

## Bills Committee on Mediation Bill

### Information Paper on the Processes Specified in Schedule 1 to the Mediation Bill (“the Bill”)

No.	Processes to which the Bill does not apply <sup>1</sup>	Explanations of the processes
1.	Conciliation referred to in sections 6, 15, and 25 of the Labour Tribunal Ordinance (Cap.25) (“the LTO”).	<p>(i) The statutory requirement for conciliation under the LTO is different from the mediation proposed to be regulated by the Bill. “Conciliation” is defined in section 2 of the LTO as “a discussion or action initiated or undertaken by an authorized officer for the purpose of reaching a settlement of a claim”. Under section 6(5), the Commissioner for Labour may authorize any public officer to assist in conciliation under the LTO.</p> <p>(ii) According to section 15(1), the Labour Tribunal (“the tribunal”) will not hear a claim until a certificate of conciliation in the prescribed form signed by a tribunal officer or an authorized officer is filed to the effect that—</p> <ul style="list-style-type: none"> <li>(a) one or more of the parties has refused to take part in conciliation;</li> <li>(b) conciliation has been attempted but no settlement has been reached;</li> <li>(c) conciliation is unlikely to result in settlement being reached; or</li> </ul>

<sup>1</sup> In some existing enactments, the English reference to “conciliation” is rendered as “調解” in Chinese. In order to standardize the use of the Chinese term “調解” for “mediation”, and “調停” for conciliation, all Chinese equivalents of “conciliation” in those enactments are proposed to be changed to “調停” (see Schedule 2 to the Bill). In this paper, the English references to “conciliation” under those enactments are also tentatively rendered as “調停” in Chinese according to the amendments proposed in Schedule 2 to the Bill.

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		<p>(d) conciliation may prejudice the interests of a party.</p> <p>(iii) If a settlement of a claim is reached, the terms of the settlement must be reduced to writing in the prescribed form and be filed in the tribunal. The settlement filed is to be treated as if it were an award of the tribunal (section 15(7) to (9)).</p> <p>(iv) Section 25(3) further provides that each person represented in a representative claim is deemed to have authorized the representative to agree to the holding of and to take part in conciliation.</p> <p>(v) As the Bill is not intended to affect the existing practice and procedure of conciliation as provided in the LTO, any conciliation referred to in sections 6, 15 and 25 of the LTO is proposed to be excluded from the application of the Bill.</p>
2.	Conciliation referred to in section 39 of the Apprenticeship Ordinance (Cap. 47).	According to section 39 of the Apprenticeship Ordinance (Cap. 47), if a dispute arises between the parties to a registered contract of apprenticeship regarding an alleged breach of any term or condition of the contract, any such party may refer the dispute to the Director of Apprenticeship who must endeavour to settle it by conciliation. As the conciliation referred to in that section involves the discharge of a specific statutory duty on the part of the Director of Apprenticeship, it is different from the mediation regulated by the Bill, and is therefore proposed to be excluded from the application of the Bill.

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3.	Conciliation and special conciliation referred to in Part II of the Labour Relations Ordinance (Cap. 55) (“the LRO”).	<p>(i) Part II of the LRO enables the Commissioner for Labour (“the Commissioner”) to inquire into, and to authorize a conciliation officer of the Labour Relations Division (“the LRD”) of the Labour Department to initiate or undertake conciliation in a trade dispute in order to promote settlement (section 3). If a dispute is not settled by ordinary conciliation, the Commissioner may appoint a special conciliation officer (i.e. a senior officer of the LRD or any other public officer or person authorized by the Commissioner) to initiate or undertake special conciliation (section 5(1)). Instead of authorizing ordinary conciliation, the Commissioner may, if the circumstances so warrant, refer a dispute directly to special conciliation (section 5(2)). If a trade dispute is settled by conciliation or special conciliation, a memorandum of the terms of the settlement must be drawn up and signed by both parties and delivered to the Commissioner (section 8).</p> <p>(ii) If an attempt to settle a trade dispute by ordinary conciliation or special conciliation fails, the appointed officer must promptly report the matter to the Commissioner (sections 4 and 7). On receipt of the officer’s report, the Commissioner may submit a report on the dispute together with a recommendation to the Chief Executive in Council (section 10). After considering the Commissioner’s report, the Chief Executive in Council may refer the dispute either to arbitration (with the consent of the parties) or to a board of inquiry, or take any other action as warranted by the circumstances of the dispute (section 11).</p>

