

**For discussion on
18 July 2017**

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

**Legal Aid Services Council's Proposals on
the provision of legal advice services for persons detained in police stations**

PURPOSE

This paper briefs Members on the findings and recommendations of a study on “Legal Assistance to Detainees at Police Stations” completed by the Legal Aid Services Council¹ (“LASC”). LASC’s recommendations as extracted from LASC’s Annual Report 2015-16 are set out at **Annex**.

BACKGROUND

2. In November 2009, LASC’s Interest Group on Scope of Legal Aid embarked on a study on whether legal assistance should be extended to cover persons detained by law enforcement agencies in Hong Kong. When conducting the study, LASC met with relevant stakeholders, including the two legal professional bodies, LAD, Duty Lawyer Service and law enforcement agencies. LASC also carried out a comparative study of the provision of legal assistance in five other jurisdictions, i.e. England and Wales, Scotland, Taiwan, New Zealand and Ontario of Canada.

RECOMMENDATIONS OF LASC

3. In its submission to the Government in February 2016, LASC recommended that a publicly funded scheme should be made available to ensure that detainees could have access to legal advice on their rights once their liberty is restricted.

4. LASC proposed that the service be introduced on a pilot basis, implemented in stages and kept under review. As a start, four representative police stations may be identified for the pilot scheme which should be

¹ LASC is a statutory body set up in 1996 under the Legal Aid Services Council Ordinance (Cap. 489) to oversee the administration of legal aid services provided by the Legal Aid Department (“LAD”), and to advise the Chief Executive on legal aid policy.

implemented for no longer than two years. An interim review after the first year and a comprehensive review after the second year are recommended. LASC considered that any possible logistic or financial concerns can best be tested out in a single or a series of progressive pilot schemes so that the relevant issues can be identified and resolved through further discussions. Subject to the outcome of the review, LASC held the view that the service may be extended to other police stations and law enforcement agencies.

5. The key features of LASC's proposed pilot scheme are summarised below –

- (a) the scheme should cover the period when the individual is detained (i.e. when his liberty is restricted in a police station) but should not cover legal advice to detainees after a charge has been laid (i.e. during the “police station to court” period);
- (b) while LASC has not made a firm recommendation on whether the advice should be subject to a time limit and if so, how much time should be spent on giving such advice, the majority view was that the service to be provided to a detainee should not last for more than one hour. The attending lawyers should use their professional judgement to decide how much time should be spent on each case, and may extend the service beyond the time limit in such cases as serious offences or special circumstances where the detainee has difficulty in understanding the advice;
- (c) the scheme should cover a lawyer's attendance at the police station to give legal advice to the detainee in person because face-to-face contact will enable the lawyer to better elicit and understand the detainee's concerns and needs. However, to enable quick legal assistance, initial advice may be provided over the telephone (see paragraph (e) below also);
- (d) the service should be extended only to persons where bail is refused by the police or where the detainee cannot afford the bail money;
- (e) a call centre, supported by lawyers with experience in criminal practice (“Centre Lawyers”), may be set up to provide initial telephone advice to detainees. The Centre Lawyer may contact Duty Lawyers (i.e. lawyers on a pre-approved panel of eligible lawyers) to meet with detainees in police stations as necessary; and

- (f) the initial legal advice session should be free of charge and non means tested. Subsequent visit to a detainee, if any, should be subject to a means test similar to the Duty Lawyer Scheme and a contribution in the range of \$500 to \$1,000 payable by the detainee.

6. As for implementation, LASC has considered whether the proposed scheme can be incorporated into the existing legal aid schemes under LAD. However, the existing legal framework does not permit the extension of legal aid to a detainee prior to charge. Besides, a means test is the pre-requisite of the grant of legal aid certificates and this is not feasible in the urgent setting of granting immediate legal advice to a detainee in a police station. In the circumstances, LASC considers it more appropriate to provide legal advice to detainees through an administrative scheme to be implemented on a pilot basis initially.

WAY FORWARD

7. As LASC's proposal to establish a publicly funded scheme to provide legal advice to detainees would entail substantial financial and operational implications, relevant bureaux and departments have been carefully examining the feasibility after receiving LASC's recommendations. Upon completion of the internal deliberation process, we will report to this Panel again on the recommended way forward.

