



Report of the Secretary of Justice's Working Group on Mediation Submission of the Law Society

The Law Society supports the Government's initiatives in promoting mediation and has the following comments on the Consultation Report:

(A) Definition of Mediation

The Law Society recognizes mediation has many features which provide a flexible process and is therefore difficult to define. It may not be correct to say that the process is 'voluntary' as there is mandatory mediation in other jurisdictions and possible costs sanction in Hong Kong if parties refuse to mediate unreasonably – see Judiciary's Practice Direction 31. There are also different views on the 'neutrality' of mediator and the degree of intervention by the mediator which might affect the 'consensual' nature of the outcome.¹

We therefore consider that a workable definition should avoid using controversial adjectives and we accept the Working Group's view set out in paragraph 7.48 that the underlying philosophy and core operational features of facilitative mediation should be included so that the public can be educated on the mediation process and that it has limitations.

The Law Society has identified a set of core elements which are common to most facilitative mediation practices in Hong Kong, which could be covered by the definition:

- a) **The process is confidential and privileged with certain exceptions.**
- b) **The process is non-adversarial.**
- c) **The process facilitates negotiation and decision-making.**
- d) **The process aims to rebuild the relationship of the parties to a different level.**
- e) **The Mediator together with the parties, identify the issues for discussion.**
- f) **The Mediator does not decide on the dispute, give advice, or evaluate a party's case.**
- g) **The Mediator conducts the mediation process.**
- h) **Parties are not required to reach an agreement / settlement in mediation.**
- i) **Parties develop options, consider alternatives and endeavour to make informed decisions.**

The definition adopted by the National Alternative Dispute Resolution Advisory Council (NADRAC) of Australia, which is considered by the Report at paragraph 7.46, largely covers the above attributes:

"A process in which parties to a dispute, with the assistance of a (mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement"

¹ L. Boulle, *Mediation: Principles Process Practice*, Butterworths 1996, Chapter 1

A simpler definition is offered by Boule (1996):²

“a decision-making process in which the parties are assisted by a third party, the mediator. The mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can assent”

The Law Society’s current definition of mediation has taken into account the merits of the NADRAC definition and the definition used in its ‘*Guidelines for Professional Practice of Family Mediators*’:

“Mediation is a non-adversarial, co-operative and confidential decision-making process in which a qualified and impartial third party, “the mediator” helps parties resolve their disputes. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution. The parties to a dispute, with the facilitation of the mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach a settlement based upon sufficient information and legal advice for each party.”

The Law Society has also used the Chinese term ‘調解’ for mediation and takes the view that the term for ‘facilitative’ should be ‘促進式’.

Recommendation 1

A clear and workable definition of mediation be agreed upon. Some degree of flexibility in the definition of mediation should be maintained so that future application and development of mediation in Hong Kong will not be unnecessarily restricted.

Recommendation 2

The use of the words “mediation” and “conciliation” within the Hong Kong legislation should be reviewed, in particular in the Chinese text, to remove any inconsistency.

Recommendation 34

There should be an interpretation section in the Proposed Mediation Ordinance setting out the key terminology such as ‘mediation’ and ‘mediator’. As regards the expressions ‘mediation agreement’ and ‘mediated settlement agreement’, they should be defined if the Proposed Mediation Ordinance is to contain provisions dealing with their enforcement.

Response:

The Law Society agrees with **Recommendation 1** that a clear and workable definition is necessary to unify understanding and distinguish mediation from other similar processes such as conciliation and assisted-negotiation (where a third party representative is engaged to negotiate on one’s behalf). It is also necessary for legislation (**Recommendation 34**) and promotion as both regulators and users need to know what they can expect of the process.

The Law Society appreciates the advantages of the various definitions used by itself, NADRAC, Folberg and Taylor (1984), and Boule(1996). We do not have preference over any of them.

Although the Chinese term for mediation ‘調解’ has been widely used, the Law Society notes that the term may not properly convey the meaning of mediation especially in the family mediation context. Some divorcing couples misunderstand and have the view that the objective of mediation is to reconcile their marriage and therefore refuse to use the service.

