



THE

**LAW SOCIETY**  
OF HONG KONG  
香港律師會

LC Paper No. CB(2)1215/08-09(01)

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**Deputy Secretary General**  
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Heidi K.P. Chu  
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27 March 2009

Ms. Flora Tai,  
Clerk to LegCo Panel on  
Administration of Justice & Legal Services,  
Legislative Council Building,  
8 Jackson Road,  
Central,  
Hong Kong.

Dear Ms. Tai,

**PANEL ON ADMINISTRATION OF JUSTICE AND LEGAL SERVICES  
("Panel") MEETING ON 30 MARCH 2009**

Thank you for your letter dated 24 February 2009.

We note the Administration will report work progress to the Panel on next Monday on Items IV and V of the Agenda for the Panel meeting on 30 March 2009.

The Law Society has previously expressed its views on Agenda Item IV – "*Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants*". We would like to reiterate our stance as stated in our letter dated 26 May 2008 to the Panel and expressed by our representatives at the Panel meeting on 26 May 2008. A copy of our letter dated 26 May 2008 is enclosed.

On Agenda Item V, i.e. "*Pilot Scheme on Mediation of Legally Aided Matrimonial Cases*", we attach our letter to the Administration dated 16 September 2008 for the Panel's consideration. We would stress our concern over the Government's proposal for the Director of Legal Aid to consider the hourly rate quoted by the

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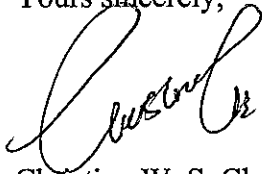
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mediator on a case-by-case basis. We do not think we can recommend the permanent arrangements to our members until the Government has provided full details of its policy on allocation of funding for mediator in legally-aided matrimonial cases.

We regret that up to the moment of this writing, we have not received any feedback from the Administration on any of our above concerns raised. We shall not be sending any representative to next Monday's Panel meeting but would invite the Panel to take note of our concerns. We would also like to have the Administration's reply to the concerns raised and be kept informed of the development on the two subjects.

Yours sincerely,



Christine W. S. Chu  
Assistant Director of Practitioners Affairs

Encls.

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Criminal  
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BY EMAIL (pma@legco.gov.hk)

26 May 2008

URGENT

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Deputy Secretary General I: No.114854  
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Heidi K.P. Chu  
 朱潔冰

Mrs. Percy Ma,  
 Clerk to Panel,  
 Legislative Council Building,  
 8 Jackson Road,  
 Central,  
 Hong Kong.

Dear Mrs. Ma,

**PANEL ON ADMINISTRATION OF JUSTICE AND LEGAL SERVICES ("LegCo Panel") MEETING ON 26 MAY 2008**

We refer to today's meeting of the LegCo Panel and are pleased to confirm that the following representatives of the Law Society will attend the meeting on Agenda Item V:-

1. Mr. Dennis C. K. Ho (何志權律師), a member of the Legal Aid Committee (法律援助委員會成員);
2. Mr. Patrick M. Burke, a member of the Working Party on Recovery Agents (索償代理人工作小組成員); and
3. Ms. Christine W. S. Chu (朱穎雪律師), Assistant Director of Practitioners Affairs (執業者事務部副總監)

**Item V – Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants**

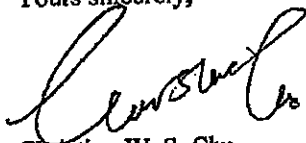
We note that the Administration is still considering various aspects of the review and intends to consult the relevant stakeholders and revert to the LegCo Panel by the end of this year. We would urge the Administration to take into account the following matters in the 2007 5-yearly review exercise :-

1. *Results of the 2003 5-yearly review* – the Administration should report on whether the concerns and issues raised in the 2003 5-yearly review have been addressed and identify outstanding issues to be pursued.
2. *Proposals of the Law Reform Commission of the Hong Kong Conditional Fees Subcommittees to expand the SLAS.*

