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Report of the Bills Committee on Mediation Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Mediation Bill.

Background

2. Mediation is a dispute resolution process that is used to resolve dispute other than through litigation in the courts. At present, there is no specific piece of legislation on mediation in Hong Kong. In the 2007-2008 Policy Address, the Chief Executive announced the establishment of a cross-sector working group headed by the Secretary for Justice ("SJ") ("the Working Group") to review the development of mediation and to map out plans to employ mediation more extensively and effectively in both commercial disputes and at community level. On 8 February 2010, the Working Group published its Report for three-month public consultation. The 48 recommendations contained in the Working Group's Report covered the three important areas of training and accreditation, regulatory framework and publicity and public education. A Mediation Task Force chaired by SJ was set up to assist in implementing the recommendations of the Working Group that received wide public support with a view to promoting wider use of mediation in Hong Kong.

3. In respect of the regulatory framework for mediation, the Working Group recommended that there should be a stand-alone Mediation Ordinance to provide a proper legal framework for the conduct of mediation without hampering the flexibility of the mediation process. The Working Group also recommended that the proposed Ordinance should set out its objectives and key terminology such as "mediation" and "mediator" and make provisions for rules of confidentiality and privilege, including provisions for the statutory exceptions to the application of such rules. In respect of enforcement of mediated settlement agreements, the Working Group did not consider it necessary to include in the proposed Ordinance a statutory enforcement mechanism as such agreements could be enforced by the courts as contracts where necessary. According to the Administration, there was overwhelming

support for the enactment of a Mediation Ordinance in the three-month public consultation exercise.

The Bill

4. The Bill seeks to provide a regulatory framework in respect of certain aspects of the conduct of mediation and to make consequential and related amendments.

The Bills Committee

5. At the House Committee meeting on 2 December 2011, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Dr Margaret NG, the Bills Committee has held seven meetings to study the Bill and received views from 32 organizations and individuals at one of those meetings. The names of organizations and individuals which have submitted views to the Bills Committee are in **Appendix II**.

Deliberations of the Bills Committee

6. The organizations/individuals submitting views to the Bills Committee in general are supportive of the introduction of the Bill, but have raised issues of concern in various aspects of the Bill. The Bills Committee has taken up these issues with the Administration. At the Bills Committee's request, the Administration has provided written responses to the comments made by these organizations/individuals on the general aspects and specific provisions of the Bill (issued vide LC Paper Nos. CB(2)894/11-12(01) and CB(2)1499/11-12(02) respectively). The main deliberations of the Bills Committee are set out below.

Objects of the Bill

7. The objects of the Mediation Ordinance, as provided in clause 3 of the Bill, are -

- (a) to promote, encourage and facilitate the resolution of disputes by mediation; and
- (b) to protect the confidential nature of mediation communications.

8. Members have queried the efficacy of the Bill. They have expressed concern about its implementation in the absence of relevant provisions on

accreditation of mediators and rules governing the conduct of mediators and the mediation process in the Bill.

9. The Administration has explained that there is a trend of resolving disputes in civil proceedings by mediation and legislating on mediation to provide a legal framework for the development of mediation should be the first step to promote mediation. The question of whether to include model mediation rules into the Bill had been considered by the Working Group. It was considered that the provision for rules governing the conduct of mediation and the mediation process was not really necessary and if any rules were to be included, it should only serve as a guide and should not be made mandatory in order to maintain the flexibility of the mediation process. The flexibility and adaptability of the mediation process are two of the most valued features of mediation. Thus rules incorporated into the agreement to mediate are best suited for governing the conduct of a particular mediation.

10. Members, however, are of the view that the Administration should not focus merely on the legislative work on mediation. They stress the need for the Administration to work out the accreditation system of mediators and other assistance relating to mediation in tandem to provide a solid basis for the implementation of the legislation.

Meaning of mediation and definition of a mediator

11. Under the Bill, "*mediation*" is defined to mean a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to identify the issues in dispute, explore and generate options, communicate with one another, and/or reach an agreement regarding the resolution of the whole, or part, of the dispute. "Mediator" means an impartial individual referred to in the definition.

12. Members share the concern expressed by some depositions about the quality of mediators. They have queried how the quality can be ensured if anyone who claims to be impartial is able to assume the role of a mediator. Members have asked whether a person needs to go through a certain period of training or be registered with a particular association in order to be qualified as a mediator in Hong Kong. Members consider that a mediation system based on proper training and registration should be adopted to maintain the standard and accountability of mediators.

