

For discussion on
26 April 2010

**LEGISLATIVE COUNCIL
PANEL ON
ADMINISTRATION OF JUSTICE AND LEGAL SERVICES**

**Non-Civil Service Appointment of
a Deputy Principal Government Counsel in the Department of Justice
for Furthering the Development of Mediation**

PURPOSE

This note provides supplementary information on the duties and responsibilities of the non-civil service position of Deputy Principal Government Counsel (DPGC) at the equivalent rank of DL2 proposed to be created in the Department of Justice (DoJ) from August 2010 for a period of three years to provide the necessary support for the promotion of the development of mediation in Hong Kong with specific reference to the recommendations of the Secretary for Justice (SJ)'s Working Group on Mediation.

BACKGROUND

2. On 22 February 2010, having considered LC Paper No. CB(2)950/09-10(08), some Members expressed reservations over the need for the creation of a DPGC position in DoJ for three years from August 2010 to provide necessary support for the promotion of mediation. Members requested the Administration to provide further information and a detailed timetable on the duties to be undertaken by the proposed DPGC during the three year period.

The Main Duties of the Proposed DPGC

3. The main duties of the proposed DPGC will be to implement the work in respect of those areas highlighted in the earlier paper, namely -

- (a) to work with the 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.

In the light of the measures taken by the Judiciary to implement the Civil Justice Reform including the promulgation and coming into operation of the Practice Direction on Mediation, PD 31, there is growing interest in mediation training courses and in the use of mediation. It is important to ensure the implementation of the Code, the proper development of an accreditation system and standard and the development of a legislative framework. The implementation of the above areas of work should be commenced without delay in order to meet the rising need for mediation services by members of public.

The Implementation of the Hong Kong Mediation Code

4. The healthy development of mediation services hinges on a credible and workable quality assurance system with some 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.

5. At the Conference on Civil Justice Reform organised by the University of Hong Kong on the 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 Civil Justice Reform. 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. The proposed DPGC will in the first year 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. We expect that in the second year, the proposed DPGC will 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. In the third year, the proposed DPGC will 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 and advise on the need for alternative regulatory approach.

Development of the System of Accrediting Mediators

6. 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 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”.

7. 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 concern that there is an urgent need to set up a single accreditation body. The Chairman of the Bar Association, for example, at the AJLS Panel 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 standardized system of accrediting mediators.

8. 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 (for example, whether the body’s work should cover both mediators and mediation training) and the pace and mode of establishment (by statute or a company limited by guarantee).

9. 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 is still in progress, 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. We envisage that 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 Mediation Legislation

10. 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.

11. 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. In the first year, 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

12. 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.

13. For example, the Department assisted some mediation bodies on how to make the best use of community resources to support mediation by assisting 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.

14. 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

15. This 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 providing advice on the resources required and work with the mediation service providers.

Proposed formation of an Advisory Group on Mediation

16. 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 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 recommendation. 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

17. Practice Direction 31 impacts upon all parties in civil litigation, and Government is of no exception. It is envisaged that the proposed officer 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.

ADVICE SOUGHT

18. Members are invited to note the above supplementary information. Subject to members' support on the proposal to create a non-civil service position of DPGC, DoJ will seek the approval of the Establishment Subcommittee/ Finance Committee.

Department of Justice
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