

**For discussion on
27 February 2012**

**Legislative Council Panel on
Administration of Justice and Legal Services**

**A Two-year Pilot Scheme to Provide Legal Advice for
Litigants in Person**

PURPOSE

This paper sets out the revised operational framework of a proposed two-year pilot scheme to provide legal advice for litigants in person (LIPs).

BACKGROUND

2. In November 2011, we briefed the Legislative Council Panel on Administration of Justice and Legal Services (the Panel) on the operational framework of a proposed two-year pilot scheme to provide legal advice for LIPs (the Scheme) (vide LC Paper No. CB(2)380/11-12(04)). Arising from the deliberations at the meeting, the Administration was requested to revert to the Panel in early 2012 on the Scheme having regard to the views of Members and the two legal professional bodies, and to provide information on relevant overseas experience. Subsequent to the meeting, we have further consulted the two legal professional bodies and the Duty Lawyer Service (DLS). The revised operational framework of the proposed Scheme, having regard to the views of Members and relevant stakeholders, are set out in the ensuing paragraphs.

COMMENTS RECEIVED

A. Whether the provision of procedural advice is adequate

3. At the Panel meeting held in November 2011, some Members considered it not practicable to limit the scope of the Scheme to procedural matters only, as both substantive and procedural legal matters would often be involved in legal proceedings. In their written

submissions, the two legal professional bodies also commented that it might be difficult to differentiate between procedural advice and advice on substantive law.

B. Encouraging more LIPs / vexatious litigants

4. Both legal professional bodies are concerned that, as applications under the Scheme would be refused if lawyers have already been instructed, the Scheme may have the unintended consequence of encouraging more litigants to become LIPs to take advantage of the service under the Scheme to obtain free legal advice. The Hong Kong Bar Association also questioned whether community lawyers are duty bound to provide procedural advice under the Scheme if the LIP is a vexatious litigant who asks his/her community lawyer about the procedure to advance their vexatious litigation.

C. Honorarium for community lawyers

5. The Law Society of Hong Kong (the Law Society) opined that the proposed honorarium of \$300 per three-hour session is too low, and considered that the daily rate for community lawyers should not be less than the rate provided to lawyers on the DLS panel who receive a daily rate of \$3,000 per half day, plus \$750 per hour of preparation and \$750 per hour for conferences.

D. Enhancing existing services

6. At the Panel meeting held in November 2011, some Members considered that instead of setting up a new institutional framework, consideration should be given to enhancing the existing services provided by the DLS.

E. Others

7. The Law Society considered that adequate procedures/safeguards should be in place to avoid potential conflict of interests of the community lawyers. As regards professional indemnity insurance, the Law Society noted that notwithstanding the Administration's attempt to avoid negligence claims by aggrieved LIPs, there is still a potential impact on the Law Society's Professional Indemnity Scheme. The Law Society also questioned whether lawyers with two years' post-qualification experience (PQE) would have sufficient experience to advise on the range of cases before the courts.

REVISED OPERATIONAL FRAMEWORK

8. We have consulted the Judiciary Administration and refined the Scheme having regard to the comments in paragraphs 3 to 7 above. The revised arrangements are elaborated below.

A. Procedural advice

Identifying the Needs of LIPs

9. As highlighted in the Administration's paper to the Panel in November 2011, the general difficulties faced by LIPs include –

- (a) lack of knowledge of the rules of procedural and substantive law;
- (b) lack of knowledge as to how to present their case at the interlocutory stages and at the trial;
- (c) a sense of inequality and being disadvantaged where the other party has legal representation; and
- (d) in some cases, a sense of grievance induced by perceived judicial irritation at having to deal with an unrepresented litigant unfamiliar with the law and court procedures.

10. The Working Group on LIPs appointed by the Chief Justice has identified LIPs' frequently asked questions at Court Registry counters, which are primarily related to court procedures¹. Typical questions include –

- (a) the mode of commencing legal proceedings and the procedure that follows;
- (b) the filling out of the acknowledgment of service;
- (c) the manner of effecting service of judicial document outside Hong Kong;
- (d) the language of the court, whether they can file pleadings and documents in Chinese;

¹ The Working Group on LIPs was appointed by the Chief Justice in April 2001 to review the issue of LIPs with regard to civil proceedings in the District Court and High Court.

