

For discussion on
22 February 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 Promotion of Mediation**

PURPOSE

This paper invites Members' views on the proposed creation of 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 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's Working Group on Mediation. The plan is to create the position in August 2010.

JUSTIFICATION

Background

2. In the 2007-08 Policy Address, the Chief Executive announced the establishment of a cross-sector working group headed by the Secretary for Justice (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 **Annex A**.

Promoting the development of Mediation in Hong Kong

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 to 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, 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. The use of mediation has moved into a new phase with the implementation of the Civil Justice Reform (CJR).

4. 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, 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.

5. 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. 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.

The Recommendations of the Working Group

6. The public is being consulted on the 48 recommendations of the Working Group and the consultation will be completed in early May 2010. Subject to the outcome of the consultation exercise, we envisage that the work in respect of the following would need to be pursued in the coming three years –

- (a) to work 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) 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

7. In 2008 when the Working Group was first set up, a part-time non-civil service DPGC position was created for 12 months 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 post 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 this 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 **Annex B**.

8. To take forward the recommendations of the Working Group in the next three years, in particular the matters set out in paragraph 6 above, dedicated professional support at the DPGC level is needed. As the 48 recommendations mentioned above span over the three subject areas of regulation, accreditation and publicity and public education, the issues involved are specialised and the implementation process would require the subject officer working closely with stakeholders from different sectors, including the Judiciary, other government departments, the mediation community and the academia, we consider that the incumbent should be mature, professionally competent with knowledge and experience in mediation work and be able to

work independently. The position should therefore appropriately be pitched at DPGC level. Having considered the magnitude and anticipated duration of work as mentioned in paragraph 6 above, we further propose that the position should be created for three years.

9. The possession of legal knowledge and knowledge and experience in mediation are crucial to the effective discharge of the duties of the proposed DPGC position. We will fill the position through an open recruitment exercise. The job description of the proposed DPGC position in LPD is at **Annex C**. The organisation chart showing the proposed change is at **Annex D**.

10. Currently, as shown in **Annex D**, the LPD is headed by the Solicitor General (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.

Alternatives Considered

11. 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 stretched to provide the dedicated support required to take forward the recommendations made by the Working Group. 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

12. The total remuneration package for the proposed non-civil service position will not exceed the full annual average staff cost, including salaries and staff on-cost, which is \$2,192,496 for a DPGC (DL2). We will include the necessary provision in the 2010-11 draft Estimates to meet the cost of this proposal.

ADVICE SOUGHT

13. Members are invited to comment on the proposal. Subject to Members' support, we will seek the approval of Establishment Committee/Finance Committee.

Department of Justice
February 2010

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

Summary of Recommendations

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.

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

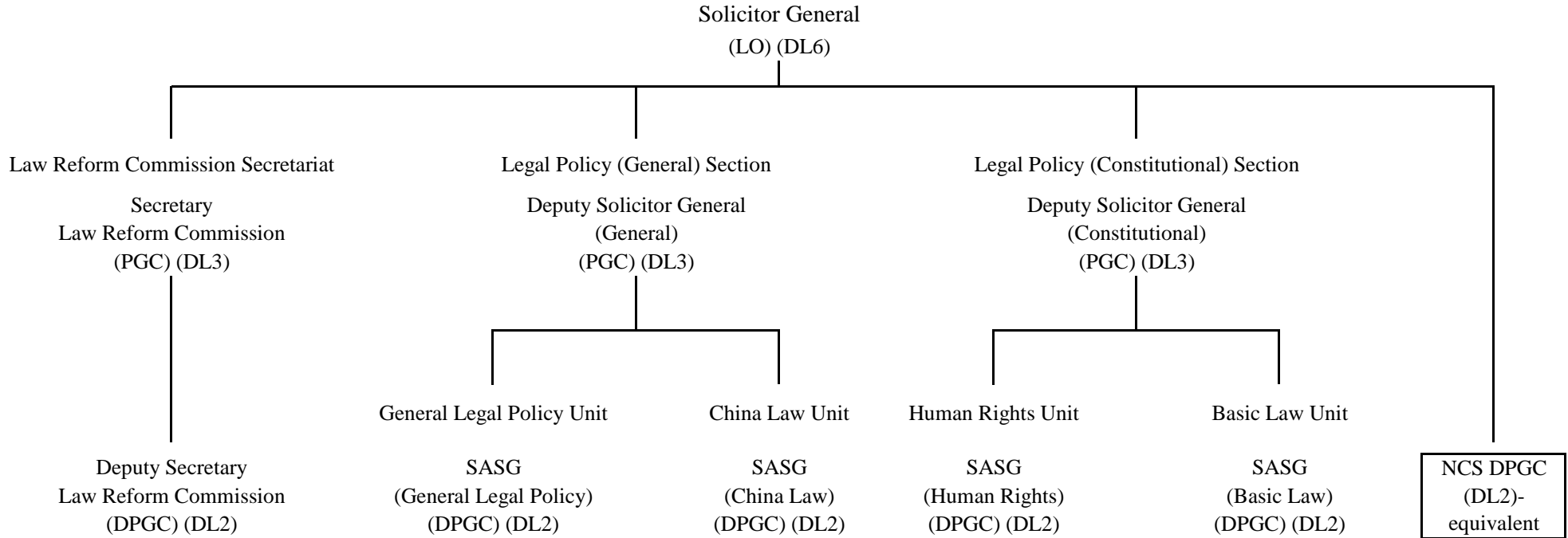
Equivalent rank : Deputy Principal Government Counsel (DL2)

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.

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