

ITEM FOR ESTABLISHMENT SUBCOMMITTEE OF FINANCE COMMITTEE

HEAD 92 – DEPARTMENT OF JUSTICE Subhead 000 Operational expenses

Members are invited to recommend to Finance Committee the creation of a non-civil service position of Deputy Principal Government Counsel at the equivalent rank of DL2 (\$116,100 - \$126,985) in the Department of Justice for a period of three years.

PROBLEM

We need to provide the necessary support for furthering the development of mediation in Hong Kong with specific reference to the recommendations of the Secretary for Justice (SJ)'s Working Group on Mediation.

PROPOSAL

2. We propose to create a non-civil service position of Deputy Principal Government Counsel (DPGC) at the equivalent rank of DL2 in the Legal Policy Division (LPD) of the Department of Justice (DoJ) for a period of three years from August 2010.

JUSTIFICATION

Background

3. Mediation is a private, voluntary and confidential process to resolve disputes with the assistance of a neutral third party (the mediator). The mediator helps the parties identify what really matters in the dispute (more on what each party wants, than what the legal issues are), talks to each party separately and in

/confidence

confidence, and generates options to resolve the dispute for the consideration of the parties concerned. In Hong Kong, the use of mediation is not new. It has been commonly used in settling disputes in, for example, construction contract disputes and family matters.

Furthering the development of Mediation in Hong Kong

4. In the 2007-08 Policy Address, the Chief Executive announced the establishment of a cross-sector working group headed by SJ to map out plans to employ mediation more extensively and effectively in handling higher-end commercial disputes and relatively small-scale local disputes. On 8 February 2010, the Working Group published its Report for public consultation for three months. The 48 recommendations contained in the Report covered the three important areas of training and accreditation, regulatory framework and publicity and public education. A summary of the Recommendations of the Working Group is at Enclosure 1.

Encl. 1

5. The use of mediation also moved into a new phase in Hong Kong with the implementation of the Civil Justice Reform (CJR). The CJR has brought about important changes in the civil procedure of the Hong Kong Courts. It emphasises the Court's role and duty in active case management, facilitating settlement, and saving of time and costs. One of the most significant changes is the emphasis on the use of Alternative Dispute Resolution (ADR), in particular mediation, to resolve disputes in favour of full-blown litigation. As part of the CJR, Practice Direction 31 on Mediation issued by the Judiciary came into effect on 1 January 2010. It places a duty on all parties and their legal representatives to assist the Court in furthering an underlying objective of the CJR which is to facilitate the settlement of disputes. One important driving force is that a party will have to face an adverse costs order if it fails to engage in mediation without any reasonable explanation.

6. The Judiciary and the mediation community are prepared for this new development and systems are in place to provide support to parties who require information about mediation. The consultation in respect of the Working Group's recommendations ended on 8 May 2010. While the DoJ is analysing the comments received, we note that there is general support for many of the recommendations of the Working Group. As the momentum for the wider use of mediation builds up, we see the need to adopt a more anticipatory approach and proactively plan ahead to facilitate the development of mediation in Hong Kong.

7. Against the above background, we envisage that the work in respect of the following would need to be pursued in the coming three years –

/(a)

- (a) to work with relevant stakeholders to oversee the adoption and implementation of the Hong Kong Mediation Code (the Code) and to review the operation of the Code in the light of experience;
- (b) to work with stakeholders to keep in view the development of the system of accrediting mediators;
- (c) to work out the details of the proposed mediation legislation taking into account the development of the mediation landscape. It is envisaged that, subject to the outcome of the consultation exercise, the legislation would set out the regulatory framework for the conduct of mediation;
- (d) to spearhead the various public education and publicity initiatives recommended by the Working Group, including building on the Mediate First initiative, conducting matching programmes for venues and users, and to work with relevant parties to foster the wider use of community mediation, etc; and
- (e) to work with relevant parties to explore the opportunities for initiating pilot mediation schemes in different sectors.

Proposed creation of the non-civil service DPGC position

8. In 2008 when the Working Group was first set up, a part-time non-civil service DPGC position was created for 12 months in DoJ to provide secretarial support to the Working Group. Given the workload then envisaged, the time-limited nature of the duties involved and the preference for a candidate with mediation work experience, it was then considered that a time-limited and part-time position was appropriate and this position lapsed on 28 November 2009. When the Working Group decided to seek the views of the public on its recommendations, DoJ created a six-month full-time non-civil service DPGC position to undertake the specific consultation exercise. A full-time position was required because of the workload involved. This position was created on 26 January 2010 and would lapse on 26 July 2010. The duties of this time-limited non-civil service DPGC position are at Enclosure 2.

