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(These minutes have been seen by the Administration)

Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 22 February 2010, at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Dr Hon Margaret NG (Chairman) Hon Albert HO Chun-yan (Deputy Chairman) Hon James TO Kun-sun Hon LAU Kong-wah, JP Hon Miriam LAU Kin-yee, GBS, JP Hon Emily LAU Wai-hing, JP Hon TAM Yiu-chung, GBS, JP Hon Audrey EU Yuet-mee, SC, JP Dr Hon Priscilla LEUNG Mei-fun Hon IP Wai-ming, MH Hon Paul TSE Wai-chun
Members absent	:	Dr Hon Philip WONG Yu-hong, GBS Hon Timothy FOK Tsun-ting, GBS, JP
Public Officers attending	:	Item IV Judiciary Administration Mr NG Sek-hon Deputy Judiciary Administrator (Operations) Miss Clara TANG Assistant Judiciary Administrator (Development) Item V Department of Justice Mr WONG Yan-lung, SC Secretary for Justice

Mr Simon LEE
Deputy Law Officer (Civil Law)

Ms Sou CHIAM
Deputy Principal Government Counsel

Judiciary Administration

Mr NG Sek-hon
Deputy Judiciary Administrator (Operations)

Item VI

Department of Justice

Miss Susie HO
Director of Administration and Development

Mr Simon LEE
Deputy Law Officer (Civil Law)

Item VII

Department of Justice

Mr Frank POON
Deputy Solicitor General

Miss Michelle TSANG
Senior Assistant Solicitor General

Mr LEE Tin-yan
Senior Government Counsel

Attendance by invitation : Items IV, V and VI

Hong Kong Bar Association

Mr Russell Coleman, SC
Chairman

Clerk in attendance : Miss Flora TAI
Chief Council Secretary (2)3

Staff in attendance	:	Mr KAU Kin-wah Assistant Legal Adviser 6 Ms Amy YU Senior Council Secretary (2)3 Ms Wendy LO Council Secretary (2)3 Mrs Fonny TSANG Legislative Assistant (2)3

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I. Confirmation of minutes of meeting
[LC Paper No. CB(2)931/09-10]

The minutes of the meeting held on 15 December 2009 were confirmed.

II. Information papers issued since last meeting

2. Members noted that no information paper had been issued since the last meeting.

III. Items for discussion at the next meeting
[LC Paper Nos. CB(2)950/09-10(01) - (03)]

3. In accordance with the list of items tentatively scheduled for discussion in the current session [LC Paper No. CB(2)950/09-10(01)], members agreed to discuss the following items at the next regular meeting on 29 March 2010 -

(a) Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants;

(b) Free legal advice service; and

(c) Matrimonial Proceedings and Property (Amendment) Bill.

4. The Chairman said that at the last meeting, the Panel had agreed to further discuss the subject of "Independent statutory legal aid authority" with the Chairman of the Legal Aid Services Council ("LASC"). It had been further suggested that members of LASC should also be invited. In this regard, the Chairman informed members that LASC had advised upon the enquiry of the Legislative Council ("LegCo") Secretariat that Mr Paul CHAN, Chairman of LASC, would be available to attend the next Panel meeting scheduled for 29 March 2010. Members agreed to further discuss the subject of "Independent statutory legal aid authority" at the next Panel meeting.

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IV. Transcript fees
[LC Paper Nos. CB(2)950/09-10(04) - (05)]

Briefing by the Judiciary Administration ("JA")

5. Deputy Judiciary Administrator (Operations) ("DJA") introduced JA's paper reporting on the progress of the overall costing review of transcript and recording services and the processing of legislative proposals on fees for transcript and record of proceedings [LC Paper No. CB(2)950/09-10(04)]. Members noted that on the basis of the outcome of the overall costing review, JA proposed to freeze the existing fees for English and Chinese transcripts and audio tape, and to reduce the fee for Compact Disc ("CD") from $315 to $170 and that for Digital Versatile Disc ("DVD") from $570 to $210. Subject to members' views, it was JA's intention to implement the reduced fees with effect from 1 March 2010.

6. Members noted the updated background brief prepared by LegCo Secretariat on the subject under discussion ("Background Brief") [LC Paper No. CB(2)950/09-10(05)].

