

**Convention Against Torture and Other Cruel, Inhuman or Degrading  
Treatment or Punishment (“CAT”)**

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**Follow-up information of the Hong Kong Special Administrative  
Region (“HKSAR”) on the Concluding Observations of the  
Committee against Torture (“the Committee”) on the third periodic  
report of the HKSAR**

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**November 2016**

## **Introduction**

Further to the Concluding Observations of the Committee on the third periodic report of the HKSAR under the CAT, the HKSAR hereby provides follow-up information in response to the Committee's recommendations at paragraphs 7(b), 9 and 13 as requested.

2. The relevant recommendations of the Committee were that the HKSAR should –

### Paragraph 7(b) of the Concluding Observations

- enhance the fairness and transparency of the screening process by, inter alia, ensuring that non-refoulement claims are thoroughly and individually examined; allowing sufficient time for claimants to fully indicate the reasons for their application and to obtain and present crucial evidence, such as their own medical expert evidence; and publishing redacted versions of the decisions of the Torture Claims Appeal Board;

### Paragraph 9 of the Concluding Observations

- ensure that the Prosecutor's office is duly informed of all the allegations of torture or ill-treatment received by that particular body and launch investigations on its own initiative whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed;
- guarantee that alleged perpetrators of torture and ill-treatment are immediately suspended from duty for the duration of the investigation, subject to the observance of the principle of presumption of innocence;
- establish confidential complaints mechanisms in all places of detention to facilitate the submission of complaints by victims of torture and ill-treatment to the investigating body, including for obtaining medical evidence in support of their allegations, and to ensure in practice that complainants are protected against any reprisals as a consequence of their complaint or any evidence given;
- ensure that the suspected perpetrators are duly prosecuted,

tried and, if found guilty, punished in a manner that is commensurate with the gravity of their acts; and

Paragraph 13 of the Concluding Observations

- ensure that all detainees are afforded in practice all fundamental legal safeguards from the very outset of their deprivation of liberty, including the right to be assisted by a lawyer without delay; to have immediate access to examination and treatment by independent doctors, without conditioning such access on the permission of officials; to be informed of the reasons for arrest and the nature of any charges against them; to be registered at the place of detention; to inform promptly a close relative or a third party concerning their arrest; and to be brought before a judge without delay. Hong Kong, China should adopt effective measures to ensure compliance with its legally prescribed procedures of arrest and monitor the compliance of public officials with the legal safeguards. It should also ensure that those who are suspected of not complying with the legal guarantees or of arresting persons without justifiable reason are investigated and, if found guilty, duly sanctioned.

**On paragraph 7(b) of the Concluding Observations**

3. The Committee is invited to note that all non-refoulement claims are individually screened under the unified screening mechanism (“USM”), under which each non-refoulement claimant would be given all reasonable opportunities to submit his grounds and supporting evidence (including his own medical expert evidence, if any) to establish his claim, including to complete and submit a non-refoulement claim form where the claimant may state all grounds of the claim and all the facts supporting the claim, and include such other information as is required by the form. Where there are special circumstances under which it would be unjust not to allow a further period for the claimant to complete and return the completed claim form, the Immigration Department (“ImmD”) will allow such a further period as appropriate. Upon submission of a claim form, the claimant will be invited to attend a screening interview with an immigration officer to further provide information and answer questions relating to the claim. These procedural safeguards are provided for under the Immigration Ordinance (Cap. 115) (sections 37Y and 37ZB) to ensure that the screening procedures meet the high standards of fairness required by law.

4. Claimants aggrieved by a decision of an immigration officer to reject a non-refoulement claim may appeal to an independent statutory appeal board (the Torture Claims Appeal Board (“TCAB”). Although TCAB may choose to decide on an appeal without an oral hearing, at present, over 90% of appeals are decided after an oral hearing. Practice and procedures of TCAB are also provided for under the Immigration Ordinance (sections 37ZQ to 37ZU and Schedule 1A).

5. In addition to the above, publicly-funded legal assistance is available to all claimants in completing the claim form, attending the interview, and (where the lawyer assisting the claimant is of the view that an appeal is meritorious), lodging an appeal and attending the appeal hearing (if any).

6. In determining whether a claim is substantiated, the decision maker in ImmD or TCAB (as the case may be) must, having regard to the individual circumstances of the case, take into account all relevant considerations including, if applicable, relevant country information and whether there is any region within the risk country in which the claimant would not face a risk of harm under any applicable grounds. If the claim is found to be substantiated, the claimant will not be removed from Hong Kong to the risk country until the said risk no longer exists. ImmD and TCAB would inform a claimant of their decisions and reasons in writing.

7. As regards the Committee’s suggestion to publish redacted version of TCAB’s decisions, it is being carefully considered by TCAB.

### **On paragraph 9 of the Concluding Observations**

8. The HKSAR is a common law jurisdiction underpinned by the rule of law which embodies the principle that no one is above the law. Any perpetrators of torture or ill-treatment (including public officials acting in the course of duty) will be prosecuted, tried and punished in accordance with the law.

9. A public official or person acting in an official capacity, whatever the official’s or the person’s nationality or citizenship, commits the offence of torture under the Crimes (Torture) Ordinance (Cap. 427) if in Hong Kong or elsewhere the official or the person intentionally inflicts severe pain or suffering on another in the performance or purported performance of his or her official duties.

10. Where there is evidence suggesting that a public official may have committed a criminal offence, the matter will be referred to the Prosecutions Division of the Department of Justice (“DoJ”) for deciding whether or not to prosecute the official in question, and if so, for what offence(s).

