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Our Ref: LS/10/RLR/CON(1)/2016/ADR2.CPC2.FLP2.SLF2/HLT/jy/ak/yj/ct

Your Ref:

28 April 2016

Ms Faith Boey
Assistant Director (Policy Advisory Division)
Ministry of Law
100 High Street, #08-02
The Treasury
Singapore 179434

BY POST AND EMAIL
faith_boey@mlaw.gov.sg

Dear Madam,

PUBLIC CONSULTATION OF THE MEDIATION BILL 2016

1. We refer to your email of 17 March 2016 inviting the Law Society to provide feedback on the public consultation of the Mediation Bill 2016.
2. The consultation was referred to our Practice Committees and has been considered by Council.
3. The consolidated views of the Alternative Dispute Resolution Committee, Civil Practice Committee, Family Law Practice Committee and the Small Law Firms Committee are set out in Annex A.
4. Thank you.

Yours faithfully

DELPHINE LOO TAN
Director, Representation and Law Reform

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ANNEX A – FEEDBACK ON THE PUBLIC CONSULTATION OF THE MEDIATION BILL 2016

PUBLIC CONSULTATION OF THE MEDIATION BILL 2016 (THE “BILL”)

| S/N | Provision | Comments |
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| 1. | In General | <p>A. DEFINITIONS</p> <p><u>Family Law Practice Committee</u></p> <ul style="list-style-type: none"> • As no specific information or criteria has been provided in the Bill with respect to “mediation service provider” and “mediation institution”, the Committee hopes that these will be made clear in the subsidiary legislation to follow. • The term “Agreement to Mediate” as opposed to “Mediation Agreement” is preferred as it better defines itself. A “Mediation Agreement” may be misunderstood to mean a “mediation (mediated) settlement agreement”. If this is accepted, the wording in section 4(4) will require further amendment. <p>B. CONSENT IN MEDIATION</p> <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> • The Committee supports the recognition and promotion of mediation which has long been used by the Bar to resolve matters. However, it notes that for mediation to be truly effective as not only a form of resolving disputes but as a means of ensuring access to justice, it is necessary that parties wholly consent to mediation. • Apart from what may be an exception for family court disputes, the Committee is concerned that parties may increasingly be ‘forced’ to mediate in situations when they are either not ready to do so or do not wish to do so. In such cases, the mediation process creates dissatisfaction with the dispute resolution process among members of the public. For example, when parties are made to undergo court directed mediation, the Committee acknowledges that matters may still be resolved but this may come at the expense of the parties’ perception of whether they had access to justice. <p>C. SELECTION OF MEDIATOR</p> <p><u>Small Law Firms Committee</u></p> <ul style="list-style-type: none"> • The Bill should allow for parties to choose their mediator (as with the case of arbitration), or ask for a change of mediator if the proceedings appear not to be fair or neutral, or challenge the mediator for misconduct or other reasons. |

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| | | <p>D. NON-CERTIFIED MEDIATORS</p> <p><u>Family Law Practice Committee</u></p> <ul style="list-style-type: none"> • The Committee seeks clarification on what are the implications/validity for: <ul style="list-style-type: none"> (i) A person who performs the function of a mediator but who is not certified by a designated mediation institution, and (ii) A mediated settlement arising from a mediation carried out by a person who is not so certified. • Will and should it prevent such an agreement from being recorded a Consent Order of Court? <p>E. MEDIATOR IMMUNITY</p> <p><u>Alternative Dispute Resolution Committee</u></p> <ul style="list-style-type: none"> • There is presently no statutory provision for any immunity for the mediator in the Bill and the Committee suggests that some measure of immunity should be conferred to mediators governed by the Bill. • The omission of mediator immunity in the Bill is questionable given the existence of immunity in the following scenarios: <ul style="list-style-type: none"> (i) Judicial Officers are, per se, given immunity; (ii) Court-appointed mediators (who may not be judicial officers) in divorce cases with the Family Justice Courts are given immunity (see section 45(4) of the Family Justice Act 2014); (iii) Court-appointed mediators (who may not be judicial officers) in mediation of cases in the State Courts are given immunity (see section 68(4) of the State Courts Act); (iv) Mediators at Community Mediation Centres are given statutory immunity for acts done in good faith without involvement of fraud or wilful misconduct (see section 17 of the Community Mediation Centres Act). (v) On a different but related note, arbitrators are given immunity (see section 20 of the Arbitration Act and section 25 of the International Arbitration Act). • In conjunction with the efforts to professionalise the mediation industry, it is suggested that immunity can be a privilege given to mediators where: <ul style="list-style-type: none"> (i) The mediation is administered by a designated mediation service provider; or (ii) The mediation is conducted by a certified mediator. • This adopts the language and standard set by section 12(3)(a) of the Bill, which sets out one of the standards that a mediated settlement agreement must meet before it can be recorded as an order of court. |

