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为被扣留在警署人士 提供法律方面的援助

Legal Assistance to Detainees
at Police Stations



本局邀请了辖下的法律援助范围兴趣小组（「兴趣小组」）就法律援助的涵盖范围应否扩大至包括被扣留在香港执法机构的人士进行研究。除与持分者会面外，「兴趣小组」研究了相关的法例和统计，亦同时以5个有为被扣留人士提供法律方面的援助的司法管辖地区，即英格兰及威尔斯、苏格兰、台湾、新西兰和加拿大安大略省，作比较及研究，借以了解海外地区为被扣留人士提供相关法援的范畴及形式。「兴趣小组」就为被扣留在香港警署的人士提供法律方面的援助的研究结果会在随后的段落中详述。

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.

香港的情况

The Hong Kong Position

在香港的刑事法例下，在法院或法庭之前，人人平等及皆假定无罪，而举证责任在控方。每个人都有权得到公平公开审讯的权利，不会被强迫作出违反自己利益的供词或被迫认罪。为确保基本人权受到保障，每个人都应有权得到保密和及时的法律意见、以及可由律师代表出庭。但是，一个被扣留人士在受到审问前，他是否能得到及时的律师意见以保障其个人权益备受关注。故此有人建议，如被扣留人士无经济能力聘请律师，应以法援方式为他们代聘。

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.

目前香港并无任何公共计划协助保障一个被扣留人士，由其个人自由受到限制至在裁判法院出庭期间的个人权益。香港保留普通法中保持缄默的权利。根据保安局发出的程序守则规定，一个人只有在有合理理由被怀疑干犯了罪行的情况下，才会被进行警诫。

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

这警诫是提醒每个人均有权保持缄默的第一个通知，可是一个被拘留在执法机关的人士却未必清楚可以行使这个权利。

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

建议

Recommendations

经审慎考虑所有相关议题后，本局认同「兴趣小组」的建议，即应设立一个由政府资助的计划为被拘留人士提供法律方面的援助，以保障其法律权益。

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.

服务范畴

1. 援助计划的目的是为确保被拘留人士在他的个人自由受到限制时，可以获得有关应有权益的法律意见。
2. 该计划的援助范围应由一个人被拘留开始，即他的个人自由被限制在警署内，但不应包含被拘留人士被正式落案起诉后的法律咨询，即「警署至出庭间」的时段。因为除非得到保释，一般在被落案起诉后，该人士很快便会被安排出庭，而且当案件转介至裁判法院后，当值律师服务便可向该人士提供法律意见和支援。
3. 应为被拘留人士提供初步的法律意见。
4. 虽然就法律咨询服务应否受时间限制及如需要设限，应设定在多少时间方面未达成共识，但主流意见认为有关服务不应超逾1小时。

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. 律师应运用其专业判断以决定单一案件所需的工作时间，在某些特别的情况下，例如涉及严重罪行或被扣留人士对理解法律意见有困难，律师便可酌情处理服务时限。
 6. 服务应包括律师亲自到警署为被扣留人士提供法律意见。透过与被扣留人士面对面的对话，律师可准确地引导和明白被扣留人士的忧虑和需要，从而提供更适合和贴近他们情况的法律意见。
 7. 由于并非所有被扣留人士都会要求或需要律师亲身提供法律意见，以及为了令有需要的人士能迅速得到法律支援，律师可用电话提供初步的法律意见，如有需要可再安排面对面的会见。
 8. 服务应只提供予被警方拒绝保释的人士，或没有能力缴付保释金的被扣留人士。为避免服务被滥用，如有需要，可就服务对象的定义作进一步的阐释。
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. 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. 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. 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.

服务的形式

在对5个提供相关服务的司法管辖地区的研究中，发现每一个援助计划都有设立电话中心以处理所有有关提供法律意见（或法律代表）的要求。因此，「兴趣小组」内有建议设立一个类似的电话中心，作为被拘留人士的第一个接洽点。电话中心由有处理刑事案件经验的律师（「中心律师」）支援，用电话向被拘留人士提供初步法律意见。「中心律师」可因应案件的情况，联络在预先核准的名册上的合资格律师（「值勤律师」）到警署为被拘留人士提供适时的法律意见。为能够更快提供有关的法律支援服务，亦有建议安排律师在警署内驻守。

申请人的财务资格及分担费

给予被拘留人士的初步法律意见应是不用收费的。可是，如有后续面谈的需要时，就应施行一个简单、容易管理及类似当值律师计划所采用的经济审查，同时应向被拘留人士收取500元至1000元的分担费。

服务的推行

这建议应以试验计划形式进行，分阶段落实，并受监察和检讨。试验计划可先在4间有代表性的警署试行。要令这试验计划成功，选取合适的警署和得到香港警务处的支持尤为重要。此外，亦有建议试验计划的服务只涵盖部分罪行、或社会上较弱势人士，如年龄在18岁以下或65岁以上的人士、不谙说及 / 或不明白广东话、普通话或英语的人士、及 / 或被确认为患有智障的人

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。试验计划的财务负担将视乎服务的规模和提供服务的方式而有所变化。

试验计划应先试行不多过两年，并建议在完成首年试行后作中期检讨及在试行两年后作全面检讨。至于可否引入资讯科技协助提供服务及会否将服务扩展至提供法律代表给被扣留人士，可在试行推展后再作考虑。此外，警方在一些案件中，在落案后可能继续向被扣留人士问话，故有关服务应在「警署至出庭间」这时段提供亦受到关注。另外，为被扣留人士提供服务的实际时间能否限制在1小时内也是令人关切的问题，尤其当口供是以书面方式记录而非录像记录。为回应这些关注，「兴趣小组」认为有关方面有必要收集数据来进行分析和检讨。试验计划服务可视乎检讨结果，扩展至其他警署和执法机构，即入境事务处、香港海关及廉政公署。

「兴趣小组」曾经研究能否将建议服务纳入现行由法援署管理的法援计划。可惜，在现行法例框架下，法援不能伸延至未被落案的被扣留人士；此外，法律援助证书必须在申请人通过经济审查后才可发出，而这种审查，在为被扣留人士提供即时紧急的法律支援的情况下是不可行的。因此，「兴趣小组」认为以行政计划的形式为被扣留人士提供法律方面的援助更为合适。

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「兴趣小组」在讨论计划书时，尽管在有限的人力和资源下，仅能收集执法机构、当值律师服务及两个法律专业团体的相关意见，本局相信上述的建议是公正而合理的。本局认为通过单一或一系列循序渐进的试验计划，可以找出可能出现的程序或财务问题，而这些技术上的问题，均可透过进一步的商讨解决。

本局已于2016年2月2日向行政长官提交以上建议，并促请政府当局慎重考虑及尽快落实执行有关建议。

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.