

**Administration’s Responses to Submissions made by Deputations to the Bills Committee on the Mediation Bill**

No.	Organisations/ Individuals	Comments	Administration’s Responses
1.	CEDR Asia Pacific [LC Paper No. CB(2) 819/11-12(01)]	<ul style="list-style-type: none"> <li>i. Supportive of the Mediation Bill (<del>the</del> Bill”).</li> <li>ii. Concerned whether flexibility of the mediation process could be maintained with legislation on mediation and potential danger that it may provide grist for some lawyer’s mill.</li> <li>iii. Concern with Clause 4(2) and 4(3); whether pre-mediation telephone conversation is a mediation session as defined under Clause 4(1). Does this mean for example a</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. Legislation on mediation is in line with world trends and is one of the recommendations of the Working Group on Mediation (<del>Working</del> Group”) chaired by the Secretary for Justice. The Mediation Bill (<del>the</del> Bill”) can address some areas in which the case law concerning confidentiality and privilege is uncertain. It will provide greater clarity and certainty to parties resorting to mediation.</li> <li>iii. The purpose of clause 4(2) and (3) is to clarify the meaning of <i>mediation</i> within the context of the Bill in order to protect the confidential nature of any <i>mediation communication</i> (as defined in</li> </ul>

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		<p>mediator having a pre-mediation telephone conversation with a party or their lawyer about the choice of venue is a mediation session and that for the purposes of the Ordinance a mediation session has therefore been conducted and then it is conceivable that recalcitrant parties can then assert –We conducted a mediation session fulfilling our obligations under the Mediation Practice Direction but we couldn't agree on the venue.” CEDR is of the view that this is mediation preparation and not mediation session.</p> <p>iv. Accepts that there could be exceptions to confidentiality and without prejudice principles, mediation communication should remain inadmissible in subsequent litigation.</p> <p>v. Tests for leave to disclose mediation</p>	<p>clause 2(1)) made –for the purpose of or in the course of mediation”. In determining what amounts to a minimum level of participation or a substantive mediation session for the purpose of the Practice Direction 31 on mediation (–PD 31”), the court will consider the quality, rather than the quantity of mediation and whether the conduct of a party is a sincere and genuine attempt on mediation (see <i>Hak Tung Alfred v Bloomberg L.P. (a firm) and another</i>, HCA 198/2010). The definition of mediation in the Bill should not be applied to interpret PD 31 in the manner and for the purpose as described in the comment.</p> <p>iv. Mediation communications are confidential and inadmissible as evidence in subsequent proceedings except as provided by clauses 8, 9 and 10 of the Bill.</p> <p>v. We are confident that a specified court or</p>

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		communication by the Courts/ Tribunals are not high to overcome.	tribunal hearing an application for leave under the Bill will take into account all relevant circumstances and exercise sound judgment in balancing the need to keep mediation communications confidential against the need for disclosure in each individual case.
2.	RICS Hong Kong	i. Simple mechanism similar to enforcement of arbitration award.	i. Mediation is a flexible process whereby the mediation settlement is agreed by the parties to the mediation. It is not adjudication. It is considered that civil remedies for enforcing mediated settlement agreements that are currently available are adequate. Countries such as Australia and the United States generally view mediated settlement agreements as contracts and apply traditional contract law principles to disputes arising out of efforts to enforce them.
3.	Professional Mediation Consultancy Centre [LC Paper No. CB(2)802/11-12(01)]	i. Whether the enactment of the Bill will enhance public awareness as to promote the wider use of mediation as Alternative Dispute Resolution (ADR) Method.	i. The Bill aims at providing a regulatory framework in respect of certain aspects of the conduct of mediation, such as confidentiality and admissibility and will increase public

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		<p>ii. Whether the community will be more harmonious with the wider use of mediation and whether social resources can be utilized more economically and costs effective.</p> <p>iii. Enforceable mediated settlement not as another contract for possible subsequent litigation.</p>	<p>awareness of mediation as an ADR method.</p> <p>ii. The aim of mediation is to reach a solution which is acceptable to all the parties in a dispute. When more disputes are settled in an amicable and peaceful way with the use of mediation, it is likely that the community will be more harmonious. Compared to litigation or arbitration, the parties' control over the process is much greater and the time, money and other resources utilized to resolve the dispute may be less. Hence, social resources can be utilized more economically and cost effectively.</p> <p>iii. The Working Group recommended that it was not necessary to include in the proposed mediation legislation a statutory mechanism for enforcing mediated settlement agreements. This was Recommendation 41 in the Report of the Working Group (–Report”) which was put out for a 3 months' public consultation in 2010. This recommendation was supported by the public. The Bill is based on those recommendations in</p>

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		<p>iv. Standardized mediators' training and accreditation. How will the quality of mediators be ensured?</p> <p>v. Protection for mediator against professional claims. Consideration of mandatory insurance for mediators.</p>	<p>the Report that had obtained widespread public support in the public consultation exercise. Please see response 2(i).</p> <p>iv. The Hong Kong Mediation Code (<del>the Code</del>) promulgated in June 2009 has been adopted by major mediation services providers, such as the eight organizations that formed the Joint Mediation Helpline Office (<del>JMHO</del>). Each organization has a robust complaints and disciplinary processes to enforce the Code.</p> <p>v. The Working Group was of the view that there should not be statutory immunity for mediators. (See Recommendation 39 in the Report). There was a suggestion for a partial immunity for pro bono or community mediation. This suggestion was considered by the Mediation Ordinance Group, a subgroup of the Mediation Task Force which recommended that there be no statutory immunity for mediators. Mediators could choose to take out professional indemnity insurance.</p>

