

## Bills Committee on Mediation Bill

### Administration’s Updated Responses<sup>1</sup> to Deputations’ Representations on Individual Provisions including Drafting Issues of the Mediation Bill (“the Bill”)

No.	Provisions in the Bill	Comments	Administration’s Responses
1.	Clause 2(1), definition of <i>agreement to mediate</i>	Consider that <i>agreement to mediate</i> can also include agreement made orally or by conduct. [Faculty of Law of the University of Hong Kong; The Law Society of Hong Kong (LC Paper No. CB(2)819/11-12(03)); C&L Holdings Limited (LC Paper No. CB(2)802/11-12(14))]	The Bill is to apply to a structured mediation process that involves a written <i>agreement to mediate</i> . The Bill is not intended to apply to other informal processes.
2.	Clause 2(1), definition of <i>agreement to mediate</i>	It is not stated in the Bill that a mediator is also a contracting party to the mediation. [ADR Consultancy Hong Kong Limited (LC Paper No. CB(2)802/11-12(13))]	An <i>agreement to mediate</i> may or may not include a mediator as one of the contracting parties—see paras. (a), (b) and (c) in the definition of <i>agreement to mediate</i> in clause 2(1).
3.	Clause 2(1), definition of	(i) Including “anything said or done” and “any document	It is necessary for the definition of <i>mediation</i>

<sup>1</sup> Updated parts which include response to the written representations of the Hong Kong Arbitration and Mediation Centre dated 8 February 2012 to the Bills Committee are shown underlined for easy reference.

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	<i>mediation communication</i>	<p>prepared” in this definition may be impractical. [K.M. Lai &amp; Li, Solicitors &amp; Notaries]</p> <p>(ii) Only concessions, admissions and settlement offers should be kept confidential, and that something done or prepared but “not communicated” or some calculations done or revised during the course of mediation should not be included as <i>mediation communication</i>. [Hong Kong Institute of Surveyors (LC Paper No. CB(2)802/11-12(12))]</p> <p>(iii) <i>Mediation communication</i> is too widely defined. [Hong Kong Institute of Architects (LC Paper No. CB(2)819/11-12(04))]</p>	<p><i>communication</i> to include “anything said or done” and “any document prepared” for the purpose of and in the course of mediation to ensure that the confidentiality of mediation communications are sufficiently protected. <u>It is often difficult to differentiate and draw a clear line between concessions, admissions and settlement offers from other things said in the course and for the purposes of mediation. The addition of further qualifications to definition of mediation communication may give rise to disputes that will affect the effectiveness of mediation.</u> We consider that the definition currently proposed in the Bill has struck an appropriate balance. In any event, information constituting <i>mediation communications</i> as defined may be disclosed with the consent of all persons concerned under clause 8(2) (a), or if it falls within other exceptions provided in clause 8(2) and (3).</p>
4.	Clause 2(1), definition of <i>mediation communication</i>	Confidentiality of settlement agreement to be regulated by the parties’ agreement rather than by legislation. [Hong Kong Institute of Architects (LC Paper No. CB(2)819/11-12(04))]	<u>A mediated settlement agreement is excluded from the definition of <i>mediation communication</i> as currently drafted.</u> The Bill does not compel parties to keep mediated settlement agreements confidential nor otherwise restrict parties’ autonomy to include such

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			an express provision in their agreements.
5.	Clause 2(1), definition of <i>mediator</i>	<p>(i) Clarify who can be <i>mediator</i>. Untrained but experienced <i>mediator</i> may breach the law without knowing it. [Democratic Alliance for the Betterment and Progress of Hong Kong]</p> <p>(ii) A <i>mediator</i> in the Bill should be an “accredited mediator”. [K.M. Lai &amp; Li, Solicitors &amp; Notaries]</p> <p>(iii) Whether the impartial mediator should be accredited or not should be specified. [Faculty of Law of the University of Hong Kong]</p> <p>(iv) The word “trained” mediators should be included in the Bill. [Dr James Chiu Shing-ping, Accredited Mediator (LC Paper No. CB(2)802/11-12(11))]</p> <p>(v) Standardize mediators’ training and accreditation. [Professional Mediation Consultancy Centre (LC Paper No. CB(2)802/11-12(01))]</p>	<p><u>As the major mediation service providers are still working towards the formation of a non-statutory industry-led single accreditation body for mediators in Hong Kong, the Administration does not propose to impose a mandatory requirement on the qualifications of mediators at this stage.</u> 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 consider appointing mediators listed on the panels of the major mediation service providers.</p>