Encl. 2

9. To take forward the recommendations of the Working Group, in particular the matters set out in paragraph 7 above, dedicated professional support in DoJ is needed. We consider that the incumbent should be mature, professionally competent with knowledge and experience in mediation work and be able to work independently. Having considered the magnitude and anticipated duration of work mentioned above, we further propose that the position should be created for three years. The specific duties to be undertaken by the proposed DPGC during the three year period are set out below.

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The Implementation of the Hong Kong Mediation Code

10. The healthy development of mediation services hinges on a credible and workable quality assurance system with basic ground rules governing the actions of mediators. In relation to quality assurance, the Working Group has promulgated the Code, which is an ethical code of conduct for mediators in Hong Kong. SJ has personally written to mediation service providers to encourage them to adopt the Code and to set up robust complaints and disciplinary processes to enforce it. Its voluntary nature notwithstanding, the Code functions as a common standard among mediators irrespective of what area of mediation they are in and has an important quality assurance role.

11. At the Conference on CJR organised by the University of Hong Kong on 15 and 16 April 2010, both the Hon. Chief Justice Andrew Li Kwok Nang and the Hon. Chief Judge Geoffrey Ma reinforced the Judiciary's stance that mediation is now an important aspect of the CJR. The Hon. Mr Justice Johnson Lam, in his presentation at the Conference stated that over 40 judges and masters in the Judiciary have undergone mediation training and will encourage parties to consider mediation as an option to resolve their dispute. There were concerns expressed about the quality of mediators that will be mediating the cases from the courts. There is an imminent need to oversee the adoption of the Code as a code of ethics for mediators as the direction of setting up a single accreditation body has yet to be agreed on by all the stakeholders. During the three year period, the proposed DPGC will –

- (a) address the current issues that have arisen including providing assistance and advice on international best practice on how to set up robust complaints resolution and disciplinary processes within the mediation service providers in order to provide some redress and recourse for consumers of mediation services;
- (b) continue to work with the mediation service providers to review the adoption of the Code, advise on any difficulties or uncertainties that have arisen in practice due to the actual wording of the Code and address any further issues that may have arisen; and
- (c) review the implications of mediation service providers who have yet to adopt the Code or set up robust complaints resolution process and, taking into account the developments, advise on the need for an alternative regulatory approach.

Development of the System of Accrediting Mediators

12. As early as in November 2007, the Hon. Mr Chief Justice Andrew Li Kwok Nang in his Opening Address at the “Mediation in Hong Kong

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Conference: The Way Forward” said that, “to ensure the quality of mediators, all concerned should make a concerted effort to develop a common benchmark in this jurisdiction for accreditation as mediator”.

13. The Working Group recognised that it is desirable to establish a single body to accredit mediators in order to ensure quality and consistency and ultimately enhance public confidence in mediation. Feedback from the main mediation service providers is that there is an urgent need to set up a single accreditation body. The Chairman of the Bar Association, for example, at the Legislative Council Panel on Administration of Justice and Legal Services meeting on 22 February 2010 considered that a single accreditation body of mediators should be put in place as soon as possible. The Chairman of the Hong Kong Mediation Council in his submission of April 2010 held that steps should be taken urgently to set up the single accreditation body. The Chairman of the Mediator Accreditation Committee of the Hong Kong International Arbitration Centre held the same view and in his letter of 8 April 2010 stated that the time is now right to prescribe a standardised system of accrediting mediators.

14. We note that there are many different mediation service providers in Hong Kong. Some are better organised and more structured, others less so. Their focus is also varied – from commercial and construction disputes to family and building management matters. The types of mediation training are also varied and standards differ. At a stage when the mediation landscape and players are diverse, it would be conducive to the healthy development of mediation if the proposed DPGC is to work with the different mediation bodies to facilitate a discussion on the future direction of standard setting for mediators including the formation of an accreditation body, its scope of work and the pace and mode of establishment.

