

**For information
on 25 June 2007**

LegCo Panel on Administration of Justice and Legal Services

**Pilot Scheme on Mediation in
Legally-Aided Matrimonial Cases**

PURPOSE

This paper briefs the Panel on the evaluation of the Pilot Scheme on mediation in legally-aided matrimonial cases (Pilot Scheme) and the proposed way forward.

BACKGROUND

2. Following consultation with the Panel in February 2005, the Legal Aid Department (LAD) launched a one-year Pilot Scheme on 15 March 2005. From a legal aid policy perspective, the Pilot Scheme aimed to establish whether extending funding to cover mediation of legally-aided matrimonial cases was justified on grounds of cost-effectiveness and the full implications.

3. The Pilot Scheme was modeled on the Judiciary's pilot scheme that took place from May 2000 to July 2003, and took into account the specific recommendations of the Civil Justice Reform (CJR) Report and the views of the Legal Aid Services Council. It operated using the Judiciary's existing facilities established for matrimonial cases since 2000 – a Mediation Coordinator's Office (MCO) and a panel of accredited mediators. The main features of the Scheme are at the **Annex**. The Pilot Scheme ended on 14 March 2006.

4. A Steering Committee was set up to oversee and evaluate the Pilot Scheme. The Steering Committee was chaired by Director of Administration and comprised representatives from LAD, Home Affairs Bureau and Mr Justice Hartmann from the Judiciary.

5. We provided an interim report to the Panel on 22 May 2006 (CB(2)2039/05-06(01)). We undertook to examine the feasibility and appropriateness of turning the Pilot Scheme into a standing feature of legal aid service.

OUTCOME OF THE PILOT SCHEME

6. The Pilot Scheme captured legally-aided matrimonial cases with applications made or legal aid certificates granted during the 12 months ending 14 March 2006. Legal proceedings on some of the cases are still on-going. However, the data and information obtained is already sufficient to complete the evaluation of the Pilot Scheme. The key findings as at 15 March 2007 are set out below.

Caseload

7. A total of 6,297 relevant legal aid certificates were granted. Legally-aided persons were invited to use the mediation service under the Pilot Scheme on a voluntary basis. They may do so at any stage as their cases progress. Of the 6,297 cases –

- (a) legally-aided persons in 297 cases have expressed interest to attempt mediation (274 cases indicated after the first interview with assigned solicitors; 12 at the same time as the petition was issued; 6 after the issue of the petition; and the remaining 5 some time after the proceedings were instituted). They have hence been referred to the MCO;
- (b) eventually, only 107 (1.7%) cases were referred to the mediators. The majority of the cases (4,727 cases, 75%) were either not suitable (e.g. child abuse or domestic violence involved), not necessary (i.e. no real issue in dispute), or not possible (e.g. opposite party could not be located, opposite party cannot/refuses to attend) to be subject to mediation. For the other cases, reasons for not opting for mediation varied (e.g. they preferred other means, like through court, to resolve their disputes, or they considered that mediation would not help);
- (c) 88 cases (1.4 %) were mediated; and
- (d) 61 (69%) of the 88 mediated cases reached either full (48) or partial (13) agreement.

8. The small caseload did not come as a surprise. As seen from paragraph 7(b) above, there are indeed a large number of cases for which mediation is either not suitable, not necessary or not possible. We have also drawn reference from the Judiciary's three-year Pilot Scheme, under which an average of about 310 cases were mediated per annum (about 1.9% of the some 16,000 divorce cases filed a year). The corresponding figure under the Pilot Scheme of LAD is 1.4% (paragraph 7(c)).

9. The Panel has asked us to assess the effect of the Judiciary's on-going Pilot Scheme on Financial Dispute Resolution (FDR)¹ on the Pilot Scheme of LAD. According to the Judiciary, the Pilot Scheme is still on-going and an evaluation of the scheme has yet to be done. In any case, we do not find any apparent effect of the FDR Scheme on the take-up rate of the Pilot Scheme of LAD. We observe that about 97 legal aid cases were mediated per annum under the Judiciary's Pilot Scheme on Mediation when there was no FDR Scheme (about 1.5% of the legal aid certificates for matrimonial cases in a year then). The figure is in line with that under LAD's Pilot Scheme (88 mediated cases, 1.4% of relevant matrimonial legal aid certificates). Possible reasons are –

