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 Security Panel

## on Framework for Legal representation of Convention Against Torture Claimants and Asylum seekers

## Introduction

1. Since the Convention Against Torture ("CAT") was extended to Hong Kong in 1992, thousands of people have come to Hong Kong to seek protection from persecution and torture. They are continuing to arrive regularly. They come from many different countries but their needs are the same, which is a procedurally fair determination of their cases under the law. Specifically, these persons, whether fleeing persecution or torture, are entitled to a decision as to whether they are entitled to protection from forced return or "*refoulement*".

2. Refugees are persons who flee their own country because of persecution by the state or organs of the state. Persecution may take many forms, including physical abuse amounting to torture. Torture, on the other hand, may not be inflicted in order to persecute. Although very many refugees have experienced torture, not every refugee is a torture victim and vice versa.

3. Although the HK Government is not bound by the UN Refugee Convention governing states' responsibilities to persons fleeing from persecution, it does not remove persons who seek protection from the UNHCR until such claims are dismissed. (The issue as to whether the Administration is required to conduct screening of asylum claimants because of customary international law independent of the UN Convention is a matter that is the subject of an appeal to the Court of Appeal – *C & Others v Director of Immigration* – to be heard in October 2009.)

4. The position with CAT is much clearer. Between the extension of CAT in 1992 and 2004, the Administration did not conduct independent screening of claimants under CAT, relying instead on determinations of the UNHCR that such persons were or

were not genuine refugees. In *Prabakar v Secretary for Security* [2005] 1 HKLRD 289, the Court of Final Appeal rejected this approach as insufficient, and found that CAT required the Administration to conduct its own enquiry on the facts, in accordance with a process that ensured "high standards of fairness".

5. Between 2004 and 2008, the Administration implemented a screening process that fell well short of such high standards. The process involved the completion of a "Questionnaire" and a series of interviews leading to a decision by a senior Immigration officer on the merits of the case. Negative decisions were able to be appealed to the Chief Executive in Council. On 5 December 2008, Saunders J declared, in *FB v. Director of Immigration* [2009] 2 HKLRD 346, that the CAT assessment process was unfair and unlawful in a number of respects, including:

    - The practice of not permitting the presence of a legal representative during the completion of the Questionnaire or during the interviews
    - The practice to refuse to provide, at public expense, legal representation to a Convention claimant
    - The systemic anomaly in which the examining Immigration officer and the officer making the decision on the claim are not the same person
    - The fact that the decision-makers are insufficiently trained (at the first level and on petition/appeal) and
    - The failure to provide for an oral hearing on a petition and, as before, the lack of provision for legal representation at that oral hearing

6. At the Opening of the Legal Year on 12 January 2009, the then President of the Law Society, Mr. Lester Huang, expressed concerns given the "*momentous importance*" of the decision for the individuals concerned and urged the Administration to address the "issues stemming from these cases" and called for legislation to ensure high standards of fairness. It is in the interests of all participants for the screening process to identify as efficiently and speedily as possible genuine claimants and provide them with protection.

7. On 3 February 2009, at the last meeting of this LegCo Panel, the Deputy Secretary for Security Mr. Ngai Wing-chit said the Government would submit a "*legislative framework*" for a regime to assess the CAT claimants by the end of the year. Whether or not the framework would provide for contemporaneous screening of such persons as refugees – as we contend it should – is not known. The Bar and the Law Society raised this issue with the Security Bureau, together with other issues of concern, in a Joint Position Paper dated 31 March 2009, a copy of which is attached.

8. Since that time, the Law Society and the Bar have been made aware that negotiations on an interim or "pilot" program for the provision of legal representation have been conducted by the Security Bureau with the Duty Lawyer Service. Given the nature of the proposals, such negotiations should have taken place directly with the two branches of the profession.

**Wasted resources of screening under the old system**

9. The effect of the 5 December 2008 judgment in *FB* was to declare unlawful the screening of the applicants in the six cases before the Court. The case had a wider effect though. The Administration has stopped the screening of all other persons and has agreed to the quashing of decisions made under the flawed system.

10. The non-compliance with high standards of fairness in the screening of CAT claimants has resulted in considerable delay for the claimants. They are in limbo (they cannot work, cannot leave HK, cannot acquire any residency rights). It has also very probably resulted in massive wasted resources on the part of the Administration.

**Principal issues on legal representation**

11. The following are, as we see it, the principal questions to be addressed in setting up an interim system affording legal representation to CAT claimants/asylum-seekers:

    (1) How should publicly-funded legal representation be arranged i.e. through the Legal Aid Department or the Duty Lawyer Service or some other Department or body?
    (2) Should there be means and merits tests and how should they operate?
    (3) Who should be on the "panel" of lawyers available to be instructed, including issues of training and experience, and minimum years of qualification?
    (4) What kind of training should take place for such lawyers, including who will supply such training?
    (5) Is it possible/reasonable (having regard to *Prabakar* and *FB*) for the Administration to impose limits on the extent of work to be provided by the claimant's lawyers in any given case and if so, how are such limits to be determined?
    (6) What conditions or limits, if any, can be placed on legal representation, including the conduct of lawyers during an interview, and how should such conditions or limits be drafted and agreed upon?