15. This is a difficult and complicated task for the proposed DPGC in view of the implications on the vested interests of the different bodies affected. However, it is noted that major mediation bodies in Hong Kong have contributed to the work of the Working Group for two years and are amenable to working collaboratively with SJ and DoJ to further the development of mediation in Hong Kong. At this stage when the public consultation exercise has just been completed, it is difficult to say with certainty how long the process of developing common accreditation standards and the regulatory regime would take. However, as indicated above, there are calls for adopting a faster pace. The dedicated efforts of the proposed DPGC would provide a focal point and add impetus to the process in the coming few years by facilitating the different mediation service providers to identify mutually acceptable standards. The proposed DPGC would also work with the mediation bodies to set out the professional requirements (with reference to overseas and local experience) for consideration and discussion.

/Proposed

Proposed Mediation Legislation

16. At present, there is no legislation governing mediation in Hong Kong. The Working Group looked at the pros and cons of enacting legislation on mediation. It recognised that excessive legislative control over mediation could be counterproductive to the healthy development of mediation in Hong Kong considering the flexibility of the mediation process. It identified a number of key advantages in introducing legislation on mediation in Hong Kong. These included the establishment of a proper legislative framework within which mediation can be conducted and assistance in the promotion of Hong Kong as an international dispute resolution centre. The Working Group proposed that the legislation should set out the key definitions and the general rules governing confidentiality and privilege. This is important because confidentiality and privilege provide immense incentive to potential users to have recourse to mediation as a means of dispute resolution, and express provisions dealing with these two areas would provide greater clarity. Furthermore, although there is a considerable body of case law dealing with confidentiality and privilege, it is not desirable (from a policy point of view) to depend entirely on case law. In his letter of 9 April 2010, the Chairman of the Bar Association stated the Bar Association's support for a Mediation Ordinance. Both the Mediation Committee of the Law Society and the Hong Kong Mediation Council supported the provision of a legal framework for the conduct of mediation.

17. The development of a Mediation Ordinance would involve deciding on the detailed matters to be covered by statute, where necessary, further consulting relevant parties on the specific aspects of the proposed legislation, preparing the drafting instructions, working with the Law Draftsman to prepare the Bill, preparing the relevant Executive Council and Legislative Council submissions and attending the Bills Committee meeting when one is convened to explain the provisions. It is estimated that the entire process could take up to three years. During that period, the DPGC would firm up the coverage of the proposed legislation, consult the relevant stakeholders and prepare drafting instructions. Thereafter, the proposed Mediation bill would be finalised and subject to availability of legislative slot and the approval of the Executive Council, the DPGC would assist in the process of introducing the proposed Bill into the legislature and assist in the process of examining the provisions in the Bill by the legislature. The proposed DPGC will be the lead officer in the development of the proposed Mediation Ordinance.

Public Education and Publicity Initiatives

18. While DoJ is not the sole entity within Government to further the development of mediation in Hong Kong, given the fact that SJ chaired the Working Group for two years, there is an expectation that the Department will continue to lead and support the mediation initiatives and Pilot Project described in the Report and its recommendations.

19. For example, the DoJ helped some mediation bodies to make the best use of community resources to support mediation and assisted in the setting up of the Pilot Project on Community Venues for Mediation. There is the need to continue with promoting the Mediate First initiative in the commercial sector. All these require the dedicated efforts of the proposed DPGC who will work independently in the Department. We believe that such support for the development of mediation in Hong Kong will be important in particular in the coming few years when mediation begins to take a stronger presence in the community at large.

20. The proposed DPGC will work on the Mediate First initiative and advise on the essential elements of operating mediation pilot schemes. There will be a lot of networking and information exchange in the process. Such activities also generate the additional benefits of providing the proposed DPGC an overview of the development of mediation services and identify the current strengths and the areas that require improvement. These will be useful information in assisting DoJ to shape, for example, some of the detailed provisions in the proposed Mediation Ordinance.

Pilot Mediation Scheme

21. The Pilot Schemes would include the Financial Disputes Resolution Centre proposed by the Financial Services and the Treasury Bureau that is currently part of a public consultation process and mediation pilot scheme proposed by the Development Bureau for the Lands (Compulsory Sale for Redevelopment) Ordinance (Cap. 545). The proposed DPGC will strengthen the ability of DoJ to provide such specialist advice on mediation schemes. At present, the work of advising the relevant bureaux on the setting up of the above pilot schemes falls on the post holder of the six-month non-civil service DPGC position, and the relevant position would lapse in July 2010. The early creation of the three-year DPGC position would ensure that there is sustained support in rendering advice on these pilot schemes. The proposed DPGC will consider and advise on the merits of any proposed pilot scheme, assist in formulating the scheme including advising on whether mediation should be made part of the routine process where there was imbalance of bargaining of powers between parties to a dispute, providing advice on the resources required and work with the mediation service providers.