13. According to the Administration, it has looked at overseas practices and the training requirements for mediators in Hong Kong in defining the term

"mediator" in the Bill. A neutral or an impartial mediator is a key element in the definition of mediation in overseas mediation legislation. While a mediator in some jurisdictions (e.g. Republic of Trinidad and Tobago) is required by legislation to go through certain kind of training and be registered with a particular government agency, Hong Kong, like other countries, has adopted a common model under which a mediator is not required by legislation to go through certain training and to be formally registered with accreditation body. However, mediation service providers in Hong Kong have prescribed requirements for training and continuing professional development for mediators to ensure the standard of mediators. The accreditation of mediators can be further worked out after the establishment of a non-statutory industry-led single accreditation body for mediators.

14. The Administration has further advised that parties to the dispute may enter into an agreement to mediate in writing which governs the conduct of mediation (e.g. the impartial manner of the mediator and the confidentiality of mediation communications) to ensure that the mediation is duly conducted. The mediation service providers, as and when required by the parties, will exercise due diligence in assigning a mediator to the parties to a dispute. The Administration will also educate the public on how to seek appointment of mediators through publicity and assistance is available to the public from the Judiciary's Mediation Information Office and the Joint Mediation Helpline Office set up by eight organizations involved in providing mediation services. Moreover, the Hong Kong Mediation Code ("the Code") promulgated in June 2009 has been adopted by major mediation service providers, such as the eight organizations that formed the Joint Mediation Helpline Office. Each organization has robust complaints and disciplinary processes to enforce the Code.

15. Members have suggested that the Administration should consider specifying in the Bill that a mediator should be an impartial individual who has completed the mediation training course recognized by the four major mediation service providers in order to enhance public confidence in mediation services. The Administration, however, considers it not appropriate to do so at this stage. According to the Administration, many practicing mediators who have received training overseas, or have been accredited by other organizations or have not received formal training but have acquired practical experience in mediation in particular fields (e.g. experienced mediators in the areas of commercial and construction disputes) will be excluded from the practice of mediation if the proposed requirement is imposed, thus hampering the flexibility of the mediation process and the development of mediation in Hong Kong. Moreover, such requirement will also limit the public's choice of mediator in resolving their disputes. Members also note the advice of the legal

adviser to the Bills Committee that narrowing the definition of "mediator" may have a side effect to limit the scope of application of the proposed provisions relating to confidentiality and privilege of mediation communication in the Bill.

16. Referring to the role of the parties to a dispute in mediation as specified in clause 4(1), some members are worried that the parties to a dispute may be under the impression that their rights are protected by the Mediation Ordinance and will not be aware of their proactive roles in protecting their own rights in the mediation process. Members have urged the Administration to step up the promotional and public education work on mediation in the community, particularly on the roles and responsibilities of parties to a dispute in mediation. The Administration has undertaken to enhance the related promotional work to educate the public on the use of mediation.

Accreditation and training of mediators

17. Members have enquired whether the current accreditation of the practicing mediators will be recognized after enactment of the Bill. The Administration has explained that although the Bill will not contain provisions relating to accreditation of mediators, the Administration is working with stakeholders on the development of a single non-statutory industry-led accreditation body for mediators. The Administration has also assured members that the legislation will not affect the current practices of mediation given that mediation is mainly voluntary and of a facilitative nature without adjudicating a dispute.

18. Some members have expressed disagreement with the Administration's position that matters relating to accreditation of mediators can be dealt with at a later stage after enactment of the Bill. They consider that given the diversities in qualifications and background of practicing mediators in the industry and variations on the mediation costs, a system of accrediting mediators should be worked out to ensure the professionalism of mediators and the Administration should devise a timetable for developing an accreditation system of mediators. Some other members, however, take the view that as mediation does not involve the adjudication of a dispute and the expertise and experience required for mediation in specific industries vary, there is no urgent need to establish a standardized accreditation system for mediators at this stage in order not to hinder its diversified development.

19. The Administration has explained that while it does not have a timetable for making legislation in respect of an accreditation system of mediators, the Accreditation Group of the Mediation Task Force has all along been tasked to facilitate the establishment of a single non-statutory industry-led accreditation

body for mediators. Such organization can enhance the development of professionalism of mediators in future and such kind of professional bodies are normally set up by the professions concerned themselves.

20. Some members have pointed out that while there is unanimous support in the community for the promotion of wider use of mediation, there are diverse views on whether the system of accrediting mediators should be solely developed by the single mediation accrediting body or with the participation of other existing accrediting organizations. They have also asked whether the Administration will consider specifying a panel of accredited mediators in the Bill.