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6.	Clause 4	The essence that a genuine attempt was made by the parties concerned to reach an agreement to resolve a dispute should also be included in this clause. [Faculty of Law of the University of Hong Kong]	The Bill is to apply to a structured mediation process that involves a written agreement to mediate. The parties will have to thoroughly consider the terms in the mediation agreement before signing the document.
7.	Clause 4(1)	Use of the word "impartial" vs. "neutral". [Society of Certified Mediators and Negotiators, Limited (LC Paper No. CB(2)802/11-12(10))]	The term "impartiality" has a stronger emphasis on mediator behaviour than "neutrality". 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 "impartial". Also "impartiality" is the word used in the Hong Kong Mediation Code ("the Code").
8.	Clause 4(1)	No mention that mediation is a voluntary process. Parties have the obligation under clause (4) (1) (a) to (d) not the mediator as the mediator performs a facilitative role. [The Law Society of Hong Kong (LC Paper No. CB(2)819/11-12(03)); Hong Kong Mediation and Arbitration Centre (LC Paper No. CB1034/11-12(01))]	We consider that the definition of mediation as currently drafted is adequate. Jurisdictions with mediation legislation such Australia and Canada have adopted similar definitions without using the word "voluntary".

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9.	Clause 4(2)	Mediation can be conducted by more than „a“ mediator. [ADR Consultancy Hong Kong Limited (LC Paper No. CB(2)802/11-12(13))]	The use of the indefinite article “a” before “mediator” 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.
10.	Clause 4(2) & (3)	Concern whether a pre-mediation telephone conversation is a mediation session as defined under clause 4. Does this mean for example a 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? 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 Asia Pacific (LC Paper No. CB(2) 819/11-12(01))]	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 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 <i>mediation</i> in the Bill should not be applied to interpret PD 31 in the manner and for the purpose as described in the comment.

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11.	Clause 5	Flexibility of cross-border mediation should be considered. [C&L Holdings Limited (LC Paper No. CB(2)802/11-12(14))]	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.
12.	Clause 5(2)	Administration should consider the differences in existing practice rather than excluding certain process which may be problematic in future. [Hong Kong Institute of Architects (LC Paper No. CB(2)819/11-12(04))]	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.
13.	Clause 5(4)	This provision may affect mediation conducted before the enactment of the Bill. [ADR Consultancy Hong Kong Limited (LC Paper No. CB(2)802/11-12(13))]	Clause 5(4) will not have adverse impact on the “without prejudice” 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 (if enacted) even if the related mediation was completed before that date.
14.	Clause 7	Provision of assistance or support in mediation should not be restricted only to the legal professionals. [The Council of Social	Clause 7 clarifies that the provision of assistance or support in the course of mediation will not be

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		Development (LC Paper No. CB(2)802/11-12(04) & LC Paper No. CB(2)809/11-12(01))]	regarded as infringing certain provisions in the Legal Practitioners Ordinance (Cap. 159). There is no need to make similar clarification for other professionals.
15.	Clause 7	This provision is unnecessary and should be deleted. [The Law Society of Hong Kong (LC Paper No. CB(2)819/11-12(03))]	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 on Mediation ("Working Group") chaired by the Secretary for Justice recommended a similar provision to be included in the Bill. <u>As both arbitration and mediation are alternative dispute resolution methods, the Mediation Task Force was content that a similar provision be included in the Bill for consistency.</u> 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. <u>The inclusion of clause 7 will ensure that those assisting and supporting the disputing parties in mediation, taking also into account the fact that, like arbitration, they may come from overseas, will not run into the risk of infringing sections 44, 45 and 47</u>

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			<p><u>of Cap. 159. Further response will be presented in a separate paper.</u></p>
16.	Clause 8	<p>(i) No provision on sanction for breaching the Bill. Unclear if the parties can only seek civil remedies through the court system. [Methodist Centre; Joint Mediation Helpline Office]</p> <p>(ii) Consider provision on sanctions for breaching the Bill. [The Law Society of Hong Kong (LC Paper No. CB(2)819/11-12(03)); The Hong Kong Association of Banks (LC Paper No. CB(2)892/11-12(01))]</p> <p>(iii) Suggestion that penalty clause to be added to the Bill to avoid violation of confidentiality. [The Hong Kong Institution of Engineers (LC Paper No. CB(2)831/11-12(01))]</p> <p>(iv) Simple mechanism similar to enforcement of arbitration award. [RICS Hong Kong]</p>	<p>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. Moreover, the Hong Kong Mediation Code (“the Code”) promulgated in June 2009 has been adopted by major mediation services providers, such as the eight organizations that formed the Joint Mediation Helpline Office (“JMHO”). Each organization has a robust complaints and disciplinary processes to enforce the Code.</p> <p>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</p>

