

REPORT OF THE WORKING GROUP ON MEDIATION

Executive Summary

**Department of Justice
The Government of the Hong Kong
Special Administrative Region**

February 2010

THE WORKING GROUP ON MEDIATION REPORT

Executive Summary

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Foreword by the Secretary for Justice

“In China, mediation has remained vibrant and alive from antiquity to modernity not because of sound institutions and perfect legal provisions or because of mediation’s operational simplicity and low-cost effectiveness. Rather, it has done so because it offers a core value meaningful to every human being, one that is increasingly being accepted by modern society: harmony.”

Professor Zeng Xianyi,¹
Dean, Faculty of Law,
Renmin University of China

The time, costs, acrimony and uncertainty involved in traditional litigation raise hard issues as to whether the present dispute resolution process is adequate to meet the needs of justice and efficiency. Increasingly, mediation is considered the alternative or even the preferred method. In Hong Kong, whether the use of mediation can take off affects not only our status as a leading financial and business centre, but also our efforts to build a more harmonious community. Mediation has become a core subject in all my duty visits to the United Kingdom, Australia, Canada as well as Mainland China. The message given to me is overwhelmingly in favour of mediation forming an integral and prominent part of our dispute resolution mechanism and culture. Apart from improving access to justice, mediation fosters more varied and proportionate dispute resolution processes in our society.

With the support of the Chief Executive, the Working Group on Mediation was set up in early 2008 under my chairmanship. The Working Group has reviewed and considered many important issues that are fundamental to the greater use of mediation in Hong Kong. Recommendations have been made in this Report, and pending public consultation and further deliberation, decisions will be made on the way forward to facilitate the more effective and extensive application of mediation in both commercial disputes and those at the community level.

This Report is the collective effort of members of the Working Group and its three Sub-groups. The Sub-groups have looked into public education and promotion, accreditation and training as well as the regulatory framework for mediation. In addition to preparing reports and recommendations for the Working Group, the Sub-groups have also taken

¹ Zeng Xianyi, “Mediation in China – Past and Present”, Asia Pacific Law Review, Vol. 17, Special Edition on Mediation, LexisNexis, 2009, at page 21.

concrete steps to promote mediation such as launching the 'Mediate First' campaign among the business and professional community, promulgating a Hong Kong Mediation Code as a voluntary code of conduct, as well as instituting a pilot scheme on Community Venues for Mediation. With these well-defined directions and concerted efforts, we believe a major milestone has been reached in the development of mediation services in Hong Kong.

We have had the good fortune of being able to learn from others who are ahead of us in the use of mediation. We are grateful to pioneers and veterans from all over the world who generously provided us with information, material and advice and shared their experience in developing mediation in their own jurisdictions. We are conscious of the need to generate demand for mediation in addition to formulating standards, rules and framework. While we are convinced that quality assurance and standard setting are essential, we are also mindful that the diversity of mediation services should not thereby be stifled.

The Civil Justice Reform, together with the various mediation pilot schemes introduced by the Judiciary, has transformed the legal landscape by encouraging litigants to consider mediation. The legal professions are embracing the new culture. Training and accreditation courses for mediators are being organised at a higher frequency to meet the demand and professional codes of conduct are being reviewed to incorporate mediation practice.

I would like to extend my sincere gratitude to the members of the Working Group and the three Sub-groups for their dedication and initiatives. I would like to thank in particular the chairmen of the Sub-groups, Mr Fred Kan, Mr Lester Huang and Mr Rimsky Yuen SC, for their able leadership. Thanks must also be given to Mr Christopher To, formerly Secretary-General of the Hong Kong International Arbitration Centre, for drafting the initial discussion document and sharing with us his insights. We are also much indebted to Ms Sou Chiam, the Secretary to the Working Group, and Ms Maria Choi, the Secretary to the Sub-groups for putting this Report together.