Proposed formation of an Advisory Group on Mediation

22. At a time when the development of mediation is progressing fervently, and the leading members of the mediation community have been working closely as members of SJ's Working Group, there would be benefits of

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building on the infrastructure that has been working well and setting up a “Mediation Advisory Group” to continue to advise SJ on the implementation of the Working Group’s recommendations. We note that the Mediation Committee of the Law Society has recommended that DoJ should set up an advisory body to support the Department in the implementation of the recommendations of the Working Group. Whether such a Group would ultimately be established would depend on the outcome of the consultation exercise. If established, the proposed DPGC would provide secretarial support to this Group.

Organising and providing mediation updates, advocacy training and information to colleagues at the Department of Justice, Government bureaux and departments

23. Practice Direction 31 impacts upon all parties in civil litigation, and Government is of no exception. It is envisaged that the proposed DPGC will organise and provide mediation updates and mediation advocacy training to colleagues at DoJ. The proposed DPGC will be tasked to keep abreast of the latest case law on mediation that will be helpful to Government Counsel and circulate such information in a timely fashion. Also, the proposed DPGC will be expected to liaise with Government bureaux and departments who wish to provide mediation information training for their officers to identify the actual mediation process and information needs before selecting the best form of training suited to such needs.

Organisation

Encl. 3 24. The proposed DPGC would be accommodated in LPD. An organisation chart of LPD is at Enclosure 3. Currently, the LPD is headed by the Solicitor General, rank at Law Officer (DL6), who is supported by three permanent Principal Government Counsel (PGC) (DL3) posts, namely Deputy Solicitor General (Constitutional) [DSG(C)], DSG (General) [DSG(G)] and Secretary, Law Reform Commission (LRC). Each of the two DSGs in turn supervises two units each headed by a DPGC (DL2), namely the Human Rights Unit and the Basic Law Unit under DSG(C) and the General Legal Policy Unit and the China Law Unit under DSG(G). The Secretary, LRC is assisted by a DPGC. All these directorate officers are currently fully occupied with their specific duties. The organisation chart at Enclosure 3 shows the proposed change.

Encl. 4 The job description of the proposed DPGC position is at Enclosure 4. We will fill the position through an open recruitment exercise.

Alternatives Considered

25. We have critically examined whether the existing directorate staff in DoJ have the spare capacity to absorb the duties of the proposed position. They are already fully committed to their responsibilities and could not be further

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stretched to provide the dedicated support required to take forward the recommendations made by the Working Group. In addition, given the workload and complexity of work in LPD, it is operationally not possible to deploy the serving DPGC in LPD, who are fully occupied with their respective portfolios, to take up the additional duties relating to furthering the development of mediation in Hong Kong. At this stage, we envisage that implementing the recommendations of the Working Group would take about three years. Taking into account the professional expertise (the need for legal knowledge) and experience (in respect of mediation related matters) required to handle the tasks involved, we consider that creating a non-civil service position which allows us to trawl the most suitable candidate through an open recruitment exercise is the only viable option.

FINANCIAL IMPLICATIONS

26. The total remuneration package for the proposed non-civil service position will not exceed the full annual average staff cost of \$2,144,000, inclusive of salaries and staff on-cost, for a DPGC (DL2). There is sufficient provision in the 2010-11 Estimates to meet the cost of this proposal.

PUBLIC CONSULTATION

27. We consulted the Legislative Council Panel on Administration of Justice and Legal Services on 22 February 2010. In response to Members' request, further information on the duties to be undertaken by the proposed DPGC was provided to the Panel on 26 April 2010. Members supported the proposed creation of the position.