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| | | <ul style="list-style-type: none"> By according such selective immunity in accordance with these higher standards of mediation envisioned by the Bill, this is an added incentive for all mediators to attain the proper professional qualification. <p>Family Law Practice Committee</p> <ul style="list-style-type: none"> Mediator immunity is an established principle in neighbouring countries: <table border="1" data-bbox="645 416 2029 1340"> <thead> <tr> <th data-bbox="645 416 837 451">Jurisdiction</th> <th colspan="2" data-bbox="837 416 2029 451">Provision</th> </tr> </thead> <tbody> <tr> <td data-bbox="645 451 837 624">Malaysia</td> <td data-bbox="837 451 1133 624">Section 19, Mediation Act 2012</td> <td data-bbox="1133 451 2029 624"> <p>Liability of a mediator</p> <p>19. A mediator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of his functions as a mediator unless the act or omission is proved to have been fraudulent or involves wilful misconduct.</p> </td> </tr> <tr> <td data-bbox="645 624 837 898">India</td> <td data-bbox="837 624 1133 898">Rule 22, Mediation and Conciliation Rules</td> <td data-bbox="1133 624 2029 898"> <p>Rule 22: Immunity</p> <p>No mediator/conciliator shall be held liable for anything bona fide done or omitted to be done by him during the mediation/conciliation proceedings for civil or criminal action nor shall he be summoned by any party to the suit or proceeding to appear in a Court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation/conciliation proceedings.</p> </td> </tr> <tr> <td data-bbox="645 898 837 1340">Hong Kong</td> <td data-bbox="837 898 1133 1340">Hong Kong Mediation Code</td> <td data-bbox="1133 898 2029 1340"> <p>EXCLUSION OF LIABILITY AND INDEMNITY</p> <p>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.</p> <p>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.</p> <p>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</p> </td> </tr> </tbody> </table> | Jurisdiction | Provision | | Malaysia | Section 19, Mediation Act 2012 | <p>Liability of a mediator</p> <p>19. A mediator shall not be liable for any act or omission in respect of anything done or omitted to be done in the discharge of his functions as a mediator unless the act or omission is proved to have been fraudulent or involves wilful misconduct.</p> | India | Rule 22, Mediation and Conciliation Rules | <p>Rule 22: Immunity</p> <p>No mediator/conciliator shall be held liable for anything bona fide done or omitted to be done by him during the mediation/conciliation proceedings for civil or criminal action nor shall he be summoned by any party to the suit or proceeding to appear in a Court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation/conciliation proceedings.</p> | Hong Kong | Hong Kong Mediation Code | <p>EXCLUSION OF LIABILITY AND INDEMNITY</p> <p>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.</p> <p>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.</p> <p>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</p> |
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| | | <div data-bbox="645 240 2029 309" style="border: 1px solid black; padding: 2px;"> for defamation, libel, slander or any related complaint, and this document may be pleaded as a bar to any such action. </div> <ul style="list-style-type: none"> <li data-bbox="593 316 2029 379">• The Committee is of the view that mediators should not be exposed to the risk of being sued subsequently by any party if mediation fails or ends with a party feeling that his/her interest has been compromised. <li data-bbox="593 386 2029 481">• In this regard, the Committee proposes that mediator immunity be provided for in the Bill to mirror the immunity accorded to arbitrators under the Arbitration Act. A sample mediator immunity provision as such is set out below. <div data-bbox="645 488 2029 1062" style="border: 1px solid black; padding: 5px;"> <p data-bbox="654 488 1576 520">Sample of Mediator Immunity Provision (based on Arbitration Act)</p> <p data-bbox="654 555 936 587">Liability of mediator</p> <p data-bbox="654 590 1115 622">A mediator shall not be liable for —</p> <ul style="list-style-type: none"> <li data-bbox="654 625 1930 657">(a) negligence in respect of anything done or omitted to be done in the capacity of the mediator; or <li data-bbox="654 660 1612 692">(b) any mistake of law, fact or procedure made in the course of mediation. <p data-bbox="654 724 1137 756">Immunity of mediation institutions</p> <ul style="list-style-type: none"> <li data-bbox="654 759 2020 855">(1) The appointing authority, or a mediation or other institution or person designated or requested by the parties to appoint or nominate a mediator, shall not be liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith. <li data-bbox="654 858 2020 992">(2) The appointing authority, or a mediation or other institution or person by whom a mediator is appointed or nominated, shall not be liable, by reason only of having appointed or nominated him, for anything done or omitted by the mediator, his employees or agents in the discharge or purported discharge of his functions as mediator. <li data-bbox="654 995 2020 1059">(3) This section shall apply to an employee or agent of the appointing authority or of a mediation or other institution or person as it applies to the appointing authority, institution or person himself. </div> <p data-bbox="542 1098 990 1129">F. CONSENT TO CONVERSION</p> <p data-bbox="593 1168 1034 1200"><u>Family Law Practice Committee</u></p> <ul style="list-style-type: none"> <li data-bbox="593 1203 2029 1367">• Some members of the Committee are of the view that it is important for the other party's consent to be sought before the Mediated Agreement is converted into an Order of Court. Although there may be some advantage in promptly converting the Mediated Agreement into an Order (e.g. certainty and finality), there is much to be said in favour of autonomy remaining with both parties separately until such time as and when parties are prepared to take the Mediated Agreement to the next level. There is little advantage to be gained by one |