ADVICE SOUGHT

8. Members are invited to note the recommendations of LASC.

Home Affairs Bureau
July 2017

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為被扣留在警署人士 提供法律方面的援助

Legal Assistance to Detainees
at Police Stations



本局邀請了轄下的法律援助範圍興趣小組（「興趣小組」）就法律援助的涵蓋範圍應否擴大至包括被扣留在香港執法機構的人士進行研究。除與持分者會面外，「興趣小組」研究了相關的法例和統計，亦同時以5個有為被扣留人士提供法律方面的援助的司法管轄地區，即英格蘭及威爾斯、蘇格蘭、台灣、新西蘭和加拿大安大略省，作比較及研究，藉以了解海外地區為被扣留人士提供相關法援的範疇及形式。「興趣小組」就為被扣留在香港警署的人士提供法律方面的援助的研究結果會在隨後的段落中詳述。

The Interest Group on Scope of Legal Aid (IG) of this Council has been invited to study whether legal aid should be extended to cover legal assistance for persons detained by law enforcement agencies in Hong Kong. Apart from meeting stakeholders, the IG examined relevant legislation and statistics when conducting the review. A comparative study of the provision of legal assistance to detainees in 5 foreign jurisdictions, i.e. England and Wales, Scotland, Taiwan, New Zealand and Ontario of Canada was also carried out to gain more understanding on the scope and delivery of such legal assistance to detainees overseas. The findings of the IG's study on the provision of legal assistance to detainees at police stations are given in the ensuing paragraphs.

香港的情況

The Hong Kong Position

在香港的刑事法例下，在法院或法庭之前，人人平等及皆假定無罪，而舉證責任在控方。每個人都有權得到公平公開審訊的權利，不會被強迫作出違反自己利益的供詞或被迫認罪。為確保基本人權受到保障，每個人都應有權得到保密和及時的法律意見、以及可由律師代表出庭。但是，一個被扣留人士在受到審問前，他是否能得到及時的律師意見以保障其個人權益備受關注。故此有人建議，如被扣留人士無經濟能力聘請律師，應以法援方式為他們代聘。

目前香港並無任何公共計劃協助保障一個被扣留人士，由其個人自由受到限制至在裁判法院出庭期間的個人權益。香港保留普通法中保持緘默的權利。根據保安局發出的程序守則規定，一個人只有在有合理理由被懷疑干犯了罪行的情況下，才會被進行警誡。

Under the Criminal Law in Hong Kong, all persons should be equal before the courts and tribunals. One is presumed innocent and the burden of proving guilt is on the prosecution. Everyone shall be entitled to a fair and public hearing, and not be compelled to testify against one's own interest or to confess guilt. The rights to confidential legal advice, access to timely advice by lawyers and for legal representations in court are means to ensure that the basic rights are protected. However, concerns have been raised for timely access to a lawyer so that a detainee's rights could be properly protected before he is interrogated. There has been suggestion of providing a lawyer to a detainee by way of legal aid when he is unable to afford one.

At present, there is no public scheme intended to cover the period where a person's liberty is restricted and before he is brought before a Magistrate. Hong Kong has retained the common law right of silence. Only a person who is reasonably suspected to have committed an offence will be cautioned as prescribed in the procedural rules issued by the Security Bureau. The caution is the first notice to a person of his rights

這警誡是提醒每個人均有權保持緘默的第一個通知，可是一個被扣留在執法機關的人士卻未必清楚可以行使這個權利。

to silence. The exercise of that right may not be most clear to a person who is detained at a law enforcement facility.

建議

Recommendations

經審慎考慮所有相關議題後，本局認同「興趣小組」的建議，即應設立一個由政府資助的計劃為被扣留人士提供法律方面的援助，以保障其法律權益。

After careful consideration of all relevant issues, the Council agrees to the IG's recommendations that a publicly funded scheme should be made available to protect the legal rights of detainees.

服務範疇

1. 援助計劃的目的是為確保被扣留人士在他的個人自由受到限制時，可以獲得有關應有權益的法律意見。
2. 該計劃的援助範圍應由一個人被扣留開始，即他的個人自由被限制在警署內，但不應包含被扣留人士被正式落案起訴後的法律諮詢，即「警署至出庭間」的時段。因為除非得到保釋，一般在被落案起訴後，該人士很快便會被安排出庭，而且當案件轉介至裁判法院後，當值律師服務便可向該人士提供法律意見和支援。
3. 應為被扣留人士提供初步的法律意見。
4. 雖然就法律諮詢服務應否受時間限制及如需要設限，應設定在多少時間方面未達成共識，但主流意見認為有關服務不應超逾1小時。