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			Some mediation service providers have made arrangements for group professional indemnity insurance for their panel mediators.
4.	Methodist Centre	<ul style="list-style-type: none"> <li data-bbox="792 443 1218 475">i. Supportive of Mediation Bill</li> <li data-bbox="792 544 1413 715">ii. Noted that the Bill is based on general mediation, but will be beneficial if elements for offender/victim mediations to be included.</li> <li data-bbox="792 831 1368 906">iii. Provision for sanctions for breaching the Bill.</li> <li data-bbox="792 975 1406 1007">iv. Clause 8(d) to clarify <del>reasonable grounds</del></li> </ul>	<ul style="list-style-type: none"> <li data-bbox="1464 443 1592 475">i. Noted.</li> <li data-bbox="1464 544 2136 762">ii. The Bill aims at providing a regulatory framework for mediation in Hong Kong. Industry-specific elements to mediation can be considered in the light of further development of mediation in Hong Kong.</li> <li data-bbox="1464 831 2011 863">iii. Please see our responses 2(i) and 3 (iv).</li> <li data-bbox="1464 975 2136 1294">iv. It is common for statutory requirements to adopt <del>reasonable grounds</del> as an element in an objective test when the factual situations of each individual case should be taken into account. Countries such as Australia, Samoa and Singapore have included similar elements in their mediation legislation.</li> </ul>

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5.	Centre for Restoration of Human Relationships	i. Whether enactment of the Bill affect current practice of mediation conducted at the school level.	i. –Peer mediation” conducted in schools that do not include a written agreement to mediate will not be affected by the Bill.
6.	Democratic Alliance for the Betterment and Progress of Hong Kong	i. Supportive of early enactment of the Bill.  ii. Discussion with the establishment of the industry-led single accreditation body should be transparent and open.  iii. Clause 4 – Clarify who can be mediator. Untrained but experienced mediator may breach the law without knowing it.	i. Noted.  ii. Based on the recommendations of the Working Group in its Report, the Mediation Task Force chaired by the Secretary for Justice provides a facilitative role for the major mediation service providers to consider the formation of a single accreditation body. The major mediation service providers are still discussing the establishment of an industry led accreditation body and working on the draft Memorandum and Articles of Association.  iii. Currently most mediators in Hong Kong are trained and accredited through different mediation service providers. Most provide a 40-hour training programme and accreditation assessments. Parties to mediation will generally

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		<ul style="list-style-type: none"> <li data-bbox="790 395 1413 475">iv. Liability of mediators. Reference to section 104 of the Arbitration Ordinance</li> <li data-bbox="790 544 1413 671">v. Protection for mediators who do not wish to be witness or give evidence in subsequent legal proceedings.</li> <li data-bbox="790 783 1413 863">vi. Clause 7 – Exceptions to disclose mediation communications for legal advice.</li> <li data-bbox="790 1070 1413 1110">vii. Clause 8 – Supportive of Clause 8.</li> </ul>	<p data-bbox="1507 248 2130 328">consider appointing mediators listed on the panels of the major mediation service providers.</p> <ul style="list-style-type: none"> <li data-bbox="1449 395 1827 435">iv. Please see response 3(v).</li> <li data-bbox="1449 544 2130 719">v. An agreement to mediate may include a provision that the parties agree not to call the mediator to appear as a witness or give evidence in subsequent legal proceedings.</li> <li data-bbox="1449 783 2119 1015">vi. It is not the intention of the Bill to prohibit parties from seeking legal or other professional advice. It is considered unnecessary to include specific exceptions for this purpose as suggested.</li> <li data-bbox="1449 1070 1592 1110">vii. Noted.</li> </ul>
7.	Hong Kong Society of Accredited Mediators [LC Paper No. CB(2)802/11-12(02)]	<ul style="list-style-type: none"> <li data-bbox="790 1174 1133 1214">i. Supportive of the Bill.</li> <li data-bbox="790 1270 1368 1310">ii. Clause 8(1) – Confidentiality should not</li> </ul>	<ul style="list-style-type: none"> <li data-bbox="1449 1174 1592 1214">i. Noted.</li> <li data-bbox="1449 1270 2029 1310">ii. Documents that are used in an attempt to</li> </ul>



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		<p>only be restricted to mediation communications, documents used in attempt to negotiate a settlement should also be kept confidential.</p> <p>iii. Clause 8(2) (c) – May cause ambiguity and confusion since mediation communication is generally <del>without</del> "without prejudice" (and not subject to discovery).</p> <p>iv. Clause 8(3) (b) – Complaint of professional misconduct may be abused by parties as unreasonable complaints to disclose mediation communication.</p> <p>v. Suggestion that mediation communication should not be adduced as evidence in any civil proceedings.</p>	<p>negotiate a settlement which are <del>for</del> "for the purpose of or in the course of mediation" will fall within the definition of <del>mediation communication</del> "mediation communication" in clause 2 of the Bill and their confidentiality will be protected under the Bill.</p> <p>iii. Clause 8(2)(c) prevents people from abusing the mediation process by introducing otherwise discoverable information into mediation in order to make it <del>undiscoverable</del> "undiscoverable". Clause 8(2)(c) does not authorize a person to disclose any document that is not subject to discovery under the existing discovery rules.</p> <p>iv. Please see response 1(iv).</p> <p>v. Please see response 1(iv). Clause 9 restricts the admissibility of mediation communications in evidence in any proceedings by requiring leave of a specified court or tribunal.</p>

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		<p>vi. Propose that the Government should establish a unified registration and regulatory body.</p>	<p>vi. At present the major mediation service providers are considering the formation of a non-statutory industry-led single accreditation body for mediators in Hong Kong. The proposal to establish a unified registration and regulatory body will be considered in the light of the experience of the industry-led initiative and further development of mediation in Hong Kong.</p>
8.	<p>The Democratic Party [LC Paper No. CB(2)802/11-12(03)]</p>	<p>i. Supportive of early enactment of the Bill.</p> <p>ii. Propose that the Government should establish a unified registration and regulatory body. Regulatory body to regulate the ethics of mediators.</p> <p>iii. Clause 8(2) (c) - mediation communication is generally “without prejudice” and should not be subjected to discovery in subsequent legal proceedings.</p>	<p>i. Noted.</p> <p>ii. Please see response 7(vi).</p> <p>iii. Please see response 7(iii).</p>

