

Bills Committee on Mediation Bill

Administration's Response to issues raised at the meeting held on 7 February 2012

Introduction

This paper sets out the Administration's response to the issues raised by Members at the meeting of the Bills Committee on the Mediation Bill ("the Bill") held on 7 February 2012 and includes the Administration's view as to whether amendments should be made to the Bill as appropriate.

Whether the consent required by clause 8(2)(a) should be in writing

2. Clause 8(2)(a) of the Bill as is currently drafted allows a person to disclose mediation communications if the disclosure is made with the consent as specified under clause 8(2)(a)(i) to (iii). If enacted as drafted, the provision will not impose a statutory requirement for the consent to be in writing. We understand that parties do not necessarily require consent for disclosure of mediation communications to be given in writing under existing practice. However, parties could do so if they consider it appropriate. If the consent is one of the conditions of the mediated settlement agreement, the consent will be reflected in the mediated settlement agreement which is usually in writing. Mediation is a flexible process and it is not the intention of the Bill to hamper the existing mediation practice. We note that not all countries with mediation legislation impose written requirement

for consent of the parties for the disclosure of mediation communications. We consider therefore that it is not necessary to require the consent under clause 8(2)(a) to be in writing.

Whether leave of a specified court or tribunal should be obtained before disclosure is made under clause 8(2)(d)

3. Some Members suggested that a person seeking to disclose a mediation communication for the purpose of preventing or minimizing the danger of injury to a person or of serious harm to the well-being of a child under clause 8(2)(d) should apply for leave of a specified court or tribunal.

4. While we note the basis of Members' concern, we also are wary of the practical implications that may arise if the requirement to seek the leave of the Court is added. We understand from practitioners and family mediators in particular that there may be imminent situations where disclosure is necessary *to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child*. Where the situation arises, it would be impractical to apply for leave before the specific mediation communication could be disclosed. Therefore, we do not consider that the requirement to apply for the leave of a specified Court for the purposes of a disclosure under clause 8(2)(d) should be added.

5. Regarding Members' concern that it might be difficult for a person to determine whether a ground is within the meaning of "reasonable grounds" to justify the disclosure of a mediation communication under clause 8(2)(d), the

Mediation Ordinance Group (“MOG”) under the Mediation Task Force chaired by the Secretary for Justice considered that what a ground would be reasonable for the purpose of clause 8(2)(d) would depend on the facts or circumstances of each individual case. Members may be interested to note that the Law Reform Commission of Ireland¹ recommended a similar exception to the confidentiality of mediation communications and considered that a person would be “expected to gauge the seriousness of the threat” in deciding whether to disclose the mediation communication in issue.

6. Our view is therefore that the reference to “reasonable grounds” in clause 8(2)(d) should be kept as drafted.

Express exception to allow disclosure for the purpose of seeking legal advice and other professional advice

7. Parties to mediation may choose their representatives as they see fit and may choose representatives who are not lawyers even though it is common for lawyers to be instructed to advise and assist the parties. We note Members’ concern regarding situations where parties to mediation have not instructed lawyers to assist them in the first place and wish to consult lawyers after the commencement of the mediation. As a party may need to disclose mediation communications to the lawyer in order to obtain the legal advice required, at issue is whether such disclosure of mediation communications is allowed.

8. We understand Members’ concern. As we consider that there is no

¹ Para. 3.62 of the Report on Alternative Dispute Resolution: Mediation and Conciliation by the Law Reform Commission of Ireland.

justification to restrict parties' access to legal advice and that the provisions of the Bill should not suggest any restriction to the rights of parties to seek legal advice, we will propose an amendment of the Bill to expressly allow the disclosure of mediation communications for the purpose of seeking legal advice.

Disclosure of Mediation Communication under clause 8(3)(a)

9. The object of clause 8(3) is to ensure that the statutory requirement provided in clause 8(1) to keep mediation communications confidential will not become a bar to the use of mediation communications as evidence where it is necessary to disclose or admit mediation communications in evidence in circumstances including those described more specifically in clause 8(3)(a) and (b). For instance, if the relevant mediation communications cannot be disclosed or admitted in evidence, a party to mediation who considers that the mediator has misconducted the mediation would unlikely be able to establish the complaint.

