

Pilot Scheme on Provision of Publicly-funded Legal Assistance to Non-refoulement Claimants under the Unified Screening Mechanism

Views of the Hong Kong Bar Association

1. The Security Bureau of the HKSAR Government has invited the Hong Kong Bar Association (“HKBA”) to submit its views on the Government’s plan to launch a pilot scheme to provide publicly-funded legal assistance to non-refoulement claimants under the Unified Screening Mechanism (“USM”). Officers of the Bureau briefed and discussed the plan with members of the HKBA’s Committee on Constitutional Affairs and Human Rights on 30 September 2016.
2. The HKBA now submits its views on the Government’s plan.
3. The Government’s plan of the pilot scheme is intended to run in parallel to the existing scheme run by the Duty Lawyer Service for the purpose of meeting the policy target to step up the number of determination of non-refoulement claims to 5,000 or above per year beginning 2017/18. The pilot scheme is expected to take up the number of cases commencing screening that is above the daily quota presently handled through the existing scheme run by the Duty Lawyer Service. Lawyers eligible for assignment of cases under the pilot scheme will be assigned cases on a rotational basis to provide assistance to the USM claimant throughout all stages of screening, with an office set up to liaise between claimants and their assigned lawyers, as well as between lawyers and interpreters. There is no legal executive support (like that currently provided by court liaison officers under the Duty Lawyer Service scheme) and the assigned lawyer will be paid an allowance on top of legal fees to cover “such duties”, which may include contacting interpreters. The office of the pilot scheme will also have rooms for assigned lawyers to meet claimants. Lawyers taking up a case under the pilot scheme will be paid a flat fee per assignment, set by reference to the average legal fees per case under the existing scheme run by the Duty Lawyer Service, which at present appears to be \$20,700, plus an additional \$6,520 to stand as the allowance covering

legal executive support. The Government's plan of the pilot scheme also envisages the possibility of cases initially assigned for assistance under the pilot scheme to be "[reverted] back to ImmD so that the case can be referred to the DLS scheme under existing quota, subject to discussion between the assigned lawyer and the [pilot scheme's office]".

4. Officers of the Security Bureau clarified during the meeting of 30 September 2016 that the pilot scheme's office will be set up by the Security Bureau and payment will be made by the HKSAR Government to the assigned lawyers. The officers also clarified that the reference of cases between the existing scheme run by the Duty Lawyer Service and the pilot scheme will be a mechanical process with reference to the daily quota presently handled under the existing scheme run by the Duty Lawyer Service.
5. The HKBA has strong reservations of the pilot scheme as described, clarified and explained above. They are:
 - (1) Unlike the existing scheme run by Duty Lawyer Service, the pilot scheme will be established and run entirely by the HKSAR Government. The pilot scheme office will apparently be staffed by civil servants or contract staff recruited by the HKSAR Government and run according to policy and guidance formulated by different parts of the HKSAR Government. The Immigration Department is to be responsible for the designation and allocation of cases as between the pilot scheme and the existing scheme run by the Duty Lawyer Service, albeit that the allocation has been described as "mechanical". Whereas there is the possibility of a case initially allocated under the pilot scheme to be reverted to the existing scheme run by the Duty Lawyer Service, this is not undertaken "on demand" either from the claimant or from the assigned lawyer but necessitates decision-making by the responsible officer of the pilot scheme office and then by the responsible officer of the removal assessment section of the Immigration Department. At the end of the screening process, a decision vital to the wellbeing and interests of the claimant will be made by the responsible government

department under the supervision of the Security Bureau, namely the Immigration Department. The structural and operational arrangements described above, in the opinion of the HKBA, clearly attract criticisms of being apparently biased and lacking in independence and impartiality. USM claimants are entitled to legitimately perceive or be concerned that the pilot scheme, administered through an office which is set up, staffed and run by the HKSAR Government, will not be able to provide them with publicly funded legal services that satisfy the high standards of fairness required of the screening process, of which the publicly funded legal services representing the rights and interests of the claimant form part. They are entitled to be of the impression that the lawyers assigned to represent them in the screening process under the pilot scheme are lawyers retained and paid by the decision-makers themselves. An analogy can be drawn here of the Department of Justice paying lawyers to act for defendants in criminal prosecutions pursued by the Department of Justice.

