LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND CONCILIATION

(LRC 98-2010)

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Law Reform Commission

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The Hon Mr Justice Donal O'Donnell, Judge of the Supreme Court

LAW REFORM RESEARCH STAFF

Director of Research:
Raymond Byrne BCL, LLM (NUI), Barrister-at-Law

Legal Researchers:
Dannie Hanna BCL (NUI), LLM (Cantab)
Helen Kehoe BCL (Law with French Law) (NUI), LLM (Dub), Solicitor
Donna Lyons LLB (Dub), LLM (NYU)
Tara Murphy BCL (Law with French Law) (NUI), LLM (Essex), Barrister-at-Law
Jane O'Grady BCL, LLB (NUI), LPC (College of Law)
Darelle O'Keeffe LLB (UL), H Dip Soc Pol (NUI), EMA (EIUC)
Helen Whately LLB, LLM (Dub)

STATUTE LAW RESTATEMENT

Project Manager for Restatement:
Alma Clissmann, BA (Mod), LLB, Dip Eur Law (Bruges), Solicitor

Legal Researcher:
Andrew Glynn BBLS (NUI), LLM (Dub)

LEGISLATION DIRECTORY

Project Manager for Legislation Directory:
Heather Mahon LLB (ling. Ger.), M.Litt, Barrister-at-Law

Legal Researcher:
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ADMINISTRATION STAFF

Executive Officers:
Deirdre Bell
Simon Fallon

Legal Information Manager:
Conor Kennedy BA, H Dip LIS

Cataloguer:
Eithne Boland BA (Hons), HDip Ed, HDip LIS

Clerical Officers:
Ann Browne
Ann Byrne
Liam Dargan

PRINCIPAL LEGAL RESEARCHER FOR THIS REPORT

Nicola White LLB, LLM (Dub), Attorney at Law (NY)

CONTACT DETAILS

Further information can be obtained from:

Law Reform Commission
35-39 Shelbourne Road
Ballsbridge
Dublin 4

Telephone:
+353 1 637 7600

Fax:
+353 1 637 7601

Email:
info@lawreform.ie

Website:
www.lawreform.ie

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Mr Fergus Armstrong, Director, One Resolve
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Ms Bernadette Casey, Mediator
Ms Maureen Chalmers, Senior Social Worker, WISE
Mr Oliver Connolly, FriaryLaw ADR
Mr Michael Culloty, National Social Policy & Communications Officer, MABS
Ms Susan Dowling, Dispute Resolution Adviser, ECC Dublin
Mr Liam Duffy, Dublin Hospitals Group Risk Management Forum
Ms Karen Erwin, President, Mediators Institute of Ireland
Mr Ciaran Fahy, Chartered Institute of Arbitrators
Mr Ronan Feehily, Solicitor
Ms Nicola Flannery, Solicitor
Mr Jay Folberg, Executive Director, JAMS Foundation (US-based ADR organisation)
Mr Michael Gorman, FriaryLaw ADR
Ms Wendy Gray, Department of Enterprise Trade & Employment
Mr Eamon Harrington, Solicitor, Comyn Kelleher Solicitors
Ms Tricia Hayes, Mediator
Mr David Hickey, Coordinator, Cork Community Mediation Service
Ms Maria Hurley, Director of Policy, Advocacy & Communications, National Consumer Agency
Ms Phyl Kealy, Solicitor
Mr Joseph Kelly, Partner, A & L Goodbody Solicitors & former Chairman of the Law Society Committee on Arbitration & Mediation
Mr David Lawless, Solicitor
Mr Kevin Liston, Solicitor
Mr Ed Madden, National University of Ireland Maynooth
Mr Patrick Maguire, Chartered Accountant, Maguire & Co
Mr Sheila Maguire, Solicitor, Daniel O'Connell & Son
Ms Patricia Mallon, Partner, Eoin Daly Solicitors
Ms Paulyn Marrinan Quinn, Senior Counsel and Ombudsman for the Defence Forces
Mr Johnnie McCoy, Barrister-at-Law
Mr Donagh McGowan, Solicitor, Mason, Hayes & Curran Solicitors
Mr Robert O'Donnell, Director, Woodstock Institute for Negotiation
Mr Turlough O'Donnell, Senior Counsel
Ms Polly Phillimore, Family Mediation Service
Ms Melanie Pine, Director, The Equality Tribunal
Mr Noel Rubotham, Director of Reform & Development, Courts Service
Ms Delma Sweeney, National University of Ireland Maynooth
Mr Gordon Wade, FriaryLaw ADR
Hon Daniel Weinstein, JAMS
Mr Michael Williams, Solicitor

Full responsibility for this publication lies, however, with the Commission.

TABLE OF CONTENTS

INTRODUCTION **1**

A Background to the Report 1
B The Commission's approach to alternative dispute resolution, in particular mediation and conciliation 1
(1) The role of the courts in encouraging parties to agree solutions 1
(2) Delays in the court process and the development of ADR 1
(3) The court process and ADR 2
(4) Efficiency, including cost efficiency 2
(5) Other benefits of ADR, including flexibility 3
(6) An integrated approach to dispute resolution 3
(7) The main focus of the Report 4
C Outline of Report Chapters 4

CHAPTER 1 **ADR: AN OVERVIEW** **7**

A Introduction 7
B Access to Justice and ADR 7
C Appropriateness of ADR 9
D Conclusion 11

CHAPTER 2 **ADR: TERMINOLOGY & SCOPE** **13**

A Introduction 13
B Definition and scope of the term 'ADR' 13
(1) ADR: Dispute Resolution and Prevention 13
(2) General Scope of ADR 15
C Distinguishing between mediation and conciliation 17
(1) Role of the Third Party 17
(2) Rights Based v Interest Based Resolutions 18
(3) Conclusion 18
D Statutory Definition of Mediation 19
(1) Structured Formal Process 20
(2) Differing Models of Mediation 20
(3) Conclusion 22
E Statutory Definition of Conciliation 22
F General Scope of Statutory Mediation & Conciliation 24
(1) Civil & Commercial Disputes 24
(2) Cross-Border Civil & Commercial Disputes 26
G Conclusion 27

CHAPTER 3 **GENERAL PRINCIPLES OF MEDIATION & CONCILIATION** **29**

A Introduction 29
B Consultation Paper 29
C Voluntary Nature of Mediation & Conciliation 30
(1) Consultation Paper 30
(2) Right to Withdraw from Mediation or Conciliation 30
(3) Conclusion 32
D Confidentiality 32
(1) Consultation Paper 32
(2) Increase of Satellite Litigation 33

(3) Confidentiality in the 2008 EC Directive on Mediation 37
(4) Distinct Form of Privilege for Mediation & Conciliation 38
(5) Mediation and Conciliation Communications 40
(6) Holders of the Privilege 41
(7) Waiver of the Privilege 42
(8) Exceptions to the Privilege 42
(9) Party expectations of confidentiality outside of proceedings 45
(10) Conclusion 45
E Self-Determination 46
(1) Consultation Paper 46
(2) Capacity to Participate 47
(3) Informed Consent 48
(4) Seeking Independent Advice During a Mediation or Conciliation 49
(5) Conclusion 50
F Efficiency 51
(1) Costs of Mediation or Conciliation 51
(2) Duration of Mediation or Conciliation 52
(3) ADR Efficiency & Public Sector Disputes 53
G Legal Aid for Mediation and Conciliation 56
H Flexibility 59
I Neutrality & Impartiality 60
(1) Consultation Paper 60
(2) Duty to Disclose Conflict of Interests 62
J Enforceability 63
K Limitation Periods 63
L Quality and Transparency of Procedure 64

CHAPTER 4 ADR & THE CIVIL JUSTICE SYSTEM 65

A Introduction 65
B Enforceability of Dispute Resolution Clauses 65
(1) Power to stay proceedings 65
(2) Severability of mediation and conciliation clauses 70
C Mediation or conciliation where there is no referral clause 71
(1) Provision of Information on ADR 71
(2) Role of Legal Representatives 72
(3) Requirement to file a mediation and conciliation certificate 76
(4) Conclusion 77
D Referral to Mediation or Conciliation After Litigation Has Begun 78
(1) Consultation Paper 78
(2) Role of the Court in Encouraging ADR 78
(3) Court-Annexed Mediation Scheme 83
E Limitation Periods 84
F Enforceability of Agreements 86
(1) Self Determination & Enforceability 87
(2) Enforcement as a contract 87
(3) Enforcement by a Court 88
G Costs: Sanctions and Recovery 90
(1) Cost Sanctions: Good Faith Requirement 90

(2) Criteria for Imposing a Costs Sanction 91
(3) Recovery of Mediation and Conciliation Costs 93
H Content of Mediators and Conciliators Reports to Court 94

CHAPTER 5 EMPLOYMENT DISPUTES & INDUSTRIAL RELATIONS: THE ROLE OF ADR 97

A Introduction 97
B Employment Disputes & ADR: An Overview 97
(1) Nature of Workplace Disputes 97
C Private Workplace ADR & Dispute System Design 98
D ADR Clauses in Employment Contracts 102
E Conclusion 102

CHAPTER 6 FAMILY DISPUTES & ADR 105

A Introduction 105
B Family Disputes in Ireland 105
C Information Meetings 106
(1) Consultation Paper on ADR & Report on Family Courts 106
(2) Mandatory Information Sessions 107
D Parenting Plans 109
E Family Mediation 110
(1) Legislative Development of Family Mediation in Ireland 111
(2) Role of Advisers in Family Mediation 112
(3) Enforcement & Review of Mediated Agreements 113
(4) Voice of the Child in Family Mediation 114
(5) Screening in Family Mediation 116
F Collaborative Practice 117
(1) Training for Collaborative Practitioners 118
(2) Code of Practice for Collaborative Practitioners 119
(3) Referral to Collaborative Practice 121
(4) Conclusion 121
G Family Probate Disputes & ADR 121
(1) Estate & Succession Planning 122
(2) Section 117 of the Succession Act 1965 123
H Elder Mediation 125
(1) Family Disputes & Elder Transitions 125
(2) Elder Mediation 126

CHAPTER 7 PERSONAL INJURIES & ADR 129

A Introduction 129
B Consultation Paper 129
C Clinical Claims & ADR: An Overview 129
D Early Neutral Evaluation (ENE) 132
(1) The Personal Injuries Assessment Board and Early Neutral Evaluation 132
(2) Medical Negligence Disputes & Early Neutral Evaluation 133
E Mediation & the Civil Liability and Courts Act 2004 135
F An Open Disclosure Policy and the Power of an Apology 137
(1) Policy of Open Disclosure 137
(2) The Power of an Apology 139

CHAPTER 8 COMMERCIAL DISPUTES & ADR 143

A Introduction 143
B Commercial Disputes & ADR: An Overview 143
(1) Internal Corporate Dispute Resolution Strategies 145
(2) ADR Clauses 146
(3) ADR Corporate Pledge 146
C Commercial Court & ADR 147
D Shareholder Disputes & ADR 148
E Construction Disputes & ADR 149
(1) ADR Clauses in Irish Government Public Works Contracts 149
(2) Role for Mediation in Resolving Construction Disputes 150
F International Commercial Dispute Resolution 152
G Conclusion 154

CHAPTER 9 CONSUMER DISPUTES & ADR 157

A Introduction 157
B Consumer Disputes: An Overview 157
C European Developments 159
(1) Notified ADR Schemes: EC Recommendations 159
(2) European Consumer Centre 161
(3) Collective Consumer Redress 163
D Online Dispute Resolution 164
E Small Claims Court 166

CHAPTER 10 PROPERTY DISPUTES & ADR 169

A Introduction 169
B Property Disputes: An Overview 169
C Neighbour Disputes & ADR 171
(1) Boundary Disputes 171
(2) Community Mediation 174
D Planning Application Disputes & ADR 176
E Mediation and property-related debt 177

CHAPTER 11 ACCREDITATION, TRAINING & REGULATION 179

A Introduction 179
B Regulation of Mediators & Conciliators 179
(1) Consultation Paper 179
(2) Statutory Code of Conduct for Mediators and Conciliators 180
(3) Requirement for Training & Accreditation 183
(4) Enforcement of the Code of Conduct 185

CHAPTER 12 SUMMARY OF RECOMMENDATIONS 187

APPENDIX DRAFT MEDIATION AND CONCILIATION BILL 2010 197

INTRODUCTION

A Background to the Report

1. This Report forms part of the Commission's *Third Programme of Law Reform 2008-2014*[1] and follows the publication of its *Consultation Paper on Alternative Dispute Resolution*.[2] The Report contains the Commission's final recommendations in this area. The main alternative dispute resolution (ADR) processes are mediation and conciliation, and the Consultation Paper and this Report have focused on these. The Commission recommends in this Report that a *Mediation and Conciliation Act* should be enacted to provide a clear framework for mediation and conciliation, and the Appendix contains a draft *Mediation and Conciliation Bill* to give effect to the Commission's recommendations. In that respect, the Commission places significant emphasis on the key principles involved in ADR, including its voluntary nature, the need for confidentiality, its efficiency and the transparency and quality of the process. The Commission is also conscious that a number of related processes have also emerged in specific areas, such as collaborative practice in the family law setting and early neutral evaluation in the context of personal injuries. While the Report and draft Bill therefore concentrate on providing a legislative framework for mediation and conciliation, the Commission has also had regard to these emerging developments.

