

Bills Committee on Mediation Bill

Administration's Responses to the Representations made by the Hong Kong Association of Banks ("HKAB")

No.	Representations by the HKAB	Administration's Response
1.	<p>Clause 8 in general</p> <p>It is too broad in scope and does not serve its intended purpose of providing legal certainty regarding confidentiality of mediation communications.</p>	<p>First, the exceptions to the prohibition against disclosure of mediation communications have been carefully considered by the Task Force chaired by the Secretary for Justice and its Mediation Ordinance Group, comprising representatives of mediation service providers, the legal professions and the judiciary. These exceptions serve important functions and provide legal certainty.</p> <p>Second, reference has been made to comparable statutory provisions in other jurisdictions, the position of common law, and the special circumstances of Hong Kong. Similar provisions are found in a number of overseas jurisdictions. The <u>Annex</u> is a table summarising the relevant statutory provisions.</p>

2.	<p>Clause 8(2)(d)</p> <p>It is undesirable to allow disclosure of mediation communication if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child. This exception would cause inconsistency with the current position on privilege in without prejudice communications in court litigation.</p>	<p>First, this exception has taken into consideration the views of community mediators, especially those involved in family-related mediation. Practising mediators especially family mediation practitioners considered the exception necessary. This provides assurance to mediators that they can disclose mediation communications in exceptional circumstances in order to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child for the public interest.</p> <p>Second, similar (and in fact even wider ones allowing disclosure to prevent damage to property) provisions are found in comparable legislation in Australia and Singapore.</p> <p>Third, it seems most unlikely that the disputes to be dealt with under the Financial Dispute Resolution Scheme (“FDRS”), i.e. mainly financial disputes between customers and financial institutions, will involve circumstances where this head of exception is engaged.</p>
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		<p>Fourth, it should also be noted that even the privilege in without prejudice communications in court litigation is not absolute¹.</p> <p>Fifth, and furthermore, if this information in the mediation communication is intended to be admitted in evidence in any proceedings, it is still subject to the leave of the court or tribunal.</p>
3.	<p>Clause 8(2)(e)</p> <p><i>Clause 8(2)(e) allows mediation communication to be disclosed if the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates.</i></p> <ul style="list-style-type: none"> • HKAB have no objection to the publication of general statistics as to the outcome of mediation but considered that there might be possible unintended disclosure of the details of the mediation even if the identities of the parties 	<p>First, it should be clarified that nothing in Clause 8 permits disclosure of any detail of the mediation agreement or the mediation settlement (e.g. the settlement sum, breakdown or terms). For under Clause 2(1), “mediation communication” specifically excludes “an agreement to mediate or a mediated</p>

¹ See, e.g. discussion in para.7.107 to 7.117 of the Report of the Working Group on Mediation 2010.

involved not revealed.

- It may also create unnecessary expectations on the outcome of mediations even if the identities of the parties are not revealed.

settlement agreement”.

Second, if there is any further concern that any specific matter in the mediation communication may be prone to revealing the identity of the persons concerned and therefore should not be disclosed as a class, it is open to the parties to agree by contract to a more stringent disclosure regime, or for the Terms of Reference of the FDRS to provide for the same.

Third, the current wording of Clause 8(2)(e) was drafted to address the concern that the likelihood of revelation is higher in Hong Kong as it is a small community. Therefore, where there is a likelihood to reveal, directly or indirectly, the identities of the persons concerned, Clause 8(2)(e) does not permit disclosure. This is in fact tighter against disclosure when compared with comparable provisions in other jurisdictions (e.g. in Australia and Canada).

Fourth, at this stage of the development of mediation in Hong Kong, research and evaluation are crucial to ensure we are moving in the right direction, investing resources where they are most deserved, and training mediator service providers in the most effective ways. Universities and private mediation

		<p>organisations conduct surveys which will aid the promotion and is necessary to facilitate the healthy development of mediation in Hong Kong. Research practice is in accordance with international practice with various international publications published over the years.</p> <p>Fifth, many Universities require researchers to abide by the Code of Ethics for research. Any further general concern about disclosure for the purposes of research may be addressed by issuing of guidelines.</p>
4.	<p>Clause 8(3)(c)</p> <p><i>A person may disclose a mediation communication with leave of the court or tribunal under section 10 for any other purpose that the court or tribunal considers justifiable in the circumstances of the case.</i></p> <p>HKAB considered that the exception provides a wide discretion for the tribunal or the court without guiding principles for the court to consider whether to allow the disclosure of mediation communication.</p>	<p>The specific tribunal or court 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 justification for disclosure in each individual case.</p>

