

**立法會**  
**Legislative Council**

LC Paper No. CB(2)1617/15-16(04)

Ref : CB2/PL/SE

**Panel on Security**

**Updated background brief prepared by the Legislative Council Secretariat  
for the meeting on 7 June 2016**

**Reports of the Hong Kong Special Administrative Region  
under the United Nations Convention Against Torture  
and other Cruel, Inhuman or Degrading Treatment or Punishment**

**Purpose**

This paper provides background information on reports of the Hong Kong Special Administrative Region ("HKSAR") to the United Nations Committee Against Torture ("the CAT Committee") under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention") and summarizes past discussions of the Panel on Security ("the Panel") on the subject.

**Background**

2. The People's Republic of China ("PRC") is a State Party to the Convention. Article 19.1 of the Convention requires State Parties to submit periodic reports on the measures they have taken to give effect to their undertakings under the Convention.

3. In July 1998, the Administration issued an outline of the topics to be included in the first report of HKSAR under the Convention (the "initial report"). The initial report was submitted in May 1999, as part of the third periodic report of PRC, to the CAT Committee. The CAT Committee heard the initial report on 4 and 5 May 2000 and issued its conclusions and recommendations on 9 May 2000.

4. In May 2004, the Administration issued an outline of the topics to be included in the second report of the HKSAR under the Convention (the "second report"). The second report was submitted in June 2006, as part of the fourth

and fifth periodic reports of PRC, to the CAT Committee. The CAT Committee heard the second report in November 2008 and issued its conclusions and recommendations on 19 January 2009.

5. In June 2012, the Administration issued an outline of the topics to be included in the third report of the HKSAR under the Convention (the "third report"). The third report was submitted in February 2015, as part of the sixth periodic report of PRC, to the CAT Committee. The hearing of the CAT Committee on the third report was held on 17 and 18 November 2015.

### **Deliberations of the Panel**

6. The reports of HKSAR under the Convention had been discussed at meetings of the Panel and the deliberations are summarized in the following paragraphs.

#### Determination of torture claims and refugee claims

7. Members noted that the CAT Committee recommended in its concluding observations on the second report that, among others, the HKSAR Government should incorporate the provisions in Article 3 of the Convention (Torture as a ground for refusal to expel, return or extradite) 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 the Convention.

8. Some members expressed the view that a proper regime should be established for handling torture claims. Appeals relating to torture claims should not be determined by the Secretary for Security, but by an independent committee or the court. They were concerned about the time required for the determination of refugee status and torture claims. They considered the determination process far too long.

9. Members subsequently noted that the Immigration (Amendment) Ordinance 2012 ("the Amendment Ordinance"), which was enacted in July 2012 and came into operation on 3 December 2012, provided for a statutory process for making and determining claims, including how a torture claim was made, the time limit for a claimant to return the torture claim form, the requirements for the Immigration Department ("ImmD") to arrange screening interviews and issue written notices of decision, etc. It also provided 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. At the Panel meeting on 2 July 2013, members were advised that the Administration planned to introduce a unified screening mechanism ("USM") to assess claims for non-refoulement protection lodged by persons not having the right to enter and remain in Hong Kong on the basis that removing them to another country would expose them to a risk of torture as defined under the Convention, a risk of torture or cruel, inhuman or degrading treatment or punishment under Article 3 of the Hong Kong Bill of Rights, and/or a persecution claim with reference to Article 33 of the 1951 Refugee Convention relating to the Status of Refugees. Members noted that in view of the judgment of the Court of Final Appeal in *Ubamaka and C*, ImmD would withhold removing or deporting any person to another country where the person had made such a non-refoulement claim. Where any of these claims was substantiated, ImmD would provide non-refoulement protection to the claimant. USM commenced operation on 3 March 2014.

11. Prior to the CAT Committee's hearing on the HKSAR's third report as part of China's sixth report under CAT, the Panel discussed with the deputations and the Administration the report at the meeting on 3 November 2015. Some members expressed concern that the percentage of substantiated non-refoulement claims in Hong Kong was only about 0.3%, whereas those in other countries ranged from 20 % to 50%. Some other members were, however, of the view that while assistance should be offered to claimants who suffered from torture, actions should also be taken to prevent abuse of the existing regime.

12. According to the Administration, most non-refoulement claimants in Hong Kong did not originate from countries in conflict and thus it was inappropriate to compare the percentage of substantiated claims in Hong Kong with those of other countries. Non-refoulement claims in Hong Kong were determined under USM which met the high standards of fairness required by law. The publicly-funded legal assistance scheme and the timeline allowed for providing information and making submissions under the screening process (including the appeal process) in Hong Kong were on par with, if not more lenient than, those adopted by many other countries.

13. Members were advised at the Panel meeting on 2 February 2016 that the Administration would conduct a comprehensive review of the strategy in handling USM claims in the areas of pre-arrival control, screening procedures, detention and enforcement, so as to contain and reverse the growing number of USM claimants stranded in Hong Kong.

