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Panel on Security

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 2 July 2013**

Torture claim screening

Purpose

This paper provides background information and summarizes past discussions of Members on torture claim screening.

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.

Administrative mechanism for handling torture claims

3. In the past, torture claims made under Article 3 of CAT were handled by the Immigration Department in accordance with a set of administrative procedures. The administrative mechanism had 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), 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 blanket policy of

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

Enhancement of the administrative screening mechanism

4. In December 2008, CFI decided in a judicial review case that the screening procedures put in place by the Administration were unable to meet the high standards of fairness for reasons including the following -

- (a) the Administration had not provided publicly-funded legal assistance to needy claimants;
- (b) the officer who decided whether a claim was substantiated was not the one who interviewed the claimant; and
- (c) the Administration had not arranged for oral hearings of the petitions lodged by claimants who were dissatisfied with the result of the screening.

5. The screening process was suspended following CFI's judgment. The Administration decided to improve the appeal mechanism by appointing retired judges and magistrates to handle petitions lodged against the decisions made in relation to screening by decision makers with a legal background and relevant experience.

6. The Administration subsequently implemented the enhanced mechanism in December 2009. The enhanced mechanism incorporated the provision of publicly-funded legal assistance to torture claimants through the Duty Lawyer Service, enhanced training for decision makers and the establishment of a new petition procedure involving adjudicators with legal background who may conduct oral hearing if required.

Establishment of a legislative regime for handling torture claims

7. In the concluding observations of the United Nations Committee Against Torture ("the CAT Committee") on the "Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two : Hong Kong Special Administrative Region", the CAT Committee recommended, among others, that the Hong Kong Special Administrative Region Government should

incorporate the provisions in Article 3 of CAT under the Crimes (Torture) Ordinance (Cap. 427) and consider adopting a legal regime with a view to establishing a comprehensive and effective procedure to examine thoroughly the merits of each torture claim when determining the applicability of its obligations under Article 3 of CAT.

8. When the review of the torture claim screening mechanism was discussed by the Panel on Security ("the Panel"), some members called for the establishment of a proper regime for handling torture claims. According to the Administration, it was considering the CAT Committee's recommendations of putting in place a legislative regime for handling torture claimants and covering the non-refoulement principle under Article 3 of CAT. The Panel noted at its meeting on 6 July 2009 that the Administration planned to introduce legislation on torture claim screening procedures, such that the procedures would be based on clear statutory provisions.

9. Following the introduction of the Immigration (Amendment) Bill 2011 into the Legislative Council ("LegCo") on 13 July 2011 and the scrutiny by a Bills Committee, the Immigration (Amendment) Ordinance 2012 ("the Amendment Ordinance") was enacted in July 2012 and came into operation on 3 December 2012. The Amendment Ordinance provides for a statutory process for making and determining claims, including how a torture claim is made, the time limit for a claimant to return the torture claim form, the requirements for the Immigration Department to arrange screening interviews and issue written notices of decision, etc. It also provides that a claimant who was aggrieved by the decision might lodge an appeal, which would be handled by a statutory Torture Claims Appeal Board.

10. Under the statutory mechanism, after a claimant has submitted the grounds of the claim and supporting facts in a torture claim form, the responsible immigration officer must arrange a screening interview for the claimant to further provide information and answer questions relating to the claim. Decisions on torture claims must be given to claimants in the written form and with reasons for the decisions. Claimants aggrieved by such decisions have a right to lodge an appeal to the Torture Claims Appeal Board, which may decide to hold an oral hearing if it considers that the appeal cannot be justly determined otherwise.

11. The Amendment Ordinance provides that, among other things, a torture claim must be accepted as substantiated if there are substantial grounds for believing that the claimant would be in danger of being subjected to torture if removed or surrendered to a torture risk country, and all relevant considerations

are to be taken into account in determining a torture claim.

12. In the course of deliberations of the Bills Committee to study the Amendment Ordinance, members expressed concern that, among other things, the Administration should not restrict claims for non-foulement protection in Hong Kong to be lodged only when claimants were subject to removal. Such a provision might invite claimants to overstay before they would be eligible for lodging torture claims and seeking legal assistance. The Administration explained that non-foulement protection under Article 3 of CAT only applied to a person who was subject to removal.