		<p>Guidance is provided in clause 10(2) according to which the court or tribunal must take into account the following matters in deciding whether to grant leave for a mediation communication to be disclosed or admitted in evidence –</p> <ul style="list-style-type: none"> (a) Whether the mediation communication may be, or has been, disclosed under section 8(2); (b) Whether it is in the public interest or the interests of the administration of justice for the mediation to be disclosed or admitted in evidence; (c) Any other circumstances or matters that the court or tribunal considers relevant.
5.	<p>Provisions for sanction</p> <p>HKAB considered that provision for sanction as recommended in the Working Group Report is essential in safeguarding the protection of confidentiality of mediation.</p>	<p>The Task Force and its Mediation Ordinance Group deliberated on this issue thoroughly and decided that the Bill need not make express provision for sanctions. If there is a breach of confidentiality, the party aggrieved may rely on civil remedies available from the courts for breaches of confidentiality.</p> <p>It is not common in other jurisdictions to include an express provision on sanction for breach of confidentiality of mediation</p>

		communications. We understand that only Austria ² and Samoa ³ have imposed sanctions on disclosing confidential mediation communications.
6.	<p>Appointment of Mediator</p> <p>HKAB welcomed the omission of the previously proposed clause on default appointment of mediators from the Bill but asked whether the Hong Kong International Arbitration Centre would serve as the default body for appointing mediators.</p>	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 Bill does not propose to designate any organization to be the default appointing body for mediators at this stage. Mediation is a flexible process and mediation service providers such as the JMHO can assist parties in locating a mediator that fulfils the parties’ requirement.
7.	<p>Mediation conducted by the Financial Dispute Resolution Centre (“FDRC”) should be excluded from the application of the Bill</p> <ul style="list-style-type: none"> • There may be potential conflicts between the Terms of Reference (“ToR”) and the Mediation and Arbitration Rules (“Rules”) of the FDRC and 	First, we have consulted the Financial Services and Treasury Bureau (“FSTB”) and are informed that the ToR of the FDRC would be finalised on the basis that the Bill will be applicable to

² Austria, Mediation Act 2003, Article 16(3)

³ Samoa, Alternative Dispute Resolution Act 2007, section 7(3)

the Bill concerning confidentiality and admissibility. In particular, the exceptions in clause 8 and 9 of the Bill were said to go beyond what was disclosable in the ToR and the Rules.

- HKAB is of the view that the FDRC is a quasi-statutory scheme and mediation conducted under the FDRC is similar to the processes excluded in Schedule 1 to the Bill.
- It is said that an HKAB member does not have a choice whether to enter into mediation and arbitration if the case is accepted by the FDRC, and this is said to be fundamentally different from the voluntary and consensual approach adopted generally for mediation.

the mediations conducted by the FDRC (“FDRC mediations”). In fact, we have been assured that FDRC mediations would fit into the definition of *mediation* in clause 4 of the Bill. When the mediation conducted by the FDRC is intended to be the mediation as defined in the Bill, there is no reason why FDRC mediations should be excluded.

Second, as to HKAB’s concerns over Clauses 8 and 9, see the explanation above. We believe the concerns could be sufficiently addressed.

Third, we note from the consultation with FSTB, unlike the statutory processes listed in Schedule 1, the FDRC is not a regulatory body and do not have any statutory power to investigate into possible alleged offences during mediation. The processes included in Schedule 1 to the Bill are self-contained statutory schemes. As the statutory purposes and/or procedures of those schemes may not be consistent with the mediation and related matters provided for in the Bill, there is the need to exclude them by way of Schedule 1. In the case of the FDRC scheme, although HKAB said many of its members were regulated by the Securities and Futures Commission in the conduct of securities business, and in that capacity, they must also

		<p>become members of the FDRC, the fact is the FDRC scheme remains administrative by nature. No TOR has been finalised yet and, as mentioned, those TOR are in any event intended to be consistent with the Bill.</p> <p>Fourth, it must be emphasized that whether the parties embark on mediation purely of their own volition or upon direction of some authority is not relevant and does not affect the applicability of the Bill to the mediation in question. The Bill is not concerned with how the parties come to use mediation to settle their disputes (be it by consent, directed by the terms of FDRC, or because of the costs sanctions under Practice Direction 31). The Bill is primarily concerned with, after the parties have started mediation, the conduct of certain aspects of the mediation (such as confidentiality and admissibility of evidence) which ought to be regulated. Even if the parties have been directed to start mediation, it would still be entirely up the parties to reach an agreement or not in the mediation process. It is still entirely voluntary as no one can be forced to reach a settlement on any term against his or her will.</p> <p>Fifth, it is respectfully submitted that applicability of the Bill to FDRC mediations can only be beneficial to the users of FDRC</p>
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		mediations, as the provisions relating to confidentiality and admissibility of evidence will provide legal certainty and predictability, and thereby reducing potential disputes arising from the mediation process.
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Table of Similar Exceptions to Confidentiality of Mediation Communication in other Jurisdictions