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			<p>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.</p>
17.	Clause 8(1)	Confidentiality should not only be restricted to mediation communications, documents used in attempt to negotiate a settlement should also be kept confidential. [Hong Kong Society of Accredited Mediators (LC Paper No. CB(2)802/11-12(02))]	Documents that are used in an attempt to negotiate a settlement which are “for the purpose of or in the course of mediation” will fall within the definition of <i>mediation communication</i> in clause 2 of the Bill and their confidentiality will be protected under the Bill.
18.	Clause 8(2)	Exceptions to disclosure of mediation communication are detrimental to mediation. [The Law Society of Hong Kong (LC Paper No. CB(2)819/11-12(03))]	The Bill strives to strike a balance between protecting confidentiality in mediation and the prevention of abuse.
19.	Clause 8(2)	Disclosure of mediation communication should be restricted to	Consent by all parties, the mediator and third parties

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		the parties not "a person". [The Council of Mediation Development (LC Paper No. CB(2)802/11-12(05) & LC Paper No. CB(2)809/11-12(02))]	who made the communication during mediation is required if anyone seeks to disclose a mediation communication.
20.	Clause 8(2)	<p>(i) Opined that a person may disclose a mediation communication which is made by himself/herself. [Hong Kong Institute of Construction Managers (LC Paper No. CB(2)802/11-12(07); ADR Consultancy Hong Kong Limited (LC Paper No. CB(2)802/11-12(13))]</p> <p>(ii) Parties should be able to disclose mediation communication made by himself/herself. [Hong Kong Mediation Centre (LC Paper No. CB(2)802/11-12(09))]</p>	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 the mediation process indirectly. We consider that the restrictions and exceptions as currently proposed in the Bill have struck an appropriate balance.
21.	Clause 8(2)	The implication of this provision on the common practice of including a contractual provision in an agreement to mediate that required the parties to a dispute to comply with the rule of confidentiality should be clarified. [Faculty of Law of the University of Hong Kong]	An agreement to mediate is a contractual document and the parties have the freedom to include such terms that they consider necessary <u>so long as the contractual terms are not inconsistent with the provisions of the Bill and do not exclude the jurisdiction of the court.</u>
22.	Clause 8(2)(a)	Mediators may be pressured by the parties to disclose the	A mediator should be in the position to decide

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		mediation communication as consent of the mediator is required under the Bill. [Hong Kong Family Welfare Society (LC Paper No. CB(2)819/11-12(02))]	independently whether to give consent and may take into account the reasons for which parties wish to disclose the mediation communication in question.
23.	Clause 8(2)(c)	Mediation communications are generally “without prejudice” and should not be subjected to discovery in subsequent legal proceedings. [Hong Kong Society of Accredited Mediators (LC Paper No. CB(2)802/11-12(02)); The Democratic Party (LC Paper No. CB(2)802/11-12(03))]	Clause 8(2)(c) prevents people from abusing the mediation process by introducing otherwise discoverable information into mediation in order to make it “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.
24.	Clause 8(2)(d)	<p>(i) To clarify “reasonable grounds”. [ Methodist Centre]</p> <p>(ii) Opined that “reasonable ground” for the threshold to disclose mediation communication is too low. [C&amp;L Holdings Limited (LC Paper No. CB(2)802/11-12(14))]</p>	It is common for statutory requirements to adopt “reasonable grounds” 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.
25.	Clause 8(2)(d)	This exception is considered undesirable. [The Hong Kong Association of Banks (LC Paper No. CB(2)892/11-12(01))]	The exception for disclosure of mediation communication was discussed and considered by the Task Force and the Mediation Ordinance Group.

