

Bills Committee on Mediation Bill

Administration's Responses to the Representations made by the Law Society of Hong Kong ("Law Society")

No.	Representations by the Law Society	Administration's Responses
1.	<p>Voluntariness of parties to mediate</p> <p>Law Society's concern that the definition of mediation fails to emphasize that mediation is (a) a voluntary process; and (b) the parties themselves have the primary responsibility to achieve settlement with the assistance of the mediator.</p>	<p>It is one of the recommendations of the Report of the Working Group on Mediation ("the Report") that there should be mediation legislation without hampering the flexibility of the mediation process¹. It was also considered in the Report that there may be compulsory court-referred mediation² subject to future development of mediation in Hong Kong. However, whether the parties embark on mediation purely of their own volition or upon direction of some authority is not relevant and does not affect the applicability of the Bill to the mediation in question. The Bill is not concerned with how the parties come to use mediation to settle their disputes (be it by consent, directed by the terms of the Financial Dispute Resolution</p>

¹ Recommendation 32 of the Report: "Hong Kong should have legislation on mediation, which should be aimed at providing a proper legal framework for the conduct of mediation in Hong Kong. However, the legislation should not hamper the flexibility of the mediation process."

² Recommendation 45 of the Report: "Compulsory referral to mediation by the court should not be introduced at this stage, but the issues should be revisited when mediation in Hong Kong is become more developed."

		<p>Centre, or because of the costs sanctions under the Judiciary’s Practice Direction 31 (“PD 31”). The Bill is primarily concerned with, after the parties have started mediation, the conduct of certain aspects of the mediation (such as confidentiality and admissibility of evidence) which ought to be regulated. Even if the parties have been directed to start mediation, it would still be entirely up the parties to reach an agreement or not in the mediation process. The mediation process is still entirely voluntary as no one can be forced to reach a settlement on any term against his or her will.</p> <p>We note that the facilitative mediation is the most popular mode of mediation in Hong Kong and the definition of mediation as currently drafted reflects the existing mediation practice. The definition of mediation in clause 4(1) of the Bill provides expressly that mediation does not involve the adjudication of a dispute or any aspect of it.</p>
2.	<p>Clause 7</p> <p>(i) PD 31 covers the Judiciary’s expectation in relation to mediation both before and after parties litigate their disputes before the courts in Hong</p>	<p>1. In Hong Kong, persons other than qualified solicitors and barristers have been involved in providing assistance and representation in arbitrations and mediations for a long time.</p>

<p>Kong</p> <ul style="list-style-type: none"> (ii) Providing legal advice to assist a client of mediation is giving advice in a dispute situation which is analogous to giving advice to litigation (iii) Foreign lawyers are not permitted to practice Hong Kong law (iv) Risk of an inexperienced mediator not being able to handle power imbalances in a mediation (v) A person giving support or assistance – in the form of legal advice – must be a solicitor subject to professional standards (vi) Government being „cherry-picking“and failing to cite similar provisions in the Australian and Canadian legislation 	<p>Given that arbitration and mediation are forms of ADR and both are private and consensual, parties should be entitled to appoint advisers and advocates of their own choice, whether or not legally qualified and whether local or foreign³. The process of mediation is even less formal than arbitration proceedings. Hence the case for allowing persons other than non-qualified lawyers to represent parties in mediations is even more compelling.</p> <ol style="list-style-type: none"> 2. Mediation does not involve any determination of the parties' rights and liabilities. Although legal matters cannot be completely ignored, mediation settlements are not achieved as a result of legal advice or submissions. Hence there is no justification to restrict representation to lawyers. This is so particularly when the disputes to be resolved by mediation can arise in a wide spectrum of specialised disciplines including community disputes. 3. In respect of arbitration, the recognition that persons other than qualified lawyers can take part in arbitration has long been put in statutory form. Section 63 of the Arbitration
---	--

³ Robert Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (1997), [2F.03]

Ordinance (Cap. 609) provides that sections 44, 45 and 47 of the Legal Practitioners Ordinance (Cap. 159) (“LPO”) do not apply to arbitral proceedings. Similarly, in the UK, section 36 of the 1996 Arbitration Act makes it clear that a party to an arbitration may be represented by the person of the party’s choice. In respect of mediation, the Bill is the first legislation on mediation in Hong Kong. It is only appropriate for there to be a comparable provision for the sake of certainty and consistency.

4. In almost all other jurisdictions, persons other than qualified lawyers can represent parties in mediations without restriction. For example, in the US, the Uniform Mediation Act⁴, adopted by various states, expressly provides that lawyer or an individual person may accompany a party to participate in mediation. Similarly, Farm Debt Mediation Act of New South Wales (NSW), Australia⁵, provides that a party to mediation may be accompanied by an adviser and that adviser need not be legally or professionally qualified.
5. Unless Clause 7 of the Bill is specifically enacted, the

⁴ Uniform Mediation Act (last revised in 2003), Section 10.