Views of the Hong Kong Bar Association ("Bar Association")

7. Mr Russell Coleman, Chairman of the Bar Association, said that the Bar Association welcomed the proposed fee reduction and looked forward to seeing the proposed legislative amendments.

Discussion

8. Noting from paragraphs 14 and 15 of the Background Brief that the existing fee for transcripts in criminal appeal bundles was $17 per page, Ms Emily LAU sought information on the average amount paid by litigants for a copy of transcript. DJA responded that while he did not have specific statistics at hand, the amount paid would vary from case to case. Ms LAU expressed dissatisfaction that JA was not able to provide such information to facilitate members' discussion.

9. Mr Paul TSE informed members that it was expensive to obtain a transcript. According to his experience, a transcript cost around HK$5,000 to HK$10,000. The Chairman, however, said that a transcript usually consisted over 100 pages and might well cost more than the amount mentioned by Mr Paul TSE.

10. At the Chairman's invitation, Mr Russell Coleman advised that instant transcripts were provided during arbitration proceedings. According to his experience as an arbitrator, the transcript for one day of proceedings dealing only with English language legal submissions would be about 160-170 pages. For one day of evidence taken only in English, the transcript would probably be about 100-110 pages. As for one day of evidence taken through an interpreter, the transcript might be about 70-80 pages.

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11. The Chairman said that the change in the charging basis for transcript fees from "per page" to "per English word/Chinese character" had resulted in savings for court users. She added that instead of transcripts, litigants might also consider obtaining a copy of the audio record of proceedings in CD or DVD, which cost much less than a transcript, and then make their own arrangement for transcribing the relevant parts of the proceedings.

12. Mr Paul TSE sought clarification on whether audio record of proceedings in CD or DVD would only be provided upon special request. DJA responded that it was up to the litigant concerned to choose whether he wished to obtain a transcript or an audio record of proceedings. Mr TSE said that not many court users were aware of the option of obtaining an audio record of proceedings. A litigant could obtain an audio record and then arrange to transcribe only those parts of the proceedings he needed, instead of obtaining a full transcript. At the suggestion of Mr TSE, DJA

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agreed to enhance publicity on the availability of audio record of proceedings

13. In response to Mr LAU Kong-wah's request for clarification on whether different transcript fees were charged in different situations at different levels of court, DJA explained that since 1 February 2007, the charging basis for transcripts produced from the Digital Audio Recording and Transcription Services ("DARTS") had been changed from a per page basis to a per word/character basis. Such change had been applied to all the transcripts fees which were charged on an administrative basis. However, for transcript fees which were prescribed in subsidiary legislation, namely the fee of $17 per page for transcripts in criminal appeal bundles and $36 per page for a transcript of the notes or records of evidence made at an inquest at Coroners' Court prescribed under the Criminal Appeal Rules (Cap. 221A) and Coroners (Fees) Rules (Cap. 504D) respectively, they were still charged on a per page basis pending amendments to be made to the relevant subsidiary legislation to enable charging on a per word/character basis.

14. Noting from the Background Brief that the existing fees for transcript at $0.14 per English word and $0.10 per Chinese character would translate into about $46.2 per page of English transcript (an average of 330 words per page) and $86 per page of Chinese transcript (an average of 860 characters per page), Mr LAU Kong-wah expressed concern about the substantial increase in the fees for those transcripts which were currently charged at $17 and $36 per page after amendments were made to change their charging basis to a per word/character basis. DJA responded that the fee rate for those two types of transcripts under the new charging method had yet to be worked out.

15. Ms Audrey EU said that all along she had expressed concern about the impact of the level of transcript fees on litigants' ability to institute appeals. She pointed out that even though the charging basis for transcripts had been changed to a per word/character basis, the cost of transcripts was still unaffordable to many litigants, which had severely limited their ability to pursue appeals. In her view, the provision of transcripts should be treated as part of the court services provided by the Judiciary to court users. She stressed that the fee charged should be affordable to court users, regardless of the length of trial.

