

# OFFICIAL RECORD OF PROCEEDINGS

Friday, 15 June 2012

The Council continued to meet at Nine o'clock

## MEMBERS PRESENT:

THE PRESIDENT

THE HONOURABLE JASPER TSANG YOK-SING, G.B.S., J.P.

THE HONOURABLE ALBERT HO CHUN-YAN

IR DR THE HONOURABLE RAYMOND HO CHUNG-TAI, S.B.S., S.B.ST.J., J.P.

THE HONOURABLE LEE CHEUK-YAN

DR THE HONOURABLE DAVID LI KWOK-PO, G.B.M., G.B.S., J.P.

THE HONOURABLE FRED LI WAH-MING, S.B.S., J.P.

DR THE HONOURABLE MARGARET NG

THE HONOURABLE JAMES TO KUN-SUN

THE HONOURABLE CHAN KAM-LAM, S.B.S., J.P.

THE HONOURABLE MRS SOPHIE LEUNG LAU YAU-FUN, G.B.S., J.P.

DR THE HONOURABLE PHILIP WONG YU-HONG, G.B.S.

THE HONOURABLE WONG YUNG-KAN, S.B.S., J.P.

THE HONOURABLE LAU KONG-WAH, J.P.

THE HONOURABLE LAU WONG-FAT, G.B.M., G.B.S., J.P.

THE HONOURABLE MIRIAM LAU KIN-YEE, G.B.S., J.P.

THE HONOURABLE EMILY LAU WAI-HING, J.P.

THE HONOURABLE TAM YIU-CHUNG, G.B.S., J.P.

THE HONOURABLE ABRAHAM SHEK LAI-HIM, S.B.S., J.P.

THE HONOURABLE LI FUNG-YING, S.B.S., J.P.

THE HONOURABLE FREDERICK FUNG KIN-KEE, S.B.S., J.P.

THE HONOURABLE AUDREY EU YUET-MEE, S.C., J.P.

THE HONOURABLE VINCENT FANG KANG, S.B.S., J.P.

THE HONOURABLE WONG KWOK-HING, M.H.

THE HONOURABLE LEE WING-TAT

THE HONOURABLE JEFFREY LAM KIN-FUNG, G.B.S., J.P.

THE HONOURABLE ANDREW LEUNG KWAN-YUEN, G.B.S., J.P.

THE HONOURABLE CHEUNG HOK-MING, G.B.S., J.P.

THE HONOURABLE WONG TING-KWONG, B.B.S., J.P.

THE HONOURABLE RONNY TONG KA-WAH, S.C.

THE HONOURABLE CHIM PUI-CHUNG

PROF THE HONOURABLE PATRICK LAU SAU-SHING, S.B.S., J.P.

THE HONOURABLE KAM NAI-WAI, M.H.

THE HONOURABLE CYD HO SAU-LAN

THE HONOURABLE STARRY LEE WAI-KING, J.P.

DR THE HONOURABLE LAM TAI-FAI, B.B.S., J.P.

THE HONOURABLE CHAN HAK-KAN

THE HONOURABLE PAUL CHAN MO-PO, M.H., J.P.

THE HONOURABLE CHAN KIN-POR, J.P.

DR THE HONOURABLE PRISCILLA LEUNG MEI-FUN, J.P.

THE HONOURABLE CHEUNG KWOK-CHE

THE HONOURABLE WONG SING-CHI

THE HONOURABLE WONG KWOK-KIN, B.B.S.

THE HONOURABLE IP WAI-MING, M.H.

THE HONOURABLE IP KWOK-HIM, G.B.S., J.P.

THE HONOURABLE MRS REGINA IP LAU SUK-YEE, G.B.S., J.P.

DR THE HONOURABLE PAN PEY-CHYOU

THE HONOURABLE PAUL TSE WAI-CHUN, J.P.

DR THE HONOURABLE SAMSON TAM WAI-HO, J.P.

THE HONOURABLE ALAN LEONG KAH-KIT, S.C.

THE HONOURABLE TANYA CHAN

THE HONOURABLE ALBERT CHAN WAI-YIP

THE HONOURABLE WONG YUK-MAN

**MEMBERS ABSENT:**

THE HONOURABLE CHEUNG MAN-KWONG

THE HONOURABLE LEUNG YIU-CHUNG

THE HONOURABLE ANDREW CHENG KAR-FOO

THE HONOURABLE TIMOTHY FOK TSUN-TING, G.B.S., J.P.

THE HONOURABLE TOMMY CHEUNG YU-YAN, S.B.S., J.P.

DR THE HONOURABLE JOSEPH LEE KOK-LONG, S.B.S., J.P.

DR THE HONOURABLE LEUNG KA-LAU

THE HONOURABLE LEUNG KWOK-HUNG

**PUBLIC OFFICERS ATTENDING:**

THE HONOURABLE WONG YAN-LUNG, S.C., J.P.

THE SECRETARY FOR JUSTICE

MS JULIA LEUNG FUNG-YEE, J.P.

SECRETARY FOR FINANCIAL SERVICES AND THE TREASURY

**CLERK IN ATTENDANCE:**

MRS PERCY MA, ASSISTANT SECRETARY GENERAL

**BILLS****Second Reading of Bills**

**(Bills originally scheduled to be dealt with at the last Council meeting)**

**Resumption of Second Reading Debate on Bills**

**PRESIDENT** (in Cantonese): Good morning, we now resume the Second Reading debate on the Mediation Bill.

**MEDIATION BILL****Resumption of debate on Second Reading which was moved on 30 November 2011**

**PRESIDENT** (in Cantonese): Dr Margaret NG, Chairman of the Bills Committee on the above Bill, will address the Council on the Committee's Report.

(Mr Albert CHAN stood up)

**MR ALBERT CHAN** (in Cantonese): President, please do a headcount.

**PRESIDENT** (in Cantonese): Will the Clerk please ring the bell to summon Members to the Chamber.

(After the summoning bell had been rung, a number of Members entered the Chamber)

**PRESIDENT** (in Cantonese): Dr Margaret NG, please.

**DR MARGARET NG** (in Cantonese): President, in my capacity as Chairman of the Bills Committee on Mediation Bill (the Bills Committee), I now report to this Council on the major deliberations of the Bills Committee.

There is no specific law on mediation issues in Hong Kong. The objective of the Mediation Bill (the Bill) is to provide a legal framework for the development of mediation.

In addition to clearly defining the meaning of "mediation", the Bill mainly provides for the confidentiality of mediation communications and the admissibility of mediation communications in evidence. The Bills Committee has expressed concern that the Bill has neither provided for the accreditation of mediators nor set out rules to regulate the conduct of mediators and the mediation process.

The Administration has explained that legislation is the first step to promote mediation. In order to maintain the flexibility of the mediation process, it is more appropriate to incorporate relevant regulatory rules into an agreement to mediate instead of the Bill.

According to the meaning of "mediation" in the Bill, "mediator" refers to an impartial individual. To ensure the quality of mediation, members query whether a person needs to go through a certain period of training or be registered with a particular association in order to be qualified as a mediator in Hong Kong. Members consider that a mediation system based on proper training and registration should be adopted to maintain the standard and accountability of mediators.

The Administration has explained to the Bills Committee that mediation service providers in Hong Kong have prescribed requirements for training and continuing professional development for mediators to ensure the standard of mediators. The accreditation of mediators can be further worked out after the establishment of a non-statutory industry-led single accreditation body for mediators. The Administration has further advised that the parties to the dispute may enter into an agreement to mediate which governs the proper conduct of mediation.

The Bills Committee has considered whether the Bill should require mediators to have completed one of the mediation training courses recognized by the four major mediation service providers. The Administration has pointed out that many practicing mediators who have received training overseas, have been accredited by other organizations or have not received formal training will be excluded from the practice of mediation if the proposed requirement is imposed.

At the request of the Bills Committee, the Administration has also updated members on the establishment of a single non-statutory industry-led mediation accreditation body for mediators. The Bills Committee agrees that the Panel on Administration of Justice and Legal Services should follow up on the relevant issues after enactment of the Bill.

President, the Hong Kong Association of Banks (HKAB) has expressed a strong view to the Bills Committee that mediation conducted by the Financial Dispute Resolution Centre (FDRC), which will come into operation soon, should be excluded from the application of the Bill. According to the HKAB, the FDRC is not administrative in nature but more of a quasi-statutory scheme; moreover, there may be potential conflicts between the terms of reference and the mediation and arbitration rules of the FDRC and the provisions relating to confidentiality and admissibility of mediation communications in the Bill.

The Administration has explained to the Bills Committee that all of the mediation and conciliation processes to which the Bill does not apply as set out in Schedule 1 to the Bill are self-contained statutory schemes, and the purposes and procedures of those statutory schemes may not be consistent with the mediation and related matters provided for in the Bill. However, the mediations conducted by the FDRC in the future will fit into the definition of "mediation" in the Bill. Moreover, the FDRC is not a regulatory body, and the scheme concerned is administrative by nature.

Regarding confidentiality of mediation communications, clause 8 provides that a person shall not disclose a mediation communication except as provided by clauses 8(2) and (3). A person may disclose a mediation communication without the leave of the Court or tribunal under the specific circumstances set out in clause 8(2)(a) to (f). Under clause 8(3), a person may disclose a mediation communication with leave of the Court or tribunal for specified purposes.

Members are concerned that in the absence of sanctions against the breach of the rule of confidentiality, disclosure can be easily made under clause 8(2)(d) by a mere allegation that there are reasonable grounds to believe that the disclosure serves to prevent or minimize the danger of serious harm to the well-being of a child. Some members have suggested that a person seeking to disclose a mediation communication under this clause should apply for leave of a specified court or tribunal.

The Administration has explained to the Bills Committee that sanctions are rarely provided in mediation legislation of most common law jurisdictions. Of the jurisdictions that have mediation legislation, only Austria and Samoa have imposed sanctions on disclosing confidential mediation communications. Should there be a breach of confidentiality by a mediator, the aggrieved parties may file complaints to the professional body to which the mediator belongs. They may also rely on civil remedies available from the courts for breaches of confidentiality. The Administration has also pointed out that it is given to understand by practitioners in the industry and family mediators that there may be imminent situations where 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. Where the situation arises, it will be impractical to apply for leave before the specific mediation communication can be disclosed.

President, in response to the concerns expressed by depositions to the Bills Committee and the views of the Bills Committee on drafting, the Administration will propose some amendments later on at the Committee stage. The Bills Committee supports these amendments.

President, next I will express some views on the Bill in my personal capacity.

First of all, I urge Members of this Council to pass this Bill. The Bill is not a complete piece of legislation. Notably, although the Administration said on the one hand that the Bill aims at promoting, encouraging and facilitating the settlement of disputes by means of mediation, many elements are not included in the Bill at all, in particular the recognized qualification of mediators, the accreditation body, the ethics of mediators, and so on. Furthermore, no complete system has been proposed apart from the Bill.



Such deficiency needs to be remedied, but why am I still urging Members of this Council to pass this Bill? It is because, firstly, now is the best time to encourage more organizations that are currently providing mediation services to establish a single non-statutory accreditation body for mediators, and if we miss this opportunity, it may take another period of time to do so, thus delaying the work to facilitate the accomplishment of this obligation. Secondly, the real urgency of this Bill lies in the second part of its objectives, that is, to maintain confidentiality of mediation communications. For this reason, the provisions relate mainly to such questions as how to maintain confidentiality, when to make a disclosure, which disclosures should be subject to application and which should not, as well as what mediation communications are admissible in court, because the most pressing need of mediation legislation lies in the regulations related to the Court.

As a result of the reform of civil procedure, mediation has become an indispensable part of a civil action. That is to say, before further processing a civil action, the Court will ask both parties to the dispute whether they have at least seriously explored ways to carry out mediation. If they have no knowledge of mediation, or the mediation process cannot be kept confidential, this step of work would be very difficult indeed. Therefore, all of the principal provisions in the Bill relate to confidentiality.

President, if we pass this Bill today, we can indeed achieve publicity and accomplish the objective of promoting, encouraging and facilitating mediation. However, we must also ask whether it has heightened public expectations but failed to meet them? Would we mislead people into thinking that mediation is a very good and useful recourse, but when they ask who are qualified to conduct mediation, we are unable to give a correct answer? Many people are self-convinced of their ability to take on mediation tasks, but in actual fact that is not the case at all. Consequently, problems may arise right from the outset of the development of mediation services. Therefore, I hope that the authorities will embark on some very urgent work after the passage of this Bill.

President, members have expressed their understanding of mediation during the scrutiny of the Bill. With high expectations, they think that mediation can replace the litigation culture. In other words, a mediation system will be created and a mediation culture will be developed now to replace the existing litigation culture. This notion can bring about many effects at a deeper level. If mediation can be an option to the litigation required for certain matters,

it may make an enormous contribution. However, the notion of a mediation culture being able to replace litigation reveals firstly the existence of a very negative perception of litigation among Hong Kong people, which in my view has been strengthened during the debate over the past few days.

Nevertheless, mediation is not a panacea in the first place. Not all disputes can be addressed by mediation, because mediation warrants genuine willingness from both parties to conduct it, and it is possible only if there is room for mediation. If either party believes itself to be right, unwilling to make concessions, mediation becomes meaningless at all. Besides, there are also some circumstances where mediation is impossible. In particular, commercial disputes lend themselves to neither emotion-driven solutions nor mediation. Therefore, mediation does not necessarily apply to all issues. This is the first point that needs to be understood.

Secondly, we should not believe that mediation services must be inexpensive, whereas litigation will definitely incur high costs. In fact, when we discussed mediation services in the Panel on Administration of Justice and Legal Services, some deputations already pointed out that some service providers charged low fees, and some were even voluntary, but some charged several hundred or even several thousand dollars. This is because, like disputes, there is a wide range of mediation services. Some involve mediation in the professional fields, just like some members who are professionals in the Bills Committee. Taking as an example professional mediation in the construction or engineering sector, it is indeed necessary for mediators to have expertise in that field. Such mediation efforts will not be cheap either.

Meanwhile, even though currently many members of the legal profession have acquired the qualifications of mediators after attending mediation training courses, their charges will not be cheap, possibly even comparable to those of lawyers, because in some lawsuits which are intrinsically very complicated, while both parties feel a great impetus to hopefully avoid litigation through mediation, the person in charge of the mediation must also possess a wealth of professional knowledge. However, the bargain lies in the fact that, if mediation is agreed, the process may speed up a little, but it may not necessarily be "a good bargain" in terms of fees.

Thirdly, mediation is not aimed at fostering harmony either. If litigation is perceived as provocative and mediation is perceived as amicable and conducive to maintaining harmonious relationships, which is more in line with Chinese culture, I do not think we should harbour such expectations, because just like disputes which vary from case to case, there is no one-size-fits-all conclusion as to whether or not harmony can be maintained by mediation; moreover, the purpose of mediation is not to foster harmony, but some disputes may better be resolved by mediation.

President, is mediation definitely beneficial to the poor or disadvantaged party? Maybe not. Many Mainland scholars have raised doubts about mediation, saying that if one party is very dominant and the other has no bargaining power at all, mediation becomes some sort of oppression indeed. Therefore, far be it for me to give all sorts of negative comments on mediation services, but I wish to point out that probably the Government should make more effort in terms of expectation management, so as to achieve truly positive outcomes for cases that are really suitable for mediation.