² Boule, *supra* note 1.

In addition, the term does not emphasize that the end result of the process is to create harmony, represented by the Chinese character ‘和’, nor does it explain the process of engaging parties in pragmatic negotiations.

If the Administration considers a new Chinese translation of “mediation”, the character ‘和’ can be an alternative to denote the objective of “*creating harmony*”. We also recommend consistency between all service providers and also in all pieces of legislation.

On Recommendation 2, the Law Society considers ‘調停’ to be an appropriate Chinese term for ‘conciliation’. Conciliation is usually backed up by authority and the Chinese term has an implication that the person who intervenes has the authority to ‘stop’ or ‘end’ the dispute.

(B) Public Education

The following recommendations of the Consultation Report deal with public education on mediation:

Recommendation 3

An “Umbrella” mediation awareness programme which targets the general public with information on the modes and process of mediation be implemented through the use of sector specific mediation publicity campaigns such as those targeting the business and commercial sector, communities, youth and elderly. Such sector specific campaigns should focus on the modes of mediation that are effective and relevant to the specific sector.

Recommendation 4

Given the many parties involved in the promotion of and public education on mediation and the good work that they have been engaged in, it is recommended that these parties be encouraged to continue their important promotional and public education work. These diverse parties should actively seek to collaborate with each other and pool their efforts and expertise together where the opportunity arises, as concerted efforts would carry greater and more lasting impact.

Recommendation 5

Mediation information and training for frontline dispute resolvers (such as police officers, social workers, family psychologists, correctional officers and lawyers) should be supported as such training will assist them in their day-to-day work and having a good understanding of mediation will assist them to be effective dispute resolvers or mediation referrers. It will also assist them in promoting mediation as a means to resolve conflicts harmoniously at the community level.

Response:

The Law Society supports the launching of a generic mediation awareness programme (Recommendation 3) and that stakeholders should work together to promote mediation (Recommendation 4).

In relation to Recommendation 5, the Report has rightly pointed out in paragraph 3.11 that distinction has to be drawn between Mediation Training, Conflict Management/Resolution Training, Mediation Advocacy Training and Negotiation Training. The Law Society considers Negotiation and Conflict Management / Resolution Education may be more relevant to users and frontline dispute resolvers in dealing with their daily work. Mediation Advocacy courses should be offered to litigators and property managers in order to provide assistance to their clients and prepare them to take part in mediation sessions.

(C) Promotion of Mediation

The Law Society notes that the government is trying to promote mediation as an ADR, but has failed to discuss funding or consider the resources required for the promotion.

We are of the view that unless the government is willing to allocate resources it will be very difficult to promote mediation to the community. At the policy level, mediation can help reduce backlog of court cases and increase access to justice. It can enhance the competitiveness of Hong Kong if commercial disputes can be resolved speedily at a low cost. Domestically, mediation can reduce youth problems and community conflicts by empowering citizens to cope with differences and the stress entailed. We note the government had allocated funding to set up the HKIAC in order to establish Hong Kong as an international arbitration centre, and it should consider doing the same for mediation.

For these reasons the Law Society urges the government to set aside a budget to implement the following recommendations of the Consultation Report:

(i) Mediation First Pledge (MFP)

Recommendation 6

Further promotion of the 'Mediate First' Pledge should be encouraged within the business and commercial sectors given its initial success.

Recommendation 7

The 'Mediate First' Pledge to be promoted to different sectors of the community and its website (www.mediatefirst.hk) be maintained, updated and made interactive in order to provide support to those who subscribe to the Pledge and interested members of the public.

Response:

The Law Society agrees with the recommendations but considers the promotion of MFP should not finish with the initial launch of the MFP initiative and the photo-opportunity of interested parties signing of the pledge. The Government must continue to provide adequate follow-up on this initiative.

Hence, the Law Society suggests providing training or information sessions to employees of the signatories on mediation, how it can help them and what they have to prepare when representing their company to participate in mediation. Mediation policy has to be embraced by the corporate culture if it is to supplement other dispute resolution methods.