Wong Yan Lung, SC
Secretary for Justice

THE WORKING GROUP ON MEDIATION REPORT

Executive Summary

Chapter 1 – Introduction to Mediation in Hong Kong

1. Mediation is taking root in Hong Kong. It is already well-developed in relation to certain areas such as construction disputes. However, there is much more development required in areas such as community disputes. Mediation can result in settlements which go beyond the legal remedies that a court may allow. Mediation service providers are becoming active in the training and accreditation of mediators. Various professional bodies are also developing mediation within their own bodies.

2. The Judiciary in Hong Kong has taken an active role in the use of mediation in civil cases. Mediation is recognised as an important supplement to court proceedings. The Civil Justice Reform (“CJR”) implemented in 2009 is in response to social change and technological advances which had resulted in a sharp increase in civil litigation. The CJR sets out a number of underlying objectives as stated in Order 1A Rule 1 of the Rules of the High Court. These included objectives to increase cost effectiveness of civil procedure, to deal with cases as expeditiously as is reasonably practicable, to promote a sense of reasonable proportion and procedural economy, and to facilitate the settlement of disputes. The Judiciary promulgated a Practice Direction 31 on Mediation which was made effective from 1 January 2010.

Chapter 2 – The Working Group on Mediation

3. The Secretary for Justice’s Working Group on Mediation (“Working Group”) was set up to review the current development of mediation and provision of mediation services in Hong Kong. The Working Group was established in 2008 following the October 2007 Policy Address of the Chief Executive of the HKSAR to map out plans to employ mediation more extensively and effectively in Hong Kong in handling higher-end commercial disputes and relatively small scale local disputes.

4. The membership of the Working Group is set out in **Annex 1**. The terms of reference of the Working Group is set out in **Annex 2**.

5. The Working Group was assisted by its three Sub-groups on:

- Public Education and Publicity
- Accreditation and Training
- Regulatory Framework

6. Each of these Sub-groups was active in conducting discussions, consultations and deliberations on their respective terms of reference. They also organised promotional events and launched a mediation website and a Pilot Project on Community Venues for Mediation. They provided the Working Group with their respective Sub-group reports on which this Report is substantially based.

Chapter 3 – Mediation

7. Mediation is generally used and promoted in Hong Kong as an efficient and effective cooperative and consensus oriented dispute resolution method which can be used within diverse practice areas, including both public and private spheres. Consequently, it is challenging to construct a definition of mediation that is applicable to all the settings in which mediation is used in Hong Kong. However, a useful general definition of the mediation process is offered by Folberg and Taylor as follows:

“[Mediation] can be defined as the process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.”²

8. In Hong Kong, anecdotal evidence suggests that most of the mediation conducted for the family, commercial and court related matters is facilitative mediation, although other models of mediation are used in other areas. The primary (although not exclusive) focus of the discussion in this Report is focused on the facilitative model of mediation as used in various sectors in Hong Kong.

9. The general definition of mediation can vary depending upon the context in which it is used in Hong Kong and the roles adopted by the mediator. The terms “mediation” and “conciliation” are commonly used interchangeably and generally refer to a process in which a neutral third party assists disputing parties to communicate and negotiate a settlement of their conflict or dispute. However, this is often a source of confusion and the terms are also used in the variable ways in both mediation literature and statutory provisions in Hong Kong.

10. In Hong Kong, there are no uniform Chinese terms for the English terms “mediation” and “conciliation”. In legislation, where mediation is not governed by one uniform code or legislative framework but referred to in various legislative provisions, the Chinese terms for “mediation” and “conciliation” vary. The lack of uniformity, especially the interchangeable use of “調解”, inevitably

² Jay Folberg & Alison Taylor, “Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation”, 1984, at page 7.

leads to confusion and misunderstanding among the general public and the important stakeholders in the mediation process in Hong Kong.

