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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 22 January 2013**

Development of mediation services

Purpose

This paper provides background information on the development of mediation services and summarizes past discussions of the Legislative Council ("LegCo") on the related matters.

Background

2. Mediation is a dispute resolution process that is used 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 review the development of mediation and to map out plans to employ mediation more extensively and effectively in both commercial disputes and at the community level. On 8 February 2010, the Working Group published its Report ("the Report") for a three-month public consultation. The 48 recommendations contained in the Report¹ covered the three important areas of training and accreditation, legal framework, and publicity and public education.

3. According to the Administration, it had received positive and constructive feedback on the 48 recommendations. A Mediation Task Force ("the 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 with a view to promoting wider use of mediation. The Task Force was assisted by three

¹ A summary of the 48 recommendations of the Working Group is in [Appendix I of LC Paper No. CB\(2\)1480/10-11\(10\)](#).

groups working specifically on the areas of accreditation, Mediation Ordinance, and public education and publicity.

4. The Mediation Bill was introduced into LegCo on 30 November 2011. The objective of the Bill was to provide a legal framework for the development of mediation. In addition to clearly defining the meaning of "mediation", the Bill mainly provided for the confidentiality of mediation communications and the admissibility of mediation communications in evidence. The Bill had been scrutinized by a Bills Committee ("the Bills Committee") and was passed at the Council meeting on 15 June 2012 with a number of Committee Stage amendments moved by the Administration. The Commencement Notice for the Mediation Ordinance (L.N.167 of 2012) was gazetted on 19 October 2012, and a subcommittee had been formed to study the Commencement Notice ("the Subcommittee"). The Ordinance came into operation on 1 January 2013.

Major concerns and views of Members

Accreditation and training of mediators

5. At present, mediators practising in Hong Kong are mostly accredited by the Hong Kong International Arbitration Centre ("HKIAC"), the Law Society of Hong Kong ("the Law Society") and the Hong Kong Mediation Centre ("HKMC"). In early 2010, the Hong Kong Mediation Code was promulgated by the Department of Justice ("DoJ"). The Code was intended to provide a common standard among mediators and had an important quality assurance role. Twenty-one mediation service providers, including HKIAC, the Law Society and HKMC, had adopted the Code.

6. The Bills Committee expressed concern that the Bill had neither provided for the accreditation of mediators nor set out rules to regulate the conduct of mediators and the mediation process. Bills Committee members considered that a mediation system based on proper training and registration should be adopted to maintain the standard and accountability of mediators.

7. The Administration explained that legislation was the first step to promote mediation. In order to maintain the flexibility of the mediation process, it was more appropriate to incorporate relevant regulatory rules into an agreement to mediate instead of the Bill. The parties to the dispute may enter into an agreement to mediate which governs the proper conduct of mediation. As regards training and accreditation, the Administration advised that mediation service providers in Hong Kong had prescribed requirements for training and continuing professional development for mediators to ensure the standard of

mediators. The accreditation of mediators could be further worked out after the establishment of a non-statutory industry-led single accreditation body for mediators.

8. The Subcommittee was briefed by the Administration on the progress of the establishment of a non-statutory, industry-led accreditation body for mediators. The Subcommittee noted that the Hong Kong Mediation Accreditation Association Limited ("HKMAAL") was incorporated on 28 August 2012 as a company limited by guarantee. Its four founder members are the Hong Kong Bar Association, the Law Society, HKIAC and HKMC. The HKMAAL was working on matters including the admission of members, the formulation of an accreditation system and the grandparenting policy. HKMAAL would operate as a self-financing body and it had no plan to seek government funding. After successfully establishing itself, the next step forward for HKMAAL was to seek statutory backing. The Subcommittee also noted as the Mediation Ordinance did not contain provisions relating to HKMAAL or the accreditation of mediators, and the commencement of the Ordinance needed not be subject to the readiness of HKMAAL.

9. Some Subcommittee members were concerned that the Administration would not be able to exercise any role in overseeing HKMAAL's operations and the standards for accreditation of mediators. The Administration advised that its role was to facilitate the establishment of HKMAAL in collaboration with stakeholders, and would continue to monitor the accreditation and training of mediators in Hong Kong. The four founder members were the leading organizations working with a common goal to further develop and promote mediation in Hong Kong. DoJ would keep in view future developments, in particular whether there would be any unhealthy competition in the provision of mediation services.

10. As regards Subcommittee members' view that mediators in other professions and fields (such as architecture, surveying, construction etc.) should not be excluded from HKMAAL, the Chairman of HKMAAL assured the Subcommittee that the future participants of HKMAAL would not be limited to a single profession such as the legal sector HKMAAL.

11. Subcommittee members also expressed concern about the availability of accredited mediators and whether the subject of mediation had been given sufficient coverage in the academic programmes offered by local universities. The Administration advised that there were over 2 000 mediators accredited by the Law Society, HKIAC and HKMC. The law programmes offered by universities had included courses on negotiation skills and mediation. HKMAAL concurred with a member's view that HKMAAL should collaborate

with local universities in formulating its standards for accrediting mediation training courses.

Other major issues discussed at the Panel on Administration of Justice and Legal Services

12. The Panel on Administration of Justice and Legal Services ("the Panel") discussed issues relating to the development of mediation services and the recommendations made by the Working Group at a number of meetings held between June 2008 and July 2011. The major concerns and views expressed by Panel members are summarized below.