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| | | <p>party unilaterally applying to make the Mediated Agreement into an Order since the party seeking to uphold the Mediated Agreement already has the comfort of a fairly large body of case law which has upheld Mediated Agreements or agreements made in the contemplation of divorce. This obviates the need to push the Mediated Agreement through the court without the overt consent of the other party.</p> <ul style="list-style-type: none"> • On the other hand, for those who find that the Mediated Agreement no longer augurs well for whatever reasons in their fact case scenario, they would have to persuade the Court not to uphold that part of the Mediated Agreement rather than having to argue a change of circumstances in a variation application. In the arena of family law (more than commercial or contractual law), this is important as it affects so directly the lives of the parties and children. • The Committee would like to seek clarification on whether the Bill will provide for situations when consent to record is withheld or if parties do not wish to record the agreement as an Order. |
| 2. | Section 2 | <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> • A brief definition for “mediation institution” and “mediation service provider” has been provided for in the Bill. More specific information and criteria can be provided to supplement the definition. |
| 3. | Section 4 | <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> • The term “mediation agreement” as used in the Bill is likely to be confused with the meaning of a “mediation settlement agreement”. The Committee suggests that the term “agreement to mediate” may provide greater clarity. |
| 4. | Section 6 | <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> • Section 6(a) envisions a consensual mediation case whereas Sections 6 (b) to (d) refers to forms of mediation directed by the courts. A breach of such directions could have cost implications for the parties involved. • Where Sections 6(b) to (d) court mandated mediation are concerned, the Committee would like to seek clarification on the following: <ul style="list-style-type: none"> (i) Whether the Bill, as primary legislation, ought to spell out the Courts’ power to direct parties to mediation; (ii) What is the extent of (i) the Court’s powers to direct parties to mediation and (ii) the parties’ obligations in attempting to comply with the said directions; and (iii) In relation to Section 6(d), the Committee notes there is reference to “any mediation conducted by ... the High Court or the Court of Appeal.” As the High Court and Court of Appeal currently do not conduct mediation, this needs to be clarified. |

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| | | <ul style="list-style-type: none"> In so far as the Bill may empower courts to direct parties to mediate, the Committee's concern is that court mandated mediation, save in family matters, is at odds with the fundamental tenet of mediation being a voluntary arrangement which parties enter into to seek an amicable resolution. |
| 5. | Section 7 | <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> If the intention of the Bill is to develop mediation as a scheme that has the trust of the public, the Committee suggests the consideration of the following points: <ol style="list-style-type: none"> To provide transparency on the selection criteria of any mediation service provider and mediation institute; and To create a framework of ethics and professional responsibility applicable to mediators. <p><u>Family Law Practice Committee</u></p> <ul style="list-style-type: none"> The Committee is of the view that to garner trust in the mediation community, it may be worth considering an openness in the selection criteria of any mediation service provider and mediation institute and having in place a framework of ethics and professional responsibility applicable to all mediators. |
| 6. | Section 8 | <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> The Committee notes that Section 8 mirrors the court's power to stay proceedings in favour of arbitration, as found in the Arbitration Act (Cap. 10) and the International Arbitration Act (Cap. 143A). However, a key difference between mediation and arbitration is that mediation may be used as an "intermediate" step before arbitration or litigation. As such, the Committee suggests limiting the court's power to stay cases only where mediation is agreed to be a final mode of dispute resolution, as opposed to agreements which envisage mediation merely as an intermediate step before litigation. <p><u>Family Law Practice Committee</u></p> <ul style="list-style-type: none"> The Committee is of the view that a provision could be included in the Bill to cover the situation in which either party starts court proceedings when mediation is ongoing. One suggestion is to clarify and widen the provision under Section 8 to cater for situations where: <ol style="list-style-type: none"> Court proceedings have commenced and parties later enter into an agreement to mediate; and Where parties agree to mediate but concurrently start or commence court proceedings half way through the mediation. |

