THE LAW SOCIETY OF HONG KONG 香港律師會

Joint Submission of the Law Society of Hong Kong and the Hong Kong Bar Association to the Legco Panel on Security on Torture Claim Screening System: Current practice and legislative proposal

I. Introduction

1. At the meeting of the Legco Panel on Security on 3 February 2009, the Deputy Secretary for Security Mr. Ngai Wing-chit indicated the Administration's plan to introduce a legislative framework for a regime to assess claimants under the Convention Against Torture (CAT) by the end of 2009.

2. The Joint Profession also notes the Administration has recently signed an agreement with the Duty Lawyer Service (DLS) to extend the Pilot Scheme on CAT (Scheme) for another two years. As the Scheme involves issues of fundamental human rights, rule of law, procedural fairness and professional duties of legal practitioners, the Administration should have taken this opportunity to consult the Joint Profession to improve the operation of the Scheme. The Joint Profession notes and regrets the delay by more than three years for the introduction of the legislative framework.

3. In the absence of a legislative framework, we highlight in our joint submission issues of concern with the existing regime for the screening of CAT claimants.

II. The Pilot Scheme on CAT

4. Interview Protocol (Protocol)

The Joint Profession notes the Protocol (**See Appendix A**) is a non-statutory document which has no force in law. Lawyers are bound by their respective Codes of Conduct and are duty bound to advise their clients independently and without any allegiance or influence from anyone else. The Joint Profession commented on the Protocol but did not approve or endorse the contents. One of the purposes for

implementing a Pilot Scheme is to review the same and remove systemic problems before the legislative scheme is introduced. The Joint Profession supports the introduction of a statutory scheme but it must be one that serves its purpose.

The Joint Profession wishes to raise its concerns on the following issues:

(A) Attendance at CAT Interviews

5. Under current practice, barristers are entitled to have the assistance of non-qualified staff when they attend the "Interview" at the ID. However, the ID has refused to allow Panel Lawyers who are solicitors to attend the Interview with a team member, even when the claimant has so requested and instructed. The ID's decision is based on paragraph 12 of the Protocol which states:

"Access to interview should be denied to representatives who are not qualified legal professionals except those who are required to accompany barristers for an interview. For the avoidance of doubt, this exception includes a Court Liaison Officer from the Duty Lawyer Service accompanying a duty lawyer to the interview."

ID's decision to exclude team members from the Interview has been challenged. The professional duties of Panel Lawyers have been raised with the DLS which indicated the Protocol is an administrative protocol and it was only one of the matters discussed with the Security Bureau. The Joint Profession considers the problem which has arisen over access to interviews is a systemic flaw in the system which needs to be addressed.

6. ID has failed to provide *any rationale* for this practice which permits barristers to attend with assistants but not solicitors, yet both are "Panel Lawyers". It is accepted that the Duty Lawyer should not bring any "outsider" to the ID Interview, but if the person is a "team member" of the lawyers' practice it is the opinion of the Joint Profession that it is a reasonable and appropriate request. The Joint profession wrote to the Security Bureau on 4 April 2011 on this issue and a copy of the letter is at **Appendix B**.

(B) Order of screening cases, including backlog

7. There is no information as to the basis upon which claims are dealt. In particular it is unclear whether claims are dealt with on a "first-come-first-served" basis, which had been the policy for Vietnamese claimants.

8. The Joint Profession is of the opinion that cases involving juveniles or vulnerable persons should have priority under the system. There is no information on whether a list for vulnerable persons is in place, if at all, or whether a Selection Committee to screen claimants and prioritize claims has been convened. If there is no Selection Committee, we recommend a Committee should be convened with representation which should include lay members and the legal profession. The Selection Committee should publicly report on its work.

9. It is also observed that:

(a) Many claimants have yet to be assigned a Panel Lawyer despite the fact they have been in Hong Kong for many years.

(b) The Director of Immigration selects the cases and it appears that DLS is handling the latest arrivals first. Claimants who registered under the old system appear to remain in limbo and can only proceed if a judicial review is launched on their behalf.

(c) The Administration should provide information on the arrival dates of the claimants since implementation of the Scheme, and the criteria under which all cases have been handled. The "first-come-first-served" principle should be implemented.

