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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 30 March 2009**

Pilot Scheme on Mediation in Legally-aided Matrimonial Cases

Purpose

This paper summarizes the past discussions of the Panel on Administration of Justice and Legal Services (the Panel) on issues relating to the Pilot Scheme on Mediation in 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 between May 2000 and July 2003 to test the effectiveness of mediation in resolving matrimonial disputes. 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 user satisfaction rate and a high rate of reaching agreement, and resulted in savings in court time.

The Legal Aid Department's Pilot Scheme on Mediation in Legally-aided Matrimonial Cases

3. In tandem, the Chief Justice's Working Party on Civil Justice Reform examined possible reform in, inter alia, the area of alternative dispute resolution (ADR), including mediation, and issued its final report in March 2004. To encourage greater use of mediation as a method of ADR, the Working Party recommended, among others, that the Legal Aid Department (LAD) should have power in suitable cases 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 was inappropriate or had failed. To facilitate the Administration in considering the Working Party's recommendation, LAD launched a one-year pilot scheme on 15 March 2005 to assess the cost-effectiveness and

implications of extending legal aid funding to cover mediation of legally-aided matrimonial cases. The Pilot Scheme was modelled on that launched by the Judiciary in 2000.

Outcome of LAD's Pilot Scheme

4. The LAD's Pilot Scheme ended on 14 March 2006. As most matrimonial cases took about two years to conclude, the Administration reported the final evaluation of the Pilot Scheme to the Panel at its meeting on 25 June 2007. The key findings were as follows -

Caseload

- (a) Legal aid certificates had been granted for 6 297 matrimonial cases during the 12-month period of LAD's Pilot Scheme. Legally-aided persons in 297 of these cases had indicated an interest to attempt mediation. Of the 107 cases referred to mediators, 88 cases were mediated of which 61 cases reached either full (48) or partial (13) agreement. The Panel noted from the Administration that the small number of caseload (i.e. 88 cases, or 1.4%) was not surprising as the majority of the cases were either not suitable (e.g. domestic violence was involved), not necessary (e.g. no real issue in dispute), or not possible (e.g. opposite party could not be located/refused to participate) for mediation, and the percentage was comparable to the 1.5% of the Judiciary's Pilot Scheme on Family Mediation.

Cost

- (b) The average mediator fee for each case was \$5,413, and the average time spent per mediated case was eight hours. There were no conclusive findings as to whether mediation had reduced the total costs (i.e. litigation costs plus mediation costs); and

User feedback

- (c) 90% of those surveyed rated the Pilot Scheme positively.

5. On the basis of the evaluation and findings of the Pilot Scheme, the Administration proposed that mediation in legally-aided matrimonial cases should be established as a permanent feature of the legal aid service, having regard to the social benefits of mediation and in line with the world trend and local efforts of promoting mediation as an alternative to litigation. The Panel expressed general support for the proposal.

Discussions of the Panel on the proposed permanent arrangement

6. The main features of the proposed permanent arrangement as provided by the Administration are set out in **Appendix I**. The proposal was discussed by the Panel at the meetings on 25 June 2007 and 23 June 2008. The major issues raised by members are summarized in the ensuing paragraphs.

Mandatory mediation

7. Some members expressed concern about the small caseload of the Pilot Scheme and urged the Administration to review how the proposed permanent arrangement should be implemented to make it more attractive. A member pointed out that mediation in Australia was successful as it was a statutory requirement for parties involved in matrimonial disputes to go through mediation first. The Administration advised that under the proposed arrangement, mediation would not be a mandatory pre-condition for the granting of legal aid for legal representation, as it was intended to be an adjunct to litigation and an alternative channel to dispute resolution between the parties.

Number of hours of mediation process

8. Regarding the Administration's proposal for the mediation process for each case to be capped initially at 15 hours, a member suggested that, as it would not take long to ascertain whether a case could be mediated, the hours allowed for the mediation process should be capped at a low level as a start and be extended when there was a need to do so, e.g. initially capped at six hours which would be extended for another nine hours if required. The Administration agreed to consider the interim checkpoint approach suggested by the member.

Level of fees for mediators

9. The Panel noted the view of the Law Society of Hong Kong that the \$600 hourly rate offered by LAD to mediators under its Pilot Scheme was unfair to the legal profession, given that a professional mediator and a trainee solicitor currently charged \$3,000 per hour and \$1,400 per hour respectively. Should the rate be adopted under the permanent arrangement, it would discourage lawyers from taking part in mediation and clients would have fewer choices in selecting their mediators. Members shared the view that it was unreasonable to expect the legal profession to provide mediation services on a pro bono basis. In this regard, the Panel noted from the Administration that under the proposed permanent arrangement, the Director of Legal Aid (DLA) would consider the hourly rate quoted by the mediator on a case-by-case basis. In line with the practice for other disbursements such as medical experts' fees, DLA would decide whether the proposed mediators' fees for particular cases were reasonable. Where necessary, quotes or estimated cost from more than one mediator would be obtained for comparison purposes.