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16. DJA said that the issue had been raised during past discussions by the Panel. He understood that members had been particularly concerned about the impact of transcript fees on the ability of litigants to pursue criminal appeals. Under the existing waiver mechanism applicable to criminal appeals, transcripts were supplied free of charge to legally-aided and unrepresented appellants. These cases made up about 90% of all criminal appeals. For the remaining 10% of criminal appeal cases, i.e. where the appellant was not legally aided but represented, a fee of $17 per page as prescribed in the Criminal Appeal Rules (Cap. 221A) was charged for transcripts in the appeal bundle. However, the court had discretion to waive or reduce the transcript fees in deserving cases. Furthermore, where the appellant obtained an order for costs in his favour, the transcript fees were part of his costs which were recoverable from the prosecution. The Judiciary considered the existing waiver mechanism for transcripts in criminal appeal bundles adequate in ensuring that access to justice would not be prejudiced as a result of a lack of means to pay the fees.

17. Ms Audrey EU asked whether consideration could be given to setting a nominal fee for transcripts, and at the same time empowering the court to impose a higher charge in cases of abuse or where the transcript was not necessary for the purpose of appeal.

18. DJA responded that it was Government's prevailing policy that fees and charges for public services should in general be set at a full cost recovery level. The Judiciary did not object to adopting a full cost recovery approach, provided that adequate safeguards were in place to ensure that access to justice, in particular litigants' ability to pursue appeals, would not be prejudiced as a result of a lack of means to pay the fees.

19. The Chairman expressed reservation about the suggestion of charging a standard nominal fee for transcripts, irrespective of the length of trial. However, she opined that consideration could be given to providing audio records of proceedings in CD or DVD to court users at a nominal fee as part of court services, considering that their production involved little cost and time.

20. Ms Audrey EU said that for a long hearing, the litigants concerned might found it more useful to obtain a transcript rather than an audio record. She reiterated her view that the provision of transcript should be treated as part of the court services and charged at an affordable rate, with the court being empowered to impose a higher charge in cases of abuse or where the transcript was not necessary for the purpose of appeal. Such a mechanism could better ensure that court users would not be deprived of the right of access to court due to a lack of means. DJA said that this would be a departure from the prevailing policy and would require discussion with the Administration. He undertook to follow it up as appropriate.

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21. Mr IP Wai-ming shared Ms Audrey EU's view that the provision of transcripts should be treated as part of court services. He pointed out that the transcript for a trial in the Labour Tribunal would often cost one to two thousand dollars, which was a heavy burden for many employees. The transcript fee was also disproportionate to the amount of award sought in the Labour Tribunal, which often involved only a few thousand dollars. He added that consideration should also be given to providing transcripts in electronic format instead of hardcopy.

22. Noting that the fees for transcripts comprised two components, viz. the charges paid by JA to the DART contractors for the production of transcripts, and the staff and administrative costs incurred by JA in processing the application for transcript, Mr Paul TSE asked whether there was any scope for reducing the costs of these two components with a view to reducing the transcript fees.

23. DJA advised that the fees charged for transcripts was to a large extent a reflection of the charges paid by JA to the DART contractors which were selected through open tender. As far as the staff and administrative costs incurred by JA was concerned, the relevant work procedures had been reviewed and streamlined and the costs had been greatly reduced in the past few years. He further pointed out that the full costs of producing a transcript could not be spread out, as in most cases it was requested only by the parties to the proceedings concerned.

24. In response to Mr James TO's enquiry on whether the softcopy of a transcript could be provided upon request, DJA said that there was no provision for such under the existing arrangement. It was unclear under the existing laws whether softcopies of transcripts could be provided. He added that the Bar Association had also suggested that consideration be given to the provision of softcopies of transcripts, and JA was considering the feasibility of the suggestion.

25. Mr James TO said that the provision of a softcopy would facilitate the party concerned in searching the content of the transcript, which would be particularly useful if the document was long. In his view, the provision of a softcopy accompanied by a disclaimer, in addition to the hardcopy, should not pose any problem, even without amending the relevant legislation. He further suggested JA to explore the feasibility of using voice recognition software to reduce the costs of producing transcripts.

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26. The Chairman requested JA to consider members' suggestion of provision of softcopies of transcripts in the context of the legislative amendments to be made concerning transcripts and records of proceedings. In response to the Chairman's enquiry on the time frame for the introduction of the legislative amendments, Assistant Judiciary Administrator (Development) said that JA would consult the two legal professional bodies when the draft legislative amendments were available and aimed at introducing the legislative proposals to LegCo in the 2010-2011 legislative session. The Chairman requested JA to expedite the introduction of the legislative amendments.