**Duty Lawyer Service**

12. We are aware that the Security Bureau began discussions with the Duty Lawyer Service, on condition of strict confidentiality, as to the provision of legal representation for CAT claimants, within a few days of the judgment in *FB*.

13. It is now clear that the Security Bureau intends to establish a program of such representation through an extension of the existing Duty Lawyer Scheme.

14. The Duty Lawyer Scheme at present provides representation in the Magistrates Courts, Juvenile Courts and Coroners Courts, and in extradition proceedings. It also covers hawker appeals to the Municipal Services Appeal Board.

15. We have concerns as to the suitability of the DLS to provide such a service. These include the ability and experience of the lawyers on the panel to undertake such work, when few, if any, have experience in the area. Moreover, those who have sufficient skills, experience and knowledge are, we would suggest, unlikely to be satisfied with duty lawyer rates, particular in representing such clients on petitions to the Security Bureau against negative decisions of the Director of Immigration. Although it may be that a special separate panel of suitable lawyers could be set up for the purpose of providing representation of CAT claimants, it is unclear how DLS was aiming to recruit lawyers with the necessary skills.

**Training**

16. There is, as yet, no system in place to train those lawyers assigned to represent CAT claimants. It is our view that such persons should have or acquire during training knowledge in a number of key areas, including procedural fairness, refugee law, and management of clients with special needs e.g. unaccompanied minors, victims of mental or physical trauma.

17. Such training will have to encompass numerous key elements: the methodology involved in assessment of torture claims, including burden and standard of proof, and objective/subjective tests.

18. The Law Society and the Bar Association are ready to assist in this process. However, a word of warning needs to be sounded. Such training cannot be undertaken lightly, or with some pre-conceived idea that a week or two of part-time training will be sufficient to provide the necessary experienced lawyers for such work. Again, the Law Society and the Bar Association note that, as a matter of common sense, lawyers are unlikely to undertake such specialized training, involving considerable time (and hence lost income), if such work is to be remunerated at Duty Lawyer rates.

**The lack of a comprehensive and holistic approach**

19. The lack of an overall scheme to deal with asylum-seekers/CAT claimants who arrive in Hong Kong adds to the difficulty likely to face lawyers who undertake such work.

20. We have already noted the fact that the Administration does not consider itself bound by the customary international law principle of non-*refoulement* of asylum-seekers, and will not undertake screening of asylum-seekers, whether under the Refugee Convention or at all. The Law Society and the Bar Association note that the Refugee Convention has been extended to Macau SAR which has legislation for the assessment of asylum seekers.

21. The Law Society and the Bar Association are particularly concerned about the procedural deficiencies and potential for abuse in having a separate assessment

process for refugee status determination ("RSD"). The UNHCR assessment process is not amenable to the jurisdiction of the Hong Kong Courts. If it were, it would not meet the high standards of fairness for substantially the same reasons as set out in *FB*. Having one standard for the screening of a person under CAT and another for RSD by a body immune from challenge in the Courts is a serious anomaly and one which cries out to be addressed at this critical juncture.

22. A further difficulty is the uncertainty as to what "triggers" the CAT screening process. Persons who arrive in Hong Kong cannot make an application under CAT for protection until their limit of stay has expired. Claimants who approach the Torture Claims Assessment Section (formerly the "Special Assessment Section") will be turned away if they have an unexpired visa. As this is stated policy it is difficult to see how the Administration can complain that CAT claimants are overstayers, as the Administration *requires* them to be before they can register a claim. This provides a strong disincentive and may be one of the reasons why there is a perceived delay in registering a claim for protection with the Administration.

23. Furthermore, the Director has determined that the existence of a claim to the UNHCR or a request for protection under CAT is not sufficient reason for an extension of a limit of stay pending the outcome of such claim. CAT claimants are routinely denied extensions of stay, when their claim is still unresolved.

24. This means that a claim cannot be initiated and will not be considered until the person has broken the law – i.e. overstayed. This has obvious implications on the fairness of the existing system.

25. The Court in *FB* commented that, where a person comes to the attention of the Director of Immigration, the existence of a claim to the UNHCR by such person and statements to the effect that they would be in danger if returned to their home country should spur enquiries to be made by the Director as to whether there are circumstances that might give rise to a claim under CAT. In other words, the Director cannot wait until the magic word "torture" is spoken by the person in question. The Director maintains that the initiation of the screening process is a matter for the Director to decide. As noted, the criteria for the initiation of a claim remain vague and uncertain.

Law Society of Hong Kong
Hong Kong Bar Association
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