Mediation service for building management cases

13. Regarding mediation services for owners and Owners' Corporations ("OCs") to resolve building management disputes, the Judiciary introduced a pilot scheme to streamline the processing of building management cases in the Lands Tribunal ("the Tribunal") from January 2008 to June 2009, aiming to facilitate a more efficient, expeditious and fair disposal of building management cases filed with the Tribunal. In the light of the positive experience gained, the Tribunal decided to turn the pilot scheme into standard arrangement with effect from July 2009. In support of the scheme, the Judiciary has set up a Building Management Mediation Co-ordinator's Office ("BMMCO") in the Tribunal in January 2008 to facilitate the parties in seeking mediation services.

14. Furthermore, for building management disputes which are caused by different understanding or interpretation of the provisions in the Building Management Ordinance (Cap. 344), staff of the District Offices of the Home Affairs Department ("HAD") will give general advice to the OCs on the relevant provisions and precedent court cases, if any. Subject to the nature of the disputes, District Offices' staff may refer owners to any of the ten Property Management Advisory Centres operated by the Hong Kong Housing Society for free consultations with lawyers. If the disputes persist and the parties concerned are willing to resolve their disputes through mediation service, HAD will refer them to the free mediation scheme operated in collaboration with the Hong Kong Mediation Council and HKMC.

15. Members were concerned whether the mediation schemes available to owners and OCs in resolving building management disputes would be maintained after the enactment of the Mediation Ordinance. In addition, members were concerned about the difficulty in finding suitable places for conducting mediations especially by mediators who provided their services to

resolve community disputes including building management disputes on a pro bono basis.

16. The Administration advised that it was the Administration's plan to continue the provision of free mediation service for building management cases and the Administration would expand the service where necessary. As regards the venues for mediation, the Administration advised that the District Facilities Management Committees of the Yau Tsim Mong District Council and the Wan Chai District Council had approved the use of venues and facilities at the Henry G Leong Yaumatei Community Centre and Leighton Hill Community Hall respectively as community venues for mediation. Consideration would be given to extending the mediation scheme to community centres in other districts. If mediation was conducted in these two community venues on a pro bono basis, fees for using the venues and facilities would be waived.

17. At the Panel's request, the Administration provided in March 2012 information on the success rate of dispute cases which were resolved through mediation, in particular those relating to building management².

Enhancing the legal profession's understanding of mediation services

18. Members noted the concern among legal practitioners about the onerous requirements imposed on them by the Practice Direction on Mediation ("PD 31") in connection with the implementation of the Civil Justice Reform. 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. The Law Society had expressed the view that to require solicitors to assess the fees that would be incurred in mediation and help the legally-aided client to see whether the fees involved would be disproportionate to what might be recovered was an onus unfairly put on the legal profession. Members considered it important to provide legal practitioners with more information on mediation to enhance their understanding of this alternative dispute resolution procedure. The Administration assured members that the Working Group would work together with other parties to enhance the legal professional's understanding of mediation services.

19. In this connection, the Panel noted that the Mediation Information Office was established within the Judiciary with effect from 4 January 2010 to provide litigants with relevant information on mediation so as to assist them in considering whether they should attempt mediation in resolving disputes upon

² LC Paper No. CB(2)1597/11-12(01)

the implementation of PD 31. On the concern about sham mediation after the implementation of PD 31, the Panel noted that the Hong Kong Bar Association and the Law Society had issued a circular to remind their members that participating in sham mediations either as counsel or as a mediator was an act of professional misconduct and might be subject to disciplinary action. The court was also monitoring the situation and the Working Group would consider taking appropriate action if necessary.

Impact of development of mediation on right to access to court

20. While indicating support for the development of mediation services, 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. 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 Working Group believed that at the present 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. A member expressed concern about the lack of free legal or mediation services on consumer disputes. It was pointed out that the Reports on the Consultancy Study of the Demand for and Supply of Legal and Related Services published by DoJ in May 2008 revealed that many people in Hong Kong had experienced difficult-to-solve problems in incidents related to consumer matters and hoped that such disputes could be resolved by mediation, given that legal costs involved would be disproportionate to the amount involved in the disputes. DoJ advised that the relevant part of the Report on the Consultancy Study would be drawn to the attention of the Working Group which would consider how to promote understanding and awareness of mediation services to the community.

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, DoJ 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.

Latest position

24. At the coming Panel meeting on 22 January 2013, the Administration will report to the Panel on the implementation by the Task Force of the recommendations in the Report of the Working Group published in February 2010.

Relevant Papers

25. A list of the relevant papers which are available on the Legislative Council website is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
18 January 2013

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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 [LC Paper No. CB(2)1597/11-12(01)]
	21 July 2011	Agenda Minutes
Bills Committee on Mediation Bill	21 December 2011 10 January 2012 13 January 2012 1 February 2012 7 February 2012 28 March 2012 25 April 2012	Report [LC Paper No. CB(2)1943/11-12]

Meeting	Meeting Date	Paper
Subcommittee on Mediation Ordinance (Commencement) Notice	6 November 2012 16 November 2012	Report [LC Paper No. CB(4)191/11-12]

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