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| 7. | Section 9 | <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> The Committee notes that the obligation to observe confidentiality for mediation communications is wide, given the broad definition for “mediation communication” under Section 2. From a plain reading of Section 2 with Section 9, the Bill might be interpreted as adopting a blanket approach by cloaking everything done and all information conveyed in the course of the mediation as confidential. If this is the case, one issue is the effect on information that was previously agreed as non-confidential between the parties. The Committee is of the opinion that matters which are not confidential should not now become confidential simply by virtue of them being part of the things said or done or information provided in the course of mediation. <p><u>Family Law Practice Committee</u></p> <ul style="list-style-type: none"> The Committee is of the view that confidentiality should be waived if a party or parties to mediation brings a claim against a mediator arising out of matters in connection with the mediation. Confidentiality should cease once there is settlement. |
| 8. | Section 9(2) | <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> With specific regard to the exceptions to confidentiality of mediation communications under Section 9(2): <ul style="list-style-type: none"> (i) Section 9(2)(g) could be broadened. In its current form, section 9(2)(g) does not adequately cover situations where a party needs to disclose the fact of mediation, the result of mediation, or some mediation communication, for the purposes of regulatory compliance. For example, a listed company may need to disclose information about mediation if information about the on-going dispute constitutes material information. Therefore, the Committee proposes that section 9(2)(g) adopts similar wording to Rule 35.2(e) of the SIAC Rules 2013, which allows disclosure of confidential information “in compliance with the request or requirement of any regulatory body or other authority”; and (ii) A new exception could be created where confidentiality is waived if a party or parties to a mediation bring(s) a claim against the mediator(s) arising out the matters in connection with the mediation. |
| 9. | Section 9(3)(b) | <p><u>Alternative Dispute Resolution Committee</u></p> <ul style="list-style-type: none"> Although the Committee agrees that confidentiality under the mediation communication may be waived in relation to an “allegation or a complaint of professional misconduct against a mediator”, they are concerned over the absence of prescribed professional standards governing mediators under the Bill. The Bill should institute provisions that define the mediator’s professional standards and liabilities to enable mediators to determine when and how they might be liable for such professional misconduct. |

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| | | <ul style="list-style-type: none"> The Committee suggests that for the purposes of clarity, the Bill should go further and institute provisions touching on the mediator's liability, indemnity and complaints procedure. |
| 10. | Section 9(3)(d) | <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> With regard to the exceptions to confidentiality of mediation communications requiring leave of the court or arbitral tribunal under Section 9(3), Section 9(3)(d) embodies a "catch-all" provision giving the court or arbitral tribunal a wide discretion to grant leave to the parties to disclose a mediation communication as long as the court or arbitral tribunal considers it justifiable in the circumstances of the case. Section 9(3)(d) thus embodies a very wide and invasive discretion conferred on the court or arbitral tribunal. The Committee notes that mediation is a process where the parties' privacy is preserved and this is an important element which gives the parties the confidence to thoroughly engage in the process. Having knowledge of section 9(3)(d) means that parties become more likely to withhold information that would have better allowed them to achieve a consensus in mediation. |
| 11. | Section 11 | <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> The Committee notes that section 11 allows a party to apply to the court for leave to admit mediation communications into evidence in the court proceedings. It is suggested that unlike litigation, public interest considerations should not be applied to open up mediation communications. Mediations may be conducted informally and in an unstructured manner. Most mediations are likely to be case specific. One view is that there should be no disclosure of mediation communications so as not to impede the process itself as it may have a stifling effect. Alternatively, the matters under section 11(2) should be limited to the matters under (a) and in the 'interests of administration of justice'. Disclosure, if allowed, should be in the rarest of cases. The Committee notes that paragraphs 7 and 8 of the Ministry of Law briefing note (accessible at: https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-the-draft-mediation-bill.html) suggests that the Bill <u>codifies</u> what may or may not be admissible. If that is the intention, the common law may cease to inform the statutory position. However, the use of factors such as in the "interests of the administration of justice" under section 11(2)(b) requires the court to apply common law principles of when privilege applies or is waived. |
| 12. | Section 12(1) | <p><u>Alternative Dispute Resolution Committee</u></p> <ul style="list-style-type: none"> The Committee suggests that the enforceability aspect of a mediation settlement agreement via recording as a court order can be improved. The Committee suggests that section 12(1) should apply as a default position, where parties to the agreement may unilaterally apply to the court to record the agreement as a court order, |