⁵ New South Wales, Australia: Farm Debt Mediation Act 1994, Section 17

otherwise application of Sections 44, 45 and 47 of the LPO may deter or prohibit a person other than a qualified lawyer from assisting a party in a mediation because of the risks of contravening those provisions. This may unduly restrict the participation by other professionals (not just foreign lawyers, but also architects, engineers, and social workers) in mediation, and render mediation not as flexible and effective as it should be. The uncertainty surrounding the application of sections 44, 45 and 47 of the LPO has generated considerable legal proceedings in the past⁶.

6. The introduction of PD 31 has not changed the nature of mediations or the nature of representations called for. Although mediation costs are recoverable at the end of the legal proceedings should they ensue upon the failure to settle the case through mediation, the costs incurred on mediation are costs *incidental to* legal proceedings but *not part of the legal proceedings*⁷. Similarly, in providing legal aid assistance for mediation, it is the practice of the Legal Aid Department to treat mediation costs as expenses

⁶ See eg: *The Magway*, unrep., HCAJ 14/199 (1 August 2002); *Voce v Henley Group Ltd.*[2008] 5 HKLRD 429; *Piper Double Glazing Ltd. v D.C. Contractors* [1994] 1 WLR 777; *R (Factortame Ltd.) v Transport Secretary* (No. 8) [2003] QB 381; and *Agassi v Robinson (Inspector of Taxes)* (No. 2) [2006] 1 WLR 2126.

⁷ See *Chun Wo Construction & Engineering Co Ltd and another v China Win Engineering Ltd* [2008] HKEC 977

incidental to the legal proceedings (similar to expert's fees) and not as part of the legal expenses.

7. Further, so far as legally aided cases are concerned, a solicitor is assigned to represent the legally aided person at the time when legal aid is granted. A mediator will only be engaged at a later stage usually through nomination by the assigned solicitor in consultation with the client. The role of the solicitor and that of a mediator are quite distinct, even though the mediator nominated is also a solicitor.
8. As regards general participation of foreign lawyers in ADR in Hong Kong, it has long been recognized that it is important for the promotion of Hong Kong as an international dispute resolution centre. If in reality only locally qualified lawyers can safely represent parties in mediation, it will deal a serious blow to development of mediation, ADR generally and the reputation and competitiveness of Hong Kong.
9. In recent years, the use of "med-arb", i.e. the combined and flexible use of mediation and arbitration, has become more popular. It is in fact also envisaged in the financial dispute

		<p>resolution scheme, the FDRS, in Hong Kong. Should there be inconsistent approach regarding representations, it would significantly jeopardise the development of ADR in Hong Kong.</p> <p>10. Further still, other professionals have been contributing significantly to the development of mediation in Hong Kong. A party to mediation may or may not choose to instruct lawyers to be present during mediation.</p>
3.	<p>Confidentiality Clause 8(2)(e)</p> <p>The Law Society is concerned with the exception under clause 8(2)(e), that identities of parties to mediation may be revealed given the small community nature of Hong Kong.</p>	<p>The Hong Kong Association of Banks has expressed similar concern. We reiterate our response as follows:</p> <p>First, it should be clarified that nothing in Clause 8 permits disclosure of any detail of the mediation agreement or the mediation settlement (e.g. the settlement sum, breakdown or terms). For under Clause 2(1), “mediation communication” specifically excludes “an agreement to mediate or a mediated settlement agreement”.</p>

	<p>Second, if there is any further concern that any specific matter in the mediation communication may be prone to revealing the identity of the persons concerned and therefore should not be disclosed as a class, it is open to the parties to agree by contract to a more stringent disclosure regime, or for the Terms of Reference of the FDRS to provide for the same.</p> <p>Third, the current wording of Clause 8(2)(e) was drafted to address the concern that the likelihood of revelation is higher in Hong Kong as it is a small community. Therefore, even where there is a likelihood to reveal, directly or indirectly, the identities of the persons concerned, Clause 8(2)(e) cannot be used. This is in fact tighter against disclosure when compared with comparable provisions in other jurisdictions (e.g. in Australia and Canada).</p> <p>Fourth, at this stage of the development of mediation in Hong Kong, research and evaluation are crucial to ensure we are moving in the right direction, investing resources where they are most deserved, and training mediator service providers in the most effective ways. Universities and private mediation organisations conduct surveys which will aid the promotion and is necessary to facilitate the healthy development of</p>
--	--

		<p>mediation in Hong Kong. Research practice is in accordance with international practice with various international publications published over the years.</p> <p>Fifth, many Universities require researchers to abide by the Code of Ethics for research. Any further general concern about disclosure for the purposes of research may be addressed by issuing of guidelines.</p>
--	--	---

Department of Justice
March 2012