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3. *Proposals to expand the scope of services and percentage coverage of the society population by the Legal Aid Scheme* – The Society notes the Administration has endorsed the proposal to extend legal aid to cover mediation, and would like to seek clarification on how this will be implemented.
4. *Recovery agents* – the Society has expressed concerns on the activities of recovery agents. These unqualified persons are using legal aid as a funding tool so that they can take a greater portion of damages from the Plaintiff leaving the legal aid to pay the costs of solicitors. Such recovery agents are not professionally qualified or subject to any code of professional conduct and there is no compulsory insurance covering any claims directed at them. The Society has sought advice from Senior Counsel on the legality of a number of recovery agent contracts and is advised that the contracts are champertous and unenforceable. Maintenance (of which champerty is a more serious form) remains a criminal offence in Hong Kong and recovery agents are liable to be prosecuted. The Administration must clarify what it has done to tackle this area of concern.
5. *Criminal Legal Aid Fees* – Concern has been raised since 2003 that insufficient funding has undermined the criminal justice system. The Government should increase its budget on criminal legal aid without further delay in order to maintain the integrity of the system and to ensure equality of arms between the defence and the prosecution, and the fair treatment between the 2 branches of the profession.
6. *Independence of the Legal Aid* – The legal aid system should be an independent body and the Government should indicate when this will be introduced.

Yours sincerely,



Christine W. S. Chu  
Assistant Director of Practitioners Affairs

c.c.: Mr. Lester Huang, the President  
Mr. Raymond Ho, Secretary General  
Members of the Legal Aid Committee



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Legal Aid  
S/F(2) to HAB/CR 19/1/42

16 September 2008

**BY FAX (25916002) AND BY POST**

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何志強

**Deputy Secretary General 1: No.114854**  
副秘書長

Heidi K.P. Chu  
朱潔冰

Ms. Elaine Mak,  
Office of Secretary for Home Affairs,  
31<sup>st</sup> Floor,  
Southorn Centre,  
130 Hennessy Road,  
Wanchai,  
Hong Kong.

Dear Ms. Mak,

## **Proposal on the Permanent Arrangement for Mediation in Legally-aided Matrimonial Cases**

Thank you for your letter dated 6 June 2008 enclosing a Proposed Paper on the "Permanent Arrangement for Mediation in Legally-aided Matrimonial Cases" for our comments.

The Council notes that the wider use of mediation is in line with the world trend and the local efforts to promote mediation as an alternative to litigation and supports in principle the idea to extend legal aid to cover mediation in legally aided matrimonial cases on a "permanent" basis. However, we have grave concerns over the Government's funding policy for implementing the "permanent" arrangement and the financial implications of this to solicitors undertaking mediation work.

We noted that a fixed hourly fee of HK\$600, based on the Social Work Pay Scale, was offered to mediators acting under both the Pilot Schemes conducted by the Judiciary and the Legal Aid Department ("LAD") on family mediation in 2000 and 2005 respectively and have raised concern with the last LegCo Panel on Administration of Justice and Legal Services ("AJLS Panel") in June 2007 and June 2008 respectively that to adopt the same hourly rate of HK\$600 for the permanent arrangement will not be acceptable to the profession.

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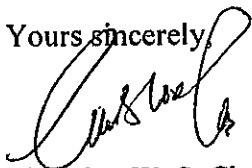
Whilst a professional mediator and a trainee solicitor currently charges at HK\$3,000 and HK\$1,400 per hour respectively, limiting legally-aided mediation costs to HK\$600 per hour will only have the implications that mediators with legal background will either not be attracted to the scheme or will have to provide their services at a loss. The last AJLS Panel agreed with us that mediators' service should not be promoted without proper funding and that it would be unreasonable to expect solicitors to provide the service free or at a loss. Without repeating ourselves, we attach two submissions made by our Alternative Dispute Resolution Committee and the Family Law Committee in this regard for your information.