Last but not least, mediation proceedings are no substitute for judicial proceedings, nor so intended. The mediation proceeding has developed not out of the culture of Hong Kong or Chinese people, but was first seen in American society about 30 or 40 years ago and spread to the United Kingdom after about 10 years of development in the United States. There is no point for me to elaborate on the background, but legal sociologist Prof Hazel GENN has conducted a most in-depth and extensive research in this connection. She said that if a jurisdiction put too much emphasis on mediation services and reduced the allocation of resources to judicial proceedings, some problems would arise.

First of all, law belongs to the people and relates to the standards of the entire society, whereas mediation is a means to address private disputes. Law is about rights, whereas mediation focuses on personal relationships. If one wishes to maintain good relationships, mediation would be more favourable. In the context of the administration of justice and the rule of law, one must resort to judicial proceedings, but in the context of mediation, one may aim at maintaining long-term relationships. Therefore, the two types of proceedings are distinct from each other. If mediation is overly perceived as a substitute for litigation, the development of law will be affected. For this reason, judicial proceedings are essential to the advancement in jurisprudence, and we should not put in too

few resources. Law should be well publicized to prevent unpleasant occurrences, or exert a deterrent effect, whereas mediation must be kept confidential because of its personal nature, thus not having the aforesaid effect.

Therefore, President, we hold that both should operate in parallel in the long run. In the reform of civil procedure, mediation is also deemed to be a proceeding additional rather than substitutional to litigation. If only we clearly grasp this point, there is a very optimistic outlook for development on both sides.

I so submit, and hope Members will support this Bill. Thank you, President.

**MR CHEUNG KWOK-CHE** (in Cantonese): President, as a member of the Bills Committee, I support the enactment of the Mediation Ordinance. However, I wish to point out here that legislation is only the first step for full implementation of the mediation initiative. Going forward, we must do more practical work, for instance, public education and professional development.

President, the current Mediation Bill can only clarify the grey areas in the work of mediators in respect of the meaning of mediation, as well as the confidentiality and admissibility of mediation communications. However, there is no protection at all for the interests of service users. I am afraid that the purpose of enacting this ordinance, that is, promoting, encouraging and facilitating the settlement of disputes by means of mediation, can hardly be achieved because, as members of the public are unclear even about their right to free choice of mediators and the way to complain against mediators violating professional conduct, it would be difficult for this system to gain the trust of people, and the pace of popularization would also be dragged down.

The Secretary for Justice, Mr WONG Yan-lung, said recently on a public occasion that some people were worried that mediation would be reduced to some routine practices prior to the litigation process and, in order to complete this formality as a matter of routine, the disputing parties would hire mediators with doubtful qualifications or conduct, or those charging unreasonable fees. In fact, does the Secretary know of any lawyer who, at the moment of about to pass a case to a mediator, asked the mediator not to work out a settlement agreement?

This is, I believe, a rather exceptional case; however, it did occur. Obviously, this is not an issue of the conduct of individual mediators, but rather an issue of conflict of interest among some stakeholders in the sector.

President, many people would query whether there is a conflict of roles if a lawyer also serves as a mediator. After all, in terms of income, there is a world of difference between fighting lawsuits and conducting mediation. In the United States, such mediators have been given the indecent epithet of "deal breakers".

Under the Mediation Bill and the Hong Kong Mediation Code, mediators shall not adjudicate a dispute or any aspect of it, nor give legal or other professional advice to any party, nor impose a result on any party. In other words, mediators do not necessarily need a legal or arbitration background. Overseas experience also reveals that a successful mediator is not necessarily from the legal profession. Why is it that, after years of promotion, many people still have the misconception that people without any legal background cannot be mediators? Could it be that they are afraid of other people getting a share of the hitherto still immature mediation market in Hong Kong?

The current trend of development suggests that the Government is aware that the conduct of mediators, such as maintaining confidentiality, refraining from adjudication, declaring interests, and so on, will affect the interests of users. Nevertheless, the Government will not be willing to engage in intervention directly or to a greater extent like it did in the past to the insurance and real estate practitioners, as well as social workers, nurses, and so on. On the contrary, the Government attempts to set standards for mediator qualifications and discipline through a single accreditation body for mediators, namely the Hong Kong Mediation Accreditation Association Limited (HKMAAL), but has no intention of granting it statutory status through legislation. In that case, what is the point of being "single"? Could there be a second "single" body at same time? After all, what is the relationship between the Government and the HKMAAL? Why have only four mediation service providers been tacit agreement to be the founding members of the HKMAAL, and even anchor members of its Council, before there is an open process of accreditation?

More importantly, although not necessarily involving public resources, if the Government deliberately assists the HKMAAL, which is not a public organization, it already displays a tilt towards the HKMAAL in its attitude while

the public has insufficient knowledge of mediation. Is this a fair move? If being single implies a flat fee, would the public's right to choice be undermined? Would it run counter to the fair competition advocated by us?

Moreover, how can the flexibility and diverse development of mediation be retained by such singularity? It must be noted that the application of mediation should not be limited to civil proceedings. Disputes among members of the public in terms personal relationship, workplace, family and community alone offer enormous room for development. Of course, the charges for such mediation services should be much less than the costs of judicial proceedings. Maybe that explains why nobody notices it, but its merit is great effectiveness, given that the disputes will have been resolved before being brought to court.

According to overseas experience, a single accreditation body for mediators is conducive to building public confidence in the mediation system, but it tends to have certain legal status, or else uniform implementation would be impossible. Besides, to prevent the market from being monopolized, the accreditation body itself should refrain from offering training courses, thus avoiding conflicts of interest and monopolization of the market, rather than only requiring those mediation agencies joining it to cease using the existing accreditation system of their own.

Therefore, in addition to its current legislative exercise, the Government should, in my view, make as a prime task the most direct commitment to such aspects of accreditation standard, disciplinary adjudication and promotion of popularity through education. If there are genuine difficulties and hence a need to assist the single accreditation body for mediators, the Government should, in addition to first expressing its stance and intention, widen the engagement of stakeholders from the sector in determining the composition and functions of the single body and extend the relevant consultation to various strata of the community, so as to enhance public acceptability and transparency.

President, as I said earlier, the scope of application of mediation is very broad. It is impossible for those involved in disputes to learn about mediation just a preamble of judicial proceedings, rather they should start to do so before deciding to file lawsuits. Otherwise, in my view, the pace of popularization will be very slow, and the success rate will also be dragged down due to the increased

complexity of various considerations. In Chinese society, where harmony is highly treasured, how many cases each year are so serious as to warrant a solution in court, might I ask? To accelerate the pace of popularization of mediation, more individuals or organizations accredited for mediation and committed to serving the community should be encouraged to provide the community with different types and levels of mediation services in a level playing field. Only when the public recognizes that mediation is not necessarily related to judicial proceedings, but a dispute reconciliation process instead that can be independently carried out at any stage, can mediation become popularized in our community, hence truly reducing unnecessary lawsuits and achieving the ideal of building a harmonious society.

President, based on the aforesaid conditions, I support the passage of the Mediation Bill. Nevertheless, I expect the Government to follow up such matters as professional training, accreditation, professional conduct and social education related to the mediation profession in the future, and set down a timetable accordingly. Thank you, President.

**MR ALBERT HO** (in Cantonese): President, the Second Reading of the Mediation Bill resumes today. This Bill, once passed, will help promote and monitor mediation services. The Democratic Party supports it.

According to *Hong Kong Judiciary Annual Report 2011*, the caseload at the Court of First Instance at the High Court was 16 479, of which 15 887 were civil cases. Discounting cases of bankruptcy and winding-up of companies, there are 6 423 civil cases a year. In general, the time taken from application to fix a date for hearing of civil cases is 231 days, which is eight full months. Therefore, the number of cases to be heard keeps on piling and the workload of the Courts is heavy as court proceedings grind on through the years. This will certainly expend a large amount of resources. At the same time, as we all know, the results of litigations are often not predictable.

It cannot be denied that litigations in the judicial system are very important in that they ensure that people who need to seek justice through judicial proceedings can be given such protection. As we know, however, litigation costs and time are involved and distress may also be caused to the parties. So mediation is a very important channel of alternative dispute resolution apart from

meticulous judicial proceedings. The major objective of alternative dispute resolution is to find concrete solutions to problems.

A very important point to note is that mediation is not the appropriate form of resolution for many kinds of litigations. Examples of these are litigations involving constitutional issues and public law. It is because these cases involve the question of the legality of public policy and there is no way mediation can help. These are major issues of right and wrong, as well as those on major principles held by society and the responsibilities of the Government. And we know that mediation is definitely not a means to solve such problems.

Mediation cannot be used for serious criminal cases as well. If it is about cases of violation of law or infringement of rights, these cannot be mediated either. The Government has a responsibility to enforce the law in such cases. Of course, when cases involving interpersonal relationship of not as a serious nature, such as sexual harassment, we can see that at times the Equal Opportunity Commission will offer mediation service to see if problems can be solved by mediation in some minor cases.

In general, mediation service is used in family actions, building management and such like cases. In some cases, the nature of the cases is of a more professional nature, such as those about building construction and insurance claims. Through mediation, the parties involved can come to understand each other's stance, interests and needs and then resort to using simpler procedures to arrive at a solution acceptable to both parties. This will minimize the unpredictable outcome of litigation. As a result, the parties will not come to a lose-lose situation and they can at least gain something out of it. This is the objective which mediation hopes to reach.

In view of the increasing awareness of mediation service in Hong Kong, the demand for it is also increasing. As a result, the professionalism of mediators is therefore a cause of concern. All along the Democratic Party has been following up the development of professional mediation service in Hong Kong. We have set up a special group tasked with mediation at the district level, in order to promote the adoption of mediation as the first step to address certain kinds of problems. But Members should note that we will proceed with mediation only when the cases are suitable for mediation. When in our opinion the cases should not undergo any mediation, then we will fight for justice by resorting to proceedings.



When we help people in the districts solve their disputes, we will urge the mediators to forge links with different professions and acquire the professional knowledge and information concerned. This will hopefully enhance the ability of mediators in providing mediation service. The Government proposes that a single non-statutory industry-led accreditation body for mediators be set up. We do not object to this idea. However, we would like to express our concern for a number of areas.

In our opinion, there is a need to set up a single registration and regulatory regime for mediators. However, we should note that as there is an increasing demand for mediation service and as there are many private organizations in the market making their own accreditation, there will arise a problem of quality in the absence of a single regulatory regime. This especially applies to certain professional mediation services because some of the clients have no knowledge of the relevant profession at all. Then how can the dispute in question be effectively resolved? This kind of problems will lead to distress of the users of mediation services and in some cases, the interests of these users may be jeopardized. So we consider that there should be regulation.

But we are also concerned about one thing and that is, as we set up an accreditation system for standard qualifications, we must take into account the standards of mediators because, as I have just said, mediation can involve a great number of trades. Therefore, we think that there should be requirements in many aspects in order to ensure that mediation services can see diversified development.

For common problems like those related to building management and family mediation, it does not need as much professional knowledge as others and it would be easier for mediators to grasp the skills involved. But when there are complicated cases like those I have just said, such as the law on compulsory sale of land in the future, I think that they are very complicated. If we are to understand the entire system, we have to understand the interests of the constructors and developers and how these are related to the parties on whom a compulsory sale is being imposed. The effort required of a mediator is not simple at all. What should be done in calculating the costs in a case where a dispute arises when the construction works are half completed and there is a possibility that the project will not be completed? Who should step in and take over? How much should be paid to the previous party engaged in the project?

Often the issue of quality would come in for this kind of incomplete works. We can just imagine that a mediator in such cases must understand the professional aspects involved and he should be able to assess and evaluate the quality of the works. These are no simple tasks.

In view of these, we think that there is a need to have people with experience and expertise in various fields to join the mediation trade and there should not be too much stress on homogeneity and the adoption of rigid and single standards. In overseas countries, professional mediators are divided into many areas and they may come under a centralized assessment or registration system. But the system takes into account these various areas and the classification of the same may also be diversified. We must understand that this kind of pluralistic needs cannot be met by a single set of standards. So with respect to this, I must stress that while we support a single registration and regulatory regime, there is a real need to pay attention to and take into account the needs of diversified development.

We also stress that when an accreditation system is to be set up in the future, it must be industry-led. There must also be sufficient consultation to take on board the views of the industry and hence formulate a qualification accreditation regime with certain stringent requirements while not compromising plurality and flexibility.

Another issue I wish to talk about is confidentiality of mediation communications. This is an important part of the Bill. We are concerned about the clauses of the Bill on the disclosure of mediation communications. The confidentiality of communications is of the utmost importance to both mediators and parties undergoing mediation. It is because once there is unauthorized disclosure, the professional integrity of the mediators and the interests of the parties receiving mediation will be affected and damaged. So unless consent has been obtained, it is the responsibility of a mediator to keep the contents and communications of mediation in strictest confidence. Of course, there are exceptions regarding those grounds stipulated by law. A mediator should keep all communications in confidence and this includes relevant information obtained in the mediation process.

Since mediators have such a grave responsibility, they must understand this responsibility fully before taking part in any mediation. When mediators receive

training, they must know clearly this professional responsibility. We hope that after the passage of this Bill, the authorities will undertake periodic reviews of the relevant Ordinance and the relevant mechanisms. We should also take reference of overseas experience in this regard as the mediation industry is a new one here. We should therefore gain as much experience as possible and undertake constant reviews and examinations of the operation of the system.

Lastly, when the Mediation Bill is passed into law, we hope that the Government can allocate more resources to enhancing public understanding of mediation. Community education efforts are therefore very important. Public forums on mediation should be organized by the relevant authorities to enable parties to disputes to know that many other avenues to dispute resolution are available before they consider taking the case to court. As a matter of fact, it is the aim of the parties in a dispute to merely solve the problem and it does not hinge on any big issue of right and wrong and the quest for justice is not their only goal. Assuming that the parties concerned only want to find a concrete solution to the problem, then they must be aware of the existence of many alternative options and there are certainly things that can be solved when they sit down and discuss about them.

The most important part in mediation service is the role played by mediators. We know that a mediator stands in a neutral position and he or she must possess strong communication skills to foster a meaningful dialogue between the parties. Each party should be made to understand the position of the other party as well as their own interests and needs. This will enable the parties to make any compromise when necessary and hence arrive at a proposal acceptable to all. This is very important.

I hope that the Government can put in more efforts in this regard. The Democratic Party will lend its full support to the Government to enhance some ancillary mediation service in our judicial system. We know that there is such ancillary service in the Family Court. I hope that this kind of service can be added to other litigation areas. This is especially the case with building management or property management and I think mediation service in these areas is essential. I hope that with the passage of this Bill, we can see mediation service as an effective means to resolve disputes among members of the public. Thank you, President.