B The Commission's approach to alternative dispute resolution, in particular mediation and conciliation

2. In preparing its Consultation Paper and this Report, the Commission's approach is based on the key objective that civil disputes are resolved in a way that meets the needs of the parties and conforms to fundamental principles of justice. This objective involves several related issues, which the Commission described in the Consultation Paper and reiterates here to underline its overall approach to ADR, notably mediation and conciliation.

(1) The role of the courts in encouraging parties to agree solutions

3. It is clear that, from one perspective, the word "alternative" refers to looking outside the courtroom setting to resolve some disputes. In this respect, the Commission fully supports the long-standing approach of the legal profession and of the courts that, where it is appropriate, parties involved in civil disputes should be encouraged to explore whether their dispute can be resolved by agreement, whether directly or with the help of a third party mediator or conciliator, rather than by proceeding to a formal "winner v loser" decision by a court. This happens every day in the courts, in family litigation, in large and small commercial claims and in boundary and other property disputes between neighbours.[3] In that respect there are strong reasons to support and encourage parties to reach a solution through agreement, especially in disputes where emotional issues combine with legal issues, provided that this alternative process meets fundamental principles of justice.

(2) Delays in the court process and the development of ADR

4. In addition to the recognition by the legal profession and the courts that some disputes can be better resolved by agreement rather than court decision, the emergence in Ireland (and internationally) of alternative dispute resolution processes has also been associated with real problems of delays in the court system. An undoubted advantage of mediation and conciliation is the ability to get speedy access to a process that may produce a satisfactory outcome for the parties in a short space of time. The Commission accepts that any long delays in the court process involve clear barriers to justice: justice delayed is, indeed, justice denied. While some ADR processes may have emerged in response to delays

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1 *Report on the Third Programme of Law Reform 2008 - 2014* (LRC 86 – 2007), Project 5.

2 *Consultation Paper on Alternative Dispute Resolution* (LRC CP 50-2008), referred to as the Consultation Paper in the remainder of this Report.

3 See, for example, the discussion of the mediation arising from the 2008 High Court case *Charlton v Kenny*, at paragraph 10.18, below.

in the court process, the Commission also considers it is important to note that the court process has not stood still or ignored the problem of delay.

(3) The court process and ADR

5. The court process in Ireland has responded to the problem of delay - and the connected development of ADR processes - with important initiatives. For example, the Commercial Court list in the High Court, which was established in 2004 to deal with large commercial disputes,[4] uses active judicial case management to improve the efficiency of the litigation process itself and also encourages the use of mediation and conciliation. Similarly, the Smalls Claims Court in the District Court is a mediation process for certain consumer disputes (which can be filed on-line and is available for a small handling fee), under which the first step is to seek informal resolution of the dispute using a document-only approach.[5] In a wider setting, the Family Mediation Service[6] provides an important alternative resolution facility in the context of family conflicts. The Commission also notes in this respect that, in its *Report on Consolidation and Reform of the Courts Acts*,[7] it has recommended that the existing Courts Acts, which comprise over 240 Acts (146 of which precede the foundation of the State in 1922) should be consolidated and reformed into a single *Courts (Consolidation and Reform) Act.* The Commission's draft *Courts (Consolidation and Reform) Bill* attached to that Report proposes a number of detailed reforms aimed at enhancing the effectiveness of the administration of justice in the courts. This would include enhancing the efficiency of civil proceedings, and would build on the important initiatives, such as those connected with the Commercial Court, which have been developed in Ireland in recent years. That Report includes proposals concerning judicial case management and the obligation on parties in civil proceedings to conduct their proceedings efficiently; as well as supporting current arrangements to inform parties, where appropriate, of alternative dispute processes, including mediation and conciliation.[8]

(4) Efficiency, including cost efficiency

6. Research on the efficiency of ADR processes (some based on Irish experience) indicates that mediation and conciliation processes often provide a speedy resolution to a specific dispute.[9] That research also indicates that there is – to put it simply – no such thing as a free conflict resolution process, alternative or otherwise. Where the resolution process is provided through, for example, the courts or the Family Mediation Service, most or all of the financial cost is carried by the State. Where the resolution process involves private mediation, the cost is often shared by the parties involved. The Commission accepts, of course, that the additional financial costs involved in an individual case that goes through an unsuccessful mediation and must then be resolved in litigation has to be balanced against the possible savings where a complex case is successfully mediated. The Commission nonetheless considers it is important not to regard ADR as a patently cheaper alternative to litigation costs; in some instances, it may be, but where a mediation or conciliation is not successful it obviously involves additional expense. On the whole, the Commission accepts that careful and appropriate use of ADR processes is likely to reduce the overall financial costs of resolving disputes.

7. In addition, the other aspect of efficiency – timeliness – may be of great value to the parties. The Commission is also conscious of other values associated with ADR processes, including party autonomy and respect for confidentiality. The point of noting the narrow issue of financial cost is primarily to indicate

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4 See Chapter 8, below.

5 See Chapter 9, below.

6 See Chapter 6, below.

7 *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

8 *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010), at paragraphs 2.35-240, and sections 75 to 77 of the draft *Courts (Consolidation and Reform) Bill* appended to the Report.

9 See LRC CP 50-2008 at 3.154-3.176.

that the available research strongly supports the view that ADR assists timely resolution of disputes, but is less clear that direct financial costs savings may arise for the parties.[10]

(5) Other benefits of ADR, including flexibility

8. The Commission appreciates that ADR processes also bring additional benefits that are not available through the litigation process. ADR processes may, for example, lead to a meeting between parties where an apology is offered.[11] They can also facilitate an aggrieved party to participate in the creation of new arrangements or procedures to prevent a recurrence of the incident in dispute. This underlines a key element of ADR – that it has the potential to enhance the empowerment of those involved in its processes.[12] A memorial to victims of a perceived wrong can also emerge from a mediated agreement.[13] The flexibility offered by ADR processes is an important aspect of a civil justice system in its widest sense.

(6) An integrated approach to dispute resolution

9. Ultimately, therefore, the Commission envisages in this Report and the draft *Mediation and Conciliation Bill* an integrated approach to dispute resolution in which ADR plays an appropriate part, and in which it complements the role of the courts in resolving disputes. In that respect, the word "alternative" in "alternative dispute resolution" does not prevent the court-based dispute resolution process from continuing to play a positive role in resolving disputes by agreement. This can be through the long-established practice of intervening at a critical moment in litigation to suggest resolution by agreement or though the structured innovations of, for example, the Commercial Court or the Small Claims Court. As the Commission makes clear in this Report and the draft *Mediation and Conciliation Bill*, mediation and conciliation should be clearly delineated as quite different from litigation as such, and can be initiated by parties completely independently of litigation. In the Report and the draft Bill, therefore, the Commission reflects the approach of the High Court that it will postpone, or stay, proceedings if the parties have already made an agreement that includes an ADR clause, such as a mediation or conciliation clause.[14] This mirrors the long-standing approach taken to arbitration clauses, now set out in the *Arbitration Act 2110*. Equally, mediation and conciliation can also appropriately arise from or otherwise be linked to litigation.[15] The Commission agrees that an integrated civil justice process includes a combination of ADR processes, such as mediation and conciliation, and the court-based litigation process.[16] Each process plays its appropriate role in meeting the needs of the parties involved and fundamental principles of justice. As noted by the current Chief Justice: "For mediation as a process to take hold in this country

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10 The Commission does not, in this respect, ignore the indications in the research of indirect cost savings that may arise from speedy resolution of, for example, large commercial disputes (whether in the reduced time required of senior management or long term savings through the preservation of business relationships).

11 In the sense that ADR may involve a meeting between those in dispute and an apology from a wrongdoer it involves a passing resemblance to restorative justice, but that is where the similarity ends. The Commission emphasises that ADR is associated solely with civil disputes and has no connection with restorative justice, which is connected with criminal law. The Commission's *Third Programme of Law Reform 2008-2014*, Project 15, concerns restorative justice.

12 See LRC CP 50-2008 at 3.140-3.153.

13 See the discussion at paragraph 3.134, below, of the English mediation connected with the resolution of over 1,000 complaints concerning the retention of organs from deceased children at Alder Hey Hospital in Liverpool, arising from which an apology was made and a memorial built to remember the children.

14 See the discussion of the decision in *Health Service Executive v Keogh, trading as Keogh Software* [2009] IEHC 419, at paragraph 4.04, below, which involved a software support contract. See also the discussion of the 2010 High Court proceedings in *Clayton v Hawkins*, an employment-related dispute, at paragraph 5.22, below.

15 See LRC CP 50-2008 at 1.72-1.73.

16 These complementary roles are reflected in the judgment in *Plewa and Giniewicz v Personal Injuries Assessment Board* High Court, 19 October 2010, discussed at paragraph 7.17, below.

there is a need to heighten public consciousness as well as that of legal practitioners and other professions of its usefulness, its value and its availability."[17]

(7) The main focus of the Report

10. The Commission's main focus in the Report can be divided into three areas in respect of which it makes recommendations. First, the Commission examines the terminology associated with ADR, in particular the need for a consistent definition of mediation and conciliation, and the underlying general principles concerning these ADR processes. The purpose of this is to seek to achieve consistency in the use of terminology surrounding ADR and the key underlying principles. The second area of focus is on the application of mediation and conciliation in specific areas, including family law disputes, commercial disputes and property disputes. The purpose here is to address more specific matters in these settings which the Commission considers may be in need of further clarification or development. The third area concerns the training and regulation of ADR professionals. The Commission regards this as a vital aspect of ensuring the quality of justice likely to be achieved through ADR.

C Outline of Report Chapters

11. Having described its general approach to alternative dispute resolution, the Commission turns to provide a brief outline of each Chapter in the Report.

12. In Chapter 1, the Commission provides an overview of ADR and its role in a modern civil justice system and discusses the principle of access to justice and its relationship with ADR. The Commission also examines the appropriateness and limitations of ADR processes such as mediation and conciliation.

13. In Chapter 2, the Commission examines ADR terminology and the scope of ADR processes. The Commission explains why it is necessary to ensure that the more commonly used ADR terms, in particular mediation and conciliation, are clearly defined and provides recommendations for statutory definitions of these processes

14. In Chapter 3, the Commission examines the main objectives and principles of mediation and conciliation. These include: the voluntary nature of ADR, the principle of confidentiality, principles of self-determination and party empowerment, the objective of ensuring efficiency, flexibility, neutrality and impartiality of the mediator or conciliator and the quality of the process for the parties.

15. In Chapter 4, the Commission examines the integration of mediation and conciliation into the civil justice system. The Commission discusses the following issues: the enforceability of mediation and conciliation clauses; referral methods to mediation and conciliation where there is no mediation or conciliation clause between the parties; the manner in which parties engage in mediation or conciliation after litigation has begun; whether the parties in a mediation or conciliation may agree in writing to suspend the running of any limitation period; the enforceability of agreements reached through mediation or conciliation; the issues of costs and the guidelines to be used when imposing a costs sanction for an unreasonable refusal to consider mediation or conciliation; and whether mediation costs should be recoverable as legal costs.

16. In Chapter 5, the Commission examines the role of ADR processes, such as mediation and conciliation, in the resolution of workplace disputes which have not been referred to a statutory body. Ireland has a comprehensive set of statutory bodies which are responsible for the resolution of employment grievances and disputes outside the court system.[18] ADR processes such as facilitation, mediation, and conciliation play important roles in the activities of most of these statutory agencies.

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[17] Speech by the Chief Justice, Mr Justice John Murray, at the launch of the Dublin Solicitors Bar Association Family Mediation Group, 2 March 2010. The Chief Justice reiterated support for the development of mediation, in particular in family law disputes, at a speech to mark the 30th Anniversary of the Legal Aid Board, 15 September 2010. See Coulter "Mediation cuts dispute resolution costs, says Chief Justice" *The Irish Times*, 16 September 2010.

[18] For a detailed discussion on the role of ADR in these statutory bodies see LRC CP 50-2008 at 4.12 – 4.71.

17. In Chapter 6, the Commission examines the role of ADR in resolving family law disputes, which the Commission previously addressed in its 1996 *Report on Family Courts.*[19] This includes a discussion of the need for information meetings for separating or divorcing couples. The Commission also discusses the recent emergence of collaborative practice and elder mediation in the family law setting. The Commission also discusses the appropriateness of mediation for resolving family probate/succession disputes.

18. In Chapter 7, the Commission examines how ADR processes, in particular mediation and early neutral evaluation, could assist in the resolution of personal injury disputes, including disputes arising from medical treatment. The Commission also explores the role for early neutral evaluation in the resolution of personal injury claims, including claims arising from medical treatment. The Commission also considers the need for an open disclosure policy in the healthcare setting and the role of apologies in the resolution of personal injury disputes, particularly disputes arising from medical treatment.