ESTABLISHMENT CHANGES

28. The establishment changes in the DoJ for the last two years are as follows –

Establishment (Note)	Number of posts			
	Existing (as at 1 May 2010)	As at 1 April 2010	As at 1 April 2009	As at 1 April 2008
A	73*+(1)#	73*+(1)	71+(1)	71+(1)
B	340	340	320	311
C	731	731	719	717
Total	1 144+(1)	1 144+(1)	1 110+(1)	1 099+(1)

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Note :

- A - ranks in the directorate pay scale or equivalent
- B - non-directorate ranks, the maximum pay point of which is above MPS Point 33 or equivalent
- C - non-directorate ranks, the maximum pay point of which is at or below MPS Point 33 or equivalent
- () - number of supernumerary directorate post; the post is due to be deleted on 26 May 2010 upon retirement of the incumbent.
- * - there is an increase of two directorate posts when compared with the figure as at 1 April 2009 and 1 April 2008, which were approved by the Finance Committee on 5 February 2010 vide EC(2009-10)13.
- # - as at 1 May 2010, there was no unfilled directorate post.

CIVIL SERVICE BUREAU COMMENTS

29. The Civil Service Bureau supports the proposed creation of the non-civil service position. The ranking at which the non-civil service position will be pitched is considered appropriate having regard to the level and scope of responsibilities required.

ADVICE OF THE STANDING COMMITTEE ON DIRECTORATE SALARIES AND CONDITIONS OF SERVICE

30. As we propose to create a non-civil service position in DoJ, advice from the Standing Committee on Directorate Salaries and Conditions of Service is not required.

Department of Justice
May 2010

Summary of Recommendations

Extract from the Executive Summary of the Working Group on Mediation Report

Recommendation 1

A clear and workable definition of mediation be agreed upon. Some degree of flexibility in the definition of mediation should be maintained so that future application and development of mediation in Hong Kong will not be unnecessarily restricted.

Recommendation 2

The use of the words “mediation” and “conciliation” within the Hong Kong legislation should be reviewed, in particular in the Chinese text, to remove any inconsistency.

Recommendation 3

An “Umbrella” mediation awareness programme which targets the general public with information on the modes and process of mediation be implemented through the use of sector specific mediation publicity campaigns such as those targeting the business and commercial sector, communities, youth and elderly. Such sector specific campaigns should focus on the modes of mediation that are effective and relevant to the specific sector.

Recommendation 4

Given the many parties involved in the promotion of and public education on mediation and the good work that they have been engaged in, it is recommended that these parties be encouraged to continue their important promotional and public education work. These diverse parties should actively seek to collaborate with each other and pool their efforts and expertise together where the opportunity arises, as concerted efforts would carry greater and more lasting impact.

Recommendation 5

Mediation information and training for frontline dispute resolvers (such as police officers, social workers, family psychologists, correctional officers and lawyers) should be supported as such training will assist them in their day-to-day work and having a good understanding of mediation will assist them to be effective dispute resolvers or mediation referrers. It will also assist them in promoting mediation as a means to resolve conflicts harmoniously at the community level.

Recommendation 6

Further promotion of the 'Mediate First' Pledge should be encouraged within the business and commercial sectors given its initial success.

Recommendation 7

The 'Mediate First' Pledge to be promoted to different sectors of the community and its website (www.mediatefirst.hk) be maintained, updated and made interactive in order to provide support to those who subscribe to the Pledge and interested members of the public.

Recommendation 8

The pace of promoting mediation should take into account the readiness of mediators, the maturity of the infrastructural support, and the needs of mediation users. The course of the promotion may be divided into 3 stages: Stage 1 (Awareness Building), Stage 2 (Intensified and Targeted Publicity), and Stage 3 (Mass Outreach). As development migrates from Stage 1 to Stage 2, the pace of promoting mediation should be stepped up. Given the competing demands for Government publicity resources, the support and concerted efforts of all parties involved in mediation should be enlisted.

Recommendation 9

Mediation pilot schemes be considered for disputes in areas such as in the workplace and employment, intellectual property, banking and financial services, medical malpractice and healthcare, child protection, environmental, urban planning, land use and re-development.

Recommendation 10

The experience and statistics from the operation of the Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme be analysed to identify the factors that are conducive to the success of this scheme, its limitations and the lessons to be learnt for the future.

Recommendation 11

The initiative of the insurance industry in the establishment of the New Insurance Mediation Pilot Scheme ("NIMPS") is worthy of support. The Federation of Insurers should be encouraged to analyse and share its experience in operating NIMPS, in particular the factors that are conducive to its success and the lessons to be learnt. The sharing of success stories would be a very effective means of promoting mediation.