**MR LAU KONG-WAH** (in Cantonese): President, it is often difficult to avoid coming to any dispute in the course of interaction with people. I have been engaged in district work for many years and often I have to solve problems among residents and negotiate with them. So I can know very well the importance of the Mediation Bill tabled today to our society. It is a common belief that peace should be treasured and harmony produces wealth. It is better to solve a dispute by resorting to peaceful and rational means than spending money and taking the case to a court of law. A party will win and the other will lose in a lawsuit, but in mediation, people can discuss and negotiate and in the end resolve the dispute and arrive at a win-win situation.

Put simply, mediation service is an alternative means to dispute resolution through litigation in a court of law. Commercial conflicts and disputes arising from building management and even divorce can be resolved by mediation. Mediation service can reduce the losses in financial terms and in time caused by litigation, as well as the damage done to interpersonal relationship. It is therefore a notable trend in our society. Today, we are going to formulate a legal framework for mediation service. The objective of this Bill is to advocate, encourage and promote the use of mediation to resolve disputes. On the other hand, the Bill aims to ensure confidentiality of mediation communications. These are the first step taken in promoting mediation service, an important step.

In recent years the Government has been advocating mediation service. Mr WONG Yan-lung, the Secretary for Justice, said earlier that an ongoing measure practised by the Government was to promote the development of Hong Kong into a regional centre for legal services and dispute resolution. It can therefore be seen that mediation service is taking up an increasingly important position. The Bills Committee tasked with studying this Bill has held a total of seven meetings and heard the views presented by 32 deputations and individuals. They show general support for the enactment of this Bill into law.

During the meetings, I have been relatively more concerned about the question of promoting mediation service. After the passage of the Bill, the Government should step up the publicity on mediation in the districts as well as education efforts among the public. After public awareness and receptivity are

enhanced, efforts should be made to make good use of mediation service by encouraging members of the public to use mediation to resolve their disputes before bringing the case to the Court .....

(Mr Albert CHAN stood up)

**MR ALBERT CHAN** (in Cantonese): I request a headcount.

**PRESIDENT** (in Cantonese): Will the Clerk please ring the bell to summon Members back to the Chamber.

(When the summoning bell was ringing, Mr WONG Ting-kwong asked the President about the meeting arrangements for the evening)

**PRESIDENT** (in Cantonese): No meeting will be held this evening because a meeting of the Finance Committee is going to take place.

**MR WONG TING-KWONG** (in Cantonese): Then, will the time for the next meeting be extended?

**PRESIDENT** (in Cantonese): That will have to depend on Members' opinions.

**MR WONG TING-KWONG** (in Cantonese): I agree with that. This is because last night you said that the headcounts had wasted our time and meetings should be extended as a result. We always put our words to action.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

**PRESIDENT** (in Cantonese): Mr LAU Kong-wah, please continue.

**MR LAU KONG-WAH** (in Cantonese): President, may I advise Mr Albert CHAN that he needs not stand on ceremony when I speak, for basically I do not require all Members to sit down and listen. It would be no cause for complain if the proposer of requests for headcount had been sitting tight in past meetings. But unfortunately, it is not the case. That he asked again that a headcount be done is, in my view, somewhat childish and annoying. It also runs counter to the spirit of treasuring peace and harmony. I hope therefore that Mr Albert CHAN can think twice.

President, to many members of the public, mediation service may still be a novelty and so promotion is needed so that they can know more about it. There are questions that people may ask, such as, what exactly is mediation service all about, does mediation mean that people may still meet in a court of law, under what circumstances should mediation be used to solve problems, what are the advantages of mediation service, what are the roles and responsibilities of the disputing parties in the mediation process, and so on. I do not think many members of the public know these points well enough. The Government should step up publicity and educational efforts in these aspects. I think that the Government should be more proactive in this and apart from resorting to advertisements, Announcements of Public Interest and audio recordings, it can also organize some activities at the district level, or hold talks in schools, produce TV drama series on relevant themes, and so on, so that the citizens can gain a better understanding of mediation service.

In addition, when the representatives of some deputations conveyed their views to us, they expressed their concern about the quality of mediators. They queried that it seemed to be the case that anyone claiming himself to be impartial could act as a mediator. They asked how the quality of mediators should be assured and whether there should be any express requirement that mediators should undergo training for a specific period of time or be registered with certain specific bodies before they can be qualified as mediators in Hong Kong. The Administration explained that the accreditation requirements for mediators could be finalized after a single industry-led non-statutory accreditation body for mediators has been formed. The Administration is worried that if it is provided in the Bill that mediators should be impartial and should have completed a

training programme recognized by the main mediation service providers, the flexibility of mediation service will be affected and its development in Hong Kong impeded. I understand the considerations and the kinds of factors in the mind of the Government as it weighs the pros and cons. I therefore hope that when the Government promotes mediation service in the future, it will monitor the operation and quality of mediation service to foster public confidence in the service.

In the course of deliberation, some Members have expressed the concern that at the initial stage, the parties to mediation may not have hired a lawyer but once the mediation process has commenced, they may want to seek legal advice. Since the parties may need to disclose mediation communications to their lawyer, Members consider that under such circumstances, the disclosure of mediation communications should be allowed. The Administration has advised that there are no grounds forbidding the parties from seeking legal advice and, in this connection, it has agreed to move an amendment to clause 8 to provide for express permission to disclose mediation communications for the purpose of seeking legal advice. I believe this amendment can serve to make the mediation parties rest assured and they can still seek help from lawyers after the mediation process has commenced.

In sum, in the days to come, members of the public should acquaint themselves with mediation service as soon as possible; and in terms of qualifications, there should be accreditation expeditiously. The Democratic Alliance for Democracy and the Betterment of Hong Kong (DAB) supports the passage of the Mediation Bill and amendments proposed by the Administration. Thank you, President.

**MR WONG KWOK-HING** (in Cantonese): President, today is a day to rejoice since I joined the Legislative Council. Why? Because the Mediation Bill (the Bill) is finally tabled formally to the Legislative Council for Second and Third Readings near the end of this session of the current term.

First of all, I have to express my profound gratitude to the Secretary for Justice, Mr WONG Yan-lung, for making this contribution during his term of office. I remember that several years ago at a meeting in which we asked questions on the policies announced in the Policy Address, I said to Secretary for Justice WONG Yan-lung face to face during the discussion of the relevant panel that I wished to see the promotion of mediation service by the Government, and

the Secretary for Justice, Mr WONG Yan-lung, responded positively. He made a promise right away and showed to us that taking forward the introduction and development of mediation service in Hong Kong was one of his goals after he had taken up office as the Secretary for Justice. Therefore, I wish to take this opportunity to thank Secretary for Justice WONG Yan-lung once again for his efforts which enable this Bill to be finally tabled before the Legislative Council today.

Why do I take a keen interest in and eagerly look forward to this Bill? This is very much related to my experience as an elected Member of the Eastern District Council (DC) for 17 years and an elected Member of the Urban Council for five years. During my tenure as a DC Member and a Member of the Urban Council, I had assisted in the setting up of over 90 owners' incorporations (OCs). I also set up an Owners' Committee for Provident Centre where I lived and subsequently set up the Incorporated Owners of Provident Centre. During these 17 years, I had handled countless disputes between owners, disputes between owners and the management company, and disputes between the management company and various other stakeholders or suppliers in relation to building management. I had also handled many disputes between small owners and the principal owner. From these many disputes, I have come to realize that mediation service is badly needed in Hong Kong, especially for multi-storey private buildings. In the process, apart from building management, many civil disputes are also involved, such as those relating to marriage and the provision of business services. Must these civil disputes be brought to the Court in order to be resolved? This is not necessarily the case. If we can put in place a mediation system in society, the parties to disputes can work out solutions acceptable to all parties through mediation. This will enable the parties to disputes to come up with a win-win or all-win approach which ensures that all parties can win. Only in this way can various strata of society and parties to disputes make concerted efforts to contribute to greater harmony in society. Therefore, I think the Bill which advocates, encourages and promotes mediation as a means to resolve civil disputes is most correct and worthy of our support.

President, with the Bill having come to this stage in the Legislative Council today, I urge Members from all parties and groupings as well as non-affiliated Members to throw full weight behind the Bill. The enactment and implementation of this Bill will be unprecedented in the history of Hong Kong and will benefit the people. I, therefore, very much hope that Members can staunchly support it.



In respect of the commencement of the Bill, I would like to put forward my views on several points to the Administration for its consideration and follow-up. First, I hope that after the passage of this Bill, the Government can increase its strength in publicity and education, in order to build up the credibility of an efficient, inexpensive and simple channel for resolving civil disputes and enhance public understanding of this channel and their confidence in using it to resolve disputes. This is very important. A number of Members also pointed out earlier the importance of publicity and education and, especially as this is a sheer novelty, it is all the more necessary for the Government to plough in resources for its promotion and facilitation. In the event of disputes in society, this will practically provide an effective means for various parties to resolve their disputes in a peaceful and calm manner. This is the first point that I wish to make.

Second, I would like to propose to the Government that in spite of the enactment and commencement of this Bill on mediation, I think the Government can, in fact, allow greater diversity in its approach to handling complex social problems. To this end, I would like to stress that both formal mediation and informal mediation must not be neglected and can be taken forward in parallel. It is because mediation is not mysterious *per se*. Before the tabling of the Bill to the Legislative Council today, I believe Members of this Council, whether they are in this Chamber or not, and people who have taken part in various social activities actually have to regularly deal with various social problems relating to interpersonal relationship, personal matters and social affairs all the time. We hence become mediators either consciously or unconsciously and so, mediation is not mysterious at all. I have been a DC Member for 17 years and I have to deal with lots of issues that require mediation every day. Colleagues of District Offices (DOs) also face a great deal of work that requires their handling and mediation every day. We agree to the need to provide mediators under a standardized, uniform, regulated and recognized system through legislation but this aside, informal mediators also have a role to play because our society is very complex and pluralistic, not unitary. Moreover, the expertise required to deal with different sectors, different social strata, different social problems and different professions varies. I, therefore, hope that the Government can extensively absorb talents from all fields and encourage, through various training programmes, people with insights, expertise, social exposure and enthusiasm to take part in mediation. In this connection, I hope that the Government can

promote the provision of both formal and informal mediators, and neither of them should be stressed to the neglect of the other. This is my second proposal.

As for my third proposal, I hope that the Government, after putting in place a mediation system, can increase the provision of social resources and support. Particularly, the DOs should play a greater role in the districts by providing guidelines, mediation and counselling. This way, the Government can provide more counselling and support for civil disputes that arise at the community level. The doors of DOs are open to the public and they have to deal with loads of such problems every minute. The DOs must not shift their responsibility of handling civil disputes to the mediators just because the legislation on mediation is enacted and a standardized or uniform system is put in place for the registration of mediators. That would be most inappropriate. Apart from additional government support, government departments, especially DOs at the community level, should increase resources and step up efforts to provide training to staff or officials responsible for handling community matters, in order to equip them with mediation competence to handle matters at the front line. This is also very important. They do not necessarily have to be formally-trained mediators but they are, in effect, providing mediation services every day. I think the Government should increase the provision of resources for their training, in order to upgrade their mediation competence. I think this should be given equal emphasis. Although I can only see the Secretary for Justice and his team in the Chamber but not officials from the Home Affairs Bureau, I very much hope that the Secretary for Justice can provide a direction, and I hope that other government departments, especially the Home Affairs Bureau, will strongly support it, for they also have great responsibilities in this respect. Despite the impending change of government, I think the next-term Government must be clear that the implementation of this law will require vigorous efforts of the next-term Government on taking up the baton and in particular, it requires the Home Affairs Bureau and the DOs to increase their strength in providing support and co-ordination.

Lastly, as for the fourth point that I wish to make, I hope that the Government can conduct an interim review after the commencement of the law. For example, about one and a half years to two years after the ordinance has been brought into effect, the Government can conduct a review in a timely manner on various problems in the implementation of the ordinance as well as the positive

sides and inadequacies of the ordinance, and also collect public views, with a view to further improving this ordinance for the benefit of the public.

President, this is all for my speech. Lastly, let me once again take this opportunity to thank the Secretary for Justice, Mr WONG Yan-lung, for laying a milestone for the beginning of mediation service in Hong Kong. My gratitude goes to him.

**PROF PATRICK LAU** (in Cantonese): President, I am very grateful to Dr Margaret NG, Chairman of the Bills Committee, and other members, for their efforts in scrutinizing the Bill to enable its scrutiny to be completed within this session of this term of the Legislative Council. I hope the Bill can be passed smoothly, thereby encouraging more people to resolve dispute through mediation to avoid wasting a substantial amount of money and time resulting from litigation in the Courts. Meanwhile, I am also grateful to Secretary for Justice WONG Yan-lung for his efforts in promoting mediation. In fact, we already discussed this question a long time ago.

Actually, mediation services have been used by the construction industry for many years because neutral advice from experts in the industry must be sought before many disputes involving works contracts can be resolved. Hence, many professional institutes of the industry I represent have indicated to me their support for the Bill, despite some opinions concerning the details which have to be followed up by the Administration.

I hope, after providing for the specific principles in law, the Government can expeditiously provide for details in respect of the accreditation of mediators. Most importantly, the Government must ensure that mediators for works contracts must possess relevant professional qualifications.

According to the existing law, there is no requirement in Hong Kong that mediators must receive training and register with an accreditation body. Nevertheless, all the mediation service providers in Hong Kong have made requirements for the training and continuous learning of mediators.

(THE PRESIDENT'S DEPUTY, MS MIRIAM LAU, took the Chair)

As far as I know, the Government is making preparations for the establishment of the Hong Kong Mediation Accreditation Association Limited (HKMAAL) as a single non-statutory industry-led body for the accreditation of mediators. As mediators in the future can only obtain accredited qualification through the HKMAAL, and the HKMAAL can also appoint a mediator in case where consensus cannot be reached by various parties on the appointment of a mediator, the HKMAAL will hold significant powers.

I hope the Administration can undertake that the HKMAAL, consisting of not more than 10 members in its council, should comprise professionals in the industry, such as architects or surveyors, to ensure that the HKMAAL has adequate expertise to accredit the qualification of mediators for works-related cases and the appointment of mediators with professional construction qualifications to provide mediation services.

Most importantly, there must be professionals with construction expertise in the council of the HKMAAL to ensure the making of judgments from the professional angle for the relevant mediation cases and the provision of professional mediation services rather than the provision of mediation by a layman who is completely incapable of reading and understanding construction works contracts. In view of their complexity, a layman might not be able to read and understand these works contracts. Nor can he provide appropriate mediation from a professional perspective.

In fact, given the frequent occurrence of disputes over works contracts, if problems can be resolved through a mediation mechanism, a large amount of money and time can indeed be saved. Many delays in works resulting from contract disputes can be avoided, too. Most importantly, both parties will not be required to pay a large sum of money for legal proceedings. This will save many small and medium works contractors from bankruptcy as a result of defeat in such proceedings.

In the Legislative Council, I think that, in addition to Mr WONG Yuk-man, "Hulk" and "Long Hair", Members who are best at filibustering are more often than not lawyers because they can prolong the procedure for dealing with works contract disputes to an exceedingly long period of time. Moreover, they can charge fees by the minute, and lawyers' fees can be astronomical figures. It is evident that lawyers can make profits through "filibustering". Like the

President, however, mediators can resort to "cloture", making use of mediation to make both parties in the tug of war let go of their prejudices and employing a prompt military tactic to defuse the bomb expeditiously in order to resolve the issue. This can prevent delays in works arising from disputes, which will otherwise lead to compensation as well as more pecuniary losses in the end.