- (e) the procedure for setting aside a judgment obtained by default;
- (f) the procedure for enforcing judgment or orders;
- (g) the procedure for staying execution of a judgment or an order;
- (h) the means of launching an appeal;
- (i) the costs involved in proceedings and the taxation of the costs; and
- (j) the procedure for setting actions down for trial.

11. While the Judiciary's Resource Centre for LIPs could provide general information on some of the LIPs' questions, LIPs are often faced with situations where they need specific guidance and advice on procedural matters. Examples are set out at **Annex A**.

12. The LIPs' lack of procedural knowledge may cause them, the court and other parties in the proceedings difficulties in progressing and trying the cases. We believe that the provision of procedural advice could help facilitate access to justice by LIPs and other parties involved.

Overseas experience in providing procedural advice only

13. Drawing from the experience in the United Kingdom (UK), the Royal Courts of Justice Advice Bureau (RCJAB) was established in 1978 to provide advice for LIPs. The RCJAB established a pro bono advice scheme in 1996 to advise LIPs and provide assistance in the preparation of court documents. The advice by the duty or volunteer lawyers are primarily on the procedural aspects of cases. Apart from simple and straightforward cases that fall within the expertise of the lawyers, no advice on the substantive merits of cases would be given. Lawyers under the scheme would not draft court documents for clients, as the RCJAB is not the legal representative of the LIPs. Instead, the lawyers would assist the LIPs in drafting by explaining what the relevant documents are for and what information should be included. Should the LIPs require representation in court or advice on substantive law, the scheme would refer the LIPs to other relevant legal aid or pro bono agencies for assistance.

Advice to be provided under the pilot scheme

14. We note the two legal professional bodies' concern that it may be difficult to draw a clear line to distinguish advice on procedure and substantive law. However, the UK experience as set out in paragraph 13 above demonstrates that it is possible to provide procedural-only advice in practice. Community lawyers should be able to differentiate between procedural matters and substantive law and advise the LIPs accordingly. When providing advice on procedures, the community lawyers may refer to the relevant court rules on procedures, practice directions and the law and advise the LIPs on the procedural steps and requirements that need to be taken if the case is to be proceeded.

15. In view of the successful experience in the UK and the most frequent enquiries raised by LIPs in Hong Kong, we would adhere to our original proposal in providing advice on procedural matters only. The advice to be provided under the Scheme, which has been set out in the Administration's paper to the Panel in November 2011, is re-capped at **Annex B**.

B. Encouraging more LIPs / vexatious litigants

16. The scope of the Scheme will be confined to the provision of advice on procedural matters only. LIPs should not be able to rely on the Scheme for legal advice in the proceedings they are involved in. As such, it is unlikely that litigants who would otherwise have engaged lawyers in their cases would opt to proceed unrepresented on account of free procedural advice. We will put in place measures to avoid the undue expectation by LIPs that the Scheme would run the case for them. Applicants will need to agree to and sign a document which sets out the terms and conditions of the Scheme (at **Annex C**), in particular, that –

Clause (e): The Scheme will not take on the conduct of litigation, nor will it act as lawyers on the record, and will not pay court fees or photocopy documents for inclusion in bundles for hearings; and

Clause (f): Clients will remain responsible at all times for the running of their own proceedings.

17. Meanwhile, providing procedural advice to LIPs at an early stage should facilitate smoother proceedings, and ensuring that LIPs would not be disadvantaged in their access to justice by their lack of procedural expertise. The Scheme will also enable us to better understand the

profile of LIPs, including their needs and difficulties as well as the participation rate of pro bono lawyers, so as to better review and refine the provision of the service at the end of the pilot period.

C. Honorarium for community lawyers

18. In reviewing the honorarium for the community lawyers under the Scheme, we have sought to strike a balance between the usage of public resources for the Scheme and the legal profession's suggestions. In this regard, we propose to increase the honorarium from \$300 per three-hour shift to \$1,000 per four-hour shift².

19. Under the revised Scheme, 9 000 interview sessions per year is expected to be provided³. A provision of around \$9.2 million (around \$4.6 million per year) will be set aside to operate the Scheme for a period of two years to cover the staff cost, honoraria for community lawyers, interpretation and insurance costs, and other operating costs.