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		<p>(iii) Any information communicated to a conciliation officer or special conciliation officer in connection with the conciliation is not admissible in evidence in proceedings before an arbitration tribunal or board of inquiry, except with the consent of the person who provides the information (section 9).</p> <p>(iv) As the Bill is not intended to affect the existing self-contained scheme of conciliation under the LRO, any conciliation or special conciliation referred to in Part II of the LRO is proposed to be excluded from the application of the Bill.</p>
4.	Mediation referred to in Part IIA of the Labour Relations Ordinance (Cap. 55) (“the LRO”). <sup>2</sup>	<p>(i) Under Part IIA of the LRO, the Commissioner for Labour (“the Commissioner”) may, where a trade dispute exists and whether or not ordinary conciliation or special conciliation has been attempted, appoint a mediator or a board of mediation consisting of two or more persons to mediate the trade dispute (section 11A).</p> <p>(ii) Section 11B provides that a mediator may inquire into the causes and circumstances of a trade dispute and may—</p> <p>(a) visit premises where parties to the trade dispute or other interested parties</p>

<sup>2</sup> In the existing LRO, the English reference to “mediation” is rendered as “調停” in Chinese. In order to standardize the use of the Chinese term “調解” for “mediation”, and “調停” for conciliation, all Chinese equivalents of “mediation” in the LRO are proposed to be changed to “調解” (see Schedule 2 to the Bill). In this paper, the English references to “mediation” under the LRO are also tentatively rendered as “調解” in Chinese according to the amendments proposed in Schedule 2 to the Bill.

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		<p>are employed or carry on business;</p> <p>(b) conduct interviews with the parties to the trade dispute or other interested parties;</p> <p>(c) make such observations or do such other things as the mediator considers will assist in mediating the dispute; and</p> <p>(d) make recommendations to the parties respecting the settlement of the trade dispute and may make such recommendations public.</p> <p>(iii) No mediator is liable to any suit or other proceedings for any act or thing done in good faith as a mediator (section 11C). Any information communicated to a mediator in connection with the mediation is not admissible in evidence in any proceedings, except with the consent of the person who provides the information (section 11D). The Commissioner may pay to a mediator a remuneration out of the general revenue (section 11E).</p> <p>(iv) As the Bill is not intended to affect the existing self-contained scheme of mediation under the LRO, any mediation referred to in Part IIA of the LRO is proposed to be excluded from the application of the Bill.</p>
5.	The process described in section 17 of the Marriage Reform Ordinance (Cap. 178) (“the MRO”).	(i) According to section 15 of the MRO, certain customary marriages and validated marriages may be dissolved in accordance with Part V of the MRO. After the parties to such a marriage have given notice of their intention to dissolve the marriage, section 17 of

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		<p>the MRO requires them to appear before a mediation officer or assistant mediation officer, who is a public officer designated for the purpose of Part V of the MRO (see the Schedule to the Designation of Public Officers Notice (Cap. 178 sub. leg. D)). The function of the officer is to interview the parties and, if they satisfy the officer that they understand the effect of dissolution of marriage and freely and voluntarily desire to dissolve the marriage, to sign a form to that effect and deliver it to the parties. Afterwards, the parties may sign an agreement or memorandum for the dissolution of the marriage unequivocally with effect from the registration of the particulars with the officer.</p> <p>(ii) As the process described in section 17 of the MRO involves the discharge of a specific statutory duty on the part of a designated public officer, it is different from the mediation regulated by the Bill, and is therefore proposed to be excluded from the application of the Bill.</p>
6.	Mediation referred to in section 11B of The Ombudsman Ordinance (Cap. 397).	<p>(i) The Ombudsman is appointed under The Ombudsman Ordinance (Cap. 397) to investigate actions by Government departments and public bodies for administrative deficiencies and to recommend remedial measures. Section 11B of the Ordinance empowers the Ombudsman to deal with a complaint by mediation if the subject matter of the complaint involves no, or only minor, maladministration (section 11B(1)). The Ombudsman may authorize any person appointed for carrying out the functions under the Ordinance to act as a mediator in any mediation (section 11B(2)).</p>

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		<p>(ii) Under section 11B(6), if an attempt to deal with a complaint by mediation under that section is unsuccessful—</p> <ul style="list-style-type: none"> <li>(a) the complaint is to be treated as if the mediation had not taken place; and</li> <li>(b) the mediator is excluded from participating as an investigating officer in any subsequent investigation of the complaint.</li> </ul> <p>(iii) Section 11B(7) further provides that anything said or admitted during the mediation or any document prepared for the purposes of the mediation is neither admissible in evidence in any subsequent investigation of the complaint concerned (unless with the consent of the person who said or admitted the thing, or to whom the document related) nor admissible in evidence against any person in any court or at any inquiry or in any other proceedings. No evidence in respect of the mediation may be given against any person.</p> <p>(iv) As the requirements for mediation under section 11B of The Ombudsman Ordinance are different from the mediation intended to be regulated by the Bill, any mediation referred to in that section is proposed to be excluded from the application of the Bill.</p>
7.	Conciliation referred to in sections 4 and 14 of	(i) The statutory requirement for conciliation under the MECABO is different from

