

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.

...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.

**Law Society of Hong Kong
Hong Kong Bar Association**

8 April 2011

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Appendix A

Interviewing Protocol

This protocol sets out the role of case officers, legal representatives and interpreters when a substantive interview with torture claimant is conducted.

Purpose of the Substantive Interview

2. While torture claimants will be given every reasonable opportunity to put forward the basis of their claims and provide supporting evidence before the substantive interview, the interview is a forum for clarifying issues pertaining to the claim including any which may arise in the interview itself. It will be the principal opportunity for the claimant to respond to any requests for clarification and address the points of contention as well as for the case officer to examine any details of the claim he/she considers necessary. The scope and structure of the interview is within the discretion of the case officer, operating within "Guidelines for Handling Claims Made under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (the "Guidelines").

3. The substantive interview is a fact finding exercise. However, legal representatives may attend an interview to assist a claimant to set out his/her grounds for the claim if necessary.

4. Where a claimant is not represented by a legal representative at an interview, the claimant may request the case officer to audio record the interview. Private recording equipment must not be brought into the interview room by claimants or legal representatives or interpreters.

Role of Case Officers

5. All case officers of the Torture Claim Assessment Section ("TCAS") of the Immigration Department must act professionally, impartially and courteously at all times during the interview. They should find out whether there are any substantial grounds for believing that the claimants would be in danger of being subjected to torture on return, with reference to evidence already contained on the file as a basis and having regard to the relevant country information available.

6. At the start of the interview, they should:
- identify themselves;
 - introduce all parties present at the interview and explain the purpose of the interview;
 - remind participants to switch off all mobile telephones and other beeping device during the course of the interview;
 - ensure that the interview starts promptly and that any necessary delay is explained;
 - inform the claimant of the confidentiality obligation as referred to in paragraphs 48 – 49 of the Guidelines;
 - confirm that the claimant is fit and well enough to be interviewed; if the claimant is unwell, the case officer may postpone the interview, or should record full details of the client's concerns;
 - ensure effective communication between the claimant and the interpreter and remind the claimant to raise any difficulties in understanding any questions;
 - give an outline of how the interview will be conducted.
7. During the interview, they should:
- keep an accurate and legible interview record, including comments made by the legal representative, the times of breaks and any difficulties in the course of the interview;
 - give the claimant a reasonable opportunity to explain and address any apparent inconsistencies in the account of events given by him/her. The interview will be conducted in a manner that is conducive to this aim;
 - allow the claimant to show visible scars which allegedly were inflicted by torture. The viewing of the scar and its position on the body should be noted. Photographs of those visible scars with adequate lighting in the background will be taken and given to the claimants as soon as possible;
 - put to the claimant any potentially prejudicial information;
 - offer the claimant breaks as the case officer considers necessary. The claimant and/or the legal representative may request breaks to seek legal advice; and
 - invite the legal representative to comment and make observations at the conclusion of the interview.

8. At the end of the interview, they should:
- ask the claimant if there is any addition, deletion or alteration of the interview record. The record will be read back to the claimant with the assistance of an interpreter. One copy of the interview record will be provided and the claimant should be asked to acknowledge its receipt. Photographs of those visible scars with adequate lighting in the background will be given to the claimant as soon as possible.

Role of Legal Representatives

9. The duty lawyer who is assigned to advise or represent the claimant or the claimant's legal representative appointed at his/her own cost should inform TCAS of his/her representation as soon as possible. A legal representative is expected to have had the opportunity, before attending the interview, to properly advise the claimant which may include having advised, as the legal representative considers appropriate in his professional judgement, the claimant the importance of understanding the contents of the questionnaire and the likely consequences of not providing all relevant information. Where a legal representative is present in the interview, his/her role includes ensuring that the claimant understands the interview process and has the opportunity to provide all relevant information. If there is no legal representative, the case officer should ensure that the claimant understands the contents of the questionnaire.

