



Mediation Bill
Submission of the Law Society

The Law Society in principle supports the proposal to enact a Mediation Ordinance but has the following comments on the Bill:

Clause 2. Interpretation

(1) *In this Ordinance—*

agreement to mediate (調解協議) means an agreement in writing by 2 or more persons to submit a dispute between them to mediation, regardless of—

- (a) whether the agreement is in the form of a mediation clause in an agreement or in the form of a separate agreement;
- (b) whether the agreement is made before or after the dispute arises; and
- (c) whether or not a mediator is appointed at the time the agreement is made;

Note-

An agreement to mediator could be in electronic form – see also section 5(1) of the Electronic Transactions Ordinance (Cap.533).

Law Society's Response:

It is noted "*agreement to mediate*" in practice means an agreement between the mediator and the parties to a dispute which confirms the appointment of the mediator, sets out his terms of services, and stipulates the roles and obligations of the mediator and the parties (See: *Agreement to Mediate* annexed to the *Hong Kong Mediation Code*). An *agreement to mediate* in this sense is but one type of '*agreement to submit a dispute to mediation*'. Hence, if the drafter intends to describe a general agreement to submit a dispute to mediation, we recommend this term be redrafted in order to avoid confusion.

Clause 4. *Meaning of Mediation*

- (1) *For the purposes of this Ordinance, mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following –*
- (a) identify the issues in dispute;*
 - (b) explore and generate options;*
 - (c) communicate with one another;*
 - (d) reach an agreement regarding the resolution of the whole, or part, of the dispute*
- (2) *For the purposes of subsection (1), a session is a meeting between a mediator and one or more of the parties to a dispute, and includes any activity undertaken in respect of–*
- (a) arranging or preparing for such a meeting, whether the meeting takes place or not; and*
 - (b) following up any matter or issue raised in such a meeting.*

Law Society’s Response:

Paragraph 7.48 of the Report on Mediation published by the Secretary for Justice’s Working Group on Mediation recommended that the definition of mediation should:

- “(1) describe the process by identifying the key elements of a facilitative mediation, which would include: (a) the process is voluntary and the parties participate in the process pursuant to an agreement made by them; (b) the process is conducted by an independent third party (the mediator) who will maintain a neutral and impartial role throughout the process; (c) the process is confidential and privileged; (d) the role of the mediator is to assist the parties to identify issues, to explore options and alternatives and to reach a settlement agreement acceptable to the parties;*
- (2) expressly state that the mediator will not in any way determine the dispute or give any opinion or evaluation to any party to the dispute;”*

We note Clause 4(1) of the Bill adopts the Working Group’s recommendation except it is not mentioned that the process is voluntary. The clause as drafted gives more prominence to the mediator instead of the parties. If the Government intends to promote facilitative mediation, the legislation should highlight the reality in practice that it is the parties who have primary responsibility to identify the issues in dispute; explore and generate options; communicate with one another; and reach an agreement regarding the resolution of the whole, or part, of the dispute. We therefore recommend the provision be redrafted. An example that the may be considered is:

“(1) For the purposes of this Ordinance, mediation is a structured process comprising one or more sessions in which the parties to the dispute, with the facilitation of one or more mediator(s), do any or all of the following –

- (a) identify the issues in dispute;*
- (b) explore and generate options;*
- (c) communicate with one another;*
- (d) reach an agreement regarding the resolution of the whole, or part, of the dispute*

(2) Mediator in subsection (1) means an impartial individual who conducts the process of mediation without:

- (a) giving any advice and/or opinion on the contents of the dispute;*
- (b) evaluating the dispute or any part thereof;*
- (c) determining the dispute or any part thereof.”*

Clause 7. Provision of assistance or support during mediation

The following sections of the Legal Practitioners Ordinance (Cap. 159) do not apply to the provision of assistance or support to a party to mediation in the course of the mediation –

- (a) section 44 (penalty for unlawfully practising as a barrister or notary);*
- (b) section 45 (unqualified person not to act as solicitor);*
- (c) section 47 (unqualified person not to prepare certain instruments, etc.)*

Law Society’s Response:

The Law Society objects to Clause 7. There is no law prohibiting non-lawyers and foreign lawyers to assist parties in mediation provided they comply with the Legal Practitioners Ordinance (Cap.159). The restrictions imposed on unqualified persons in the Ordinance are clear and should always apply. The practice of foreign lawyers in Hong Kong is governed by the Foreign Lawyers Practice Rules and they are free to assist parties in mediations as long as they act in accordance with the Rule.