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		<p>iv. Clause 8(3) (b) –Exception to disclose mediation communication is too low if there is no requirement that such complaint need to be substantiated.</p> <p>v. Time for consultation of the draft Mediation Bill in June 2011 was too short.</p> <p>vi. Provision for single accreditation body to unify the standards of mediators.</p>	<p>iv. Please see response 1(iv).</p> <p>v. The Working Group made 48 recommendations and members of the public were invited to send comments and views on the findings and recommendations in the Report published in February 2010 during the three months public consultation. The provisions in the consultation draft of the Bill in June 2011 are based on the recommendations of the Report which had received widespread public support.</p> <p>vi. Please see response 6(ii).</p>
9.	Rainbow Consultancy Limited	<p>i. Supportive of the Bill</p> <p>ii. How to promote and encourage mediation is not mentioned in the Bill.</p>	<p>i. Noted.</p> <p>ii. The Bill promotes and encourages mediation by providing a regulatory framework and clarifying</p>

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			<p>areas in which the case law concerning confidentiality and privilege is unclear. Moreover, the Publicity and Public Education Group of the Task Force are making efforts to promote mediation. One of the recommendations of the Report (see recommendation 24 of the Report) was to produce an Announcement in Public Interest (–API”) on mediation. The API was aired on television and radio from December 2011.</p>
10.	Hong Kong Family Welfare Society [LC Paper No. CB(2)819/11-12(02)]	<ul style="list-style-type: none"> <li>i. Supportive of the Bill</li> <li>ii. Suggested to include element of family mediation in the Bill.</li> <li>iii. Clause 8 – Mediators may be pressured by the parties to disclose the mediation communication as consent of the mediator is required under the Bill.</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. Please see response 4(ii).</li> <li>iii. A mediator should be in the position to decide independently whether to give consent and may take into account the reasons for which parties wish to disclose the mediation communication in question.</li> </ul>

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		<ul style="list-style-type: none"> <li data-bbox="786 252 1415 427">iv. Admissibility of mediation communication may have negative impact on protecting confidentiality of mediation communication.</li> <li data-bbox="786 491 1415 619">v. Clause 8(3) (a) and 8(3) (b) – Requirements for disclosure of mediation communication are too low.</li> <li data-bbox="786 683 1415 810">vi. Include provisions of the Hong Kong Mediation Code on roles and responsibilities of mediator in the Bill.</li> <li data-bbox="786 930 1415 1010">vii. Provision for single accreditation body to unify the standards of mediators.</li> </ul>	<ul style="list-style-type: none"> <li data-bbox="1447 252 1753 284">iv. See response 1(iv).</li> <li data-bbox="1447 491 1832 523">v. Please see response 1(v).</li> <li data-bbox="1447 683 2101 858">vi. Please see response 3(iv). It is considered unnecessary to include the Code as part of the Bill to avoid hampering the flexibility of mediation.</li> <li data-bbox="1447 930 1832 962">vii. Please see response 6(ii).</li> </ul>
11.	Hong Kong Construction Association [LC Paper No. CB(2)645/11-12(03)]	i. Schedule 1(12) – General mediation conducted under s32 (1) of the Arbitration Ordinance (Cap. 609), where it provides that HKIAC to appoint default mediation should not be excluded from the Bill.	i. Item 12 of Schedule 1 excludes from the application of the Bill " <i>mediation proceedings referred to in sections 32 and 33 of the Arbitration Ordinance (Cap. 609).</i> " In section 32 of Cap. 609, neither subsection (1)

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			<p>nor (2) refers to any "mediation proceedings". This expression is only referred to in subsection (3). Therefore, item 12 of Schedule 1 to the Bill does not have the effect of excluding any mediation conducted by a mediator appointed under the default appointment mechanism mentioned in section 32 (1) of Cap. 609 from the application of the Bill.</p>
12.	<p>The Council of Social Development [LC Paper No. CB(2)802/11-12(04)] [LC Paper No. CB(2)809/11-12(01)]</p>	<p>i. Supportive of the Bill</p> <p>ii. Clause 7 – Provision of assistance or support in mediation should not be restricted only to the legal professionals.</p> <p>iii. Clause 8 – Confidentiality should not be easily disclosed.</p>	<p>i. Noted.</p> <p>ii. Clause 7 clarifies that the provision of assistance or support in the course of mediation will not be regarded as infringing certain provisions in the Legal Practitioners Ordinance (Cap. 159). There is no need to make similar clarification for other professionals.</p> <p>iii. Please see response 1(v).</p>

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13.	<p>The Council of Mediation Development  [LC Paper No. CB(2)802/11-12(05)]  [LC Paper No. CB(2)809/11-12(02)]</p>	<ul style="list-style-type: none"> <li>i. Provide mediation trainings for front line officers to promote the use of mediation at the community level.</li> <li>ii. There should be updates on the “Mediation Pledge” website to promote mediation in Hong Kong.</li> <li>iii. To include mediation as a standalone subject in the education syllabus.</li> <li>iv. To promote early dispute resolution in organisations and schools and also to set up a foundation for funding.</li> <li>v. Provision for single accreditation body to unify the standards of mediators. There should be wider public consultation.</li> <li>vi. Clause 8 (1) – Disclosure of mediation communication should be restricted to the parties not “a person”.</li> </ul>	<ul style="list-style-type: none"> <li>i. Suggestion noted.</li> <li>ii. Suggestion noted.</li> <li>iii. Suggestion noted.</li> <li>iv. Suggestion noted.</li> <li>v. Please see response 6(ii).</li> <li>vi. Consent by all parties, the mediator and third parties who made the communication during mediation is required if anyone seeks to disclose a mediation communication.</li> </ul>

