

Written evidence from Louis Flannery KC (Mishcon de Reya LLP) Rupert D’Cruz KC (Littleton Chambers)

**SUBMISSIONS ON THE BILL (“the Bill”)
TO AMEND THE ARBITRATION ACT 1996 (“the Act”)**

By
Louis Flannery KC (Mishcon de Reya LLP)
Rupert D’Cruz KC (Littleton Chambers)

1. We are arbitration specialists practising from the aforementioned Chambers and law firm.
 - (1) Louis Flannery KC is the co-author of *Merkin and Flannery on the Arbitration Act 1996*.
 - (2) Rupert D’Cruz KC is Head of Littleton’s Arbitration Group.

2. In these submissions we set out proposed changes to the wording of clauses: **1(2)** (law applicable to arbitration agreement); and **2(2)** (Impartiality: duty of disclosure) of the Bill. We believe that these changes would add clarity for the reasons explained below. These submissions have not been published anywhere already.

Clause 1(2)

3. For the avoidance of doubt, we propose that **s.6A** state explicitly in **subs.(1)(b)** that in determining the law of the arbitration agreement law under that subs., reference ought to be made to the seat of the arbitration as designated or determined in accordance with **s.3** of the Act (the seat of the arbitration). Our suggested wording is as follows:

"...(b) where no such agreement is made, the law of the seat of the arbitration in question, **designated or determined in accordance with section 3.**" (emphasis added)

Clause 1(3)

4. Under the proposed **s.23(A)**, an individual's duty of disclosure would: (i) arise the moment they are approached about a possible appointment; and (ii) apply *even if they do not intend to accept it*. In our view that would impose an undue (and potentially sensitive) disclosure obligation. The objective of proposed **s.23(A)** could, we believe, be achieved more proportionately by either of the two following changes:

- (1) Remove proposed **ss.(1)** and rephrase proposed **ss.(2)** as follows:

"...(1) An arbitrator **who has either been appointed or nominated or intends to accept a possible [or proposed] appointment or nomination as arbitrator** must, as soon as reasonably practical, disclose to the parties to the arbitral proceedings any relevant circumstances of which the arbitrator is, or becomes, aware." (emphasis added)

Or:

- (2) Amend proposed **ss.(1)** and **(2)** as follows:

"(1) An individual who has been approached by a person in connection with the individual's possible appointment as an arbitrator must **(if intending to accept the proposed appointment)**, as soon as reasonably practical, disclose to the person any relevant circumstances of which the individual is, or becomes, aware.

(2) **Once appointed**, an arbitrator must, as soon as reasonably practical, disclose to the parties to the arbitral proceedings any relevant circumstances of which the arbitrator is, or becomes, aware." (emphasis added)

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