We therefore recommend Clause 7 be deleted as it is unnecessary.

Clause 8. Confidentiality of mediation communication

- (1) A person must not disclose a mediation communication except as provided by subsection (2) or (3).*
- (2) A person may disclose a mediation communication if-*

- (a) *the disclosure is made with the consent of-*
- (i) *each of the parties to the mediation;*
 - (ii) *the mediator for the mediation or, if there is more than one, each of the,; and*
 - (iii) *if the mediation communication is made by a person other than a party to the mediation or a mediator – the person who made the communication;*
- (b) *the content of the mediation communication is information that has already been made available to the public, except for the information that is only in the public domain due to an unlawful disclosure;*
- (c) *the content of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power;*
- (d) *there are reasonable grounds to believe that the 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;*
- (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*
- (f) *the disclosure is made in accordance with a requirement imposed by law*
- (3) *A person may disclose a mediation communication with leave of the court or tribunal under section 10 –*
- (a) *for the purpose of enforcing or challenging a mediated settlement agreement;*
 - (b) *for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator or any other person who participated in the mediation in a professional capacity; or*
 - (c) *for any other purpose that the court or tribunal considers justifiable in the circumstances of the case.*
- (4) *In this section-*
Child means a person under the age of 18 years.

Law Society's Response:

Sub-clauses (2)(e)

The Government's desire to collect information on the effectiveness of mediation does not mean it is entitled to introduce statutory provisions to emasculate the confidentiality which goes to the heart of the mediation process. There are other means to obtain data and whether

cases settled and parties are satisfied with the process fall outside the meaning of “mediation communications”. In circumstances where mediation communications are required to conduct empirical research or case studies (written or otherwise) for educational purposes then the consent of the parties to the mediation must be obtained. This is covered by the provisions in clause (2)(a) of the Bill. The Law Society takes the view if such exception is provided then appropriate guidelines or Code of Practice for carrying out such research must be issued.

Other comments

(a) Partial Immunity for Mediators

The Report of the Working Group on Mediation noted that partial immunity to mediators had been considered in Clause 103 of the Arbitration Bill:

- “(1) *An arbitral tribunal or mediator is liable in law for an act done or omitted to be done by—*
(a) the tribunal or mediator; or
(b) an employee or agent of the tribunal or mediator,

in relation to the exercise or performance, or the purported exercise or performance, of the tribunal’s arbitral functions or the mediator’s functions only if it is proved that the act was done or omitted to be done dishonestly.

- (2) *An employee or agent of an arbitral tribunal or mediator is liable in law for an act done or omitted to be done by the employee or agent in relation to the exercise or performance, or the purported exercise or performance, of the tribunal’s arbitral functions or the mediator’s functions only if it is proved that the act was done or omitted to be done dishonestly.*

- (3) *In this section, “mediator” (調解員) means a mediator appointed under section 32 or referred to in section 33.”*

This provision is now in section 104 of the new Arbitration Ordinance which covers arbitrators and mediators. We note the applicability of such immunity is confined to situations where an arbitrator also acts as a mediator and that it is not a common practice in other common law jurisdictions to grant immunity to mediators, we have no objection that such immunity is not provided in the Bill.

(b) Sanctions for breaching confidentiality

The Law Society also considers whether the proposed legislation should provide for sanctions for breaching confidentiality as suggested by Recommendation 38 of the Report. However, it is noted common law remedy for breach of contract and injunction will be available to the innocent party to redress the problem.

**The Law Society of Hong Kong
Mediation Committee
11 January 2012**