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	<p>the Minor Employment Claims Adjudication Board Ordinance (Cap.453) (“the MECABO”).</p>	<p>the mediation proposed to be regulated by the Bill. “Conciliation” is defined in section 2 of the MECABO as “a discussion or action initiated or undertaken by an authorized officer for the purpose of reaching a settlement of a dispute in respect of which a claim may be brought”. Under section 4(6), the Commissioner for Labour may authorize any public officer to assist in conciliation.</p> <p>(ii) According to section 14(1), the Minor Employment Claims Adjudication Board will not hear a claim until a certificate signed by an authorized officer is filed with the registrar to the effect that—</p> <ul style="list-style-type: none"> <li>(a) one or more of the parties has refused to take part in conciliation;</li> <li>(b) conciliation has been attempted but no settlement has been reached;</li> <li>(c) conciliation is unlikely to result in settlement being reached; or</li> <li>(d) conciliation may prejudice the interests of a party.</li> </ul> <p>(iii) If a settlement of a claim is reached, the terms of the settlement must be reduced to writing in such form as the registrar may specify, signed by the parties to the settlement and filed with the registrar. The settlement filed is to be treated as if it were an award of the Board (section 14(2), (3) and (4)).</p> <p>(iv) As the Bill is not intended to affect the existing practice and procedure of conciliation as provided in the MECABO, any conciliation referred to in sections 4 and 14</p>

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		of the MECABO is proposed to be excluded from the application of the Bill.
8.	Conciliation referred to in sections 64 and 84 of the Sex Discrimination Ordinance (Cap. 480) (“the SDO”) and section 8 of the Sex Discrimination (Investigation and Conciliation) Rules (Cap. 480 sub. leg. B).	<p>(i) The conciliation conducted by the Equal Opportunities Commission under the SDO is different from the mediation proposed to be regulated by the Bill. The Commission has the statutory duty to encourage persons who are concerned with an alleged unlawful act of discrimination under the SDO to effect a settlement of the matter by conciliation, whether under section 84 or otherwise (section 64(1)(d)). The Commission may employ staff or engage the services of suitable persons to conduct investigation and conciliation (section 64(2)(d) and (e)).</p> <p>(ii) Under section 84, if a person lodges with the Commission a complaint alleging that another person has done an unlawful act under the SDO, subject to the provisions in subsection (4), the Commission must conduct an investigation into the act and endeavour, by conciliation, to effect a settlement of the matter. Section 84(4) provides that the Commission may decide not to conduct, or to discontinue, an investigation if it is satisfied that the alleged act is not unlawful; the aggrieved person has no desire to pursue the complaint; a period of more than 12 months has elapsed since the alleged act was done; it determines that the complaint should not be a representative complaint; or it is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance. Evidence of anything said or done by any person in the course of conciliation under that section is not admissible in evidence in any proceedings under the SDO except with the</p>

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		<p>consent of that person. However, this restriction does not apply if a settlement has been effected of the matter under complaint.</p> <p>(iii) Section 8 of the Sex Discrimination (Investigation and Conciliation) Rules (Cap. 480 sub. leg. B) sets out the rules of procedure at a conciliation conference. The person presiding at a conference may determine its order of proceedings and the manner of conducting it. If the person presiding at a conference—</p> <ul style="list-style-type: none"> <li>(a) is of the opinion that a matter cannot be settled by conciliation;</li> <li>(b) has endeavoured to settle a matter by conciliation but has not been successful; or</li> <li>(c) is of the opinion that the nature of a matter is such that it should be referred to the Commission,</li> </ul> <p>the person must refer the matter to the Commission together with a report relating to any investigation made into the matter. The report must not include or describe anything said or done in the course of the conference.</p> <p>(iv) As the Bill is not intended to affect the existing practice and procedure of the conciliation conducted by the Commission, any conciliation referred to in the SDO and its subsidiary legislation is proposed to be excluded from the application of the Bill.</p>
9.	Conciliation referred to in sections 62 and 80 of	(i) The conciliation conducted by the Equal Opportunities Commission under the