21. The Administration has reiterated that it is working with stakeholders to facilitate the establishment of the single accreditation body for mediators. A provision can be included in an agreement to mediate to provide for the appointment of a mediator by the Hong Kong International Arbitration Centre ("HKIAC") or other mediation service providers in case where consensus cannot be reached by the parties to a dispute on the appointment of the mediator.

22. Members observe that a note has been inserted in the definition of the term "*agreement to mediate*" in clause 2 of the Bill to draw readers' attention to the fact that an agreement to mediate can be made in electronic form according to section 5(1) of the Electronic Transactions Ordinance ("ETO") (Cap. 553). The legal adviser to the Bills Committee considers that the sentence "an agreement to mediate can be in electronic form" in the note carries substantive meaning which should not be included in a note form. Members have also queried whether it is necessary to add the note under the definition as the general public may not notice that the note is not intended to have a legal effect in the same way as a statutory provision.

23. The Administration has, however, explained that the note is inserted following its consultation with stakeholders to address their concern as to whether an agreement to mediate can be in electronic form. It was noticed in the consultation that some stakeholders might not be familiar with the general application of the ETO, according to which an agreement to mediate could be in electronic form, the note was therefore included in the Bill. It is considered that the note is useful as an aid to readers by providing factual information available in other relevant legislation, and will help to further the objective of the Bill in promoting and facilitating the use of mediation to resolve disputes. The note is not intended to have a legal effect in the same way as a clause in the Bill. The contents of the note should not be incorporated into the relevant definition.

Progress for setting up a single non-statutory industry-led mediation accrediting body for mediators

24. The Bills Committee has held a discussion with the Chairman of the Mediation Ordinance Group of the Mediation Task Force on the progress for establishing the single non-statutory industry-led mediation accrediting body for mediators. The Bills Committee notes that the Mediation Task Force and its Accreditation Subgroup are working towards the setting up of such organization in the form of a company limited by guarantee, i.e. the Hong Kong Mediation Accreditation Association Limited ("HKMAAL"). The council of HKMAAL will consist of not more than 10 council members including (a) four ex-officio members (each to be nominated by the Law Society of Hong Kong ("Law Society"), the Hong Kong Bar Association ("Bar Association"), the Hong Kong Mediation Centre and HKIAC; (b) not more than four other members elected by members of HKMAAL; and (c) two co-opted members who are not members of HKMAAL. As a condition for membership, the mediation service providers will give up their existing individual accreditation system and future mediators will be accredited through HKMAAL only. It is hoped that HKMAAL, when established, can be the default appointing body of mediator when parties to mediation cannot come to consensus on the appointment of a mediator. It is expected that the terms of the draft Memorandum and Articles of Association of HKMAAL will be finalized for registration with the Companies Registry within this year if no further significant issues arise.

25. The Administration has explained that the Law Society, the Bar Association, the Hong Kong Mediation Centre and HKIAC are made founding members of HKMAAL as they are the leading organizations in the development of mediation in Hong Kong. It is the initial thinking that these 10 council members will be serving as representatives of the relevant bodies, rather than in their individual capacity.

26. Members are of the view that as mediation is at its development stage, more organizations will be formed. It may not be appropriate to limit the number of council members to 10 and the four other elected members should come from related fields. These members are also concerned that conflict of interest may arise if the conditions for membership are to be determined by the four founding members. It is suggested that a review should be conducted in a few years after the establishment of HKMAAL on whether the ex-official membership of the council should be maintained or whether all its council members should be elected by all members of HKMAAL. It is further suggested that provisions relating to HKMAAL, once it is formed, should be incorporated in the Mediation Ordinance. Members also stress that the process to establish HKMAAL and its future operation should be transparent

and open. They have enquired about the role of the Government after the establishment of HKMAAL. The Administration has assured the Bills Committee that the Department of Justice will continue to participate actively in the process to set up HKMAAL and to facilitate the development of mediation service in Hong Kong. The Government will also strive to ensure that HKMAAL will operate in an open, transparent and professional manner.

27. At the request of the Bills Committee, the Administration has agreed to elaborate further on the composition of HKMAAL and the timetable for its establishment during the resumption of the Second Reading debate on the Bill. The Bills Committee agrees that the Panel on Administration of Justice and Legal Services should follow up on the relevant issues after enactment of the Bill.

Professional indemnity insurance and immunity for mediators

28. Noting the concern of some depositions about protection for mediators against professional claims, members have enquired about the provision for mandatory insurance for mediators.

