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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 25 June 2007**

Pilot Scheme on Mediation of Legally Aided Matrimonial Cases

Purpose

This paper summarises the past discussions by the Panel on issues relating to the Pilot Scheme on Mediation of Legally Aided Matrimonial Cases.

Background

The Judiciary's Pilot Scheme on Family Mediation

2. The Judiciary launched a three-year Pilot Scheme on Family Mediation in May 2000 to test the effectiveness of mediation in resolving matrimonial disputes. The Pilot Scheme took place from May 2000 to July 2003 and ended on 14 March 2006. The Pilot Scheme was administered by the Mediation Co-ordinator's Office (MCO) of the Judiciary. The Judiciary funded the mediation fees for 930 matrimonial cases, and the cost of the Pilot Scheme was \$6.2 million, exclusive of staff costs. The success rate of the 930 cases was about 78% (with about 68% achieving full settlement and about 10% achieving partial settlement). The Pilot Scheme concluded that mediation helped produce a high users' satisfaction rate and a high agreement rate and resulted in saving court time.

The Legal Aid Department's Pilot Scheme on Mediation of Legally Aided Matrimonial Cases

3. In tandem, the Chief Justice's Working Party on Civil Justice Reform has examined possible reform in, inter alia, the area of alternative dispute resolution (ADR), and has issued its final report in March 2004. The Working Party recommends that litigants be provided with better support and information by the court with a view to encouraging greater use of purely voluntary mediation in conjunction with other appropriate measures to promote court-related mediation.

4. To encourage greater use of mediation as a method of ADR, the Working Party also recommends that the Legal Aid Department (LAD) should have power in suitable cases, subject to further study by the Administration and consultation on the development and promulgation of the detailed rules for the implementation of a scheme, to limit its initial funding of persons who qualify for legal aid to the funding of mediation, alongside its power to fund court proceedings where mediation is inappropriate or has failed.

5. Pending the consideration and implementation of the recommendations of the Working Party, the Judiciary will continue to maintain the MCO following the expiry of its Pilot Scheme.

6. In order for the Administration to consider the Working Party's recommendation in paragraph 4 above, the LAD launched a one-year pilot scheme on 15 March 2005 to assess the cost-effectiveness and implications of providing legal aid to cover mediation of legally aided matrimonial cases.

7. As a matrimonial case will take about two years to conclude, the Administration aims at conducting an evaluation of the Pilot Scheme in 2007. The Administration will examine the propriety of turning the Pilot Scheme into a standing feature of legal aid services and evaluate the resource implications of providing legal aid for mediation of matrimonial cases, including the cost and duration for completing the legally aided cases, as well as the operational and legislative requirements involved.

8. The Panel discussed the Pilot Scheme at its meeting in February 2005, October 2005 and May 2006. The main issues of concern discussed by the Panel are summarised in paragraphs 9 to 17 below.

Issues of concern raised by the Panel

Voluntary participation in mediation

9. Members considered that mediation should not be imposed as a condition for the grant of legal aid. The Administration assured members that the Pilot Scheme would operate on the basis of voluntary participation. The grant of legal aid for court proceedings would not be affected by whether the case could be considered for mediation or whether the parties had agreed to undertake mediation. A certificate of legal aid issued to an applicant would not be withdrawn by LAD on the ground that the applicant had refused the option of mediation. The information leaflet on the Pilot Scheme would clearly state that participation in mediation was strictly voluntary. The Administration had undertaken to consider other channels through which the voluntary aspect of the Pilot Scheme could be publicised.

Publicity

10. Members considered that the Administration should proactively promote the Pilot Scheme through multiple channels and enhance public awareness of mediation as an effective means of ADR.

11. Some members expressed concern whether the assigned solicitors would advise their clients of the availability of mediation and encourage them to undertake mediation, as mediation might result in less work for the solicitors. There was a suggestion that information concerning the assistance available under the Pilot Scheme should be provided to an aided person before a solicitor was assigned to him. There was also concern over the difficulty in persuading legally aided persons to opt for mediation, particularly when the legal costs of court proceedings would not be of concern to them.

12. The Administration addressed the above concerns by assuring members that publicity materials, including information leaflets and Explanatory Notes on the Pilot Scheme, as well as the forms to be used by assigned solicitors and mediators had been prepared. The assigned solicitors would be provided with an Explanatory Note on details of the Pilot Scheme and their role in the Scheme. The solicitors were required to advise legal aid applicants of the availability of mediation in accordance with the court's Practice Directions as well as the particulars of the Pilot Scheme; and to report to LAD on whether their legally aided clients would attempt mediation under the Scheme. A video on mediation would be made available for viewing by legal aid applicants. Details of the Scheme would also be publicised through LAD's website and non-governmental organisations requested to distribute the publicity materials.