Deputy President, this Legislative Council Complex is a case in point. I have always said that, under the design and build model, contractors might allow multi-tier subcontracting of works, thereby resulting in falling quality as subcontracting prices become increasingly low. Meanwhile, as the contracts are expressed mainly in words, and many detailed requirements are not explained in detail in plans, disputes over failures to fit the promised descriptions might arise, particularly problems emerging during the maintenance period. On the one hand, contractors have to pay extra fees for remedial works and, on the other, the Architectural Services Department (ASD) will have to pay extra for manpower for rendering assistance because it does not want the progress to be delayed by contractors. I am worried that disputes over costs will arise when eventually the construction costs for this Complex have to be settled and professional mediation services might need to be sought by then.

Let me cite a simple example. One of the two cubicles in a male toilet near the elevator on the 7/F has been closed for repairs for a long period of time. After investigation, I have found that it is caused by the passing of the buck between the ASD and the contractor, with both parties at loggerheads. As a result, there is no toilet available for use on the 7/F. Consequently, the ASD has purchased a pedestal toilet on its own for replacement. I believe there will be a dispute on who should meet the relevant cost.

I have cited this example in an attempt to illustrate that there are disputes every day concerning construction works contracts, and there is even a rising trend of such disputes. Works projects, big or small, require a large number of mediators with professional background to help resolve problems to prevent further financial losses caused by delays of works. For instance, the Housing Department under the Housing Authority has adopted mediation to make intervention at different stages at the earliest opportunity to stabilize the costs of works rather than spending a lot of time on disputes when the account is to be settled in the end.

Hence, I think that representatives from the construction profession must participate in the HKMAAL to be set up in the future to ensure that the mediators must possess an adequate ability of professional analysis. This will enhance the chances of works contract disputes of reaching a settlement through professional mediation, thereby preventing the progress of works, particularly infrastructure projects, from being impeded as a result of litigations to be instituted by both parties to the contract. Expediting the progress of such projects can propel the overall economy to roll forward.

I hope the Secretary for Justice can make an undertaking in his response later to ensure that people with professional qualifications in construction can join the body responsible for accrediting the qualifications of mediators with a view to enhancing the effectiveness of the enforcement of the Bill after passage. Deputy Chairman, in order to assist the industry in resolving works contract disputes through mediation and saving money and time, I support the Second Reading of the Bill. Thank you, Deputy Chairman.

**DEPUTY PRESIDENT** (in Cantonese): Does any other Member wish to speak?

**MR ALBERT CHAN** (in Cantonese): Deputy President, Mr WONG Kwok-hing has already left the Chamber. I guess he was worried that I might request a headcount again. Now, there are only six or seven Members here. Deputy Chairman, I welcome and support the Mediation Bill (the Bill) in principle, but I would like to take this opportunity to have a full and frank exchange with Secretary for Justice WONG Yan-lung.

In fact, mediation has been popularly implemented and used in many places, such as the United Kingdom, the United States, Canada, Australia and New Zealand, for more than two or three decades. In handling disputes, especially those between the government and the community, in places like Canada and Australia, it has been clearly stated or specified in law for more than two decades that the disputes must be dealt with through mediation or arbitration.

Concerning land or land resumption issues under dispute between the Government and members of the public, Deputy Chairman, I have had dozens of

meetings and exchanges with the Government, particularly the Lands Department (LandsD), the existing Development Bureau and the former Planning and Lands Bureau, over the past decade and formally submitted proposal papers to the LandsD and the Development Bureau to call on the Government to resolve and deal with disputes and compensation issues relating to land resumption through mediation or arbitration. However, the Government has rejected my request adamantly, and it is still resorting to the Lands Resumption Ordinance as its "imperial sword" to force owners or victims to resolve the issues through the Lands Tribunal.

Over the past years, the Government has indicated, on numerous public occasions or in international seminars, its bid to turn Hong Kong into a mediation centre. Nevertheless, it should examine its conscience and reflect on itself: In appearance, it pretends to be representative, authoritative, kind-hearted and able to sympathize with the plights of the people with the belief that mediation is the best solution for there is no need for cases to be heard in court or hiring professionals, and a decision can be made through this legal process; but when the Government finds itself involved in the most significant land resumption and compensation issues, it has so far shown no willingness at all to make use of mediation or arbitration to deal with them.

I would like to remind the Secretary for Justice that the Government had made use of mediation in handling some major disputes in the past. Let me cite the toll increase for the Eastern Harbour Crossing as an example. As it was stated clearly in past agreements that toll increases could be dealt with by way of mediation or arbitration, the latter was eventually used to deal with the relevant issue. Certainly, the Government was defeated in the end.

However, I would like to point out that land resumption issues are actually extremely important. Moreover, many small owners are in a very miserable situation. I personally have had little contact with the Secretary for Justice. It has been 12 years since the authorities began dealing with the incident involving the resumption of the Wah Kai Industrial Centre, but still land resumption compensation disputes involving more than dozens of owners remain unresolved. To the LandsD, it does not matter for the relevant land has already been resumed. Not only has the original building been torn down, the new one will soon be completed on the original site and offered for sale shortly. Dozens of owners,

however, have not yet received any compensation. One of them eventually committed suicide because he was dissatisfied with the land resumption compensation and the resumption had also made him lose his factory and job. Secretary for Justice, I was talking about a person who had committed suicide.

Although the Government was requested by owners dissatisfied with the rate of compensation to deal with the matter by mediation or arbitration, the latter were, on the contrary, requested by the former to file a writ with the Lands Tribunal. Dr Margaret NG should be very clear about this. It would cost the owners millions of dollars to consult lawyers and experts before filing a writ with the Tribunal. At that time, one discontented owner filed a writ with the Lands Tribunal on the ground that the rate of the Government's compensation was hundreds of thousands of dollars short but ended up spending more than \$1 million in lawyers' fees just to fight for hundreds of thousands of dollars in compensation. In the end, he was defeated and ordered to compensate the Government for the fees paid to both lawyers and experts. Why did the Government refuse to make use of mediation?

The Government has praised mediation for being so great and impartial, but why did it refuse to make use of mediation and arbitration? Many Members in this Chamber have expressed support for mediation and called on the Government to make use of mediation, which is within its scope of authority to do so, but why did it refuse to make use of mediation and, instead, force the ordinary masses or small owners to face the distress of proceedings and bring them a step closer to death? Secretary for Justice, this is a real case.

One of the owners of the Wah Kai Industrial Centre, who rejected the compensation offer after resumption, found himself in great distress and unable to find a job. Previously a factory proprietor, he was compelled to work as a security guard. In the end, he could not accept the change and, in the face of severe hardships in living, eventually committed suicide. There were also some other owners who were dissatisfied with the resumption and compensation. One of the aggrieved owners had even broken his leg after jumping off a building. Quite a number of owners had been taking psychiatric drugs over the past decade, with some even receiving Comprehensive Social Security Assistance (CSSA). Because of all these problems, they turned from owners or factory proprietors into mental patients, and their families had to live on CSSA since then.



Secretary for Justice, government officials enjoy a high status and enormous powers. The staff of the LandsD were very generous in offering a compensation figure. They told the owners to either accept the offer or press charges against the Government should they reject it. They added that \$1 billion had been earmarked for compensation offered in connection with the Wah Kai incident. The money would be kept there even if the owners rejected the offer. In the end, it was the owners who suffered, whereas the government officials could continue to sit in their air-conditioned rooms unscathed, make public money, receive wages, and act in accordance with ordinances and the book.

More ridiculously, the Government financed the owners in commissioning surveyors, including the President of the Hong Kong Institute of Surveyors, to complete two survey reports, and the rates of compensation recommended by both reports were higher than that determined by the Government. Although the two surveyors were professional, and so was the Government, the rates of compensation recommended in the two reports were higher than that set by the Government. However, the Government rejected the recommended rates and even refused discussion.

After my repeated requests, I was joined by the owners and their surveyor to eventually sit down with the LandsD and the surveyor commissioned by it for the only meeting held in 12 years. During the meeting, we asked why this method of calculation was used. When I heard the reply given by the surveyor commissioned by the Government, I found his explanation and justification absolutely ridiculous. Since then, the Government has been reluctant to hold meetings with us again because its weaknesses and problems will be exposed once such meetings are held.

If these cases are dealt with by arbitration or mediation, even an ordinary mediator will make sensible recommendations and adjudication after listening to the justifications given by both parties. But now, this is not the case. The expert commissioned by the Government has only stated his decision without giving any explanation whatsoever. While the reports prepared by the other party are so thick and fully explain why a certain rate of compensation is warranted, they are rejected by the expert commissioned by the LandsD. Instead, the expert has only quoted a single rate. The owners can only accept it

or press charges against the Government in the Lands Tribunal. My blood pressure will rise again once these issues are discussed.

In my opinion, the Government is simply using its power to bully the people. Branded as a "superwoman", Secretary for Development Carrie LAM is using her power and making use of the law to bully people. She can do everything in the dark without giving any account of her actions, including these professional evaluations, and go on exploiting the law and her influence to bully people. Does she dare to do so in the face of large consortia? Does she dare to do so when confronted by LI Ka-shing and other plutocrats? On the contrary, the Government behaves in such a tough manner when confronted by the ordinary masses and indigenous residents. Such being the case, why does it not present all the information and reports to convince people with reasons and virtues? It is only right for the Government to do so rather than using its influence to bully people. Now the Government is precisely acting in this manner. While LEUNG "The Wolf"<sup>1</sup> Chun-ying is backed by the communists in Hong Kong, the Government is relying on unfair and unreasonable draconian laws to bully the people, thereby causing the ordinary masses to struggle in very straitened circumstances.

The Secretary for Justice is going to leave office in 10-odd days. When the Chief Executive appeared before the Legislative Council yesterday, we branded him as Hong Kong's Number One shameless and greedy government official. In comparison, the Secretary for Justice has a higher popularity rating. He also impresses people as more humane and sensible in his work, and people chatting with him will find him more approachable. With only 10-odd days in office, the Secretary cannot do much. The only regret I have with him is that I have held numerous discussions with him about enacting legislation to regulate debt collecting companies. Although the Security Bureau is responsible for this, the request made by the Law Reform Commission has yet to be given effect. I would like to tell the Secretary that we can still find hundreds of thousands of people harassed and somewhat threatened by triad-like tactics employed by debt collecting companies and living in anxiety every year. This demonstrates that the Government has failed to perform its gate-keeping role properly when it comes to the law.

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<sup>1</sup> "LEUNG" (梁) in Cantonese rhymes with "wolf" (狼)

I would like to tell the Secretary that, insofar as the form of law is concerned, let me cite the laws in many states in Australia and the practices of many provincial governments in Canada as examples. It has been stated clearly for over two decades that a three-step approach must be followed in connection with land resumption and ordinances on land disposal. According to this approach, the steps to be taken include mediation to be followed by arbitration and, if there are further problems, legal proceedings. This is stated clearly in their law. Certainly, this mediation law is the first step insofar as Hong Kong is concerned. It is worth commending that the Director of Lands, realizing that mediation is going to become the general trend, enrolled on a mediation course on his own initiative two years ago. Despite being a Director, he was open-minded in studying and gaining an understanding of mediation. Upon completion of the course, however, he should have introduced amendments to the procedure and legislation.

Deputy President, on the front of mediation, I hope the Secretary can issue an order to other government departments through the passage of the Bill today, including the LandsD and the Development Bureau I mentioned earlier, as well as the Transport Department, since the Railways Ordinance similarly involves many issues. The same is also true of the Environment Bureau. In New South Wales, Australia, free mediation is even provided through the Courts for environmental issues. This is worthy reference for us. Furthermore, Mr WONG Kwok-hing has mentioned the Buildings Management Ordinance. Over the past two decades, we have been dealing with the persistent disputes between owners, management companies and owners' corporations. Hence, it should be specified in the Buildings Management Ordinance (Cap. 344) that relevant persons can select mediation when necessary or specify the use of mediation for the resolution of disputes prior to taking their cases to court.

Certainly, a full overhaul is possible only with complementary efforts made in respect of other laws, particularly the professional accreditation of mediators in law, as mediation covers different professions, including land, environment and other civil contracts. I noted on the Internet that the courses offered and professional mediation qualifications conferred by existing mediation centres or arbitration bodies are still not up to the level of professionalism. Certainly, ordinary mediation is currently provided by many lawyers and professionals in arbitration bodies, and they all have particular background, experience and expertise. Insofar as the future training of mediators is concerned, if the relevant

ordinance in future can complement and specify the training of mediators, the special job of mediators will become even more professional. Let me cite land mediators as an example because of the complexity of the property management law. Even the Secretary for Justice should be aware that mediators must refer to many land-related laws and court cases when dealing with land issues and have a good grasp of knowledge in many areas, including property management, the operation of corporations, contract disputes, maintenance, understanding of deed of mutual covenants, and so on.

I hope the Bill can be passed today. This will represent the first step taken for mediation in Hong Kong. But most importantly, given the Government's support and commendation for mediation, it should accept mediation in the relevant law and specify therein that mediation must be adopted. *(The buzzer sounded)*

**DEPUTY PRESIDENT** (in Cantonese): Speaking time is up.

**MR WONG YUK-MAN** (in Cantonese): Deputy President, during the Committee stage of the Competition Bill, Dr Margaret NG had said repeatedly that she did not know very well the economic issues covered by the Competition Bill; nor did she keep a keen interest in them. But the barrister, Ronny TONG, who was sitting next to her was very nervous. Now that he is not nervous anymore, right? In spite of this, Dr Margret NG had performed her duty as a Member of this Council and spoken for many times on the Competition Bill, unlike another group of people in this Chamber who looked as if they had been doped to become mute. For such an important Bill like this, it should really be our obligation to discuss it for two or three days. Why should this be taken as filibustering? Although Dr Margaret NG and I may not see eye to eye on some amendments to the Competition Bill, the contribution that she made during the Committee stage of the Competition Bill does merit our recognition.

The Government has moved the resumption of the Second Reading debate on the Mediation Bill (the Bill) today. Seeing the word "mediation", I cannot but think of Mr Albert CHAN and me, in order to put up resistance to a draconian law some time ago, jointly waging a filibuster war against the Legislative Council (Amendment) Bill 2012, which is unprecedented in the history of the legislature

of Hong Kong, in an attempt to bar its passage. Although we still failed on the verge of success, we have done our part as a minority faction in this Chamber by putting up lawful resistance in the face of violence by the majority.

Today, the same Government has moved the resumption of the Second Reading debate on a Bill, and this has aroused deep feelings in me. Even though I also do not quite understand mediation; nor do I know much about it or take any interest in it — unlike Mr Albert CHAN who gets excited whenever he talks about it — I feel obliged to fulfill my duty and speak on the Bill. Meanwhile, this is also meant to show support for the work of the Bills Committee chaired by Dr Margaret NG.