29. The Administration has explained to the Bills Committee that the Working Group was of the view that there should not be statutory immunity for mediators. The suggestion for partial immunity for pro bono or community mediation was considered by the Mediation Ordinance Group of the Mediation Task Force which also recommended that there should be no statutory immunity for mediators. Mediators could choose to take out professional indemnity insurance. Some mediation service providers have made arrangements for group professional indemnity insurance for their panel mediators.

30. Some members have expressed concern that there may be further disputes after the mediation if a party to a dispute is not satisfied with the mediated settlement agreement or holds the mediator responsible for not conducting the mediation in an impartial manner. They have sought information on how mediators can be protected against complaints and civil claims by the parties to disputes as the aggrieved parties may abuse the complaint or court procedures.

31. The Administration has explained that complaints relating to the performance of mediators and further disputes after mediated settlement agreements have been reached are rarely seen. A party to a dispute will need to apply for the leave of the court for disclosure and admissibility of mediation communications for the purpose of challenging a mediated settlement agreement according to the provisions in the Bill. As leave of the court will be

required for disclosure and admissibility of mediation communication, abuse can be prevented. Complaints about the misconduct of mediators can also be made to the relevant mediation service providers which have set up robust complaints handling systems. Moreover, recourse should be made available against mediators in case of any misconduct on their part.

Scope of application of the Bill

32. Members note that the Bill applies to any mediation conducted under an agreement to mediate if the mediation is wholly or partly conducted in Hong Kong or the agreement to mediate provides that the Bill or the law of Hong Kong is to apply to the mediation. Clause 6 states that the Bill applies to the Government. Unlike section 6 of the Arbitration Ordinance (Cap. 609), the Bill does not stipulate that it applies to the Offices set up by the Central People's Government in Hong Kong Special Administrative Region ("CPG Offices").

33. The Administration has explained that the background for legislating on arbitration and mediation is significantly different. While the Government is studying the applicability of the laws of Hong Kong to CPG Offices, the Administration will continue to consider and sort out the applicability of specific ordinances, such as the Mediation Ordinance, if enacted, to CPG Offices.

34. The Bills Committee further notes that the Bill does not apply to the processes under various Ordinances as specified in Schedule 1 to the Bill. These processes include conciliation under the Labour Tribunal Ordinance (Cap. 25) and the existing four anti-discrimination Ordinances, mediation under the Ombudsman Ordinance (Cap. 397) and certain mediation proceedings referred to in the Arbitration Ordinance (Cap. 609). At the request of the Bills Committee, the Administration has explained in writing the specific reasons for excluding the relevant processes from the application of the Mediation Ordinance.

35. The Hong Kong Construction Association has submitted to the Bills Committee that general mediation conducted by mediators appointed by HKIAC under the default appointment mechanism provided in section 32(1) of the Arbitration Ordinance should not be excluded from the Bill. The Administration has explained to the Bills Committee that the reference to sections 32 and 33 of the Arbitration Ordinance 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 the Arbitration Ordinance, so that mediation proceedings in the context of "med-arb" under section 32 and "arb-med-arb" under section 33 of the Arbitration Ordinance will be regulated, as they are intended to, by the relevant provisions in the Arbitration Ordinance, 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 the Arbitration Ordinance, item 12 of Schedule 1 to the Bill will not have the effect of excluding any mediation conducted by a mediator appointed by HKIAC under section 32(1) of the Arbitration Ordinance from the application of the 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 the Arbitration Ordinance. However, to avoid any doubt, the Administration will move a Committee Stage amendment ("CSA") to item 12 of Schedule 1 to the Bill by replacing the general reference to section "32" of the Arbitration Ordinance with a specific reference to section "32(3)".

36. The Bills Committee notes the strong view of the Hong Kong Association of Banks ("HKAB") that mediation conducted by the Financial Dispute Resolution Centre ("FDRC") should be excluded from the application of the Bill. According to HKAB, FDRC is not administrative in nature but more of a quasi-statutory scheme and it should be allowed to apply its own rules in conducting mediation, rather than being constrained by the Bill which is more applicable to voluntary mediation generally. HKAB considers that there may be potential conflicts between the terms of reference ("ToR") and the mediation and arbitration rules of FDRC and the provisions relating to confidentiality and admissibility of mediation communication in the Bill. In particular, the exceptions in clauses 8 and 9 of the Bill are said to go beyond what can be disclosed according to the ToR and the relevant rules of FDRC. Moreover, an HKAB member does not have a choice whether to enter into mediation and arbitration if the case is accepted by FDRC, and this is said to be fundamentally different from the voluntary and consensual approach adopted generally for mediation.