We note with regret that in response to the AJLS Panel's request, the Government now proposes, inter alia, that:

- (a) instead of a fixed hourly rate, the DLA will consider the hourly rate quoted by the mediator "*on a case-by-case basis*" and decide if the quoted fees for particular cases are reasonable; and
- (b) the number of hours allowed for the mediation process for each case is initially capped at 15 hours per case with additional hours being allowed subject to the further approval of the DLA, again on a case-by-case basis.

We do not think the Government's above proposal for the DLA to consider the hourly rate quoted by the mediator on a case-by-case basis has addressed our concerns. If the Government is really serious about promoting mediation as a viable alternative to court litigation, it should devote sufficient resources to allow the LAD to fund proper professional rates. Unless the Government provides full details of its policy on allocation of funding for mediation in legally aided matrimonial cases, we cannot see how we can recommend the permanent arrangements to our members on the terms as presently proposed by the Government.

Yours sincerely,



Christine W. S. Chu  
Assistant Director of Practitioners Affairs

Encls.  
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Your Honours,

The Law Society, and several NGO's I am also associated with, greatly welcome the Administrations intention to extend legal aid to cover mediation in legally-aided matrimonial cases.

The LAD's scheme confirms the Judiciary's findings that Mediation is of considerable Value to divorcing families. Mediation promotes understanding, co-operation and allows positive change that affects the family now, *and* affects the future families of the current children. Mediation is an investment in our Future.

Without Mediation, families of Divorce often remain stressed and stuck - frozen in dispute and discontent – Without Mediation these families are more needful of expensive Government and other Court Services and they stay buried in the Past. Without Mediation the Court system is overloaded.

We all agree that Mediation is essential. The only question is how to go about it.

The small caseload for the LAD Scheme is of no real significance. The earlier Judiciary Scheme proved that Mediation works. You only need to take a few cases through the LAD system to see where issues arise.

What the LAD scheme needs to concentrate on is *how to implement* mediation - for example:

Firstly the funding implications of those cases where only one party is legally aided.

One mediator is engaged by two Parties.

Secondly, If a party with Private Funds wants to hire a Professional Mediator – who charges more than the \$600 fee paid for by LAD – Is that allowed?

Would the LAD then contribute \$600 towards the cost – or only \$300 for its client's share?

What happens if the Legally-aided client cannot not raise the balance of the funds?

Would that that be a refusal to mediate? And who is doing the refusing? The legally-aided party or the LAD?

and

Thirdly, the implications of limiting legally-aided mediation costs to \$600 per hour – the Charity funded rate.

The \$600 mediators fee adopted by the Judiciary Scheme, and then LAD Scheme, was based on the Social Work Pay Scale. The NGO's actual cost of providing the service was just over \$800 per hour – there was, and is, a 25% funding shortfall.

The shortfall was accepted because the priority was for the Scheme to go ahead so that Government could appreciate the effectiveness of Mediation.

My Agency was able to participate in the Judiciary Scheme because the Community Chest and Jockey Club helped subvent the costs of the Service. Our Mediators take-home pay was HK\$100 per hour.

There was no Charitable subvention available for the LAD Scheme and so my Agency could not provide mediators.

An essential difference between the Judiciary Scheme and the LAD Scheme, was that the Judiciary Scheme allowed Top-Up Fees. The Government would pay the first \$600 and parties could elect to choose more experienced mediators by paying the difference in cost themselves. This allowed more Professionals and Solicitors and Barristers to be on the Mediation Panel. The Top-Up Scheme allowed more Choice.

The Solicitor Mediators I have spoken to joined the LAD scheme for various reasons. Some because doing 10 cases will give them an extra qualification. Others because doing the occasional case will maintain their qualifications, and others volunteer their time as providing the service keeps Mediation in the public eye.