19. In Chapter 8, the Commission discusses ADR in the context of commercial disputes. The Commission examines in particular the role of the Commercial Court in encouraging the use of mediation and explores whether the innovations it has developed could be applied to a wider commercial setting. The Commission also examines the role for ADR in the resolution of construction disputes.

20. In Chapter 9, the Commission examines the development of ADR in resolving consumer disputes with a specific focus on European developments in this field. The Commission also examines whether the Small Claims Court procedure could be expanded to resolve more consumer disputes.

21. In Chapter 10, the Commission explores the role of ADR in the resolution of specific types of property disputes, in particular between neighbours. The Commission considers whether ADR has any role to play in the resolution of planning application disputes.

22. In Chapter 11, the Commission addresses the accreditation, training and regulation of mediators and the various non-statutory and statutory schemes for assuring the quality of mediators. The Commission also outlines the need for a statutory code of conduct for mediators and conciliators.

23. Chapter 12 contains the recommendations made by the Commission in the Report.

24. The Appendix contains a draft *Mediation and Conciliation Bill* to give effect to the Commission's recommendations in the Report concerning the enactment of a statutory framework for mediation and conciliation.

[19] *Report on Family Courts* (LRC 52 – 1996).

CHAPTER 1 ADR: AN OVERVIEW

A Introduction

1.01 In this chapter the Commission provides an overview of ADR and its role in a modern civil justice system. In Part B the Commission discusses the potential for ADR to provide access to individualised justice for citizens in appropriate cases. In Part C the Commission examines the appropriateness and limitations of ADR processes, such as mediation and conciliation.

B Access to Justice and ADR

1.02 Access to justice, in its widest sense of the effective resolution of disputes whether through court-based litigation or alternative dispute resolution processes, is an essential aspect of ensuring the realisation of the fundamental rights recognised and given protection by the Constitution of Ireland. It is also recognised in Article 6 of the Council of Europe's 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights). In addition, the European Union's Court of Justice has recognised the right to valid remedies as a general principle of EU law[1] and this has been reinforced by Article 47 of the Charter of Fundamental Rights of the European Union.[2] As the Commission noted in its Consultation Paper:

> "In promoting access to justice, a modern civil justice system should offer a variety of approaches and options to dispute resolution. Citizens should be empowered to find a satisfactory solution to their problem which includes the option of a court-based litigation but as part of a wider 'menu of choices'."[3]

1.03 The Commission also noted that justice may sometimes require a decision from a High Court judge who has heard and considered evidence and legal arguments from both sides after an adversarial hearing. This is why the courts will always remain central and indispensible to our civil justice system.[4] In other cases, of course, justice might mean an apology and change of administrative process in response to a particular problem. It is clear that in that sense there are circumstances in which ADR can provide resolutions and individualised justice for parties which a court cannot. Indeed, the court-based process cannot be expected to provide an optimal solution to all conflicts in society.[5] Nonetheless, the courts continue to be an important location to resolve disputes. The *Courts Service Annual Report 2009* indicates that there has been a 40% increase in the workload of the courts since 2006 and that in 2009:[6]

- 27,465 civil cases were issued in the High Court (an increase of 20% on the 2008 figure of 22,862);

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1 Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.

2 See Nockleby "Access to Justice: It's Not For Everyone" (2008-2009) 42 *Loyola of Los Angeles Law Review* 859; and Ryan "Access to Justice and Unmet Legal Needs" (2008) 26 ILT 325.

3 See LRC CP 50-2008 at 1.12.

4 See LRC CP 50-2008 at 1.26.

5 See LRC CP 50-2008 at 1.15. See also Lammy *"Speech on key issues for Government"* delivered at Centre for Effective Dispute Resolution Conference: The First Mediators' Congress, November 2003, London. Available at http://www.dca.gov.uk/speeches/2003/dl201103.htm and see also the *"Alder Hey Children's Hospital Mediation Case Study"* in LRC CP 50-2008 at 1.15.

6 A report published by the *National Competitiveness Council* (NCC) found that legal fees were still 18.4% above the average 2006 price at the end of 2009.

- 44,266 civil cases were issued in the Circuit Court (an increase of 20% on the 2008 figure of 36,763);
- there was a 53% increase in new cases admitted to the High Court Commercial list;[7] and
- there was a 48% increase in debt cases in the High Court.[8]

1.04 As noted in the 2005 *Report of the Legal Costs Working Group:* "The ability to defend and vindicate private rights is a cornerstone of a civilised society. It is central both to the promotion of the welfare of citizens as well as to the economic development of the State."[9] While the courts will always retain a central place in the civil justice system, it is increasingly recognised throughout the world that, in many instances, there may be alternative and perhaps more appropriate methods of resolving civil disputes in a manner which may be more cost and time efficient for parties. Merely because a dispute is defined as "justiciable" does not necessarily mean that the courts are the only option to seek redress.[10] The Commission concurs with the view that "we should want much more than an effective court system. We should want an integrated civil justice system wherein the courts are a forum of last resort, supported by other, closely related techniques for ensuring the law is open to all."[11]

1.05 In this respect, the 2008 EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters[12] is intended to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings. The 2008 Directive, which applies to mediation for disputes within the EU having a cross-border (inter-state) element, must be implemented in Member States in 2011. Recital 5 of the 2008 Directive states that: "The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods."[13] Furthermore, the European Commission suggests that:

> "ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought before courts is increasing, the proceedings are becoming more lengthy and the costs incurred by such proceedings are increasing."[14]

1.06 The cost of access to justice for citizens is an important issue to consider. The Competition Authority in its 2005 *Study of Competition in Legal Services* noted that "Access to justice requires not only that the legal advice given is sound but also that it is provided in a cost effective and client responsive

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7 It should be noted that, despite the increase in cases admitted to the list, the average time for disposal remained at 2 weeks, with 25% of all cases being disposed of in less than 4 weeks, and 90% of all cases being disposed of within 50 weeks.

8 *Courts Service Annual Report 2009.* Available at www.courts.ie.

9 *Report of the Legal Costs Working Group* (Stationary Office, Government Publications, 2005) at 5.41.

10 LRC CP 50-2008 at 1.12.

11 *Civil justice 2000: A vision of the Civil Justice System in the Information Age* (Ministry of Justice November 2001) at 2.11. Available at http://www.dca.gov.uk/consult/meta/cj2000fr.htm. See also De Vos "Alternative Dispute Resolution From An Access to Justice Perspective" (1993) *Journal of South African Law* 156; Mc Ewen & Williams "Legal Policy and Access to Justice Through Courts and Mediation" (1997-1998) 13 *Ohio State Journal on Dispute Resolution* 865.

12 Directive 2008/52/EC of the European Council and of the Parliament of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, O.J. No. L.136, 24/5/2008, p.3, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF.

13 *Ibid.*

14 *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final at 1.2(5). Available at http://eurlex.europa.eu/.

manner. High quality legal services are important to society, but of limited value if available only to the very rich or those paid for by the State."[15] As noted by Winkler CJ (Chief Justice of Ontario):

> "If litigants of modest means cannot afford to seek their remedies in the traditional court system, they will be forced to find other means to obtain relief. Some may simply give up out of frustration. Should this come to pass, the civil justice system as we know it will become irrelevant for the majority of the population. Our courts and the legal profession must adapt to the changing needs of the society that we serve."[16]

1.07 The Commission considers it important not to regard ADR as a patently cheaper alternative to litigation costs; in some instances, it may be, but where an ADR process is not successful it obviously involves additional expense. On the whole, the Commission acknowledges that careful and appropriate use of ADR processes is likely to reduce the overall financial costs of resolving disputes.[17]

1.08 Furthermore, the Commission considers that access to justice should not only guarantee access to the courts system, but also to adequate dispute resolution processes and forums to resolve disputes in a manner which best meets the goals of the parties involved in securing access to individualised justice. The South African Law Reform Commission has suggested that to suggest that ADR can provide increased access to justice for citizens is perhaps ambitious.[18] It suggests that parties who, with the assistance of a mediator, are able to resolve their dispute may not regard themselves as having received justice but may simply consider that they have attained the more modest goal of settling their dispute.[19]

1.09 The Commission considers, however, that "Access to justice should include resilience: reinforcing and enhancing the capacity of people to resolve disputes themselves."[20] Indeed, "Access to justice is not only about accessing institutions but also about having the means to improve 'everyday justice'; the justice quality of people's social, civic and economic relations. This means giving people choice and providing the appropriate forum for each dispute."[21] Therefore, the Commission concludes that ADR must be integrated into the civil justice system, as it is an important mechanism in providing greater access to individualised justice for citizens in appropriate cases.

C Appropriateness of ADR

1.10 While the Commission acknowledges that ADR processes, such as mediation and conciliation, have an important role to play in providing greater access to justice, ADR is not a panacea for all disputes, it has its limitations and it is not always appropriate.[22] Indeed, opponents of mediation argue that

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15 *Study of Competition in Legal Service: Preliminary Report* (The Competition Authority, February 2005). Available at www.tca.ie. The European Commission has also stated: "Access to justice is an obligation which is met by the Member States through the provision of swift and inexpensive legal proceedings." *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final at 1.2(7). Available at http://eurlex.europa.eu/.

16 Speech delivered by The Hon. Warren Winkler Chief Justice of Ontario *"Access to Justice, Mediation: Panacea or Pariah?"* (2007). Available at http://www.ontariocourts.on.ca/coa/en/ps/speeches/access.htm.

17 As noted in the Consultation Paper, the Commission accepts, of course, that the additional financial costs involved in an individual case that goes through an unsuccessful mediation and must then be resolved in litigation has to be balanced against the possible savings where a complex case is successfully mediated.

18 South African Law Commission on *Alternative Dispute Resolution* (Issues Paper No. 8, Project 94, 1997). Available at http://www.saflii.org/za/other/zalc/ip/8/8-CHAPTER-2.html.

19 *Ibid.*

20 Report by the Access to Justice Taskforce *"A Strategic Framework for Access to Justice in the Federal Civil Justice System"* (Department of the Attorney General of Australia, 2009). Available at www.ag.gov.au.

21 *Ibid.*

22 See LRC CP 50-2008 at 1.23.

"it is 'soft justice,' nothing more than an additional layer of costs in the litigation stream and a process fundamentally at odds with the role of the court as decision maker."[23]

1.11 The Commission considers it important to reiterate that the potential benefits of mediation and conciliation, including the cost and time effectiveness of the processes, must be balanced against the reality that mediation and conciliation can also be seen as an additional layer on civil litigation where it does not lead to a settlement and that every step along the way drives up the costs of litigation.[24] Furthermore, the Commission considers that there are a number of cases which do not lend themselves well to ADR processes. One such category, for instance, would include those disputes involving allegations of illegality or impropriety. "Cases based on allegations of fraudulent conduct or illegal behaviour are not conducive to mediation because the polarized positions that characterize these disputes inhibit discussion. Moreover, they often place the mediator in an impossible ethical position."[25] ADR may not be appropriate in some cases where power imbalances may exist which put the parties on an unequal footing, allowing one party to place undue pressure on the other. The result may be that one party may impose their solution on the other side. In other cases there may be uncertainties in the law which need to be clarified, either because there is a lot at stake in a particular case, or because its outcome could affect a number of other cases.[26] Sometimes legal precedents need to be relied on, or to be established for future cases. There are cases in which public interest dictates that a public hearing should take place and a public decision be made. Furthermore, any case in which a party is motivated to engage in an ADR process, but only for improper tactical reasons, is not one appropriate for resolution through ADR.

1.12 The corollary to the general rule that some types of cases ought not to be resolved through ADR processes is that parties to specific types of disputes should nearly always be encouraged to consider mediation or conciliation. The Commission considers that disputes which are most amenable to resolution through mediation and conciliation include: appropriate family law disputes; appropriate employment law disputes; property disputes and, in particular, boundary disputes; probate disputes and, in particular, section 117 applications under the *Succession Act 1965*; appropriate medical negligence claims; and commercial and consumer disputes.

1.13 While it is difficult to set out general categories of cases which are appropriate for resolution through mediation or conciliation, it can be suggested that features of appropriate cases include: where the parties wish to restore or maintain their relationship with the other party (parents, business partners, siblings); claims where the monetary and non-monetary costs of litigation are disproportionately high in comparison to the issues in dispute;[27] claims where one or both parties are seeking remedies which are not available through the traditional court system (such remedies may include: an apology, an explanation; flexibility in relation to financial repayments; changes in administrative procedures); and where the parties wish to resolve the dispute in a confidential and private manner.

1.14 The Commission's clear view is that not all cases are suitable for resolution by ADR, just as the court based adversarial process is not suitable for all cases. The decision to use ADR should be made on

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23 Speech delivered by The Hon. Warren Winkler Chief Justice of Ontario *"Access to Justice, Mediation: Panacea or Pariah?"* (2007). Available at http://www.ontariocourts.on.ca/coa/en/ps/speeches/access.htm.