37. The Administration, however, does not accept the exclusion of the FDRC mediations from the application of the Bill on the following grounds –

- (a) the Financial Services and Treasury Bureau has advised that the ToR of FDRC will be finalized on the basis that the Bill will be applicable to the mediations conducted by FDRC which will fit into the definition of "*mediation*" in clause 4 of the Bill;
- (b) unlike the statutory processes listed in Schedule 1, FDRC is not a regulatory body and does 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 a need to exclude them by way of Schedule 1. In the case of the FDRC scheme, although many of HKAB's members are regulated by the Securities and Futures Commission in the conduct of securities business, and in that capacity, they must also become members of FDRC, the FDRC scheme remains administrative (instead of statutory based) by nature;

- (c) whether the parties embark on mediation purely on 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 primarily concerned with, after the parties have started mediation, the conduct of certain aspects of the mediation (such as confidentiality and admissibility of mediation communications in evidence) which ought to be regulated. Even if the parties have been directed to start mediation, it will still be entirely up to the parties to reach an agreement or not in the mediation process. The mediation process is still entirely voluntary as no one can be forced to reach a settlement on any term against his or her will; and
- (d) applicability of the Bill to FDRC mediations can only be beneficial to the users of mediation conducted by FDRC, as the provisions relating to confidentiality and admissibility of mediation communications in evidence will provide legal certainty and predictability, and thereby reducing potential disputes arising from the mediation process.

Provision of assistance or support in mediation

38. Clause 7 provides that the provision of assistance or support to a party to mediation in the course of the mediation does not constitute an infringement of section 44 (penalty for unlawfully practising as a barrister or notary public), section 45 (unqualified person not to act as solicitor), and section 47 (unqualified person not to prepare certain instruments, etc) of the Legal Practitioners Ordinance ("LPO") (Cap. 159). The effect of this is that non-lawyers or foreign lawyers can participate in mediation conducted in Hong Kong. The Bills Committee notes that this proposal is in line with Recommendation 37 of the Working Group's Report.

39. Members have requested the Administration to justify the need to include clause 7 in the Bill as a mediator is not required to be qualified as a lawyer to

conduct mediation. The legal adviser to the Bills Committee has also enquired whether a social worker and friends of the disputing parties assisting in mediation will be afforded protection by clause 7.

40. The Administration has explained that as section 63 of the Arbitration Ordinance provides that sections 44, 45 and 47 of LPO does not apply to arbitral proceedings. Given that arbitration and mediation are forms of Alternative Dispute Resolution and both are private and consensual, parties should be entitled to appoint advisers and advocates of their own choice, whether or not legally qualified and whether local or foreign. As mediation is even less formal than arbitration, the case for allowing persons other than non-qualified lawyers to represent parties in mediation is even more compelling. Inclusion of clause 7 will ensure that those assisting and supporting the disputing parties (e.g. social workers, friends of the parties) will not run into the risk of infringing sections 44, 45 and 47 of LPO.

Confidentiality and admissibility of mediation communication

41. Under the Bill, the term "*mediation communication*" is defined to mean anything said or done, any document prepared, or any information provided, for the purpose of or in the course of mediation, but does not include an agreement to mediate or a mediated settlement agreement. Clause 8 stipulates that a mediation communication must not be disclosed to anybody except as provided in clause 8(2) and (3). Clause 8(2) sets out the circumstances under which a mediation communication may be disclosed. These include disclosure with the consent of all relevant parties and the mediator, the availability of the content of the mediation communication to the public, and the content of the mediation communication being subject to discovery in civil proceedings. Under clause 8(3), a person may disclose a mediation communication with leave of the court or tribunal for specified purposes.

42. The legal adviser to the Bills Committee has sought clarification from the Administration as to whether a written consent is required to disclose a mediation communication under clause 8(2)(a). The Administration has explained that clause 8(2)(a) of the Bill as currently drafted allows a person to disclose mediation communications if the disclosure is made with the consent as specified under clause 8(2)(a)(i) to (iii). If enacted as drafted, the provision will not impose a statutory requirement for the consent to be in writing. Parties do not necessarily require consent for disclosure of mediation communications to be given in writing under existing practice. However, parties can do so if they consider it appropriate. If the consent is one of the conditions of the mediated settlement agreement, the consent will be reflected in the mediated settlement agreement which is usually in writing.

43. Some deputations have expressed concern that the scope of the disclosure of mediation communication under clause 8 is too broad and the threshold for disclosure of mediation communication may be too low. The Administration has explained that a specified court or 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.