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| | | <p>unless the parties agree otherwise (either in the mediated settlement agreement or a separate agreement on the matter). As such, the Committee proposes an amended version of section 12(1):</p> <div style="border: 1px solid black; padding: 5px;"> <p>“12 – (1) <u>Unless the parties agree otherwise</u> where a mediated settlement agreement has been reached at a mediation in relation to a dispute for which no proceedings have been commenced in court any party to the agreement [with the consent of all the other parties to that agreement] may apply to a court to record the agreement as an order of court.”</p> </div> <ul style="list-style-type: none"> • The Committee recognises that the proposed version of section 12(1) will create a new practice in Singapore requiring mediation advocates to actively consider whether parties should “contract out” of section 12(1). This new practice potentially gives rise to negligence claims against mediation advocates where such mediation advocates fail to advise their clients on the effect of section 12(1). However, this position will promote Parliament’s intention for the heightened enforceability of mediated settlement agreements and will therefore be in line with the “pith and marrow” of section 12. • On a related note, the Committee notes that the intent of section 12(1) is that parties should be able to engage in a relatively simple process of enforcing the mediated settlement agreement via an application to court to record the agreement as an order of court. However, the Committee notes that a mediated settlement agreement is part of a “mediation communication” per the interpretation under section 2. Under section 9(3)(a), a person may disclose a “mediation communication” with leave of the court under section 11 “for the purpose of enforcing or disputing a mediated settlement agreement”. The Committee therefore seeks clarification on the following: <ul style="list-style-type: none"> (i) Whether leave of the court under section 11 ought to be required for the purposes of recording a mediated settlement agreements as a court order under section 12(1), thus making the process of enforcement tedious and time-consuming; (ii) If mediation settlement agreements are part of the “mediation communication” and are therefore cloaked with confidentiality under the Bill, the Committee notes that this differs from practice as not all mediation settlement agreements are confidential unless the parties otherwise agree. <p><u>Civil Practice Committee</u></p> <ul style="list-style-type: none"> • With regard to section 12(1), it is suggested that consent of <u>all</u> parties be obtained as recording the outcome of a mediation as an order of court was probably not envisaged when parties agreed to mediate especially when such mediations are not done in the course of legal proceedings. • The COMMITTEE suggests an amendment to section 12(1), which caters for situations where a mediated settlement agreement is concluded not at the mediation but at a later date: |

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| | | <div style="border: 1px solid black; padding: 5px; margin-bottom: 10px;"> <p>“Where a mediated settlement agreement has been reached <u>through a</u> at-a mediation in relation to a dispute for which no proceedings have been commenced in court, any party to the agreement may[, with the consent of all the other parties to that agreement,] apply to a court...”.</p> </div> <ul style="list-style-type: none"> • This amendment will cater for situations where a mediated settlement agreement is concluded not at the mediation, but at a later date. |
| 13. | Section 12(2) | <p><u>Alternative Dispute Resolution Committee</u></p> <ul style="list-style-type: none"> • With regard to section 12(2), the Committee suggests that the application to record the mediated settlement agreement as an order of court may also be made “within such longer period as the parties may agree”. <p><u>Family Law Practice Committee</u></p> <ul style="list-style-type: none"> • With regards to section 12(2)(a), the Committee seeks clarification on the consequences if the application is made after the stipulated time of 4 weeks, in particular, if this would render the application void or unenforceable. |
| 14. | Section 12(4) | <p><u>Alternative Dispute Resolution Committee</u></p> <ul style="list-style-type: none"> • With regard to section 12(4) which sets out the instances where the court may refuse to record a mediated settlement agreement as an order of court, the Committee notes that one such instance is where the “subject matter of the agreement is not capable of settlement” [i.e. section 12(4)(b)]. The Committee questions the purpose and utility of section 12(4)(b), given that most scenarios that warrant the court’s refusal to record the mediated settlement agreement would be captured by sections 12(4)(a), (c) and (d). As such, the Committee proposes to remove section 12(4)(b). <p><u>Family Law Practice Committee</u></p> <ul style="list-style-type: none"> • The Committee is of the view that section 12(4)(c) and (d) should address what happens if the court refuses to record the agreement because the subject matter is not capable of settlement but parties managed to reach a settlement. • For section 12(4), it is suggested that provision be made for the court to refuse to record “portions” of a mediated settlement agreement if (a) to (d) apply. This will allow for parts of the settlement agreement to be recorded as a Consent Order where other portions may fail. |