

立法會 *Legislative Council*

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Bills Committee on Mediation Bill

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper sets out the background of the Mediation Bill ("the Bill") and gives an account of the discussions of the Panel on Administration of Justice and Legal Services ("the Panel") on the proposed legislation which seeks to provide a regulatory framework in respect of certain aspects of the conduct of mediation and to make consequential and related amendments.

Background

2. Following the Chief Executive's announcement in the 2007 Policy Address to develop mediation services in Hong Kong, the Working Group on Mediation ("Working Group") was established by the Secretary for Justice ("SJ") to review the current development of mediation and to make recommendations on how mediation can be more effectively and extensively used in both commercial disputes and at the community level. The Working Group was chaired by SJ and comprised representatives from the Department of Justice ("DoJ"), the Judiciary, the Legal Aid Department, the two legal professional bodies, the three local law schools and relevant mediation bodies.

3. On 8 February 2010, the Working Group published its Report ("the Report") which contained 48 recommendations for a three-month public consultation. The Working Group in the Report recommended that 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.

4. After the end of the public consultation exercise in May 2010, a Mediation Task Force chaired by SJ was set up to assist in considering and implementing these recommendations in the coming 30 months with a view to promoting wider use of mediation. The Mediation Task Force has set up a Mediation Ordinance Group to consider the views gathered during the public consultation period in respect of the proposed Mediation Ordinance.

Relevant discussions of the Panel

5. The Panel discussed issues relating to the draft Mediation Bill at its meetings on 22 February, 22 October 2010 and 19 April and 21 July 2011. A brief account of the discussion is summarized in the ensuing paragraphs.

Enacting a Mediation Ordinance

6. According to the Administration, the Working Group recommended that there should be a stand-alone Mediation Ordinance to provide a proper legal framework for the conduct of mediation without hampering the flexibility of the mediation process. The Working Group also recommended that the proposed Mediation Ordinance should set out its objectives and underlying principles, as well as key terminology such as "mediation" and "mediator". It should also include provisions dealing with the rules of confidentiality and privileges, as well as setting out the statutory exceptions to the rules and sanctions for breaching the rules of confidentiality and privilege. The Working Group, as a matter of principle, had no objection to include model rules in the proposed Ordinance, although it considered that it was not strictly necessary. Any model mediation rules so included should only serve as a guide and not be mandatory such that parties could choose their own mediation rules. In respect of enforcement of mediation settlement agreements, the Working Group did not consider it necessary to include in the proposed Ordinance a statutory mechanism for enforcing mediated settlement agreements as such agreements could be enforced by the courts as contracts where necessary.

7. Some members queried the need for introducing the proposed Mediation Ordinance which did not seem to contain any mandatory rules governing the conduct of mediation. They expressed concern about contradiction between legislating on mediation and maintaining the flexibility of the mediation process. The Administration reiterated that the primary objective of enacting legislation on mediation was to provide a proper framework for the conduct of mediation. Legislating on rules of confidentiality, including setting out statutory exceptions to the rules and the sanctions for breaching them, could provide clarity and certainty for their operation.

8. The Administration subsequently informed the Panel that there was overwhelming support from the public consultation for the enactment of a Mediation Ordinance. The Mediation Task Force together with its Mediation Ordinance Group had been working on the contents of the proposed Mediation Ordinance. It was considered that primarily the proposed Bill would provide some clarification on what was meant by mediation so that there was no confusion. Secondly, the Bill would cover confidentiality provisions and thirdly, the Bill would cover privilege in mediation.

9. The Administration briefed the Panel on the objectives and main aspects to be covered by the proposed Mediation Bill at the meeting on 21 July 2011. Members noted that both the Hong Kong Bar Association ("the Bar Association") and the Law Society of Hong Kong ("the Law Society") supported the enactment of a Mediation Ordinance. The Law Society, however, considered that the proposed Bill provided too many statutory exceptions to the confidentiality rules and it would undermine the important rule of confidentiality for mediators. It also highlighted the need to differentiate between family mediations and non-family mediations in the Bill having regard to the requirement for a mediator to consider the interests of the children of the marriage in conducting family mediations. The Law Society further suggested that a provision providing for partial immunity to mediators should also be added to the future Mediation Ordinance.

10. While some members expressed support for the enactment of a Mediation Ordinance, some members reiterated their concern about the need for legislating on mediation. The Administration advised that the proposed Bill would set out the meaning of mediation, key terminology, rules of confidentiality and admissibility of mediation communications in evidence etc. A prominent impact to be brought about by the Bill would be the inclusion of sanctions for breaching the rules of confidentiality.

11. Some members expressed concern over the possible cost of mediation and sought clarifications on whether the Administration would incorporate provisions monitoring the cost of mediation and setting benchmark on the charges in the proposed Bill. The Administration advised that according to the existing practice, the fees charged for mediation was mutually agreed upon by the two parties concerned. The policy inclination was to maintain the current market practice.

Developing a system of accrediting mediators

12. Members noted that in early 2010, the Hong Kong Mediation Code ("the Code") was promulgated by DoJ. The Code was intended to provide a common standard among mediators and had an important quality assurance role. Twenty-one mediation service providers, including the Hong Kong International Arbitration Centre, the Law Society and the Hong Kong Mediation Centre, had adopted the Code.

13. The Administration advised that the Working Group recommended a review of the possibility of setting up a single mediation accrediting body in Hong Kong in the form of a company limited by guarantee in five years taking into account the development of the mediation landscape. Members noted that the Bar Association considered that such an accrediting body should be put in place as soon as possible as there was a risk that different accrediting bodies might open up in the interim, rendering it more difficult to bring them under one umbrella body.

14. The Administration subsequently informed members that the majority of the submissions received during the public consultation exercise urged that a single accreditation body should be set up as soon as possible. However, the Mediation Task Force considered that it was premature to provide a statutory scheme for the establishment of a single accreditation body at this stage in the development of mediation in Hong Kong. It considered that a non-statutory industry-led single accreditation body should be supported.

15. The Administration advised at the meeting on 21 July 2011 that the proposed Bill would not contain provisions governing the establishment of the proposed industry-led accrediting body. According to the Administration, a non-statutory industry-led accrediting body, the Hong Kong Mediation Accreditation Association, would be set up shortly in the form of a company limited by guarantee. The Administration considered it an efficient approach to set up such a body in the form of a company limited by guarantee, instead of a statutory organization, to provide for flexibility in the development of mediation. The Administration also advised that given that the Code was commonly adopted by the mediation industry, the Administration considered that there was no need to make statutory provisions in the Bill about the Code and set out sanctions in that aspect.

Relevant papers

16. A list of the relevant papers which are available on the Legislative Council website is in the **Appendix**.

Appendix

Relevant documents on Bills Committee on Mediation Bill

Committee	Date of meeting	Paper
Panel on Administration of Justice and Legal Services	22.2.2010 (Item V)	Agenda Minutes
	22.10.2010 (Item I)	Agenda Minutes
	19.4.2011 (Item VI)	Agenda
	21.7.2011 (Item I)	Agenda

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