44. Some deputations are of the view that provision for sanctions is essential in safeguarding the protection of confidentiality of mediation. The Bills Committee notes that while the Working Group recommended the provision of sanctions for breaching the rules of confidentiality, no such provision is proposed in the Bill. According to the Administration, the Mediation Task Force and its Mediation Ordinance Group had considered the recommendation of the Working Group that provisions be made for sanctions for breaching the rules of confidentiality. However, they had decided against it after consideration of the feedback received during the public consultation exercise and the relevant laws in other jurisdictions. The Administration notes that sanctions are rarely provided in mediation legislation of most common law jurisdictions. Of the jurisdictions that have mediation legislation, only Austria and Samoa have imposed sanctions on disclosing confidential mediation communications. Should there be a breach of confidentiality by a mediator, parties aggrieved may file complaints to the professional body to which the mediator belongs. Further, a party is able to rely on civil remedies available from the courts for breaches of confidentiality.

45. Members have enquired how the situation can be dealt with where divergent views are held by the parties to a dispute on the disclosure of a mediation communication. The Administration has advised that a party to a dispute may seek to disclose a mediation communication under the specific circumstances set out in clause 8(2)(b) to (f) but agreement of parties on disclosure is preferable in order to protect the interests of all concerned.

46. Regarding clause 8(2)(c), the legal adviser to the Bills Committee has expressed concern that a person, who is not a party to the mediation but is a party to civil proceedings which is not related to the subject dispute in the mediation but has possession, custody or control of certain information contained in the mediation communication which is subject to discovery in the civil proceedings, may be able to disclose the mediation communication concerned.

47. The Administration has advised that the term "a person" in clause 8 is not confined to persons who are parties to the mediation. As provided for in clause 8(2)(c), a person may disclose a mediation communication if the content

of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or control. This exception is important to prevent people from abusing the mediation process by introducing otherwise discoverable information into mediation in order to make it "undiscoverable". The Administration also considers that the chance that a mediation communication is obtained by a third party who is not a party to the mediation is rather slim in reality.

48. Members have observed that unlike the situation in clause 8(3), a person may disclose a mediation communication without the leave of the court or tribunal under the specific circumstances set out in clause 8(2)(a) to (f). Under clause 8(2)(d), a person may disclose a 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. Members are concerned about that in the absence of sanctions against the breach of the rule of confidentiality, disclosure can be easily made by a mere allegation that there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of serious harm to the well-being of a child.

49. The Administration has reiterated that although the Bill does not set out the sanctions against such disclosure, the affected party can resort to civil remedies including injunction and damages for breach of confidentiality of mediation communication. Regarding clause 8(2)(d), mediation communication may only be disclosed if the disclosure will be necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child.

50. Some members have expressed concern that the well-being of the child will be compromised if the mediator is worried that a party to a dispute will take legal action against the disclosure of a mediation communication. They have suggested that as the meaning of "*well-being*" or "*reasonable grounds*" in clause 8(2)(d) is subject to interpretation, a person seeking to disclose a mediation communication for the purpose of preventing or minimizing the danger of injury to a person or of serious harm to the well-being of a child under clause 8(2)(d) should apply for leave of a specified court or tribunal.

51. The Administration has explained that it is given to understand by practitioners in the industry and family mediators that there may be imminent situations where 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. Where the situation arises, it will be impractical to apply for leave before the specific mediation communication can be disclosed. Regarding members' concerns

about the interpretation of "*well-being*" and the meaning of "*reasonable grounds*" to justify the disclosure of a mediation communication under clause 8(2)(d), the Administration has advised that the Mediation Ordinance Group considered that what a ground will be reasonable for the purpose of clause 8(2)(d) will depend on the facts or circumstances of each individual case. The Administration has also considered the views of experienced family mediators in drafting clause 8(2)(d). The term "*well-being*" is used because it has a broad meaning covering psychological, economic, physical development in addition to personal injuries.

52. Members have asked about the legal consequences to a person who has refused to disclose a mediation communication resulting in harm to a person. The Administration has advised that the Bill does not seek to impose any additional legal liability on a person who has refused to disclose mediation communication resulting in harm to a person. The risk of incurring legal liability is low if the disclosure is made on the basis of reasonable grounds with sufficient information obtained to support the decision.

53. Some members, however, maintain the view that the inclusion of clause 8(2)(d) will undermine the intended purpose of clause 8 to safeguard the confidentiality of mediation communications. They take the view that the Mediation Ordinance to be enacted will be a toothless tiger in the absence of any sanctions against the breach of the rule of confidentiality.

54. Under clause 8(2)(e), a person may disclose a mediation communication 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. The Bills Committee notes from the Administration that similar exceptions allowing the disclosure of mediation communications for research or evaluation purposes can be found in mediation legislation enacted in other jurisdictions such as Australia and Canada.