24 See LRC CP 50-2008 at 3.165.

25 Speech delivered by The Hon. Warren Winkler Chief Justice of Ontario *"Access to Justice, Mediation: Panacea or Pariah?"* (2007). Available at http://www.ontariocourts.on.ca/coa/en/ps/speeches/access.htm.

26 *Modern Law for a Modern Scotland: A Report on Civil Justice in Scotland* (Scottish Executive, February 2007) at 29.

27 See *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002. In this case the English Court of Appeal gave a very strong endorsement to the use of mediation at an early stage in a case, particularly where litigation costs were more likely to be disproportionate to the amount in dispute. In *Egan*, the amount in dispute was only £6,000 but the parties between them had spent in the region of £100,000 on the litigation, including the appeal. Ward LJ stated that he regarded the parties as "completely cuckoo" to have engaged in such expensive litigation with so little at stake.

the basis of a range of factors including how best to serve the specific interests of the parties and how best to ensure that justice is accessible, efficient, and effective for the parties involved.

D Conclusion

1.15 The Commission agrees with the view of the European Commission that:

> "ADRs are an integral part of the policies aimed at improving access to justice. In effect, they complement judicial procedures, insofar as the methods used in the context of ADRs are often better suited to the nature of the disputes involved. ADR can help the parties to enter into dialogue where this was not possible before, and to come to their own assessment of the value of going to court."[28]

1.16 The Commission reiterates that while ADR processes, such as mediation and conciliation, must form an integral part of a modern civil justice system in providing greater access to justice, these processes should only be used in appropriate cases. Furthermore, the role of the legal profession should not be overlooked in relation to assessing the appropriateness of ADR. [29] Many disputants may not be aware of the full spectrum of dispute resolution processes which are available to them and, when assessing a client case, solicitors should also assess whether ADR is appropriate because:

> "An effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves. Accessibility is about more than ease of access to sandstone buildings or getting legal advice. It involves an appreciation and understanding of the needs of those who require the assistance of the legal system."[30]

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28 *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final. Available at http://eurlex.europa.eu/.

29 See LRC CP 50-2008 at 1.32.

30 Report by the Access to Justice Taskforce *"A Strategic Framework for Access to Justice in the Federal Civil Justice System"* (Department of the Attorney General of Australia, 2009). Available at www.ag.gov.au. For a more detailed discussion on the duty on legal representatives to advise clients on the availability of ADR processes see paragraphs 4.36 to 4.45 below.

CHAPTER 2 ADR: TERMINOLOGY & SCOPE

A Introduction

2.01 In this Chapter, the Commission discusses the terminology surrounding ADR and the scope of the mediation and conciliation processes it proposes. In Part B the Commission provides a definition for the acronym ADR and explores the scope of ADR. In Part C the Commission discusses the fundamental procedural differences which exist between mediation and conciliation. In Part D the Commission provides a statutory definition for mediation and examines the various models of mediation which are practised. In Part E the Commission provides a statutory definition of conciliation. In Part F the Commission examines the general scope and applicability of the draft *Mediation and Conciliation Bill* attached to the Report.

B Definition and scope of the term 'ADR'

2.02 In its Consultation Paper, the Commission defined ADR as:

> "... a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which a involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes."[1]

2.03 The Commission notes that while ADR processes, such as mediation and conciliation, are increasingly being integrated into the Irish civil justice system through statutory and legislative provision, the growth of ADR has not been matched by the development of consistent language within the field.[2] Indeed, "the fundamental term that needs to be brought up to date, and which has given rise to sterile and at times misleading debate is ADR itself."[3] There is little consensus as to what the acronym 'ADR' signifies and "there has been a great deal of angst about what is included within the term ADR and what excluded."[4] Whilst cautioning against getting caught up unnecessarily in semantics, it has been suggested that:

> "Definitions are important. They have particular utility in an actively evolving area and provide clarity and consistency… Definitions are also needed in that they convey crucial information about what the definer believes to be central to the process and what the user can expect from it."[5]

The Commission now turns to examine the definition of ADR in more detail.

(1) ADR: Dispute Resolution and Prevention

2.04 The Commission recognised in its Consultation Paper that "ADR has flourished to the point that it has been suggested that the adjective should be dropped altogether and that 'dispute resolution'

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1 LRC CP 50-2008 at 2.12.

2 Recent statutory and legislative provision for mediation and conciliation include: *Enforcement of Court Orders (Amendment) Act 2009*; *Circuit Court Rules (Case Progression (General)) 2009*; and *Rules of Superior Court (Mediation and Conciliation) 2010*.

3 Street *ADR Terminology Responses to NADRAC Discussion Paper* (National Alternative Dispute Resolution Advisory Council, 24 June 2005).

4 Astor and Chinkin *Dispute Resolution in Australia* (2nd ed, 2002) at 77.

5 *Ibid.* at 76.

should be used to describe the modern range of dispute resolution methods and choices."[6] In the Consultation Paper the Commission provisionally concluded that, at this stage in its development in Ireland, it remained appropriate to refer to the term 'alternative dispute resolution' as opposed to dropping the use of the adjective 'alternative' or replacing it with another term such as appropriate, additional, amicable or accelerated dispute resolution.[7] The Commission recognises that this terminological debate is significant as it relates to deeper theoretical questions as to the relationship between processes, such as mediation and conciliation, and formal judicial adjudication.

2.05 Indeed, the central criticism associated with the term ADR rests of the use of the word 'alternative' which suggests a firm distinction between ADR processes and traditional litigation. Concerns have been expressed that the word 'alternative' not only cloaks a looseness of meaning but that it can be positively misleading. The looseness of meaning has led to the oft-repeated question "alternative to what?"[8] For example, Sir Laurence Street, the former Chief Justice of New South Wales, suggests that ADR:

> "It is not in truth '*Alternative*'. It is not in competition with the established judicial system… Nothing can be alternative to the sovereign authority of the court system. We can, however, accommodate mechanisms which operate as *Additional* or subsidiary processes in the discharge of the sovereign's responsibility. These enable the court system to devote its precious time and resources to the more solemn task of administering justice in the name of the sovereign."[9]

2.06 The Commission noted in its Consultation Paper that "ADR should not been seen as a separate entity from the court-based arrangements for civil justice but rather should be seen as an integral part of the entire system."[10] Similarly, the Victorian Parliament Law Reform Committee in its *Discussion Paper on Alternative Dispute Resolution* stated that "ADR and the formal justice systems are not homogenous, separate and opposed entities. Their relationship is complex and evolving."[11] The Commission concurs with the view that "Over the last two decades ADR has become a cornucopia of processes, procedures and resources for responding to disputes, all of which supplement rather than supplant traditional approaches to conflict."[12]

2.07 A further criticism associated with the term 'alternative' is that it is "socially and historically inaccurate, bestowing an undeserved primacy on litigation where in reality the majority of 'disputes' have traditionally been resolved without the use of formal legal processes."[13] As noted by Wade, "Ireland has been well-served by the courts but the public forum is not always the best place to resolve differences. 92% of all cases taken in Ireland will normally reach finality in ways other than through a trial hearing."[14] Furthermore, it is important to note that various statutory bodies such as the Ombudsmen schemes, the

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6 LRC CP 502-008 at 2.12.

7 LRC CP 50-2008 at 2.11.

8 Street, *ADR Terminology Responses to NADRAC Discussion Paper* (National Alternative Dispute Resolution Advisory Council, 24 June 2005).

9 Street 'The Language of Alternative Dispute Resolution' (1992) 66 *Alternative Law Journal* 194.

10 LRC CP 50-2008 at 2.06.

11 *Discussion Paper for the Inquiry into Alternative Dispute Resolution* (Victoria Parliament Law Reform Committee, September 2007). Available at: http://tex.parliament.vic.gov.au/lawreform/inquiries/ADR/Discussion_paper.pdf.

12 *Dispute Resolution First Aid Kit for Attorneys* (1988) ABA General Practice Section, Introduction.

13 Lewis and McCrimmon *'The Role of ADR Processes in the Criminal Justice System: A view from Australia'.* Paper presented ALRAESA Conference, Uganda, September 2005 at 3. Available at: http://www.justice.gov.za.

14 Wade "Irish Courts and Alternative Dispute Resolution: Current Issues and Future Possibilities for Mediation" (2009) *Trinity College Dublin Journal of Postgraduate Research* Volume 8 at 23.

Labour Relations Commission, the Private Residential Tenancies Board, and the Injuries Board process a tremendous number of disputes annually which would, arguably, otherwise enter the litigation system.

2.08 Despite these criticisms, the Commission concludes that it is appropriate to continue using the acronym 'ADR' in Ireland for the purposes of constancy and clarity. The Commission cautions against describing dispute resolution processes as pure 'alternatives' to litigation as it must be acknowledged that ADR processes, such as mediation and conciliation, are not merely 'alternatives' to litigation but have also become important elements of an integrated approach to the resolution of civil disputes within our modern civil justice system.

(2) General Scope of ADR

2.09 As previously noted, the Commission defined ADR in its Consultation Paper as "...a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which a involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes."[15] The breadth of this definition of ADR constitutes recognition by the Commission of the fact that 'ADR' is an umbrella term for a variety of processes which differ in form and application. Differences include: levels of formality, the presence of lawyers and other parties, the role of the third party (for example, the mediator) and the legal status of any agreement reached.[16] Despite these differentials, the Victorian Parliament Law Reform Committee suggests that it is possible to identify some common features relating to the acronym 'ADR'. For example:

- There is a wide range of ADR processes;
- ADR excludes litigation;
- ADR is a structured process;
- ADR normally involves the presence of an impartial and independent third party;
- Depending on the ADR process, the third party assists the other two parties to reach a decision, or makes a decision on their behalf; and
- A decision reached in ADR may be binding or non-binding.[17]

2.10 In its *Green paper on alternative dispute resolution in civil and commercial law*[18] the European Commission defined alternative methods of dispute resolution as out-of-court dispute resolution processes conducted by a neutral third party,[19] excluding arbitration.[20] It noted that an initial distinction must be drawn between:

- ADRs which are conducted by the court or entrusted by the court to a third party ('ADRs in the context of judicial proceedings'), and
- ADRs used by the parties to a dispute through an out-of-court procedure ('conventional ADRs').

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15 LRC CP 50-2008 at 2.12.

16 Lewis and McCrimmon *'The Role of ADR Processes in the Criminal Justice System: A view from Australia'.* Paper presented ALRAESA Conference, Uganda, September 2005 at 2. Available at: http://www.justice.gov.za.

17 *Discussion Paper for the Inquiry into Alternative Dispute Resolution* (Victoria Parliament Law Reform Committee, September 2007). Available at: http://tex.parliament.vic.gov.au/lawreform/inquiries/ADR/Discussion_paper.pdf

18 *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final at 29. Available at http://eurlex.europa.eu/.

19 This definition results in excluding the following procedures from the scope of this Green Paper: expert opinions and complaint handling systems made available to consumers by professionals.

20 It suggested that arbitration is closer to a quasi-judicial procedure than to an ADR as arbitrators' awards replace judicial decisions. The Commission considers that arbitration is a determinative ADR process.

2.11 A further distinction made by the European Commission was between the different conventional ADR processes. It noted that in certain ADR processes the third party or parties responsible for the procedure can be called upon to take a decision that is binding for one party or make a recommendation to the parties which they are free to follow or not. This category of ADR processes would therefore include conciliation. In other ADR procedures, such as mediation, the third parties do not formally adopt a position on the possible means of resolving the dispute but simply help the parties come to an agreement. This distinction by the European Commission reflects the categorisation by the Commission in its Consultation Paper of ADR processes into various categories including 'facilitative ADR processes' and 'advisory ADR processes.'[21]

2.12 The Commission acknowledges that in the ADR definition in its Consultation Paper, the term "empowers parties to resolve their own dispute", excludes non-facilitative ADR processes such as arbitration where the third party has a determinative role in resolving the dispute for the parties and the principle of party self-determination is not a feature of such processes. An argument has been put forward that determinative processes, such as arbitration and expert determination, are not dispute *resolution* processes, in that they are not resolved through consensual oriented interaction between the disputants. For example, arbitrators do not resolve disputes; they or adjudicate on them and it is suggested that the term ADR should not encompass such processes.[22] The Commission views ADR as encompassing all dispute resolution processes, including determinative processes, but it does not include litigation.

2.13 It is also important to note that ADR is now becoming more than dispute resolution in the strict sense of the term, and also encompasses conflict avoidance, conflict management and conflict resolution.[23] For example, in elder mediation, the mediation may focus on planning the future care of the older member of the family, a dispute as to this matter may not have arisen yet. A further example includes succession mediation, whereby family members come together at a mediation to plan for the succession of the family business to the next generation. Therefore, the Commission acknowledges that ADR is being used not only to resolve actual disputes but also to prevent future potential disputes between parties. Furthermore, the Commission notes that some ADR processes, such as collaborative practice, do not necessarily involve the assistance of a neutral and independent third party.

