

Bills Committee on Mediation Bill

**Administration's Response to issues raised at
the meeting held on 28 March 2012**

Purpose

This paper sets out the Administration's response to the comments raised by Members at the meeting of the Bills Committee on the Mediation Bill ("the Bill") held on 28 March 2012 concerning the need to provide expressly for guidelines in clause 8(2)(e) of the Bill for the disclosure of mediation communications for research, evaluation or educational purposes. This paper also provides information concerning the setting up of the industry-led single accreditation body for mediators in Hong Kong.

Guidelines for disclosure of mediation communications for research, evaluation or educational purposes

2. Clause 8(1) of the Bill provides that a person must not disclose a mediation communication except as allowed in circumstances set out in clause 8(2) or (3). Under clause 8(2)(e), a person may disclose a mediation communication if 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. As explained by the Administration, similar exceptions allowing the disclosure of mediation communications

for research or evaluation purposes can be found in mediation legislation enacted in other jurisdictions such as Australia and Canada. Under clause 8(2)(e) of the Bill, disclosure of a mediation communication for research, evaluation or educational purposes is subject to the requirement that the disclosure will not reveal, or be likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates. Members were concerned with unwarranted and untimely disclosure of mediation communications through publications for research, evaluation or educational purposes. In response to the Administration's suggestion that guidelines might be provided to assist those proposing to use mediation communications for research, evaluation or educational purposes to comply with clause 8(2)(e), Members asked if clause 8(2)(e) might provide expressly for such guidelines.

3. We appreciate Members' concern and reiterate the desirability of having guidelines for researchers and other interested parties in providing sufficient data for necessary research whilst at the same time steadfastly safeguarding the confidentiality of mediation communications. However, for the reasons set out below, the Administration takes the view that it would not be desirable at this stage to include in the Bill an express reference to a set of guidelines intended to be applicable for the disclosure of a mediation communication if the disclosure is made for research, evaluation or educational purposes.

4. First, as previously explained, the Bill is intended to provide a basic framework for the conduct of mediation in Hong Kong but at the same time allows sufficient room of flexibility so as not to stifle the

future development of mediation in Hong Kong. Consistent with these objectives, the provisions in the Bill only deal with the key principles without going into specific details about the practice of mediation. Accordingly, as a matter of legislative approach, it would not be desirable to impose detailed requirements in a particular aspect at this stage by inserting an express provision in the Bill dealing with the publication of guidelines.

5. In this regard, we note that in certain jurisdictions such as Australia and Canada, where mediation communications may be disclosed for research, evaluation or educational purposes, no express reference to guidelines is provided in their legislation for these purposes. In other jurisdictions, such as Ireland and Malta, a specific body or committee is identified to provide a general Code of Conduct for mediators and guidelines for the promotion of mediation.

6. Second, before the Bill can provide for the publication of guidelines, it would have to address the question of who should be authorized to issue the guidelines. One of the recommendations of the Report of the Working Group chaired by the Secretary for Justice (“the Report”) was to establish a single accreditation body to ensure the quality and consistency of standards of mediators¹. In view of this, we consider it more appropriate for the proposed guidelines to be formulated by the single accreditation body comprising major mediation service providers upon its establishment to ensure that good research practice is maintained

¹ Recommendation 25 of the Report: “The establishment of a single body for accrediting mediators is desirable and can assist to ensure the quality of mediators, consistency of standards, education of the public about mediators and mediation, build public confidence in mediation services and maintain the creditability of mediation.”

by practising mediators and mediation service providers. However, there remains a need to conduct proper consultations with stakeholders including practising mediators on which person or body should be empowered to be the appropriate authority to issue the proposed guidelines for mediators.

7. We also note that local universities² provide policies on the conduct of research and research ethics compliance for academic researchers to ensure that the integrity of research is upheld. The Report recommended for more statistical data to be made available for the promotion of mediation³. In compiling the intended guidelines, it would also be necessary to review the current policies and guidelines of individual universities so as to ensure that in using mediation communications for research, evaluation or educational purposes, clause 8(2)(e) will not be contravened. A uniform guideline for the conduct of research on mediation may be promulgated for academics, universities and government bodies. It would be necessary to conduct consultations with local universities, academics, researchers and government bodies to review any existing individual research policy before a set of uniform guidelines could be promulgated.

8. Third, apart from consultation, the intended single

² Research Services of the Hong Kong University (HKU) provides support and promotion for research at HKU. Policy for ethical practice in research at HKU can be access at this website: <http://www.rss.hku.hk/integrity/rcr/policy>. Code of Ethics for Research is also available for academics of the Hong Kong Polytechnic University at its website: <http://www.polyu.edu.hk/ro/sitemap.html>

³ Recommendation 13 of the Report: “The challenges posed by unrepresented litigants in court should be further studied and more statistical data made available so that promotion of mediation to unrepresented litigants may be better supported.”

accreditation body is still in the formation stage. Hence, even if it is the final consensus that the single accreditation body should issue the guidelines, no provisions can be made in the Bill at this stage. The matter certainly can be addressed after the single accreditation body is formed, and future amendments may be proposed to the Mediation Ordinance (if enacted).

Progress of the industry-led single accreditation body

9. The Report recommended the establishment of a single mediation accrediting body in the form of a company limited by guarantee to be reviewed in 5 years⁴. The public had been consulted on the initiative, which was well supported by the majority of public response received. Noticeably, the view was for the single body to be formed as soon as possible. In an earlier response to the Assistant Legal Adviser's enquiry⁵, we provided Members with some background information regarding the recommendation of the Report to establish the single mediation accrediting body in the form of a company limited by guarantee⁶.

10. The Mediation Task Force and its Accreditation Subgroup are working towards the setting up of the single accreditation body in the form of a company limited by guarantee, i.e. the Hong Kong Mediation

⁴ Recommendation 28 of the Report: "A single mediation accrediting body in Hong Kong could be in the form of a company limited by guarantee. The possibility for establishing this body should be reviewed in 5 years.:"

⁵ LC Paper No. CB(2)769/11-12(01)

⁶ Recommendation 28 of the Report: "A single accrediting body in Hong Kong could be in the form of a company limited by guarantee. The possibility for establishing this body should be reviewed in 5 years."

Accreditation Association Limited (“HKMAAL”) with the following structure:

- the council of the HKMAAL will consist of not more than 10 council members, including a member each nominated by the Law Society of Hong Kong, the Bar Association, the Hong Kong Mediation Centre and the Hong Kong International Arbitration Centre;
- not more than 4 other members elected by members of the HKMAAL; and
- two co-opted members who are not members of HKMAAL.

11. It is proposed that, as a condition of the membership, the mediation service providers would give up their existing individual accreditation system and future mediators would be accredited through the HKMAAL only. In addition, it is hoped that the HKMAAL, when established, could be the default appointing body of mediator when parties to mediation cannot come to consensus on the appointment of a mediator.

12. It is expected that the terms of the draft Memorandum and Articles of Association of the HKMAAL will be finalised for registration with the Companies Registry within this year if no further significant issues arise.

Department of Justice

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