55. Members have also expressed concern that mediation communications may be disclosed unwarrantedly and untimely through publications for research, evaluation or educational purposes. They are worried that the identities of parties to mediation will be revealed and it will have very negative impact on the parties concerned given the fact that Hong Kong is a small place.

56. On the need for clause 8(2)(e), the Chairman of the Mediation Ordinance Group of the Mediation Task Force has advised that while the confidentiality of mediation communications is crucial, there is a need to include clause 8(2)(e) in the Bill to provide for the gathering of information for research and evaluation purposes to facilitate the development of mediation in Hong Kong which is still

in its embryonic stage. To guard against the possibility that the identities of parties to mediation may be revealed, the relevant provision has been worded in a more stringent manner when compared with similar provisions in other jurisdictions in order to prohibit the disclosure of mediation communications when there is a likelihood to reveal, both directly or indirectly, the identities of the persons concerned. The Chairman of the Mediation Ordinance Group of the Mediation Task Force has further advised that in order to strike a balance between safeguarding the confidentiality of mediation communications and providing a legal basis for the disclosure of information for research, evaluation and educational purposes, the Mediation Ordinance Group has suggested that, after the enactment of the mediation legislation, guidelines may be provided to assist mediators and researchers in the universities proposing to use mediation communications for research, evaluation or educational purposes to comply with clause 8(2)(e) ("the proposed guidelines"); and such guidelines can be incorporated into a Code of Conduct for Mediator to be introduced in future. In addition, it is envisaged that most of the information collected under clause 8(2)(e) will be statistics only and the chance for disclosure of details of cases for empirical research purpose is rather slim.

57. Members consider that while the disclosure of mediation communications for research, evaluation and educational purposes is crucial in facilitating the development of mediation, the crux of the issue is how such disclosure should be made in order to protect the anonymity of the parties concerned. Members have suggested that clause 8(2)(e) may provide expressly for the proposed guidelines to assist those proposing to use mediation communications for research, evaluation or educational purposes to comply with clause 8(2)(e).

58. The Administration, however, is of the view that the express provision for the proposed guidelines in the Mediation ordinance at this stage may hamper the flexibility of mediation. Future amendments may be proposed to the Mediation Ordinance (if enacted). The Administration has further explained that the provisions in the Bill only deal with the key principles without going into specific details about the practice of mediation. It will not be desirable to impose detailed requirements in a particular aspect at this stage by inserting an express provision in the Bill dealing with the publication of guidelines. Moreover, it is more appropriate for the proposed guidelines to be formulated by the single mediation accreditation body comprising major mediation service providers upon its establishment to ensure that good research practice is maintained by practicing mediators and mediation service providers, and adequate consultation with academics/researchers, universities and government bodies will be conducted. The Administration stresses that in order to abide by the requirement not to reveal parties' identity under clause 8(2)(e), if there is 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 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 that 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 can be disclosed for the purpose of research, evaluation or educational purposes, should not be disclosed in the specific case at hand so as to prevent revelation of the identities of the persons concerned.

59. Members have pointed out that parties to mediation may choose their representatives as they see fit and may choose representatives who are not lawyers even though it is common for lawyers to be instructed to advise and assist the parties. They are concerned about situations where parties to mediation have not instructed lawyers to assist them in the first place and wish to consult lawyers after the commencement of the mediation. As a party may need to disclose mediation communications to the lawyer in order to obtain the legal advice required, members consider such disclosure of mediation communications should be allowed.

60. The Administration has advised that there is no justification for restricting parties' access to legal advice and that the provisions of the Bill should not suggest any restriction to the rights of parties to seek legal advice. 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. To address the concern, the Administration has agreed to move CSAs to clause 8 of the Bill to expressly allow the disclosure of mediation communications for the purpose of seeking legal advice.

Admissibility of mediation communication

61. Under clause 9, a mediation communication may be admitted in evidence in any proceedings (including judicial, arbitral, administrative or disciplinary proceedings) only with leave of the court or tribunal granted under clause 10 of the Bill. Clause 10 sets out matters that the court or tribunal must take into account in deciding whether to grant leave for a mediation communication to be disclosed or admitted in evidence. Clause 10 also specifies the court or tribunal to which an application for leave should be made.

62. Some deputations have submitted views to the Bills Committee that admissibility of mediation communication may have negative impact on protecting confidentiality of mediation communication which should not be disclosed in arbitral or administrative proceedings. The Administration has explained that clause 9 restricts the admissibility of mediation communications in evidence in any proceedings by requiring leave of a specified court or tribunal, 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) also provides clear guidance to the court or tribunal on the exercise of discretion for the purposes.