20. We note that the legal profession has a noble tradition in providing pro bono services. Members of the two legal professional bodies might prefer to provide free advice to receiving the proposed honorarium. To facilitate the furtherance of the pro bono culture, and to allow members of the profession to set examples for others, there will be a mechanism whereby participating community lawyers could choose to waive their honorarium.

21. To further promote the pro bono culture in the public sector, we will also explore the opportunity of inviting Government solicitors / counsel to participate in the Scheme as community lawyers in their private capacity.

² A total of around \$1.48 million per year will be earmarked for payment of honoraria to the community lawyers (\$1,000 per shift x 3 lawyers per shift x 2 shifts per day x (5 days per week x 52 weeks per year – 13 days of public holiday)), increased from the provision of \$700,000 in the original proposal.

³ The operating hours of the LIPs office will be from 8:30 am to 5:30 pm Monday to Friday (i.e. 9 hours per day including lunch hour). A community lawyer will work for four hours per half-day shift and on average be able to serve five clients per shift (each interview slot will last up to 45 minutes). A total of three community lawyers will be engaged to work in parallel in one shift. Together with the resident lawyer, the expected total interview sessions will be around 9 000 per year (30 slots per day x (5 days per week x 52 weeks per year – 13 days of public holiday) + sessions conducted by resident lawyer as appropriate).

22. All along, the Government places high regard to the noble spirit of the legal profession in its tireless and staunch support for the provision of pro bono legal services to the community. To give recognition to the work of the professionals in this aspect, the Home Affairs Bureau has launched a Recognition Scheme for Provision of Pro Bono Legal Services (Recognition Scheme). The objectives of the Recognition Scheme are to recognise the pro bono legal services provided by the legal professionals in Hong Kong for the community and to commend those who have made such contributions, thereby encouraging more legal professionals in Hong Kong to volunteer to provide more free legal services to the members of the public. Members of the legal profession may be nominated for the Award if they have provided pro bono services within the period from 1 July 2011 to 30 June 2012 for at least 25 hours. We also look forward to the legal profession's active participation in the Recognition Scheme.

D. Enhancing existing services

23. We have consulted the DLS on Members' suggestion that instead of setting up a new institutional framework, consideration should be given to enhancing the existing services provided by the DLS. However, the DLS advised that it would not be appropriate for them to take up the administration and supervision of the Scheme as their resources are already fully stretched in operating five legal assistance and representation schemes⁴. Besides, the DLS opined that they do not have the necessary expertise amongst its panel of duty lawyers to deal with civil matters, as their expertise is principally on criminal defence in the Magistracies.

E. Others

24. In working out the details of the Scheme, we will ensure that adequate procedures/safeguards are in place to avoid potential conflict of interests of the community lawyers. As set out in the Administration's paper in November 2011, the Scheme will also take out professional indemnity insurance to cover possible claims made against the community lawyers in their discharge of services under the Scheme. We will also arrange thematic seminars to address the common procedural problems encountered by LIPs when the database is built up upon commencement of the Scheme.

⁴ The five schemes are (a) the Free Legal Advice Scheme, (b) the Duty Lawyer Scheme, (c) the Tel Law Scheme, (d) the Legal Representation Scheme for Children/Juveniles Involved in Care or Protection Proceedings, and (e) the Legal Assistance Scheme for Torture Claimants.

25. As regards the PQE requirement of community lawyers under the Scheme, we note that the RCJAB pro bono scheme in the UK set out in paragraph 13 above requires participating solicitors to have at least two years' PQE. In Hong Kong, all qualified lawyers could participate in the Free Legal Advice Scheme under the DLS. The Duty Lawyer Scheme under the DLS is also open to all lawyers with practicing certificates, and lawyers with two years' PQE could represent clients in courts. In view of the above, we consider that the minimum two-year PQE requirement of community lawyers under the Scheme reasonable.

OVERSEAS EXPERIENCE

26. We have drawn reference to the experience in the UK and Australia in designing the proposed pilot scheme.

UK

27. The background and scope of service provided by the RCJAB of the UK are set out in paragraph 13 above. The work of the RCJAB is overseen by a management committee which is chaired by a judge and comprises representatives from the Judiciary, city law firms and other voluntary legal advice providers. While the management committee is responsible for the strategic direction and policy of the RCJAB, its day-to-day operation and management is delegated to a chief executive who is assisted by a team of paid and voluntary lawyers and staff.