11. The merits of mediation include allowing parties to a dispute with an opportunity to save:³

- time
- money
- risk
- dignity
- stress
- relationships

In addition, mediation may result in settlements which go beyond the legal remedies that a court may allow and there is a high rate of compliance.

Chapter 4 – Overview of Current Development of Mediation

12. Mediation is a world trend and Hong Kong is in fact a late comer in its use in certain sectors of public life. An overview is made of the current development of mediation and the provision of mediation services in Hong Kong in the following areas:

- Construction Mediation
- Family Mediation
- Commercial Mediation
- Community Mediation
- Building Management Mediation
- Mediation for Parents
- Peer Mediation in Schools
- Victim-offender Mediation

Chapter 5 – Public Education and Publicity

13. The Public Education and Publicity Sub-group examined ways to promote a wider use of mediation and public education on mediation and reported to the Working Group. This Sub-group looked at efforts to promote peer mediation in schools which would assist to create a mediation culture among the young. It assisted mediators to find suitable and affordable community venues to conduct mediation through its Pilot Project on Community Venues for Mediation. It also promoted awareness and the use of mediation in the commercial sector through a 'Mediate First' campaign. Companies, trade associations and organisations were invited to subscribe to a 'Mediate First' pledge. A 'Mediate

³ Danny McFadden, "The Development of Mediation in the UK", talk delivered in capacity of CEDR Director for Asia at Hong Kong Club for the Chartered Institute of Arbitrators (East Asia Branch) on 3 November 2009.

First' briefing reception which was supported by various organisations⁴ was held on the 7 May 2009. A new website www.mediatefirst.hk was launched. A mediation booklet was prepared and distributed. Over 70 companies and 40 trade associations or organisations signed the 'Mediate First' pledges and affirmed their commitment to consider the use of mediation to resolve disputes before pursuing other ADR processes or litigation in court

14. The Working Group notes the important roles played by the following parties in the promotion of mediation:

- Judiciary;
- Legal practitioners;
- Mediation service providers;
- Frontline conflict resolvers;
- Chambers of Commerce;
- Consumer Council; and
- Schools and universities.

15. The Working Group is of the view that the 'Mediate First' Pledge should be encouraged within the business and commercial sector given its initial success. It considers that the appropriate pace of mediation promotion should take into account the readiness of mediators, maturity of infrastructural support and needs of mediation users. It considered the types of disputes that were suitable or not suitable for mediation and recommends that pilot schemes be considered for suitable 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.

16. In relation to the challenges posed by unrepresented litigants in court, the Working Group recommends that they should be further studied and more statistical data made available so that promotion of mediation to unrepresented litigants may be better supported.

17. The Working Group is supportive of the Pilot Project on Community Venues for Mediation to provide block booking of community venues to be made available for the conduct of mediation, especially for community mediation conducted by pro bono mediators.

18. The Working Group considers that further support and expansion of the current Restorative Justice and Mediation Programmes throughout the community in Hong Kong should be encouraged.

19. As it is important to introduce the process of mediation to young people in Hong Kong, the Working Group recommends that consideration be given to support the expansion of the Peer Mediation Project in schools. It notes

⁴ Including the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Federation of Insurers, the Hong Kong Mediation Council, the Mediation Centre, the Consumer Council, the Hong Kong Federation of Women Lawyers and the Department of Justice.

that the potential introduction of mediation education in primary and secondary schools warrants serious examination. It considers that the question of mediation being incorporated into compulsory courses in the Law Faculties be revisited when the mediation landscape becomes more mature.

20. The Working Group recommends that mediation publicity via radio, printed media and new media platform be pursued. An Announcement in the Public Interest could be produced and aired on television for the promotion of mediation.