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	<p>the Disability Discrimination Ordinance (Cap. 487) (“the DDO”) and section 8 of the Disability Discrimination (Investigation and Conciliation) Rules (Cap. 487 sub. leg. B).</p>	<p>DDO is different from the mediation proposed to be regulated by the Bill. The Commission has the statutory duty to encourage persons who are concerned with an alleged unlawful act of discrimination under the DDO to effect a settlement of the matter by conciliation, whether under section 80 or otherwise (section 62(1)(d)).</p> <p>(ii) Under section 80, if a person lodges with the Commission a complaint alleging that another person has done an unlawful act under the DDO, subject to the provisions in subsection (4), the Commission must conduct an investigation into the act and endeavour, by conciliation, to effect a settlement of the matter. Section 80(4) provides that the Commission may decide not to conduct, or to discontinue, an investigation if it is satisfied that the alleged act is not unlawful; the aggrieved person has no desire to pursue the complaint; a period of more than 12 months has elapsed since the alleged act was done; it determines that the complaint should not be a representative complaint; or it is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance. Evidence of anything said or done by any person in the course of conciliation under that section is not admissible in evidence in any proceedings under the SDO except with the consent of that person. However, this restriction does not apply if a settlement has been effected of the matter under complaint.</p> <p>(iii) Section 8 of the Disability Discrimination (Investigation and Conciliation) Rules (Cap. 487 sub. leg. B) sets out the rules of procedure at a conciliation conference.</p>

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		<p>The person presiding at a conference may determine its order of proceedings and the manner of conducting it. If the person presiding at a conference—</p> <ul style="list-style-type: none"> <li>(a) is of the opinion that a matter cannot be settled by conciliation;</li> <li>(b) has endeavoured to settle a matter by conciliation but has not been successful; or</li> <li>(c) is of the opinion that the nature of a matter is such that it should be referred to the Commission,</li> </ul> <p>the person must refer the matter to the Commission together with a report relating to any investigation made into the matter. The report must not include or describe anything said or done in the course of the conference.</p> <p>(iv) As the Bill is not intended to affect the existing practice and procedure of the conciliation conducted by the Commission, any conciliation referred to in the DDO and its subsidiary legislation is proposed to be excluded from the application of the Bill.</p>
10.	<p>Conciliation referred to in sections 44 and 62 of the Family Status Discrimination Ordinance (Cap. 527) (“the FSDO”) and section 8 of the Family Status Discrimination (Investigation and Conciliation) Rules (Cap. 527 sub. leg. A).</p>	<p>(i) The conciliation conducted by the Equal Opportunities Commission under the FSDO is different from the mediation proposed to be regulated by the Bill. The Commission has the statutory duty to encourage persons who are concerned with an alleged unlawful act of discrimination under the FSDO to effect a settlement of the matter by conciliation, whether under section 62 or otherwise (section 44(1)(c)).</p>

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		<p>(ii) Under section 62, if a person lodges with the Commission a complaint alleging that another person has done an unlawful act under the FSDO, subject to the provisions in subsection (4), the Commission must conduct an investigation into the act and endeavour, by conciliation, to effect a settlement of the matter. Section 62(4) provides that the Commission may decide not to conduct, or to discontinue, an investigation if it is satisfied that the alleged act is not unlawful; the aggrieved person has no desire to pursue the complaint; a period of more than 12 months has elapsed since the alleged act was done; it determines that the complaint should not be a representative complaint; or it is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance. Evidence of anything said or done by any person in the course of conciliation under that section is not admissible in evidence in any proceedings under the SDO except with the consent of that person. However, this restriction does not apply if a settlement has been effected of the matter under complaint.</p> <p>(iii) Section 8 of the Family Status Discrimination (Investigation and Conciliation) Rules (Cap. 527 sub. leg. A) sets out the rules of procedure at a conciliation conference. The person presiding at a conference may determine its order of proceedings and the manner of conducting it. If the person presiding at a conference—</p> <ul style="list-style-type: none"> <li>(a) is of the opinion that a matter cannot be settled by conciliation;</li> <li>(b) has endeavoured to settle a matter by conciliation but has not been successful; or</li> </ul>