#### Police's handling of searches of detainees

14. With reference to the CAT Committee's concluding observations on the second report regarding strip search and body cavity search, some members

queried the need for conducting Level III searches by the Police, which involved the complete removal of clothing, on all detainees. They considered that the scope of search should be no more than what was rational and proportionate, and the Police should establish reasonable suspicion before conducting a search on any detainee. A right balance should be struck between the protection of human rights and the Police's discharge of its statutory functions and fulfilment of its duty of care to all persons detained in custody.

15. According to the Administration, the Police had a duty at common law to take all reasonable measures to ensure that detainees did not escape or assist others to do so, did not injure themselves or others, did not destroy or dispose of evidence, and did not commit further crime. The Administration's legal advice had confirmed that the search of a detainee, if properly conducted, with the scope of the search on each occasion to be determined having regard to the prevailing circumstances and on a case-by-case basis, would not be an unlawful or arbitrary interference with the detainee's privacy or personal integrity as the purpose of the search was legitimate. Under the Police's new arrangements for the handling of searches of detainees implemented on 1 July 2008, a Duty Officer should determine the scope of the searches on a case-by-case basis having regard to the prevailing circumstances. The scope of each search should be no more than what was rational and proportionate. Details of the searches, including the reasons for and the scope of the searches, were required to be properly recorded in the Police's Communal Information System ("CIS").

16. Members noted that with effect from 1 January 2009, the Police had sub-categorized custody searches involving removal of underwear (i.e. Level III searches) into three sub-categories, namely "looking into underwear" (sub-category (a)), "partial removal of underwear" (sub-category (b)) and "full removal of underwear" (sub-category (c)). Frontline officers were required to specify, in respect of any Level III search conducted on a detainee, the sub-category involved in CIS. All Assistant Divisional Commanders (Operations), in the capacity of reviewing officers of the circumstances surrounding the detention or continued detention of all detainees in the police stations concerned, were required to personally review all Level III(c) custody searches recorded in CIS in the stations under their charge. Further enhancement had also been made in supervisory control by adding an automatic function in CIS to bring all Level III(c) custody searches conducted to the attention of the Operation Support Sub-unit Commander and the Assistant Divisional Commander (Operations) concerned for review.

#### Prosecution of persons arrested for assaulting police officers

17. Some members were concerned that the Police could initiate prosecution against persons who participated in public order events and arrested for

assaulting Police officers engaged in public duty by applying the relevant provisions in the Offences Against the Person Ordinance ("OAPO") (Cap. 212) or the Police Force Ordinance ("PFO") (Cap. 232). These members pointed out that a person convicted of such an offence under OAPO could be imprisoned, while conviction of an offence under the latter might only result in a fine. Concern was raised as to whether the Police had issued internal guidelines setting out the circumstances whereby offenders should be charged for assault on Police officers, and whether the Department of Justice ("DoJ") had any prosecution policy on whether an offender should be prosecuted in accordance with OAPO or PFO.

18. According to the Administration, the Police had consulted DoJ in relation to the prosecution of cases involving assault on police officers and issued internal guidelines in August 2010 based on legal advice. The guidelines required all frontline officers to seek legal advice from DoJ beforehand, if they intended to proceed with a charge pursuant to section 36(b) of OAPO.

#### Protection of the rights of children

19. Information was sought on the measures taken by the Administration to combat the sale of children and child prostitution. According to the Administration, there were adequate laws in Hong Kong against human trafficking and child prostitution and actions were taken by the Police to combat such crime.

#### Handling of transgender persons

20. Some members expressed concern that the Police and Correctional Services Department were still arranging the search of transgender persons in accordance with the gender as appearing on the identity card of a person.

21. According to the Administration, it had formed an Inter-departmental Working Group on Gender Recognition to study issues relating to gender recognition. The Working Group was preparing a consultation document on gender recognition for public consultation. It would revert to the relevant Panel on the details of the public consultation in due course.

#### **Relevant papers**

22. A list of the relevant papers on the Legislative Council website is in the **Appendix**.

## Appendix

### Relevant papers on reports of the Hong Kong Special Administrative Region under the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Committee	Date of meeting	Paper
Panel on Home Affairs	13.3.2000 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Home Affairs	11.6.2004 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Security	5.12.2006 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Security	27.10.2008 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Security	3.2.2009 (Item IV)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Subcommittee on Police's Handling of Sex Workers and Searches of Detainees	--	<a href="#">Report</a>
Panel on Security	6.7.2009 (Item III)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Security	11.11.2010 (Item III)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Bills Committee on Immigration (Amendment) Bill 2011	--	<a href="#">Report of the Bills Committee to the Legislative Council</a>

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Security	2.7.2013 (Item II)	<a href="#">Agenda</a> <a href="#">Minutes</a>
Panel on Security	3.11.2015 (Item V)	<a href="#">Agenda</a> <a href="#">Minutes</a> <a href="#">LC                      Paper                      No.</a> <a href="#">CB(2)233/15-16(01)</a>
Panel on Security	2.2.2016 (Item IV and VI)	<a href="#">Agenda</a> <a href="#">Minutes</a>

Council Business Division 2  
Legislative Council Secretariat  
1 June 2016