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			Countries such as Australia, Malta, Singapore and United States have included similar exceptions in their mediation legislation.
26.	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. [The Hong Kong Association of Banks (LC Paper No. CB(2)892/11-12(01))]	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 Oregon, United States have similar statutory exceptions for disclosure of mediation communication for research purposes.
27.	Clause 8(3)	<p>(i) Tests for leave to disclose mediation communication by the Courts/ Tribunals are not high to overcome. [CEDR Asia Pacific (LC Paper No. CB(2) 819/11-12(01))]</p> <p>(ii) Complaint of professional misconduct may be abused by parties as unreasonable complaints to disclose mediation</p>	We are confident that a specified court or tribunal hearing an application for leave under the Bill will <u>construe all the provisions as a whole</u> , take into account all relevant circumstances and exercise sound judgment in balancing the need to keep mediation communications confidential against the need for

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		<p>communication. [Hong Kong Society of Accredited Mediators (LC Paper No. CB(2)802/11-12(02))]</p> <p>(iii) Exception to disclose mediation communication is too low if there is no requirement that such complaint need to be substantiated. [The Democratic Party (LC Paper No. CB(2)802/11-12(03))]</p> <p>(iv) Requirements for disclosure of mediation communication are too low. [Hong Kong Family Welfare Society (LC Paper No. CB(2)819/11-12(02))]</p> <p>(v) Tests for leave to disclose mediation communication by the Courts/Tribunal are too wide without setting any guiding principles. [The Hong Kong Association of Banks (LC Paper No. CB(2)892/11-12(01))]</p>	<p>disclosure in each individual case. <u>Clause 10(2) provides clear guidance to the court or tribunal on the exercise of discretion for the purposes.</u></p>
28.	Clause 8(3)(a)	The word “challenging” should be deleted. [K.M. Lai & Li, Solicitors & Notaries]	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.

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29.	Clause 8(3)(b)	<p>(i) "Professional misconduct" is not defined. [Tru-Tight &amp; Associates Limed (LC Paper No. CB(2)802/11-12(06))]</p> <p>(ii) This provision should be excluded, especially as "professional misconduct" is not defined in the Bill. [K.M. Lai &amp; Li, Solicitors &amp; Notaries]</p>	<p>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 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>
30.	Clause 8	<p>(i) Disclosure of mediation communications should be allowed for the purpose of seeking legal advice. [Democratic Alliance for the Betterment and Progress of Hong Kong]</p> <p>(ii) Provision to allow disclosure of mediation communication to parties' own professional advisers, i.e., lawyers and financial advisers. [Hong Kong Institute of Surveyors (LC Paper No. CB(2)802/11-12(12)); Hong Kong Institute of Architects (LC Paper No. CB(2)819/11-12(04))]</p>	<p>The right to confidential legal advice is guaranteed under Article 35 of the Basic Law. The Bill does not have the effect of restricting the parties' right to seek legal advice. <u>It is also common for parties to include express provisions in mediation agreements to allow the disclosure of confidential information for the purpose of seeking financial or other professional advice if necessary. In the absence of such a mutual agreement, clause 8(3) provides an avenue for parties to seek leave from a specified court or tribunal to disclose mediation communications for the purpose of seeking financial or other professional advice.</u></p>

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			<p><u>which we understand is currently unavailable at common law. There is no suggestion to restrict a party's access to legal advice and an express provision will be added to allow disclosure of mediation communications for the seeking of legal advice.</u></p>
31.	Clause 8	<p>Parties and mediators may not remember what was said during mediation. Mediators may need to prepare notes. To whom, when and how the notes can be disclosed, and whether the disclosure is fair is unclear. [Tru-Tight &amp; Associates Limited (LC Paper No. CB(2)802/11-12(06)); C&amp;L Holdings Limited (LC Paper No. CB(2)802/11-12(14)); Hong Kong Mediation and Arbitration Centre (LC Paper No. CB1034/11-12(01))]</p>	<p>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.</p>
32.	Clause 9	<p>Protection for mediators who do not wish to be witness or give evidence in subsequent legal proceedings. [Democratic Alliance for the Betterment and Progress of Hong Kong; Hong Kong Catholic Marriage Advisory Council (LC Paper No. CB(2)809/11-12(05)); ADR Consultancy Hong Kong Limited (LC Paper No. CB(2)802/11-12(13))]</p>	<p><u>We consider it unnecessary to include a statutory provision for this purpose. Despite the fact that 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, the agreement does not by itself prevent the court from ordering evidence to be disclosed if</u></p>