Recommendation 12

Further promotion and expansion of family mediation services in Hong Kong should be supported. Consideration should be given to support NGOs providing family mediation services to the community. Development of Collaborative Practice as a less adversarial means of resolving family disputes could be explored further.

Recommendation 13

The challenges posed by unrepresented litigants in court should be further studied and more statistical data made available so that promotion of mediation to unrepresented litigants may be better supported.

Recommendation 14

Special efforts should be made to promote mediation to unrepresented litigants in court including the provision of mediation information and the promotion of the 'Mediate First' website (www.mediatefirst.hk) to them through the Mediation Information Office and the Resource Centre for Unrepresented Litigants in the High Court.

Recommendation 15

Further support and expansion of the current Restorative Justice and Mediation Programmes throughout the community in Hong Kong should be encouraged.

Recommendation 16

Pending the outcome of the Pilot Project on Community Venues for Mediation, there should be at least one community centre in Hong Kong Island, one in Kowloon and one in the New Territories to be made available as community venues for mediation.

Recommendation 17

Recognising the competing demands on the school curriculum, the potential introduction of mediation education within the primary and secondary schools warrants serious examination and it is recommended that consideration be given to support the expansion of the Peer Mediation Project.

Recommendation 18

The Bar Association and the Law Society should be invited to consider the content and coverage of mediation training for their members as part of their ongoing professional development and whether such training should be made compulsory.

Recommendation 19

In order to foster the further development of mediation knowledge in the legal profession, consideration should be given to revisit the question of mediation being incorporated into compulsory courses at PCLL, LL.B and J.D. programmes at a later stage when the mediation landscape becomes more mature.

Recommendation 20

Subject to resource and curriculum constraints, the Universities should consider enhancing the current elective mediation courses and the mediation element in other courses within the Law Faculties at both the undergraduate and postgraduate levels.

Recommendation 21

The Universities should be invited to consider offering common core courses on mediation and dispute resolution within the first year undergraduate University programme through an integrated interdisciplinary approach to educating students about the process and skills of mediation.

Recommendation 22

The Law Faculties of the three Universities (University of Hong Kong, Chinese University of Hong Kong, and City University of Hong Kong) should be encouraged to proceed with the development of the proposed “Hong Kong Mediation Competition”.

Recommendation 23

Early Dispute Resolution (“EDR”) systems could be beneficial for organisations, universities and other tertiary institutions in Hong Kong to give due consideration in order to help resolve conflicts and minimise dispute resolution costs within organisations and institutions.

Recommendation 24

An Announcement in the Public Interest be produced and aired on television for the promotion of mediation. More publicity via radio, printed media and new media platform should also be pursued. Educational programmes on mediation targeted at youth should be strengthened and special efforts be made to approach television stations and script-writers to consider including mediation in their television drama productions.

Recommendation 25

The establishment of a single body for accrediting mediators is desirable and can assist to ensure the quality of mediators, consistency of standards, education of the public about mediators and mediation, build public confidence in mediation services and maintain the credibility of mediation.

Recommendation 26

It is considered that currently the time is not right to prescribe a standardised system of accrediting mediators and that the emphasis should be on the provision of appropriate mediation information to potential users of mediation that will enable them to decide whether to choose mediation to resolve disputes and also assist them to be better able to choose competent mediators.

Recommendation 27

There should be wide promulgation of the Hong Kong Mediation Code which is a code of conduct for mediators in Hong Kong and mediation service providers are encouraged to adopt the Code and set up robust complaints and disciplinary processes to enforce the Code.

Recommendation 28

A single mediation accrediting body in Hong Kong could be in the form of a company limited by guarantee. The possibility for establishing this body should be reviewed in 5 years.

Recommendation 29

Information on the Continuing Professional Development requirements (if any) of mediator accrediting organisations should be made available to the public.

Recommendation 30

Whenever the question of an appropriate mediator arises in court, the Judiciary might suggest that the parties consider selecting a mediator (of whatever qualifications or accreditation) who has at least subscribed to the Hong Kong Mediation Code.

Recommendation 31

Encouragement should be given for experienced mediators to assist newly accredited mediators to obtain practical mediation experience.

Recommendation 32

Hong Kong should have legislation on mediation, which should be aimed at providing a proper legal framework for the conduct of mediation in Hong Kong. However, the legislation should not hamper the flexibility of the mediation process.