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14.	Li & Partners [LC Paper No.CB(2)850/11-12(01)]	<ul style="list-style-type: none"> <li data-bbox="801 252 1413 427">i. Indemnity for mediator. It is for the protection of all parties involved not for the mediator's discretion to consider whether it is necessary to have insurance</li> <li data-bbox="801 491 1413 762">ii. Suggestion to establish a local mediation body similar to that of the duty lawyer service at a community level to promote mediation,, provide free or lower mediation fees for members of public with low income.</li> </ul>	<ul style="list-style-type: none"> <li data-bbox="1462 252 1832 284">i. Please see response 3(v).</li> <li data-bbox="1462 491 2130 667">ii. Suggestion noted. Mediation is still developing in Hong Kong. This proposal can be considered in the light of further experience of mediation in Hong Kong.</li> </ul>
15.	Construction Industry Council	<ul style="list-style-type: none"> <li data-bbox="801 836 1137 868">i. Supportive of the Bill.</li> <li data-bbox="801 932 1413 1155">ii. Suggestion to include mediator indemnity as insurance may be too costly for part-time mediators. Reference to s104 of the Arbitration Ordinance for partial liability of mediators to be included in the Bill.</li> <li data-bbox="801 1219 1384 1299">iii. Provision for single accreditation body to unify the standards of mediators and</li> </ul>	<ul style="list-style-type: none"> <li data-bbox="1462 836 1597 868">i. Noted.</li> <li data-bbox="1462 932 1783 963">ii. Please response 3(v).</li> <li data-bbox="1462 1219 1832 1251">iii. Please see response 6(ii).</li> </ul>



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		provide an accredited panel of mediators for the public.	
16.	Tru-Tight & Associates Limed [LC Paper No. CB(2)802/11-12(06)]	<ul style="list-style-type: none"> <li data-bbox="792 395 1411 432">i. Supportive of the Bill.</li> <li data-bbox="792 491 1411 624">ii. Supportive to establish a single accreditation body with standardised training for mediators.</li> <li data-bbox="792 683 1411 719">iii. Supportive of Clause 7.</li> <li data-bbox="792 778 1411 1054">iv. Clause 8 – Parties and mediators may not remember what was said during mediation. Mediator may need to prepare notes and to have the parties to sign. To whom, when, how the mediation can be disclose, whether the disclosure is fair is unclear.</li> <li data-bbox="792 1118 1411 1198">v. Clause 8(3) (b) – “Professional misconduct” is not defined.</li> </ul>	<ul style="list-style-type: none"> <li data-bbox="1464 395 1592 432">i. Noted.</li> <li data-bbox="1464 491 1832 528">ii. Please see response 6(ii).</li> <li data-bbox="1464 683 1592 719">iii. Noted.</li> <li data-bbox="1464 778 2130 1007">iv. It is not the intention of the Bill nor does it contain any provision to prescribe how mediation should be conducted and the extent to which mediators or parties to mediation are required to make or keep notes of the mediation.</li> <li data-bbox="1464 1118 2130 1294">v. Under existing practice, mediators are usually required to observe the professional code of conduct set by the mediation service providers to which they belong. As the major mediation</li> </ul>

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			<p>service providers are still working towards the establishment of a single accreditation body, we do not consider it appropriate to put forward a definitive standard of professional conduct for all mediators at this stage.</p>
17.	Hong Kong Construction Arbitration Centre	i. Supportive of the Bill	i. Noted.
18.	Faculty of Law of the Chinese University of Hong Kong	<p>i. Consider redrafting of a broader Bill to include Conciliation.</p> <p>ii. Consider to provide provision for video conference to conduct mediation to be included in the Bill.</p> <p>iii. Code of conduct of mediators to be included.</p>	<p>i. The term “mediation” and “conciliation” are commonly used interchangeably and often cause confusion in Hong Kong. The Bill aims at providing a regulatory framework for mediation. Conciliation processes are excluded in Schedule 1 to the Bill.</p> <p>ii. Clause 4(3) of the Bill provides that a meeting can be conducted by video conferencing.</p> <p>iii. Please see response 10(vi).</p>

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19.	Joint Mediation Helpline Office	<ul style="list-style-type: none"> <li>i. Supportive of the Bill.</li> <li>ii. No provision of sanction for breaching the Bill. Unclear if the parties can only seek civil remedies through the court system.</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. The Task Force and the Working Group took into account the feedback during the public consultations, the laws in other jurisdictions and deliberated on the matter before deciding that no provision will be made for such sanctions. If there is a breach of confidentiality, the party aggrieved may rely on civil remedies available from the Courts for breaches of confidentiality and may complain against the mediator if the mediator has committed such a breach, as the case may be. It is noted that of the jurisdictions that have mediation legislation, only Austria has provided for criminal sanctions for breach.</li> </ul>
20.	Hong Kong Institute of Construction Managers [LC Paper No. CB(2)802/11-12(07)]	<ul style="list-style-type: none"> <li>i. Supportive of the Bill.</li> <li>ii. Consider that the confidentiality of mediation communication unclear and too wide. Opined that a person may disclose a mediation communication which is made by</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. Please see response 1(iv). If anyone is at liberty to disclose any mediation communication made by oneself, the disclosure may prejudice other parties or create pressure for other participants in</li> </ul>