2.14 To reflect these observations, the Commission defines ADR as a broad spectrum of structured binding and non-binding processes, including mediation, conciliation and arbitration, but does not include litigation, though it may be linked to or integrated with litigation. ADR processes can involve the assistance of a neutral third party and can empower parties to resolve potential or actual disputes. As the Commission noted in its Consultation Paper: "Only a very limited number of key terms should be defined in statute, where consistency and compliance are essential. Where diversity and flexibility are important, it may be more appropriate to have descriptive terms."[24] For this reason, the Commission has concluded, and recommends, that there should be a statutory framework for specific forms of Alternative Dispute Resolution (ADR) processes, rather than for ADR in general terms, and that the statutory framework should not include a prescriptive definition of ADR. The Commission has also concluded that the proposed statutory framework should focus on mediation and conciliation, the two most significant forms of ADR. Those involved in the many other ADR processes discussed in this Report are, of course, free to adopt a non-statutory descriptive definition of ADR. The Commission also recommends that while, in broad terms, arbitration is part of the family of ADR processes, the proposed statutory framework should, to avoid any doubt on the matter, not apply to arbitration, which is now dealt with in the *Arbitration Act 2010* (and which covers both domestic and international arbitration). The Commission also considers that the general framework should encompass disputes involving individuals as well as corporate entities.

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[21] See LRC CP 50-2008 at 2.16-2.125. Other ADR categories included: preventive ADR processes, determinative ADR processes, collective ADR processes and Court-based ADR processes.

[22] Street *ADR Terminology Responses to NADRAC Discussion Paper* (National Alternative Dispute Resolution Advisory Council, 24 June 2005).

[23] Alexander, *'Mobile Mediation: How technology is driving the globalization of ADR*' (Australian Centre for Peace and Conflict Studies University of Queensland, 2006). Available at: www.apmec.unisa.edu.au.

[24] LRC CP 50-2008 at 2.05.

Bearing in mind that many disputes involve public sector entities, that public bodies have already begun to use ADR clauses in their contracts[25] and that Government Standard Contracts provide for ADR,[26] the Commission also recommends that the statutory framework should make clear that it applies to individuals, partnerships, corporate bodies and State bodies.

2.15 *The Commission recommends that there should be a statutory framework for specific forms of Alternative Dispute Resolution (ADR) processes, in particular mediation and conciliation, and that the statutory framework should not include a prescriptive definition of ADR. The Commission also recommends that the statutory framework should make clear that it applies to individuals, partnerships, corporate bodies and State bodies.*

2.16 *The Commission recommends that ADR should be considered as comprising a broad spectrum of structured binding and non-binding processes, including mediation and conciliation, but does not include litigation though it may be linked to or integrated with litigation. ADR processes can involve the assistance of a neutral third party and can empower parties to resolve potential or actual disputes. The Commission also recommends that, to avoid any doubt on the matter, the proposed statutory framework should not apply to arbitration within the meaning of the Arbitration Act 2010.*

C Distinguishing between mediation and conciliation

2.17 The Commission is aware that at present multiple meanings co-exist for many ADR terms. The terms mediation and conciliation continue to be used interchangeably in this jurisdiction and the difference between conciliation and mediation is not very clear.[27] As noted by Dowling Hussey:

> "... the conflicting and contradictory definitions which are used in these two distinct areas tend to create some degree of uncertainty as to what precisely is meant by the phrase. Logic would suggest that both users and practitioners are less likely to make use of, or recommend, something that they do not fully understand because of such confusion."[28]

2.18 The Commission now turns to examine the important distinctions which exist between mediation and conciliation and which should reflected when provision for mediation and conciliation is made in legislative form.

(1) Role of the Third Party

2.19 In its Consultation Paper, the Commission provisionally recommended that when provision for mediation is made in legislative form, it should be defined as "a *facilitative*, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement."[29] In contrast, the Commission provisionally recommended that when provision for conciliation is made in legislative form, it should be defined as "an *advisory*, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement."[30] It is evident from the Commission's provisional recommendations that the fundamental difference between mediation and conciliation is the degree of involvement by the neutral and independent third party in the respective processes. While both processes incorporate the principle of self-determination and are non-determinative processes, conciliation allows the third party (the conciliator) to advise on substantive matters through the issuing of formal recommendations and settlement proposals. In contrast, mediation

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25 See the discussion of the decision in *Health Service Executive v Keogh, trading as Keogh Software* [2009] IEHC 419, at paragraph 4.04, below, which involved a software support contract.

26 See paragraphs 8.28-8.37, below.

27 The Labour Relations Commission's website describes conciliation as a voluntary mediation process. See www.lrc.ie.

28 Hussey-Dowling 'Conciliation: Coming out of the shadows?' (2009) 16(3) CLP 48.

29 LRC CP 50-2008 at 2.128.

30 LRC CP 50-2008 at 2.129.

requires that the third party (the mediator) address process issues only and facilitate the parties in reaching a mutually acceptable negotiated agreement.

2.20 Turning to the 2008 EC Directive on Mediation, it defines mediation as "…a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator."[31] This is a broad definition of mediation and could, on first reading, suggest that conciliation falls within the remit of this definition. However, recital 11 of the 2008 EC Directive states that the Directive should not apply to "...processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute."[32] As the conciliator plays an advisory role in the resolution of disputes and can issue a formal recommendation to the parties, it is evident that the 2008 Directive also recognises that there is a distinction between these two processes based on the role of the third party in each process.

2.21 The Commission considers that this explicit difference should be reflected in legislative provisions defining these processes for two reasons. Firstly, it will ensure that those referring parties to the processes and the parties themselves comprehensively understand the role of the third party in the process. Secondly, this distinction is highly significant in setting the duties and the boundaries of the role of the third parties under either process.[33]

(2) Rights Based v Interest Based Resolutions

2.22 Another important distinguishing feature between mediation and conciliation can be found in an analysis between a rights based approached to resolving a dispute and an interested based approach to resolving a dispute. As the Commission noted in its Consultation Paper, interest-based dispute resolution processes expand the discussion beyond the parties' legal rights to look at the underlying interests of the parties, they also address parties' emotions and seek creative solutions to the resolution of the dispute. The focus of these processes is on clarifying the parties' real motivations or underlying interests in the dispute with the aim of reaching a mutually acceptable compromise which meets the real interests of both parties.[34] It is generally accepted that mediation is a purely interest-based dispute resolution process. However, in conciliation, there can be a greater focus on the legal rights on the parties as opposed to their underlying interests. For example, clause 13.1.8 of the Irish Government's Public Work contracts[35] states that where the parties cannot reach an agreement within 42 days after the conciliator is appointed the conciliator is to provide a written recommendation to both parties.[36] Clause 13.1.8 adds that any such recommendation shall be based on the parties' rights and obligations under the Contract. The Commission notes that not all agreements reached through conciliation are based solely on the legal rights of the parties and that the underlying interests of the parties may also be taken into consideration by the conciliator when issuing a recommendation.

(3) Conclusion

2.23 It is evident that there exists a fundamental procedural difference between the role of the conciliator and that of a mediator. The conciliator is a more active intervener, and may have an advisory

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31 Article 3 (a) of the 2008 Directive.

32 Recital 11 of the 2008 Directive.

33 See Baylis "Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions" (1999) VUWLR 38. Available at: 'http://www.austlii.edu.au/nz/journals/VUWLawRw/1999/38.html.

34 LRC CP 50-2008 at 1.08.

35 See: Public Works Contract for Building Works Designed by the Employer Public Works Contract for Building Works Designed by the Contractor; Public Works Contract for Civil Engineering Works Designed by the Employer; Public Works Contract for Civil Engineering Works Designed by the Contractor; Public Works Contract for Minor Civil Engineering and Building Works designed by the Employer (contracts less than €5m); Short Form of Public Works Contracts for Building and Civil Engineering Works (contracts less than €500,00.00). Available at www.finance.gov.ie.

36 Or a longer period proposed by the conciliator and agreed by the parties.

role on the content and the outcome of a dispute. A conciliator may make suggestions, give expert advice and use intervention techniques that not only actively influence the likely terms of an agreement, but also encourage all parties to settle. A mediator on the other hand generally assist the parties to communicate with each other so that they can identify, clarify and explore the issues in dispute before they consider their options to reach a mutually acceptable negotiated agreement. The Commission considers that is an important distinction between mediation and conciliation and that this should be clearly and consistently reflected in any provision for mediation and conciliation in legislative form.

2.24 *The Commission recommends that mediation and conciliation should be clearly and consistently separately defined in legislative form*.

D Statutory Definition of Mediation

2.25 It has been suggested that the term mediate is derived from the Latin word 'mediare' which means 'to be in the middle'. However, as mediation continues to develop in this jurisdiction there "... is less consensus on what constitutes mediation. This may be due in part to the expansion of mediation into new dispute arenas and to the increasing involvement of individuals from other professions."[37] The Commission is aware that the term mediation can have different meanings depending upon the context in which it is used and on whether the emphasis is put on the process or the outcome.

2.26 Indeed, Menkel-Meadow describes 8 different conceptual approaches to mediation;[38] Boulle describes 4 models;[39] Riskin has a 'grid' of mediator orientations;[40] and Alexander presents 6 contemporary practice models of mediation in her meta-model.[41] Sourdin has suggested that mediation is impossible to define, with various forms of processes used in different jurisdictions and subject areas, with the primary difference relating to the role of the mediator.[42]

2.27 Despite this latter argument, the Commission considers that mediation should have a statutory definition in Ireland. As the Commission suggested in its Consultation Paper, the development of clear and consistent definitions of the more commonly used ADR terms would serve several important functions.[43] As noted by the Australian National Alternative Dispute Resolution Advisory Council:

> "The inconsistent use of both ADR terminology and principles potentially affects consumers, referrers, evaluators, researchers, policy makers, courts and tribunals, all of whom need consistent and accurate information on ADR. As a result, it is likely that many disputes that could effectively be resolved through ADR are litigated in the courts and tribunals."[44]

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37 See Picard '*The Many Meanings of Mediation: A Sociological Study of Mediation in Canada'* (Carleton University, 2000).

38 Menkel-Meadow, 'The many ways of mediation: The transformation of traditions, ideologies, paradigms and practices' (1995) 11 *Negotiation Journal*, 217, 228-230.

39 Boulle, *Mediation: Principles, process, practice* (2nd edition) (LexisNexis Butterworths , 2005) at 43-47.

40 Riskin, 'Understanding mediators' orientation, strategies and techniques: A grid for the perplexed' (1996) 1 *Harvard Law Review*, 7; Riskin, 'Decision making in mediation: The new old grid and the new new grid system' (2003) 79(1) *Notre Dame Law Review*, 1.

41 Alexander "The mediation meta model: Understanding practice around the world" (Paper presented at the 4th Asia-Pacific Mediation Forum: Mediation in the Asia-Pacific: Constraints and Challenges, Kuala Lumpur, 16-18 June 2008) at 8-20.

42 *Final Report for the Inquiry into Alternative Dispute Resolution and Restorative Justice* (Victoria Parliament Law Reform Committee, May 2009). Available at: www.parliament.vic.gov.au

43 LRC CP 50-2008 at 2.04.

44 *"The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction – A Report to the Attorney General"* (NADRAC, September 2009). Available at: www.nadrac.gov.au.

2.28 As previously noted, the Commission provisionally recommended in its Consultation Paper that "when provision for mediation is made in legislative form, it should be defined as a facilitative, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement."[45] The Commission now turns to examine this definition in more detail.

(1) Structured Formal Process

2.29 While there are many definitions of mediation, most people agree that the purpose of the process is to assist people in reaching a voluntary resolution of a dispute. Therefore, in its simplest form, it can be said that mediation is negotiation facilitated by a third-party. Applying this basic definition of mediation, it is evident that this process is used daily by people who may not even realise that they are engaged in a mediation process. For example, a manager may informally mediate a dispute between two members of staff or a parent may mediate a dispute between two siblings. Such informal mediations are part of everyday life and settle a huge number of disputes. For the purposes of this Report, the Commission views mediation as a structured formal process which is governed by a set of key principles. This reflects the definition of mediation in the 2008 EU Directive on Mediation which states that it is "a structured process."[46]

(2) Differing Models of Mediation

2.30 The Commission acknowledges that partly as a result of the increasing uptake of mediation and partly as a result of working in a highly competitive culture, mediators are dividing into distinct areas of practice and are promoting different styles and approaches to resolving disputes.[47] Furthermore, those training as mediators are coming from varied professional backgrounds with differing areas of subject matter knowledge. The Law Institute of Victoria has suggested that as a result of this increasing diversity within the mediation profession:

- people who practice a particular sort of mediation or ADR are often of the view that the way it is practised in their segment of the market is the only correct way;
- practitioners in a particular segment of the market are often unaware of what their colleagues in the same market segment are doing;
- practitioners in a particular segment of the market are often unaware of what practitioners in other market segments are doing; and
- as a result, there is significant confusion and discrepancy in the various market places and between practitioners.[48]

2.31 In its Consultation Paper, the Commission noted that several models of mediation have developed including: facilitative, evaluative, transformative, and therapeutic mediation.[49] Cloke sets out the various approaches of these models in the context of a family dispute as follows:

- an evaluative approach might focus on reaching agreements regarding the issues, such as how money is being spent;
- a facilitative approach might explore their relationships and emotional responses to each other;
- a transformative approach might encourage recognition and empowerment;

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45 See LRC CP 50-2008 at 2.128.

