

Speech by Secretary for Justice at conference luncheon on mediation

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Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, at the luncheon of the conference "Mediation in Hong Kong: The Way Forward" today (November 30):

Chief Justice, Distinguished Guests, Ladies and Gentlemen,

Introduction

May I start by welcoming you all to this Conference, especially our guests who are visiting from overseas. After the morning sessions on the experiences in various jurisdictions, I am much delighted to be here to share with you where Hong Kong stands in relation to the use and development of mediation.

Mediation as an ADR process

As Mr Chief Justice this morning has mentioned, in his policy address delivered in October, our Chief Executive pledged to develop mediation services in Hong Kong. Mediation has been in use in Hong Kong for some time. But it is fair to say its application is still relatively narrow. So why are the key players in the administration of justice, including the Government, the Judiciary, the professions, the academic institution are joining hands to promote it now?

Like many of you from jurisdictions which are ahead of us in mediation practices, we too recognize that the conventional processes for resolving disputes are overloaded despite the continuing development of judicial remedies and the growth in the size of the legal profession. Although we are increasing resources and simplifying the judicial procedures, the court process can still be lengthy, costly, antagonistic, and uncertain, and can lead to dissatisfaction with the legal process.

Hong Kong as you all know is a global financial centre, whose capacity has been increasing with the phenomenal growth of the economy of the Mainland and the corresponding international investments. We must have a full range of dispute resolution facilities to strengthen our position in this competitive world. In the business world, while disputes are inevitable, breakdown of relationships can be avoided, and speedy resolution of differences must in any event be beneficial to all. The trends in other jurisdictions as we have heard this morning are definitely encouraging us to tap into the potential of mediation as a better approach.

Secondly, we want to improve the access to justice here. We want to help the ordinary people resolve disputes by quicker and more cost-effective ways. Taking the smaller disputes to the judicial system is simply disproportionate. Setting up more specialized tribunals is not the answer and cannot be easily justified as a matter of public spending. We also want to foster a more harmonious society where 7 million of us are living very closely to one another and mostly in high-rise buildings in Hong Kong.

As aptly described by Lord Justice Brooke in *Dunnett v Railtrack* [2002] 2All ER 850, "Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve... by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live."

It has been suggested that there is something distinctly Asian about mediation, as there is a strong element of compromise and harmony. So in promoting mediation, we may well be embarking on a process of cultural awakening.

Getting things going

We shall be setting up a cross-sector working group to map out our plans to promote mediation in Hong Kong. Although we are still working on the detailed composition and term of reference, the group will comprise representatives from the Department of Justice, the Judiciary, the legal professions, the mediation bodies as well as academic experts. I am sure you agree with me that we have an unusual consensus here we are all convinced that this is the way forward and we are looking forward to our close cooperation.

We believe informing and educating the public of what mediation is and what benefits it can bring is a matter of priority. Admittedly, even among legal professionals, there are many who are skeptical of the effectiveness of mediation and are concerned with any erosion mediation may bring to their traditional litigation business. In that connection, today's conference is an important starting point. We are grateful to our overseas experts for sharing with us what you have been through. This afternoon we shall have the mediation service providers telling us what they can offer, and focusing on public sector initiatives and the use of mediation in various commercial disputes. Tomorrow, the programme will switch into the Chinese language and local experts will be sharing mediation experience in building management, labour and family disputes.

It is important to demonstrate to the public and the sceptics how mediation can make a difference. In Hong Kong, mediation has already established a very steady foothold in specific areas.

#### Construction Mediation

In that connection, may I say a few words about what's happening here. Mediation has been in use in construction disputes in Hong Kong since the early 1980's. Since the early 1990's, mediation was adopted for all major public works contracts such as the Airport Core Projects (ACP) contracts. This has proved very effective in reducing the number of claims which would otherwise proceed to arbitration. Under these contracts, mediation was a mandatory requirement of the dispute resolution process, and 80% of all such disputes were settled by mediation or through negotiation at the mediation stage.

Last year, the Judiciary has introduced a two-year pilot scheme for mediation of construction disputes. Although mediation under the scheme is voluntary, confidential and without prejudice to the parties, the relevant Practice Direction backing the pilot scheme provides that an "adverse costs order" may be made against parties who unreasonably refuse or fail to attempt mediation.

#### Family Mediation

There is another court-annexed scheme of mediation in relation to matrimonial disputes. In May 2000, a three-year pilot scheme on Family Mediation was launched by the Judiciary. A Mediation Co-ordinator's Office was set up within the Family Court building to assist in implementing the pilot scheme. The scheme produced a high user's satisfaction rate and a high agreement rate. Because of this, it was decided to maintain the Mediation Co-ordinator's Office at the close of the pilot scheme. Although family mediation services are now provided on a fee-charging basis, some non-governmental organizations operate fee exemption and reduction schemes for those with financial difficulties, such as recipients of Comprehensive Social Security Assistance or those with a monthly income of \$4,000 or less.

