



## **Report of the Secretary of Justice's Working Group on Mediation Law Society Initial Submissions**

### **Background**

The Mediation Committee of the Law Society charged with reviewing matters relating to mediation and formulating mediation policies, has considered the key aspects of the Report of the Working Group on Mediation (the "Consultation Report"). The Consultation Report contains 48 recommendations covering publicity and public education on mediation, accreditation of mediators and the legal framework for regulating the mediation profession.

### **General Comments**

The Consultation Paper promulgates a proper definition for mediation (**Recommendations 1-2**), greater awareness and accessibility of mediation services (**Recommendations 3-24**), professional standards and integrity (**Recommendations 25 – 31**) and a basic regulatory framework (**Recommendations 32 – 48**). It is apparently difficult to object to any of these recommendations at first reading.

### **Specific Comments**

The purpose of this Initial Submission is to highlight some of the Law Society's concerns about the key aspects of the Report, namely the promotion of mediation, quality assurance of mediators and the institutional arrangement for implementing mediation policies. Set out below are the Committee's considered responses to some relevant recommendations posed in the Consultation Report.

#### **Recommendation 8**

The pace of promoting mediation should take into account the readiness of mediators, the maturity of the infrastructural support, and the needs of mediation users. The course of the promotion may be divided into 3 stages: Stage 1 (Awareness Building), Stage 2 (Intensified and Targeted Publicity), and Stage 3 (Mass Outreach). As development migrates from Stage 1 to Stage 2, the pace of promoting mediation should be stepped up. Given the competing demands for Government publicity resources, the support and concerted efforts of all parties involved in mediation should be enlisted.

#### **Recommendation 9**

Mediation pilot schemes be considered for disputes in areas such as in the workplace and employment, intellectual property, banking and financial services, medical malpractice and healthcare, child protection, environmental, urban planning, land use and re-development.

#### **Response:**

The Law Society supports the use of mediation and encourages its members to consider mediation as a tool to enhance dispute resolution. Indeed, it is a requirement under the Code of Conduct for solicitors to consider resolving all disputes by alternative dispute resolution

mechanisms. The promotion of mediation in Hong Kong is now moving from 'awareness building' to 'targeted publicity'. Hence promotional efforts should target various categories of users and industry sectors such as the financial services, medical services, property development, land use and environmental conservation. Moreover, government officials of the relevant Bureaus should be trained to understand the nature and limitations of mediation before they incorporate mediation as a dispute resolution mechanism into their policies. Institutional support should also be made available to newly-qualified mediators, to enable them to obtain practical experience in order to have the ability to provide the standard of service expected.

#### **Recommendation 16**

Pending the outcome of the Pilot Project on Community Venues for Mediation, there should be at least one community centre in Hong Kong Island, one in Kowloon and one in the New Territories to be made available as community venues for mediation.

#### **Response:**

The Law Society notes that in other comparable jurisdictions, subsidized venues for mediation are available, notwithstanding the fact that it is normally the responsibility of the parties to find and fund the venue:

- **England and Wales:** cases referred to mediation by the National Mediation Helpline are usually conducted in court premises. If mediation is subsidized by the Legal Aid the scheme will reimburse the reasonable costs of hiring a venue.
- **Singapore:** mediation venues are provided by the Singapore Mediation Centre funded by the government through Ministry of Law.
- **Australia:** venues are provided by charities, community centres and the Department of Justice.

Indeed, there is a view that disputes can be resolved in courts without the parties having to bear venue charges. To the extent that there will be more disputes resolved outside courts through mediation, there will be less demand for court resources, and therefore the Judiciary should be ready to devote more resources for mediation. We therefore take the view that not only should subsidized venues be made available, but also basic facilities such as white boards, stationery, round tables, photocopying services, etc. These centres should be available during the day and not just during evenings.

#### **Recommendation 18**

The Bar Association and the Law Society should be invited to consider the content and coverage of mediation training for their members as part of their ongoing professional development and whether such training should be made compulsory.

#### **Response:**

The Law Society organises training and seminars to train mediators and to provide lawyers with alternative skills that strengthen their effectiveness as advocates, including negotiation and mediation advocacy courses. The Law Society will continue to provide such courses but does not think compulsory courses should be introduced as lawyers practising in different fields have different training needs. Lawyers must comply with training requirements of their professional bodies and due to competing time commitments it will be onerous to make mediation-related

training compulsory. The Law Society will however continue to cover developments in mediation practice in its publications which are circulated to all members of the profession so that the concept of mediation is well known and understood in the profession.