Recommendation 33

There should be the enactment of a Mediation Ordinance, instead of introducing legislative provisions relating to mediation into the existing Arbitration Ordinance or other Ordinances.

Recommendation 34

There should be an interpretation section in the Proposed Mediation Ordinance setting out the key terminology such as 'mediation' and 'mediator'. As regards the expressions 'mediation agreement' and 'mediated settlement agreement', they should be defined if the Proposed Mediation Ordinance is to contain provisions dealing with their enforcement.

Recommendation 35

There should be a section in the Proposed Mediation Ordinance setting out its objectives and underlying principles.

Recommendation 36

The Working Group does not recommend the introduction of legislative provisions dealing with enforcement of a mediation agreement. However, if it is considered appropriate to introduce such legislative provisions, the enforcement scheme can be designed along the lines of the scheme for enforcing arbitration agreements (i.e. a stay of proceedings pending mediation).

Recommendation 37

There is no need for the Proposed Mediation Ordinance to include any provisions to deal with the mediation process, save that there should be: (a) a provision dealing with the appointment of the mediator along the line of clause 32 of the Draft Arbitration Bill; and (b) a provision (similar to section 2F of the Arbitration Ordinance) that sections 44, 45 and 47 of the Legal Practitioners Ordinance do not apply so that non-lawyers or foreign lawyers can participate in mediation conducted in Hong Kong.

Recommendation 38

The Proposed Mediation Ordinance should include provisions dealing with the rules of confidentiality and privilege, as well as setting out the statutory exceptions to the rules and the sanctions for breaching the rules of confidentiality and privilege.

Recommendation 39

The issue of whether to grant mediator immunity from civil suits is a controversial one. Although it is not recommended that such immunity be granted, it may be desirable to allow partial immunity, especially in respect of *pro bono* or community mediation.

Recommendation 40

It is not necessary to introduce legislative provisions to suspend the running of limitation periods during the mediation process.

Recommendation 41

It is not necessary to include in the Proposed Mediation Ordinance a statutory mechanism for enforcing mediated settlement agreements. Where necessary, enforcement of mediated settlement agreements can be left to the court as in ordinary cases of enforcement of contracts.

Recommendation 42

Whilst not really necessary, there is in principle no objection to include a set of model mediation rules in the Proposed Mediation Ordinance. However, any model mediation rules so included should only serve as a guide and should not be made mandatory. To maintain flexibility of the mediation process, parties should be at liberty to adopt such mediation rules as they deem fit.

Recommendation 43

The question of whether there should be an Apology Ordinance or legislative provisions dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body.

Recommendation 44

Unless there are specific exceptions that can be properly justified, the Government should be bound by the Proposed Mediation Ordinance.

Recommendation 45

Compulsory referral to mediation by the court should not be introduced at this stage, but the issue should be revisited when mediation in Hong Kong is more developed.

Recommendation 46

At this stage, the Judiciary should not provide mediation services. However, the question should be revisited in future after consultation with the Judiciary (whether as part of the review of the implementation of the Civil Justice Reform or as a separate review).

Recommendation 47

It would not be necessary to include in the Proposed Mediation Ordinance provisions for cross-boundary enforcement of mediated settlement agreements.

Recommendation 48

Legal aid should be provided to legally aided persons when they are willing to participate in mediation.

Job Description
Non-Civil Service Position
of Deputy Principal Government Counsel (DL2)
(26 January 2010 – 25 July 2010)