It is self-evident that the mere signing of the pledge cannot bring about a paradigm shift and continual effort to educate users is necessary. The Law Society is aware of similar pledges being promoted in the US, Canada, the UK and France. In the US and Canada, the campaigns are administered by dedicated bodies which provide resources to support signatories to use mediation.³ Their efforts have been highly recognized by other jurisdictions. By contrast the UK government has also signed an ADR Pledge but the mediation take up rate is low.⁴ This may be attributable to insufficient training of government officials on ADR as indicated by Parliamentary documents.⁵

It is important to provide training and support to signatories and the MFP should be administered and promoted by a dedicated institution supported by government resources.

³ See the Canadian Foundation for Dispute Resolution (http://www.cfdp.org/pro_main.htm); and the CPR Institute (<http://www.cpradr.org>)

⁴ Ministry of Justice, "Annual Pledge Report 2007/2008"

⁵ Hansard 11 December 2008

(ii) Sector-Specific Schemes

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:

We have commented on this recommendation in our first submission and we are generally supportive of establishing sector-specific mediation schemes.

(iii) Statistics

Recommendation 10

The experience and statistics from the operation of the Lehman Brothers-related Investment Products Dispute Mediation and Arbitration Scheme be analysed to identify the factors that are conducive to the success of this scheme, its limitations and the lessons to be learnt for the future.

Recommendation 11

The initiative of the insurance industry in the establishment of the New Insurance Mediation Pilot Scheme ("NIMPS") is worthy of support. The Federation of Insurers should be encouraged to analyse and share its experience in operating NIMPS, in particular the factors that are conducive to its success and the lessons to be learnt. The sharing of success stories would be a very effective means of promoting mediation.

Response:

We agree in principle that statistics should be generated to gauge the effectiveness of mediation and the factors conducive to the success of mediation. However, there are views that the NIMPS may not be an appropriate model to follow because of the structure of the NIMPS's scheme and the manner in which funding is reimbursed.

Apart from mediation schemes mentioned in Recommendations 10 and 11, data can also be collected by the Judiciary for all cases during a Check List Hearing or the Case Management Conference / Pre Trial Review stage of the litigation case. Masters/Judges are already asking questions on ADR/Mediation and they should have the ability to extract relevant data to evaluate the effectiveness of mediation and the attitude of parties towards mediation. For instance:

- (a) Lands Tribunal PD BM 1/2007 - question A7 asks: "*Have you attempted to resolve the dispute by mediation? If not why, and whether you are willing to try mediation?*"**
- (b) Case Management Conference - PD 5.2/14 on Case Management - the first set of questions in Appendix A cover ADR. PD.18.1 on Personal Injuries - Appendix F Question 1-3 relate to mediation.**
- (c) Pre-Trial Review PD18.2 - the Employees' Compensation List - Appendix D part I questions 7, 8, 9.**

(iv) Family Mediation and Collaborative Practice

Recommendation 12

Further promotion and expansion of family mediation services in Hong Kong should be supported. Consideration should be given to support NGOs providing family mediation services to the community. Development of Collaborative Practice as a less adversarial means of resolving family disputes could be explored further.

Response:

The Law Society agrees that the scope of family mediation services should be expanded. Under the current definition of 'family mediation', its scope only encompasses matrimonial disputes, but not other types of family dispute.⁶ We note that disputes between family members may be disguised in a form of shareholder disputes within a family business. It can also be a parent-child dispute or a dispute involving elderly members of the family.⁷ In relation to resolving disputes between family members other than spouses, the scope of services to promote mediation in these areas has been neglected and should be reviewed; resources should be allocated to expand much needed services.

On the other hand, Collaborative Practice (CP) currently refers to the engagement of lawyers and other professionals to deal with matrimonial disputes in an interest-based, bilateral negotiation without the assistance of a mediator. However, we note the skills required for CP are also applicable in other areas of disputes. We consider it important that solicitors engage with other professionals such as accountants and tax experts, valuers or surveyors in order to engage the parties in constructive, interest-based negotiation.