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		<p>him/her.</p> <p>iii. Liability of mediators. Reference to section 104 of the Arbitration ordinance.</p>	<p>the mediation process indirectly. We consider that the restrictions and exceptions as currently proposed in the Bill have struck an appropriate balance.</p> <p>iii. Please see response 3(v).</p>
21.	<p>Hong Kong Catholic Marriage Advisory Council [LC Paper No. CB(2)809/11-12(05)]</p>	<p>i. Whether mediator as defined in the Bill refers to accredited mediators?</p> <p>ii. Clause 8(2) – May be abused by the parties. Consideration to include code of mediators in the Bill, for example, the rules used by HKIAC or Law Society.</p> <p>iii. Concern with the disclosure of mediation communication in family mediations. In</p>	<p>i. The Bill does not refer to accredited mediators. The major mediation service providers are still working towards the establishment of a single accreditation body.</p> <p>ii. Please see response 10(vi).</p> <p>iii. Noted. The current practice referred to will not be affected and can continue if the Bill is</p>

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		<p>their current practice, it will be stated in the agreement to mediate that mediators would not be called to give evidence in subsequent court proceedings or disclose mediation communication. Without such provisions in the Bill, it will deter parties to attempt mediation.</p>	<p>enacted. A mediation communication, according to clause 9, may be admitted in evidence in any proceedings only with the leave of the court or tribunal under clause 10 of the Bill. The said requirement for leave of the court or tribunal will protect the confidential nature of mediation communications and will serve to encourage the use of mediation to resolve disputes</p>
22.	<p>KM Lai &amp; Li [LC Paper No. CB(2)802/11-12(08)] Restricted</p>	<ul style="list-style-type: none"> <li>i. Clause (2) – Comment that a mediator in the Bill should be an <del>accredited</del> mediator”.</li> <li>ii. Consideration to differentiate family and general mediators.</li> </ul>	<ul style="list-style-type: none"> <li>i. Please see response 6(iii).</li> <li>ii. Please see response 4(ii). At present, different mediation service providers have different training and accreditation requirements for family mediators and non-family mediators. We do not consider it necessary to make a statutory distinction between them at this stage for the purpose of the Bill.</li> </ul>

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		<p>iii. Mediation Communication – <del>anything said or done</del>” and <del>any document prepared</del>” may be impractical.</p> <p>iv. Clause 8(3) (a) – the word <del>challenging</del>” should be deleted.</p> <p>v. Clause 8(3) (b) – should be excluded, especially as <del>professional misconduct</del>” is not defined in the Bill.</p>	<p>iii. It is necessary for the definition of <i>mediation communication</i> to include <del>anything said or done</del>” and <del>any document prepared</del>” for the purpose of and in the course of mediation to ensure that the confidentiality of mediation communications are sufficiently protected.</p> <p>iv. A party may challenge the validity of a mediated settlement agreement by taking out legal proceedings. The Bill requires leave of a specified court or tribunal if a person seeks to disclose mediation communications for the purpose of challenging a mediated settlement agreement.</p> <p>v. Please see response 16 (v).</p>

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23.	Hong Kong Mediation Centre [LC Paper No. CB(2)802/11-12(09)]	<ul style="list-style-type: none"> <li>i. Supportive of the Bill.</li> <li>ii. Disclosure to mediation communication is too wide. Parties should be able to disclose mediation communication made by himself/herself.</li> <li>iii. Liability of mediators. Reference to section 104 of the Arbitration ordinance</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. Please see response 20(ii).</li> <li>iii. Please see response 3(v)</li> </ul>
24.	Faculty of Law of the University of Hong Kong	<ul style="list-style-type: none"> <li>i. Supportive of the Bill that it provides essential framework and that it is not over regulated.</li> <li>ii. Clause 2(1) – Consider that agreement to mediate can also include agreement made orally or by conduct.</li> <li>iii. Clause 4 – Suggestion that mediators should be accredited.</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. The Bill is to apply to a structured mediation process that involves a written agreement to mediate. The Bill is not intended to apply to other informal processes.</li> <li>iii. Please see response 6(iii).</li> </ul>

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		<ul style="list-style-type: none"> <li>iv. Suggestion to include those parties should participate in a genuine attempt to resolve a dispute through mediation.</li> <li>v. Clause 8(2) – Clarify that agreement to mediate may include contractual provisions.</li> </ul>	<ul style="list-style-type: none"> <li>iv. Please see response 24 (ii). The parties will have to thoroughly consider the terms in the mediation agreement before signing the document.</li> <li>v. The Bill does not stipulate any standard provisions in an agreement to mediate. The agreement to mediate is a contractual document and the parties have the freedom to include such terms that they considered necessary.</li> </ul>
25.	<p>The Chartered Institute of Arbitrators (East Asia Branch) [LC Paper No. CB(2)809/11-12(03)]</p>	<ul style="list-style-type: none"> <li>i. Supportive of the Bill.</li> <li>ii. Provision for single accreditation body to unify the standards of mediators.</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. Please see response 6(ii).</li> </ul>
26.	<p>EC Harris (HK) Limited</p>	<ul style="list-style-type: none"> <li>i. Commented that there are few complaints or legal issue relating to mediation.</li> <li>ii. Consider the provision for mediator immunity.</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. Please see response 3(v).</li> </ul>
27.	<p>Society of Certified Mediators and</p>	<ul style="list-style-type: none"> <li>i. Supportive of the Bill.</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> </ul>



No.	Organisations/ Individuals	Comments	Administration's Responses
	Negotiators, Limited [LC Paper No. CB(2)802/11-12(10)]	<ul style="list-style-type: none"> <li>ii. Commented that legislating mediation does not mean that there are high volume of complaints, but considered it a prevent clause as there are more mediation service providers and public using mediation.</li> <li>iii. Promotion and education on mediation.</li> <li>iv. Use of the word <del>impartial</del>" vs. <del>neutral</del>"</li> <li>v. Users of mediators should be protected.</li> </ul>	<ul style="list-style-type: none"> <li>ii. Noted.</li> <li>iii. Noted. Please see response 9(ii).</li> <li>iv. The term <del>impartiality</del>" has a stronger emphasis on mediator behaviour than <del>neutrality</del>". It denotes a disinterestedness, or absence of bias, in the sense of no partiality directed at either party in the conduct of the mediation process. The trend in overseas legislation on mediation is moving towards the use of the word <del>impartial</del>". Also <del>impartiality</del>" is the word used in the Code.</li> <li>v. The Bill contains provisions on confidentiality and admissibility of mediation communication which are aimed at protecting the users of mediation.</li> </ul>