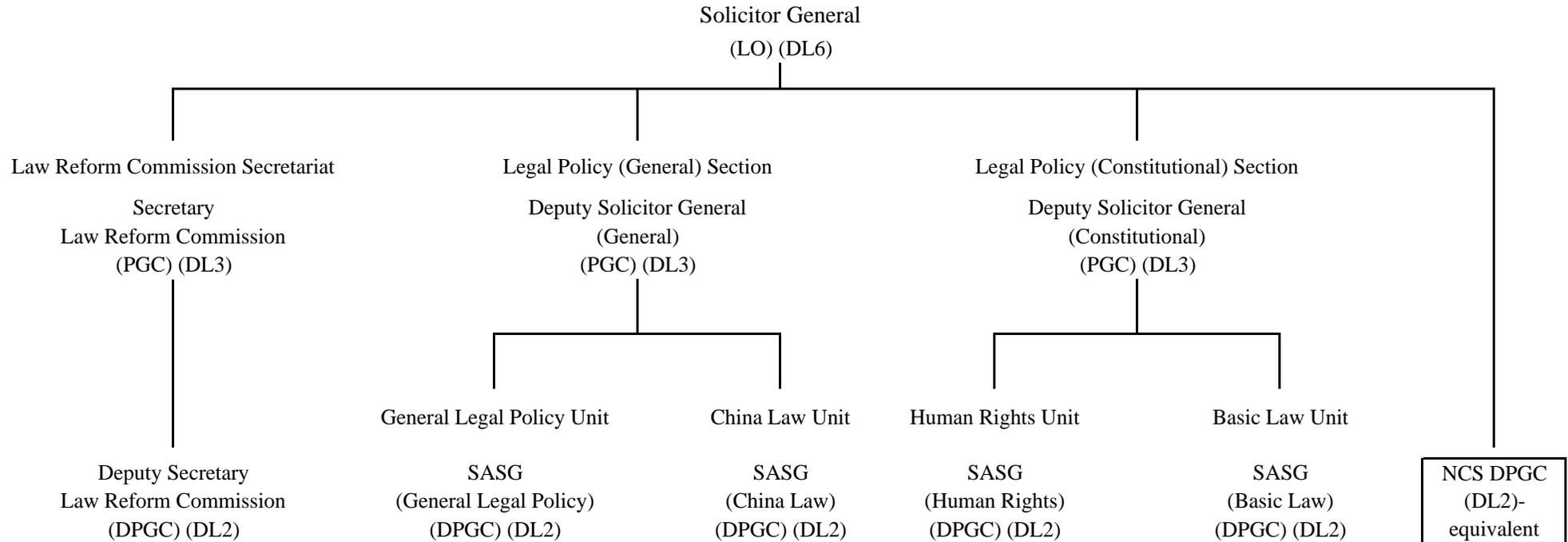
Equivalent rank : Deputy Principal Government Counsel (DL2)

Responsible to : Solicitor General, Legal Policy Division

The DPGC will spearhead the consultation exercise for the Report of the Working Group on Mediation, including undertaking the following duties –

1. To arrange for the public consultation exercise including preparation of relevant documents for the press conference launching the Report and other events relating to the consultation exercise.
2. To make presentations and/or discussions, forums and seminars to explain the Working Group's recommendations and to listen to the comments.
3. To attend to inquiries, comments and feedback from mediation stakeholders and the public arising from the consultation exercise.
4. To collate and analyse the comments received on the Report and its recommendations for the Secretary for Justice's consideration and to develop strategies to take forward the recommendations.
5. To assist the Secretary for Justice to promote development of mediation services, and to liaise with the relevant stakeholders, including mediation service providers, the Judiciary Administrator and other Government Departments as required.
6. To undertake such other duties as may be assigned from time to time.

Existing and Proposed Organisation Chart of the Legal Policy Division



Legend:

- DPGC - Deputy Principal Government Counsel
- LO - Law Officer
- PGC - Principal Government Counsel
- SASG - Senior Assistant Solicitor General

- Proposed non-civil service (NCS) DPGC position at DL2-equivalent

**Job Description
Non-Civil Service Position
of Deputy Principal Government Counsel (DL2)**

Equivalent rank : Deputy Principal Government Counsel (DL2)

Responsible to : Solicitor General, Legal Policy Division

Main Duties and Responsibilities –

1. To assist the Secretary for Justice to consider and develop strategies to take forward the recommendations of the Working Group on Mediation taking into account the outcome of the public consultation exercise. This would include –
 - (a) working with relevant stakeholders to oversee the adoption and implementation of the Hong Kong Mediation Code and to review the operation of the Code in the light of experience;
 - (b) working with stakeholders to keep in view the development of the system of accrediting mediators;
 - (c) working out the details of the proposed mediation legislation taking into account the development of the mediation landscape;
 - (d) spearheading the various public education and publicity initiatives recommended by the Working Group, and
 - (e) working with relevant parties to facilitate them to explore the opportunities for initiating pilot mediation schemes in different sectors.
2. To advise and assist the Secretary for Justice in promoting and facilitating the wider use of mediation in Hong Kong as appropriate.
3. To assist the Chairman of the Department of Justice's Mediation Support Group in providing support and advice to Government Counsel in the Department on the use of mediation.
4. To undertake such other duties as may be assigned from time to time.