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V. Development of mediation services
[LC Paper Nos. CB(2)634/09-10(01) and CB(2)950/09-10(06) - (07)]

Briefing by the Administration/JA

27. Secretary for Justice ("SJ") briefed members on the major recommendations made by the Working Group on Mediation ("Working Group") in its Report published on 8 February 2010 ("the Report"), covering the three important areas of accreditation and training, regulatory framework, and public education and publicity, as set out in the Administration's paper [LC Paper No. CB(2)950/09-10(06)]. Members noted that the three-month public consultation on the Report would end on 8 May 2010. In the meantime, without prejudicing the outcome of the consultation exercise, the Administration would commence preparatory work for the implementation of the recommendations in the Report.

28. DJA briefed members on the establishment of the Mediation Information Office ("MIO") within the Judiciary, details of which were set out in JA's paper [LC Paper No. CB(2)634/09-10(01)]. Members noted that in support of the implementation of Practice Direction 31 on Mediation ("PD 31"), MIO was set up to provide litigants with relevant information on mediation. It commenced operation with effect from 4 January 2010 and had been working well. Members also noted that to maintain its independent and impartial position, the Judiciary would not provide mediation services. The actual mediation would be provided by accredited mediators outside the Judiciary to be appointed by the parties themselves.

29. Members noted the background brief prepared by the LegCo Secretariat on the subject under discussion [LC Paper No. CB(2)950/09-10(07)].

Views of the Bar Association

30. Mr Russell Coleman indicated strong support for the development of mediation in Hong Kong. The Bar Association would study the Report in detail and submit a full response in due course. Regarding the Working Group's recommendation of reviewing the possibility of establishing a single mediation accrediting body in Hong Kong in five years' time, Mr Coleman considered five years to be too long as there was a risk that different accrediting bodies might open up in the interim, rendering it more difficult to bring them under one umbrella body. In his view, a single accrediting body for mediators should be put in place as soon as possible.

Discussion

Legislation on mediation

31. Mr James TO said that he was supportive of the development of mediation in Hong Kong. Noting that the proposed mediation ordinance did not seek to regulate mediators or the mediation process, he sought clarification on the objectives of introducing the ordinance.

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32. SJ explained that the proposed mediation ordinance sought to provide a proper legal framework for the conduct of mediation without hampering the flexibility of the mediation process. It would include provisions dealing with important matters such as confidentiality, privilege and immunity of mediators.

33. Mr James TO queried the need for introducing the proposed mediation ordinance which did not seem to contain any mandatory rules governing the conduct of mediation. He opined that if the provisions of the ordinance were meant for reference only, a code of best practices would suffice and there was no need to enact legislation.

34. In response, SJ stressed that mediation as an alternative dispute resolution ("ADR") was voluntary and flexible in nature and it was important that any legislation on mediation should not impose undue restraint over the mediation process. The Working Party's Sub-group on Regulatory Framework had studied in-depth whether Hong Kong should enact legislation on mediation with reference to the regulatory framework for mediation in various overseas jurisdictions. It was noted that some overseas jurisdictions had enacted legislation on mediation while others had not. Having considered and balanced the pros and cons in the light of the circumstances of Hong Kong, the Sub-group saw the desirability of introducing a mediation ordinance to provide a clear and predictable legal framework for the operation and further development of mediation. He referred members to Recommendations 32 to 48 of the Report as set out in its Executive Summary for details of the Working Group's views on what should and should not be included in the proposed legislation and then highlighted some of the key areas that the proposed legislation would cover. It would include an interpretation section on key terminology such as "mediation" and "conciliation". The definition of "mediation" might clarify the types of mediation process which the proposed legislation was intended to deal with such as "facilitative mediation" and "evaluative mediation". In "facilitative mediation", the primary role of the mediator would be a neutral third party to objectively facilitate the parties' communication and negotiation of their dispute, while in "evaluative mediation" the mediator tried to persuade the parties to settle their disputes by offering opinions on law, facts and evidence relevant to their disputes. The proposed legislation would also address some of the areas in which the law was uncertain, such as confidentiality, admissibility and enforcement of agreement to mediate.