Interim report in May 2006

13. The Administration provided an interim report on the LAD's Pilot Scheme to the Panel in May 2006. The Panel was advised that although the Pilot Scheme ended on 14 March 2006, most of the cases were ongoing. Assistance would continue to be provided under the Pilot Scheme to legally aided matrimonial cases where the parties had applied for legal aid before that date. A copy of the Administration's paper to the Panel is in **Appendix I**.

Caseload

14. Members noted the caseload as of 7 April 2006 and expressed concern that both the take-up rate and success rate of the LAD's Pilot Scheme were quite low (paragraphs 5 - 7 of the paper refer), compared to that of the Judiciary's Pilot Scheme. The Administration explained that -

- (a) the small caseload did not come as a surprise as a large number of cases was not suitable (i.e. domestic violence/child abuse was involved), or not necessary (i.e. there was no real issue in dispute), or not possible (i.e.

aided person/opposite party was a mental patient, the opposite party could not be located/refused to participate) for mediation;

- (b) the 930 cases funded by the Judiciary's Pilot Scheme included both legally and non-legally aided cases. As a number of non-legally aided cases involved controversial issues and large sums of money, the parties concerned would be inclined to opt for mediation to resolve their disputes; and
- (c) a possible factor affecting the take-up rate of the LAD's Pilot Scheme could be attributed to the Judiciary's concurrent pilot scheme on Financial Dispute Resolution (FDR), which involved the reform of ancillary relief procedures in matrimonial proceedings and facilitated the settlement of quite a number of matrimonial cases at an early stage. The take-up rate of the Judiciary's Pilot Scheme was unaffected because it was completed before the launch of the FDR scheme which ended in December 2006.

15. Members asked the Administration to -

- (a) analyse the 194 cases under LAD's Pilot Scheme to ascertain the stages at which legally aided persons had decided to opt for mediation;
- (b) analyse the 930 cases funded by the Judiciary's Pilot Scheme to find out the number of non-legally aided cases and the reason for their high success rate; and
- (c) assess the impact of the FDR scheme on the LAD's Pilot Scheme and revert to the Panel on the final evaluation reports of both schemes.

Number of hours of mediation

16. Members noted that in line with the Judiciary's Pilot Scheme, the number of hours for mediation under LAD's Pilot Scheme was capped at 15 hours per case at a mediation fee of \$600 per hour. As at April 2006, LAD paid some \$169 000 to mediators for 33 cases (i.e. an average of \$5000 per case). As the average time spent per mediated case was only about 8.5 hours, a member suggested reducing the maximum number of hours for mediation to save resources. Another member cautioned against such a reduction, as it might hinder the effective operation of the Pilot Scheme.

17. The Administration responded that LAD could approve funding beyond the initial 15 hours for suitable cases. The Administration would take into account members' views in the final evaluation of the Pilot Scheme.

Meeting on 25 June 2007

18. The Administration will report to the Panel on its final evaluation of the LAD's Pilot Scheme and the way forward at the meeting on 25 June 2007.

Relevant papers

19. A list of the relevant papers which are available on the LegCo website is in **Appendix II**.

Council Business Division 2
Legislative Council Secretariat
21 June 2007

For information

LegCo Panel on Administration of Justice and Legal Services

**Pilot Scheme on Mediation of
Legally Aided Matrimonial Cases**

PURPOSE

This paper provides Members with an interim update on the progress of the Pilot Scheme on mediation of legally aided matrimonial cases (Pilot Scheme).

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. As reported at the Panel meeting on 28 February 2005, 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, which were set out in the above-mentioned panel paper, are at the **Annex**. The Pilot Scheme ended on 14 March 2006.

PROGRESS

Caseload as of 7 April 2006

4. 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.

5. Solicitors in 4,781 cases have reported to LAD whether mediation would be attempted by the legally aided persons. The legally aided persons in 194 cases have expressed interest to attempt mediation and have been referred to the MCO, while the remaining 4,587 cases have not been so referred. At preliminary count, for over 3,000 of these 4,587 cases, mediation was either obviously **not suitable** (i.e. domestic violence/child abuse was involved), or **not necessary** (i.e. there was no real issue in dispute), or **not possible** (i.e. aided person/opposite party was a mental patient, the opposite party could not be located/refused to participate). For the other cases, the legally aided persons have not opted for mediation because they preferred other means to resolve their disputes (e.g. by way of reconciliation or counseling or through their solicitors or court), or considered that mediation would not help, etc.

6. Of the 194 cases that have been referred to MCO, 68 cases were referred to mediators and 43 cases were still in process as of 7 April (e.g. awaiting for information sessions or parties' instructions). No referral to mediators were made in respect of the remaining 83 cases mainly because opposite parties refused to attend the information session or to mediate, or it subsequently transpired that there was no real issue in dispute between the parties.

7. For the 68 cases referred to mediators, 23 were still in process. For the remaining 45 cases, 24 completed mediation with full agreement; two with partial agreement; 12 without agreement, and mediation did not take place for seven cases.