(C) Medical Examinations

10. In the Joint Profession's submissions dated 24 September 2009, we noted:

> "*The Administration proposes that the only medical examination to be conducted at public expense will be by a medical practitioner chosen by the Director. That, plainly, does not accord with the highest standards of fairness, and is in our view likely to result in more judicial challenges rather than less. Apparently, and despite urgings on our part, the Administration is stubbornly refusing to alter its position.*" (see paragraph 7(4))

11. Under the current system, a case officer may request a claimant to undergo a medical examination if this may shed light on the credibility of the claim. The Joint Profession understands the DLS refers such cases to the ID as it does not have the resources to maintain its own list of specialist medical practitioners. Under the existing system it is the ID which selects the medical practitioner from its own list, arranges the appointment and has even arranged for the claimant to be escorted to the medical examination by its own officers.

12. The ID has complete control over the process and the claimants appear to have no right to object to such arrangements.

13. In practice, the current arrangement can be criticized as follows:

(a) The ID should not be involved in this aspect of the claimant's case. Claimants should be entitled to medical examinations procured by independent lawyers without any intervention on the part of the ID.

(b) The list of medical practitioners has been collated by the ID – it is *their* list. The DLS should be provided with adequate funding to prepare its own list of medical practitioners without the involvement of the ID.

(c) Can doctors on the list be regarded as impartial as they have all been selected by the ID?

(d) The criteria used to select these doctors – do they have any relevant experience in assessing whether a person has been tortured?

(e) Medical reports should be sent directly to the claimant's lawyers and a copy to the DLS.

(d) The current administration and practice of this aspect of the Scheme is full of conflicts and needs urgent review.

III. CAT claims and Refugee Status Determination under the Refugee Convention.

14. In the Joint Position Paper by the Law Society and the Bar Association on 31 March 2009, we noted:

> *"Both the Law Society and the Bar Association are also aware of the procedural deficiencies and potential for abuse in having a separate assessment process for refugee status determination ("RSD") in the HKSAR which is presently carried out by the United Nations High Commissioner for Refugees ("UNHCR"). The UNHCR assessment process, if it was amenable to the jurisdiction of the Hong Kong courts, would not meet the high standards of fairness and would most likely be declared unlawful for substantially the same reasons as in FB. Further, it is unfair and anomalous that the ultimate decision on the individual's refugee status by the UNHCR is not amenable to judicial scrutiny. Indeed, the UNHCR itself has been calling on the HKSAR to legislate and carry out RSD for a number of years.*
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> *...Since the HKSAR must interview for CAT, if increasing resources are to be spent on a complete revision of the process, and a decision on refugee status can be made based on the same interview process (as is done in other developed jurisdictions), there does not seem to be any impediment to the HKSAR taking control, in a fair and efficient way, of the entire process and putting in place a comprehensive legislative framework. This would include, inter alia, basic screening legislation, including the setting up of an independent tribunal, legislation governing immigration status pending a decision and legislation for related issues such as provision of social assistance during the process. All of these are presently lacking."* (pp. 2-3)

15. The Administration only proposes to introduce a scheme for CAT claims and has refused to conduct a complete review of the system to include asylum seekers. The Administration has adopted the view that "*Hong Kong's relative economic prosperity and its liberal visa regime makes it vulnerable to possible abuses if the Refugee Convention is extended to Hong Kong*".

16. This approach is short-sighted and will not achieve the goal of effectively processing the claims of CAT claimants. CAT Panel Lawyers are aware that there have been many cases where claimants have made refugee ***and*** CAT claims, or where claimants

have made a CAT claim first, and when this fails launched a refugee claim. The increase in the number of such claims and the lack of resources of the Hong Kong Sub-office of the UNHCR, which is responsible for handling refugee claims, increases the burden on UNHCR. It also gives such claimants "2 bites at the cherry" which is not in the best interests of Hong Kong. The failed CAT claimants cannot be removed from Hong Kong because they immediately put in an application to the UNHCR and prolong their presence in Hong Kong. The Administration should reconsider its position regarding the extension of the Refugee Convention so as to speed up the RSD process.

17. We maintain our view that there is potential for abuse in having a separate assessment process for RSD. Having one system for the screening of a claimant under CAT and another for RSD by a body immune from challenge in the Courts is a serious anomaly. The Administration should consider introducing a coherent and comprehensive system for contemporaneous assessment of both torture claims made under CAT and claims for refugee status under the Refugee Convention.

IV. UNHCR Hong Kong – Standard Operating Procedures

18. The UNHCR published a document "*Standard Operating Procedures: Legal Assistance*" in December 2010, which purports to apply a code of ethics for legal professionals. As this document is concerned with the professional ethics which legal practitioners should observe, the Joint Profession expresses regret that no consultation had taken place with the Law Society or the Bar Association before its publication.

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