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Panel on Administration of Justice and Legal Services

Meeting on 22 July 2014

**Updated background brief on the development of mediation services
in Hong Kong**

Purpose

This paper provides background information on the development of mediation services in Hong Kong, and summarizes the major views and concerns expressed by members of the Panel on Administration of Justice and Legal Services ("the Panel") on the matter in previous discussions.

Background

Working Group on Mediation and Mediation Task Force

2. Mediation is a dispute resolution process to resolve disputes other than through litigation in the courts. In the 2007-2008 Policy Address, the Chief Executive announced the establishment of a cross-sector working group headed by the Secretary for Justice ("SJ") ("the Working Group") to map out plans to employ mediation more extensively and effectively in both commercial disputes and at the community level.

3. On 8 February 2010, the Working Group published its Report ("the Report") for a three-month public consultation. The 48 recommendations¹ contained in the Report covered the three important areas of (i) regulatory framework; (ii) accreditation and training; and (ii) public education and publicity. A Mediation Task Force, chaired by SJ, was set up in December 2010 to assist in implementing the recommendations of the Working Group that received wide public support

¹ A list of the recommendations in the Working Group's Report and the status of their recommendations is in Annex A of LC Paper No. CB(4)321/12-13(05) issued in January 2013.

with a view to promoting wider use of mediation. By October 2012, the Task Force had by and large fulfilled the work set out in its terms of reference in the three areas mentioned above². The work of the Task Force in respect of the three areas is summarized in paragraphs 4 to 6 below.

Regulatory framework

4. To provide a proper legal framework for the conduct of mediation in Hong Kong, the Mediation Bill, which sought "to promote, encourage and facilitate the resolution of disputes by mediation" and "to protect the confidential nature of mediation communications", was introduced into the Legislative Council on 30 November 2011. The Mediation Ordinance (Cap. 620) has come into operation on 1 January 2013.

Accreditation and training

5. The majority of the submissions received during the public consultation of the Working Group's Report urged for the establishment of a single accreditation body as soon as possible. The Hong Kong Mediation Accreditation Association Limited ("the HKMAAL") (香港調解資歷評審協會有限公司), a non-profit-making company limited by guarantee, was incorporated on 28 August 2012. The founder members of HKMAAL are the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong International Arbitration Centre and the Hong Kong Mediation Centre. Members of these professional bodies are closely involved in the development and promotion of the use of mediation in Hong Kong and the latter three bodies have much experience in operating their respective accrediting systems. Whilst it will set standards for training and accreditation, HKMAAL itself will not provide training courses and a member of HKMAAL would have to abandon its own accreditation system once being admitted (so as to eventually build up a single accreditation system in Hong Kong).

Public education and publicity

6. The Task Force had, in collaboration with different bodies, implemented various initiatives, including the production of an Announcement of Public Interest ("API") which was broadcast in December 2011, and the holding of the "Mediate First" Conference on 11 and 12 May 2012. The conference aimed at raising public awareness of mediation and providing an opportunity for overseas and local mediation experts to share their experience.

² See LC Paper No. CB(4)321/12-13(05).

Steering Committee on Mediation

7. Upon wrapping up of the work of the Task Force, a new Steering Committee on Mediation ("the Steering Committee") chaired by SJ and with cross-sector membership was set up in November 2012 to further promote and develop mediation in Hong Kong. The terms of reference of the Steering Committee are set out in **Appendix I**. To assist the Steering Committee, three sub-committees have been formed to monitor the implementation of the Mediation Ordinance, the accreditation and training of mediators, and to advise on ongoing and new initiatives to promote and publicize the wider use of mediation. Details of the work of the Steering Committee in respect of the three areas are set out in **Appendix II**.

Discussions of the Panel

8. The Panel discussed issues relating to the development of mediation services at its meetings held between June 2008 and April 2013. The major views and concerns expressed by Panel members and the Administration's responses are summarized below.

Accreditation and training of mediators

9. Some members expressed concern as to whether mediators who were accredited by organizations other than HKMAAL would in future be allowed to practise mediation in Hong Kong. They were worried that if HKMAAL set stringent academic/profession criteria for accreditation, many practicing mediators who did not possess the required qualifications might not be able to continue with their practice. As a result, the service fee for mediation would be raised because of the lack of competition in the provision of mediation service.

