



HONG KONG SOCIETY OF
ACCREDITED MEDIATORS
香港認可調解員學會

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By EMAIL

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Clerk to Bills Committee on Mediation Bill
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Sir / Madam,

VIEWS ON THE MEDIATION BILL

Hong Kong Society of Accredited Mediators (HKSAM), founded in 2009, is a non-profile making professional organisation which setup by accredited mediators from different accreditation bodies in Hong Kong to encourage accredited mediators to participate in social services and to enhance the code of professional conducts and ethics in mediation industry.

We are of the view that the Bill is a right and major step forward in an attempt to providing the legal framework for mediation. As encapsulated in Clause 3of the Bill the objectives are to promote, encourage and facilitate the resolution of disputes by mediation; and to protect the confidential nature of mediation communication.

Mediation is a process that encourages the full and frank disclosure of the materials and views of the parties to the mediator. Confidentiality provides the basis for the guarantee that what are disclosed in the mediation will not be disclosed to the world at large or to be used against the party in subsequent litigation. The shield of confidentiality also protects mediators from being the subject of abusive complaints.

On the other hand, there is a need for listing or exceptions to the shield as far as there is public interests and justifiable to do so. For example, exceptions should be in place so that the parties will not take advantage of confidentiality by deliberately putting materials adverse to their case in mediation so as to prevent it from being disclosed in

subsequent proceedings. Or should there be serious misconduct of the mediators such as dishonesty or fraud, they should not be covered under the pretext of confidentiality.

The Bill is correct in trying to strike a balance between confidentiality and the exceptions. But as a Bill with an underlying objective of encouraging and facilitating the use of mediation, we suggest the consideration of the following:

Clause 8 (3) (b)

Clause 8 3(b) of the Bills provides that a person may disclose mediation with leave for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator. Such a provision may dampen the enthusiasm of mediators. In Hong Kong we find that there is a culture of complaints. Many in both the private and public sectors have encountered unreasonable complaints that have caused them a lot of time and effort. The provision in the Bill that the shield can be lifted if there are complaints about misconduct will undoubtedly discourage rather than encourage the resolution of disputes by mediation.

To follow some other jurisdictions with more mature statutory provisions such as Australia, the statutes provide exceptions only if there are proceedings founded on fraud or about offence happening in the mediations. Instead of using the expression of misconduct, we may provide more concrete provision such as mediator's failure to conduct proceedings in accordance with the agreed procedure as the ground for the exception.

Clause 8(1) and 8(2)

Clause 8 (1) of the Bill provides that mediation communication must not be disclosed except under the subsections of (2) and (3)

We have little comments on Clause 8(2) (a) (b) (d) (e) and (f) provides as most of the exceptions such as parties' consent and protection of children from injury are widely acceptable to the public. We are concerned that Clause 8(2) (c) expressly provides that the content of mediation that is otherwise subject to discovery in civil proceedings may be disclosed. As a guiding principle for the discovery of documents in civil proceedings is that the document 'relate to the matter' in question. On the other hand, the content of mediation communication is commonly subject to 'without prejudice' privilege. Clause 8(2) (c) may cause ambiguity and confusion in what is the proper

procedure in dealing with mediation communications in discovery in civil proceedings.

We also suggest that in Clause 8(1), confidentiality should not only be restricted to mediation communications, "documents prepared in connection with an attempt to negotiate a settlement" should also be included. Furthermore, it is worth considering statements such as "mediation communications are not to be adduced as evidence in any civil proceedings" except as provided under subsection (2) and (3) can be added.

Establishment of Mediators Registration Board

According to the current course of professional mediators and representatives from organizations based accreditation system, HKSAM suggests that the establishment of a unified registration and regulatory body (recommended to called "Mediators Registration Board"), and provide some basic mediation curriculum standards, then by the provision of approved courses are added as needed. This will ensure the quality of professional mediators, help mediators to abide by the principles of neutrality and impartiality, to promote mediation services, and to enhance the acceptance of mediation in the community, and to treat the trained mediators from different training institutions fairly.

The Government should establish a statutory registration and regulatory bodies "Mediators Registration Board", and clearly stated the composition, organizational structure of the say Board in the "Mediation Ordinance". The operation model can refers to the current engineers, planners, housing managers, social workers and other professional sectors.

We sincerely wish that the Committee will take into account our comments before passing the Bill.

Yours truly,

For and on behalf of
Hong Kong Society of Accredited Mediators

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