**Recommendation 25**

The establishment of a single body for accrediting mediators is desirable and can assist to ensure the quality of mediators, consistency of standards, education of the public about mediators and mediation, build public confidence in mediation services and maintain the credibility of mediation.

**Recommendation 26**

It is considered that currently the time is not right to prescribe a standardised system of accrediting mediators and that the emphasis should be on the provision of appropriate mediation information to potential users of mediation that will enable them to decide whether to choose mediation to resolve disputes and also assist them to be better able to choose competent mediators.

**Recommendation 27**

There should be wide promulgation of the Hong Kong Mediation Code which is a code of conduct for mediators in Hong Kong and mediation service providers are encouraged to adopt the Code and set up robust complaints and disciplinary processes to enforce the Code.

**Recommendation 28**

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

**Response:**

The Law Society agrees with the recommendations in principle subject to the following qualifications.

In order to enhance the professional standard of and public confidence in mediators, uniform accreditation benchmarks and a regulatory framework under a single accreditation body should be established. The Law Society considers:

- 1) setting up a single accreditation body, prescribing standardised accreditation benchmarks and promulgating a Code of Conduct of mediators are three issues which should be dealt with separately.
- 2) the establishment of a single accreditation body should take into account the current standards of the various providers, the readiness of stakeholders and the relevant Government policies.
- 3) the single accreditation body can be a company limited by guarantee, or a statutory body or a joint committee subject to agreement amongst stakeholders.
- 4) Accreditation bodies should be working together, as a matter of priority, to formulate uniform accreditation benchmarks, including the accreditation of mediation training courses, assessments and post qualification requirements to eliminate the stumbling blocks of setting up a single accreditation body.
- 5) a Code of Conduct cannot replace an accreditation system as accreditation seeks to maintain the minimum skills expected of a mediator to conduct facilitative mediation, whilst the Code of Conduct seeks to maintain the professional integrity and ethics of mediators.
- 6) the proposed Hong Kong Mediation Code states the minimum ethical standards expected of mediators. We recommend commentaries be added to provide more guidance on how mediators can maintain neutrality, impartiality and confidentiality.

- 7) it is recommended the major mediation service providers cooperate on how the Hong Kong Mediation Code can be adopted. If each service provider attempts to merge the Hong Kong Mediation Code with their own existing codes the purpose of establishing a common code will be defeated.
- 8) The current training and assessment criteria should be reviewed and a common standard should be formulated among various accreditation bodies on how to accredit mediation training courses and assess the skills expected of a candidate.
- 9) mediation practice in Hong Kong is developing expeditiously with more than 400 new mediators accredited in 2009 alone. There are now almost 1000 mediators and the number will continue to grow rapidly and so we consider it sensible to review accreditation policies within the next 2 years rather than the 5 year period as stated in the recommendation.

**Recommendation 32**

Hong Kong should have legislation on mediation, which should be aimed at providing a proper legal framework for the conduct of mediation in Hong Kong. However, the legislation should not hamper the flexibility of the mediation process.

**Response:**

Mediators must work within the framework of a legal system which will require legislation to provide the framework on how mediation is defined, applied and practised. However, the Law Society has also considered which department would be most suited to monitor the implementation of the institutional arrangements, that is, who will initiate the legislation, implement the recommendations of the Working Group, oversee the policies in relation to mediation at large and mobilize stakeholders in the development of mediation. Taking into account the experience of comparable jurisdictions such as Australia, United Kingdom, New Zealand and Canada, where their Ministries of Justice / Attorney General took the initiative to implement mediation policies, the Law Society recommends that the Department of Justice (DOJ) should allocate resources to carry this portfolio. Over the last 2 years, the Secretary for Justice's Working Group has been supported by the DOJ and it has developed the necessary expertise and working relationship with various stakeholders to carry out the policy implementation. In Australia, the National Alternative Dispute Resolution Advisory Council (NADRAC) has been set up to provide policy advice to the Australian Attorney-General on the development of mediation. Likewise, the existing Working Group can also be transformed to an advisory body to support the DOJ in the implementation of recommendations contained in their Consultation Report.

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Mediation Committee  
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