Consequential and related amendments

63. Schedule 2 to the Bill sets out the consequential and related amendments to existing Ordinances. Members note that the purpose of the proposed amendments is to standardize the use of "調解" as the Chinese rendition for "mediation" and "調停" as the Chinese rendition for "conciliation" in existing legislation. According to the Administration, the proposed amendments will bring the terminology in line with that used in the recently enacted Arbitration Ordinance.

Date of resumption of Second Reading debate

64. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 23 May 2012.

Consultation with the House Committee

65. The Bills Committee reported its deliberations to the House Committee on 11 May 2012.

Bills Committee on Mediation Bill

Membership list

Chairman Dr Hon Margaret NG

Members Hon Albert HO Chun-yan
Mr LAU Kong-wah, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon Cyd HO Sau-lan
Hon CHEUNG Kwok-che

Total : 8 Members

Clerk Miss Flora TAI

Legal Adviser Mr YICK Wing-kin

Date 21 December 2011

《調解條例草案》委員會
Bills Committee on Mediation Bill

曾向法案委員會表達意見的團體/個別人士名單
List of organizations/individuals which/who have
submitted views to the Bills Committee

<u>名稱</u>	<u>Name</u>
* 1. C & L Holdings Limited	C & L Holdings Limited
2. CEDR 太平洋中心	CEDR Asia Pacific
3. EC Harris (HK) Ltd	EC Harris (HK) Ltd
4. 民主建港協進聯盟	Democratic Alliance for the Betterment and Progress of Hong Kong
5. 民主黨	The Democratic Party
6. 李偉斌律師行	Li & Partners
7. 固堤建築測量及顧問有限公司	Tru-Tight & Associates Limited
8. 社會發展研究總會	The Council of Social Development
9. 建造業議會	Construction Industry Council
10. 英國皇家特許測量師學會香港分會	RICS Hong Kong
11. 香港大律師公會	Hong Kong Bar Association
12. 香港大學法律學院	Faculty of Law of the University of Hong Kong
* 13. 香港工程師學會	The Hong Kong Institution of Engineers
* 14. 香港工會聯合會	The Hong Kong Federation of Trade Unions
15. 香港中文大學法律學院	Faculty of Law of the Chinese University of Hong Kong
16. 香港公教婚姻輔導會	Hong Kong Catholic Marriage Advisory Council
17. 香港和解中心	Hong Kong Mediation Centre
18. 香港城市大學法律學院	School of Law of the City University of Hong Kong
19. 香港建造商會	Hong Kong Construction Association
* 20. 香港建築師學會	The Hong Kong Institute of Architects
21. 香港建築業仲裁中心	Hong Kong Construction Arbitration Centre
22. 香港律師會	The Law Society of Hong Kong
23. 香港家庭福利會	Hong Kong Family Welfare Society
* 24. 香港專業培訓人員總會	Hong Kong Training Professionals General Union

* 25. 香港測量師學會	Hong Kong Institute of Surveyors
26. 香港認可調解員學會	Hong Kong Society of Accredited Mediators
* 27. 香港銀行公會	The Hong Kong Association of Banks
* 28. 香港調解仲裁中心	Hong Kong Mediation and Arbitration Centre
29. 香港調解會	Hong Kong Mediation Council
* 30. 香港樹仁大學糾紛調解中心， 中心主任 Nadya Alexander 教授	Professor Nadja Alexander, Professor and Director, International Institute of Conflict Engagement and Resolution of Hong Kong Shue Yan University
31. 香港營造師學會	Hong Kong Institute of Construction Managers
32. 特許仲裁學會(東亞分會)	The Chartered Institute of Arbitrators (East Asia Branch)
33. 專業和解顧問中心	Professional Mediation Consultancy Centre
34. 專業調解及談判學會有限公司	Society of Certified Mediators and Negotiators, Ltd
35. 復和綜合服務中心	Centre for Restoration of Human Relationships
36. 循道衛理中心	Methodist Centre
37. 雲彩顧問有限公司	Rainbow Consultancy Limited
* 38. 誠明顧問香港有限公司	ADR Consultancy Hong Kong Limited
39. 趙承平醫生，專業調解員	Dr James CHIU Shing-ping, Accredited Mediator
40. 調解發展研究總會	The Council of Mediation Development
41. 黎錦文李孟華律師事務所	K M Lai & Li
42. 聯合調解專線辦事處	Joint Mediation Helpline Office
* 43. 醫院管理局	Hospital Authority

* 只提交書面意見的團體/個別人土
Organizations/individuals which/who have submitted written views only