

**Bills Committee on Mediation Bill**

**Administration’s Responses to the Suggestions made by the Hong Kong Association of Banks (“HKAB”) in its letter to the Bills Committee dated 20 April 2012<sup>1</sup>**

No.	Suggestions by the HKAB	Administration’s Responses
1.	<p><b>Clause 2, definition of <i>mediation communication</i></b></p> <p>HKAB proposed that “mediation communication” be defined along the following lines (with suggested changes in italics):</p> <p>“mediation communication means.... but does not include an agreement to mediate or a mediated settlement agreement <i>or any details of such agreement to mediate or mediated settlement agreement that may be contained in any information or document referred to in paragraphs (a) to (c) above;</i>”</p>	<p>The definition of <i>mediation communication</i> proposed in the Mediation Bill (“the Bill”) was formulated after thorough discussion of the Mediation Task Force chaired by the Secretary for Justice and its Mediation Ordinance Group. It is essential that the meaning of <i>mediation communication</i> should be broad enough to ensure that the confidentiality of communications generated in different forms and by different means for the purpose of or in the course of the mediation process will fall within the protection of clause 8 of the Bill.</p> <p>An agreement to mediate and a mediated settlement agreement are excluded from the definition of <i>mediation communication</i> in view that in practice in general, parties may or may not require</p>

<sup>1</sup> LC Paper No.CB(2)1798/11-12(01)

these two documents to be kept confidential. The Bill therefore does not propose to regulate the treatment of these documents in either way. Parties are at liberty to agree to keep either or both of these documents or any part of their contents confidential as they see fit to.

HKAB suggests narrowing down the meaning of *mediation communication* further by excluding from the definition “*any details of such agreement to mediate or mediated settlement agreement that may be contained in any information or document referred to in paragraphs (a) to (c) above*”.

We consider the suggestion unacceptable and unnecessary. It is unacceptable as it will convolute not only the meaning but also the policy intent of the provisions. It is unnecessary in view that, as explained, parties to mediation may agree to keep the mediation agreement or mediated settlement agreement or any part of their contents confidential as the parties see fit to. If the content of a mediation communication contains the details of a confidential mediated settlement agreement, it is hard to imagine how a person who discloses the content of the mediation communication could argue that the confidentiality of the details

		<p>of the mediated settlement agreement is not compromised at the same time if the party is contractually bound to keep the contents of the mediated settlement agreement confidential.</p> <p>We consider that the attempt to undercut the general scope of mediation communications merely for the sake of carving out information from legitimate disclosure for research, evaluation or educational purposes under clause 8(2)(e) is unwarranted and will water down the objectives of the Bill in protecting the confidentiality of mediation communications and promoting the development of mediation in Hong Kong. We therefore do not recommend this suggestion to be adopted.</p>
2.	<p><b>Parties may expressly agree by contract to limit the scope of disclosure</b></p> <p>HKAB recommended that a clause be included in clause 8 to the effect that parties to mediation may expressly agree by contract to limit the scope of disclosure in the event that any matters in the mediation communications are likely to reveal the identity of any of the parties concerned.</p>	<p>According to clause 8 of the Bill as currently drafted, a person may disclose a mediation communication with the consent of all parties, the mediator and other concerned participants in the mediation. In the absence of the required consent, the mediation communication may be disclosed only if one of the other exceptional circumstances specified in clause 8(2) and (3) is</p>

applicable. While clause 8(2)(e) provides that a person may disclose a mediation communication if the disclosure is made for research, evaluation or educational purposes, such a disclosure must not be made if the identity of any of the parties is revealed, or is likely to be revealed, directly or indirectly, by the purported disclosure. The 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. Hence, the wording is tighter against disclosure when compared with comparable provisions in other jurisdictions.

