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Attention: Wendy LO  
Council Secretary  
The LegCo Secretariat

11.01.12

Dear Ms Lo

Thank you for inviting me to make a submission to the Bills Committee in relation to the Mediation Bill. I consider the Bill to be a milestone in the development of professional mediation practice in Hong Kong and am honoured to offer my comments. My submission is enclosed in the pages that follow.

For the Committee's information, I have also attached my curriculum vitae. In addition to my membership of the Mediation Taskforce in Hong Kong, I am also a member of NADRAC, the Australian ADR Advisory Council in which capacity have advised on mediation legislation in Australia. I also was a member of the Advisory Council on a Mediation Law in Germany. The German parliament (lower house) passed the Mediation Law on December 15, 2011. Currently I am engaged by the World Bank Group as an international consultant on mediation regulation issues. My books and articles deal with the regulation of mediation around the world. They include: *Global Trends in Mediation* (2006), *International and Comparative Mediation* (2009), and *Mediation in Hong Kong* (2010).

I am very sorry that I am unable to attend the meeting on Friday the 13<sup>th</sup> of January due to travel commitments outside of Hong Kong. However I would be happy to answer any questions the Committee might have in relation to my submission.

Yours sincerely

Nadja Alexander

*Professor and Director,  
International Institute of Conflict Engagement and Resolution  
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# Submission to the Bills Committee

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I strongly support the adoption of the Mediation Bill for the following reasons.

*1. The Hong Mediation Bill is in line with legislative trends around the world.*

As mediation develops into a profession it requires a regulatory framework. This has been the experience of jurisdictions all over the world. Jurisdictions with a highly developed and thriving mediation practice enjoy a robust regulatory framework with issues such as confidentiality and admissibility of mediation evidence in the form of legislation.

The success of mediation legislation has captured the attention of international donor organisations such as the *World Bank*. These international organisations now include mediation regulation as part of their legal reform projects globally. For example, the World Bank has recently published the *ADR Guidelines* for policy and law-makers globally, which outlines the benefits of appropriate mediation regulation including framework legislation.

Hong Kong is by no means the first jurisdiction to adopt legislation on mediation — in fact, the Mediation Bill follows legislative developments on mediation in the United States, Australia and the Pacific, other Asian jurisdictions, parts of Africa and Europe.

*2. The content of the Mediation Bill is in line with leading ADR jurisdictions and with best practice.*

In terms of the content of the Bill, it is important to focus on what the Bill seeks to achieve. This Bill seeks to establish an essential regulatory framework within which the flexible process called mediation can operate.

The flexibility of mediation is one of the factors, which makes it attractive to disputing parties. Mediation gives parties a greater voice in sorting out their own disputes and in shaping a dispute resolution process to suit their specific needs. Legislation must support the practice of mediation without stifling it and this is a delicate balance.

International experience shows that the most litigated aspect of mediation is confidentiality and admissibility of mediation evidence. As such this is the primary area that requires a uniform approach through legislation and this is the primary, although not sole focus of the Mediation Bill. As a point of international comparison, confidentiality and admissibility of mediation evidence is also the primary focus of the Uniform Mediation Act in the United States.

By not addressing aspects of mediation such as conduct of the process and accreditation, the Bill makes room for party autonomy and flexibility in mediation. In addition it allows industry-based forms of regulation such as the Hong Kong Mediation Code to develop in these areas, and this is in line with international practice. The Hong Kong Mediation Code (available on the DOJ website) addresses practice standards for mediators. In other words it is a code of conduct.

*3. Accreditation: On a global analysis, the majority of jurisdictions have or are working towards industry-led mediator accreditation systems.*

Australia and the Netherlands are examples of two countries that have established such a system. Like Hong Kong, Germany, England and many other jurisdictions are dealing with this issue at the moment. These countries and others have deliberately left accreditation out of legislation and permitted industry experts shape accreditation standards directly.

The beauty of the Mediation Bill in its current form is that it applies to professional mediation activity that is currently taking place. In addition it will apply to mediators under a future industry-based accreditation scheme such as the planned HKMAAL without requiring any changes whatsoever. Its broad scope is essential to capture professional mediation activity by accredited, and other, mediators.

*4. The Mediation Bill is the result of a thorough process of deliberation and consultation combined with extensive international research.*

The process that has led to the Mediation Bill began with the Working Group on Mediation, which published its Report with recommendations in February 2010. Among other things those recommendations point to the need for essential framework legislation for mediation. The Report makes it clear that mediation should not be *over-regulated* by legislation and that only certain aspects of mediation such as confidentiality and admissibility of mediation evidence should be the subject of legislation. A three-month consultation period followed the Report and then the Mediation Taskforce was formed to implement the Report recommendations and consultation outcomes.

I have been privy to similar ‘deliberation, consultation and decision-making processes’ in a variety of jurisdictions and have been very impressed with the attention to transparency and fair process that I have witnessed in Hong Kong.

*5. Hong Kong needs a Mediation Ordinance to support its position as a leading international dispute resolution hub.*

Hong Kong prides itself as a leading international dispute resolution hub. It has a well-respected judiciary and is an internationally recognised arbitration centre. To

maintain its leading edge Hong Kong needs to build on what it has and adopt a framework legislation for mediation. The adoption of the Mediation Bill will instil confidence in international parties that Hong Kong is indeed operating at international standards in relation to mediation.

6. A final word for anyone concerned at the brevity of the Mediation Bill.

As the saying goes, good things come in small packages. The Mediation Bill is one of them.