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			<p><u>the court considers that it is in the interest of justice to do so (see <i>Farm Assist Ltd. (in liq.) v The Secretary of State for the Environment, Food and Rural Affairs (No. 2)</i> [2009] WEHC 1102 (TCC), in which the court dismissed a mediator's application to set aside a witness summons).</u></p>
33.	Clause 9	<p>(i) Suggestion that mediation communication should not be adduced as evidence in any civil proceedings. [Hong Kong Society of Accredited Mediators (LC Paper No. CB(2)802/11-12(02))]</p> <p>(ii) Admissibility of mediation communication may have negative impact on protecting confidentiality of mediation communication. [Hong Kong Family Welfare Society (LC Paper No. CB(2)819/11-12(02))]</p> <p>(iii) Do not agree that mediation communication can be disclosed and admitted as evidence in arbitral or administrative proceedings. [C&amp;L Holdings Limited (LC Paper No. CB(2)802/11-12(14))]</p>	<p>Clause 9 restricts the admissibility of mediation communications in evidence in any proceedings by requiring leave of a specified court or tribunal, <u>which will act as a gatekeeper in balancing the need to keep mediation communications confidential against the need for disclosure in each individual case. Clause 10(2) provides clear guidance to the court or tribunal on the exercise of discretion for the purposes.</u></p>

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34.	Clause 10	Burden on the courts/tribunal to determine the application for leave to disclose mediation communication may result in more litigation cases. [ADR Consultancy Hong Kong Limited (LC Paper No. CB(2)802/11-12(13))]	<u>Under existing common law, in the absence of mutual agreement, a party who seeks to disclose mediation communications will need to apply to the court anyway. In making statutory provisions on matters of confidentiality and admissibility of evidence, the Bill by its clause 10(2) in particular will give parties clearer guidelines on how these issues are to be dealt with and therefore help them to make more informed decisions in considering whether to seek leave from court to disclose mediation communications.</u>
35.	Clause 10(2)	Consideration for disclosure of mediation communication is too wide. [C&L Holdings Limited (LC Paper No. CB(2)802/11-12(14)); Hong Kong Institute of Architects (LC Paper No. CB(2)819/11-12(04))]	We are confident that a specified court or tribunal hearing an application for leave under the Bill will construe all the provisions as a whole, 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.
36.	Schedule 1	There may be potential conflicts between the Bill and 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	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

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		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. [The Hong Kong Association of Banks (LC Paper No. CB(2)892/11-12(01))]	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). <u>Further response will be provided in a separate paper.</u>
37.	Schedule 1, item 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. [Hong Kong Construction Association (LC Paper No. CB(2)645/11-12(03))]	<u>The reference to sections 32 and 33 of Cap. 609 in item 12 of Schedule 1 to the Bill is to provide that the Bill does not apply to “mediation proceedings” referred to in section 32(3) of Cap. 609, so that mediation proceedings in the context of “med-arb” under section 32 and “arb-med-arb” under section 33 of Cap. 609 will be regulated, as they are intended to, by the relevant provisions in Cap. 609, including provisions in section 33(3) and section 33(4) which deal with confidentiality of information obtained by an arbitrator acting as a mediator in conducting the mediation proceedings. Since there is no reference to “mediation proceedings” in section 32(1) and (2) of Cap. 609, item 12 of Schedule 1 to the Bill will not have the effect of excluding any mediation conducted by a mediator appointed by the Hong Kong International Arbitration Centre (HKIAC) under section 32(1) of Cap. 609 from the application of the</u>

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			<p><u>Bill if the mediation in question does not constitute “mediation proceedings” in the context of “med-arb” and “arb-med-arb” provided in sections 32 and 33 of Cap. 609. Nevertheless, amendments will be proposed to specifically refer to section 32(3) to remove the concern that may otherwise arise.</u></p>
38.	Other comments—specific areas of mediation	<ul style="list-style-type: none"> <li>(i) Suggestion to include elements of mediation between offenders and victims. [Methodist Centre]</li> <li>(ii) Suggestion to include element of family mediation in the Bill. [Hong Kong Family Welfare Society (LC Paper No. CB(2)819/11-12(02))]</li> <li>(iii) Consideration to differentiate family and general mediators. [K.M. Lai &amp; Li, Solicitors &amp; Notaries]</li> </ul>	<p>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. 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.</p>
39.	Other comments—professional code for mediators	<ul style="list-style-type: none"> <li>(i) Consideration to include code of mediators in the Bill, for example, the rules used by HKIAC or Law Society. [Hong Kong Catholic Marriage Advisory Council (LC Paper No. CB(2)809/11-12(05))]</li> </ul>	<p>The Hong Kong Mediation Code (“the Code”) promulgated in June 2009 has been adopted by major mediation services providers, such as the eight organizations that formed the Joint Mediation Helpline Office (“JMHO”). Each organization has a</p>