No.	Organisations/ Individuals	Comments	Administration's Responses
		<ul style="list-style-type: none"> <li data-bbox="786 252 1415 331">vi. Provision for single accreditation body to unify the standards and regulates mediators.</li> <li data-bbox="786 395 1415 435">vii. Declaration of interest by mediators.</li> <li data-bbox="786 730 1415 810">viii. The Bill did not refer to the Hong Kong Mediation Code.</li> </ul>	<ul style="list-style-type: none"> <li data-bbox="1447 252 1832 284">vi. Please see response 6(ii).</li> <li data-bbox="1447 395 2130 667">vii. Under the Code, a mediator is required to declare any conflict of interest which the mediator may have. This Code has been adopted by major service providers including the eight major mediation service providers that formed the JMHO.</li> <li data-bbox="1447 730 1854 762">viii. Please see response 10(vi).</li> </ul>
28.	School of Law of the City University of Hong Kong	<ul style="list-style-type: none"> <li data-bbox="786 884 1415 1011">i. Supportive of the Bill and consider that it is well drafted and has dealt with confidentiality and admissibility in depth.</li> <li data-bbox="786 1075 1415 1294">ii. Suggestion that Hong Kong should adopt a mechanism similar to the procedure under the People's Mediation Law of the People Republic of China (《中華人民共和國人民調解法》) whereby parties may jointly apply</li> </ul>	<ul style="list-style-type: none"> <li data-bbox="1447 884 1599 916">i. Noted.</li> <li data-bbox="1447 1075 2107 1294">ii. Unlike the Mainland system, Hong Kong does not have institutions similar to the People's Mediation Commissions. We do not propose to introduce a new mechanism for mediated settlement agreements to be submitted to the</li> </ul>

No.	Organisations/ Individuals	Comments	Administration's Responses
		to the People's Court for judicial confirmation of a mediation agreement reached by a people's mediation commission (人民調解委員會).	court for judicial confirmation in the absence of any ongoing legal proceedings, taking into account the recommendation of the Working Group that it was not necessary to include in the proposed mediation legislation a statutory mechanism for enforcing mediated settlement agreements (see Recommendation 41 of the Report).
29.	Hong Kong Bar Association	i. Supportive of the Bill and considered that the Bill provided appropriate framework.	i. Noted.
30.	Hong Kong Mediation Council	i. Supportive of the Bill.	i. Noted.
31.	The Law Society of Hong Kong [LC Paper No. CB(2)819/11-12(03)]	i. Supportive of the Bill.  ii. Clause 2(1) – Agreement to mediate could include verbal agreement.  iii. Clause 4 – Did not mention that mediation is a voluntary process. Parties have the obligation under Clause (4) (1) (a-d) not the	i. Noted.  ii. Please see response 24 (ii).  iii. We consider that the definition of mediation as currently drafted is adequate. Jurisdictions with mediation legislation such Australia and Canada

No.	Organisations/ Individuals	Comments	Administration's Responses
		<p>mediator as the mediator performs a facilitative role.</p> <p>iv. Clause 7 – Commented that it is unnecessary and should be deleted.</p> <p>v. Clause 8(2) – Exceptions to disclosure of mediation communication is detrimental to mediation.</p> <p>vi. Not common in other jurisdictions to grant immunity to mediators. No objection that S104 of the Arbitration Ordinance is not included in the Bill.</p>	<p>have adopted similar definitions without using the word “voluntary”.</p> <p>iv. Section 63 of the Arbitration Ordinance (Cap. 609) provides that sections 44, 45 and 47 of the Legal Practitioners Ordinance (Cap. 159) do not apply to arbitral proceedings. The Working Group recommended a similar provision to be included in the Bill. Similar provisions can also be found in other jurisdictions with mediation legislation such as section 25 of Malta's Mediation Act 2004 and Article 12(1) and (3) of Bulgaria's Mediation Act 2004.</p> <p>v. The Bill strives to strike a balance between protecting confidentiality in mediation and the prevention of abuse.</p> <p>vi. Please see response 3(v).</p>

No.	Organisations/ Individuals	Comments	Administration's Responses
		vii. Provision for sanctions for breaching the Bill.	vii. Please see response 2(i).
32.	Dr James Chiu Shing-ping, Accredited Mediator [LC Paper No. CB(2)802/11-12(11)]	<ul style="list-style-type: none"> <li>i. Supportive of early enactment of the Bill. Other issues that require more time for discussion could be left for amendment.</li> <li>ii. Training and standards of mediator are important to the success of mediation.</li> <li>iii. The word <del>trained</del> 'mediators should be included in the Bill.</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. Please see response 6(iii).</li> <li>iii. Please see response 6(iii).</li> </ul>
33.	Hong Kong Institute of Surveyors [LC Paper No. CB(2)802/11-12(12)]	<ul style="list-style-type: none"> <li>i. Supportive of the Bill.</li> <li>ii. Clause 2 – Mediation communication. Commented that only concessions, admissions and settlement offers should be kept confidential, and that something done or prepared but <del>not</del> "communicated" or some calculations done or revised during the course of mediation should not be included as mediation communication.</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. The definition of <i>mediation communication</i> is sufficiently broad for protecting confidentiality. We consider that the definition currently proposed in the Bill has struck an appropriate balance. In any event, information constituting mediation communications as defined may be disclosed with the consent of all persons concerned under clause 8(2) (a), or if it falls</li> </ul>

