

Panel on Administration of Justice and Legal Services Meeting:

Meeting 22nd January 2013

Topic: Agenda Item V: “Proposed creation of a supernumerary post of Deputy Principal Government Counsel in the Civil Division of the Department of Justice” - the Administration plans to create a supernumerary Deputy Principal Government Counsel post to provide support to the Secretary for Justice to promote and facilitate the use of mediation in Hong Kong.

Submission:

The Law Society welcomes the creation of the supernumerary post to promote and facilitate the use of mediation in Hong Kong. Since 1996, many Law Society members, on a pro bono basis, have done much to promote and facilitate the use of mediation in Hong Kong. We thank you for the opportunity to add our experience to the Administration’s proposals.

Balancing the needs of the Community, having effective use of Court facilities, and ensuring Hong Kong core values, requires a multi-door approach to Justice.

Mediation can result in what litigation does not often allow: dialogue, reconciliation and closure. Arbitration allows resolution in a private setting and Litigation may be the surest path to uncover truth, right wrongs and achieve Justice. The choice of which avenue to take depends on the parties and the issues involved. Clearly, it is horses for courses.

Whoever holds the post to be created in the DOJ, must appreciate and be supported by the Administration in recognizing and upholding the core principles of Mediation – simplicity, confidentiality, voluntariness, self-determination and open dialogue.

If this post is approved, we think it helpful for the Law Society to be allowed to comment on the proposed criteria for the candidates and job specifications. There are three reasons for this:

- 1) In the keen adoption of Mediation, we are noticing the inadvertent slippage of these core principles. We see the adoption of paradigms from litigation and

notions of accountability to others outside the room. We find the increasing use of rules, paragraphs, sub-paragraphs, and requirements to show settlement agreements to administrators.

In our view the post holder needs to be able to recognize when the Mediation process is being turned into an arbitration or a litigation process and to have the authority to stop that shift

- 2) Mediation has proved to be a viable avenue and force when used appropriately. And any force, like Star Wars can tell you, has a dark side.

There are reasons why Mediation Schemes limit legal representation, but there is always the proverbial little old lady who can be dis-enfranchised by that requirement. Confidentiality agreements encourage original and private solutions, but they also encourage the concealment of patterns of corporate misconduct.

The post holder needs to be able to appreciate balance of power issues, how powerless people may be empowered. The post holder also needs to be able to comment that, despite the existence of an issue specific mediation scheme, that maybe it is not in the interests of justice for a particular client to be required to participate.

- 3) In many jurisdictions, the perception is that mediation was adopted primarily because it could clear the court lists. Hong Kong is fortunate in that it can learn the lessons from other jurisdictions so that, in our wisdom, we do not get subverted by monetary concerns above all others.

The post holder needs to appreciate that despite the benefits of mediation, the paramount principle is that everyone is always entitled to access the court and to have legal representation in doing so.

Thank you