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		<p>(ii) Declaration of interest by mediators. [Society of Certified Mediators and Negotiators, Limited (LC Paper No. CB(2)802/11-12(10))]</p> <p>(iii) How will the quality of mediators be ensured? [Professional Mediation Consultancy Centre (LC Paper No. CB(2)802/11-12(01))]</p> <p>(iv) Include provisions of the Hong Kong Mediation Code on roles and responsibilities of mediator in the Bill. [Hong Kong Family Welfare Society (LC Paper No. CB(2)819/11-12(02))]</p>	<p>robust complaints and disciplinary processes to enforce the Code. Under the Code, a mediator is required to declare any conflict of interest which the mediator may have. It is considered unnecessary to include the Code as part of the Bill to avoid hampering the flexibility of mediation.</p>
40.	Other comments—liability and immunity of mediators	<p>(i) Protection for mediators against professional claims. Consideration of mandatory insurance for mediators. [Professional Mediation Consultancy Centre (LC Paper No. CB(2)802/11-12(01))]</p> <p>(ii) Liability of mediators. Reference to section 104 of the Arbitration Ordinance. [Democratic Alliance for the Betterment and Progress of Hong Kong; Hong Kong Institute of Construction Managers (LC Paper No. CB(2)802/11-12(07)); Hong Kong Mediation Centre (LC</p>	<p>The Working Group was of the view that there should not be statutory immunity for mediators. (See Recommendation 39 in the Report of the Working Group (“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</p>

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		<p data-bbox="658 245 1081 280">Paper No. CB(2)802/11-12(09))]</p> <p data-bbox="577 344 1417 568">(iii) 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. [Construction Industry Council]</p> <p data-bbox="577 632 1406 855">(iv) Consider the provision for mediator immunity. [EC Harris (HK) Limited; The Hong Kong Institution of Engineers (LC Paper No. CB(2)831/11-12(01)); Hong Kong Mediation and Arbitration Centre (LC Paper No. CB1034/11-12(01))]</p> <p data-bbox="577 919 1411 1102">(v) Not common in other jurisdictions to grant immunity to mediators. No objection that S104 of the Arbitration Ordinance is not included in the Bill. [The Law Society of Hong Kong (LC Paper No. CB(2)819/11-12(03))]</p> <p data-bbox="577 1166 1361 1342">(vi) Provision for mediator indemnity. Consideration for waiver for pro-bono mediation, school and community mediation. [C&amp;L Holdings Limited (LC Paper No. CB(2)802/11-12(14))]</p>	<p data-bbox="1444 245 2130 376">insurance. Some mediation service providers have made arrangements for group professional indemnity insurance for their panel mediators.</p>

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41.	Other comments— enforcement of mediated settlement agreements	<p>(i) Enforceable mediated settlement not as another contract for possible subsequent litigation. [Professional Mediation Consultancy Centre (LC Paper No. CB(2)802/11-12(01)); Hong Kong Institute of Surveyors (LC Paper No. CB(2)802/11-12(12))]</p> <p>(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 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). [School of Law of the City University of Hong Kong]</p>	<p>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 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 the Report that had obtained widespread public support in the public consultation exercise.</p> <p>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 court for judicial confirmation in the absence of any ongoing legal proceedings.</p>
42.	Other comments— appointment of mediators	<p>(i) Provision of appointment of default mediator. [Hong Kong Institute of Surveyors (LC Paper No. CB(2)802/11-12(12)); The Hong Kong Association of Banks (LC Paper No. CB(2)892/11-12(01))]</p> <p>(ii) Suggestion that the clause "Determination of selection of</p>	<p>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>

No.	Provisions in the Bill	Comments	Administration's Responses
		mediator" should be added with further elaboration on the method of reaching agreement between the parties to mediation and the mediators. [The Hong Kong Institution of Engineers (LC Paper No. CB(2)831/11-12(01))]	

**Department of Justice**

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