(v) Restorative Justice

Recommendation 15

Further support and expansion of the current Restorative Justice and Mediation Programmes throughout the community in Hong Kong should be encouraged.

Response:

The Law Society agrees with the recommendation.

(vi) Venue for Mediation

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 matter was discussed in our earlier submission and we repeat our view that the Government and the Judiciary should consider allocating adequate resources to provide appropriate venues for mediation as is the case in other jurisdictions.

(vii) Mediation at Schools and Universities

Recommendation 17

Recognising the competing demands on the school curriculum, the potential introduction of mediation education within the primary and secondary schools warrants serious examination and it is recommended that consideration be given to support the expansion of the Peer Mediation Project.

Response:

The Law Society considers the Report's discussion on the promotion of mediation in schools to be too narrow as the approach is limited to the 'curriculum approach' where a specific time is devoted to teaching the basic principles and skills of conflict resolution. The Report also refers

⁶ Cecilia Wong, "Family Property and Estate Disputes", Hong Kong Mediation Handbook, 2009, p.184

⁷ Beatrice Hung, "Family Relationship and Elderly Dispute", Hong Kong Mediation Handbook, 2009, p.194

to a 'mediation programme' where selected students are trained to provide mediation service to their peers. These proposals are very limited especially when viewed against the competing demands on the school curriculum.

The Office of Juvenile Justice and Delinquency Prevention of the US Department of Justice and the US Department of Education, as part of the 'Safe and Drug-Free School Program', published the "*Conflict Resolution Education: A Guide to Implementing Programs in Schools, Youth-Serving Organizations, and Community and Juvenile Justice Settings*" (the *Guide*), which discusses at length two other approaches of promoting mediation at school:

(a) The 'peaceable classroom approach'

A programme has been devised whereby the teaching methodology has been revised to incorporate conflict resolution education into the syllabus of the existing curriculum and classroom management strategies. Teachers are taught the principle and techniques of mediation which enables them to adapt their teaching methods and apply them in classroom management where appropriate. The *Guide* provides an example where a history teacher has prepared case studies based on historical disputes and asked students to discuss or conduct role-plays; and

(b) The 'peaceable school approach'

Teachers, staff members, counselors, principals and parents are trained to use mediation as the 'default' problem-solving mechanism in the operation and management of the school.

The Law Society sees potential in introducing these approaches in order to reduce conflict not only within the classroom but also within the wider school community as conflicts are inevitable in the workplace, the classrooms, parent-teachers organisations and the management of schools.⁸ The education of school members about mediation can help them reduce work pressure⁹, increase efficiency of school management and create a more amicable environment for teachers and students alike.

Given the multi-disciplinary nature of mediation, the training programme in schools should also incorporate a psychological element in order to raise awareness of the emotional reactions to situations.

The Law Society recommends the government to consider adopting a more flexible strategy in its intended promotion of mediation in schools.

(viii) Announcement in the Public Interest

Recommendation 24

An Announcement in the Public Interest be produced and aired on television for the promotion of mediation. More publicity via radio, printed media and new media platform should also be pursued. Educational programmes on mediation targeted at youth should be strengthened and special efforts be made to approach television stations and script-writers to consider including mediation in their television drama productions.

Response:

The Law Society agrees with the recommendation and takes the view that the Government should provide the funding to achieve it.

⁸ Ming Pao Daily News, "資深校長：改革太急易招反效果", 9 April 2010

⁹ Ming Pao Daily News, "飯盒銷量纏擾輕生教師 夫現身控訴：妻承受校長家長壓力", 29 April 2010

(D) Unrepresented Litigants

Mediation is not a panacea and may not be suitable for unrepresented litigants. A Consultation Paper issued by the Law Reform Commission of Western Australia (Project No.92, 1999) confirms this observation. It is noted that unrepresented litigants are less likely to be in a position to make informed decisions on which course of action to take. Before the decision to mediate, a party may need to obtain initial advice concerning the pros and cons of litigation, the strengths and weaknesses of his case, the advantages of early settlement and how to proceed with settlement negotiation. Without proper advice, an unrepresented litigant cannot effectively decide whether or not he should agree to mediation. A similar evaluation of one's position based on new information obtained during the course of mediation is also desirable for parties to make an informed decision on settlement. Regarding the following recommendations, the Law Society has the following response:

Recommendation 13

The challenges posed by unrepresented litigants in court should be further studied and more statistical data made available so that promotion of mediation to unrepresented litigants may be better supported.