- (a) as mentioned in paragraph 7(b) above, the majority of the cases are either not suitable, not necessary, or not possible to be subject to mediation. In particular, over 2,600 cases have no real issues in dispute. The FDR mechanism will likewise not be applicable to these cases. Whether there is a FDR Pilot Scheme available is therefore not so relevant; and
- (b) under LAD's Pilot Scheme, legally-aided persons were advised of the availability of the service at the time of their application at LAD and thereafter at their first interview with the solicitor. These all took place before the issue of the petition, when the FDR mechanism kicked-in. They are also allowed to join the Pilot Scheme at any stage of their proceedings. The availability of the FDR mechanism hence will unlikely affect the legally-aided persons' decision to join LAD's Pilot Scheme or not.

¹ The FDR Scheme covers all matrimonial cases involving claims for ancillary relief, except for those in which only nominal maintenance is claimed. Parties are required to make disclosure of their respective financial circumstances before the first appointment with the FDR judge. The judge's role is to explore possible grounds for, and where appropriate, attempt to facilitate early settlement. If parties cannot reach a settlement at the FDR hearing, the matter will then proceed for trial.

Cost

10. Mediation cost incurred under the Pilot Scheme was insignificant. Fee has been paid to the mediators of 92 cases at \$498,070 (average \$5,413 per case). Average time spent per mediated case was 8 hours.

11. Mediation does not necessarily bring down the overall cost (i.e. litigation costs plus mediation costs) of the cases. Only 31 mediated cases have finalised the accounts. The median total cost (litigation costs and mediation costs) of these cases was \$21,050, higher than the median cost of legally-aided matrimonial cases before the commencement of the Pilot Scheme² (\$13,200). On one hand, we note that because lawyers in most legally-aided matrimonial cases charge a fixed rate for their work done, if cases are mediated, mediator's fees averaging at \$5,000 odd will be added to the fixed costs, whether mediation is successful or not. On the other hand, we are mindful that had mediation not been made available to these mediated cases, the litigation costs might have been even higher.

Duration of the cases

12. No correlation can be drawn between the use of mediation and the duration of the cases. Many factors affect the overall duration of matrimonial cases, e.g. the nature of disputes, the degree of complexity, the parties' attitude and management of court processes by judges.

User feedback

13. The Pilot Scheme is successful in terms of rating by users and agreement reached through mediation. 659 (90%) of the respondents of the questionnaire survey have rated the Scheme positively. 61 (69%) of the 88 mediated cases have reached either partial or full agreement.

² Legal aid certificates granted from 1 January 2004 to the commencement of the Pilot Scheme.

Panel of Mediators

14. The panel of 82 mediators are those on the MCO's panel list who agree to participate in the Pilot Scheme. The following is a breakdown of their background –

Social work	53
Legal	26
Counselling	2
Clinical Psychology & Psychotherapy	<u>1</u>
Total :	82

PROPOSAL

World and local trend

15. The world trend is to develop mediation as an adjunct to litigation. It provides an alternative channel (not a replacement) to bring the parties to reasonably early and informed settlement in a less adversarial manner. In the realm of family disputes in particular, it would likely bring about less antagonistic relationship in the long term. Major overseas jurisdictions including the UK, Australia, Canada, the US, Japan and Singapore have instituted the use of mediation in the family dispute resolution process.

16. In the local arena, the Chief Justice has established a working party to consider how to facilitate mediation in civil disputes in the Court of First Instance, the District Court and the Lands Tribunal. The Secretary for Justice has also set up a working group comprising representatives of the legal profession, mediation organisations and academics to identify means to promote mediation; taken steps to examine the wider use of mediation in civil disputes in which the Government is a party; and enhanced in-house mediation training.

17. Although providing legal aid for mediation in legally-aided matrimonial cases may not necessarily reduce the overall costs of matrimonial cases and the number of beneficiaries may not be great until mediation becomes generally more popular, we consider that we should establish mediation in legally-aided matrimonial cases as a permanent feature of the legal aid service. This is in line with the world trend and our local efforts of promoting mediation as an alternative to litigation.