No.	Organisations/ Individuals	Comments	Administration's Responses
		<p>iii. Provision to allow disclosure of mediation communication to a parties' own professional adviser, i.e., lawyers and financial advisers.</p> <p>iv. Provision of appointment of default mediator.</p> <p>v. Provision of sanctions of mediators.</p> <p>vi. Enforcement of mediated settlement agreement.</p>	<p>within other exceptions provided in clause 8(2) and (3).</p> <p>iii. Please see response 6(vi).</p> <p>iv. Mediation is a flexible process where parties can engage a mediator of their choice. Mediation service providers such as the JMHO can assist parties in locating a mediator that fulfils the parties' requirement.</p> <p>v. Please see response 3 (iv).</p> <p>vi. Please see response 3(iii).</p>
34.	ADR Consultancy Hong Kong Limited [LC Paper No. CB(2)802/11-12(13)]	i. Clause 2(1) – Agreement to mediate. It is not stated in the Bill that a mediator is also a contracting party to the mediation.	i. An agreement to mediate may or may not include a mediator as one of the contracting parties—see paras. (a), (b) and (c) in the

No.	Organisations/ Individuals	Comments	Administration's Responses
		<p>ii. Clause 4(2) – Mediation can be conducted by more than <u>a</u> mediator.</p> <p>iii. Clause 5(4) – May affect those mediation conducted before the enactment of the Bill.</p> <p>iv. Clause 8(2) (a) - opined that a person may disclose a mediation communication which is made by himself/herself.</p>	<p>definition of <i>agreement to mediate</i> in clause 2(1).</p> <p>ii. The use of the indefinite article <del>“a”</del> before <del>“mediator”</del> in clause 4(2) does not have the effect of restricting the number of mediators conducting a meeting to one only—see section 7(2) of the Interpretation and General Clauses Ordinance (Cap.1), which provides that words in the singular include the plural.</p> <p>iii. Clause 5(4) will not have adverse impact on the <del>“without prejudice”</del> privilege of the parties. On the contrary, it will protect the confidentiality of mediation communications that are sought to be disclosed after the commencement date of the Bill even if the related mediation was completed before that date.</p> <p>iv. Please see response 20(ii).</p>

No.	Organisations/ Individuals	Comments	Administration's Responses
		<ul style="list-style-type: none"> <li>v. Clause 9 - Protection for mediators that they do not have to be witness or give evidence in subsequent legal proceedings.</li> <li>vi. Clause 10 – Burden on the courts/tribunal to determine the application for leave to disclose mediation communication may result in more litigation cases.</li> </ul>	<ul style="list-style-type: none"> <li>v. Please see response 6 (v).</li> <li>vi. Please see response 1(v).</li> </ul>
35.	C&L Holdings Limited [LC Paper No. CB(2)802/11-12(14)]	<ul style="list-style-type: none"> <li>i. Support the early enactment of the Bill.</li> <li>ii. Clause 2(1) – consider that agreement to mediate could also include agreement by conduct.</li> <li>iii. Clause 5 – Flexibility of cross-border mediation should be considered.</li> </ul>	<ul style="list-style-type: none"> <li>i. Noted.</li> <li>ii. Please see response 24(ii).</li> <li>iii. The Bill (if enacted) will apply to mediation conducted under an agreement as stated under clause 5 of the Bill including mediation wholly or partly conducted in Hong Kong.</li> </ul> <p style="text-align: center;">\</p>



No.	Organisations/ Individuals	Comments	Administration's Responses
		<p>iv. Clause 8(2) (d) – Opined that “reasonable ground” for the threshold to disclose mediation communication is too low.</p> <p>v. Duration for mediation communication to be kept is not stated.</p> <p>vi. Clause 9 – Do not agree that mediation communication can be disclosed and admitted as evidence in arbitral or administrative proceedings.</p> <p>vii. Clause 10(2) – Commented that consideration for disclosure of mediation communication is too wide.</p> <p>viii. Provision for mediator indemnity. Consideration for waiver for pro-bono mediation, school and community mediation.</p>	<p>iv. Please see response 4(iv).</p> <p>v. Please see response 16(iv).</p> <p>vi. Please see response 7(v).</p> <p>vii. Please see response 1(v).</p> <p>viii. Please see response 3(v).</p>

No.	Organisations/ Individuals	Comments	Administration's Responses
		ix. Provision for single accreditation body to unify the standards of mediators.	ix. Please see response 6(ii).
36.	Hospital Authority [LC Paper No. CB(2)809/11-12(04)]	i. Supportive of the Bill.	i. Noted.
37.	International Institute of Conflict Engagement and Resolution of Hong Kong Shue Yan University [LC Paper No. CB(2)809/11-12(06)]	i. Supportive of the Bill that it is line with legislative trends around the world.  ii. Content of the Bill is in line with leading ADR jurisdictions and with best practice.  iii. Provision for a future industry-led accreditation scheme.  iv. The Bill is not over regulated, providing a framework as recommended in the Working Report on Mediation.  v. Legislation of Mediation will instil confidence in Hong Kong as an international ADR centre.	i. Noted.  ii. Noted.  iii. Please see response 6(ii).  iv. Noted.  v. Noted.