46 Article 3 of the 2008 Directive.

47 Cloke "Let a Thousand Flowers Bloom: A Holistic, Pluralistic, & Eclectic Approach to Mediation" (Winter 2007) 6 *MCFM Family Mediation Quarterly*1. Available at: http://www.mcfm.org/pdf/spring07.pdf.

48 Law Institute of Victoria *ADR Terminology Responses to NADRAC Discussion Paper* (National Alternative Dispute Resolution Advisory Council, 24 June 2005).

49 LRC CP 50-2008 at 2.39.

- a spiritual or heart-based approach might find out the kind of family they each want to have, bring awareness to the family they are actually experiencing and encourage them to speak from their hearts;
- a systems design approach might consider the conflict culture in the family and invent proactive and preventative alternatives to handle their next conflict; and
- a holistic, pluralistic, eclectic approach might seek to accomplish each of these, moving back and forth between them as family interactions suggest different obstacles to resolution.[50]

2.32 While the Commission recognises that the practice of mediation is subject to interpretation and debate, there does appear to be elements common to most mediation models and a number of assumptions which underlie most mediation approaches. These include: mediators assist negotiation, they do not hold decision-making power; it is a consensual processes; mediators help disputing parties understand each other through effective communication; parties need to go beyond positions to uncover interests; parties should be empowered to resolve their own disputes; parties are best able to generate options for settlement; parties will be more compliant with an agreement they have themselves constructed; and mediation is future, more so than past, oriented.

2.33 For the purposes of this Report, the Commission focuses on the facilitative mediation model. Facilitative mediation is based on the belief that, with the assistance of a neutral and independent third party, people can work through and resolve their own disputes. In the facilitative mediation model, the mediator takes an active role in controlling the process. The mediator asks questions to identify the interests of the parties and the real issues in the disagreement. The mediator helps the parties explore solutions that benefit both parties but does not suggest solutions. As previously noted, the 2008 EC Directive defines mediation as "…a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator."[51] The inclusion of the term "... parties attempt by themselves" suggests that the mediator should not play an advisory or evaluative role in the resolution of the dispute, but the parties should come to a resolution by themselves. This would suggest that the definition set out in Article 3(a) of the Directive encompasses the facilitative model of mediation; however, it does not explicitly exclude other models of mediation.

2.34 Some jurisdictions have already legislated for mediation and provide statutory definitions for the process. For example, Article 1 of the Austrian *Civil Law Mediation Act 2003* defines mediation as "an activity voluntarily entered into by the Parties, whereby a professionally trained neutral facilitator (Mediator) using recognised methods systematically encourages communication between the Parties, with the aim of enabling the Parties to themselves reach a resolution of their dispute."[52] This reflects the facilitative mediation model as there is an emphasis on the parties themselves, as opposed to the mediator, reaching a resolution of their dispute. Similarly, Section 5 of the *Commercial Mediation Act 2005* in Nova Scotia defines mediation means "a collaborative process in which parties agree to request a third party, referred to as a mediator, to assist them in their attempt to try to reach a settlement of their commercial dispute, but a mediator does not have any authority to impose a solution to the dispute on the parties."[53] In the United States, mediation is defined under Section 2(1) the *Uniform Mediation Act 2004* as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[54] According to the commentary attached to the *Uniform Mediation Act*, the emphasis on negotiation in this definition is intended to exclude

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50 Cloke 'Let a Thousand Flowers Bloom: A Holistic, Pluralistic, & Eclectic Approach to Mediation' (Winter 2007) 6 *MCFM Family Mediation Quarterly* 1 at 1. Available at: http://www.mcfm.org/pdf/spring07.pdf.

51 Article 3 (a) of the 2008 Directive.

52 *Civil Law Mediation Act 2003* (*Zivilrechts-Mediations-Gesetz,* BGBl I 2003/29). Published 6 June 2003.

53 Chapter 36 of the Acts of 2005.

54 The Uniform Mediation Act was drafted by the National Conference of Commissioners of Uniform State Laws and approved by it and recommended for enactment in all the states, August 10–17, 2001 and amended August 1–7, 2003 Available at: http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm.

adjudicative processes, such as arbitration and fact-finding, as well as counselling. It was not intended to distinguish among styles or approaches to mediation.

2.35 The Commission considers the evaluative mediation model should not be expressly encompassed in any statutory definition of mediation as it goes against the fundamental principle of mediation which is self-determination.[55] The Commission considers that if evaluative mediation was provided for through legislative provision, this would result in further confusion between the important distinctions which exist between mediation and conciliation. The Commission considers that the fundamental role of the mediator is to facilitate the resolution of the dispute and that they should play no advisory or evaluative role in the resolution of the dispute. However, the Commission is aware that, in practice, parties to a facilitative mediation may reach an impasse and jointly consent to the mediator offering their opinion or propose possible settlement options to the parties to bring about a resolution. For this reason, the Commission recommends that the parties may, at any time during a mediation process, request the mediator to take on the role of conciliator, thus converting the process into a conciliation process. This is to ensure that the inherent flexibility which is associated with ADR is protected. Parties should be free to consent to move along the dispute resolution spectrum from mediation to conciliation with the same third party, should they reach an impasse in the mediation process.

(3) Conclusion

2.36 The Commission acknowledges that there are inherent difficulties in providing a statutory definition for mediation given the increasing emergence of various mediation models in this jurisdiction. However, if mediation is to continue to be fully integrated into our modern civil justice system, it is fundamental that a consistent and clear definition of mediation is introduced through legislative provision. Taking into account the definition of mediation in the 2008 EC Directive and the various issues examined in the sections above, the Commission recommends that when provision for mediation is made in legislative form, it should be defined as a facilitative and confidential structured process in which the parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute with the assistance of an independent third party, called a mediator.

2.37 *The Commission recommends that when provision for mediation is made in legislative form, it should be defined as a facilitative and confidential structured process in which the parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute with the assistance of an independent third party, called a mediator.*

2.38 *The Commission recommends that a mediator may not, at any stage in the mediation process, make a proposal to the parties to resolve the dispute.*

2.39 *The Commission recommends that the parties may, at any time during a mediation process, request the mediator to take on the role of conciliator, thus converting the process into a conciliation process.*

E Statutory Definition of Conciliation

2.40 As the Commission noted in its Consultation Paper provision for conciliation can be found in a number of legislative acts and statutory instruments, but they do not provide any definition for the term conciliation.[56] In its Consultation Paper, the Commission provisionally recommended that:

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55 In evaluative mediation the third party plays a more advisory role in assisting in the resolution of the disputes. The mediator allows the parties to present their factual and legal arguments. After evaluating both sides, he or she may then offer his or her own assessment of the dispute or put forward views about the merits of the case or particular issues between parties. This form of mediation mirrors conciliation.

56 For example, the *Rules of the Superior Courts (Commercial Proceedings) 2004* and the *Rules of the Superior Courts (Competition Proceedings) 2005* expressly mention both mediation and conciliation, but do not provide any definitions of the terms. It must be assumed that those drafting the 2004 and 2005 Rules intended them to have different meanings.

> "... when provision for conciliation is made in legislative form, it should be defined as an advisory, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement."[57]

2.41 The 2002 UNCITRAL Model Law on International Commercial Conciliation defines conciliation as:

> "… a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute."[58]

2.42 The broad nature of the definition indicates that there is no intention to distinguish among procedural styles or approaches to mediation or conciliation. However, a distinction can be found between the two processes in Section 4 of the Model Law which states that "The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute."[59] Similarly, the Centre for Effective Dispute Resolution in the United Kingdom defines conciliation as "a process where the neutral takes a relatively activist role, putting forward terms of settlement or an opinion on the case."[60] Therefore, it can be stated that the conciliator has a more interventionist role in bringing the two parties together and can make proposals for settlement to the parties which they are free to choose to accept or reject. Unlike, for example an arbitrator, a conciliator does not have the power to impose a settlement. As noted by Bunni:

> "Conciliation is a more formal process than mediation and it could generally involve the engagement of legal representatives, thus making it a more expensive process than mediation. There is, however, the added advantage that should no amicable solution be reached, the conciliator has the duty to attempt to persuade the differing parties to accept his own solution to the dispute."[61]

2.43 The Commission considers it essential that any statutory definition of conciliation clearly and consistently defines the role of the third party as one in which they actively assist the parties in finding a resolution to the dispute. The Commission recommends that when provision for conciliation is made in legislative form, it should be defined as an advisory and confidential structured process in which an independent third party, called a conciliator, actively assists the parties in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.

2.44 *The Commission recommends that when provision for conciliation is made in legislative form, it should be defined as an advisory and confidential structured process in which an independent third party, called a conciliator, actively assists the parties in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.*

2.45 *The Commission recommends that a conciliator may, at any stage in the conciliation process, make a proposal to the parties to resolve the dispute, but he or she may is not empowered to impose such a proposal on the parties.*

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57 LRC CP 50-2008 at 2.129.

58 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at www.uncitral.org. See also Dobbins "UNCITRAL Model Law on International Commercial Conciliation: From a Topic of Possible Discussion to Approval by the General Assembly" (2002) 3 Pepp Disp Resol L J 529.

59 *Ibid.* at Article 6.4.

60 See www.cedr.co.uk .

61 Bunni *The FIDIC Forms of Contract* (Blackwell Publishing 3rd ed., 2008) at 445.

F General Scope of Statutory Mediation & Conciliation

2.46 The 2008 EC Directive on Mediation[62] is based on the premise that, in order to promote the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce legislation addressing, in particular, key aspects of civil procedure.[63] The 2008 Directive applies to mediation in cross border civil and commercial disputes only, but it also states that "nothing should prevent Member States from applying such provisions also to internal mediation processes."[64] In its Consultation Paper the Commission invited submissions as to whether the 2008 Directive should be applied to disputes that do not involve a cross-border element, that is, disputes arising within Ireland.[65] As previously noted by the Commission, in promoting access to justice, any modern civil justice system must now offer a variety of approaches and options to dispute resolution. For this reason, the Commission recommends that the legislative framework for mediation and conciliation set out in the *Mediation and Conciliation Bill* attached to the Report should apply to disputes arising within Ireland, and that this is separate from the obligation to implement the 2008 EC Directive on Mediation in Cross-Border Disputes, Directive 2008/52/EC.[66]

2.47 *The Commission recommends that the legislative framework for mediation and conciliation set out in the Mediation and Conciliation Bill attached to the Report should apply to disputes arising within Ireland, and that this is separate from the obligation to implement the 2008 EC Directive on Mediation in Cross-Border Disputes, Directive 2008/52/EC.*

(1) Civil & Commercial Disputes

2.48 The Commission recommends that the legislative framework for mediation and conciliation set out in the *Mediation and Conciliation Bill* attached to the Report should be applicable to the resolution of civil or commercial disputes that could give rise to civil liability.[67] The Commission considers that this term should be used without general qualification, by contrast with the restrictions, which the Commission discusses below, in connection with the definition of "cross-border dispute" under the 2008 EC Directive on Mediation. The 2008 Directive directly links the scope of the terms "cross-border dispute" with the scope of "civil or commercial disputes" within the meaning of the 2001 EC "Brussels I" Regulation, Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The scope of the Commission's proposed framework for mediation and conciliation that arise in Ireland, without a "cross-border" element as defined in the 2008 Directive, is therefore wider. Nonetheless, the Commission considers that such "domestic" mediation or conciliation should not apply to any mediation, conciliation or other dispute resolution process engaged in under the statutory remit of the Labour Relations Commission or the Labour Court.[68] The statutory framework for "domestic," mediation and conciliation will, of course, apply to any dispute arising within an employment context that has not been referred to the dispute resolution processes of the Labour Relations Commission or the Labour Court.

2.49 As the Commission has previously noted, there are already a number of existing statutory provisions providing for varying forms of dispute resolution outside the scope of civil proceedings in court.

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62 Directive 2008/52/EC of the European Council and of the Parliament of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, O.J. No. L.136, 24/5/2008, p.3, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF.

63 Recital 7 of the 2008 Directive.

64 Recital 8 of the 2008 Directive.

65 LRC CP 50-2008 at 3.223.

66 It should be noted that the Commission, in drafting its recommendations on the main principles for mediation concerning disputes arising within Ireland, has supplemented some of the provisions of the 2008 Directive.

67 The Commission emphasises that ADR is associated solely with civil disputes and has no connection with restorative justice, which is connected with criminal law. The Commission's *Third Programme of Law Reform 2008-2014*, Project 15, concerns restorative justice.