- (2) In an email dated 10 November 2016 from the Security Bureau, the Security Bureau referred to the decision of Leung Hon Wai v. Director of Environment Protection (HCAL 49/2012. CACV 176/2013 & FACV 2/2015) and suggested the concern of apparent bias could be addressed by placing the operation of the pilot scheme in a functionally segregated division within the Security Bureau and operating it in accordance to a protocol which is accessible by the public. Whilst the HKBA agrees that such measures may be able to avoid the criticism of apparent bias, they still cannot solve some of the other problems arising from running two schemes in parallel at the same time.
- (3) The operational arrangement and guidance for decision-making in respect of “reverting” a case to the existing scheme of the Duty Lawyer Service (which are yet to be formulated and subject to consultation) is likely to be contentious and each decision made by the pilot scheme office and/or the responsible immigration officer denying “reverting” can be challenged by the USM claimant by way of judicial review on the grounds of unlawfulness,

unreasonableness or procedural unfairness. For example, differences between the pilot scheme office senior staff and the responsible immigration officer on the one hand and the assigned lawyer on the other hand over “all applicable grounds” and how best to address them in the particular case through publicly funded legal assistance will generate reasonable arguments which may end up in the Court of First Instance in an application for judicial review. This is one of the costs of having two schemes running in parallel, with the pilot scheme capable of being regarded as being less fair than the existing scheme of the Duty Lawyer Service, or even perceived as part of the HKSAR Government. The consequences of such challenges are obvious, including the deployment of public resources in respect of the litigation, the use (and frankly, wasting) of the HKSAR’s limited judicial resources in the adjudication of those claims, and the prolongation of the stay in Hong Kong of the USM claimants concerned.

- (4) In addition to the above more fundamental points, the HKBA also has the following observations in relation to the pilot scheme:-
 - (a) Under the HKBA Code of Conduct, subject to such exceptions as set out in Annex 20, a barrister may not act in a professional capacity except upon the instructions of a solicitor, or the Director of Legal Aid, or the Government. Hence, barristers can only accept instructions under the pilot scheme if they come from a qualified solicitor, the Director of Legal Aid, the Government (i.e. Department of Justice) or authorized organizations set out in Annex 20. There is no provision in the Code of Conduct that allows barristers to accept instructions directly from the Security Bureau. If the Security Bureau is minded to implement the pilot scheme, they would need to consider the way by which instructions can be given to barristers in accordance with the existing Code of Conduct.
 - (b) The HKBA considers that it is undesirable for barristers to engage in the legal executive work inclusive of taking of instructions from the

USM claimant; this is likely to compromise the independence and impartiality of the barrister as a legal advisor and advocate in the referral profession. It must be noted that this reservation does not concern the estimated time and costs of such legal executive work, and whether individual barristers may be sufficiently incentivized to join the list of lawyers at the disposal of the office of the pilot scheme.

- (c) In fact, many lawyers representing USM claimants under the existing scheme under the Duty Lawyer Service find the assistance of the case officers (court liaison officer rank) of the Duty Lawyer Service extremely valuable since they do not only the initial instruction taking but also the liaison and secretarial work. This enables the division of labour between the case officer and the lawyer, with the latter focusing on the detailed exploration of the crux of the claim relevant and personal to the claimant, and research on relevant country of origin information. The initial instructions taking for the factual information and allegations that constitute the claim of non-refoulement protection (ie “Answer No 35” under the current Non-refoulement Claim Form) can be time consuming. Many barristers do not have chambers facilities (such as separate interview rooms and dedicated secretaries) to handle the legal executive work currently performed by the case officers of the Duty Lawyer Service under the existing scheme.
- (d) According to the experience of those members who participate in the scheme run by the Duty Lawyer Service, the real issue in the present difficulty of unsatisfactory progress in the assessment of USM claims is the lack of interpreters of the languages of the USM claimants in Hong Kong. USM claims at present cannot be expedited not because of the lack of lawyers who can represent claimants but because of the unavailability of interpreters.

6. The HKBA's views are stated only in respect of the pilot scheme that the Security Bureau has kindly informed the HKBA in solicitation of views. The HKBA will be pleased to consider any reformulated version of the pilot scheme after the Security Bureau and the Department of Justice have together addressed the reservations stated herein above and to state its views in respect of such a reformulated proposal.

Dated this 18th November 2016.

HONG KONG BAR ASSOCIATION