In order to abide by the requirement not to reveal parties' identity under clause 8(2)(e), if there is concern that any specific matters in the relevant mediation communications may be prone to revealing the identity of the persons concerned and therefore should not be disclosed as a class for research, evaluation and educational purposes, it is open to the parties to agree by contract to a more stringent disclosure regime for implementing clause 8(2)(e). Therefore, in really exceptionally sensitive cases where the parties agree there is high risk of revelation of identities of persons even with the disclosure of the most basic information about the mediation, then in line with the spirit of clause 8(2)(e),

it is open to the parties to specifically agree that certain details of the mediation communication, which normally could be disclosed for the purpose of research, evaluation or education purposes, should not be disclosed in the specific case at hand so as to prevent revelation of the identities of the persons concerned.

Since the caveat against revelation of the identities of the persons concerned is already in-built in clause 8(2)(e), we do not believe it is necessary to provide an express clause as urged by HKAB.

An express clause may in fact be confusing, and may have the indirect but unfortunate effect of misleading parties that the disclosure provisions in the Bill could be ignored or contracted out, or encouraging the parties to mediation to indiscriminately restrict disclosure without any good cause or there being any commensurate risk of revelation of the identities concerned, and thereby defeating the very important and legitimate policy which clause 8(2)(e) pursues.

We therefore do not agree with the suggestion made by HKAB to include a provision in clause 8 to the effect that the parties to mediation may expressly agree by contract to limit the scope of

		disclosure.
3.	<p><b>Disclosure by “a person”</b></p> <p>HKAB considered that the disclosee under clause 8(2)(e) should be restricted to the mediator to protect the right to confidentiality of the parties to mediation.</p> <p>It is proposed that the opening words of clause 8(2) be revised along the following lines (with suggested changes in italics):</p> <p>“(2) A person, <i>save for subsection (e) which is restricted only to the mediator</i>, may disclose a mediation communication if –”</p>	<p>At this stage of mediation development in Hong Kong, we consider that the importance of research, evaluation and education for the promotion of the wider use of mediation cannot be overemphasized. Universities, researchers, and mediation service providers need to and should be encouraged to conduct research on the experience of mediation in Hong Kong. For these purposes, mediators are not the only class of persons who will conduct research in mediation. For instance, when the Judiciary and the Joint Mediation Helpline Office collect data in respect of mediation cases, the parties or their solicitors are supposed to provide the necessary data.</p> <p>Moreover, some research may target non-identifying information from parties, legal representatives, mediators, observers, translators and other participants in mediation. For example, a useful research question may relate to how parties and lawyers experience the skill and interventions of the mediator. This information cannot be given by the mediator and the very nature</p>

		<p>of it is unlikely to disclose identifying information.</p> <p>If mediators are specified as the only class of persons allowed to make disclosure under clause 8(2)(e), a host of questions will arise including whether information about mediation cases may only be used for research, evaluation and training that are conducted by mediators personally, and whether the relevant data may not be analysed and published by the mediation service providers to which the mediators belong, or by independent research institutions. We therefore consider that restricting the class of persons who can disclose mediation communications under clause 8(2)(e) is unnecessary. It is not justifiable and problematic, and may stifle the healthy development of mediation in Hong Kong.</p>
4.	<p><b>Timing of disclosure of mediation communications</b></p> <p>HKAB considered that mediation communications should not be disclosed at a premature stage of the mediation or when parties further advance their cases in court or in arbitration.</p>	<p>We would like to point out that qualitative and quantitative research of all kinds already occurs in relation to mediation and will continue to occur regardless of whether clause 8(2)(e) is included in the Bill or not. There is nothing to stop people talking or writing about non-identifying aspects of mediation. People</p>

It is proposed that clause 8(2)(e) be revised along the following lines (with suggested changes in italics):  
“(e) 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. *For the purpose of this subsection (e), “research, evaluation or educational purposes” is restricted to the purpose of assisting the public in developing an improved understanding of, and appreciation for, mediation; nothing in this subsection (e) shall mean the disclosure of such information to the public through any media irrespective of the platform used, including all types of broadcast, electronic and print media. For the purpose of this subsection (e), in no event should any such information be disclosed at a time before the final resolution of the disputes in the mediation case; or*”

do this all the time and they do it all over the world. In many jurisdictions, mediators, lawyers and parties are given questionnaires to complete at the end of the mediation session in order to gather qualitative research data with a view to continually improving mediation services. This is the case in numerous courts and public and private mediation centres in Australia, New Zealand, the Pacific region, the United States, Canada, etc. The purpose of including clause 8(2)(e) in the Bill is to clarify the legal situation in Hong Kong so that research, evaluation and training can be carried out in a way that ensures that the confidentiality of mediation processes are kept intact.