10. The DoJ advised that the Mediation Ordinance did not contain provisions regarding the accreditation and training of mediators. Whilst HKMAAL would set standards for training and accreditation of mediators, there was no statutory requirement for a person to be accredited by HKMAAL before the person undertook mediation. Furthermore, organizations which did not join HKMAAL as members could continue to train and accredit mediators.

11. Some members opined that HKMAAL should collaborate with local universities that offered training programmes in mediation, and there should be arrangements for existing mediation training courses to tie in with the new accreditation standards.

12. Noting that HKMAAL was established with a view to becoming the premier accreditation body for mediators in Hong Kong discharging accreditation and disciplinary functions, members were of the view that accreditation of mediators should not be confined to persons of certain background, such as the legal profession. They called on DoJ and HKMAAL to ensure participation of practicing mediators and stakeholders in the setting up of the new accreditation system. A member was doubtful as to whether HKMAAL possessed the relevant expertise over the conduct of mediation over a wide variety of dispute topics for effectively discharging its regulatory and disciplinary functions.

13. The DoJ advised that to its understanding, HKMAAL would adopt an inclusive approach in accrediting mediators. It had set up committee, working party and working group with cross-sector membership in respect of mediation accreditation and standards as well as the membership of HKMAAL. The DoJ further advised that founder members of HKMAAL had mediators coming from a diverse background including commercial, construction, accountancy, psychology and social work. The Steering Committee would work closely with HKMAAL to ensure the consistency of standards, quality of mediators and credibility of mediation.

14. To better assess whether accreditation requirements to be developed by HKMAAL were fair and reasonable on one hand, and ensure the quality of mediators on the other, a member suggested that a survey should be conducted on the background of accredited mediators, including their academic qualifications and areas of practice and whether providing mediation services was their main source of income.

Operation of HKMAAL

15. With the Mediation Ordinance came into operation on 1 January 2013, some members expressed concerns about the readiness of HKMAAL to commence operation, its transparency and the financial position as well as the Administration's role in monitoring the operation of HKMAAL. The Administration advised that HKMAAL had been busily engaged to prepare for its operation to commence in April 2013. Under the current arrangement, HKMAAL was funded by its four founder members, and the Administration would consider its request for financial assistance if it made such a request in future. Although no government official would serve as a council member of HKMAAL, the Administration, through the Steering Committee, would continue to monitor the accreditation and training of mediators in Hong Kong.

Mediation service for building management disputes

16. Members noted that a Building Management Mediation Co-ordinator's Office was set up by the Judiciary in the Lands Tribunal in January 2008 to help owners and Owners' Corporations to resolve building management disputes through mediation. Members further noted that Home Affairs Department ("HAD") could refer the concerned parties to the free mediation scheme operated in collaboration with the Hong Kong Mediation Council and Hong Kong Mediation Centre if the parties concerned were willing to resolve their disputes through mediation. They urged the Administration to step up efforts in promoting the use of mediation in resolving building management disputes, and enquired about the effectiveness of using mediation for resolving the disputes, including the number of cases and success rate, as well as the availability of community venues for conducting mediation.

17. The Administration advised that at present, a number of mediation schemes for community groups were provided by various mediation service providers and HAD on both pro-bono and at cost bases. Due to the fact that some mediation cases on building management were conducted informally, statistics on the cases resolved were not generally available. As regards the community venues for mediation, currently facilities at the Henry G Leong Yaumatei Community Centre and the Leighton Hill Community Hall could be used for conducting mediation. The number of cases handled in each of these two venues since their operation was around 50 (up to January 2013). The Steering Committee would explore venues in other districts if there was a great demand for community venues for conducting mediation.

Enhancing the legal profession's understanding of mediation services

18. Members noted the concern amongst legal practitioners about the onerous requirements imposed on them by the Practice Direction on Mediation ("PD 31")³ in connection with the implementation of the Civil Justice Reform. Members considered it important to provide legal practitioners with more information on mediation to enhance their understanding of this alternative dispute resolution procedure.