Recommendation 14

Special efforts should be made to promote mediation to unrepresented litigants in court including the provision of mediation information and the promotion of the 'Mediate First' website (www.mediatefirst.hk) to them through the Mediation Information Office and the Resource Centre for Unrepresented Litigants in the High Court.

Response:

The Law Society agrees with the recommendations with the riders that:

- (a) **Data should be collected to profile unrepresented litigants, their background, the disputes in which they are involved, costs incurred when acting without legal representation, the outcome of such cases and their level of satisfaction. The data can indicate whether mediation is a suitable process for all unrepresented litigants.**
- (b) **The reasons why such persons are without legal representation should be identified. An American study (Swank, 2005) has summarized 9 possible reasons for self-representation.¹⁰ These findings provide indicators when deciding whether a matter is a suitable case for mediation. If self-representation is induced by tactical reason, or is the result of a misbelief in the legal system or over-confidence in one's own case, mediation may not be suitable at the outset.
We consider similar research should be carried out in Hong Kong if mediation is to be promoted to unrepresented litigants.**
- (c) **If litigants' choose to forgo legal representation because of cost, the Law Society would like to stress that mediation of complicated cases can also be costly. Mediation can be cost-effective but without proper advice and preparation, mediation can also result in the matter being protracted and expensive. Unrepresented litigants need to be educated that mediation is not a cheap service provided at the expense of outcome and fairness. They can consider retaining lawyers to offer discrete legal services such as mediation advocacy.
The Western Australian Law Commission Report indicates that clients are generally willing to pay for discrete services such as legal counseling, coaching for negotiations, preparing settlement agreements and reviewing proposals and drafts.¹¹**
- (d) **Facilitative mediation is not a panacea and may not be suitable for unrepresented litigants as the mediator cannot give advice to the parties when such need arises. Some unrepresented litigants prefer "evaluative mediation" as the mediator will point out the**

¹⁰ Swank, "The Pro Se Phenomenon", *BYU Journal of Public Law*, Volume 19, No.2, 2005, pp.378-379

¹¹ Consultation Paper: Review of the Criminal and Civil Justice System in Western Australia, P.561

merits and weaknesses of their cases. It is important to inform unrepresented litigants of the different models so they can select the one which best suits their needs.

(E) Mediation Education for the Legal Profession

The Law Society has already commented on **Recommendation 18** and considers mediation training to be important for practising lawyers but it should not be made compulsory.

Recommendation 19

In order to foster the further development of mediation knowledge in the legal profession, consideration should be given to revisit the question of mediation being incorporated into compulsory courses at PCLL, LL.B and J.D. programmes at a later stage when the mediation landscape becomes more mature.

Recommendation 20

Subject to resource and curriculum constraints, the Universities should consider enhancing the current elective mediation courses and the mediation element in other courses within the Law Faculties at both the undergraduate and postgraduate levels.

Recommendation 21

The Universities should be invited to consider offering common core courses on mediation and dispute resolution within the first year undergraduate University programme through an integrated interdisciplinary approach to educating students about the process and skills of mediation.

Recommendation 22

The Law Faculties of the three Universities (University of Hong Kong, Chinese University of Hong Kong, and City University of Hong Kong) should be encouraged to proceed with the development of the proposed “Hong Kong Mediation Competition”.

