THE LAW SOCIETY OF HONG KONG 香港律師會

Draft Mediation Bill
Submission of the Law Society

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

A. PART I

Clause 3. ***Interpretation***

(1) *In this Ordinance—*

agreement to mediate *( ) means an agreement in writing by 2 or more persons to submit a dispute between them to mediation, whether the agreement is made before or after the dispute arises;*

[HKMAAL] *( ) means [Hong Kong Mediation Accreditation Association Limited], a company incorporated in Hong Kong under the Companies Ordinance (Cap. 32);*

mediated settlement agreement *( ) means an agreement by the parties to mediation settling the whole, or part, of their dispute;*

mediation *( )—see section 4;*

mediation communication *( ) means—*
(a) anything said or done;
(b) any document prepared; or
(c) any information provided,
for the purpose of, during or as a result of mediation;

mediator *( )—see the definition of* ***mediation.***

(2) *A reference in this Ordinance to the parties to mediation does not include the mediator.*

Law Society's Response:
(a) "agreement to mediate"
It is noted "*agreement to mediate*" in general mediation practice means an agreement between the mediator and the parties to a dispute which confirms the appointment of the mediator, sets out his terms of services, and stipulates the roles and obligations of the mediator and the parties (See: *Agreement to Mediate* annexed to the *Hong Kong Mediation Code*). An *agreement*

to mediate in this sense is but one type of '_agreement to submit a dispute to mediation_'. Hence, if the drafter intends to describe a general agreement to submit a dispute to mediation, we recommend this term be redrafted in order to avoid confusion.

(b) "mediation communication:
The objective of defining "_mediation communication_" is to protect confidentiality under Clauses 9-10 which promotes candid communications in mediation. However, the provision does not make it clear whether conversations to initiate mediation and other non-session communications to adjourn or reconvene mediation are covered by the definition. It was noted the confidentiality provision of the _US Uniform Mediation Act_ covers initial conversations between parties with a view that candour during these initial conversations is critical to insure a thoughtful agreement to mediate. The Law Society considers necessary to include such initial conversation into the ambit of confidentiality protection.

B. _Clause 4. Meaning of Mediation_

(1) For the purposes of this Ordinance, mediation is a structured process comprising one or more sessions in which one or more neutral individuals (mediators), without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following –

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

(2) For the purposes of subsection (1), a session is a meeting between a mediator and one or more of the parties to a dispute, and includes any activity undertaken in respect of –

(a) arranging or preparing for such a meeting, whether the meeting takes place or not; and
(b) following up any matter or issue raised in such a meeting.

Law Society's Response:
In our submissions on the _Report of the Working Group on Mediation_ (the "Report"), we expressed the view that "_a workable definition [of mediation] 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._"

Paragraph 7.48 of the Report recommended that the definition of mediation should:

"(1) describe the process by identifying the key elements of a facilitative mediation, which would include: (a) the process is voluntary and the parties participate in the process pursuant to an agreement made by them; (b) the process is conducted

by an independent third party (the mediator) who will maintain a neutral and impartial role throughout the process; (c) the process is confidential and privileged; (d) the role of the mediator is to assist the parties to identify issues, to explore options and alternatives and to reach a settlement agreement acceptable to the parties;

(2) expressly state that the mediator will not in any way determine the dispute or give any opinion or evaluation to any party to the dispute;"

We note Clause 4(1) of the draft Bill only adopts part of the Working Group's recommendation. It fails to mention the consensual nature of mediation and, as drafted, gives more prominence to the mediator instead of the parties. In our opinion, the definition of '*mediator*' is insufficient as it only provides that the mediator will not adjudicate a dispute or any aspect of it. It fails to acknowledge the mediator's independence as the mediator will not provide any advice, opinion or evaluation to any party to the dispute. Moreover, "*adjudicating*" may have a special meaning as Adjudication is another form of ADR used in construction disputes.

If the Government intends to promote facilitative mediation, the legislation should highlight the reality in practice that it is the parties who have primary responsibility for the matters in Clauses 1 (a) to (d), namely: *identify the issues in dispute; develop options; communicate with one another; and reach an agreement regarding the resolution of the whole, or part, of the dispute.*

We also notes that the draft Bill does not differentiate between Family Mediations and non-Family Mediations. In Family Mediation, a mediator has a clear duty to consider the interests of the children of the marriage and is therefore not necessarily "neutral". In practice, such duty is provided for by the agreement to mediate and works well. The Bill as drafted therefore may have encroached on the current Family Mediation practice.