Our responses to the revisions proposed to be made by HKAB to clause 8(2)(e) are as follows:

(1) The first part of the suggested changes is to add that *“research, evaluation or educational purposes” is restricted to the purpose of assisting the public in developing an improved understanding of, and appreciation for, mediation.* It is hard to imagine how a person who discloses mediation communications for purposes that clearly do not assist the public in developing an improved understanding of, and appreciation for, mediation could

argue that the disclosure is made for research, evaluation or educational purposes. In any event, the suggested requirement cannot, in our view, restrict the meaning of “research, evaluation or educational purposes” in any practical or meaningful way.

(2) The second part of the suggested changes is to provide that *“nothing in this subsection (e) shall mean the disclosure of such information to the public through any media irrespective of the platform used, including all types of broadcast, electronic and print media”*. The effect of this suggested provision is not very clear to us. If it is meant to prohibit the disclosure of information to the public through any media, it is arguably tantamount to ring-fencing clause 8(2)(e) for private research, private evaluation and private education purposes only. This suggested restriction will not only seriously undermine the objective of clause 8(2)(e), but also trigger potential disputes on what kind of acts should be regarded as disclosure of information “to the public through any media”.

(3) The third part of the suggested changes is to provide that: *“For the purpose of this subsection (e), in no event should any such information be disclosed at a time before the final resolution*

		<p><i>of the disputes in the mediation case</i>". his suggested provision would raise further interpretative arguments on when "the disputes in the mediation case" should be regarded as reaching "the final resolution". In any event, we consider this suggestion to be unnecessary as any information allowed to be disclosed under clause 8(2)(e) is non-identifying and therefore cannot affect the final resolution of the disputes. If there is any likelihood that the identity of any party may be revealed directly or indirectly in any proposed research, evaluation or training, the relevant mediation communications must not at any time be disclosed under clause 8(2)(e) without the consent required by clause 8(2)(a). Whether the proposed research, evaluation or training is to take place before or after the final resolution of the disputes is irrelevant to the restriction imposed by clause 8(2)(e).</p>
5.	<p><b>Unified guideline to regulate use of mediation communication</b></p> <p>HKAB urged that the Government to issue a unified guideline on monitoring of the independent educational institutions, scholars, researchers and tutors in relation to the disclosure and use of</p>	<p>As explained in the Administration's response to issues raised at the Bills Committee meeting on 28 March 2012 (LC Paper No. CB(2) 1728/11-12(01)), we consider it more appropriate for the proposed guidelines to be formulated by the single accreditation</p>

	<p>mediation communications for genuine research, evaluation and educational purposes, which should be made publicly available after the Mediation Bill is enacted but before it commences into operation.</p>	<p>body<sup>2</sup> comprising major mediation service providers upon its establishment to ensure that good research practice is maintained by practising mediators and mediation service providers.</p> <p>As the Bill aims at providing a framework for the conduct and development of mediation in Hong Kong and does not intend to affect the current mediation practice in general, we do not consider that the commencement of the Bill (if enacted) should be deferred until the publication of a unified guideline for research, evaluation or educational purposes. The Administration will continue to facilitate the formation of the industry-led single accreditation body and the formulation and publication of a set of unified guidelines for these purposes.</p>
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**Department of Justice**  
**April 2012**

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<sup>2</sup> Recommendation 25 of the Working Group Report: “The establishment of a single body for accrediting mediators is desirable and can assist to ensure the quality of mediators, consistency of standards, education of the public about mediators and mediation, build public confidence in mediation services and maintain the creditability of mediation.”