Mediation enables the parties to a dispute to reach an agreement and resolve their dispute through the assistance of an independent third party. Mediation has all along been a major alternative for resolving disputes other than litigations in court. Chinese people always hold that harmony is most precious, and the settlement of disputes by way of mediation can arrive at a proposal acceptable to all parties in a way which is more efficient and more economical in terms of time and costs while ensuring confidentiality, and also in a harmonious atmosphere.

Over the past few years, the Government has spared no effort in promoting mediation. We have often seen the distribution of pamphlets on mediation in the Court and some government departments; we have seen the setting up of the Mediation Information Office, and Secretary for Justice WONG Yan-lung attending all kinds of seminars and forums for the promotion of mediation; and sometimes, we can even see the Government's advertisements on television promoting mediation during the prime time. However, in order to take forward a policy, the Government cannot rely only on empty talk, and it must translate its words into actions. This is like the case of the SAR Government stressing the need to be honest and law-abiding. But when government officials in the highest echelon have been revealed to be involved in a series of corrupt practices one after another, no matter how much more the Independent Commission Against Corruption has expended on the production of more series of "ICAC Investigators" featuring more popular artists, all the efforts so made would only end as futile.

Clause 6 of the Bill provides that the ordinance applies to the Government, and this is certainly a good thing. But has the Government ever taken the approach of mediation, or in the event of disputes, has it handled the disputes in

line with the spirit or objective of mediation? Martin Luther KING said that true peace is not merely the absence of tension; it is the presence of justice. Secretary for Justice, the Bill certainly bears relevance to justice. We see that clause 6 provides that the ordinance applies to the Government but then, has the Government dealt with cases of dispute in a spirit that treasures harmony but also stresses equality? Let us not talk about things that happened a long time ago, and let us use Practice Direction 31 issued by the Judiciary which came into effect on 1 January 2010 as a dividing line and look at how the Government has acquitted itself over the last two years. Last year, the Government adamantly pressed ahead with the replacement mechanism and finally, it was only because of boiling public sentiments that the Government repeatedly made amendments to the Legislative Council (Amendment) Bill 2012. Secretary for Justice, you are a professional barrister tasked to defend the rule of law in Hong Kong and an eminent figure in the legal profession, but being an accountable official, you were inadvertently dragged into this pool of murky water, being obligated to defend that draconian law for Stephen LAM and act as the devil's advocate, which is very regrettable. The replacement mechanism was eventually amended to the effect that we are barred from running in the election. That's it. Sometimes, it is true that a person is able to distinguish right from wrong only when he is not an official, which is really sad to Hong Kong. An official cannot tell right from wrong, and toes only one line. But when a person ceases to be an official or when he is going to retire soon, York CHOW who used to be nicknamed "周一鑊" (being caught in troubles once every week) has now become "威一鑊" (making a heroic feat that commands great applause). Deputy President, I am sorry, as this is outside the scope of our discussion .....

**DEPUTY PRESIDENT** (in Cantonese): Mr WONG, since this is outside the scope of our discussion, please focus on the Mediation Bill.

**MR WONG YUK-MAN** (in Cantonese): In respect of the people's livelihood, Financial Secretary John TSANG formulated the worst ever Budget in history, insisting on transferring benefits to the fund industry by injecting \$6,000 into each Mandatory Provident Fund account and refusing to give a cash handout .....

**DEPUTY PRESIDENT** (in Cantonese): Mr WONG, I would have to ask you to focus on the Mediation Bill.

**MR WONG YUK-MAN** (in Cantonese): ..... more recently ..... Deputy President, my speech is cohesively structured, and you do not know what I am going to say next.

**DEPUTY PRESIDENT** (in Cantonese): Right, but please come to the Mediation Bill as soon as possible.

**MR WONG YUK-MAN** (in Cantonese): I still have 10 pages with me here, and I was speaking on clause 6 of the Bill which provides that the ordinance applies to the Government. Then I cited examples to illustrate that when the Government encounters disputes politically and in respect of the people's livelihood, it has not dealt with the disputes in the spirit of mediation. The first example that I cited was that draconian law related to the Secretary for Justice. I, therefore, said a few words on it, trying to take advantage of him while incidentally licking his boots.

The second example was related to the people's livelihood, and it was cited to show that the Government does not have the mindset of mediation, and I was referring to the Budget of Financial Secretary John TSANG. A more recent case in which the Government has not engaged in mediation is the Copyright (Amendment) Bill 2011. Had it not been me, Mr Albert CHAN and my assistants staying up for several nights to work out 1 390 amendments, the Copyright (Amendment) Bill 2011 would have been bulldozed through this Council in the current Session. Did the Government ever try to reach a settlement with us through mediation? The Government remained insistent on forcing its way through. As we can see from these examples, where is there mediation in the mindset of the Government? We Chinese people have an idiom — "鼎鼐調和" (which literally means balancing flavours in an ancient cooking vessel), Deputy President. A Government must go by the spirit of this idiom which stresses the importance of harmony and balance. The duty of the Government is to serve the people. There are different voices in society, and there are different groups of beneficiaries. The Government must work for harmony and balance. We, therefore, support the Bill, and we support the

Government in enacting this legislation to provide for this means in law for resolving disputes.

I remember that a few months ago the Government sought the approval of the Legislative Council for a supplementary provision to meet the increase in the expenditure on court costs. Why has the Government's expenditure on court costs increased by more than a hundred percent? Has the Government really observed the spirit and objective of mediation in handling disputes? It is necessary to take these points into consideration in enacting this Bill.

I mentioned earlier that the Judiciary's Practice Direction 31 was issued in February 2009 and came into effect on 1 January 2010. This Practice Direction 31 requires most civil cases to go through a process of mediation first, and it is only when mediation is out of the question that legal proceedings can be filed in the District Court or High Court. I myself was involved in a libel case in 2010, and it was also resolved through mediation before the proceedings.

Like other government bills, the legislative progress on this Bill was lagging behind. The Bill is actually very simple as it basically contains only 11 clauses, and there are only seven or eight clauses with substantive contents. Why is it that we in the Legislative Council can scrutinize this Bill only after Practice Direction 31 has been issued for more than three years and put into practice for nearly one and a half years? Moreover, our filibustering has resulted in "congestion" of those bills, plunging Members into a state of confusion. The Secretary for Justice sat in the Ante-Chamber for a few hours yesterday, and I wonder whether he was clever enough to leave and come back this morning. This is again an instance of lag. Of course, the situation of other government bills is also similar. So, do not put the blame on the legislature. This filibustering tactic had been adopted only once, and I would say that what we did is unprecedented because we were accused by everyone. Those on my left side wanted to kill me when they saw me, and those on my right side did not treat me any better. We had made ourselves detestable to both sides. The Deputy President is nodding. Mr TAM Yiu-chung who seldom loses his temper even banged on the desk a few times, didn't he? But these Bills have lagged behind not necessarily because of this filibustering war waged by us. This Bill could actually have been tabled earlier. The Judiciary has already issued Practice Direction 31 which has been implemented for one and a half years, right?



We encourage this concept or system of mediation for simple reasons. First, we hope that parties to disputes can reach a settlement and resolve their disputes, so as to achieve greater harmony in society. This is the case in law, but not quite so when it comes to some political disputes. The precondition of settlement of disputes is the manifestation of justice, which is most important. From an institutional perspective, the settlement of civil disputes by way of mediation will reduce legal proceedings and this can, in turn, save the time and resources of the Judiciary and ease the pending caseload of the Court.

In recent years, we have seen some phenomena that have aroused some doubts in us: In adopting these approaches or in employing mediation, do we intend to provide convenience to both parties to disputes procedurally to enable their disputes to be resolved more effectively, or have we actually interfered with or perverted the course of justice in the promotion of mediation? We must really give this consideration. In fact, we have often heard of cases in which individual Judges (especially those in the lower courts and the Magistracies) left no stone unturned to make parties to disputes come to an agreement. But it is often the case that the weaker party, awed by the imposing authority of the Court, may feel aggrieved, thinking that they are forced to reach a settlement and hence no justice can be done to them. We have often come across these ordinary members of the public who feel aggrieved in similar cases lodging complaints to us in our ward offices, but we can do nothing at all. Therefore, in considering whether or not I should support this Bill, I have kept on reminding myself to pay attention to whether justice is violated in the procedures and in the steps taken.

The Chief Justice of the Court of Final Appeal, Mr Geoffrey MA, said at the opening of the last legal year that an excessive number of cases has been appealed to the Court of Final Appeal (CFA). He proposed that the monetary threshold for a case to be given the automatic right of appeal to the CFA, which is \$1 million at present, should be raised, in order to ease the caseload of the CFA. First, I do not agree that the existing workload of the CFA is too heavy, and for cases involving a monetary value of over \$1 million, the CFA can actually reject these cases very quickly if they do not have justifications to support their appeal, and the appellants are also required to bear the litigation costs. Cases that really require the CFA to spend time hearing are those with certain justifications for appeal. In this connection, how can we seek to reduce the caseload through the \$1 million threshold for the automatic right of appeal? This will deprive people

whose cases involve a smaller monetary value of their equal right to appeal (*The buzzer sounded*) .....

**DEPUTY PRESIDENT** (in Cantonese): Time is up.

**MR WONG YUK-MAN** (in Cantonese): ..... This is sheer injustice.

**DEPUTY PRESIDENT** (in Cantonese): Mr WONG, your speaking time is up. Please sit down.

**DEPUTY PRESIDENT** (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

**DEPUTY PRESIDENT** (in Cantonese): If not, I now call upon the Secretary for Justice to reply. This debate will come to a close after the Secretary has replied.

**SECRETARY FOR JUSTICE** (in Cantonese): Deputy President, as I said when I tabled the Mediation Bill (the Bill) before the Legislative Council in November 2011, the Working Group on Mediation chaired by me published its Report in February 2010 with 48 recommendations, one of which is to enact a Mediation Ordinance. The Bill was tabled with the objective of providing a legal framework for the conduct of mediation on the basis of the Ordinance without hampering the flexibility of the mediation process, and to address some of the issues in which the existing law is uncertain, such as confidentiality and admissibility of mediation communications.

After the submission of the Bill, the Legislative Council set up a Bills Committee chaired by Dr Margaret NG. The Bills Committee has held a total of seven meetings to study various clauses and the policy vision behind them in detail. More than 40 organizations/individuals have submitted or expressed their views on the Bill to the Bills Committee. Here, I would like to express my

sincere gratitude to Dr Margaret NG and all members of the Bills Committee for their diligence and valuable advice.

Deputy President, I would like to add one more point here as I have heard that Dr Margaret NG will withdraw from the battlefield. I would like to take this opportunity to put it on record that a number of Bills promoted by the Department of Justice were scrutinized by Bills Committees chaired by Dr Margaret NG, who has shouldered great responsibility. As we all know, she has served as Chairman of the Panel on Administration of Justice and Legal Services for many years. In discharging these important duties, Dr NG has been professional, impartial and responsible. I would like to take this opportunity to express my deepest respect and gratitude to her.

Deputy President, now let me briefly respond to some relatively important issues which have been discussed by the Bills Committee, as well as some of the arguments raised by Members who have eagerly spoken earlier.

During the scrutiny of the Bill, one of the issues considered by the Bills Committee is whether the scope of mediation regulated by the Bill should cover mediation cases which have been started by the parties in accordance with certain provisions. Under clause 4 concerning the meaning of "mediation", mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any part of it, assist the parties to the dispute 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.

The mediation process is voluntary and it will be entirely up to the parties to reach an agreement or not in the process. The Bill is primarily concerned with, after the parties have started mediation, the conduct of certain aspects of the mediation (such as confidentiality and admissibility of mediation communications in evidence) which ought to be regulated.

As to the question of whether the parties embark on mediation purely on their own volition or upon direction of some authority, including Practice Direction 31 which we are familiar with, it is provided that mediation should be tried in the first place. It is not relevant and does not affect the applicability of the Bill to the mediation in question.

Secondly, I would like to discuss clause 7. Under clause 7, a person providing assistance or support to a party to mediation in the course of the mediation does not contravene the Legal Practitioners Ordinance (sections 44, 45 and 47 of Cap. 159).

The Bills Committee has discussed whether it is necessary to add this clause to the Bill. The authorities considered it necessary. It has been a long-standing practice in Hong Kong that persons other than qualified solicitors and barristers provide assistance to parties in arbitration and mediation and serve as their representatives. Given that arbitration and mediation are forms of Alternative Dispute Resolution and both are private and consensual, parties in arbitration and mediation should be entitled to appointing advisers and advocates of their own choice, whether or not legally qualified and whether local or foreign. Clause 7 seeks to provide that the provision of assistance or support to a party to mediation in the course of the mediation does not constitute an infringement of the above-mentioned provisions of the Legal Practitioners Ordinance.

In fact, the Arbitration Ordinance (Cap. 609) also contains similar provisions. As mediation is even less formal than arbitration and does not involve a decision on the rights and obligations of the parties to the dispute, it is most appropriate to make a corresponding clause in the Bill for the sake of clarity and consistency.

Thirdly, I would like to discuss clause 8. Clause 8 stipulates that a mediation communication must not be disclosed to anybody except as provided in clause 8(2) and (3). Clause 8(2) sets out the circumstances under which a mediation communication may be disclosed. These include disclosure with the consent of all relevant parties, the availability of the content of the mediation communication to the public, and the content of the mediation communication being subject to discovery in civil proceedings or to other similar procedures. Under clause 8(3), if the circumstances in section 8(2) are not applicable, a person seeking disclosure of mediation communications may achieve the purpose by applying for the leave of the Court or Tribunal under section 10.

Some depositions have expressed concern that the scope of the disclosure of mediation communication under clause 8 is too broad. I hope Members can rest assured as the Mediation Ordinance Group under the Mediation Task Force

has proposed the exceptions allowing the disclosure of mediation communications only after careful study.

Certainly, while the confidentiality of mediation communications is crucial, confidentiality is not absolute. The disclosure of mediation communications should be allowed on the ground of public interest. The Mediation Ordinance has taken these considerations into account and a balance between the two has been struck. The balance as reflected by the existing clauses of the Bill is appropriate.

Deputy President, during the deliberation of the Bills Committee, we considered that amendments to clause 8(2) and item 12 of Schedule 1 to the Bill were required. These amendments are relatively simple and supported by the Bills Committee. I will discuss them in detail when I move the amendments at the Committee stage.

Apart from the clauses of the Bill, the Bills Committee has expressed concern about the establishment of a non-statutory industry-led single accreditation body for mediators to ensure the quality and the professionalism of mediators, and requested that a timetable for developing such a body be devised by the authorities. Deputy President, I would like to pause at this juncture in order to highlight that we have adopted a three-pronged approach in the promotion of mediation. Firstly, it is the drafting and formulation of the Bill; secondly, it is our work in respect of accreditation; and thirdly, as many Members mentioned this morning, our efforts in publicity and education.

The Working Group on Mediation has been divided into three sub-groups working in these three important directions since its inception. The Report published by us contains 48 recommendations, representing proposals in these three directions. Subsequently, we have established a more streamlined Mediation Task Force to implement these recommendations. By the same token, three sub-groups have been set up for follow up. I would like to point out that we have carried out the work as a whole right from the beginning, without leaving any part of it to a later stage.

