



HONG KONG BAR ASSOCIATION

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Your Ref: HAB/CR 19/1/32

17th January 2012

Secretary for Home Affairs
Home Affairs Bureau
12/F, West Wing
Central Government Offices
2 Tim Mei Avenue, Admiralty
Hong Kong.

Attn: Miss Christine Chow
_____ for Secretary for Home Affairs

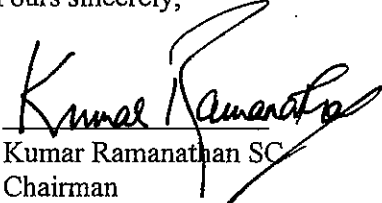
Dear *Sirs*,

Re. Pilot Scheme to Provide Legal Advice for Litigants in Person (“the scheme”)

Thank you for your letter of the 9 December 2011 attached to which was the Legco Discussion Paper (LC Paper No. CB (2)380/11-12(04) inter alia setting out the purpose, background, and operational framework of the scheme. The Home Affairs Bureau wrote seeking the Bar views upon the proposed scheme, these we now provide.

The Bar has considered the proposals under the Pilot Scheme. I send you herewith the Bar's response to the same.

Yours sincerely,


Kumar Ramanathan SC
Chairman

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The Hong Kong Bar Association's Response to the Pilot Scheme

The Bar understands the number of litigants in person (LIPs) has grown and thus the desire to provide them with advice in one form or another. The provision of such advice may assist in the administration of justice.

Whilst the Bar welcomes the Administration's attempt to 'do something' to assist LIPs the Bar notes that the underlying problems with respect to the growth in LIPs is not being addressed. The Bar perceives the underlying problems to include the failure to properly review the provision of Legal Aid, including but not limited to financial eligibility limits ("FELs") as well as expanding the scope of cases to be covered by the Supplementary Legal Aid Scheme ("SLAS"). The Hong Kong Bar Association has over the past decade prepared a number of papers on the provision and reform of both civil and criminal legal aid.

The briefing paper states the scheme will be launched "in partnership with the two legal professional bodies". Whilst the Bar welcomes being invited to circulate our members and ask them to contact the scheme if they wish to offer their services on a voluntary basis as 'community lawyers' the Bar cannot enter into any partnership or association with respect to the scheme not least as the Bar already has its own independent free legal representation /pro bono scheme operating, through which the Bar directly provides assistance not only on procedure but also on merit and substantive law. Further, the Bar cannot undertake to provide volunteer 'community lawyers'. Our members may or may not be forthcoming and it is widely known that not only do Barristers already provide their services on a pro bono basis through our own service and through that of the Free Legal Advice Service but also through a variety of other channels.

With respect to other 'free advice schemes' e.g. the Free Legal Advice Scheme managed by the Duty Lawyer Service individual Barristers provide their services – the Bar itself has no formal role in the scheme. There is no representative from the Bar on

the Duty Lawyer Service Council though 'by tradition' some of its members are Barristers acting in their individual capacities.

The Bar notes in the briefing paper on the scheme that one of the aims is to promote "*a culture of providing pro bono legal advice by the legal profession.*" With respect, members of the Bar and the Hong Kong Bar Association itself already have that culture deeply ingrained. There is a long tradition and history of providing pro bono legal advice. There are numerous Barristers who over many years have formally provided free legal advice. Further, there are those that have, by private arrangement, undertaken cases pro bono for deserving clients or undertaken cases for dramatically reduced fees. There are those who undertake appeals, particularly criminal legal aid appeals, for deserving individuals at rates of remuneration that are currently so derisory they effectively amount to 'charitable work'.

The Bar is concerned that one unintended consequence of the scheme may be to actually increase the number of LIPs. Provision of offices staffed by volunteer Barristers and Solicitors of at least 2 years standing and managed by the Home Affairs Bureau may be seen by some as an open invitation to 'manage' their cases through the scheme.

The Bar notes that under the scheme applicants who are involved in cases wherein lawyers have or had already been instructed, may be refused service under the scheme and thus the Bar is concerned that an unintended consequence of this may be that far from reducing the number of LIPs, it may once again have the effect of increasing their number – an applicant knowing that if lawyers are instructed (at any stage) their application for free advice under the scheme will be refused.

There is no means test applied to applicants. The Bar notes that the briefing papers states that 'if the client is found to have the means to pay for legal advice privately he can be refused service', and that as a preliminary part of the process of seeking advice under the scheme an applicant must declare his/her "means". However, there is no means testing and no mechanism for verifying any of the information provided. Based

upon the experience of a number of our members, some of whom have a great deal of experience garnered over many years in providing free legal advice through the Free Legal Advice Service administered by the Duty Lawyer Service the Bar notes that on occasion the service is utilised by those who have ample means to seek privately funded legal advice but chose not to do so, or have sought and obtained privately funded legal advice but want a 'second opinion'.

Under the proposed scheme the advice provided to LIPs is to cover only those areas as set out in Annex A that is "civil procedural matters only," and thus not the merits of an individual case. In these circumstances rather than having individual 'one on one' session(s) with a pro bono 'community lawyer' with time being taken to understand the specifics of the case, the Bar would suggest that it may be better to continually run seminars for LIPs on the general topics as listed in Annex A. This would save time and money, avoid endlessly repeating the same 'standard' advice on for example common practice directions or costs, and would obviate the need to take a case history and photocopy documents specific to each case.

However, it appears to us that a restriction to "civil procedural matters only" may be artificial. What is procedural and what is substantive law? The scheme seeks to limit advice to procedural matters, but where is the dividing line to be drawn? Is it incumbent on the volunteer community lawyer to understand the case and its merits or otherwise, before advising upon the procedure for say a draconian interlocutory application, or can he/she ignore the merits and advise upon the procedure for applying for a particular order?

What of the LIP who is a vexatious litigant; an LIP who asks his/her community lawyer about the procedure to advance their vexatious litigation? What are the duties and obligations of the volunteer lawyer concerned in such a situation – do they remain bound to provide procedural advice under the scheme? How can they be in a position to assess the merits or the potential 'vexatiousness' of the litigation when precluded

from providing advice other than on “civil procedural matters” only. Should procedural advice be provided when there is no merit in the application?

In conclusion the Bar have highlighted some of the problems / issues that arise from the proposed scheme in order to avoid the scheme being implemented which exacerbates the problem of LIPs rather than to address and ameliorate the issue of LIPs. Whilst the Bar welcomes the scheme in the sense that there is a need to ‘do something’ for LIPs, the Bar is of the view that the underlying reasons for the growth in LIPs is not being appropriately addressed through review and reform of legal aid. The Bar is further concerned that an unintended consequence of the scheme may be to increase the number of LIPs to the detriment of the efficient administration of justice.

17th January 2012

Hong Kong Bar Association