28. The mission of the RCJAB is to provide access to justice to unrepresented litigants and potential litigants in the Royal Courts of Justice through the provision of legal advice services. It also aims to –

- (a) ensure that individuals do not suffer through lack of knowledge of their rights and responsibilities, or of the services available to them through their inability to express their needs effectively;
- (b) develop an effective and efficient service through partnership working with the voluntary sector, pro bono providers, court services, government bodies and funders; and
- (c) exercise a responsible influence on the development of social policies and services, both locally and nationally.

29. The RCJAB has employed three full-time Duty Solicitors to work at its office in the Royal Courts of Justice where all civil cases are dealt with. The RCJAB has also established a Pro Bono Advice Scheme to provide an opportunity for volunteer solicitors from law firms to provide legal advice to litigants in person at the RCJAB office alongside the Duty Solicitors. The volunteer solicitors are known as Honorary Legal Advisers of the RCJAB. Paid and volunteer administration support staff are also employed to assist in the delivery of the services.

30. At the RCJAB's office, general legal advice on civil matter is given to litigants in person. This includes giving advice on procedure and assisting clients in the preparation of court documents. If a client needs representation in the court, the RCJAB may refer the case to the Bar Pro Bono Unit.

31. The legal services provided by the RCJAB are free of charge. Client seeking advice and assistance may be subject to a "proxy means test". The sole purpose is to check whether the client is financially eligible for legal aid and the Bar Pro Bono representation service. If he is so entitled, the Duty Solicitor/Honorary Legal Adviser may refer him to apply for legal aid or the Bar Pro Bono Unit for further assistance.

32. The RCJAB has taken out its own professional indemnity insurance for the legal services provided by Duty Solicitors and the Honorary Legal Advisers under the pro bono advice scheme.

Australia

33. Unrepresented litigants in the New South Wales (NSW) of Australia can obtain free legal advice services from the Legal Aid Commission through the "LawAccess NSW" legal helpline. The service is not means-tested and applicants are not required to apply for a grant of legal aid to receive free legal advice.

34. LawAccess NSW provides legal information, advice and referrals for people who have a legal problem in NSW. Applicants calling the LawAccess NSW legal helpline will be received by Customer Service Officers who can provide legal information over the telephone, send out written information, arrange one of their lawyers to provide telephone legal advice, or refer clients to another legal or related service including face-to-face legal advice.

35. LawAccess NSW legal helpline does not provide legal advice to everyone. The legal enquiry must be suitable to be discussed over the telephone. According to the Policy, Procedure and Service Standards Manual of the NSW Department of Justice and Attorney General, legal advice will not be provided under the following situations –

- (a) the subject matter of the client's inquiry falls outside their expertise;
- (b) the client requires complex legal advice or legal representation;
- (c) the client has documents which would need to be sighted for legal advice to be provided;
- (d) there is an existing specialist legal advice service and the client's inquiry would be more appropriately and completely addressed by that service;
- (e) the client has already obtained legal advice from a qualified solicitor and is seeking a second opinion;
- (f) the client is a business (or an employer in a business) that has the financial ability to obtain legal advice from a private solicitor; and
- (g) the client is an individual with the financial ability to obtain legal advice from a private solicitor.

36. The Law Council of Australia also encourages the legal profession to perform pro bono legal work. The National Pro Bono Centre launched the "National Pro Bono Aspirational Target" (the Target) in 2007. The Target is contained in a "Statement of Principles" and is a voluntary one of at least 35 hours of pro bono legal work per lawyer per year. The National Pro Bono Centre has also introduced a Professional Indemnity Insurance Scheme to encourage lawyers to undertake pro bono legal work.

WAY FORWARD

37. Subject to Members' views on the revised operational framework of the proposed Scheme as set out in paragraphs 9 – 25 above, we plan to launch the Scheme in the second quarter of 2012. A steering committee⁵ will be set up to oversee and advise on the operation of the Scheme, and to review the work and services provided. Upon completion of the two-year pilot, the Administration and the Judiciary could have a better understanding of the profile of the LIPs and the types of problems they encounter. These, in the long run, would help to throw light on areas for improvement in the court and civil justice procedures.

