



6 May 2010

By mail and by e-mail: mediation@doj.gov.hk

Mr Wong Yan Lung, SC, JP
Secretary for Justice
Department of Justice
1/F, High Block,
Queensway Government Offices,
66 Queensway,
Hong Kong

Dear Hon. Secretary for Justice,

RE: Report of the Working Group on Mediation

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.

Our comment:

Agree, but must be mindful that parties can adopt different models of mediation, thus the definition of mediation has to cater to various models.

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.

Our comment:

For the word mediation, "調解" and "和解" actually have different meanings; "和解" is party-driven and is not concerned with the truth of the matter whereby "調解" needs to clarify the truth of the matters before hand and be cleared on the responsibility as extracted from a book published by "人民法院出版社". In mediation, we do not know about the truth of the matters from parties therefore it is more appropriate to use the word "和解".

Our centre chose to be known as "香港和解中心" rather than "香港調解中心". The character "和" was chosen at the Beijing Olympics to make known to the world what Chinese culture values: peace and harmony. Using the term "和解" is almost self-explanatory, a process which may bring about a peaceful and harmonious settlement. The character "調" does not convey such a meaning. Even if such a term "調解" has been used in various Ordinances when mediation was hardly conducted, now that we wish to promote mediation, it is high time to correct the



terminology and adopt one which is appreciated and more easily understood by the general public.

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.

Our comment:

Promotion of mediation is plainly in the public interest. Any mediation awareness programme is good for promoting mediation. However, it is unclear as to how an “Umbrella” mediation awareness programme work as it is not provided in the Consultation Report. Is it possible to produce such a generic awareness programme?

If specific campaigns are required to cater to specific sectors, why is an “Umbrella” mediation awareness programme needed?

Any campaign must be on an on-going basis, with lots of follow up, updating etc. Support from the Government is necessary to take this up by providing manpower, money, venue etc.

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.

Our comment:

Agree that concerted efforts by diverse parties may carry greater and more lasting impact, but should not undermine the fact that friendly competition amongst different providers would bring about better products for the end-users.

On public education, the Government should put more subsidies to support the development of mediation by simplifying the application of CEF for the mediation course providers so that mediation courses would be more affordable to the general public.

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.



Our comment:

As pointed out at para. 3.11 of the Consultation Report, a distinction has to be drawn between Mediation Training, Conflict Management/Resolution Training, Mediation Advocacy Training and Negotiation Training.

Agree that mediation information and training in the form of Mediation Training, Conflict Management/Resolution Training and Negotiation Training would assist the frontline dispute resolvers in resolving conflicts harmoniously.

In addition to such frontline dispute resolvers, officials of all Government departments should likewise be trained up with mediation skills so that disputes and/or complaints can be resolved amicably and efficiently.

Recommendation 6

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

Our comment:

In addition to our comment in Recommendation 3 above, we wish to stress that it is important to give guidance and training to those who have signed up for pledge for the campaign to be meaningful, and the website must be updated.

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.

Our comment:

We cannot find any detail as to how the website is to be maintained, updated and made interactive. See our comments of Recommendation 3 and 6 above.

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.

Our comment:

We believe that although there are competing demands for Government publicity resources, the priority for a harmonious society should prevail, thus reasonable resource should be allocated to the promotion of mediation. Further, in order for Hong Kong to become the Asian Alternative Dispute Resolution Hub, the Government should help the Mediation sector by providing a permanent venue for all



mediation bodies, as it did to the Arbitration sector by providing the premises on 38th Floor, Two Exchange Square, Central, Hong Kong.

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.

Our comment:

Agree that mediation pilot schemes for different types of disputes are useful, especially in terms of collecting statistics.

Such pilot schemes must be properly administered by a Mediation Co-ordinator. We take this opportunity to thank the various Mediation Co-ordinators for their excellent work in making the pilot scheme successful. Mediators as well as participating parties spoke highly of their contribution.

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.