Coming back to the industry-led body, Deputy President, I would like to take this opportunity to introduce the idea of the second prong, that is, the Accreditation Group under the Mediation Task Force. First of all, the single

accreditation body for mediators, or the Hong Kong Mediation Accreditation Association Limited (HKMAAL), will become the premier accreditation body for mediators in Hong Kong responsible for accreditation and dealing with disciplinary matters.

Secondly, the four main mediation service providers, including The Law Society of Hong Kong, the Hong Kong Bar Association, the Hong Kong International Arbitration Centre and the Hong Kong Mediation Centre, are made founding members of the HKMAAL, as well as the core members of its council. The council members will include elected members and co-opted members. Here I would like to emphasize that apart from these four core members, there are other members elected by other organizations, including organizations engaging in mediation in other sectors and co-opted members.

Furthermore, we propose that in order to establish a standardized accreditation system for mediators in Hong Kong, organizations which wish to become members of the HKMAAL should give up their existing individual accreditation system. If they retain their existing accreditation system, we will not be able to implement a single accreditation system ultimately. Therefore, as a condition for membership of the HKMAAL, they should give up their existing individual accreditation system.

The Accreditation Group has laid down the terms of reference for the HKMAAL in the following three aspects: first, to establish the HKMAAL and its council, as well as to recruit members; second, with reference to the existing standards and practices of major mediation service providers, to set up the accreditation standard for mediators and formulate an appropriate policy to transfer the existing panel of accredited mediators of the major mediation service providers to the panel of the HKMAAL; and third, with reference to the existing practices of the main mediation service providers, to develop the accreditation system of mediators for the HKMAAL.

Besides, we expect that the Code of Practice and the Code of Conduct will be announced, and guidelines and mechanisms on narrowing mediation data for empirical studies will be formulated in order to promote the development of mediation services in Hong Kong. These are the issues to be accorded priority by the HKMAAL.

The Mediation Task Force and the Accreditation Group will continue to assist in the establishment of the HKMAAL. As mentioned by the Bills Committee at its meetings, it is expected that the HKMAAL will be registered with the Companies Registry within this year if no further significant issues arise. Deputy President, in fact, the Memorandum and Articles of Association of HKMAAL are nearing finalization. It is hoped that they can be finalized expeditiously so that the HKMAAL can be established within this year.

Deputy President, before concluding my speech, I would like to take this opportunity to respond to Members who eagerly spoke this morning.

Firstly, I would like to respond to the points mentioned by Dr Margaret NG. First of all, I have to thank Dr Margaret NG for her mentioning the significance of the legislation because we wish to clarify many ambiguities so that we can have a more secure framework for mediation, thereby boosting user confidence in the mediation mechanism as well as our confidence in the development of mediation service. This is most crucial.

On accreditation mentioned just now, I greatly emphasize that we were aware of its importance right at the beginning. Therefore, this was the focus of our work at the beginning. I will go into further details if necessary later on.

Thirdly, Dr Margaret NG has emphasized a few points from a wider perspective, including the point that mediation cannot replace the judicial process entirely. Deputy President, we agree to that because for some cases, as also mentioned by other Members, such as those involving important constitutional or legal principles, we need the Court's judgment and hope that the case will be decided by the Court.

Besides, as for cases involving the relationship between the two parties in a lawsuit or differences in their capabilities, we must be more careful for we have to be more cautious in dealing with the applicability of mediation.

The key to successful mediation lies in the way that mediation work is conducted, that is, whether it is conducted wholeheartedly by the parties, or whether it is regarded as mere ceremony or routine. Certainly it also involves the professional code of practice and professionalism of the participants as well as their recognition of mediation and level of participation.

As to the overall functions of mediation, Dr NG mentioned just now that the costs of some mediation services are not cheap. I believe this is the case, especially for mediation services which are more professional and can only be provided by people with relevant expertise.

We hope that in the long run, mediation can develop into a sustainable profession. It should not be regarded as a kind of charity, or else it will not be sustainable. However, as to how mediation can help people access judicial justice or reduce the workload of the Courts, or how mediation can help in various aspects, such as reduction in litigation costs, I believe the key lies in timing, as we hope that problems can be solved and settlement can be achieved in a relatively short period of time and in a flexible manner. In that case, we can achieve the results on the whole.

Insofar as these aspects are concerned, we have to work very hard to find out the results that can be achieved by developing mediation; the areas in which more efforts should be put; the areas in which the effect has fallen short of our expectations; and the areas which have been overlooked and should be strengthened.

Therefore, there are clauses in the Bill which set out exceptions in which disclosure of information is allowed, that is, if the relevant information can assist in research. At the present development stage of mediation in Hong Kong, this is very important, for this will provide a better basis for us to move along in the right direction. The data and research results are very important to our development. These are my responses to Dr Margaret NG's speech this morning.

Concerning Mr CHEUNG Kwok-che's speech — I am not sure whether Mr CHEUNG is present. He may not be in the Chamber, but it does not matter. He has expressed a lot of views on mediation to which I hope I can make a response as some are relatively important.

Deputy President, he asked why the Government could not make a greater degree of direct intervention at the present stage, just like what it did with other industries. I would like to respond to this point. In fact, we have carried out extensive research and made reference to the practices of many other jurisdictions in dealing with the work of promoting mediation. According to my memory,



there is no precedent of similar practices in other countries in respect of direct intervention by the government through, for instance, mandatory establishment of statutory bodies to regulate the standard and service of mediators.

A public consultation on this direction was launched in tandem with the publication of the Report. The focus of the consultation is whether it is necessary to set up a single body responsible for co-ordinating and consolidating the accreditation of mediators. The Report originally recommended that it would take five years to achieve this end given the diverse views of various sectors which, to a certain extent, had to consider their own interests.

However, according to the consultation results, many people expressed the view that we should carry it out expeditiously, and we also responded to this view. In fact, we all agreed that it would be most desirable if a single statutory body could play this role in the long run. However, we cannot get to the goal in one stride. Now, we have come up with the idea that an industry-led premier accreditation body should be set up which will be turned into a statutory body when it has developed a sound foundation in terms of standard, public acceptance, receptiveness and coverage. By then, our goal will be achieved as the saying goes, where water flows, a channel is formed.

In addition, Mr CHEUNG Kwok-che has also emphasized that — to a certain extent, Mr Albert HO has also mentioned this point — this single body should be able to cover a wide range of professionals and service providers. He has also stressed that the mediators should not be confined to lawyers.

I wish to emphasize that the framework and participants of the HKMAAL are not limited to the legal profession. At present, many mediation service providers come from other professions, including the construction industry as mentioned by Prof Patrick LAU. In the social work sector, there are also many people who provide mediation services at different levels.

Given the diversities in the background of mediators who are not limited to lawyers and have acquired the qualifications through existing accreditation bodies, I would like to emphasize that this single body will surely be pluralistic, though it is called a single body. The mediators will acquire the professional qualifications through various organizations and provide mediation services in various areas.

Deputy President, as I mentioned earlier, clause 7 stipulates that a person providing mediation service does not contravene sections 44, 45 and 47 of the Legal Practitioners Ordinance. This is precisely meant to emphasize that persons other than lawyers can provide mediation services and the clause seeks to make this clear.

Deputy President, Mr CHEUNG Kwok-che has also pointed out that the HKMAAL to be established will comprise several member organizations, including organizations of legal professionals. He queried whether there would be any possibility of conflict of interest or their decisions would be skewed in favour of some people. Deputy President, I would like to clarify that all along, we have several major service providers, who have been working very hard as members of the Working Group on Mediation and the Mediation Task Force. Some of these service providers, which have set up respective accreditation mechanisms for mediators, can accredit these mediators. They are now the providers of these core services.

As I said earlier, if we want to set up a single body, individual organizations have to give up their own systems. In this regard, we need a collaborative stage and the Government has been playing the role of helping these organizations to set up an accreditation body.

However, as I mentioned just now, the membership of this body is not limited to the four organizations. Its council will consist of other service providers, and these service providers can also be council members. So, I would like to emphasize that receptiveness do exist, while the Government will play a role in its growth by keeping a watchful eye, exercising supervision and providing support. Like I said, we will have a basis to provide the public a most effective platform which seeks to protect the standards in this area when it has turned into a statutory body with receptiveness, inclusiveness and public acceptance. We will keep this under constant review.

Regarding the establishment of this body and the continuous implementation of the Bill, I believe the Panel on Administration of Justice and Legal Services will continue to pay attention to and follow up in the future, while the Government will continue to work hard.

This morning, Mr CHEUNG Kwok-che and several other Members unanimously emphasized that if we want to promote mediation, we have to promote it for all through education and publicity. Deputy President, the third prong of the three-pronged approach I just mentioned refers to our work in this aspect. At present, the greatest impetus to promoting mediation is certainly the Judiciary's Practice Direction 31. In fact, mediation is the first step in all civil cases.

By the way, at the level of legal aid, the Legal Aid Department has also confirmed that the expenses incurred in mediation by legally aided persons will be regarded as incidental costs of litigation covered by legal aid. These will serve as important pillars of promoting mediation.

Nonetheless, substantive work has been commenced in many aspects. Here I would like to emphasize the provision of information. Apart from the Mediation Information Office within the Judiciary, the industry has also set up the Joint Mediation Helpline for providing information and referral services on a continued basis. Furthermore, Courts at different levels, such as the Family Court and the Lands Tribunal have also set up various Pilot Schemes. Besides, Members may be aware that, according to press reports yesterday or today, the Financial Dispute Resolution Centre will be able to commence operation next Monday. These Pilot Schemes or substantive work in different areas will help promote mediation in the community.

The Working Group on Mediation and Mediation Task Force of the Department of Justice have helped promoted the publicity work as mentioned by Members. These include an Announcement in the Public Interest aired on television; the provision of free or low-cost venues for mediation at community centres; organization of various international conferences to foster international exchanges, as well as maintenance of contact with industries in other aspects to identify ways for further promotion.

In this regard, several Members, particularly Mr WONG Kwok-hing, have raised a number of points. First of all, I am most grateful to Mr WONG Kwok-hing for his support of the Bill and his recognition of our promotional efforts in mediation. In particular, he asked whether informal mediation should be promoted in parallel with formal mediation. According to my understanding, what he means is that the front-line staff at various District Offices have, to a

certain extent, also provided assistance in resolving disputes though their work but this may not be regarded as professional mediation in our eyes. But in fact, they have rendered assistance to people in solving their problems. So, he wondered whether the authorities could provide support in this regard or make promotional efforts. I believe this will involve promotional efforts in education and culture as a whole.

In promoting mediation through education, we emphasize that the concept of mediation should be promoted in various educational institutions or strata, or even in the primary and secondary schools. I have also promoted mediation to various government departments. Mr WONG Yuk-man mentioned earlier that a colleague has attended relevant courses with a view to strengthening his knowledge in mediation and even become a mediator. I believe this will help promote change in the culture as a whole, apart from providing more opportunities to front-line staff to enhance their standards. Certainly, they should not be compared with professional mediators, but I believe they will know how to enhance their standards through these opportunities and services provided. I will properly reflect the views of Mr WONG Kwok-hing on this to other departments. Mr LAU Kong-wah has also placed emphasis on promotion and education, to which we cannot agree more.

In addition to all this, I hope that Members can help us to continue to promote the concept of mediation in their conduct of front-line community work. At present, many organizations also provide information and referral services. If we can establish a network so that we can promote mediation in a concerted effort, I believe there will soon be a more solid basis for us to further promote mediation.

Deputy President, Prof Patrick LAU said he hoped that the HKMAAL or even its council would comprise members from the construction industry. Deputy President, as this is an organization of the industry, our role as the Government is to provide assistance. But I cannot force them to do anything. But all along, we have been discussing this issue and I believe they understand our needs.

I would like to point out that the Hong Kong Institute of Architects is one of the eight members which have jointly founded the Joint Mediation Helpline. In Hong Kong, engineering and public works is the first sector which engaged mediation. Therefore, architects have rich experience in mediation. Here, I

can point out that I will be very much surprised if the HKMAAL or even its council does not have a representative from the construction industry. I believe we will attach great importance to the receptiveness and representativeness of the HKMAAL, which will develop in the right direction.

Finally, Deputy President, I would like to respond to some of the issues raised by Mr Albert CHAN. Deputy President, certainly, I cannot comment on individual cases because I do not have the relevant information. But I would like to raise some points. Mr Albert CHAN, when mentioning land resumption, seemed to be saying that the Government would ask the affected parties whether they would accept a certain amount of compensation and the affected parties could resort to litigation if they did not accept it. This is somewhat different from my understanding. Once land resumption is involved, including land resumption by the Urban Renewal Authority, anyone who is experienced will know that the authorities concerned will strive to reach an agreement with the affected parties before the case is referred to the Lands Tribunal. At that stage, a situation may arise where ex-gratia payment is offered as an incentive for forging an agreement. To my understanding, the parties will engage in frequent communications with a view to reaching an agreement and solving the problem expeditiously before referring the case to the Lands Tribunal. In fact, the assessment of compensation by the Lands Tribunal is the final option.

Certainly, we do not have a mandatory clause. Mr Albert CHAN has pointed out that in other jurisdictions, mediation is made mandatory before the parties can resort to other procedures. But we do not have such a requirement. In compiling our Report, we did consider whether there would be such a basis in Hong Kong for us to legislate on mandatory mediation. But our conclusion pointed to a negative answer. However, as I said earlier, the Practice Direction 31 is a kind of encouragement as well as pressure on the parties to engage in mediation. In the absence of a mandatory clause, if the affected party is willing to deal with the compensation by mediation through the Mediation Information Office or other organizations, I do not think the Government will reject it in an absolute manner. I do not think this is the current attitude of the Government. As I said earlier, I have also had opportunities to explain the merits of mediation to various government departments in the past few years.

In fact, the Lands Tribunal has set up a Pilot Scheme to promote mediation in respect of compulsory sale and building management. I will also reflect the actual situation of land resumption to the Judiciary so as to enable it to determine whether there is a need to further extend the applicability of the Practice Direction 31. Certainly, the consideration rests with the Judiciary ultimately. But I will also reflect public views to them. Regarding mediation, I am sure that we are actually moving ahead in a direction. But at this stage, we may not be able to stipulate the implementation of mandatory mediation or legislate on mandatory mediation.

Deputy President, I have spoken at length to respond to Members because I am very grateful to Members for their active participation and earnest speeches on this issue. As I said at a seminar on mediation earlier this month, we have made considerable progress in mediation which, as an option of dispute resolution, has taken root in present-day Hong Kong.

I once again thank Members for their various contributions to mediation work. I would also like to emphasize in particular that members of the Working Group on Mediation, the Mediation Task Force and other sub-groups have also spent a lot of time and efforts on this. Hence I would also like to express my gratitude to them. Undoubtedly, the enactment of legislation on mediation will mark another significant milestone, representing our efforts in promoting the wider and more effective use of mediation to resolve disputes and strengthen Hong Kong's status as an international dispute resolution centre.