10. In the event of a dispute about a mediated settlement agreement, a party who seeks to enforce or challenge that agreement may want to put forward arguments by referring to certain mediation communications leading up to the conclusion of that agreement. Under clause 8(3)(a), the party may disclose the relevant communications for that purpose only with leave of a specified court or tribunal. This will ensure a high degree of protection for the confidentiality of mediation communications. If there is no dispute arising from a mediated settlement agreement, it is unlikely that parties will seek to disclose mediation communications for the purpose of enforcing or challenging the agreement.

11. Clause 8(3)(a) does not have the effect of requiring the leave of the Court before any mediated settlement agreement can be enforced. A mediated settlement agreement is a contract. The terms of the contract can be enforced by a party against the other to the agreement as required and appropriate. The general observation is that parties to a mediated settlement agreement will usually implement the terms and conditions of the agreement without dispute. The parties enter into a mediated settlement agreement because the terms and conditions of the agreement meet their respective interests. There is more incentive to comply with the terms and conditions and it is rather unlikely that the parties will resort to litigation in order to enforce the mediated settlement agreement after they have avoided litigation by mediation.

12. Members would note that clause 10(2) provides guidance to the specified court or tribunal on how to exercise the discretion to grant leave for a mediation communication to be disclosed or admitted in evidence. We believe that applications made to disclose or admit mediation communications with a purported view to abuse the procedure can be prevented. We therefore consider that clause 8(3) as currently drafted, together with clause 10, can achieve the policy intent and is in order.

Chinese text of clause 8(3)(b)

13. As the sentence structure of the English language is different from that of the Chinese language, it is sometimes necessary to adopt different phrasing and punctuation in composing the two language texts of a provision with multiple elements. Taking into account the need for clause 8(3)(b) to relate grammatically to the opening words in clause 8(3), we consider it proper and clearer to enclose the

qualifying description of the relevant allegation or complaint within brackets in the Chinese text of clause 8(3)(b) as currently drafted.

Definition of *child* in clause 8(4)

14. According to the current drafting convention used in Government bills, definitions of general application within an enactment are grouped together in an “Interpretation” provision, but a definition that applies only to a particular provision should be placed in that provision. The definition of *child* is placed at the end of clause 8 because this term only appears once in clause 8(2)(d).

Item 12 of Schedule 1 with reference to sections 32 and 33 of the Arbitration Ordinance (Cap. 609)

15. In the Administration’s Response to issues raised at the meetings held on 10 January 2012 and 1 February 2012 (LC Paper No. CB(2)955/11-12(01)), we have explained the implications of excluding mediation proceedings referred to in sections 32 and 33 of the Arbitration Ordinance (Cap. 609) from the application of the Bill. We have since further considered the provisions involved.

16. Since neither subsection (1) nor (2) of section 32 of Cap. 609 refers to any "mediation proceedings", and as this expression is only mentioned in subsection (3) of section 32, we maintain our view that item 12 of Schedule 1 to the Bill should not have the effect of excluding from the application of the Bill any mediation conducted by a mediator appointed by the Hong Kong International Arbitration Centre under the default appointment mechanism mentioned in section 32(1) and (2) of Cap. 609 if the mediation in question does not constitute

“mediation proceedings” in the context of “med-arb” and “arb-med-arb” as specified in sections 32(3) and 33(2) of Cap. 609. However, to avoid any doubt, we will propose to make a technical amendment to item 12 of Schedule 1 to the Bill by replacing the general reference to section "32" of Cap. 609 with a specific reference to section "32(3)". We trust this will address the concern raised in the representations made by the Hong Kong Construction Association (LC Paper No. CB(2)645/11-12(03)).

Proposed Committee Stage Amendments to the Bill

17. The proposed Committee Stage Amendments, in the form of marked-up revisions to clause 8(2) of, and item 12 of Schedule 1 to, the Bill as suggested in paragraphs 8 and 16 above are now attached at the **Annex** for Members' consideration.

Department of Justice

March 2012

**Proposed Committee Stage Amendments to
Mediation Bill**

(shown as marked-up revisions to the provisions of the Bill)

8. Confidentiality of mediation communications

(2) A person may disclose a mediation communication if—

....

(e) the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates; ~~or~~

(ea) the disclosure is made for the purpose of seeking legal advice; or

(f) the disclosure is made in accordance with a requirement imposed by law.

Schedule 1

[s. 5]

Processes to Which this Ordinance Does Not Apply

12. Mediation proceedings referred to in sections 32(3) and 33 of the Arbitration Ordinance (Cap. 609).