35. Ms Audrey EU echoed the query on the need for enacting legislation on mediation, pointing out that there was contradiction between legislating on mediation and maintaining the flexibility of the mediation process. In her view, the rules regulating the conduct of mediation, such as those relating to confidentiality, could be provided for in the code of conduct for mediators without resorting to legislation.

36. SJ reiterated that the primary objective of enacting legislation on mediation was to provide a proper legal framework for the conduct of mediation. He believed that legislating on rules of confidentiality, including setting out the statutory exceptions to the rules and the sanctions for breaching them, could provide clarity and

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certainty for their operation. It would also be desirable to set out on a statutory basis rules relating to the immunity of mediators. In this regard, the issue of whether pro-bono mediators should be subject to the same or different immunity rules was worthy of further examination.

Mediation in employment cases

37. Mr IP Wai-ming expressed support for greater use of mediation as a means to resolve disputes, having regard to the reduction in time and costs vis-à-vis traditional litigation. Referring to Recommendation 9 of the Report that mediation pilot schemes should be considered for disputes in areas such as in the workplace and employment, Mr IP enquired whether there were any differences between these mediation pilot schemes and the mediation services currently provided by the Labour Department.

38. SJ explained that the assistance provided by the Labour Department and the Labour Tribunal to the parties concerned to settle their dispute was different from the mediation services referred to in the Report, which were provided by a professional mediator acting as a neutral third party to assist disputing parties to communicate and negotiate a settlement.

39. Mr IP Wai-ming considered it important for parties to mediation to negotiate on an equal footing. He pointed out that in respect of employment injury compensation cases, the employees concerned had all along relied on the advice of their legal representative in deciding whether to accept the settlement amount offered by the other party's insurance company. He enquired about the availability of support services to employees under the proposed mediation mechanism, particularly in respect of advice on the amount of compensation.

40. SJ responded that whether the parties concerned were able to negotiate on an equal footing would indeed impact upon the viability of mediation in resolving the dispute. If the mediator found that the parties to a dispute were not able to negotiate on an equal footing, he should question whether mediation was the appropriate means for resolving the dispute. Regarding Mr IP's concern about the availability of advice to employees on the amount of compensation in the mediation process, SJ said that it was his understanding that in many cases, the relevant trade unions and non-Governmental organizations ("NGOs") 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. He warned that too much reliance on legal assistance in the mediation process might run counter to the objective of mediation in facilitating the achievement of a speedy settlement.

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41. Mr IP Wai-ming said that trade unions and NGOs were not able to provide assistance to employees in every case, and reiterated his view that assistance should be provided to employees during the mediation process, particularly in respect of advice on the settlement amount. In response to Mr IP Wai-ming's remark on the important role played by mediators during the mediation process, SJ said the quality of mediators was indeed crucial to the success in mediating satisfactory settlements. The Working Group had considered and put forth recommendations relating to the training and accreditation of mediators with a view to ensuring their quality and consistency of standards.

Cost-effectiveness of mediation

42. Noting that one of the major benefits of mediation was reduction in time and costs for the parties concerned, Ms Emily LAU sought information on the amount of time and money saved in using mediation to settle disputes.

43. SJ responded that as the objective of mediation was to help the parties identify what they wanted with a view to reaching a mutually acceptable resolution, rather than resolving the legal issues, as a matter of principle, mediation should result in a swifter resolution of the dispute than traditional court proceedings. Reduction in time would in turn lead to savings in costs. The extent of reduction in time and costs would depend on the circumstances of individual cases. In some cases, a mediated settlement could be reached in a matter of hours. He further said that with the implementation of PD 31 which came into effect on 1 January 2010, for proceedings where all parties were legally represented, the legal representatives concerned had the duty to advise their clients of the need to explore mediation and explain the costs of mediation vis-à-vis litigation. A party would have to face an adverse costs order if it failed to engage in mediation without any reasonable explanation.

