



法律援助服務局
LEGAL AID SERVICES COUNCIL

Our Ref: () in LASC 2/10/1/5

Yr Ref :

E-mail : secy@lasc.hk

web-site : <http://www.lasc.hk>

Tel : 2838 5006

2 February 2016

The Honorable C Y LEUNG, GBM, GBS, JP
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China
Tamar, Hong Kong

Dear C.Y.,

Re: Legal Assistance to Detainees at Police Stations

The Legal Aid Services Council is responsible for, inter alia, advising the Chief Executive on legal aid policy. It has been keen to improve the legal aid services in Hong Kong. Recently, the Interest Group on Scope of Legal Aid of this Council has conducted a study on the provision of legal assistance to detainees who have been detained by law enforcement agencies in Hong Kong. I have the pleasure to report to you the findings of the Council.

Interest Group on Scope of Legal Aid

The Interest Group on Scope of Legal Aid (“IG”) was invited to study whether legal aid should be extended to cover legal assistance for persons detained by law enforcement agencies in Hong Kong. Members of the IG come from a wide spectrum of the local community including lawyers and non-lawyers (see *Appendix*). Apart from meeting other stakeholders, the IG also examined relevant legislation and statistics by conducting a

review and research on this matter. 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, Canada was carried out to gain an in depth understanding on the feasibility, scope and delivery of such legal assistance to detainees.

The Hong Kong Position

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, 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. Concerns have been raised for timely access to a lawyer so that a detainee's rights are properly protected before he is interrogated. When a detainee is unable to afford a lawyer, one should be provided to him by way of legal aid.

At present, there is no public scheme intended to cover the period where a person's liberty is restricted and before being 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 to silence. The exercise of that right may not be most clear to a person who is detained at a law enforcement facility.

Recommendations

After careful consideration of all relevant issues, it was considered that publicly funded legal assistance should be made available to protect the legal rights of detainees. Members were unanimously in favor of setting up a publicly funded scheme to extend such service to detainees accordingly.

Scope of the Service

1. A scheme should be made available to ensure that a detainee could have access to legal advice on his rights once his liberty is restricted.
2. Publicly funded assistance to provide legal advice to a detainee should cover the period when the individual is detained, i.e. his liberty is restricted in a police station. However, the proposed service 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. 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 would thus be tailor-made to that detainee’s circumstances.

7. Nevertheless, not all detainees would 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, in addition to or, where appropriate, in lieu of, 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.

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 (which has expressed concern on the adverse impacts of the pilot scheme on the operation and manpower support of police stations) 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 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 the circumstances, it is concluded that an administrative scheme would be more appropriate to extend legal aid for legal assistance to detainees.

I trust the foregoing recommendations are fair and reasonable even though the Council has only limited manpower and resources to collect all relevant views with the law enforcement agencies, the Duty Lawyer Service and the two legal bodies when the proposals were discussed within the Council's Interest Group. We consider 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.

For the benefit of Hong Kong, I would urge the government to seriously consider an early implementation of the Council's recommendations without delay. Meanwhile, please feel free to contact me if you require any clarification or additional information.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Eric Li', written over a white background.

Dr Eric Li Ka Cheung
Chairman

Legal Aid Services Council

Membership of Interest Group on Scope of Legal Aid

Chairperson : CHOW Juliana (Council member)
Members : KWONG Anna (Council member)
BURKE Patrick Michael
CHAN Honby
CHAN Kin Lok, Paul
CHANG Ka Chung
Dr CHIU Man Chung, Andy
CHONG Y K Sherman
HO Frankie
HO K K Thomas
HO Siu Leung, Nelson
HO Veng Ian, Rebecca
Dr IP Wing Yuk, Josephine
KWOK K B Benny
KWOK William
LAI Sai Hong
LAM Cheung Chi
LAM Kin Pui
Dr LAM Kwok Wing
LAM Wai Pan, Wilson
LEE Arthur
Dr LEE Fook Kay, Aaron
Dr LEE Wai Hung, Danny
LEUNG Wai Man, Raymond
Prof LI Che Lan, Linda
LI Mang Wah, Paul
LI Ping Fai, Tommy
LIANG PUI Saw Kian, Susan
LIN Annie
Dr LIU Wing Hong
LO Kwing Yu
MAK Hoi Wah
MAK L S Mabel
MAK Simon

McGOWAN H M James

NG Yan Yee

NG Ray

PANG Hing Tung, Pierre

TANG Pui Yee, Phoebe

TSOI Yiu Cheong, Richard

WONG Chi Yuen

WONG Kim Man

WONG Wang Tai, Ivan

Prof XU Ying

Dr YEUNG Chiu Fat, Henry

YIP Kin Keung