Features of the proposed permanent arrangement

18. The arrangements and operation of the Pilot Scheme, as set out in the **Annex**, have generally been smooth with no major difficulties. We hence consider that these features of the Pilot Scheme should continue (including that the service of the MCO of the Judiciary would continue to be used), except the following areas in order that the provision of legal aid for mediation in legally-aided matrimonial cases would be on par with legal aid in civil proceedings –

- (a) Instead of funding mediation in legally-aided matrimonial cases through an administrative scheme as the Pilot Scheme, future funding should be done on a statutory basis through amending the Legal Aid Ordinance. By doing so, DLA's power and duty in relation to mediation can be defined clearly in law, on par with legal aid in legal proceedings;
- (b) Under the Pilot Scheme, the non-legally-aided opposite parties were not required to pay their share of mediators' costs. To fund non-legally-aided persons when mediation becomes a permanent feature would be against the fundamental policy that only persons who have passed the means and merits test are eligible for legal aid. Hence, only the legally-aided persons' share of the mediator's fees should be publicly funded under the permanent arrangement; and
- (c) To be on par with all civil legal aid cases, mediators' fees and legal costs incidental to mediation should be subject to DLA's first charge on any property recovered or preserved for the aided persons under the permanent arrangement.

WAY FORWARD

19. The Government intends to consult the Legal Aid Services Council on the features of the proposed permanent arrangement to extend legal aid to cover mediation in legally-aided matrimonial cases.

Administration Wing
Chief Secretary for Administration's Office

Legal Aid Department

June 2007

**Essential Features of the Pilot Scheme
on Mediation in Legally-Aided Matrimonial Cases**

(A) Roles of different parties in the Pilot Scheme

Legal Aid Department (LAD)

LAD administers the Pilot Scheme. Its main roles are to –

- conduct the usual means and merits tests on the legal aid applicants and inform those who have passed the tests of the Pilot Scheme;
- assign solicitors to the legally-aided persons as is the case now once it decides to grant legal aid;
- maintain a panel of mediators who are on the Mediation Coordinator's Office (MCO)'s panel of mediators and who accept the terms and conditions for assignments from LAD under the Pilot Scheme;
- approve funding beyond the specified hours of funded mediation in suitable cases;
- monitor the development of the cases concerned and ensure the assigned solicitors and mediators act in accordance with the requirements of the Pilot Scheme; and
- collect the necessary data for the evaluation of the Pilot Scheme.

Legally-aided person

2. The legally-aided person and the other party involved in a matrimonial case are invited to join the Pilot Scheme on a voluntary basis. They may choose a mediator out of a list of those who are accredited and have agreed to participate in the Pilot Scheme. For cases considered suitable for mediation, they may join before or after the commencement of proceedings.

Assigned solicitor

3. The assigned solicitor is required to advise the legally-aided person of the availability of mediation in accordance with the court's Practice Directions and of the Pilot Scheme. He also advises the legally-aided person in the course of mediation as and when necessary, and appear on behalf of him in subsequent court proceedings. Where the legally-aided person has indicated his unwillingness to attempt mediation, the assigned solicitor will inform LAD of the reasons given by him.

Mediator

4. The mediator renders mediation service at a fixed rate per hour. He reports to LAD on the outcome of the mediation and, if necessary, seeks LAD's approval to extend the number of hours of mediation funded by the Pilot Scheme beyond the specified hours.

Mediation Coordinator's Office (MCO)

5. The Judiciary's MCO assists in providing information sessions for the legally-aided person and the other party, and assessing whether the case is suitable for mediation, based on the guidelines adopted in the Judiciary's pilot scheme. Should a case be identified as suitable for mediation and if the parties so agree, the MCO assists them to choose a mediator from a list of accredited mediators who have agreed to participate in the Administration's Pilot Scheme. The MCO also reports to LAD on whether the parties agree to mediate, and if so, the name of the mediator chosen by the parties.

(B) Other logistical arrangements

Number of hours of mediation

6. In line with the Judiciary's pilot scheme, the number of hours for mediation under the Administration's Pilot Scheme is capped at 15 hours per case. Based on the mediator's report, LAD may approve funding beyond the initial 15 hours in suitable cases (e.g. where it is considered that the extension would facilitate an agreement between parties concerned).

Level of mediators' fees

7. The mediator fee is \$600 per hour, the same as that paid by the Judiciary under its pilot scheme.

Payment of mediators' fees

8. In order to encourage the legally-aided person and the other party to adopt mediation and participate in the Administration's Pilot Scheme, LAD bears the mediators' fees for both sides. The mediators' fees incurred will not be recovered from the legally-aided person.