Response:

The Law Society agrees that the curriculum of the Law Schools at both undergraduate and postgraduate levels should be reviewed periodically on whether mediation should be introduced as a compulsory course (**Recommendation 19**). In civil procedures courses the mediation segment can be enhanced and mediation advocacy courses can be taught as an elective subject (**Recommendation 20**). Apart from teaching practical skills, these elective courses can focus on the alternate problem-solving methodology underpinning the mediation process. A mediation elective course can teach the skill of “conflict diagnosis” based on case studies and clinical training and this proposal also corresponds to the discussion at paragraph 5.105 of the Consultation Report; some foreign law schools mentioned in paragraph 5.105 of the Consultation Report have been offering similar training.

Given the generic nature and the wide applicability of mediation, we agree that mediation can be taught in various disciplines (**Recommendation 21**). We note Hong Kong Polytechnic University’s Construction Economics and Management programme contains a mediation component.

In order to embrace the multi-disciplinary nature of mediation, we consider opening the proposed mediation competition (**Recommendation 22**) to students outside the law faculty. The Report does not provide any rationale as to why ‘*the Mediation Competition would initially be open only to law students*’; we consider it appropriate to adopt a collaborative and interdisciplinary approach which simulates real-life mediation experience where parties and mediators may not have legal background.

(F) Early Dispute Resolution System

Recommendation 23

Early Dispute Resolution (“EDR”) systems could be beneficial for organisations, universities and other tertiary institutions in Hong Kong to give due consideration in order to help resolve conflicts and minimise dispute resolution costs within organisations and institutions.

Response:

The Law Society agrees with the recommendation. An alternative way of promoting early dispute resolution is to promote the *Mediate First Pledge* within the organisation. When disputes arise, parties should be encouraged to turn to a trained individual to mediate. If there is perceived bias due to the fact that the mediator is also a staff member, a mechanism to engage external mediators should be in place.

(G) Accreditation

We have previously commented on this and wish to reiterate that the quality of mediators is an issue of public concern. Existing accreditation bodies should work together on a common benchmark for accrediting training courses and assessing mediator candidates to meet international standards.

(H) Ongoing Support for Mediators

(i) Continuing Professional Development (CPD)

Recommendation 29

Information on the Continuing Professional Development requirements (if any) of mediator accrediting organisations should be made available to the public.

Response:

The Law Society agrees to publicise CPD requirements subject to the following qualifications:

The purpose of having CPD requirements is to maintain the skills of mediators going forward. Public education and promulgation of the Mediation Code are important but they will not replace a minimum standard of CPD requirements in order to maintain the quality of the mediators’ skills. It is essential with the implementation of PD 31 to establish a policy to ensure mediators are competent.

Currently, mediators may be accredited for years but may not have practised since accreditation for a wide variety of reasons and so there are concerns on the quality of service as mediation is a highly skill-based profession. Mediators who do not participate in mediations on a regular basis will lose their skills and it is questionable whether the current CPD requirements imposed by different bodies can address this concern.

However, the Law Society notes there is no statutory authority to enable the Government to prescribe minimum standards for CPD requirements across the board and so for the time-being this has to be left to individual accreditation bodies. The Law Society has imposed on its mediators a minimum CPD requirement and solicitor-mediators are required to keep a log book which will be audited regularly.

(ii) Judiciary's Referral

Recommendation 30

Whenever the question of an appropriate mediator arises in court, the Judiciary might suggest that the parties consider selecting a mediator (of whatever qualifications or accreditation) who has at least subscribed to the Hong Kong Mediation Code.

Response:

The Law Society agrees with the recommendation.

(iii) Practice Support to New Mediators

Recommendation 31

Encouragement should be given for experienced mediators to assist newly accredited mediators to obtain practical mediation experience.

Response:

The Law Society has established a Practice Support Scheme for its Panels of Mediators which encourages experienced mediators to share experience with newly-qualified mediators. We also work with other NGOs to provide clinical training or practice opportunities.

(I) Proposed Mediation Ordinance

The Law Society considers the DOJ should allocate resources to implement mediation policies including the initiation of legislation.

Recommendation 33

There should be the enactment of a Mediation Ordinance, instead of introducing legislative provisions relating to mediation into the existing Arbitration Ordinance or other Ordinances.