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38.	Hong Kong Institute of Architects [LC Paper No. CB(2)819/11-12(04)]	<ul style="list-style-type: none"> <li data-bbox="792 252 1413 331">i. Clause 3 – Mediation Communications is too widely defined.</li> <li data-bbox="792 395 1413 571">ii. Commented that confidentiality of settlement agreement to be regulated by the parties' agreement rather than by legislation.</li> <li data-bbox="792 639 1413 815">iii. Clause 5(2) – Administration should consider the differences in existing practice rather than excluding certain process which may be problematic in future.</li> <li data-bbox="792 927 1413 1007">iv. Clause 8 – Requirement for disclosure of mediation communication is unclear.</li> <li data-bbox="792 1075 1413 1251">v. Provision to allow disclosure of mediation communication to a parties' own professional adviser, i.e., lawyers and financial advisers.</li> </ul>	<ul style="list-style-type: none"> <li data-bbox="1449 252 1861 284">i. Please see response 22(iii).</li> <li data-bbox="1449 395 2136 571">ii. The Bill does not compel parties to keep mediated settlement agreements confidential nor otherwise restrict parties' autonomy to include such an express provision in their agreements.</li> <li data-bbox="1449 639 2136 911">iii. The processes specified in Schedule 1 to the Bill are standalone statutory schemes under certain existing Ordinances. Existing practice under those statutory schemes may be reviewed by the relevant agencies in the light of further development of mediation in Hong Kong.</li> <li data-bbox="1449 927 1854 959">iv. Please see response 16(iv).</li> <li data-bbox="1449 1075 1839 1107">v. Please see response 6(vi).</li> </ul>

No.	Organisations/ Individuals	Comments	Administration's Responses
		<p>vi. Clause 8(b) – (f) – Exceptions to the disclosure of mediation communication are not precise.</p> <p>vii. Clause 10(2) – Commented that consideration for disclosure of mediation communication is too wide.</p>	<p>vi. There are also similar exceptions concerning disclosure of mediation communications in overseas legislation. The Bill as currently drafted has been widely consulted and considered by the Task Force and its Mediation Ordinance Group to be adequate and suitable for the existing mediation practice in Hong Kong.</p> <p>vii. Please see response 1(iv).</p>
39.	The Hong Kong Federation of Trade Union [LC Paper No. CB(2)831/11-12(02)]	<p>i. Supportive of the Bill.</p> <p>ii. Suggested that members of the trade union to be able to attend mediation session with the injured workers to protect the interest of the injured workers and also to speed up the process.</p>	<p>i. Noted.</p> <p>ii. Suggestion noted.</p>

No.	Organisations/ Individuals	Comments	Administration's Responses
		<ul style="list-style-type: none"> <li>iii. Provision by the HKSARG for legal advice or professional service.</li> <li>iv. Propose that the Government should establish a unified registration and regulatory body. Regulatory body to regulate the ethics of mediators.</li> <li>v. Fees of mediators should also be defined.</li> </ul>	<ul style="list-style-type: none"> <li>iii. Suggestion noted.</li> <li>iv. Please see response 7(vi).</li> <li>v. The fees of mediators are controlled by the market forces and it is considered not appropriate for the fees to be regulated by legislation.</li> </ul>
40.	The Hong Kong Institution of Engineers [LC Paper No. CB(2)831/11-12(01)]	<ul style="list-style-type: none"> <li>i. Consider provision for mediator immunity.</li> <li>ii. Provision for single accreditation body to unify the standards of mediators.</li> <li>iii. Suggestion that the clause <del>“Determination of selection of mediator”</del> should be added with further elaboration on the method of</li> </ul>	<ul style="list-style-type: none"> <li>i. Please see response 3(v).</li> <li>ii. Please see response 6(ii).</li> <li>iii. Please see response 33(iv).</li> </ul>

No.	Organisations/ Individuals	Comments	Administration's Responses
		<p>reaching agreement between the parties to mediation and the mediators.</p> <p>iv. Suggestion that penalty clause to be added to the Bill to avoid violation of confidentiality.</p>	<p>iv. Please see response 19(ii).</p>
41.	The Hong Kong Association of Banks [LC Paper No. CB(2)892/11-12(01)]	<p>i. Clause 8(2)(d) – Considered the exception undesirable.</p> <p>ii. Clause 8(2)(e) – No objection to the publication of general statistics as to the outcome of the mediations. Concerned with unintended disclosure of the details in mediation.</p>	<p>i. The exception for disclosure of mediation communication was discussed and considered by the Task Force and the Mediation Ordinance Group. Countries such as Australia, Malta, Singapore and United States have included similar exceptions in their mediation legislation.</p> <p>ii. The concern is noted. However, the Mediation Task Force and its Mediation Ordinance Group considers that disclosure under clause 8(2)(e) for research, evaluation or educational purposes without revealing, or likely to reveal the identity of a person whom the mediation communication relates is reasonably necessary for the development of mediation in Hong Kong. Countries such as Australia and the state of</p>

No.	Organisations/ Individuals	Comments	Administration's Responses
		<p>iii. Clause 8(3)(c) – Tests for leave to disclose mediation communication by the Courts/Tribunal are too wide without setting any guiding principles.</p> <p>iv. There may be potential conflicts between the Terms of Reference (“ToR”) and the Mediation and Arbitration Rules (“MAR”) of the Financial Dispute Resolution Centre (“FDRC”). Mediation conducted under the FDRC is similar to the various mediation and conciliation schemes currently included in Schedule 1 of the Bill. Request that the mediation conducted under the FDRC be excluded from the Bill.</p>	<p>Oregon, United States have similar statutory exceptions for disclosure of mediation communication for research purposes.</p> <p>iii. Please see response 1(v).</p> <p>iv. The mediation and conciliation processes currently specified in Schedule 1 to the Bill are self-contained statutory schemes. We understand that the proposed ToR and MAR of the FDRC are administrative in nature. If the FDRC proposes to use mediation as defined in clause 4 of the Bill, it would be regulated by the provisions of the Bill (if enacted).</p>

No.	Organisations/ Individuals	Comments	Administration's Responses
		v. Provision for sanctions for breaching the Bill.  vi. Provision for default appointment of mediator.	v. Please see response 19(ii).  vi. Please see response 33(iv).

**Department of Justice**

**January 2012**

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