Solicitors Firms cannot afford to run a mediation practice on the basis of the HK\$600 per hour per couple. Only sub-vented Agencies can manage that rate.

Professional Mediators – charge in the region of \$3,000 per hour per couple. (\$1,500 per client) The LAD rate is \$600 per hour per couple (\$300 per client).

If Parties can choose a Professional Mediator – there is more likelihood of clients opting to choose Mediation as a forum – thus reducing pressure on the Court system and freeing up Judge time to allow a more efficient use of resources.

The current \$600 fee is increasing the likelihood that Mediation will be seen as a Charitable event – a Poor Cousin – and that Poor Cousin association of idea will bleed through into other legal areas.

For Mediation to become a route of Choice - it must be seen to be Valued as a viable legal channel – legal rates and Professionals are more likely to promote a legal association of idea than are the use of charitable agencies.

NGO's offer fully trained and qualified mediators but I am making a distinction between Agency mediators, Solicitors who donate time with *pro bono* work and Professional



Mediators, to highlight that there are individuals who wish to make some kind of living out of doing Mediation.

The Government does not seem to be Valuing Mediation as a serious legal avenue. The fee scale proposed by Government seems to have no bearing on the cost of education, training and responsibility of a Mediator. \$300 per hour per client is what a Masseuse charges.

It seems very odd that a Trainee Solicitor, who cannot yet qualify as an Accredited Mediator, can be charged at \$1,400 per hour per client; whereas a Solicitor Mediator, with at least 3 years PQE, and more skill and training, is only paid the equivalent of \$300 per client.

Until the Government is seen to Value Mediation; the public will remain convinced that Mediation is a poor option; and the public will continue to clog the Courts, to attend the FDR scheme, where a well-trained Judge; at his hourly rate; and at even more cost to the Government, will then proceed to mediate with the parties.

If the Civil Justice Report wants Mediation to be a Player – Mediation should be treated with the same respect and value as other legal channels. If Government continues to devalue Mediation – it will always be the Poor Cousin and the Courts will remain clogged.

The low rate suggested for Family Mediation services – significantly undermines its credibility as a serious legal avenue. In the early stages of introducing mediation to the Courts, perception is very important – Justice needs to be seen to be done – what is being seen to be done here is Charity.

Charity is a good thing. The LAD does a good job and has many understandable funding constraints and many people do need Charity – that is a fact of life. And for those cases where both parties are legally aided, Charity may be all that is available.

But where only one party needs legal aid; where only one party is temporarily embarrassed for funds; the LAD must be allowed to fund that party to participate in a Professionally charged mediation – which would allow a share of costs in the region of \$1,500 per person.

For these reasons - The Way Forward from here is to:

- 1) allow legal aid for the funding of Family Mediation Services, and
- 2) allow the LAD to fund proper Professional Rates.

The first point is good for Families; and the second point is good for Court Resources and Mediation as a whole.

Thank you



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3 June 2008

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Mrs. Percy Ma  
Clerk to Panel  
Legislative Council  
Legislative Council Building  
8 Jackson Road, Central, Hong Kong

Dear Mrs. Ma,

Re: **Panel Meeting on 23 June 2008**  
**Item IV - Pilot Scheme on mediation of legally aided matrimonial cases**

I refer to your letter addressed to the Secretary General dated 28 May 2008 and I have been asked to send a reply on his behalf.

The Family Law Committee notes the Panel will discuss the captioned item on 23 June 2008.

The Family Law Committee has already expressed its support to extend legal aid to cover mediation in legally-aided matrimonial cases. As the results of the Pilot Scheme indicate there is a demand for mediation the Committee urges the Administration to provide adequate resources to the Legal Aid Department to enable it to provide mediation to its clients on a permanent basis.

The Family Law Committee will not be sending any representative to attend the session.

Yours sincerely,

Joyce Wong  
Director of Practitioners Affairs  
e-mail: dpa@hklawsoc.org.hk

c.c. Raymond Ho