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		<p>(c) is of the opinion that the nature of a matter is such that it should be referred to the Commission, the person must refer the matter to the Commission together with a report relating to any investigation made into the matter. The report must not include or describe anything said or done in the course of the conference.</p> <p>(iv) As the Bill is not intended to affect the existing practice and procedure of the conciliation conducted by the Commission, any conciliation referred to in the FSDO and its subsidiary legislation is proposed to be excluded from the application of the Bill.</p>
11.	<p>Conciliation referred to in sections 59 and 78 of the Race Discrimination Ordinance (Cap. 602) (“the RDO”) and section 8 of the Race Discrimination (Investigation and Conciliation) Rules (Cap. 602 sub. leg. B).</p>	<p>(i) The conciliation conducted by the Equal Opportunities Commission under the RDO is different from the mediation proposed to be regulated by the Bill. The Commission has the statutory duty to encourage persons who are concerned with an alleged unlawful act of discrimination under the RDO to effect a settlement of the matter by conciliation, whether under section 78 or otherwise (section 59(1)(d)).</p> <p>(ii) Under section 78, if a person lodges with the Commission a complaint alleging that another person has done an unlawful act under the RDO, subject to the provisions in subsection (4), the Commission must conduct an investigation into the act and endeavour, by conciliation, to effect a settlement of the matter. Section 78(4) provides that the Commission may decide not to conduct, or to discontinue, an investigation if it is satisfied</p>

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		<p>that the alleged act is not unlawful; the aggrieved person has no desire to pursue the complaint; a period of more than 12 months has elapsed since the alleged act was done; it determines that the complaint should not be a representative complaint; or it is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance. Evidence of anything said or done by any person in the course of conciliation under that section is not admissible in evidence in any proceedings under the SDO except with the consent of that person. However, this restriction does not apply if a settlement has been effected of the matter under complaint.</p> <p>(iii) Section 8 of the Race Discrimination (Investigation and Conciliation) Rules (Cap. 602 sub. leg. B) sets out the rules of procedure at a conciliation conference. The person presiding at a conference may determine its order of proceedings and the manner of conducting it. If the person presiding at a conference—</p> <ul style="list-style-type: none"> <li>(a) is of the opinion that a matter cannot be settled by conciliation;</li> <li>(b) has endeavoured to settle a matter by conciliation but has not been successful; or</li> <li>(c) is of the opinion that the nature of a matter is such that it should be referred to the Commission,</li> </ul> <p>the person must refer the matter to the Commission together with a report relating to any investigation made into the matter. The report must not include or describe anything said or done in the course of the conference.</p>

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		<p>(iv) As the Bill is not intended to affect the existing practice and procedure of the conciliation conducted by the Commission, any conciliation referred to in the RDO and its subsidiary legislation is proposed to be excluded from the application of the Bill.</p>
12.	<p>Mediation proceedings referred to in sections 32 and 33 of the Arbitration Ordinance (Cap.609) (“the AO”).</p>	<p>(i) Under section 32(3) of the AO, mediation proceedings may arise from an arbitration agreement which provides for the appointment of a mediator and which further provides that the person so appointed is to act as an arbitrator in the event that no settlement acceptable to the parties can be reached in the mediation proceedings, and no objection may be raised against the appointed mediator to act as the arbitrator. This provides for the so-called “mediation-arbitration” (“med-arb”) procedure.</p> <p>(ii) Section 33(1) of the AO provides that an arbitrator may act as a mediator after the arbitral proceedings have commenced provided that all parties consent in writing and for so long as no party withdraws the party’s consent in writing. This provides for the so-called “arbitration-mediation-arbitration” (“arb-med-arb”) procedure. Section 33(2) further provides that if an arbitrator acts as a mediator, the arbitral proceedings must be stayed to facilitate the conduct of the mediation proceedings.</p> <p>(iii) The Bill is not intended to apply to mediation proceedings in the context of “med-arb” under section 32 and “arb-med-arb” under section 33 of the AO because those</p>

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		<p>procedures will be regulated, as they are intended to, by the relevant provisions in the AO, 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.</p> <p>(iv) Section 33(3) provides that an arbitrator who is acting as a mediator—</p> <ul style="list-style-type: none"> <li>(a) may communicate with the parties collectively or separately; and</li> <li>(b) must treat the information obtained by the arbitrator from a party as confidential, unless otherwise agreed by that party or unless subsection (4) applies.</li> </ul> <p>(v) Section 33(4) provides that if—</p> <ul style="list-style-type: none"> <li>(a) confidential information is obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator; and</li> <li>(b) those mediation proceedings terminate without reaching a settlement acceptable to the parties,</li> </ul> <p>the arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings.</p> <p>(vi) As the Bill is not intended to affect the existing practice and procedure of</p>

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		mediation proceedings in the context of “med-arb” and “arb-med-arb” as provided in sections 32 and 33 of the AO, they are proposed to be excluded from the application of the Bill.

**Department of Justice**

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