

立法會
Legislative Council

Ref : CB2/BC/2/11

LC Paper No. CB(2)1712/11-12
(These minutes have been seen
by the Administration)

Bills Committee on Mediation Bill

Minutes of the fifth meeting
held on Tuesday, 7 February 2012, at 4:30 pm
in Conference Room 2A of the Legislative Council Complex

- Members present** : Dr Hon Margaret NG (Chairman)
Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-yee, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Hon CHEUNG Kwok-che
- Members absent** : Hon Albert HO Chun-yan
- Public Officers attending** : Department of Justice

Mr Simon LEE
Deputy Law Officer (Civil Law)

Miss Shandy LIU
Senior Government Counsel (Law Drafting Division)

Miss Venus CHEUNG
Government Counsel
- Clerk in attendance** : Miss Flora TAI
Chief Council Secretary (2)3
- Staff in attendance** : Mr YICK Wing-kin
Assistant Legal Adviser 8

Ms Wendy LO
Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

Action

I. Meeting with the Administration

[LC Paper Nos. CB(2)955/11-12(01), CB(2)969/11-12(01),
CB(3)154/11-12 and CB(2)644/11-12(01)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Follow-up actions required of the Administration

Admin

2. The Administration was requested to –

- (a) provide a written response to the submission of the Hong Kong Association of Banks;
- (b) provide an updated response after re-consideration of the issues raised at the meetings on 10 January and 1 February 2012 and whether amendments should be made to the Bill as appropriate;
- (c) consider whether disclosure of mediation communication for seeking legal advice should be expressly allowed in the Bill;
- (d) consider whether a written consent was required to disclose a mediation communication under clause 8(2)(a);
- (e) review the drafting of clause 8(3)(a);
- (f) consider whether clause 8(4) should be put under clause 2 of the Bill;
- (g) improve the drafting of the Chinese text of clause 8(3)(b); and
- (h) explain in writing the reasons for excluding the processes specified in Schedule 1 from the application of the Mediation Ordinance.

Action

Date of next meeting

3. The Bills Committee agreed to hold the next meeting on 22 February 2012 at 8:30am.

(Post-meeting note: At the request of the Administration, the next meeting has been rescheduled for 28 March 2012 at 8:30am.)

II. Any other business

4. There being no other business, the meeting ended at 6:15 pm.

Council Business Division 2
Legislative Council Secretariat
16 April 2012

**Proceedings of the fifth meeting of the
Bills Committee on Mediation Bill
on Tuesday, 7 February 2012, at 4:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker(s)	Subject(s)	Action required
000608 - 000718	Chairman	Opening remarks	
000719 - 001349	Chairman Administration	<p>Referring to the submission from the Hong Kong Association of Banks ("HKAB") [LC Paper No. CB(2)969/11-12(01)] expressing the views that the mediation to be conducted by the Financial Dispute Resolution Centre Limited ("FDRC") should be excluded from the application of the Mediation Ordinance and the scope of the disclosure of mediation communications in clause 8 of the Bill was too broad, the Administration's response that –</p> <p>(a) the Administration did not agree with the view of HKAB noting that the mediation to be conducted by FDRC was not a self-contained statutory scheme but administrative in nature;</p> <p>(b) the Administration had explained its stance when addressing the concerns about the disclosure of mediation communications raised by deputations; and</p> <p>(c) it would provide a written response to the submission of HKAB.</p> <p>The Chairman's expression of views that –</p> <p>(a) the mediation to be conducted by FDRC, which was set up at the request of the Legislative Council to deal with financial disputes, would be entirely different from the voluntary mediations to be covered by the Mediation Ordinance as it was mandatory for all HKAB members to enter into mediation under that scheme; and</p> <p>(b) the Bills Committee might propose Committee Stage Amendments to include the mediation conducted under FDRC in Schedule 1 ("Processes to which this Ordinance Does not Apply") to the Bill if the Administration refused to do so.</p>	Admin (para 2 of minutes)

Time Marker	Speaker(s)	Subject(s)	Action required
001350 - 001507	Chairman Mr CHEUNG Kwok-che Administration	<p>The Administration's response to issues raised at the meetings on 10 January and 1 February 2012 [LC Paper No. CB(2)955/11-12(01)].</p> <p>The Administration's undertaking to provide an updated response after re-consideration of the issues raised and whether amendments should be made to the Bill as appropriate.</p>	Admin (para 2 of minutes)
001508 - 002952	Chairman Administration Mr CHEUNG Kwok-che	<p>The Administration's briefing on clause 8(1)(2) ("Confidentiality of mediation communications").</p> <p>Mr CHEUNG Kwok-che's enquiry on how the situation could be dealt with where divergent views were held by the parties to a dispute on the disclosure of a mediation communication.</p> <p>The Administration's response that –</p> <ul style="list-style-type: none"> (a) for disclosure of mediation communications, parties preferably should reach a consensus in accordance with clause 8(2)(a) in order to avoid disputes; and (b) a party to a dispute might seek to disclose a mediation communication under the specific circumstances set out in clause 8(2)(b) to (f) but agreement of parties on disclosure should be preferable in order to protect the interests of all concerned. <p>Mr CHEUNG Kwok-che's enquiry about the legal consequences to a person who refused to disclose a mediation communication resulting in harm to a person.</p> <p>The Administration's advice that –</p> <ul style="list-style-type: none"> (a) whether there was legal consequence would depend on the actual circumstances of each case; and (b) the Bill did not seek to impose additional legal liability on a person who refused to disclose mediation communication resulting in harm to a person. <p>The Chairman's observation that unlike the situation in clause 8(3), a person might disclose a</p>	