Jurisdictions	Legislation	Relevant Section	Consent	Public Domain	Discovery	Public interest/ Harm/Injury	Research	Required by Law
Austria	1. Austrian Mediation Act (Law on Mediation in Civil Law Matters)	Article 31(2)				✓		
Australia	2. Mediation Act 1997	Section 10(2)	✓			✓		✓
	3. Evidence Act 1995 (with reference to s. 9 of the Mediation Act 1997)	Section 131(2)	✓		✓			
	New South Wales 4. Courts Legislation (Mediation and Evaluation) Amendment Act 1994 No. 57	Sections of various Amendment Acts	✓			✓		✓
	5. Farm Debt Mediation Act 1994 No. 91	Section 16	✓					✓

Jurisdictions	Legislation	Relevant Section	Consent	Public Domain	Discovery	Public interest/ Harm/Injury	Research	Required by Law
	6. Community Justice Centres Act 1983	Section 29	✓		✓	✓	✓	✓
	7. Evidence Act 1995	Section 131(2)	✓		✓			
	Queensland 8. Supreme Court of Queensland Act 1991	Section 112(2)	✓			✓	✓	✓
	9. Farm Debt Mediation Bill 2003	Section 18	✓					✓
	Tasmania 10. Alternative Dispute Resolution Act 2001	Section 11	✓			✓	✓	✓
	Victoria 11. Evidence (Miscellaneous Provisions) Act 1958 No. 6246 of 1958	Section 21M(1)	✓			✓	✓	

Jurisdictions	Legislation	Relevant Section	Consent	Public Domain	Discovery	Public interest/ Harm/Injury	Research	Required by Law
Canada	British Columbia 12. Notice to Mediate (General) Regulation, BC reg 4/2011 (Law and Equity Act)	Section 36(2)	✓		✓		✓	
	Nova Scotia 13. Commercial Mediation Act, SNS 2005, c36	Section 11	✓		✓			✓
	Ontario 14. Commercial Mediation Act, 2010 S.O. 2010	Chapter 16, Schedule 3, section (2) and (3)	✓	✓		✓		✓
European Union⁴	15. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters	Article 7(1)				✓		

⁴ Note: The EU Directive 2008/52/EC was issued to EU members as guidelines to Member states to consider when drafting the individual legislation. Member states could issue stricter measures to protect confidentiality.

Jurisdictions	Legislation	Relevant Section	Consent	Public Domain	Discovery	Public interest/ Harm/Injury	Research	Required by Law
Ireland	16. Draft Mediation and Conciliation Bill 2010	Section 7			✓	✓		✓
Malta	17. Mediation Act (Chapter 474)	Section 27	✓					
People's Republic of China	18. People's Mediation Law of the People's Republic of China	Article 25				✓		
Philippines, The	19. Alternative Dispute Resolution Act	Section 11	✓	✓	✓	✓		
Republic of Serbia	20. Law on Mediation	Article 6	✓			✓		✓
Republic of Trinidad and Tobago	21. Act No. 8 of 2004	Section 11(2)	✓			✓		✓
Republic of Vanuatu	22. Civil Procedure Rules 2002 Part 10 – Mediation	Section 10.13	✓			✓		✓

Jurisdictions	Legislation	Relevant Section	Consent	Public Domain	Discovery	Public interest/ Harm/Injury	Research	Required by Law
Samoa	23. Alternative Dispute Resolution Act 2007	Section 8				✓		✓
Singapore	24. Community Mediation Centres Act (Cap 49A)	Section 20	✓		✓	✓	✓	✓
Slovak Republic	25. Act of 25 June 2004 on Mediation and Amendment of certain Acts	Article 6			✓			
Slovenia	26. Mediation in Civil and Commercial Matters Act	Article 11	✓		✓			✓
United States, The	27. Uniform Mediation Act	Section 4, 6, 7, 8	✓	✓	✓	✓		✓
	California 25. Evidence Codes	Section 1120	✓		✓			
	Florida 28. Judicial Branch Chapter 44	Section 44.405(4)(a)	✓		✓	✓		✓

Jurisdictions	Legislation	Relevant Section	Consent	Public Domain	Discovery	Public interest/ Harm/Injury	Research	Required by Law
	Mediation Alternatives to Judicial Action							
	Nebraska 29. Dispute Resolution Act	Section 25-2914	✓		✓			✓
	Oregon 30. Oregon Revised Statutes, Chapter 36 Mediation and Arbitration	Section 36.220	✓		✓	✓		✓
	Texas 31. Civil Practice and Remedies Code Title 7. Alternative Dispute Resolution	Chapter 154, Section 154.073			✓	✓		✓

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