Recommendation 34

There should be an interpretation section in the Proposed Mediation Ordinance setting out the key terminology such as 'mediation' and 'mediator'. As regards the expressions 'mediation agreement' and 'mediated settlement agreement', they should be defined if the Proposed Mediation Ordinance is to contain provisions dealing with their enforcement.

Recommendation 35

There should be a section in the Proposed Mediation Ordinance setting out its objectives and underlying principles.

Recommendation 36

The Working Group does not recommend the introduction of legislative provisions dealing with enforcement of a mediation agreement. However, if it is considered appropriate to introduce such legislative provisions, the enforcement scheme can be designed along the lines of the scheme for enforcing arbitration agreements (i.e. a stay of proceedings pending mediation).

Recommendation 37

There is no need for the Proposed Mediation Ordinance to include any provisions to deal with the mediation process, save that there should be: (a) a provision dealing with the appointment of the mediator along the line of clause 32 of the Draft Arbitration Bill; and (b) a provision (similar to section 2F of the Arbitration Ordinance) that sections 44, 45 and 47 of the Legal Practitioners

Ordinance do not apply so that non-lawyers or foreign lawyers can participate in mediation conducted in Hong Kong.

Recommendation 38

The Proposed Mediation Ordinance should include provisions dealing with the rules of confidentiality and privilege, as well as setting out the statutory exceptions to the rules and the sanctions for breaching the rules of confidentiality and privilege.

Recommendation 39

The issue of whether to grant mediator immunity from civil suits is a controversial one. Although it is not recommended that such immunity be granted, it may be desirable to allow partial immunity, especially in respect of *pro bono* or community mediation.

Recommendation 40

It is not necessary to introduce legislative provisions to suspend the running of limitation periods during the mediation process.

Recommendation 41

It is not necessary to include in the Proposed Mediation Ordinance a statutory mechanism for enforcing mediated settlement agreements. Where necessary, enforcement of mediated settlement agreements can be left to the court as in ordinary cases of enforcement of contracts.

Recommendation 42

Whilst not really necessary, there is in principle no objection to include a set of model mediation rules in the Proposed Mediation Ordinance. However, any model mediation rules so included should only serve as a guide and should not be made mandatory. To maintain flexibility of the mediation process, parties should be at liberty to adopt such mediation rules as they deem fit.

Recommendation 44

Unless there are specific exceptions that can be properly justified, the Government should be bound by the Proposed Mediation Ordinance.

Recommendation 47

It would not be necessary to include in the Proposed Mediation Ordinance provisions for cross-boundary enforcement of mediated settlement agreements.

Response:

The Law Society agrees with the above recommendations subject to the following riders:

- (a) The purpose of a mediation agreement or a mediation clause in a contract as discussed under Recommendation 36 is no more than setting out the manner in which parties will conduct negotiations and to encourage the parties to consider mediation when a dispute arises. The Working Group indicates that the remedy for a breach of a mediation agreement is to stay the proceeding (Paragraph 7.79). As the Court under CJR can direct parties to consider mediation during the case management conference and has the power to stay proceedings where appropriate, the introduction of provisions dealing with enforcement of an agreement to mediate would be redundant.
- (b) Non-lawyers or foreign lawyers should be able to participate in mediation as recommended under Recommendation 37. However, as indicated in our response to Recommendations 13-14, a party may need legal advice/services before and during the course of mediation. We consider that the proposed Ordinance should have express provisions to ensure parties to mediation will be entitled to receive legal advice/services from qualified persons in Hong Kong.

(c) Recommendation 37

The Law Society considers itself to be a competent body to make default appointment.

As far as the default mechanism is concerned, it is also noted that Article 5(3)(a) of the UNCITRAL Model Law provides:

“Parties may seek the assistance of an institution or person in connection with the appointment of conciliators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as conciliator”

Modification can be made to Clause 32, such that where a request to appoint a mediator is made unilaterally, the default appointment body can only recommend a person to act as the mediator; if the request is made jointly, the appointment by the default body shall be final. This will help preserve the consensual nature of mediation.