We therefore recommend the provision be redrafted and consideration be given to adding a new subsection to clarify the definition of mediator. An example that the Task Force may consider is:

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

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

(2) Mediator in subsection (1) means an independent individual who conducts the process of mediation without:
(a) giving any advice and/or opinion on the contents of the dispute,
(b) evaluating the dispute or any part thereof;
(c) determining the dispute or any part thereof.

(3) For the Purpose of subsection (1), a session is a meeting between a mediator and one or more of the parties to a dispute, and includes any activity undertaken in respect of –

(a) arranging or preparing for such a meeting, whether the meeting takes place or not; and
(b) following up any matter or issue raised in such a meeting."

C. Part II.

Clause 7. Default appointment of mediator

(1) If –

(a) an agreement to mediate provides for the appointment of a mediator by a person which is not a party to the agreement; and
(b) that person –
(i) refuses to make the appointment; or
(ii) does not make the appointment within the time specified in the agreement, or if no time is so specified, within a reasonable time after being requested by any party to the agreement to make the appointment,

[HKMAAL] may, on the application of any party to the agreement, appoint a mediator.

(2) [HKMAAL] may, with the approval of the Chief Justice, make rules to facilitate the performance of its function under subsection (1).

(3) A rule made under subsection (2) may prescribe fees to be paid to [HKMAAL] for performing its function under subsection (1).

(4) Subsection (1) does not apply if a party to the agreement to mediate may apply for a mediator to be appointed under section 32 of the Arbitration Ordinance (Cap. 609).

Law Society's Response:
We note HKMAAL is intended to be the umbrella body to accredit mediators in Hong Kong. However, we consider the proposal that HKMAAL will be the default appointment body premature as its composition, management structure and the company's Memorandum and Articles of Association are not yet finalized.

The provision is too narrowly drafted. The drafters have adopted section 32 of the new Arbitration Ordinance where one of the prerequisites triggering the default appointment mechanism requires a written agreement by the parties to submit their dispute to mediation by providing for the appointment of mediator by a person which is not a party to the agreement.

We note the Judiciary's Practice Direction 31 on Mediation does not require that the Mediation Notice and Response to provide for the appointment of a mediator by a person which is not a party to the agreement. In practice, parties nominate their own mediator(s) in the Mediation Notice and Response and disputes can arise thereafter over the nominations.

In respect of cases not tied to legal proceedings, a party can approach any mediation organization, and if so this organization has its own administrative practice – they can contact the other party to obtain their consent to mediate; in many cases there will not be any written agreement to submit their dispute to mediation.

Clause 7 as drafted fails to take into account the common practices highlighted in the examples above and should be reviewed.

D. ***Clause 8. Provision of assistance or support during mediation***

> *Section 44 (penalty for unlawfully practising as a barrister or notary public), section 45 (unqualified person not to act as solicitor) and section 47 (unqualified person not to prepare certain instruments, etc.) of the Legal Practitioners Ordinance (Cap. 159) do not apply to the provision of assistance or support, other than legal advice on the law of Hong Kong, to a party to mediation during the mediation.*

Law Society's Response:
The Law Society objects to Clause 8. There is no law prohibiting non-lawyers and foreign lawyers to assist parties in mediation provided they comply with the Legal Practitioners Ordinance (Cap.159). The restrictions imposed on unqualified persons in the Ordinance are clear and should always apply. The practice of foreign lawyers in Hong Kong is governed by the Foreign Lawyers Practice Rules and they are free to assist parties in mediations as long as they act in accordance with the Rule.

We therefore recommend Clause 8 be deleted as it is unnecessary.

E. ***Clause 9. Confidentiality of mediation communication***

> *(1) Except as provided by subsection (2), a person must not disclose a mediation communication.*
>
> *(2) A person may disclose a mediation communication if –*
>
> *(a) the disclosure is made with the consent of –*
> *(i) each of the parties to the mediation*
> *(ii) the mediator for the mediation or, if there is more than one, each of them; and*
> *(iii) if the mediation communication is made by a person other than a party to the mediation or a mediator – that person;*
>
> *(b) there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger to any person or loss of, or damage to, any property;*
>
> *(c) the disclosure is made for research, evaluation or educational purposes without directly or indirectly revealing, or being likely to reveal, the identity of a person to whom the mediation communication relates;*

(d) the disclosure is made in any proceedings for enforcing a mediated settlement made in respect of the mediation;

(e) the disclosure is required for establishing or disputing an allegation or complaint concerning professional misconduct or malpractice of a mediator or of any other person who participates in the mediation in a professional capacity; or

(f) the disclosure is made in accordance with a requirement imposed by law.