#### Legal aid for mediation

The Chief Justice's Working Party on Civil Justice Reform considered the possibility of making mediation a condition of legal aid. It recommended giving the Legal Aid Department the power, in suitable cases, to limit its initial funding for persons who qualify for legal aid to the funding of mediation. The Final Report of the Working Party also suggested that the Administration should conduct its own pilot scheme to evaluate the cost-effectiveness of the proposal before deciding on the way forward.

On 15 March 2005, the Government launched a one-year pilot scheme to establish whether extending funding to mediation of

legally aided matrimonial cases could be justified on grounds of cost-effectiveness and other implications. Under the pilot scheme, both the legally aided person and the other party were invited to join the scheme on a voluntary basis. During the period of the pilot scheme, 88 cases were mediated, of which 61 cases (69%) reached either full or partial agreement. Further, nine out of ten respondents of a questionnaire survey have rated the scheme positively. The Government now intends to establish mediation in legally-aided matrimonial cases as a permanent feature of the legal aid service, and is working on the detailed features of the permanent scheme.

#### Mediation of Building Management Cases

More recently, the Lands Tribunal has introduced a pilot scheme to encourage parties to building management disputes to resolve their cases by mediation before or after they issue proceedings in the Lands Tribunal. Under the scheme, if there are means to resolve a dispute by mediation, unreasonable failure to make a bona fide attempt in mediation on the part of either party will be relevant conduct to be taken into account by the Lands Tribunal in deciding on costs. At the initial phase (from 1 January 2008 to 31 December 2008), it will apply to cases with legal representation on both sides. In appropriate cases, with suitable modifications, the Lands Tribunal may apply some features of the scheme to other cases by specific direction made in the course of the proceedings.

#### Mediation: the possible steps forward

The problems we face in developing mediation in Hong Kong are by no means unique to us. For instance, in a recent detailed report evaluating two mediation programmes in Central London County Court written by a team of legal academics including Professor Dame Hazel Genn (see Note), it was commented that there is a policy challenge in reaching out to litigants so that consumer demand for mediation can develop and grow, and that courts wanting to encourage mediation must find imaginative ways of communicating directly with disputing parties. Further, it was observed that while the legal profession has more knowledge and experience of mediation than was the case a decade ago, it clearly remains to be convinced that mediation is an obvious approach to dispute resolution. It was said that a critical policy challenge is to identify and articulate the incentives for legal advisers to embrace mediation on behalf of their clients.

Moreover, conclusions drawn from evaluations in overseas jurisdictions have generated different schools of thoughts. First, some are convinced that voluntary take-up of invitations to engage in mediation is not effective and there must be certain degree of judicial compulsion to ensure mediation will take off, as we have heard this morning. However, there are also others who believe that willingness to participate in mediation is critical to its

success and thus the emphasis should be placed on facilitation, education and encouragement. And I think in between, background pressure, and also as we heard this morning, procedural structure, such as appropriate costs orders and other case management matters may play a very significant role in the process.

We hope that with the experience accumulated and the experience to come from the various pilot schemes, we shall be able to strike the proper balance as to what measures should be adopted in the circumstances in Hong Kong.

In addition to developing the market for mediation, service providers may also wish to explore ways in which the quality of their services may be improved and how qualifications can be streamlined and universally recognized. Although currently Hong Kong does not have many different service providers, their emphases and target users are quite diverse and the number of providers is on the rise. A concerted effort will need to be made to look into issues relating to proper accreditation, as well as to eliminate duplication of work. However, while streamlining standards is necessary, it is also, I think, important to maintain diversity, bearing in mind the wide spectrum of subject matters which are suitable for mediation. In the meantime, we have to spend time looking into important areas on confidentiality and other related regulatory matters.

These and many other issues will be taken up by the cross-sector Working Group on Mediation which I shall head. We will be looking at the overall strategy to promote the development of mediation services in Hong Kong. Our challenge is to come up with concrete and balanced proposals in relation to encouraging more extensive and effective use of mediation. We shall be monitoring the running of the different pilot schemes, discussing with the stakeholders and considering the various options carefully.

I hope this conference will not only produce a lot of food for thought for the Working Group, but it will also establish a greater community awareness of mediation, setting the scene for more concerted efforts to advance mediation in Hong Kong. The working group to be set up will be monitoring the development and considering the various options. In the meantime, we shall continue to explore what other promotional work can be done to strengthen the community's understanding of mediation.

On that note, I will not stop you from continuing with your lunch and I wish you all fruitful exchanges and all of you health and happiness. Thank you.

Ends/Friday, November 30, 2007

Note:

Professor Dame Hazel Genn et al, "Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure", Ministry of Justice Research Series 1/07, May 2007. See pp v-vi of the Executive Summary of the Report.