Deputy President, I urge Members to support the Second Reading of the Bill and pass the amendments to be proposed by the authorities at the Committee stage later on. Thank you.

**DEPUTY PRESIDENT** (in Cantonese): I now put the question to you and that is: That the Mediation Bill be read the Second time. Will those in favour please raise their hands?

(Members raised their hands)

**DEPUTY PRESIDENT** (in Cantonese): Those against please raise their hands.

(No hands raised)

Mr Albert CHAN rose to claim a division.

**DEPUTY PRESIDENT** (in Cantonese): Mr Albert CHAN has claimed a division. The division bell will ring for five minutes.

**DEPUTY PRESIDENT** (in Cantonese): Will Members please proceed to vote.

**DEPUTY PRESIDENT** (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Dr Raymond HO, Mr Fred LI, Dr Margaret NG, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Emily LAU, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Ms Audrey EU, Mr WONG Kwok-hing, Mr LEE Wing-tat, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Ronny TONG, Prof Patrick LAU, Mr KAM Nai-wai, Ms Cyd HO, Dr LAM Tai-fai, Mr CHAN Hak-kan, Mr Paul CHAN, Mr CHAN Kin-por, Dr Priscilla LEUNG, Mr WONG Sing-chi, Mr WONG Kwok-kin, Mr IP Wai-ming, Dr PAN Pey-chyou, Dr Samson TAM, Mr Alan LEONG, Miss Tanya CHAN and Mr Albert CHAN voted for the motion.

THE DEPUTY PRESIDENT, Ms Miriam LAU, did not cast any vote.

THE DEPUTY PRESIDENT announced that there were 37 Members present and 36 were in favour of the motion. Since the question was agreed by a majority of the Members present, she therefore declared that the motion was passed.

**CLERK** (in Cantonese): Mediation Bill.

Council went into Committee.

### **Committee Stage**

**DEUPTY CHAIRMAN** (in Cantonese): Committee stage. Council is now in Committee.

### **MEDIATION BILL**

**DEPUTY CHAIRMAN** (in Cantonese): I now propose the question to you and that is: That the following clauses stand part of the Mediation Bill.

**CLERK** (in Cantonese): Clauses 1 to 7, 9, 10 and 11.

**DEPUTY CHAIRMAN** (in Cantonese): Does any Member wish to speak?

**MR ALBERT CHAN** (in Cantonese): Deputy Chairman, I am going to respond briefly to the comments made by the Secretary for Justice just now.

First, he said that .....

**DEPUTY CHAIRMAN** (in Cantonese): Mr CHAN, you should comment on these clauses.

**MR ALBERT CHAN** (in Cantonese): Deputy Chairman, let me look at the clauses first, or someone would say again that I ....., I have to ascertain if my comments will touch on these clauses and at the same time, respond to the



comments made by the Secretary for Justice just now. This is because the clauses just now .....

Deputy Chairman, are we discussing clause 1 ..... which clauses are they? Clauses 1 to 7, 9 (*a Member spoke*) ..... I am not filibustering. Clauses 1 to 7, 9 .....

**DEPUTY CHAIRMAN** (in Cantonese): Mr CHAN, you can take a look at the screen.

**MR ALBERT CHAN** (in Cantonese): Sorry, Deputy Chairman.

**DEPUTY CHAIRMAN** (in Cantonese): You can look at the screen.

**MR ALBERT CHAN** (in Cantonese): Yes. These clauses are related to issues like the provision of support in the process of mediation, Deputy Chairman, so my comments bear some relevance to them.

In order to provide adequate support, it is necessary to have binding effect in law. Without such effect, the relevant organizations, in particular, government departments, can do as they wish. Therefore, I sincerely — I am seldom so sincere, Deputy Chairman, and of course, there is only a fortnight left in the term of the Secretary for Justice — I sincerely ..... in this society, there are many socially disadvantaged groups and many members of the public are subjected to unfair treatment and oppression by officials of most imposing demeanour in various government departments. In the face of the senior management of the Government, of course, the people in many departments would say that they could do anything but under the oppression by officials of imposing demeanour, ordinary Members of the public are absolutely vulnerable and have no support whatsoever when they actually face difficulties and problems.

Therefore, although the Secretary for Justice said just now that various departments would do this and that, from our actual experience, the situation is by

no means like the one described by him. Otherwise, it would not have been necessary for some members of the public to take psychiatric drugs for more than a decade and they would not have ended up killing themselves, nor would they have jumped off buildings, thus breaking their legs. All these are real-life instances reported by the press, Secretary. Therefore, if the Secretary for Justice thinks that the present mechanism can already take care of the instances mentioned by me, I can tell him clearly that this is not the case.

In addition, the instances mentioned by him just now are not related to the Urban Renewal Authority (URA) at all. Land resumption involves several areas, including part of the Railways Ordinance and part of the Lands Resumption Ordinance, and many cases of land resumption are also partially related to the Urban Renewal Authority Ordinance. However, the great majority of land resumption cases, particularly those involving infrastructure projects, have nothing whatsoever to do with the Urban Renewal Authority Ordinance, nor are they related in any way to compensations offered by the URA. Therefore, since the Government is so sincere and is willing to provide so much support, if it is specified in law ..... in many countries, such as China, the United States, Canada, Australia and New Zealand, it is already specified in law, particularly in legislation on land resumption and environmental protection, that a procedure must be or may be followed. If the Secretary for Justice thinks that government departments would be prepared to accept mediation if members of the public propose it, let me tell you that I had formally proposed mediation on behalf of members of the public before but the Government (in particular, the Lands Department) turned it down formally, unwilling to accept mediation.

Therefore, I hope that such a malpractice of government departments can be rectified with the passage of the Bill today. The Secretary for Justice can issue a formal order to all government departments, including the Lands Department, the URA, the Highways Department and the Home Affairs Department, and so on, that may be involved in disputes. Since the Government supports mediation and since the Secretary for Justice said in international conferences that Hong Kong aspires to becoming a dispute resolution centre, if members of the public request that mediation be conducted, it is only right that all government departments must accept mediation. Otherwise, this would surely become a scandal in the world or a blot on the Government's reputation. If Hong Kong is a dispute resolution centre but the Government itself does not accept mediation, this would be extremely ridiculous indeed.

I hope the Secretary for Justice can exert his best to issue a most important order to all government departments in the remaining fortnight of his term, so as to avoid bringing disgrace on the Government and drawing the criticism that the Secretary for Justice is preaching one thing but practising another, making high-sounding statements in the legislature but continuing to bully disadvantaged members of the public with a draconian law in actual practice.

**DEPUTY CHAIRMAN** (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

**DEPUTY CHAIRMAN** (in Cantonese): Secretary for Justice, do you wish to speak?

**SECRETARY FOR JUSTICE** (in Cantonese): Deputy Chairman, I have nothing to add.

**DEPUTY CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clauses 1 to 7, 9, 10 and 11 stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

**DEPUTY CHAIRMAN** (in Cantonese): Those against please raise their hands.

(No hands raised)

**DEPUTY CHAIRMAN** (in Cantonese): I think the question is agreed by a majority of Members present. I declare the motion passed.

**CLERK** (in Cantonese): Clause 8.

**SECRETARY FOR JUSTICE** (in Cantonese): Deputy Chairman, I move the amendment to clause 8(2) as set out in the paper circularized to Members.

Clause 8 of the Bill provides that a person must not disclose a mediation communication except as provided by subsection (2) or (3). Clause 8(2) provides for situations where a person may disclose a mediation communication. In the meetings of the Bills Committee, some Members have asked about a possible scenario and that is, the parties to mediation have not instructed lawyers to assist them in the first place and wish to consult lawyers only after the commencement of the mediation. As both parties may not have reached any agreement in advance that the parties are allowed to disclose mediation communications to the lawyer in order to obtain the legal advice required, Members are concerned as to whether the original clause would allow such disclosure of mediation communications.

In response to Members' concern, we have proposed to amend clause 8(2) of the Bill to add an additional paragraph to expressly allow the disclosure of mediation communications for the purpose of seeking legal advice. The Bills Committee has discussed this amendment and expressed support for it. I urge Members to pass the amendment.

*Proposed amendment*

**Clause 8 (See Annex II)**

**DEPUTY CHAIRMAN** (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

**DEPUTY CHAIRMAN** (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Justice be passed. Will those in favour please raise their hands?

(Members raised their hands)

**DEPUTY CHAIRMAN** (in Cantonese): Those against please raise their hands.

(No hands raised)

Mr Albert CHAN rose to claim a division.

**DEPUTY CHAIRMAN** (in Cantonese): Mr Albert CHAN has claimed a division. The division bell will ring for five minutes.

**DEPUTY CHAIRMAN** (in Cantonese): Will Members please proceed to vote.

**DEPUTY CHAIRMAN** (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Dr Raymond HO, Dr Margaret NG, Mrs Sophie LEUNG, Dr Philip WONG, Mr LAU Kong-wah, Mr LAU Wong-fat, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Frederick FUNG, Ms Audrey EU, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Ronny TONG, Mr CHIM Pui-chung, Prof Patrick LAU, Mr KAM Nai-wai, Ms Cyd HO, Ms Starry LEE, Dr LAM Tai-fai, Mr Paul CHAN, Mr CHAN Kin-por, Dr Pricilla LEUNG, Mr WONG Sing-chi, Mr WONG Kwok-kin, Mr IP Wai-ming, Dr PAN Pey-chyou, Dr Samson TAM, Mr Alan LEONG and Miss Tanya CHAN voted for the amendment.

THE DEPUTY CHAIRMAN, Ms Miriam LAU, did not cast any vote.

THE DEPUTY CHAIRMAN announced that there were 33 Members present and 32 were in favour of the amendment. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was passed.

**CLERK** (in Cantonese): Clause 8 as amended.

**DEPUTY CHAIRMAN** (in Cantonese): I now put the question to you and that is: That clause 8 as amended stands part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

**DEPUTY CHAIRMAN** (in Cantonese): Those against please raise their hands.

(No hands raised)

**DEPUTY CHAIRMAN** (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

**CLERK** (in Cantonese): Schedule 2.

**DEPUTY CHAIRMAN** (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

**DEPUTY CHAIRMAN** (in Cantonese): I now put the question to you and that is: That Schedule 2 stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

**DEPUTY CHAIRMAN** (in Cantonese): Those against please raise their hands.

(No hands raised)

**DEPUTY CHAIRMAN** (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

**CLERK** (in Cantonese): Schedule 1.

**SECRETARY FOR JUSTICE** (in Cantonese): Deputy Chairman, I move the amendment to Schedules 1 and 2 as set out in the paper circularized to Members.

Schedule 1 to the Bill sets out the processes which this Bill does not apply. These include statutory arrangements for enforcing certain specific ordinances and for which there is other form of regulation. It is not the intention of this Bill to affect these existing operations. An example is the mediation proceedings referred to in sections 32 and 33 of the Arbitration Ordinance. The reference is set out in item 12 of Schedule 1 to the Bill and the reason for excluding such mediation proceedings is that "med-arb" and "arb-med-arb" under the Arbitration Ordinance are two specific processes. These processes are specified in the Arbitration Ordinance and they should be regulated by the relevant provisions in the Arbitration Ordinance.

However, item 12 of Schedule 1 to the Bill will not have the effect of excluding any mediation conducted by a mediator appointed by the Hong Kong International Arbitration Centre under section 32(1) and (2) of the Arbitration Ordinance from the application of the Bill if the mediation in question does not constitute "mediation proceedings" in the context of "med-arb" and "arb-med-arb" provided in the Arbitration Ordinance. However, to address Members' concern and to avoid any doubts, we propose an amendment to item 12 of Schedule 1 to the Bill to replace the general reference to section 32 of the Arbitration Ordinance with a specific reference to section 32(3) of the same Ordinance.

The Bills Committee has discussed this amendment and expressed support for it. I urge Members to pass this amendment.

*Proposed amendment*

**Schedule 1 (See Annex II)**

**DEPUTY CHAIRMAN** (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

**DEPUTY CHAIRMAN** (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Justice be passed. Will those in favour please raise their hands?

(Members raised their hands)

**DEPUTY CHAIRMAN** (in Cantonese): Those against please raise their hands.

(No hands raised)

Mr WONG Yuk-man rose to claim a division.

**DEPUTY CHAIRMAN** (in Cantonese): Mr WONG Yuk-man has claimed a division. The division bell will ring for five minutes.

**DEPUTY CHAIRMAN** (in Cantonese): Will Members please proceed to vote.

**DEPUTY CHAIRMAN** (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Dr Raymond HO, Dr Margaret NG, Mr James TO, Mrs Sophie LEUNG, Dr Philip WONG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Emily LAU, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Frederick FUNG, Ms Audrey EU, Mr WONG Kwok-hing, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Ronny TONG, Mr CHIM Pui-chung, Prof Patrick LAU, Mr KAM Nai-wai, Ms Starry LEE, Dr LAM Tai-fai, Mr Paul CHAN, Mr CHAN Kin-por, Dr Priscilla LEUNG, Mr WONG



Sing-chi, Mr WONG Kwok-kin, Mr IP Wai-ming, Dr PAN Pey-chyou, Dr Samson TAM, Mr Alan LEONG, Miss Tanya CHAN, Mr Albert CHAN and Mr WONG Yuk-man voted for the amendment.

THE DEPUTY CHAIRMAN, Ms Miriam LAU, did not cast any vote.

THE DEPUTY CHAIRMAN announced that there were 37 Members present and 36 were in favour of the amendment. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was passed.

**CLERK** (in Cantonese): Schedule 1 as amended.

**DEPUTY CHAIRMAN** (in Cantonese): I now put the question to you and that is: That Schedule 1 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

**DEPUTY CHAIRMAN** (in Cantonese): Those against please raise their hands.

(No hands raised)

**DEPUTY CHAIRMAN** (in Cantonese): I think the question is agreed by a majority of Members present. I declare the motion passed.

**DEPUTY CHAIRMAN** (in Cantonese): Council now resumes.

Council then resumed.

**Third Reading of Bills**

**DEPUTY PRESIDENT** (in Cantonese): Bill: Third Reading.

**MEDIATION BILL**

**SECRETARY FOR JUSTICE** (in Cantonese): Deputy President, the

Mediation Bill

has passed through Committee with amendments. I move that this Bill be read the Third time and do pass.

**DEPUTY PRESIDENT** (in Cantonese): I now propose the question to you and that is: That the Mediation Bill be read the Third time and do pass.

**DEPUTY PRESIDENT** (in Cantonese): Does any Member wish to speak?

**DR MARGARET NG** (in Cantonese): Deputy President, please allow me to say a few words. First, I thank the Secretary for Justice for his compliments on me. I believe that defending the rule of law and ensuring the quality of the legislation enacted by the SAR Government are our common goals. I thank the Secretary for Justice for his support over the years, in particular, for his support for the Panel on Administration of Justice and Legal Services. Everyone can see that he cares about and attends personally to all matters under his charge. Through the Secretary for Justice, I wish to thank his colleagues for their serious attitude and support for this Council.

Thank you, Deputy President.