13. Since the enactment of the Amendment Ordinance, the Panel has not discussed the screening of torture claims under the statutory framework. However, two questions on the handling of torture claims had been raised by Members at the Council meetings of 21 November 2012 and 20 February 2013. The questions and the Administration's replies are in **Appendices I and II**.

Latest development

14. The Administration will brief the Panel on the screening of non-refoulement claims at the meeting on 2 July 2013.

Relevant papers

15. A list of relevant papers available on the LegCo website is in **Appendix III**.

Press Releases

Appendix I

LCQ10: Torture Claims

Following is a written reply by the Secretary for Security, Mr Lai Tung-kwok, to a question by the Hon Dennis Kwok in the Legislative Council today (November 21):

Question:

Since December 2009, the Government has implemented an "enhanced screening mechanism", which is a non-statutory and administrative scheme (the Current Mechanism), for handling torture claims made under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Even though the claimants have access to legal representation under the Current Mechanism, there has not been one successful claim so far. The Immigration (Amendment) Ordinance 2012 (Amendment Ordinance), which provides for a statutory process for making and determining claims, will come into operation on December 3, 2012. In this connection, will the Government inform this Council:

(a) given that there has not been a successful claim under the Current Mechanism so far, whether it has reviewed the effectiveness of the assessment criteria under the Current Mechanism in identifying persons in danger of being subjected to torture and protecting them from torture in accordance with CAT; if it has, of the outcome and details of the review; if not, the reasons for that; and

(b) whether the assessment criteria to be employed to weigh the relevant considerations as set out in the Amendment Ordinance are different from those employed under the Current Mechanism; if not, of the reasons for that; if so, what the differences are, whether it has assessed if the number of successful claims will increase upon the commencement of the Amendment Ordinance, and how it will monitor the new assessment criteria's effectiveness in identifying persons in danger of being subjected to torture and protecting them from torture in accordance with CAT?

Reply:

President,

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention) has been applied to Hong Kong since 1992. Under Article 3 of the Convention, a person should not be expelled, returned or extradited to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Torture claims made under the Convention in Hong Kong are handled by the Immigration Department (ImmD).

Since December 2009, the ImmD, following consultation with the legal profession and drawing reference to similar mechanisms in major common-law jurisdictions, has introduced an enhanced screening mechanism for torture claims (enhanced mechanism) to ensure that screening procedures would meet the "high standards of fairness" as required by the Court. Enhancements introduced include the provision of publicly-funded legal assistance to claimants, new petition procedures involving adjudicators with legal background determining petitions with oral hearings where fairness so requires, and enhanced training for immigration officers and adjudicators responsible for making decisions on claims and petitions respectively.

Publicly-funded legal assistance through the Duty Lawyer Service is available to each claimant upon application. At present, over 260 barristers and solicitors, who have received training on handling torture claims, are on a roster to provide legal assistance to claimants throughout the entire screening process.

Our reply to the various parts of the question is as follows:

(a) Under the current enhanced mechanism, as required by "high standards of fairness", claimants are given every reasonable opportunity to establish their claims, including submitting detailed grounds through a questionnaire with supporting documents or evidence; attending a screening interview with immigration officers to further provide information or answer questions; and making further representations to adjudicators, who are all former judges or magistrates, at petitions.

In determining whether there are substantial grounds for believing that a torture risk exists, the responsible immigration officer (and adjudicator on petitions) must consider the individual circumstances of each claim and take into account all relevant considerations. In this regard, all information provided by the claimant, including the grounds for the claim and any further submissions with supporting documentary evidence, together with other objective information, such as country of origin information, will all be considered as required by "high standards of fairness". Reference will also be drawn to relevant case law, as well as other relevant materials applicable to the individual claim, including the United Nations Committee against Torture's General Comments on the implementation of the Convention and decisions on individual cases.

Following Article 3 of the Convention, if the claimant can establish that there are substantial grounds for believing that there is a foreseeable, real and personal risk of him being subjected to torture in the torture risk country, the claim will be accepted as substantiated.