Our comment:

There is lesson to be learned from any scheme and it is useful to generate statistics to gauge its effectiveness. It is to be noted that data from the Judiciary should also be collected, as the Masters and Judges are keen to encourage parties to attempt mediation during Check List Hearing, Case Management Conference and Pre trial Review. The Chief Mediation Co-ordinator of the Judiciary may also have valuable information to share.

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.

Our comment:

See Recommendation 10 above.

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.



Our comment:

Agree to expand family mediation services in Hong Kong and support be given to NGO for providing family mediation services to the community.

It is noted that the current definition of "family mediation" has a limited scope to cover matrimonial disputes only, and not other types of family disputes. We believe that disputes between other family members should also be included, especially when 2 or 3 generations tend to live under one roof and many disputes may arise between family members other than spouses.

Agree that Collaborative Practice should be further explored.

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.

Recommendation 15

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

Our Comment to Recommendations 13, 14 and 15:

Agree.

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.

Our comment:

It is not necessary to wait for the outcome of the Pilot Project to conclude the need for community venues.

In order to encourage the general public to attempt mediation, it is unrealistic to expect the users to pay for expensive venue to try out a process which is new to them. Also refer to comment in Recommendation 8 above.

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.



Our comment:

Agree but believe that mediation education should be given to members of the Incorporated Management Committee to ensure efficient school management as well as harmonious school environment.

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.

Our comment:

Law Society should be urged to provide more Mediation Advocacy courses for their members. Should be up to the 2 bodies to decide if such training be made compulsory, although generally speaking, it is usually more effective to encourage members to take courses rather than compelling them to do so.

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.

Our comment:

It is always a good practice to review course curriculum from time to time. However, it should be up to each individual University to decide on when, where and how to do it.

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.

Our comment:

Agree in principle, same comment as in Recommendation 19 above.

In addition, the Government should help to promote mediation training to other faculties e.g. Engineering, Social Work Dept etc. since all engineering contracts in Hong Kong already have included some kind of mediation clause which is a good way of promoting mediation.

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.

Our comment:

Same as Recommendation 20 above.



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”.

Our comment:

Agree.

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.

Our comment:

Agree. Should invite such organizations, universities and other tertiary institutions to sign “Mediation First Pledge”. Our centre is happy to work out schemes for mediation service should disputes arise within such organizations and institutions.

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.

Our comment:

Agree. Such production costs are expensive; without Government's funding, it would not materialise.

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.

Our comment:

DISAGREE.

The present accreditation system, namely accreditation by HKIAC, HK Law Society, our centre, HK Institute of Surveyors, HK Institute of Architects, CEDR etc) is functioning well. There is no complaint that any of those accrediting bodies are producing substandard mediators. Having been accredited by any particular body is neither superior nor inferior to being accredited by another body. The reputation of the accredited mediator is earned by how he or she conducts the mediation, and not by where he or she obtained his or her accreditation.



It is impractical to expect that by merely setting up one single accreditation system, it will automatically 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. It is more practical for mediation experts (from the existing bodies who are accrediting mediators) to agree on a set of guideline on accreditation.

"There is no magic to accreditation", said by a very experienced American mediator who attended the Mediation Conference (held in Hong Kong organized jointly by the Judiciary, DOJ, HKU, HKIAC, HK Mediation Centre, HK Mediation Council in 2008). He was not accredited by any particular institution, but he had the heart and determination to do mediation, his skill and quality got better or perfected with number of mediation cases he conducted.

The only system cited in the Consultation Report about a single body accreditation system is the National Mediator Accreditation System "NMAS", which was commenced in 2008, and its National Mediator Standards Body was only established in 2010. Its success is yet to be seen.

It is dangerous and unwise to change a system that works, for a body yet to be formed.

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.

Our comment:

Agree.

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.

Our comment:

Agree.

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.

Our comment:

Disagree with a single mediation accrediting body. See comment to Recommendation 25.



Recommendation 29

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

Our comment:

Agree.

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.

Our comment:

Agree.

Recommendation 31

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

Our comment:

Agree.