Chapter 6 – Accreditation and Training

21. The Accreditation and Training Sub-group was tasked to review accreditation and training for mediators in Hong Kong. In tandem with considering whether a single body for accrediting mediators should be established, the Sub-group considered whether there was a need to develop a standardised system of accrediting mediators. It also considered that if a standardised system is required, whether it should entail a common benchmark applicable to all mediators irrespective of their practice areas (e.g. commercial cases or community disputes) or it should provide different benchmarks for different categories of mediators by reference to their practice areas. The Sub-group looked at some Hong Kong and overseas mediator accrediting bodies and their accreditation requirements. A report was made to the Working Group for consideration.

22. The Working Group notes that accredited mediators practising in Hong Kong are accredited by different mediation accrediting organisations, each adopting its own set of training and accreditation requirements. Furthermore, not all mediation accrediting organisations have a disciplinary mechanism to regulate the professional conduct of their mediators. Nor do all such organisations require their members to undergo continuing professional development or training after being accredited as mediators. Currently there is no single umbrella body overseeing all mediators in Hong Kong and that there is no legislation to provide for accrediting standards and training requirements.

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

24. The Working Group considers 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.

25. The Accreditation and Training Sub-group put together a draft code of conduct for mediators in Hong Kong together with a sample Agreement to Mediate. Together they make the Hong Kong Mediation Code (“Code”) attached as **Annex 3**. The Sub-group consulted with mediation service providers on a draft version of the Code and there was overwhelming support for the Code. The Working Group considers that there should be wide promulgation of the Code and mediation service providers be encouraged to adopt the Code and set up robust complaints and disciplinary processes to enforce the Code. 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 Code.

26. The Working Group considers that a single mediation accrediting body for 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.

27. The Working Group considers that encouragement should be given for experienced mediators to assist newly accredited mediators to obtain practical mediation experience.

Chapter 7 – Regulatory Framework

28. The Regulatory Framework Sub-group considered whether Hong Kong should enact a Mediation Ordinance. It also considered the proposed contents of such an Ordinance should one be enacted. These included definitions of key terminology, objectives and principles of a Mediation Ordinance, confidentiality and privilege, immunity of mediators, limitation, enforcement of mediated settlements, mediation agreement, model rules for mediation, an Apology Ordinance and contents of a mediation agreement. The Sub-group looked at the regulatory framework for mediation in various overseas jurisdictions and provided a report to the Working Group.

29. The Working Group recommends that there should be legislation on mediation and such legislation should only aim at providing a proper legal framework for the conduct of mediation and not a straight-jacket which would unduly hamper the flexibility of the mediation process. It also considers that there should be the enactment of a new stand-alone Mediation Ordinance, instead of introducing legislative provisions relating to mediation into the existing Arbitration Ordinance or other Ordinances.

30. The Working Group recommends that the Proposed Mediation Ordinance sets out its objectives and underlying principles and have an interpretation section which sets out key terminology such as ‘mediation’ and ‘mediator’. However, the Working Group does not recommend the introduction of legislative provisions dealing with enforcement of a mediation agreement. There is also 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 a mediation conducted in Hong Kong.

31. The Working Group recommends that 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. However, it does not recommend legislation that suspends the running of limitation periods during the mediation process nor grant mediator immunity from civil suits. It did consider that it may be desirable to grant partial immunity, especially in respect of *pro bono* or community mediation.

32. The Working Group is of the view that 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. Neither is it necessary to have provisions for cross-boundary enforcement of mediated settlement agreements.

33. In relation to the inclusion of model mediation rules in the Proposed Mediation Ordinance, the Working Group is of the view that whilst not really necessary, there is in principle no objection to include such rules. 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.

34. 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. The Working Group is of the view that the Government should be bound by the Proposed Mediation Ordinance unless there are specific exceptions that can be properly justified.

35. The Working Group believes that at this stage, the Judiciary should not provide mediation services nor introduce compulsory referral to mediation. However, these issues should be revisited in future after consultation with the Judiciary (whether as part of the review of the implementation of the CJR or as a separate review).

36. The Working Group supports the provision of legal aid for mediation to legally aided persons when they are willing to participate in mediation.