Recovery of mediators' fees from the legally-aided party

10. A member expressed concern whether LAD had the right to recover mediators' fees from the legally-aided party, given that mediation fees was not part of litigation fees. The Administration was requested to consider stating clearly in its legislative proposal the arrangement for payment of mediators' fees. The Administration's advice was that although the court might not make an order for costs in respect of mediation fees, the legally-aided person's share of the mediation costs would nevertheless form part of DLA's net liability on the aided person's account in the legally-aided proceedings and would be recouped from the aided person where payment of contribution was required and/or where property was recovered or preserved.

Latest developments

11. According to the Updated Legislative Programme 2008-2009 provided by the Administration on 26 February 2009, the Administration aims to introduce the Legal Aid (Amendment) Bill into the Legislative Council in the current session to extend legal aid to cover mediation in legally aided matrimonial cases.

Relevant papers

12. A list of the relevant papers which are available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix II**.

Extract from the Administration's paper on "Proposal on the Permanent Arrangement for Mediation in Legally Aided Matrimonial Cases" dated June 2008

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THE PROPOSAL ON PERMANENT ARRANGEMENT

6. Under the permanent arrangement, mediation will not be a mandatory pre-condition for the granting of legal aid for legal representation, as it is intended to be an adjunct to litigation and an alternative channel to dispute resolution between the parties. A solicitor will be assigned to the legally aided person irrespective of whether the legally aided person wishes to attempt mediation.

7. In line with the current legal aid policy which requires that only persons who pass the means and merits tests will be eligible for legal aid, LAD will only finance the legally aided persons' share of the mediators' fees. As legally aided persons may be required to contribute towards the costs and expenses incurred by LAD, mediators' fees would be recovered from the contribution paid and/or money or properties recovered or preserved in the legally aided proceedings. In other words, as with all civil legal aid cases, the Director of Legal Aid ("DLA")'s first charge will apply.

8. The DLA will give approval to the engagement of a mediator in the same manner as approval is sought and given for the engagement of medical or safety experts.

9. The DLA will consider the hourly rate quoted by the mediator on a case-by-case basis. In line with the practice for other disbursements such as medical experts' fees, the DLA will decide whether the proposed mediators' fees for particular cases are reasonable. Where necessary, quotes or estimated cost from more than one mediator would be obtained for comparison purposes.

10. The number of hours allowed for the mediation process for each case is initially capped at 15 hours per case. Additional hours required for

completing the mediation process and the additional costs incurred will be subject to the further approval of the DLA on a case-by-case basis.

11. In considering approval for the mediators to be engaged, the fees to be charged and the number of additional hours to be allowed for mediation, the DLA will take into account factors such as the nature and complexity of the disputes in question which require mediation; the benefits to the legally aided person in proportion to the costs involved and whether first charge is involved.

12. Under the permanent arrangement, the DLA or the assigned solicitor, as the case may be, will refer suitable cases to the Mediation Coordinator's Office ("MCO") for mediation, and the legally aided person and/or the assigned solicitor will liaise with the MCO on the selection of mediators.

13. At present, the Legal Aid Ordinance (Laws of Hong Kong, Chapter 91) provides legal representation in courts and tribunals as specified therein. Legislative amendments are needed to cover mediation in matrimonial cases where legal aid has been granted.

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Pilot Scheme on Mediation of Legally Aided Matrimonial Cases

Relevant documents

| <u>Meeting</u> | <u>Meeting Date</u> | <u>Paper</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 | Administration's paper 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] |
| | 25 June 2007 | Administration's paper on "Pilot Scheme on mediation in legally-aided matrimonial cases" [LC Paper No. CB(2)2221/06-07(04)] Background brief prepared by the LegCo Secretariat on "Pilot Scheme on mediation of legally aided matrimonial cases" [LC Paper No. CB(2)2228/06-07(01)] |

| <u>Meeting</u> | <u>Meeting Date</u> | <u>Paper</u> |
|-----------------------|----------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | | <p>Submission on "The Pilot Scheme on Legal Aid for Mediation in Matrimonial Cases" from the Law Society of Hong Kong [LC Paper No. CB(2)2294/06-07(01)] (English version only)</p> <p>Minutes of meeting [LC Paper No. CB(2)2654/06-07]</p> |
| | 23 June 2008 | <p>Background Brief on "Pilot Scheme on Mediation in Legally-aided Matrimonial Cases" prepared by the Legislative Council Secretariat [LC Paper No. CB(2)2327/07-08(01)]</p> <p>Administration's paper on "Proposal on the Permanent Arrangements for Mediation in Legally Aided Matrimonial Cases" [LC Paper No. CB(2)2327/07-08(02)]</p> <p>Law Society of Hong Kong's letter dated 3 June 2008 on "Pilot Scheme on Mediation of Legally Aided Matrimonial Cases" [LC Paper No. CB(2)2327/07-08(03)] (English version only)</p> <p>Minutes of meeting [LC Paper No. CB(2)2826/07-08]</p> |