Scope of the Service

1. The purpose of the scheme is to ensure that detainees could have access to legal advice on their rights once their liberty is restricted.
2. Such scheme should cover the period when the individual is detained, i.e. his liberty is restricted in a police station. However, it should not cover legal advice to detainees after a charge has been laid, i.e. during the "police station to court" period, because the time gap between charge and appearance before the Magistrate is normally very short unless bail is given, and legal advice and assistance is provided by the Duty Lawyer Service (DLS) once the matter has been referred to the Magistrate's Court.
3. Initial advice should be made available to detainees.
4. Although consensus could not be reached on whether the advice should be subject to a time limit and, if so, how much time should be spent on giving such advice, the majority considered that the service should not last for more than one hour.



5. 律師應運用其專業判斷以決定單一案件所需的工作時間，在某些特別的情況下，例如涉及嚴重罪行或被扣留人士對理解法律意見有困難，律師便可酌情處理服務時限。
5. Lawyers should use their professional judgment to decide how much time should be spent on each case. Discretion may be given to extend the service beyond the limit in specific cases e.g. serious offences or special circumstances where the detainee has difficulty in understanding the advice.
6. 服務應包括律師親自到警署為被扣留人士提供法律意見。透過與被扣留人士面對面的對話，律師可準確地引導和明白被扣留人士的憂慮和需要，從而提供更適合和貼近他們情況的法律意見。
6. The service should cover a lawyer's attendance at the police station to give legal advice to the detainee in person because a lawyer may be better to elicit and understand the detainee's concerns and needs when meeting with him face-to-face. The advice will thus be tailor-made to that detainee's circumstances.
7. 由於並非所有被扣留人士都會要求或需要律師親身提供法律意見，以及為了令有需要的人士能迅速得到法律支援，律師可用電話提供初步的法律意見，如有需要可再安排面對面的會見。
7. Nevertheless, not all detainees will request or need the advice to be rendered by the lawyer in person. In order to enable quick legal assistance to those in need, initial advice may be provided over the telephone. If necessary, lawyers may also give face-to-face advice.
8. 服務應只提供予被警方拒絕保釋的人士，或沒有能力繳付保釋金的被扣留人士。為避免服務被濫用，如有需要，可就服務對象的定義作進一步的闡釋。
8. The service should be extended only to persons where bail is refused by the police, or where the detainee cannot afford the bail money. To avoid the abuse of the proposed service, the definition of target recipients should be further elaborated if it is considered necessary.

服務的形式

在對5個提供相關服務的司法管轄地區的研究中，發現每一個援助計劃都有設立電話中心以處理所有有關提供法律意見（或法律代表）的要求。因此，「興趣小組」內有建議設立一個類似的電話中心，作為被扣留人士的第一個接洽點。電話中心由有處理刑事案件經驗的律師（「中心律師」）支援，用電話向被扣留人士提供初步法律意見。「中心律師」可因應案件的情況，聯絡在預先核准的名冊上的合資格律師（「值勤律師」）到警署為被扣留人士提供適時的法律意見。為能夠更快提供有關的法律支援服務，亦有建議安排律師在警署內駐守。

申請人的財務資格及分擔費

給予被扣留人士的初步法律意見應是不用收費的。可是，如有後續面談的需要時，就應施行一個簡單、容易管理及類似當值律師計劃所採用的經濟審查，同時應向被扣留人士收取500元至1000元的分擔費。

服務的推行

這建議應以試驗計劃形式進行，分階段落實，並受監察和檢討。試驗計劃可先在4間有代表性的警署試行。要令這試驗計劃成功，選取合適的警署和得到香港警務處的支持尤為重要。此外，亦有建議試驗計劃的服務只涵蓋部分罪行、或社會上較弱勢人士，如年齡在18歲以下或65歲以上的人士、不諳說及／或不明白廣東話、普通話或英語的人士、及／或被確認為患有智障的人

Delivery of the Service

Every scheme covered in the comparative study involves a call centre that manages all requests for legal advice (or legal representation). Similarly, there has been suggestion of setting up a call centre serving as the initial contact point for detainees. The call centre, supported by lawyers with experience in criminal practice ("Centre Lawyers"), will provide initial telephone advice to detainees. The Centre Lawyer may contact lawyers on a pre-approved panel of eligible lawyers ("Duty Lawyers") to provide timely legal advice at police stations for cases where it is so warranted. Stationing a lawyer in the police station has also been suggested for quicker access to the service.