Chapter 8 – Summary of Recommendations

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 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.

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.

Recommendation 8

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

Recommendation 9

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

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.

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.

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.

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.

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.

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.

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”.

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.

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.

Recommendation 25

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

Recommendation 26

It is considered that currently the time is not right to prescribe a standardised system of accrediting mediators and that the emphasis should be on the provision of appropriate mediation information to potential users of mediation that will

enable them to decide whether to choose mediation to resolve disputes and also assist them to be better able to choose competent mediators.

Recommendation 27

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

Recommendation 28

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

Recommendation 29

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

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.

Recommendation 31

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

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.

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 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.

Recommendation 44

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

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.

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).

Recommendation 47

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

Recommendation 48

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

Membership of the Working Group

Chairman

Mr Wong Yan Lung, SC, JP (Secretary for Justice)

Members

The Hon Mr Justice Lam Man Hon, Johnson (Judiciary)

Professor Anthony BL Cheung, GBS, JP (Consumer Council)

Mr Chan Bing Woon, SBS, JP (Hong Kong Mediation Council)

Ms Sylvia Siu Wing Yee, JP (Hong Kong Mediation Centre)

Ms Teresa Cheng, SC (Hong Kong International Arbitration Centre)

Associate Professor Katherine Lynch (The University of Hong Kong)

Professor Anne Scully-Hill (The Chinese University of Hong Kong)

Mr Michael Beckett (City University of Hong Kong)

Mrs Cecilia K W Wong (Law Society)

Ms Anna Wu Hung Yuk, SBS, JP (Shantou University Law School)

Mr Rimsky K K Yuen, SC (Bar Association)

Mr Thomas Edward Kwong (Legal Aid Department)

Mr Ian Wingfield, GBS, JP (Department of Justice)

Mr Benedict Y S Lai, JP (Department of Justice)

Terms of Reference

- (a) To review the current development of mediation and provision of mediation services in Hong Kong;
- (b) To make recommendations, taking into account overseas and Hong Kong experience in mediation, on ways to :
 - (i) facilitate and encourage a wider use of mediation in Hong Kong and, where appropriate, to introduce pilot schemes for selected types of disputes or cases, with or without elements of compulsion;
 - (ii) ensure the quality and standard of mediators;
- (c) To conduct, or to engage experts to conduct, such studies as reasonably incidental to the matters mentioned in (a) and (b) above; and
- (d) To co-ordinate with the Chief Justice's Working Party on Mediation for the purpose of carrying out the above work.

THE HONG KONG MEDIATION CODE

General Responsibilities

1. The Mediator shall act fairly in dealing with the Parties to the mediation, have no personal interest in the terms of any Settlement Agreement, show no bias towards the Parties, be reasonably available as requested by the Parties, and be certain that the Parties have been informed about the mediation process.

Responsibilities to the Parties

2. Impartiality/Conflict of Interest

The Mediator shall maintain impartiality towards all Parties. The Mediator shall disclose to the Parties any affiliations/interests which the Mediator may have or had with any Party and in such situation obtain the prior written consent of all the Parties before proceeding with the mediation.

3. Informed Consent

- (a) The Mediator shall explain to all Parties the nature of the mediation process, the procedures to be utilised and the role of the Mediator.
- (b) The Mediator shall ensure the Parties sign an Agreement to Mediate prior to the substantive negotiations between the Parties.*
- (c) The Agreement(s) to Mediate shall include the responsibilities and obligations of the Mediator and the Parties.

4. Confidentiality

- (a) The Mediator shall keep confidential all information, arising out of or in connection with the mediation, unless compelled by law or public policy grounds.
- (b) Any information disclosed in confidence to the Mediator by one of the Parties shall not be disclosed to the other Party without prior permission.
- (c) Paragraphs 4(a) and 4(b) shall not apply in the event such information discloses an actual or potential threat to human life or safety.