Each decision on a claim must be made individually, taking into account all relevant considerations including personal circumstances provided by the claimant. Whether a torture claim may be established by the claimant is a matter which depends entirely on the particular circumstances of a case. It is not apparent that there should be any correlation between the number of substantiated claims and the standard of fairness or effectiveness of the screening procedures.

(b) The Immigration (Amendment) Ordinance 2012, enacted in July 2012, will come into operation in December 2012. It provides for a statutory framework to underpin the current enhanced mechanism for determining torture claims, which includes the establishment of the Torture Claims Appeal Board ("the Appeal Board") to hear appeals against refusal decisions on claims.

Under the statutory mechanism, after a claimant has submitted the grounds of the claim and supporting facts in a torture claim form, the responsible immigration officer must arrange a screening interview for the claimant to further provide information and answer questions relating to the claim. Decisions on torture claims must be given to claimants in the written form and with reasons for the decisions. Claimants aggrieved by such decisions have a right to lodge an appeal to the Appeal Board, which may decide to hold an oral hearing if it considers that the appeal cannot be justly determined otherwise.

The amended Ordinance provides that, among other things, a torture claim must be accepted as substantiated if there are substantial grounds for believing that the claimant would be in

danger of being subjected to torture if removed or surrendered to a torture risk country, and all relevant considerations are to be taken into account in determining a torture claim.

Immigration officers responsible for assessing torture claims and the Appeal Board will continue to consider each claim on its own merits by taking into account all relevant considerations, including those set out in (a) above, in accordance with the requirement of "high standards of fairness" as laid down by the Court and relevant provisions under the amended Ordinance.

Ends/Wednesday, November 21, 2012
Issued at HKT 15:27

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Press Releases

Appendix II

LCQ14: Torture claims

Following is a written reply by the Secretary for Security, Mr Lai Tung-kwok, to a question by the Hon Dennis Kwok in the Legislative Council today (February 20):

Question:

Since December 2009, the Government has implemented the "enhanced screening mechanism", a non-statutory and administrative scheme, for handling torture claims made under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that a person should not be expelled, returned or extradited to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Under the mechanism, claimants may submit detailed grounds to establish their torture claims through a questionnaire with supporting documents or evidence (questionnaire stage). They will then be invited to attend a screening interview with immigration officers to further provide information or answer questions (interview stage). If they are aggrieved by the authorities' decisions on their claims, they may lodge petitions (petition stage). In this connection, will the Government inform this Council:

(a) among the torture claims received in each of the past three years, of the respective numbers of those which (i) had been processed, (ii) are currently outstanding, and (iii) had been withdrawn, with a breakdown by the country of origin of the claimants, set out in the table of the Question Annex;

(b) in each of the past three years, of the respective numbers of claimants (i) who had submitted the aforesaid questionnaire, (ii) whose claims had been rejected after the questionnaire stage, (iii) who had proceeded to the interview stage, (iv) whose claims had been rejected after the interview stage, (v) who had lodged petitions, and (vi) whose petitions had been rejected;

Stage of the screening process	Number of claimants involved		
	2010	2011	2012
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(i) Claimants who had submitted a questionnaire			
(ii) Claimants whose claims had been rejected after the questionnaire stage			
(iii) Claimants who had proceeded to the interview stage			
(iv) Claimants whose claims had been rejected after the interview stage			
(v) Claimants who had lodged petitions			
(vi) Claimants whose petitions had been rejected			

(c) of a breakdown of the torture claims which were rejected in the past three years by the reason for rejection; and

(d) among the claimants who had submitted torture claims in each of the past three years, of (i) the number of claimants who had departed from Hong Kong voluntarily, and (ii) the number of claimants who were deported, with a breakdown by the country of origin (same as those set out in the table in (a) above) of the claimants, set out in the table below?