11. Article 63 of the Basic Law provides that the DoJ “shall control criminal prosecutions, free from any interference”. Prosecutors act independently from the executive authorities without any political or other improper or undue influence. They act in strict compliance with the Prosecution Code.

12. In accordance with the Prosecution Code, when determining whether or not to prosecute, prosecutors must be satisfied that: (i) the admissible evidence available is sufficient to justify instituting or continuing proceedings, and (ii) the public interest requires that prosecution be conducted. Generally speaking, in cases involving serious offences (including those where a victim has suffered significant harm or losses) it is more likely that the public interest will call for prosecution.

13. When choosing charge(s) to be prosecuted, prosecutors will consider three factors:

- (a) whether the admissible evidence demonstrates a reasonable prospect of conviction;
- (b) whether the proposed charge(s) adequately reflect(s) the criminality of the conduct alleged, in a manner that is both efficient and that will enable the court to do justice between the community and the accused; and
- (c) whether the proposed charge(s) provide(s) the court with adequate scope to impose appropriate penalties to address the criminality involved.

14. Once the prosecutors have decided to prosecute an accused, the matter will be brought before the courts which will exercise judicial power independently, free from any interference, and conduct the trial in a fair and impartial manner with due regard to the right to a fair trial guaranteed by the Basic Law and the Hong Kong Bill of Rights.

15. In sentencing, the courts will take into account a multitude of factors (including the interests of the accused, the victim and the community) so as to arrive at a just and appropriate sentence. The courts will examine the seriousness of the offence concerned and the circumstances under which the offence was committed. In doing so, the courts bear in mind the maximum penalty prescribed by law for the offence, and then decide whether the sentence requires adjustment after taking into account any aggravating or mitigating factors. One aggravating factor indicating greater culpability on the part of the accused is the fact that the offence was committed by a public official acting in abuse of power. Another aggravating factor is where the offence has a serious physical or psychological impact on the victim or the experience has been especially degrading for the victim.

16. The relevant authority may, after taking into consideration the circumstances and relevant factors of the case, interdict a civil servant from duty if the civil servant has been or is likely to be charged with or convicted of a criminal offence (including the offence of torture) and it is in the public interest to cease his/her official duties.

17. There is an independent system in place for visiting Justices of Peace (“JPs”) to inspect correctional institutions run by the Correctional Services Department (“CSD”) according to statutory requirements as set out in Rules 222 to 235 of the Prison Rules (Cap. 234 sub. leg. A). All JP visits are unannounced. Visiting JPs may also request to pay additional visits to specific correctional institutions outside their tour of duty to follow-up on or look into specific complaints by persons in custody (“PICs”). In the interest of privacy, visiting JPs may choose to speak to PICs in private. If JPs prefer to interview a PIC in private, the correctional institution will make necessary arrangements to facilitate the interview and render assistance to JPs when required. The visiting JPs may, as appropriate, initiate investigative actions by making personal inquiries into the complaints or refer the cases to the institutions concerned for follow-up actions. In the latter cases, the correctional institution will carry out investigations and report to JPs the outcome of their investigations in writing. JPs are at liberty to conduct any further investigation personally as they consider necessary and encouraged to discuss with the correctional institution and staff members and inspect the complaint registers as appropriate to satisfy themselves that the correctional institution concerned has handled the previous complaints properly. Any further comments and observations made by the visiting JPs will be followed up by CSD. Visiting JPs are required to ensure that all abuses in connection with the correctional institution which come to

their knowledge are brought to the notice of the Commissioner of Correctional Services immediately; visiting JPs are also required to attend to all reports of injuries to PICs caused by discipline or treatment and communicate their opinion to the Chief Executive of the HKSAR. All correctional institutions have on-premises hospitals where basic medical care is provided to PICs by Medical Officers (“MOs”) seconded from the Department of Health. Where necessary, MOs may conduct physical examination on PICs and provide medical evidence vis-à-vis any allegation of injuries. Besides, an “Annual Report on Justices of Peace Visits” is also published to summarise the follow-up actions taken in respect of complaints, requests and enquiries made by PICs to the JPs. Paragraph 16 of the Immigration (Treatment of Detainees) Order (Cap. 115 sub. leg. E) provides for similar visit arrangement by JPs in relation to immigration detention facilities operated by the ImmD.

### **On paragraph 13 of the Concluding Observations**

18. The Police always respect the rights of persons under police custody. Every arrested person will, as soon as possible, be informed that they are under arrest, together with the factual grounds and the reason for the arrest. A notice listing the rights of a detained person will be served on and signed by every detained person. These rights include the right to seek legal assistance, to communicate privately with a lawyer of their choice, and to have a lawyer present during any interview with the Police; the right to communicate with a friend, relative or consulate, etc. as soon as possible provided no unreasonable delay or hindrance is reasonably likely to be caused to the process of investigation or administration of justice; and the right to receive medical attention, etc. When a person in police detention so requests or if a duty officer considers that the detainee is in need of medical attention, the duty officer shall send the detainee to the nearest public hospital or clinic by ambulance under escort. When a person in police custody is charged with an offence, the person shall normally be taken before a Magistrate as soon as practicable. Detainees can at any time approach police officers to lodge any complaints. The Police conduct investigations into all allegations against police officers in a fair and impartial manner, and the Independent Police Complaints Council possesses statutory power to monitor the Police’s handling and investigation of complaints. The Police will duly prosecute alleged perpetrators when appropriate in consultation with the DoJ.