19. The Administration advised that with effect from 4 January 2010, the Mediation Information Office was established within the Judiciary to provide

³ Under PD 31 which came into effect on 1 January 2010, for proceedings where all the parties are legally represented, the legal representatives concerned are required to file a Mediation Certificate to, inter alia, confirm that they have explained to their client the availability of mediation services, the procedures involved and the costs of mediation vis-à-vis litigation.

litigants with relevant information on mediation so as to assist them in considering whether they should attempt mediation in resolving disputes.

Impact of development of mediation on right to access to court

20. Some members stressed that access to court was a fundamental right of Hong Kong residents guaranteed by the Basic Law and such right should not be in any way be eroded by the development of mediation. They considered that mediation services could not substitute the role of the court in resolving disputes and cases involving significant public interests should be resolved by judicial proceedings and not mediation.

21. The DoJ assured members that the right of access to court would not be affected adversely by the development of mediation services. In the Final Report of the Chief Justice's Working Party on Civil Justice Reform, it was made clear that certain types of cases, such as those involving constitutional issues, were not suitable for mediation. In addition, cases where there was imbalance in bargaining powers between the parties were also not appropriate for mediation. Under PD 31 which was only applicable to civil disputes, the court would consider making an adverse costs order only in cases where a party had unreasonably failed to engage in mediation. The then Working Group believed that at that stage, mandatory mediation for civil disputes should not be implemented. The issue would be re-visited in the light of experience in developing mediation services.

Provision of mediation services on consumer disputes and employment cases

22. Concern was raised about the lack of free legal or mediation services on consumer disputes. As pointed out in the Report on the Consultancy Study of the Demand for and Supply of Legal and Related Services published by the DoJ in May 2008, many people in Hong Kong had experienced difficult-to-solve problems in incidents related to consumer matters and they hoped that such disputes could be resolved by mediation, given that legal costs involved would be disproportionate to the amount involved in the disputes.

23. In response to members' suggestion that assistance should be provided to employees during the mediation process, particularly in respect of advice on the settlement amount, the Administration advised that relevant trade unions and non-governmental organizations would be able to offer assistance to the employees concerned. For employees who were legally-aided, their assigned legal representatives would provide them with any necessary assistance and

advice concerning settlement by mediation, and the cost of mediation would also be covered by legal aid.

24. At the meeting on 23 April 2013, the Panel received views from 36 organizations and individuals on the provision of mediation services in Hong Kong (Appendix to LC Paper No. CB(4)524/13-14). HKMAAL assured members that the views of various stakeholders would be given due consideration in the formulation of the standardized accreditation system for mediators.

Council questions

25. Hon Albert HO raised a written question at the Council meeting of 24 April 2013 regarding the accreditation of mediators, provision of training on mediation and promotion on the wider use of mediation in resolving disputes. Hon Albert CHAN raised an oral question at the Council meeting of 26 March 2014 enquiring whether the Administration would resolve by arbitration or mediation those disputes between the Government and the public, such as land resumption. Hyperlinks to the relevant Hansard are provided in **Appendix III**.

Recent development

26. At the coming Panel meeting on 22 July 2014, the Administration will report to the Panel the latest progress of work undertaken by the Steering Committee in the development of mediation services in Hong Kong. Issues relating to the role and functions of HKMAAL will also be re-visited.

Relevant papers

27. A list of relevant papers is in **Appendix III**.

Steering Committee on Mediation

Terms of Reference

The terms of reference of the Steering Committee on Mediation are as follows:

To advise on and assist in the further promotion and development of mediation in Hong Kong, including but not limited to –

- (a) monitoring the implementation of the Mediation Ordinance, and advising on issues arising therefrom;
- (b) monitoring matters concerning the accreditation and regulation of mediators in Hong Kong, including such matters as may arise from the organisation and operation of the Hong Kong Mediation Accreditation Association Limited ("HKMAAL"), and advising on issues arising therefrom;
- (c) considering and advising on ongoing and new initiatives for the promotion and development of mediation;
- (d) conducting such studies, reviews or researches relating to mediation (whether by its own members or through others) as may be required; and
- (e) such matters as may be incidental to the matters stated in (a)-(d) above.