(e) Recommendation 38

The Working Group should consider appropriate exceptions when the government is a party to mediation and the subject matter is in the public interest.

(f) Recommendation 41

This is a major concern for parties who choose mediation as their preferred dispute resolution mechanism. It is commonplace that parties in dispute generally cannot trust each other and they are concerned that the other party may renege on any settlement.

The problem is more obvious when parties have significant power imbalance in terms of financial resources and the disadvantaged party may consider that the other party is likely to avoid performing the settlement agreement by means of litigation. The stronger party may also have concern over the ability of the weaker party to perform the agreement.

In order to allay such concerns the Government must include information on enforcement in its publicity campaign. This issue should be reviewed.

(g) The Ordinance should provide that imbalance of power is a legitimate ground to reject mediation in order to protect weaker parties.

(f) A separate section is needed for family mediation as parties in such cases have special needs.

(J) Apology Ordinance

Recommendation 43

The question of whether there should be an Apology Ordinance or legislative provisions dealing with the making of apologies for the purpose of enhancing settlement deserves fuller consideration by an appropriate body.

Response:

The Law Society agrees with the recommendation.

(K) Mandatory Mediation

Recommendation 45

Compulsory referral to mediation by the court should not be introduced at this stage, but the issue should be revisited when mediation in Hong Kong is more developed.

Response:

We agree the issue is controversial and needs further consideration. However, the situation in relation to family mediation requires further comment:

The Consultation Report bases all its comments on general mediation (paragraph 7.206 - 7.213) by failing to note that family mediation is well developed in Hong Kong as we now have many experienced practitioners and Judges and users who have expressed satisfaction with family mediation services.

The Law Society recognises that litigation is not effective for resolving matrimonial disputes especially when children are involved. A court decision may seem to mark the end of a particular action but it does not necessarily signify the end of the conflict between the former spouses. And so if there is continuing conflict, research clearly shows the negative effect on children. Currently it takes about 2 years to complete a contested divorce and it has been observed that children do suffer if their parents fail to see the need to mediate, especially in 'high-conflict' cases which would benefit from mediation; costs orders against the parents do not help the children or reduce the conflict.

We therefore propose that in family matters where children are involved, Family Judges should have the discretionary power to order parents to attempt mediation for a minimum number of hours. If mediation is unsuccessful the case can be brought back to the court.

At the very least, the government can consider mandating pre-mediation processes. We note that in Australia, divorcing couples are required to consult a psychologist so that parties will have an understanding of the impact of family disputes on the children and thus help them resolve their differences. It may not be appropriate to send divorcing couples straight to mediation without any support as it is obvious that intake and pre-mediation preparation are conducive to successful mediations. The Law Society therefore recommends mandatory pre-mediation support at the Mediation Coordinator's Office as an alternative to mandatory family mediation.

(L) Court as a Mediation Service Provider

Recommendation 46

At this stage, the Judiciary should not provide mediation services. However, the question should be revisited in future after consultation with the Judiciary (whether as part of the review of the implementation of the Civil Justice Reform or as a separate review).

Response:

The Law Society does not support any proposal for judges to act as mediators. However, the Judiciary has a definite role to encourage the parties to mediate, and to provide suitable venues as well as other resources such as information leaflets etc. to encourage and support the use of mediation.

(M) Legal Aid

Recommendation 48

Legal aid should be provided to legally aided persons when they are willing to participate in mediation.

Response:

The Law Society notes that this is the current position of Legal Aid Department. However, it is unclear whether the Legal Aid Department is prepared to cover the costs of legal representatives acting as mediation advocates who will provide support to the client in mediation meetings. The importance of legal support cannot be overemphasized. Parties need proper advice to reach an informed decision particularly when parties in some mediation are not negotiating at arm's length, and so it would be appropriate for the Legal Aid Department to provide funding for legal representatives to attend mediation sessions with legally-aided clients.

**The Law Society of Hong Kong
Mediation Committee
10 May 2010
#133971**