**DEPUTY PRESIDENT** (in Cantonese): I now put the question to you and that is .....

(Mr Albert CHAN stood up)

**DEPUTY PRESIDENT** (in Cantonese): Mr Albert CHAN, what is your point?

**MR ALBERT CHAN** (in Cantonese): Since Dr Margaret NG was allowed to speak, I suppose other Members are also allowed to speak?

**DEPUTY PRESIDENT** (in Cantonese): Yes, they are. Does any other Member wish to speak?

**MR ALBERT CHAN** (in Cantonese): Deputy President, I agree with the praises sung by the Secretary for Justice of Dr Margaret NG. I have all along worked together with Dr Margaret NG in this legislature, including in the Legislative Council of the British-Hong Kong era. Although it cannot be said that we have co-operated with each other continuously, I have learnt a lot from her, particularly in the scrutiny of legislation. Insofar as the scrutiny of legislation is concerned, there are two Members whom I admire greatly, one being Dr Margaret NG, the other being Mr Ronald ARCULLI. I joined the Legislative Council in 1991 and it can be said that when I scrutinized legal provisions together with them, my relationship with them was like that of a master and pupil. Dr Margaret NG .....

**DEPUTY PRESIDENT** (in Cantonese): Mr CHAN, we are at the stage of the Third Reading of the Mediation Bill. Regarding your compliments, you can voice them when this Council deals with the Valedictory Motion later on.

**MR ALBERT CHAN** (in Cantonese): No, this is because Dr Margaret NG is the Chairman of the Bills Committee. I only wish to take this opportunity to put my praises of Dr Margaret NG on record because Dr Margaret NG may leave the Council in the future, so this is really a pity. I hope she would change her mind and fight another battle for the Civic Party again. Since Ms Audrey EU has changed her mind, so can Dr Margaret NG. I call on her to run in direct elections. If Dr Margaret NG could run in direct elections, for democracy in Hong Kong, this would be .....

**DEPUTY PRESIDENT** (in Cantonese): This is simply a point of order because Mr Albert CHAN is not commenting on the Third Reading of the Bill. I have already reminded him.

**MR ALBERT CHAN** (in Cantonese): Deputy President, I am talking about the Chairman of the Bills Committee on this Bill.

**DEPUTY PRESIDENT** (in Cantonese): Please focus on the Third Reading of the Bill.

**MR ALBERT CHAN** (in Cantonese): Deputy President, of course, I will continue to support the Third Reading of the Mediation Bill. In the debate on the Second Reading, I have voiced my heartfelt feelings. After the passage of the Bill, any dispute, mediation ..... there are many disputes among the public, so in the future, this Bill will be able to assist the public in resolving and easing conflicts. Mr LAU Kong-wah said earlier that "harmony is the most precious" (以和為貴) but there is a film about triad societies called "以和為貴" (Election 2). Please do not make this legislature sound like a place for triad societies, as "Corrupt Donald TSANG" once said.

Harmony is the most precious and of course, wealthy people can afford to carry out mediation but often, poor members of the general public cannot do so even if they want to, as I said to the Secretary for Justice just now. They want to make use of mediation but the Government has gone so far as to refuse to do so. How can the Government refuse mediation? If we treasure harmony, should the Government take the lead in dealing with disputes in an amicable way? It should not adopt a high-handed approach and the attitude of using the law to overpower people, which were what Mr LAU Wong-fat encountered when dealing with our "fighter" Secretary. Does one mean that she can have her way? Not even any consultation had been carried out before she said she wanted to put an end to the rights to which some people have been for over a century. This right may not have such a long history of over a century, but this right is guaranteed by the Basic Law. Although we may not agree with the various privileges that indigenous villagers have, all Secretaries of Department and Directors of Bureau should change this kind of high-handed attitude. "Uncle

FAT" can first ask the Secretary for Justice and the "fighter" Secretary if, in their opinion and position, mediation is acceptable .....

**DEPUTY PRESIDENT** (in Cantonese): Mr CHAN, please focus your comments on the Mediation Bill, which is to be read for the Third time.

**MR ALBERT CHAN** (in Cantonese): I understand, Deputy President. Just now, I was exactly talking about the issue of mediation. Regarding the resolution of disputes by mediation, some disputes are civil disputes, some are legal disputes and some are political disputes. In fact, mediation is most suitable for political disputes and one cannot just rely on high-handedness. If the Government relies on high-handedness, instances of filibuster would occur. In fact, filibuster is a very humble and comparatively cowardly course of action because it is in situations that we cannot fight back and can only talk that we would say a few words more from time to time.

If the Government wants to act in concert with our great Motherland by building a harmonious society and regards harmony as the most precious, as Mr LAU Kong-wah put it, mediation is very important. Therefore, Secretary for Justice, the Government must take the lead in resolving disputes through mediation. It cannot say, "In case of civil disputes, you can mediate among yourselves but as regards these legal disputes, disputes on land development and those involving the authority of the Government, they must be dealt with according to the law. If you have the guts, just sue me!"

I hope that with the passage of the Bill, the Government can take the lead in proposing mediation for resolution of disputes. If the Government is unwilling to do so, when the public or victims take the initiative and request mediation ....., Secretary for Justice, disputes should be dealt with by a three-step approach: mediation, arbitration, to be followed by legal proceedings as the last resort. Just now, I mentioned many overseas places, for example, in Alberta, Canada, which is often cited by me as an example, the mediation mechanism for handling land disputes was established as long as 20 years ago. In Australia, several states have also introduced legal requirements, some of which have been in place for more than 20 years. They stipulate that disputes should be dealt with by a three-step approach: mediation, arbitration and legal proceedings.

In respect of mediation, sometimes, it is specified that for some disputes, both sides cannot hire lawyers in the process of mediation. This point is very important because hiring lawyers and experts is costly. Therefore, the mediation in some aspects ..... if important contracts are at stake, this would be another matter. However, if the amount of money under dispute is below a certain level or some disputes meet the legal requirements ..... this is just like the labour disputes heard by the Labour Tribunal in Hong Kong, in which both sides cannot hire any lawyer and in the same vein, lawyers cannot be hired for disputes handled by the Small Claims Tribunal. The way that these judicial institutions deal with disputes can also be regarded as mediation.

The enactment of the Mediation Bill is only the beginning in the prescription of numerous requirements. The next step is to formulate administrative measures and of course, I hope that there can be as many such measures as possible. Next, the legislation has to be amended. I believe society can be harmonious only with complementary measures in law.

Here, I thank Dr Margaret NG once again for leading the Bills Committee, so that the Bill can be put in place. I also hope that she can reconsider the proposal made by me just now. Thank you.

**DEPUTY PRESIDENT** (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

**DEPUTY PRESIDENT** (in Cantonese): I now put the question to you as stated. Will those in favour please raise their hands?

(Members raised their hands)

**DEPUTY PRESIDENT** (in Cantonese): Those against please raise their hands.

(No hands raised)

**DEPUTY PRESIDENT** (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

**CLERK** (in Cantonese): Mediation Bill.

### **Resumption of Second Reading Debate on Bills**

**DEPUTY PRESIDENT** (in Cantonese): We now resume the Second Reading debate on the Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011.

### **MANDATORY PROVIDENT FUND SCHEMES (AMENDMENT) (NO. 2) BILL 2011**

#### **Resumption of debate on Second Reading which was moved on 14 December 2011**

**DEPUTY PRESIDENT** (in Cantonese): Mr WONG Ting-kwong, Chairman of the Bills Committee on the above Bill, will now address the Council on the Committee's Report.

**MR WONG TING-KWONG** (in Cantonese): Deputy President, may I ask how much time I have for my speech? I believe there are less than 10 minutes to go before 12.30 pm, so this is not enough for me to speak in my capacity as Chairman of the Bills Committee. What can be done?

**DEPUTY PRESIDENT** (in Cantonese): Mr WONG, as far as I know, you have 15 minutes to speak on behalf of the Bills Committee and another 15 minutes to express your personal views.

**MR WONG TING-KWONG** (in Cantonese): Fine.

Deputy President, in my capacity as Chairman of the Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011 (the Bills Committee), I now submit the Bills Committee's Report to the Council and report on the highlights of the deliberations by the Bills Committee.

The principal objects of the Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2011 (the Bill) are to amend the Mandatory Provident Fund Schemes Ordinance to provide for a statutory regulatory regime for Mandatory Provident Fund (MPF) intermediaries to facilitate implementation of the Employee Choice Arrangement (ECA). The Bill also proposes to establish an electronic transfer system (E-platform) to facilitate the transmission of data on transfer of accrued benefits and enhance deterrence of default contributions by employers.

The Bills Committee has held nine meetings and invited the general public, including the relevant sectors, labour unions and professional organizations to give views on the Bill.

In view of the fact that the proposed regulatory regime involves the Mandatory Provident Fund Schemes Authority (MPFA) and three front-line regulators (FRs), namely, the Hong Kong Monetary Authority, the Insurance Authority and the Securities and Futures Commission, the Bills Committee has expressed concern over whether or not such a regulatory regime may give rise to inconsistencies in supervision and enforcement standards and what measures the Administration would take to ensure regulatory consistency and a level playing field.

The Administration has advised that the proposed regulatory approach would ensure the efficient use of regulatory resources as MPF intermediary activities are incidental to the main lines of business of most MPF intermediaries, who are subject to the supervision of the respective FRs for their main lines of business. There are various measures in the Bill to ensure regulatory consistency and a level playing field. Moreover, the MPFA has established a regular liaison forum with the FRs to enhance inter-regulator communication.

The Bills Committee notes that the current regulatory system in Hong Kong in respect of financial products is disclosure-based and MPF scheme members will rely heavily on the information provided by MPF intermediaries after the implementation of the ECA. Members are concerned about the



mechanism for ensuring that MPF intermediaries have acquired up-to-date and adequate knowledge on the MPF System and MPF products before marketing MPF products. Members are also concerned about the regulatory measures that ensure intermediaries comply with the conduct requirements.

Deputy President, the Administration indicated that continued competence of MPF intermediaries would be ensured through continued Continuing Professional Development courses supplemented by effective regulation. Since 2009, the MPFA has set up a dedicated team to implement a comprehensive quality assurance system. Under the Bill, principal intermediaries (PIs) will have a legal responsibility to put in place proper control and procedures to ensure that their subsidiary intermediaries comply with the conduct requirements. The FRs in their supervision of the PIs will ascertain compliance therewith. In this connection, the Administration has taken on board Members' suggestion of adding a provision to the Bill to require registered MPF intermediaries to keep key records regarding their compliance with the statutory conduct requirements.

The Bills Committee has examined how complaints against MPF intermediaries' misconduct would be processed, including the workflow and demarcation of responsibilities and powers among the MPFA and the FRs in handling alleged cases of misconduct of MPF intermediaries. The Bills Committee has also sought clarification on whether the MPFA will disclose details of an investigation to the complainant concerned. The Administration has advised that the MPFA will inform the complainant in writing of the outcome of the follow-up actions taken in respect of a complaint at the conclusion of an investigation and any resultant enforcement actions. The Bill also requires the MPFA to include in the Register of Intermediaries a record of the applicable disciplinary order that has been in force against the registered MPF intermediaries within the last five years.

As regards the avenues for scheme members to seek redress or compensation, the Administration has advised that in addition to any relevant common law actions, by virtue of section 108 of the Securities and Futures Ordinance, where a registered MPF intermediary makes any fraudulent representation, reckless misrepresentation or negligent misrepresentation by which a person is induced to acquire an interest in MPF schemes, the registered MPF intermediary shall be liable to pay compensation by way of damages to the other person for any pecuniary loss that the other person has sustained as a result

of reliance of the said misrepresentation. In this regard, the Bills Committee has discussed the draft amendments proposed by Mr KAM Nai-wai and Mr WONG Sing-chi. Mr KAM's amendment seeks to empower the MPFA to order an MPF intermediary who has committed misconduct to pay compensation to a person who has suffered loss due to the action of the former. Mr WONG's amendment seeks to require that when the MPFA gives a regulated person a notice in writing of a preliminary view that it should make a disciplinary order, it must also give the complainant a copy of the notice, so as to remove the inequitable situation in terms of information in the settlement negotiation process between the intermediary and the complainant. Members have expressed different views on the amendments.

Deputy President, regarding offence provisions, the Bills Committee notes that a person carrying on or holding out as carrying on regulated activities without registration commits an offence. Having considered Members' views, the Administration has undertaken to move amendments to adjust downwards the maximum level of penalties applicable to individuals acting as employees, agents or representatives of PIs.

The Bills Committee notes that while the MPFA is empowered under the Bill to charge registration fees and an annual fee on MPF intermediaries, the MPFA has indicated its plan not to charge any registration fee or annual fee at the initial stage of the implementation of the ECA, so as to facilitate smooth transition. In future, changes to the level of fees will be introduced by way of subsidiary legislation and the level of fees will be determined based on the cost-recovery principle. Some Members have expressed concern that there may be controversies when the MPFA subsequently charges the fees. The present drafting of the Bill also does not adequately reflect the policy intent that the fee waiver is only a temporary arrangement. A Member has expressed the view that the fees should form part of the operating costs of the MPF intermediaries and it is not appropriate for the MPFA to subsidize such costs.

The Administration has advised that when discussing this issue with the industry, the MPFA has made it clear that fees would be imposed after the initial period. Taking into account Members' views, the Administration has advised that the Secretary for Financial Services and the Treasury will reiterate in his speech for resumption of Second Reading debate on the Bill that the waiving of these fees is only a temporary relief measure and that the MPFA would review and propose appropriate fees for the operation of the MPF intermediary regime on

a cost-recovery basis after the initial stage of implementation of the statutory regime.

Apart from the aforementioned matters, the Bills Committee has also deliberated with the Administration the following:

- the transitional arrangements for the registration of MPF intermediaries;
- supervision, investigation and disciplinary sanction arrangements;
- the impact of the E-platform for transmission of data on transfer of MPF benefits on the fees chargeable by MPF trustees on MPF scheme members; and
- the preparatory and publicity work to tie in with the implementation of the new regulatory regime and the launch of the ECA.

In response to the concerns and views of Members, the Administration will propose various Committee stage amendments (CSAs). The Bills Committee agrees to the CSAs to be moved by the Administration and supports the resumption of the Second Reading debate on the Bill.

Deputy President, next, I am going to express my personal views and speak in support of the Bill and the CSAs on behalf of the DAB. Is there still any time left?

**DEPUTY PRESIDENT** (in Cantonese): Mr WONG, you may choose to continue with your speech. As I intend to announce the suspension of the meeting till 4.30 pm on 19 June, you may also consider continuing with your speech then.

**MR WONG TING-KWONG** (in Cantonese): I do not wish to keep Members. Let me continue with my speech when the meeting resumes.

**SUSPENSION OF MEETING**

**DEPUTY PRESIDENT** (in Cantonese): I now suspend the meeting until 4.30 pm on Tuesday, 19 June 2012.

*Suspended accordingly at twenty-eight minutes to One o'clock.*

**Annex II**

## Mediation Bill

**Committee Stage**Amendments moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
8(2)(e)	By deleting “relates; or” and substituting “relates;”.
8(2)	By adding – “(ea) the disclosure is made for the purpose of seeking legal advice; or”.
Schedule 1, item 12	By deleting “32” and substituting “32(3)”.