10. A legal representative may accompany the claimant to attend the interview(s).

11. Specifically, legal representatives are requested to:
- give prior notice in writing of their intention to attend the interview, and confirmation in writing that his/her attendance is authorised by the claimant;
 - be punctual. The questions and answers taken before legal representatives' attendance will not be repeated even though legal representatives are allowed to attend an interview that has already started;
 - carry and show identification;
 - hand to the case officer at the start of the interview any additional written evidence and translations that have not already been submitted;
 - not answer questions on behalf of the claimant. Legal representatives

should normally wait until the end of the interview to comment; unless it is to clarify questions or comments made by the case officer at any stage of the interview;

- ensure that the interview record is accurate and contains statements made by the claimant and that the case officer would ask the claimant if there is any addition, deletion or alteration of the interview record;
- comment and make observations at the conclusion of the interview. All such comments and observations will be noted on the interview record and duly signed by the legal representative and the claimant; and
- bring to the attention of the case officer any relevant lines of questioning which were curtailed or have not been pursued. They will not, however, be expected to formulate specific questions.

12. There are certain limited circumstances in which a case officer should deny a legal representative's access to an interview, but a decision to do so should not be made by the interviewing case officer without approval of the officer-in-charge. Where a legal representative is denied access, this decision should be fully recorded together with the reasons in the interview records. Examples include but not limited to:

- Access to interviews should be denied to representatives who are not qualified legal professionals except those who are required to accompany a barrister for an interview. For the avoidance of doubt, this exception include a Court Liaison Officer from the Duty Lawyer Service accompanying a duty lawyer to the interview.
- If a claimant or his/her legal guardian expressly states that he/she does not wish a legal representative to be present at, or for the rest of, an interview, the legal representative and/or the Duty Lawyer Service Court Liaison Officer should be permitted to see the claimant in private for the purpose of confirming that the presence of the legal representative is not required.
- If the case officer considers that a legal representative is seriously disrupting the course of interview, the case officer will warn that if this continues, the legal representative may be excluded from the interview. Any decision to exclude a legal representative after a warning is given

will be made with due regard primarily to fairness of the assessment process. The interview, if necessary, should be immediately suspended and the matter be reported to the Duty Lawyer Service (for all cases represented by the Duty Lawyer Service) or the legal professional bodies, namely the Law Society of Hong Kong and the Hong Kong Bar Association (for cases in which the claimant appointed his/her own legal representative), for appropriate action. The interview may be adjourned for a replacement of new duty lawyer or legal representative.

Role of Interpreters

13. The role of interpreters is to provide quality interpretation services during the course of the interview. They are not permitted to offer advice, express any opinion on the claim or enter into the discussion. For the avoidance of doubt, they are required to interpret verbatim what is said in direct speech. They should act in an impartial and professional manner, and respect confidentiality at all times. They are permitted to intervene only to ask for clarification; or to point out that a party may not have understood something through the interviewing officer.

-End-



CAT/11/143339

4 April 2011

Mr. Chow Wing Hang
Prin AS (Security) D
Security Bureau
6/F, Main and East Wings, Central, Hong Kong

Dear Mr. Chow,

Re: Convention Against Torture: Briefing on Legislative proposals

I refer to the discussion on 1 April 2011 and on behalf of the Joint Profession wish to thank you and your colleagues for taking the time to brief us on the Security Bureau's plans to introduce a statutory scheme for CAT claimants.

I refer to the discussion on representation at interviews and in particular the commentary in the first bullet point which states:

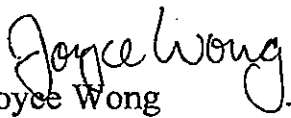
“Access to interviews should be denied to representatives who are not qualified legal professionals except those who are required to accompany a barrister for an interview. For the avoidance of doubt, this exception include a Court Liaison Officer from the Duty lawyer Service accompanying a duty lawyer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

It was noted during our discussion that persons such as trainee solicitors and pupil barristers should be permitted to attend the interviews as this can be regarded as a training opportunity for future lawyers in this area of work. It was noted that inexperienced Immigration Officers could also benefit by attending these interviews.

The Joint Profession noted there are instances in which paralegals or even non-qualified person from NGOs work with Panel Lawyers in an auxiliary capacity and provide assistance to claimants. The Joint Profession is of the opinion such persons should be permitted to attend interviews particularly when the client so requests, and on the basis their presence will not be a detraction to the proceedings. We trust this issue of concern could be dealt with in a sensible manner.

I look forward to hearing from you

Yours sincerely,

A handwritten signature in cursive script that reads "Joyce Wong".

Joyce Wong

Secretary to the Joint Professional Working Group on CAT