Country of origin	Year	Number of claimants who		Total
		(i) departed from Hong Kong voluntarily	(ii) were deported	
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	2010			
	2011			
	2012			

Reply:

President,

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) has been applied to Hong Kong since 1992. The Immigration Department (ImmD) introduced an enhanced screening mechanism in December 2009 to ensure the procedures meet the high standards of fairness as required by the Court. Subsequently, the Legislative Council enacted the Immigration (Amendment) Ordinance 2012 (the Ordinance) in July 2012 to provide for a statutory framework to underpin the enhanced administrative mechanism. The statutory mechanism has commenced operation on December 3, 2012.

Under the enhanced screening mechanism and the current statutory mechanism, claimants are given every reasonable opportunity to establish their claims, including submission of detailed grounds of the claim and supporting facts in a torture claim form, and provision of further information and answering questions relating to the claim at a screening interview. Publicly-funded legal assistance is made available to all torture claimants through the Duty Lawyer Service (DLS). When the ImmD makes a decision on torture claims, it must inform the claimants of the reasons for its decision in written form. Claimants aggrieved by ImmD's decisions have a right to lodge an appeal to the Torture Claims Appeal Board (or Adjudicators who handled petitions before the commencement of the Ordinance). Both comprise retired judges and magistrates.

My reply to the various parts of the question is as follows:

(a) The ImmD received 1 809, 1 432 and 1 174 torture claims in 2010, 2011 and 2012 respectively. The majority of claimants came from countries in South or Southeast Asia, including Indonesia (27%), Pakistan (19%), India (18%), the Philippines (10%), Bangladesh (6%), Nepal (4%) and Sri Lanka (4%). Detailed figures are at Reply Annex Table A.

(b) Since December 2009, all torture claims (including those received before December 2009) have been screened under the enhanced screening mechanism and the subsequent statutory screening mechanism as described in paragraph 2 above. As at the end of 2012, the ImmD has decided on 2 715 cases. Among them 1 330 petitions/appeals have been lodged, 1 183 of those have been determined (all dismissed); 27 have been withdrawn and 120 are pending determination.

(c) In deciding on torture claims, the ImmD must consider, in accordance with the "high standards of fairness" as required by the Court and the requirement stipulated in section 37ZI of the Immigration Ordinance, merits of individual claims and take into account all relevant considerations including the situation in

the relevant country. If the ImmD is satisfied that there are substantial grounds for believing that a claimant would be subject to a personal risk of being tortured if removed or surrendered to a torture risk State, it must accept the claim as substantiated; otherwise, the claim must be rejected.

(d) A claimant may not be removed from Hong Kong to a torture risk State unless his claim is withdrawn or is not a substantiated claim on final determination. From December 2009 to end December 2012, 1 159 torture claimants whose claim has been finally determined as unsubstantiated have been removed or deported from Hong Kong. Detailed figures are at Reply Annex Table B.

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LCQ 14
Question Annex

Country of origin	Year in which the torture claims were received	Number of torture claims which			
		(1) had been processed	(2) are currently outstanding	(3) had been withdrawn	Total
Republic of Congo	2010				
	2011				
	2012				
Democratic Republic of the Congo	2010				
	2011				
	2012				
Somalia	2010				
	2011				
	2012				
Pakistan	2010				
	2011				
	2012				
Sri Lanka	2010				
	2011				
	2012				
Ghana	2010				
	2011				
	2012				
Uganda	2010				
	2011				
	2012				
Rwanda	2010				
	2011				
	2012				
Republic of Southern Sudan	2010				
	2011				
	2012				
Sudan	2010				
	2011				
	2012				

Eritrea	2010				
	2011				
	2012				
Ethiopia	2010				
	2011				
	2012				
India	2010				
	2011				
	2012				
Bangladesh	2010				
	2011				
	2012				
Cameroon	2010				
	2011				
	2012				
Indonesia	2010				
	2011				
	2012				
Côte d'Ivoire	2010				
	2011				
	2012				
Central African Republic	2010				
	2011				
	2012				
Sierra Leone	2010				
	2011				
	2012				
Togo	2010				
	2011				
	2012				
Philippines	2010				
	2011				
	2012				
Nepal	2010				
	2011				
	2012				
Myanmar/ Burma	2010				
	2011				
	2012				
Others	2010				
	2011				
	2012				