5. Suspension or Termination of Mediation

The Mediator shall inform the Parties of their right to withdraw from the mediation. If the Mediator believes that a party is unable or unwilling to participate effectively in the mediation process, the Mediator can suspend or terminate the mediation.

* A sample Agreement to Mediate is attached.

6. **Insurance**

The Mediator shall consider whether it is appropriate to be covered by professional indemnity insurance and if so, shall ensure that he/she is adequately covered.

Defining the Process

7. **Independent Advice and Information**

In a mediation in which a Party is without legal representation or relevant expert opinion, the Mediator shall consider whether to encourage the Party to obtain legal advice or relevant expert opinion.

8. **Fees**

The Mediator has a duty to define and describe in writing the fees for the mediation. The Mediator shall not charge contingent fees or base the fees upon the outcome of the mediation.

Responsibilities to the Mediation Process and the Public

9. **Competence**

The Mediator shall be competent and knowledgeable in the process of mediation. Relevant factors shall include training, specialist training and continuous education, having regard to the relevant standards and/or accreditation scheme to which the Mediator is accredited. For example, in the event the mediation relates to separation/divorce, the Mediator shall have attained the relevant specialist training and the appropriate accreditation.

10. **Appointment**

Before accepting an appointment, the Mediator must be satisfied that he/she has time available to ensure that the mediation can proceed in an expeditious manner.

11. **Advertising/promotion of the Mediator's services**

The Mediator may promote his/her practice, but shall do so in a professional, truthful and dignified manner.

***AGREEMENT TO MEDIATE**

THIS AGREEMENT IS MADE ON _____

BETWEEN THE FOLLOWING PERSONS (*in this Agreement called the 'Parties'*)

(Name of Party: Please Print)

(Name of Party: Please Print)

(Contact Telephone Number)

(Contact Telephone Number)

(Address)

(Address)

AND THE MEDIATOR (*called 'the Mediator'*)

(Name of Mediator: Please Print)

(Contact Telephone Number)

(Address)

APPOINTMENT OF MEDIATOR

1. The Parties appoint the Mediator to mediate the Dispute between them in accordance with the terms of this Agreement.

ROLE OF THE MEDIATOR

2. The Mediator will be neutral and impartial. The Mediator will assist the Parties to attempt to resolve the Dispute by helping them to:
 - (a) systematically isolate the issues in dispute;
 - (b) develop options for the resolution of these issues; and
 - (c) explore the usefulness of these options to meet their interests and needs.
3. The Mediator may meet with the Parties together or separately.
4. The Mediator will not:
 - (a) give legal or other professional advice to any Party; or
 - (b) impose a result on any Party; or
 - (c) make decisions for any Party.

CONFLICT OF INTEREST

5. The Mediator must, prior to the commencement of the mediation, disclose to the Parties to the best of the Mediator's knowledge any prior dealings with any of the Parties as well as any interest in the Dispute.
6. If in the course of the mediation the Mediator becomes aware of any circumstances that might reasonably be considered to affect the Mediator's capacity to act impartially, the Mediator must immediately inform the Parties of these circumstances. The Parties will then decide whether the mediation will continue with that Mediator or with a new mediator appointed by the Parties.

COOPERATION BY THE PARTIES

7. The Parties agree to cooperate in good faith with the Mediator and each other during the mediation.

AUTHORITY TO SETTLE AND REPRESENTATION AT THE MEDIATION SESSION

8. The Parties agree to attend the mediation with authority to settle within any range that can reasonably be anticipated.
9. At the mediation each Party may be accompanied by one or more persons, including legally qualified persons, to assist and advise them.

COMMUNICATION BETWEEN THE MEDIATOR AND THE PARTIES

10. Any information disclosed to a Mediator in private is to be treated as confidential by the Mediator unless the Party making the disclosure states otherwise.