Law Society's Response:
We have grave concerns that Clause 9 as drafted provides too many exceptions which will result in the removal of the principle of confidentiality for mediations:

Sub-clause 2(a)(i)
We recommend redrafting sub-clause (2)(a)(i) to read "*all parties to the mediation; and*" to clarify the intention that the consent of all parties to the mediation and the mediator(s) concerned must be obtained in order for the exception to apply.

Sub-clause 2(b)
The provision of this clause will unnecessarily compromise mediation confidentiality. In our opinion, the exception should be confined to the prevention or minimization of violence or harm to human life and safety. "*Loss of, or damage to any property*" is too low a hurdle and there are remedies which can address this problem. This clause should be redrafted.

Sub-clauses (2)(c) and (d)
These 2 sub clauses should be deleted. The Government's desire to collect information on the effectiveness of mediation does not mean it is entitled to introduce statutory provisions to emasculate the confidentiality which goes to the heart of the mediation process. There are other means to obtain data and whether cases settled and parties are satisfied with the process fall outside the meaning of "mediation communications".

In circumstances where mediation communications are required to conduct empirical research or case studies (written or otherwise) for educational purposes then the consent of the parties to the mediation must be obtained. This is covered by the provisions in clause (2)(a) of the Bill.

Sub-clause (2)(d) is redundant and may result in abuse, as the mediated settlement agreement is an open document which is admissible for the purpose of enforcement. If the court orders disclosure of mediation communications for the 'administration of justice' this should be covered by sub-clause (2)(f) of the Bill .

Sub-clause 2(e)
The description *'professional misconduct and malpractice'* is not defined in the draft Bill and is too wide. We recommend the clause be redrafted to the effect that disclosure is only allowed for the establishment or defence of an allegation concerning acts done, or omitted to be done dishonestly, so that it is consistent with the new Arbitration Ordinance. (See our comments in Part G below).

The Law Society therefore recommends redrafting sub-clauses 2(a)(i), (b) and (e), and deleting sub-clauses (2)(c) and (d).

F. ***Clause 10. Admissibility of mediation communications in evidence***

(1) A mediation communication may be admitted in evidence in any judicial, arbitral, administrative or disciplinary proceedings only with the leave of the person or body conducting the proceedings.

(2) For the purposes of subsection (1), the person or body conducting the proceedings must take into account the following matters in deciding whether to grant leave for a mediation communication to be admitted in evidence –

(a) whether the mediation communication may be, or has been , disclosed under section 9;
(b) whether it is in the public interest or the interests of the administration of justice for the mediation communication to be disclosed; and
(c) any other relevant circumstances or matters.

Law Society's Response:
The drafting of Clause (1) is too wide. Mediation communications should only be admitted in evidence in the following scenarios:

1) **in judicial proceedings with the leave of a judge;**
2) **in the Lands Tribunal with the leave of the Presiding Officer;**
3) **in private and confidential disciplinary proceedings with the leave of the body conducting the proceedings.**

G. ***Other comments***

(a) Partial Immunity for Mediators
The Report of the Working Group on Mediation noted that partial immunity to mediators had been considered in Clause 103 of the Arbitration Bill:

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

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

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

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

This provision is now in section 104 of the new Arbitration Ordinance which covers arbitrators and mediators. The partial immunity conferred is applicable not only when an arbitrator acts as a mediator pursuant to section 33, but by all mediators appointed under section 32 irrespective of whether the mediator also acts as an arbitrator.

The Law Society takes the view that if a mediator appointed under the new Arbitration Ordinance is entitled to partial immunity, the same provisions should be added to the new Mediation Ordinance. If not then it appears the Government favours one group of mediators over others. It is unfair for mediators under the new Arbitration Ordinance to enjoy partial immunity whilst mediators under the Mediation Ordinance are subject to a wide range of exceptions to confidentiality. There is no justification for such disparity and we consider the policy on immunity should be consistent, so that a mediator and his/her staff or agent is liable in law for an act done or omitted to be done in relation to the exercise or performance, or the purported exercise or performance of the mediator's functions only if it is proved that the act was done or omitted to be done dishonestly.

(b) Scope of the Legislation

The Law Society notes the provisions of the draft Bill only apply in facilitative mediation but not in other models of mediation, e.g. evaluative and transformative mediations which are also routinely used in practice. It follows that parties may escape from the regulatory regime by simply adopting other styles of mediation. Likewise, parties to mediation who would otherwise enjoy the benefit of the proposed legislation would be unable to do so if the mediator deviates from the facilitative model. We consider the Bill as drafted is inflexible and is incapable of coping with other models of mediation.

We also take the view that the proposed legislation should provide for sanctions for breaching confidentiality as suggested by Recommendation 38 of the Report.

The Law Society of Hong Kong
Mediation Committee
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