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		<p>mediation communication without the leave of the court or tribunal under the specific circumstances set out in clause 8(2)(a) to (d). Her expression of concern about the absence of sanctions against the breach of the rule of confidentiality if a person claimed that there were reasonable grounds to believe that the disclosure was necessary to prevent or minimize the danger of serious harm to the well-being of a child.</p> <p>The Administration's explanation that –</p> <p>(a) although the Bill did not set out the sanctions against such disclosure, the affected party could resort to civil remedies including injunction and damages for breach of confidentiality of mediation communication; and</p> <p>(b) regarding clause 8(2)(d), mediation communication might only be disclosed if the disclosure would be necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child.</p>	
002953 - 003913	Chairman Administration Mr CHEUNG Kwok-che	<p>The Chairman's queries about the definition of "well-being" in clause 8(2)(d) and the subjective interpretation of the provision. Her suggestion that the leave of the court or tribunal should be obtained for the disclosure of a mediation communication for the purpose of preventing or minimizing the danger of injury to a person or of serious harm to the well-being of a child.</p> <p>Mr CHEUNG Kwok-che's expression of support for the Chairman's suggestion.</p> <p>The Administration's response that –</p> <p>(a) the Administration had considered the views of experienced family mediators in drafting clause 8(2)(d);</p> <p>(b) the term "well-being" was used because it had a broad meaning covering psychological, economic, physical development in addition to personal injuries; and</p>	

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		<p>(c) regarding the legal liability on mediators and the parties who disclosed a mediation communication, the Administration considered that the risk of incurring legal liability was low if the disclosure was made on the basis of reasonable grounds with sufficient information obtained to support the decision.</p> <p>Mr CHEUNG Kwok-che's expression of concern that the well-being of the child would be compromised in the end if the mediator was worried that a party to a dispute would take legal action against the disclosure of a mediation communication.</p> <p>The Chairman's views that the inclusion of clause 8(2)(d) would undermine the intended purpose of clause 8 to safeguard the confidentiality of mediation communications.</p>	
003914 - 005246	Prof Patrick LAU Chairman Administration	<p>Prof Patrick LAU's enquiry on whether a mediation communication could be disclosed to a third party for the purpose of seeking professional advice during the mediation process.</p> <p>The Administration's advice that a person must not disclose mediation communication except as provided by clause 8(2) or (3). A party to mediation might obtain the consent of all concerned under clause 8(2)(a) to disclose mediation communication to a third party for the purpose of seeking professional advice.</p> <p>The Chairman's enquiry on whether legal advice could be sought if a party opposed to the disclosure of the mediation communication. Her views that the right of the parties to seek legal advice in mediation should be provided for in the Bill.</p> <p>The Administration's response that –</p> <p>(a) lawyers representing the parties to a dispute could participate in the mediation process;</p> <p>(b) although there was no express provision providing that legal advice could be sought during the mediation process, the right of</p>	

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		<p>Hong Kong residents to confidential legal advice was guaranteed under Article 35 of the Basic Law; and</p> <p>(c) the Administration would consider whether disclosure of mediation communication for seeking legal advice should be expressly allowed in the Bill.</p> <p>Prof Patrick LAU shared the view of the Chairman that the leave of the court or tribunal should be obtained for the disclosure of a mediation communication under the circumstance in clause 8(2)(d).</p>	<p>Admin (para 2 of minutes)</p>
005247 - 005554	Assistant Legal Adviser Administration Chairman	<p>The legal adviser to the Bills Committee enquired whether a written consent was required to disclose a mediation communication under clause 8(2)(a).</p> <p>The Administration's advice that there was no similar statutory requirement in the laws of overseas jurisdiction. Depending on the nature of the mediation communication to be disclosed and the implications of the disclosure, participants of a mediation would exercise due diligence in considering the disclosure of a mediation communication and how the disclosure should be made, and would probably consider the need to record the agreement to disclose in writing. The Administration undertook to consider the issue.</p>	<p>Admin (para 2 of minutes)</p>
005555 - 010558	Ms Miriam LAU Chairman Administration	<p>Ms Miriam LAU's views that –</p> <p>(a) the leave of the court or tribunal should be obtained for the disclosure of a mediation communication under the circumstance in clause 8(2)(d);</p> <p>(b) the Mediation Ordinance to be enacted would be a toothless tiger in the absence of any sanctions against the breach of the rule of confidentiality; and</p> <p>(c) there should be express provisions setting out the relevant sanctions in the Bill.</p> <p>The queries of Ms Miriam LAU and the Chairman about the efficacy of the Mediation Ordinance.</p>	