Total	2010				
	2011				
	2012				

LCQ 14
Reply Annex**Table A: Number of torture claims - by country of origin**

Country of Origin	Torture Claims Received				(as at December 31, 2012)		
	2010	2011	2012	Total	(1) Had been determined by ImmD	(2) Were outstanding	(3) Had been withdrawn
Indonesia	550	413	234	1197	493	327	377
Pakistan	332	294	230	856	335	360	161
India	294	225	266	785	270	231	284
Philippines	182	151	93	426	245	100	81
Bangladesh	67	44	101	212	57	111	44
Nepal	119	30	12	161	63	54	44
Sri Lanka	57	58	21	136	37	64	35
<i>Sub-total</i>	<i>1 601</i>	<i>1 215</i>	<i>957</i>	<i>3 773</i>	<i>1 500</i>	<i>1 247</i>	<i>1 026</i>
Democratic Republic of the Congo	6	9	3	18	2	12	4
Somalia	7	3	3	13	1	7	5
Ghana	8	5	3	16	5	10	1
Uganda	15	27	14	56	2	41	13
Rwanda	2	2	0	4	0	2	2
Eritrea	1	3	2	6	0	4	2
Ethiopia	1	1	1	3	0	3	0
Cameroon	2	1	0	3	3	0	0
Côte d'Ivoire	1	0	0	1	0	1	0
Sierra Leone	1	1	0	2	0	1	1
Togo	11	13	14	38	0	37	1
Myanmar/ Burma	1	0	0	1	0	1	0
<i>Sub-total</i>	<i>56</i>	<i>65</i>	<i>40</i>	<i>161</i>	<i>13</i>	<i>119</i>	<i>29</i>
Others	152	152	177	481	33	324	124
Total	1 809	1 432	1 174	4 415	1 546	1 690	1 179

Table B: Number of removal of torture claimants whose claim has been finally determined as unsubstantiated - by country of origin

Country of Origin	Number of persons deported / removed			
	2010	2011	2012	2010-2012 Total
Indonesia	9	103	238	350
Pakistan	17	62	102	181
India	15	64	106	185
Philippines	2	84	92	178
Bangladesh	6	50	38	94
Nepal	4	42	54	100
Sri Lanka	2	16	40	58
<i>Sub-total</i>	<i>55</i>	<i>421</i>	<i>670</i>	<i>1 146</i>
Ghana	0	0	1	1
Cameroon	0	1	1	2
<i>Sub-total</i>	<i>0</i>	<i>1</i>	<i>2</i>	<i>3</i>
Others	1	4	5	10
Total	56	426	677	1 159

Appendix III

Relevant papers on Torture claim screening

Committee	Date of meeting	Paper
Panel on Welfare Services and Panel on Security	18.7.2006 (Item II)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	31.7.2006 (Item I)	<u>Agenda</u> <u>Minutes</u> <u>LC Paper CB(2)2994/05-06(01)</u> <u>LC Paper CB(2)526/06-07(01)</u>
	5.12.2006 (Item V)	<u>Agenda</u> <u>Minutes</u> <u>LC Paper CB(2)2429/07-08(01)</u>
	27.10.2008 (Item IV)	<u>Agenda</u> <u>Minutes</u> <u>LC Paper CB(2)366/08-09(01)</u> <u>LC Paper CB(2)433/08-09(01)</u>
	3.2.2009 (Item IV)	<u>Agenda</u> <u>Minutes</u>
	6.7.2009 (Item III)	<u>Agenda</u> <u>Minutes</u>
	29.9.2009 (Item I)	<u>Agenda</u> <u>Minutes</u>
	1.12.2009 (Item IV)	<u>Agenda</u> <u>Minutes</u>
	12.4.2011 (Item IV)	<u>Agenda</u> <u>Minutes</u>

Committee	Date of meeting	Paper
Bills Committee on Immigration (Amendment) Bill 2011	--	<u>Report of the Bills Committee to the Legislative Council</u>
Legislative Council	21.11.2012	<u>Official Record of Proceedings (Question 10)</u>
	20.2.2013	<u>Official Record of Proceedings (Question 14)</u>

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