44. In response to Ms Emily LAU, SJ clarified that the mediation process did not necessarily have to arise from a court action. Parties to a dispute might attempt mediation before court action was commenced. They could approach a mediator without going through a lawyer. On the other hand, if the parties had decided to resort to the court to resolve their dispute and the judicial proceedings had already been initiated by the issue of a writ of summons, the relevant provisions in PD 31 would apply, i.e. for cases where both parties were legally represented, the legal representatives concerned had to advise their clients on the feasibility of exploring mediation; for cases where one or more parties were not legally represented, the court might, at a suitable stage when mediation was considered appropriate, give direction to the parties to consider mediation.

45. Ms Audrey EU sought information on the respective numbers of mediators and mediation cases handled in Hong Kong in the past five years. She further enquired whether the Working Group had set any quantitative targets on the development of mediation.

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46. SJ responded that as mediation was a private, voluntary and confidential process, there was currently no full data on the number of mediation cases handled in Hong Kong. Nonetheless, he believed that with the implementation of the Civil Justice Reform and the promulgation of PD 31 on mediation, data on the number of mediation cases which would be of reference value would be available in due course. On the number of mediators, he advised that the past year had witnessed a significant increase in the number of mediators in Hong Kong. There were currently over 1 000 accredited mediators in Hong Kong who obtained their qualification through the accreditation schemes run by various bodies. For instance, the Mediator Accreditation Assessment run by the Law Society of Hong Kong had accredited a total of 122 general mediators, 21 family mediators and seven family mediation supervisors. The Panel of Accredited Mediators established under the Hong Kong International Arbitration Centre currently consisted of some 550 accredited mediators. It was expected that the number of mediators would continue to be on the rise. As regards the question of whether any quantitative targets had been set for mediation, SJ said that at the present stage, the focus was to establish a good platform for the development of mediation in Hong Kong. He considered that it would be more meaningful to consider the setting of targets after the conduct of a review in, say, a year's time when relevant statistics on mediation cases were available.

Training of mediators

47. Ms Audrey EU asked whether the training of mediators would focus on the types of disputes which were particularly suited for mediation, such as those concerning building management, professional negligence and sale/supply of consumer goods/services. SJ responded that generally speaking, mediation skills were transferrable skills. It was his understanding that internationally recognized accreditation schemes focused on general mediation skills rather than training on specialized areas of mediation. Ms EU remarked that 1 000 mediators was a small number. In her view, training more mediators in the relevant areas was more important to the success of developing mediation than introducing legislation on mediation. While noting the point made by SJ that mediation skills were generally transferrable skills, she believed that a mediator had to be well-versed with particular areas of mediation so as to be able to come up with versatile, innovative options in facilitating settlement. SJ responded that the Working Group recognized the importance of enhancing mediation education in relevant university disciplines. Apart from the study of law, the Working Group considered that mediation education should also be incorporated into other relevant disciplines, such as architecture, civil engineering and social work, where mediation could potentially play an important role in resolving disputes. He believed that such cross-disciplinary education on mediation would help incubate innovative mediation methods in different types of mediation cases.

48. Dr Priscilla LEUNG informed the meeting that in recent years, the Law Faculties of local universities had placed greater emphasis on courses on ADR, including arbitration and mediation. Some Law Faculties offered master's degree programme on ADR.

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Impact of development of mediation on right to access to court

49. While indicating support for the development of mediation services, the Deputy Chairman stressed that access to court was a fundamental right of Hong Kong residents guaranteed by the Basic Law and such right should not in any way be eroded by the development of mediation. He pointed out that while some categories of cases such as those relating to building management, employment and matrimonial matters were particularly suited for mediation, cases involving significant public interest should be resolved by judicial proceedings and not mediation. He stressed that the development of mediation must not go so far as to prohibit a person from proceeding with an action without first going through a mediation procedure.

50. SJ assured members that the right of access to court would not be adversely affected 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. As he had mentioned earlier at the meeting, 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 Working Group believed that at the present stage, mandatory mediation for civil disputes should not be implemented. The issue would be revisited in the light of experience in the development of mediation services.

51. SJ further said that he shared the Deputy Chairman's view that building management cases were particularly suited for mediation. He pointed out that in the Pilot Project on Community Venues for Mediation implemented in mid-2009 to provide venues in community centres for conducting mediation, most of the mediations conducted in these venues related to building management cases. The Administration would continue its efforts in promoting the use of mediation in building management and other appropriate cases.