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		<p>The Administration's response that –</p> <ul style="list-style-type: none"> (a) mediators and parties to mediation would exercise due diligence in dealing with the confidentiality of mediation communications and the Administration was not aware of cases of abuse so far; (b) the instances where a person could disclose a mediation communication were proposed in the Bill to address social needs; (c) there would be legal liability if a mediation communication was disclosed without the consent of the relevant parties and not under any other exceptions in clause 8 including any of the specific grounds provided in clause 8(2)(b) to (f); and (d) the Administration considered that civil remedies against breach of confidentiality were adequate and the provision of statutory sanctions against the disclosure of a mediation communication in the Bill was unnecessary and might hamper the promotion and development of mediation at this stage. 	
010558 - 011056	Assistant Legal Adviser Administration Chairman	<p>Regarding clause 8(2)(c), the legal adviser to the Bills Committee expressed concern that a person, who was not a party to the mediation but was a party to civil proceedings which was not related to the subject dispute in the mediation but had possession, custody or control of certain information contained in the mediation communication which was subject to discovery in the civil proceedings, might be able to disclose the mediation communication concerned.</p> <p>The Administration's views that the chance that a mediation communication was obtained by a third party who was not a party to the mediation was rather slim in reality. The mediation communication could be information available to the public under clause 8(2)(b). The Administration considered the drafting of clause 8(2)(c) appropriate.</p>	

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011057 - 011245	Chairman Administration Mr Abraham SHEK Assistant Legal Adviser	<p>The Administration's briefing on clause 8(3).</p> <p>Mr Abraham SHEK's enquiry as to whether a mediation communication containing personal data information could be disclosed according to clause 8(3).</p> <p>The Administration's advice that the Mediation Ordinance merely set out the instances where a mediation communication could be disclosed and personal data must be handled in compliance with the requirements set out in the Personal Data (Privacy) Ordinance.</p>	
011245 - 011808	Chairman Administration Assistant Legal Adviser	<p>In response to the legal adviser to the Bills Committee, the Administration's affirmation that –</p> <p>(a) "professional misconduct" covered the misconduct made both in the capacity as a mediator and in the capacity as other professionals during the mediation process; and</p> <p>(b) "any other person" referred to other person/professional who was not a mediator but participated in the mediation.</p> <p>The Chairman's view that it was difficult to define "professional misconduct" as the statutory requirement on the professional qualification of a mediator was not specified in the Bill.</p> <p>The Administration's explanation that as a mediator who was trained or accredited by a mediation accrediting body would be regarded as a professional in mediation, a complaint could be made against the mediator for "professional misconduct" if he or she failed to perform the duties as specified in an agreement to mediate.</p>	
011809 - 013120	Chairman Administration Mr Abraham SHEK Assistant Legal Adviser	<p>Regarding clause 8(3)(a), the Chairman's queries of –</p> <p>(a) why there was a need to "enforce" a mediated settlement agreement as the parties should be willing to observe the terms of agreement after the mediation;</p>	

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		<p>(b) why it was necessary to disclose a mediation communication in the enforcement of a mediated settlement agreement given that a mediation settlement agreement was not part of a mediation communication and therefore could be disclosed; and</p> <p>(c) whether "質疑" was the appropriate Chinese rendition of "challenging" in the provision.</p> <p>The Administration's explanation that further disputes after mediation could arise and a party to a mediated settlement agreement might refuse to act in accordance with the terms and conditions of the agreement. In order to enforce the agreement, a party could rely on clause 8(3)(a) which provided for the disclosure of a mediation communication for the purpose of enforcing a mediated settlement agreement (in other words, the suing on the contract of a mediated settlement agreement) with the leave of the court or tribunal.</p> <p>The Administration was requested to –</p> <p>(a) review the drafting of clause 8(3)(a) to reflect clearer its intended purpose;</p> <p>(b) consider whether clause 8(4), which contained the definition of "child", should be put under clause 2 of the Bill ("Interpretation"); and</p> <p>(c) improve the drafting of the Chinese text of clause 8(3)(b).</p>	<p>Admin (para 2 of minutes)</p>
013116 - 013841	Chairman Administration Mr Patrick LAU	The Administration's briefing on clauses 9 ("Admissibility of mediation communications in evidence") and 10 ("Leave for disclosure or admission in evidence").	
013842 - 014200	Chairman Administration	<p>Schedule 1 to the Bill ("Processes to Which this Ordinance Does not Apply")</p> <p>At the request of the Chairman, the Administration undertook to explain in writing the reasons for excluding the processes stipulated in Schedule 1 from the application of the Mediation Ordinance.</p>	<p>Admin (para 2 of minutes)</p>

Time Marker	Speaker(s)	Subject(s)	Action required
014201 - 014754	Chairman Mr Abraham SHEK Mr Patrick LAU	The expression of views of Mr Abraham SHEK and the Chairman that the request of HKAB for excluding the mediation to be conducted by FDRC from the application of the Mediation Ordinance was reasonable. Date of next meeting	

Council Business Division 2
Legislative Council Secretariat
16 April 2012