(Source: Annex B to LC Paper No. CB(4)321/12-13(05))

**Details of the work of the Steering Committee on Mediation
in respect of the Mediation Ordinance, accreditation and training and
public education and publicity**

Operation of the Mediation Ordinance (Cap.620) ("the Ordinance")

The Steering Committee on Mediation ('the Steering Committee') and its Regulatory Framework Sub-committee will monitor the implementation of the Ordinance and advise on issues arising therefrom, including but not limited to –

- (a) ***Proposing guidelines on the exemption for disclosure of mediation communications for research, evaluation or educational purposes under section 8(2)(e)¹ of the Ordinance*** – During the Bills Committee stage of the Mediation Bill, Members of the Bills Committee expressed concern that mediation communications might be disclosed unwarrantedly and untimely through publications for research, evaluation or educational purposes. They were worried that the identities of parties to mediation would be revealed and it might generate negative impact on the parties concerned.

It was thus suggested that, after enactment of the mediation legislation, guidelines may be provided to assist mediators and researchers proposing to use mediation communications for research, evaluation or educational purposes to comply with section 8(2)(e). The Regulatory Framework Sub-committee will follow up on the formulation of the proposed guidelines.

- (b) ***Monitoring the actual working of the exceptions to disclosure of mediation communications*** – This is to consider whether it is necessary to streamline the procedure for applying to courts for disclosure of mediation communications or its admission in evidence, and whether there is abuse of the provisions relating to disclosure of mediation communications, and if so, how to prevent such abuse.
- (c) ***Monitoring the operation of the Ordinance in practice and areas not yet covered by the Ordinance*** – The adequacy of the Ordinance would be reviewed (1) by seeing how it operates in

¹ Section 8(2)(e) of the Ordinance provides for disclosure of mediation communication if “the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates”.

practice; and (2) in addition to reported cases, by making use of empirical data collected from research in considering necessary or desirable amendments to the Ordinance.

- (d) *Considering whether there should be an Apology Ordinance or legislative provisions dealing with the making of apologies for the purpose of enhancing settlement* – This is one of the recommendations of the Working Group to be followed up. Apology legislation exists in some other jurisdictions, and is particularly relevant in disputes such as medical negligence. The legal issues involved will be complex and thorough comparative studies need to be conducted.

Accreditation and training of mediators in Hong Kong

2. The Steering Committee and its Accreditation Sub-committee will continue to monitor the accreditation and training of mediators of Hong Kong, keeping in view future developments, such as the existence of competition in the provision of mediation services.

3. In the longer term, the Steering Committee will also consider whether a statutory accreditation body should be set up to replace HKMAAL, and if so, when such body should be set up and what changes should be made to the Ordinance.

Implementation of public education and publicity initiatives

4. The Public Education and Publicity Sub-committee will continue to implement, in collaboration with the Judiciary, other government departments, organisations, stakeholders and the community, the on-going and new publicity initiatives. Such initiatives include –

- (a) production of posters, a second Announcement in the Public Interest and a docu-drama, educating the public on the roles and responsibilities of parties to a dispute in mediation;
- (b) identification of community or other venues for mediation;
- (c) promotion of the "Mediate First" Pledge in the commercial sector;
- (d) exploring opportunities for initiating pilot mediation schemes in different sectors; and
- (e) organisation of training, conferences and seminars on mediation.

Development of mediation services in Hong Kong

List of relevant papers

Meeting	Meeting Date	Paper
Panel on Administration of Justice and Legal Services	23 June 2008	Agenda Minutes
	20 October 2008	Agenda Minutes
	22 June 2009	Agenda Minutes
	22 February 2010	Agenda Minutes
	26 April 2010	Agenda Minutes
	22 October 2010	Agenda Minutes
	21 December 2010	Agenda Minutes
	19 April 2011	Agenda Minutes Follow-up paper
	21 July 2011	Agenda Minutes
	22 January 2013	Agenda Minutes
23 April 2013	Agenda Minutes	

Meeting	Meeting Date	Paper
Council meeting	24 April 2013	Official Records of Proceedings Pages 85-88 (Written question raised by Hon Albert HO)
	26 March 2014	Official Records of Proceedings Pages 19-30 (Oral question raised by Hon Albert CHAN)

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