

香港家庭福利會

(本會為註冊之有限公司)

HONG KONG FAMILY WELFARE SOCIETY

(Incorporated with Limited Liability)

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12 January 2012

Bills Committee on Mediation Bill

Legislative Council

HKSAR

Views on the Mediation Bill

1. The Hong Kong Family Welfare Society is one of the major NGO service providers of Family Mediation in Hong Kong. We support the introduction of a Mediation Ordinance and the objects of the Ordinance.
2. In view of the distinctiveness of Family Mediation and the requirement to protect the interest of the children involved, it is suggested to differentiate between Family Mediation from General Mediation in the Ordinance to address its special feature.
3. While one of the objectives of the Ordinance is to protect the confidential nature of mediation communications, we have grave concern that the exceptions to “Confidentiality of mediation communications” and the rule “Admissibility of mediation communications in evidence” in section 8 and 9 of the Mediation Bill will have negative impact on the principle of protecting the confidentiality of mediation communications in mediation.
4. We perceive that it is very essential to protect the confidentiality of mediation communication and the “without prejudice” nature of mediation to promote mutual trust and communication among the parties and the mediator and facilitate the parties to reach a mediated settlement agreement. The exceptions to the confidentiality of mediation communication [section 8(2) and 8(3)] and the rule “Admissibility of mediation communications in evidence” [section 9] will create worries among the parties the possibility of the other party or the mediator admitting the mediation communications in evidence. On the other hand, it is concerned that any party to the mediation may make use of the provision to make unnecessary request or press the mediator to admit the mediation communication in evidence.



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- 4.1 The rules will increase the chance of the mediation process being manipulated as a means in winning the battle in the litigation process.
- 4.2 According to our practice experience, especially in Family Mediation, there has always been a party who thought that the other party was too unreasonable that an agreement could not be reached and had the urge to make this known to the judge. Besides, one party or even both parties perceived that they will “win” in the litigation if the mediation communication could be disclosed. With the provision of the exceptions to the confidentiality rules, they may push for the disclosure of the mediation communication, including to give pressure to the mediator to give consent to the disclosure. This is not conducive to the development of mediation and will create extra burden to the mediator in handling such request. It will also complicate the litigation proceedings to a certain extent.
- 4.3 It is quite easy for the party/parties to make use of the rules set out in section 8(3)(a) “for the purpose of enforcing or challenging a mediated settlement agreement” and 8(3)(b) “for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator...” to request for disclosure of a mediation communication.
5. The Department of Justice has formulated the “Hong Kong Mediation Code” to guide the practice of mediators. It also includes the “Agreement to Mediate” that stipulates the roles and responsibilities of the mediator and the parties as well as the “Confidentiality of the Mediation” (Paragraph 11-14; refer to Appendix). We propose that there should be clauses in the Mediation Ordinance to be in line with these provisions, especially the “Confidentiality of the Mediation” to facilitate the effectiveness of mediation, to protect the parties and the mediator and the confidential nature of the mediation process.
6. To follow our suggestion to differentiate Family Mediation from General Mediation in the Ordinance as mentioned in paragraph 2 above. The issue of confidentiality in Family Mediation with respect to its special feature and the paramount concern to protect the interest of the children involved should be should be addressed.

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Appendix

Confidentiality of the Mediation (Paragraph 11 – 14) of the Agreement to Mediate, Hong Kong Mediation Code

11. Every person involved in the mediation:
 - (a) will keep confidential all information arising out of or in connection with the mediation, including the fact and terms of any settlement, but not including the fact that the mediation is to take place or has taken place or where disclosure is **required by law to implement or to enforce terms of settlement;**
and
 - (b) acknowledges that all such information passing between the Parties and the Mediator, however communicated, is agreed to be without prejudice to any Party's legal position and may not be produced as evidence or disclosed to any judge, arbitrator or other decision-maker in any legal or other formal process, except where otherwise disclosable in law.

12. Where a Party privately discloses to the Mediator any information in confidence before, during or after the mediation, the Mediator will not disclose that information to any other Party or person without the consent of the Party disclosing it, **unless required by law** to make disclosure.

13. The Parties will not call the Mediator as a witness, nor require him to produce in evidence any records or notes relating to the mediation, in any litigation, arbitration or other formal process arising from or in connection with the Dispute and the mediation; nor will the Mediator act or agree to act as a witness, expert, arbitrator or consultant in any such process.

14. No verbatim recording or transcript of the mediation will be made in any form.