8. Up to 7 April, LAD paid a total of \$168,770 to mediators for 33 cases, i.e. an average of \$5,114 per case. Average time spent per mediated case was 8.5 hours.

Panel of Mediators

9. The panel of 73 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	45
Legal	25
Counselling	2
Clinical Psychology & Psychotherapy	1
Total :	73

Publicity

10. The LAD has actively promoted the Pilot Scheme -
- (a) for legal practitioners, the LAD has requested the Law Society of Hong Kong to assist in publicizing the Pilot Scheme among its members, conducted a seminar for legal practitioners, distributed suitable briefing materials to lawyers assigned to represent aided persons in matrimonial cases, and required the assigned lawyers to advise the aided persons of the availability of mediation and the Pilot Scheme in accordance with the Court's Practice Directions and LAD's instructions;
 - (b) for the public and aided persons, LAD has made available posters, pamphlets and booklets at its offices, produced a video for viewing in the reception areas and in private, and provided information on LAD's website and telephone hotline. LAD staff would meet with legal aid applicants on matrimonial matters to explain and promote the Pilot Scheme; and
 - (c) to target the promotion at members of the public having matrimonial disputes, LAD has provided posters, pamphlets and booklets to the Duty Lawyer Service's Free Legal Advice Service centres for distribution when matrimonial cases were involved. It has also requested Social Welfare Department and a number of non-governmental organizations (NGOs) that are in touch with members of the public who have matrimonial disputes (e.g. Caritas-Hong Kong Family Service) to distribute similar materials.

PRELIMINARY OBSERVATIONS

11. As explained in paragraphs 4 to 7 above, although the Pilot Scheme ended on 14 March 2006, most of the cases are on-going and complete data will not be available for some time.

12. The Steering Committee overseeing the Pilot Scheme, which comprises representatives from the Administration Wing of the CS' Office, LAD, the Home Affairs Bureau and the Judiciary, has reviewed the data so far available and has made the following observations -

- (a) as described in the CJR interim report, mediation is an Alternative Dispute Resolution process which is an alternative or adjunct to civil proceedings in appropriate cases, and not a replacement for civil proceedings. Seen in this light, the Pilot Scheme has provided a viable option for legally aided persons;
- (b) similar to the Judiciary's pilot scheme, the percentage of cases that would use the mediation service under the Pilot Scheme was expected to be small. As seen from paragraph 5 above, there are indeed a large number of cases for which mediation is either not suitable, not necessary or not possible. The Steering Committee therefore observed that the small caseload thus far did not come as a surprise; and
- (c) a very, if not the most, relevant factor affecting the take-up rate of the Pilot Scheme is the Judiciary's on-going Pilot Scheme on Financial Dispute Resolution (FDR) which involves the reform of ancillary relief procedures in matrimonial proceedings. The FDR scheme covers all matrimonial cases involving claims for ancillary relief, except for those in which only nominal maintenance is claimed. Under the scheme, 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. A preliminary observation of the Steering Committee was that the FDR scheme had enabled quite a number of cases settled at an early stage.

As the CJR Final Report puts it, "judicial mediation" is an important feature of the FDR scheme. Both LAD's Pilot Scheme and the FDR scheme provide channels for settlement of the cases. It is therefore understandable that the number of cases that joined LAD's Pilot Scheme might have been affected. We are seeking the Judiciary's assistance in providing us with more information and data regarding the FDR scheme for further analysis.

WAY FORWARD

13. In tandem, we will take steps to examine the propriety of turning the Pilot Scheme into a standing feature of legal aid service. We will evaluate the resource implications of providing legal aid for mediation of matrimonial cases, including cost (e.g. mediators' fees and lawyers' cost) and the duration for completing the legally aided cases, as well as the operational and legislative requirements involved.

14. Most matrimonial cases take about two years to conclude. We are working towards conducting the final evaluation of the Pilot Scheme in around mid 2007, when hopefully about half of the relevant cases will have been concluded.

Administration Wing
Chief Secretary for Administration's Office

Legal Aid Department

May 2006

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

(A) Roles of different parties in the Pilot Scheme

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.

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.

Pilot Scheme on Mediation of Legally Aided Matrimonial Cases

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
Panel on Administration of Justice and Legal Services	28 February 2005	Administration's paper on "Pilot Scheme on Mediation of Legally aided Matrimonial Cases" [LC Paper No. CB(2)507/04-05(01)] Minutes of meeting [LC Paper No. CB(2)1254/04-05]
	17 October 2005	Administration's paper on "Policy Initiative of the Administration Wing, Chief Secretary for Administration's Office" [LC Paper No. CB(2)29/05-06(01)] Minutes of meeting [LC Paper No. CB(2)677/05-06]
	22 May 2006	Paper provided by the Administration on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases" [LC Paper No. CB(2)2039/05-06(01)] Background brief prepared by the LegCo Secretariat on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases" [LC Paper No. CB(2)2052/05-06(05)] Minutes of meeting [LC Paper No. CB(2)2737/05-06]