Financial Eligibility and Contributions

The initial legal advice provided to detainees should be free of charge. However, if there is a subsequent visit to a detainee, a means test which is similar to that in place in the Duty Lawyers Scheme and simple and easy to administer should be imposed, and a contribution of \$500 to \$1,000 should be made payable by the detainee.

Implementation

The proposed service should be introduced on a pilot basis, implemented in stages and kept under monitor and review. As a start, 4 representative police stations may be involved in the pilot scheme. To make the pilot scheme meaningful, the selection of appropriate police stations and the support of the Hong Kong Police Force are important. There has also been suggestion of confining the service of the pilot scheme to only certain types of offence; or the more vulnerable groups in the community such as people aged below 18 or above 65; people who have difficulties in speaking and/or understanding

士。試驗計劃的財務負擔將視乎服務的規模和提供服務的方式而有所變化。

試驗計劃應先試行不多過兩年，並建議在完成首年試行後作中期檢討及在試行兩年後作全面檢討。至於可否引入資訊科技協助提供服務及會否將服務擴展至提供法律代表給被拘留人士，可在試行推展後再作考慮。此外，警方在一些案件中，在落案後可能繼續向被拘留人士問話，故有關服務應否在「警署至出庭間」這時段提供亦受到關注。另外，為被拘留人士提供服務的實際時間能否限制在1小時內也是令人關切的問題，尤其當口供是以書面方式記錄而非錄像記錄。為回應這些關注，「興趣小組」認為有關方面有必要收集數據來進行分析和檢討。試驗計劃服務可視乎檢討結果，擴展至其他警署和執法機構，即入境事務處、香港海關及廉政公署。

「興趣小組」曾經研究能否將建議服務納入現行由法援署管理的法援計劃。可惜，在現行法例框架下，法援不能伸延至未被落案的被拘留人士；此外，法律援助證書必須在申請人通過經濟審查後才可發出，而這種審查，在為被拘留人士提供即時緊急的法律支援的情況下是不可行的。因此，「興趣小組」認為以行政計劃的形式為被拘留人士提供法律方面的援助更為合適。

Cantonese or Putonghua or English; and/or identified mentally disabled persons. The financial implications of the pilot scheme will vary, depending on the scale of the service to be provided and the means of delivering the service.

The pilot scheme should be implemented for no longer than two years. An interim review after the first year and a comprehensive review after the second year are recommended. Whether IT measures could be adopted to deliver the legal assistance and whether the service should be extended to cover legal representation are subject to further consideration after the pilot scheme has been put in place. Besides, there has been concern as to whether the service should cover the “police station to court” period as in some cases the Police may continue to question the detainees after a charge has been laid. Concern has also been raised as to whether the actual time spent in representing a detainee could be restricted to less than one hour, particularly when a written statement is to be taken word by word from the detainee instead of a video interview. Therefore, to address the concerns, data should be collected for analysis and review of the pilot scheme. Subject to the outcome of the review, the service may be extended to other police stations and law enforcement agencies i.e. the Immigration Department, the Customs & Excise Department, and the Independent Commission Against Corruption.

Consideration has been given as to whether the proposed service can be grafted onto the existing legal aid schemes under the Legal Aid Department. However, the existing legal framework does not permit the extension of legal aid to a detainee prior to charge. Besides, a means test is the prerequisite of the grant of a legal aid certificate and this will not be feasible in the urgent setting of granting immediate legal assistance to a detainee. In view of the circumstances, it is considered more appropriate to provide legal assistance to detainees through an administrative scheme.





本局的「興趣小組」在討論計劃書時，儘管在有限的人力和資源下，僅能收集執法機構、當值律師服務及兩個法律專業團體的相關意見，本局相信上述的建議是公正而合理的。本局認為通過單一或一系列循序漸進的試驗計劃，可以找出可能出現的程序或財務問題，而這些技術上的問題，均可透過進一步的商討解決。

本局已於2016年2月2日向行政長官提交以上建議，並促請政府當局慎重考慮及盡快落實執行有關建議。

The Council considered the foregoing recommendations fair and reasonable though it has only limited manpower and resources to collect all relevant views from the law enforcement agencies, DLS and the two legal bodies when the proposals were discussed within the Council's Interest Group. The Council also considered that any possible logistic or financial concerns can best be tested out in a single or a series of progressive pilot schemes so that any technical issues can be identified and resolved through further discussions.

The Council submitted the above recommendations to the Chief Executive on 2 February 2016 and has urged the government to seriously consider an early implementation of the recommendations without delay.