52. The Chairman expressed reservation about the recent focus on promoting mediation. She considered that traditional judicial proceedings had its own important functions and values and mediation services could not substitute the role of the court in resolving disputes.

VI. Non-civil service appointment of a Deputy Principal Government Counsel in the Department of Justice for implementation of the recommendations of the Working Group on Mediation

[LC Paper No. CB(2)950/09-10(08)]

53. Director of Administration and Development ("DAD") introduced the Administration's paper on the proposed creation of a non-civil service position of Deputy Principal Government Counsel ("DPGC") at the equivalent rank of DL2 in the

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Legal Policy Division of the Department of Justice ("DoJ") for a period of three years to provide the necessary support for the promotion of mediation in Hong Kong, and subject to the outcome of the consultation exercise on the Report, to implement the recommendations therein. Subject to the Panel's views, the Administration would seek the endorsement of the Establishment Subcommittee in late April 2010 for the approval of the Finance Committee in May 2010.

54. Mr Russell Coleman of the Bar Association indicated support for the staffing proposal.

55. The Deputy Chairman said that it was his understanding that an ethical code of conduct was usually prepared by the profession concerned. Noting from paragraph 6 of the Administration's paper that one of the duties of the proposed DPGC post was to oversee the adoption and implementation of the Hong Kong Mediation Code ("Mediation Code"), an ethical code of conduct for mediators, the Deputy Chairman sought clarification on whether the Administration would take the lead in preparing the Mediation Code.

56. DAD clarified that the Mediation Code was prepared by the Working Party's Accreditation and Training Sub-group, which was chaired by a legal professional, in consultation with the relevant mediation service providers. Referring to the accreditation system, DAD said that subject to the outcome of the consultation exercise, the profession and not the Administration would be responsible for the accreditation and regulation of mediators. In this regard, the Working Group was of the view that a single mediation accrediting body for Hong Kong could be in the form of a company limited by guarantee, and the possibility for establishing this body should be reviewed in five years taking into account the development of the mediation landscape. It was envisaged that the proposed DPGC post would be responsible for working with the mediation profession to facilitate the establishment of the accreditation body and keep in view the development of the system of accrediting mediators.

57. Ms Audrey EU expressed reservation about the staffing proposal. While agreeing on the importance of promoting mediation, she considered that the promotion work should be spearheaded by the relevant professional bodies rather than the Administration. She also did not see any urgent need to introduce legislation on mediation, which was another job duty of the DPGC post. As she had mentioned during the discussion on agenda item V above, the more pressing task was to train more mediators, rather than legislating on mediation.

58. Referring to the job description of the proposed DPGC post attached to the Administration's paper, the Chairman said that it appeared that the post holder's main responsibility was to provide support for the promotion of mediation in Hong Kong. She also expressed reservation about the need for the proposed DPGC post.

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59. In response, DAD further elaborated on the need for the proposed DPGC post. She said that subject to the outcome of the consultation exercise, in addition to promotion of mediation and preparation of the proposed legislation on mediation, the post holder was also required to work with the stakeholders on the accreditation system for mediators. He/she would also play a coordinating role in facilitating wider use of community mediation, particularly in respect of building management cases where there was a great demand for the provision of mediation services.

60. Ms Audrey EU considered it neither appropriate nor necessary to create a post in DoJ to spearhead the promotion of mediation, which should be undertaken by the relevant professional bodies. In her view, it would be more appropriate for the Home Affairs Department, rather than DoJ, to take up the coordination work relating to community mediation. She reiterated that she had reservation about the staffing proposal at the present stage.

61. The Chairman shared the view that promotion of mediation should not be spearheaded by DoJ. She further said that during the discussion under agenda item V above, members had queried the need to introduce legislation on mediation. She opined that even if legislation was to be introduced, the relevant work would probably commence only at a later stage.

62. In response, Deputy Law Officer (Civil Law) said that he noted that during the discussion on the last agenda item, Mr Russell Coleman of the Bar Association had expressed the view that a standardized system of accrediting mediators should be introduced as soon as possible. The proposed DPGC post would provide the necessary support for the development of the accreditation system for mediators in collaboration with the relevant stakeholders. Subject to the outcome of the consultation exercise, it might be necessary to commence the preparation work for the introduction of the proposed mediation ordinance at an early stage to complement the development of the accreditation system. He stressed that to take forward all the recommendations of the Working Group spanning over three subject areas of regulation, accreditation and publicity and public education, dedicated professional support at the DPGC level was needed. He added that the Administration considered DoJ the most appropriate Government department to take up these tasks relating to the development of mediation.