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.

Our comment:

Agree in principle, subject to comments below.

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.

Our comment:

Agree, provided it will not hamper the flexibility of mediation and can cater to different models and types of mediation. Also subject to other comments below.

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.

Our comment:

Agree.



Recommendation 35

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

Our comment:

Agree. It is desirable to set out the objectives and underlying principles for educational purpose to the general public, and for the court as guiding principle when dealing with topics such as confidentiality and privileges.

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).

Our comment:

Agree.

Judges have power to stay proceedings pending mediation under Civil Justice Reform, hence no need to consider staying provisions.

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.

Our comment:

Agree. If we have such an Ordinance, it should be brief and user-friendly. We stress that the flexibility of mediation should not be jeopardized by rigid legislation provisions.

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.

Our comment:

Agree, the rules of confidentiality and privilege, statutory exceptions and sanctions for breaching such rules should be provided in the Proposed Mediation Ordinance.

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*.



Our comment:

We believe that mediators should be granted full immunity, especially in respect of pro bono or community mediation.

If mediators are not granted immunity from civil suits, the potential risk factor may deter mediators from participating in pro bono or community mediation.

Further, mediators do not offer advice nor do they make decision for the parties, hence they should not be liable to the parties and should be granted full immunity.

Recommendation 40

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

Our comment:

Agree.

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.

Our comment:

Disagree. Some people who do not wish to proceed with mediation upon being told that if one party does not abide to the mediation settlement agreement, enforcement can only be left to court as in ordinary cases of enforcement of contracts, hence they feel that mediation is inferior to litigation.

By including a statutory mechanism for enforcing mediation settlement agreement, the status of mediation may be elevated. Perhaps not as high as arbitration, as arbitral awards can be enforced at other New York Convention states, but it will be a giant step forward, and would make Hong Kong ahead of other countries if we dare to take this bold measure.

Bearing in mind that parties are at liberty to reach settlement terms by themselves, they do not need to enter into any settlement agreement if they have no intention to settle on mutually acceptable terms. Once they sign the Settlement Agreement, surely they should be bound by those terms. Should not have to spend time and money going to court for further assistance in enforcement! It is certainly worth exploring the possibility of a speedy, economical way to enforce mediation settlement agreements through a statutory mechanism.

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.



Our comment:

DISAGREE.

We believe that a Hong Kong Mediation Code suffices.

We noted that at 7.193 it refers to using the Mediation Rules of the HKIAC as a starting point, and power be given to HKIAC if its Rules are included to revise the model rules from time to time without having to seek the prior approval of the Legislative Council.

We do not believe any one set of Mediation Rule prevails another, if such rules are merely to serve as a guide, the different sets of Mediation Rules, such as those of Hong Kong Law Society, Hong Kong Mediation Centre, CEDR etc should all be listed in the schedule. We disagree that power should be given to any one particular body.

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.

Our comment:

Agree. Apology, when offered with integrity and sincerity, often work like a magic wand and instrumental in reaching settlement. However, upon obtaining legal advice, parties may not be willing to put down an apology in writing in fear that such would amount to admission/liability. We should enact an Apology Ordinance similar to the Apology Act 2006 of British Columbia to alleviate such fear.

Recommendation 44

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

Our comment:

Agree that Government should be so bound.

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.

Our comment:

Agree, parties forced to mediate may not be truly co-operative. Encouragement by judges and masters to attempt mediation would be helpful, but compelling parties against their wish may be a waste of time and money.

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).



Our comment:

Agree, however judges and masters should encourage parties to attempt mediation.

Recommendation 47

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

Our comment:

Disagree. The fact that it would require bilateral arrangements between jurisdiction does not mean that there is not much point in considering specific arrangements for cross-boundary enforcement of mediated settlement. It merely means that bilateral arrangements similar to reciprocal enforcement of arbitral awards should be made.

Recommendation 48

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

Our comment:

Agree.

Yours truly,

Tsang Ping Chiu Paco
President
Hong Kong Mediation Centre