續".

13 In the proposed Schedule 4, in Table of Transitional Provisions, in item 10, by deleting "37ZL" and substituting "37ZLA".

14 In the proposed Form No. 8, by deleting "36(1A)" (wherever appearing) and substituting "36(1)".