63. To facilitate members' further consideration of the staffing proposal, the Chairman requested the Administration to provide a detailed timetable on the duties to be undertaken by the proposed DPGC post during the three-year period.

DoJ

DAD undertook to provide the requisite information.

64. Whilst expressing support for the development of mediation services, Dr Priscilla LEUNG shared the view that the Administration should provide further information on the responsibilities of the proposed DPGC post.

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VII. Arbitration in Hong Kong of Mainland-related disputes
[LC Paper Nos. CB(2)950/09-10(09) - (10)]

65. The Chairman said that the item was referred to the Panel by the Bills Committee on Arbitration Bill.

66. Members noted the background brief prepared by the LegCo Secretariat on the subject under discussion [LC Paper No. CB(2)950/09-10(10)].

67. In response to the Chairman, Deputy Solicitor General ("DSG") explained the issue relating to arbitration involving foreign investment enterprises as set out in the Administration's paper [LC Paper No. CB(2)950/09-10(09)]. He said that the legal and arbitration communities had expressed concern about the uncertainty as to whether a foreign investment enterprise set up on the Mainland as legal person was free to choose a place other than the Mainland (including Hong Kong) as the venue of arbitration to resolve contractual dispute. He elaborated that according to the relevant provisions and judicial interpretation of Mainland laws, it appeared that the parties to a contract with any foreign-related element might by agreement refer any disputes to a Chinese arbitration institution or any other arbitration institution for arbitration. However, the relevant provisions did not expressly prohibit a Mainland legal person from conducting arbitration in a place other the Mainland where a contract did not contain any foreign-related elements. Given that a foreign investment enterprise would have the status of a Mainland legal person, there was some doubt as to whether such an enterprise could choose Hong Kong as the venue of arbitration for a dispute arising from a contract which did not involve any foreign-related element and whether the awards obtained in such arbitral proceedings conducted in Hong Kong could be enforced on the Mainland.

68. DSG further said that the Administration had been in discussion with the Mainland authorities since 2007 with a view to seeking a written clarification on the issue as soon as possible. The Administration believed that it would be conducive to Hong Kong's development as a hub for international commercial arbitrations if the relevant Mainland authorities could clarify the issue. The Administration considered it most desirable if the issue could be clarified by way of express legal provisions or a judicial interpretation; if that was not feasible, a written notification could be issued by the relevant Mainland authorities to clarify the matter. He then cited two examples of such written notifications. In late 2007, the Supreme People's Court of the People's Republic of China ("SPC") issued a written notification to confirm that apart from institutional arbitral awards, ad hoc arbitral awards made in Hong Kong would also be enforceable on the Mainland under the terms of the arrangement concerning reciprocal enforcement of arbitral awards entered into between Hong Kong and the Mainland in 1999 ("the Arrangement"). Another example was the written notification issued by SPC in late 2009 confirming that arbitral awards made in Hong Kong by the International Court of Arbitration of the International Chamber of Commerce and other foreign arbitration institutions would be enforceable on the Mainland in accordance with the Arrangement.

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69. In response to the Chairman and Dr Priscilla LEUNG, DSG further explained that under the existing Mainland laws, if a contract contained any foreign-related element (as listed in paragraph 3 of the Administration's paper), the parties concerned were free to choose Hong Kong as the venue of arbitration for disputes arising from the contract. However, it was uncertain as to whether the parties concerned (including a foreign investment enterprise) could do so if the contract did not contain any foreign-related element. It was on this point that clarification was being sought from the Mainland authorities. He further said that the Administration had been in discussion with the Mainland authorities on the issue over the past three years and was advised that as important legal policies and different authorities were involved, the issue required careful consideration by relevant authorities including the courts and the Legislative Affairs Office of the State Council. The Administration would continue its dialogue with the relevant Mainland authorities with a view to seeking a written clarification on the issue as soon as possible.

VIII. Any other business

70. There being no other business, the meeting ended at 6:45 pm.

Council Business Division 2
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