68 See *Industrial Relations Acts, 1949 to 2004.*

These include dispute resolution processes concerning: landlord and tenant disputes under the *Residential Tenancies Act 2004*;[69] assessment of needs under the *Disability Act 2005*;[70] or resolution of certain complaints by mediation under the *Medical Practitioners Act 2007*.[71] The Commission recommends that the *Mediation and Conciliation Bill* 2010 attached to this Report may, with any necessary modification, be adapted for such process under any such other enactment. The existence of such statutory arrangements outside the context of court-based dispute resolution through litigation also emphasises that ADR processes already exist independently of litigation, and this should be reflected in any general legislative framework for mediation and conciliation. Accordingly, the Commission recommends that the process of mediation and of conciliation may be used by the parties either on their own initiative, that is, independently of any civil proceedings in court or any existing statutory scheme, or else arising from an initiative occurring after the initiation of civil proceedings in court, whether that initiative arises from the parties or from the court.

2.50 Furthermore, recital 10 of the 2008 Directive states that the Directive should apply to processes whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should not, however, apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law. Therefore, the Commission recommends that the provisions of the *Mediation and Conciliation Bill* attached to the Report should not be interpreted as permitting any mediation or conciliation process to negate or avoid any rights or obligations in respect of which the parties are not free to decide for themselves under the relevant applicable law, including: (a) mandatory constitutional, statutory or regulatory provisions of Ireland; or (b) the provisions or principles of international conventions to which Ireland, the Member States of the European Union or the European Union are party.

2.51 *The Commission recommends that the legislative framework for mediation and conciliation set out in the Mediation and Conciliation Bill attached to the Report should be applicable to the resolution of civil or commercial disputes that could give rise to civil liability. The Commission also recommends that the process of mediation and of conciliation may be used by the parties either on their own initiative, that is, independently of any civil proceedings in court or any existing statutory scheme, or else arising from an initiative occurring after the initiation of civil proceedings in court, whether that initiative arises from the parties or from the court. The Commission also recommends that the statutory framework for mediation and should apply to any dispute arising within an employment context that has not been referred to the dispute resolution processes of the Labour Relations Commission or the Labour Court.*

2.52 *The Commission recommends that the Mediation and Conciliation Bill attached to the Report is not to be interpreted as replacing any mediation, conciliation, or other dispute resolution process which is provided for in accordance with any other enactment but may, with any necessary modification, be adapted for such process under any such other enactment.*

2.53 *The Commission recommends that the Mediation and Conciliation Bill attached to the Report should not be interpreted as permitting any mediation or conciliation process to negate or avoid any rights or obligations in respect of which the parties are not free to decide for themselves under the relevant applicable law, including:*

(a) mandatory constitutional, statutory or regulatory provisions of Ireland; or

(b) the provisions or principles of international conventions to which Ireland, the Member States of the European Union or the European Union are party.

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69 No. 27 of 2004.

70 No. 14 of 2005.

71 No. 25 of 2007.

(2) Cross-Border Civil & Commercial Disputes

2.54 It is important to examine the definition of a cross-border dispute under the 2008 Directive. The Commission considers that the scope of mediation for "cross-border disputes" should be limited to the categories provided for in Article 1 of the 2008 Directive, which are also linked to the scope of "civil or commercial disputes" within the meaning of the 2001 EC "Brussels I" Regulation, Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[72] Therefore, based on those categories, the Commission recommends that a cross-border dispute means any civil or commercial dispute that could give rise to civil liability, but does not include a dispute concerning or arising from:

(a) The civil status of natural persons;

(b) The legal capacity of natural persons;[73]

(c) The guardianship of infants;[74]

(d) Rights, including rights in property, arising out of a matrimonial relationship;

(e) Bankruptcy, proceedings relation to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(f) Any mediation, conciliation or other dispute resolution process engaged in under the statutory remit of the Labour Relations Commission or the Labour Court;

(g) Customs, revenue or taxation matters;

(h) The liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)

(i) Social welfare matters; or

(j) Without prejudice to the matters referred in (a) to (i), any rights or obligations in respect of which the parties are not free to decide for themselves under the relevant applicable law, including:

(i) mandatory constitutional, statutory or regulatory provisions of Ireland; or

(ii) the provisions or principles of international conventions to which Ireland, the Member States of the European Union or the European Union are party.

2.55 Furthermore, Article 2 of the 2008 Directive provides that a cross-border dispute arises where at least one of the parties is domiciled[75] or habitually resident in a Member State of the European Union other than that of any other party on the date which:

(a) the parties agree to use mediation after the dispute has arisen;

(b) mediation is considered arising is ordered by the court; or

(c) an obligation to use mediation arises under an enactment.

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72 The Commission's general provisions on mediation are applicable to the mediation of a cross-border dispute, but limited to the scope of such disputes, in accordance with the 2008 Directive.

73 The *Scheme of the Mental Capacity Bill 2008*, which would implement the thrust of the Commission's *Report on Vulnerable Adults and the Law* (LRC 83-2006), includes a test to assess the mental capacity of adults and proposes to establish a statutory framework for adult guardianship.

74 The Commission, in its *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009), has provisionally recommended that the term "guardianship of infants" be replaced with the term "parental responsibility".

75 Domiciled should be determined in accordance with Articles 59 and 60 of the "Brussels I" Regulation, Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

2.56 Article 2 of the 2008 Directive also states that a cross-border dispute is also one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident.

2.57 *The Commission recommends that a cross border dispute means any civil or commercial dispute that could give rise to civil liability, but does not include a dispute concerning or arising from:*

(a) The civil status of natural persons;

(b) The legal capacity of natural persons;

(c) The guardianship of infants;

(d) Rights, including rights in property, arising out of a matrimonial relationship;

(e) Bankruptcy, proceedings relation to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(f) Any mediation, conciliation or other dispute resolution process engaged in under the statutory remit of the Labour Relations Commission or the Labour Court;

(g) Customs, revenue or taxation matters;

(h) The liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)

(i) Social welfare matters; or

(j) Without prejudice to the matters referred in (a) to (i), any rights or obligations in respect of which the parties are not free to decide for themselves under the relevant applicable law, including:

(i) mandatory constitutional, statutory or regulatory provisions of Ireland; or

(ii) the provisions or principles of international conventions to which Ireland, the Member States of the European Union or the European Union are party.

2.58 *The Commission recommends that a cross-border dispute be defined as one which arises where at least one of the parties is domiciled or habitually resident in a Member State of the European Union other than that of any other party on the date which:*

(a) the parties agree to use mediation after the dispute has arisen;

(b) mediation is considered arising is ordered by the court; or

(c) an obligation to use mediation arises under an enactment.

G Conclusion

2.59 In preparing this Report, the Commission is conscious of the observations made by Lord Judge, Lord Chief Justice of England and Wales, who stated that:

> "The mediation [and conciliation] process, could, unless danger is recognised and addressed, particularly if it is part of the court process, may eventually, and quite unintentionally, and by unforeseen accretion become increasingly formalised and procedural."[76]

The Commission firmly considers that for mediation and conciliation to continue evolving as viable and efficient mechanisms for the resolution of civil and commercial disputes in the civil justice system, there is a pressing need for clarity around the

[76] Speech by Lord Judge, Lord Chief Justice of England and Wales, at the Third Civil Mediation Council National Conference, London, 14 May 2009. Available at:www.civilmediation.org

issues of terminology. As noted by one commentator, "... unless there is clarity regarding ADR definitions, nothing else will follow."[77]

[77] Keane *ADR Terminology Responses to NADRAC Discussion Paper* (National Alternative Dispute Resolution Advisory Council, 24 June 2005).

CHAPTER 3 GENERAL PRINCIPLES OF MEDIATION & CONCILIATION

A Introduction

3.01 In this chapter the Commission examines several of the main principles of mediation and conciliation. Part B examines the general issues discussed in the Consultation Paper in relation to the principles of mediation and conciliation. In Part C the Commission explores the voluntary nature of these processes. In Part D the Commission examines the principle of confidentiality. In Part E the Commission considers the principles of self-determination and party empowerment. In Part F the Commission discusses the objective of ensuring efficiency in mediation and conciliation through the speedy and economical resolution of disputes. In Part G the Commission sets out the principle of flexibility. In Part H the Commission describes the principles of neutrality and impartiality in guaranteeing that the ADR processes are fair for all parties involved. In Part I the Commission examines the enforceability of agreements reached at mediation and conciliation. In Part J the Commission discusses the issue of limitation periods. In Part K the Commission discusses the need to ensure that the quality and transparency of mediation and conciliation processes are guaranteed.

B Consultation Paper

3.02 As noted in the Consultation Paper, ADR processes such as mediation and conciliation already form part of many statutory codes in Ireland, ranging from industrial relations to commercial litigation and these processes are increasingly being employed to resolve private disputes among citizens across many sectors.[1] The Commission notes that, "Paradoxically, while the use of mediation has expanded, a common understanding as to what constitutes mediation has weakened. It is important to identify and clarify the principles and dynamics which together constitute mediation as a dispute settlement procedure."[2] In its Consultation Paper, the Commission provisionally recommended that the key principles underlying ADR, in particular mediation and conciliation, should be set out in statutory form.[3]

3.03 This provisional recommendation stemmed from the Commission's belief that to fully integrate mediation and conciliation into our modern civil justice system and also to ensure that parties having recourse to mediation and conciliation can rely on a predictable legal framework, it is necessary to introduce a statutory framework for these processes.[4] This does not mean prescribing in detail the working of such procedures as this would go against the inherent flexibility of the processes. Rather, the Commission considers that a statutory framework should promote the autonomy of the parties by leaving to them to determine matters that can be set by agreement but that a statutory framework should identify a set of key principles that such procedures should follow in order to ensure a common minimum standard. The Commission now turns to examine the fundamental principles underlying mediation and conciliation.

3.04 *The Commission recommends that the key principles underlying mediation and conciliation should be set out in statutory form.*

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1 LRC CP 50-2008 at 3.01.

2 See Stulberg "The Theory and Practice of Mediation: A Reply to Professor Susskind" (1981) 6 Vt L Rev 85.

3 LRC CP 50-2008 at paragraph 1.74.

4 Recital 7 of the 2008 Directive.

C Voluntary Nature of Mediation & Conciliation

(1) Consultation Paper

3.05 In the Consultation Paper, the Commission examined the voluntary nature of mediation and conciliation from two perspectives. First, the voluntary nature of the processes which is exercised at each moment a party chooses to remain at the table, and is best validated by the approach that any party or mediator/conciliator may withdraw from the process at any time they choose.[5] Secondly, the Commission examined the issue of voluntary and compulsory referral to mediation or conciliation.[6] The Commission made a number of provisional recommendations on the principle of voluntariness in mediation and conciliation. These included:

- (i) that, in civil claims generally, courts should be permitted, either on their own motion initiative or at the request of a party to such claims, to make an order requiring the parties to consider resolving their differences by mediation or conciliation.[7]
- (ii) that the participation of parties in mediation should be voluntary and that the mediator should play no advisory or evaluative role in the outcome of the process, but may advise on or determine the process.[8]
- (iii) the participation of parties in conciliation should be voluntary and that the conciliator should not have the authority to impose on the parties a solution to the dispute but may make recommendations to the parties for the settlement of the dispute, which the parties may or may not accept.[9]
- (iv) a pilot Court-annexed mediation scheme should be established in the District Court based on the principles of the voluntary participation of the litigants.[10]

3.06 Provisional recommendation (ii) reflects the facilitative model of mediation and the subsequent facilitative role of the mediator. The Commission is aware that, in practice, facilitative mediators may be asked to assist parties who have reached an impasse in the facilitative model by providing them with options on how they may wish to resolve their dispute. The flexibility of the process permits this to occur with the consent of all parties.[11] The Commission now turns to examine the principle of voluntariness in more detail.

(2) Right to Withdraw from Mediation or Conciliation

3.07 This principle of voluntariness has been acknowledged and endorsed in a number of European documents and legislative instruments providing for mediation and conciliation. For example, the Explanatory Memorandum to the Council of Europe's 1998 Recommendation R. 98(1)on family mediation states that:

> "… the essence of mediation itself rests in its voluntary character and on the fact that the parties themselves try to reach an agreement and if they refuse or feel unable to mediate, it is counter-productive to attempt to compel them."[12]

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5 A mediator or conciliator may come to the conclusion, for example, that mediation or conciliation is not appropriate to continue with under the current circumstances or that their impartiality was been impaired.

