

Mediation Bill

Response to the Administration's comments on the Law Society's submissions dated 11 January 2012

1. *Clause 4: Meaning of Mediation*

(a) Law Society's original submission:

Paragraph 7.48 of the Report on Mediation published by the Secretary for Justice's Working Group on Mediation 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 Bill adopts the Working Group's recommendation except it is not mentioned that the process is voluntary. The clause as drafted gives more prominence to the mediator instead of the parties. 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 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. We therefore recommend the provision be redrafted. An example that may be considered 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) *explore and generate 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 impartial 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."*

(b) The Administration's response:

"We consider that the definition of mediation as currently drafted is adequate. Jurisdictions with mediation legislation such as Australia and Canada have adopted similar definitions without using the word "voluntary".

(c) Law Society's response to the Administration:

We repeat our original submissions. We wish to highlight again the fact the definition fails to emphasise *it is a voluntary process* and that the parties themselves have the primary responsibility to achieve settlement with the assistance of the mediator. The inclusion of the word '*voluntary*' does not detract from the process at all – in fact we consider it *supplements* and assists the public to understand the process.

2. *Clause 7: Provision of assistance or support in mediation*

(a) Law Society's original submission

The Law Society objects to Clause 7. 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) (LPO). 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 Rules.

We therefore recommend Clause 7 be deleted as it is unnecessary.

(b) The Administration's response:

"Section 63 of the Arbitration Ordinance (Cap. 609) provides that sections 44, 45, and 47 of the Legal Practitioners Ordinance (Cap. 159) does not apply to arbitral proceedings. The Working Group recommended a similar provision to be included in the Bill. Similar provisions can also be found in other jurisdictions with mediation legislation such as

section 25 of Malta's Mediation Act 2004 and Article 12(1) and (3) of the Bulgaria's Mediation Act 2004."

(c) Law Society's response to the Administration

We re-iterate our original comments that Clause 7 is unnecessary and should be removed from the Bill.

The LPO reserves 3 areas of work to solicitors namely: litigation, probate and conveyancing work. We note mediation is not a reserved area of work and that the Administration's justification to exclude the operation of sections 44, 45 and 47 of the LPO is based on a similar premise, namely arbitration is *not a reserved area of work for the legal profession*.

We note sections 45 and 47 of the LPO are in place to protect the public when they seek legal advice in relation to legal disputes before the Hong Kong courts; Clause 7 permits encroachment on the restricted areas of work.

The Judiciary has issued Practice Direction 31 (PD 31) which covers the Judiciary's expectations in relation to mediation both before and after parties litigate their disputes before the courts in Hong Kong. Foreign lawyers are not permitted to practice Hong Kong law under the Foreign Lawyers Practice Rules. Insofar as the *provision of assistance or support in mediation* relates to someone giving legal advice to assist a client of mediation - then that person providing the legal advice to a client is giving advice in a dispute situation which is analogous to giving advice to litigation; in such situations we consider this to be a breach of 'a reserved area of work for the legal profession' because the giving of legal advice in a dispute before the courts requires professional training and standards in order to protect the rights of the public.

This is an extension of the Rule of Law and fairness in society as it protects against the risk of an inexperienced mediator not being able to handle power imbalances in a mediation, particularly evaluative mediations. Hong Kong is a 'high hierarchical' culture (which means people naturally assume a pecking order as opposed to equality) so the risk of imbalance of power is high, thus a person giving support or assistance - in the form of legal advice - must be a solicitor subject to professional standards.

The Government appears to be 'cherry-picking' its jurisdictions to justify retention of Clause 7. The Administration has failed to cite similar provisions in the Australian and Canadian legislation but rather cites, with respect, obscure jurisdictions such as Malta and Bulgaria, which are civil jurisdictions, to justify its stance. We are not persuaded of the relevance of such legislation to Hong Kong.

3. Clause 8: Confidentiality of mediation communication

(a) Law Society's original response:

Sub-clauses (2)(e)

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. The Law Society takes the view if such exception is provided appropriate guidelines or Code of Practice for carrying out such research must be issued.

(b) The Administration's response:

"The Bill strives to strike a balance between protecting confidentiality in mediation and the prevention of abuse"

(c) Law Society's response to the Administration:

We re-iterate our objections to sub clause (e) and do not consider the Administration has in any way justified its retention.

We cite, as an example, mediation in family cases. These remain private until they reach the Court of Appeal - what justification is there to open up such cases? Confidentiality is the right of the parties – it is their right to decide whether to forgo this or not and experience of our mediators indicate the parties will not consent to disclose such private information.

We note mediators provide examples of *composite cases* during training. However, the Administration has failed to grasp the reality that Hong Kong is a small place and a family case which "fascinates" and was handled for example in 2008 may still be before the courts in 2012. The mediator may not be aware of this fact and by providing details of the "fascinating" case could easily result in the parties being identified. Mediation has been in place in the Family Court for several years and with the introduction of PD 31 we query why there should be a statutory provision which can require details of mediations to be made public.

**The Law Society of Hong Kong
Mediation Committee
13 March 2012
759140**