CONFIDENTIALITY OF THE MEDIATION

11. Every person involved in the mediation:
 - (a) will keep confidential all information arising out of or in connection with the mediation, including the fact and terms of any settlement, but not including the fact that the mediation is to take place or has taken place or where disclosure is required by law to implement or to enforce terms of settlement; and
 - (b) acknowledges that all such information passing between the Parties and the Mediator, however communicated, is agreed to be without prejudice to any Party's legal position and may not be produced as evidence or disclosed to any judge, arbitrator or other decision-maker in any legal or other formal process, except where otherwise disclosable in law.
12. Where a Party privately discloses to the Mediator any information in confidence before, during or after the mediation, the Mediator will not disclose that information to any other Party or person without the consent of the Party disclosing it, unless required by law to make disclosure.
13. The Parties will not call the Mediator as a witness, nor require him to produce in evidence any records or notes relating to the mediation, in any litigation, arbitration or other formal process arising from or in connection with the Dispute and the mediation; nor will the Mediator act or agree to act as a witness, expert, arbitrator or consultant in any such process.
14. No verbatim recording or transcript of the mediation will be made in any form.

TERMINATION OF THE MEDIATION

15. A Party may terminate the mediation at any time after consultation with the Mediator.
16. The Mediator may terminate the mediation if, after consultation with the Parties, the Mediator feels unable to assist the Parties to achieve resolution of the Dispute.

SETTLEMENT OF THE DISPUTE

17. No terms of settlement reached at the mediation will be legally binding until set out in writing and signed by or on behalf of each of the Parties.

EXCLUSION OF LIABILITY AND INDEMNITY

18. The Mediator will not be liable to any Party for any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this Agreement unless the act or omission is fraudulent.
19. Each Party indemnifies the Mediator against all claims by that Party or anyone claiming under or through that Party, arising out of or in any way referable to any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement, unless the act or omission is fraudulent.
20. No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator within the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded as a bar to any such action.

MEDIATION CODE

21. The mediation shall proceed according to the terms of this Agreement and the Hong Kong Mediation Code.

COST OF THE MEDIATION

22. The Parties will be responsible for the fees and expenses of the Mediator in accordance with the SCHEDULE.
23. Unless otherwise agreed by the Parties in writing, each Party agrees to share the mediation fees equally and also to bear its own legal and other costs and expenses or preparing for and attending the mediation ("each Party's Legal Costs") prior to the mediation. However, each Party further agrees that any court or tribunal may treat both the mediation fees and each Party's legal costs as costs in the case in relation to any litigation or arbitration where that court or tribunal has power to assess or make orders as to costs, whether or not the mediation results in settlement of the Dispute.

LEGAL STATUS AND EFFECT OF THE MEDIATION

- 24. Any contemplated or existing litigation or arbitration in relation to the Dispute may be started or continued despite the mediation, unless the Parties agree or a court orders otherwise.
- 25. This Agreement is governed by the law of the Hong Kong Special Administrative Region and the courts of the Hong Kong Special Administrative Region shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the mediation.

FULL DISCLOSURE (applicable to family mediation)

- 26. (a) The Parties agree to fully and honestly disclose all relevant information as requested by the Mediator and by each other.
- (b) Any failure by either of the Parties to make full and frank disclosure may result in the setting aside of any agreement reached in mediation.

SIGNING OF THE AGREEMENT TO MEDIATE

Date: _____

Name of Party or Representative (Please print and sign here)

Name of Party or Representative (Please print and sign here)

Name of Party or Representative (Please print and sign here)

Name of Party or Representative (Please print and sign here)

Name of Mediator (Please print and sign here)

SCHEDULE

Fees and Expenses of Mediator

1. For all preparation \$ (per hour)
 2. For the mediation \$ (per hour)
 3. Room hire fees \$
 4. Allocation of costs
 - Party 1 %
 - Party 2 %
 - Party 3 %
 - Party 4 %
- Or**
- All parties equally %