**Home Affairs Bureau
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⁵ The steering committee will be responsible for advising the Secretary for Home Affairs on the policy and operation of the Scheme, including –

- (a) the formulation of strategies and programmes for the Scheme;
- (b) the implementation of work and services provided under the Scheme;
- (c) the evaluation and review of work and services provided under the Scheme; and
- (d) the future arrangements with regard to provision of legal advice to the LIPs.

Common Examples of Procedural Enquiries Touching on Legal Issues

(a) Commencement of Proceedings

- (i) An LIP indicates that he would like to sue a person but cannot decide whether he shall commence the proceedings by way of a writ or an originating summons. He has read the related information leaflet but still does not know exactly which form is appropriate.
- (ii) There are often enquiries on who should be sued: whether it is an individual or a company, and how the party should be described on the writ / originating summons. Very often assistance is needed in differentiating between a sole proprietor business, a partnership business and a limited company.
- (iii) An LIP would like to commence a judicial review proceeding. Whilst he has been provided with the relevant leaflet and prescribed form, he would like to know who would be the “interested parties” and what would happen if he has left out an “interested party”.

(b) Computation of time

- (i) Very often, LIPs would ask when the last day would be for the purpose of filing their pleadings, or for lodging an appeal / applying for leave to appeal. They are currently advised to consult the relevant information leaflets to ascertain how the time should be calculated. If, however, they would like to be certain of the date, this would be an area where the Scheme could be able to assist.
- (ii) On the subject of judicial review, LIPs are normally advised to note that the relevant proceedings have to be brought promptly and in any case within three months of the date when grounds for the application first arose. LIPs often ask for the meaning of “when grounds for the application first arose” and when the last day would be for the filing of the application. These questions touch on procedural legal issues.

(c) Case Preparation

After the close of pleadings, a party has to prepare his own list of documents to inform the opposite party what documents relevant to the issues in the case are in his possession. One frequent question raised by LIPs is what kind of documents should be included in the list. This is another area that requires legal assistance.

(d) Mentally incapacitated person cases

A family member of a mentally incapacitated person would like to assist with the management of the property of the patient. Applicants have to study the relevant Practice Direction, related judgments and regulations. They need legal advice and assistance.

(e) Enforcement of judgment

At the moment, the Judiciary's staff could only inform the litigants of the available modes of enforcement. As to the differences between the various modes of enforcement and which is more appropriate to the litigant's case, this involves legal advice and could be an area for assistance under the Scheme.

Legal Advice Provided under the Scheme

- (a) Explaining court rules and procedures including Practice Direction;
- (b) Giving general advice on court documents, order and the various interlocutory applications that may be taken out by or against the litigants in person;
- (c) Giving advice on general matters that require attention when preparing court documents such as pleadings, list of documents, affirmations, witness statements with sample court forms for reference;
- (d) Explaining the hearing/trial procedure including all preparatory work required for court hearing or trial (such as preparation of hearing or trial bundles);
- (e) Explaining the costs involved in proceedings and the taxation of costs;
- (f) Explaining the procedures on execution of a judgment or an order; and
- (g) Explaining the procedures for launching an appeal.

Terms and Conditions of the Scheme

- (a) Client interviews will last up to 45 minutes;
- (b) The Centre-in-charge has the right to refuse to provide services;
- (c) Services will not be provided to clients who in the opinion of the Centre-in-charge have the means to pay for legal advice;
- (d) The Scheme will not provide advice in relation to matters where lawyers are already instructed or to individuals who have been granted legal aid;
- (e) The Scheme will not take on the conduct of litigation, nor will it act as lawyers on the record, and will not pay court fees or photocopy documents for inclusion in bundles for hearings;
- (f) Clients will remain responsible at all times for the running of their own proceedings;
- (g) The Scheme will not provide an advocacy service or represent clients at hearings;
- (h) All correspondence or other contact between clients and lawyers must take place via the Scheme; and
- (i) Clients must make available to the Scheme all documents which the lawyer might require. These will be photocopied as necessary and the originals will be returned to the clients.