6 The issue of referrals to mediation and conciliation is examined in Chapter 3 below.

7 LRC CP 50-2008 at 3.92. See Chapter 3 below for a detailed discussion on this provisional recommendation.

8 LRC CP 50-2008 at 3.95.

9 LRC CP 50-2008 at 3.96.

10 LRC CP 50-2008 at 3.98. See Chapter 3 below for a detailed discussion on this provisional recommendation.

11 See paragraph 2.39 above.

12 Explanatory Memorandum to Recommendation No. R (98) 1 on family mediation at 27 and 28. See also Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial

3.08 The EU Commission's 2004 *European Code of Conduct for Mediators* also recognises the principle of voluntary participation in mediation stating that "The parties may withdraw from the mediation at any time without giving any justification."[13] Similarly, recital 13 of the 2008 EC Directive on Mediation states that "The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time."[14] Furthermore, this principle of voluntariness has already been included in various pieces of Irish legislation providing for mediation.[15] The Mediators Institute of Ireland's Code of Ethics and Practice also provides at section 62 that "Mediation is voluntary. Any party to mediation including the Mediator may leave the process at any time without having to give reasons."[16] Similarly, the Financial Services Ombudsman Mediation Guidelines states that "Participation in a mediation by the parties to a complaint is voluntary and a party may withdraw from the mediation at any time."[17] Other jurisdictions have also made legislative provision for this principle. For example, Article 5 of the Bulgarian *Mediation Act 2004* provides that "The parties shall have equal opportunities to participate in the mediation procedure. They shall be involved in the procedure of their own free will and may withdraw from it at any time."[18]

3.09 The principle of voluntariness and the issue of withdrawing from a mediation was discussed by the District Court of Haarlem, the Netherlands, in 2002.[19] The parties had agreed orally on 16 November 1999 to resolve their dispute by mediation. A few minutes after the mediation had commenced one of the parties withdrew. The other party applied to the court for performance of the oral agreement. The party considered that the agreement obliged the other party to make a reasonable effort to ensure the success of the mediation. The Court disagreed and held that voluntariness is one of the basic principles of mediation and is also recorded in the Netherlands Mediation Institute ('NMI') Mediation Rules.[20] Article 5 of these Rules provides that each of the parties and the mediator may terminate the mediation prematurely. The Court felt that there would be no point in obliging a person to continue the mediation if this could be terminated at any desired moment and without giving reasons.[21] The Commission fully supports this view.

3.10 As the Commission stated in its Consultation Paper, there is an important distinction to be noted between mandatory *attendance* at an information session about ADR processes or at a mediation

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settlement of consumer disputes (2000/C155/01) which states that any initiative should "be based on voluntary participation."

13 European Code of Conduct for Mediators 3.3. In 2004, a European Code of Conduct for Mediators was developed by a group of stakeholders with the assistance of the European Commission. It sets out a number of principles to which individual mediators can voluntarily decide to commit. Available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

14 Recital 13 of the 2008 Directive.

15 See section 55(3) of the *Health and Social Care Professionals Act 2005.*

16 Mediators Institute of Ireland Code of Ethics and Practice (December 2009). Available at: www.themii.ie.

17 Financial Services Ombudsman Mediation Guidelines at 11. Available at: http://www.financialombudsman.ie/complaints-procedure/Mediation.asp.

18 Article 5 of the Bulgarian Mediation Act 2004. Published in State Gazette, issue 110/17.12.2004 г.

19 District Court of Haarlem, 4 June 2002 LJN AQ 2615, case number: 78515/HA ZA 01-1435.

20 The Netherlands Mediation Institute NMI is the national platform for mediation in the Netherlands. NMI is a private organization and operational since 1995. See www.nmi-mediation.nl. Article 5 of the updated 2008 Mediation Rules of the NMI now states that in relation to the principle of voluntariness "The Mediation shall take place on the basis of voluntariness of the Parties. Each Party, as well as the Mediator, may put an end to the Mediation at any time."

21 See online article 'Law & Legislation in the Netherlands' published on the European Association of Judges for Mediation website at: http://www.gemme.eu/nation/nederland/article/law-and-legislation. See also Winston "Participation Standards in Mandatory Mediation Statutes: 'You Can Lead the Horse to Water'" (1996) 11 Ohio St J on Disp Resol 187.

session and voluntary *participation* in an ADR process.[22] While there may be an element of compulsion in referring parties to mediation or conciliation, voluntariness is not negated because at most entry to the process is required, but not continued participation. As noted by Mervyn King, a former South African Supreme Court Judge "all that is required is attendance with an open mind"[23] This is evident from the American case *Graham v Baker*.[24] The parties to this case agreed to mediation and to be represented at the mediation by their lawyers. At the mediation session, the plaintiff's lawyer refused to cooperate with the mediator and denied the opposing party any chance to put forward a proposal for resolving the dispute. The issue before the Iowa Supreme Court was whether the plaintiff's attorney had participated in the mediation to a satisfactory standard? The Court held that the lawyer had attended the mediation session as required by statute and had satisfactorily participated, despite the fact that he stated that his position was not negotiable.[25] Supporting this holding, the Court reasoned that in a mediation a party could not be compelled to negotiate, rather the mediation "merely attempts to set up conditions in which the parties might find a solution to their problems."[26] Despite the inappropriate behaviour, the Court found that the mere presence of the lawyer at the mediation satisfied the minimal participation required by the statute.

(3) Conclusion

3.11 The Commission recognises voluntariness as a fundamental principle of mediation and conciliation. It agrees with the view that "... voluntary action in mediation [and conciliation] is part of the 'magic of mediation' that leads to better results: higher satisfaction with process and outcomes, higher rates of settlement, and greater adherence to settlement terms."[27] Furthermore, voluntary participation in mediation and conciliation is intrinsically linked to other fundamental principles of these processes such as autonomy and party self-determination. Indeed, "Mediation rhetoric, focusing on empowerment and recognition, is grounded in voluntariness."[28] The Commission recommends that mediation and conciliation are voluntary processes and participation in these processes cannot be compelled. Any party to mediation or conciliation, including the mediator or conciliator, may leave the process at any time and without explanation.

3.12 *The Commission recommends that participation in mediation and conciliation is voluntary, and any party involved in a mediation or conciliation, and the mediator or conciliator, may withdraw from the process at any time and without explanation.*

D Confidentiality

(1) Consultation Paper

3.13 In its Consultation Paper, the Commission provisionally recommended that the principle of confidentiality of mediation and conciliation should be placed on a statutory basis and the Commission invited submissions as to whether confidentiality in mediation should be subject to a distinct form of

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22 LRC CP 50-2008 at 3.09.

23 Speech by Justice Mervyn King at the launch of the South African Institute of Directors Mediation Centre, 28th March 2006. Available at: www.ifc.org.

24 447 N.W. 2d 397 (Iowa 1989).

25 Iowa Code Ann. § 654A.6.1.

26 447 N.W. 2d 397 at 401.

27 See Hedeen "Coercion and Self-Determination in Court-Connected Mediation: All mediations are voluntary, but some are more voluntary than others" (2005) 26 *The Justice System Journal* 273 at 275; Katz "Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?" (1993) *Journal of Dispute Resolution* 1; and Quek "Mandatory Mediation: An Oxymoron?" (2010) 11 Cardozo J Conflict Resol 479.

28 See Nolan - Haley "Mediation Exceptionality" (2009) 78 Fordham L Rev 1247 at 1251.

privilege.[29] As noted in the Consultation Paper, the importance of the legal status of confidentiality in mediation and conciliation is particularly pronounced because confidentiality is a fundamental expectation of parties in agreeing to a mediation or conciliation.[30] To echo the sentiments of Hobbs:

> "Confidentiality is a critical element of successful mediation. In order for the mediator, the attorneys and the clients to understand the central issues, the motivations, the pressure points and the risks of litigation, the participants must be assured the discussions cannot and will not be disclosed to others so they can talk openly... If discussions with the mediator are not confidential and privileged, the mediation process, the mediator's role and the potential for resolution are significantly diminished."[31]

3.14 The Commission recognises that it is essential to the working of the mediation and conciliation processes that all discussions, statements, concessions and/or admissions are protected by confidentiality and the Commission acknowledges that without this protection, parties would not be prepared to make the kind of admissions or concessions that are required to reach a settlement.[32] While the need for ensuring the confidentiality of mediation and conciliation is internationally recognised, the scope of confidentiality rules and the way in which confidentiality rules are set out differs from one jurisdiction to another.[33] Indeed,

> "… there is a consensus that some degree of confidentiality in the process is appropriate, but commentators do not agree on how strong the protection should be. In particular, some question whether mediation requires a formal legal privilege, whereas others argue that confidentiality protection should be stronger than a legal privilege which is waivable."[34]

3.15 The Commission acknowledges that the principle of confidentiality in mediation and conciliation is extremely complex. Each relationship and circumstance needs to be deconstructed and rules devised to deal with each different aspect. The Commission considers that some of the protections in relation to confidentiality should be enshrined in statute, some in Codes of Ethics and Practice in professional bodies for mediators and conciliators; and some in the contracts between the parties and the mediator or conciliator. The Commission now turns to examine the principle of confidentiality in more detail including the option of introducing a distinct statutory form of privilege for mediation and conciliation.

(2) Increase of Satellite Litigation

3.16 The Commission considers that satellite litigation stemming from issues arising directly from the parties' participation in ADR processes must be avoided.[35] This includes satellite litigation concerning the confidentiality of mediation or conciliation. However, it is evident from emerging case-law in England and Wales that confidentiality provisions in agreements to mediate are increasingly being ruled on by the Courts.[36] Commenting on the increase of this form of satellite litigation in England and Wales, Allen and Mackie suggest that:

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29 LRC CP 50-2008 at 3.139.

30 LRC CP 50-2008 at paragraphs 3.133 – 3.134.

31 Hobbs, "Mediation Confidentiality & Enforceability: Deal or No Deal?" (2006) Online article available at www.mediate.com. See also Johnson "Confidentiality in Mediation" (2002) 30 Fla St U L Rev 489; and Foster & Prentice "The Promise of Confidentiality in Mediation: Practitioners' Perceptions" (2009) J Disp Resol 163.

32 See Conway "Recent Developments in Irish Commercial Mediation – Part 1" (2009) ILT 43.

33 In many jurisdictions, confidentiality rules are considered so important that they are both statutory and regulated by codes of conduct and ethical standards.

34 Folberg et al. *Resolving Disputes: Theory, Practice and Law* (Aspen Publishers, 2010) at 479.

35 See Coben & Thompson "Disputing Irony: A Systematic Look at Litigation about Mediation" (2006) 11 Harv Negot L Rev 43.

36 From 1999 to 2005, researchers at Hamline University in the United States identified nearly 250 reported decisions that dealt with mediation confidentiality. See www.law.hamline.edu/adr/mediation-case-law-database.

"Recently judges have either felt able or been invited to consider what happened at a mediation, something which is unsettling for mediators who are used to assuring parties and their advisers at the outset of the process that what happens at the mediation is off the record and not available to a judge."[37]

3.17 One of the most common legal mechanisms used to protect the confidentiality of a mediation and conciliation is the inclusion of a confidentiality clause in an agreement made prior to entering the process. The effect of the confidentiality clause in the mediation or conciliation agreement is to prevent all of the individuals at the mediation or conciliation from disclosing any of the information they learn during the process to third parties. Therefore, if any of them disclose details of what was said or done at the mediation or conciliation, they will be in breach of contract and liable either to be injuncted or to pay damages if the parties suffer a loss.[38] Contractual confidentiality may be insufficient where a party seeks disclosure of the material in subsequent legal proceedings. Whatever the parties may have agreed in the underlying agreement to mediate or conciliate, the obligation to disclose relevant material will in practice override that confidentiality protection. That is why the 'without prejudice' privilege is so important and why it, rather than confidentiality, has been the focus of the recent case-law.[39] In its Consultation Paper, the Commission examined a number of English cases which ruled on the applicability and exceptions to the 'without prejudice' common law principle in relation to confidentiality in mediations.[40] Two more recent cases on this subject also merit discussion.

(a) Cumbria Waste Management Ltd and Lakeland Waste Management Ltd v Baines Wilson

3.18 The English High Court case *Cumbria Waste Management Ltd & Lakeland Waste Management Ltd v Baines Wilson*[41] involved one party at a mediation that would not waive the confidentiality privilege despite the requests of the other parties to have the confidentiality privileged waived by the Court. The essential issues before the Court were:

(1) whether disclosure could be ordered contrary to one party's wishes by virtue of an exception to "without prejudice" privilege; and

(2) whether the confidentiality provisions of the agreement to mediate also (and separately) precluded disclosure at the behest of one of the mediation parties.

3.19 The defendants, Baines Wilson, were solicitors for the two claimants and they had drafted a services agreement between the claimants and the Department for Environment, Food and Rural Affairs ('DEFRA'). Payment disputes arose on that agreement which the claimants settled with DEFRA after two mediations.[42] The claimants then alleged that the disputes had arisen because of the poor drafting of the services agreement and they sued the defendant for professional negligence in its drafting, asserting that

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37 Allen & Mackie "Moves in Mediation: Confidentiality the EU Directive and regulation" (November 2009) *The Barrister Magazine* Issue 32. Online article available at: http://www.barristermagazine.com/articles/issue32/mackie.html.

38 See LRC CP 50-2008 at 3.102-3.103.

39 Irish law provides for the concept of "without prejudice" negotiations, which means that oral and written statements made on a "without prejudice" basis during negotiations towards the settlement of a dispute are inadmissible in subsequent court proceedings relating to the same subject matter. See also Kallipetis & Woods "Farm Assist: The Latest Developments in Mediation Privilege" (2009) *The Mediator Magazine*. Online article available at: www.themediatormagazine.co.uk.

40 See *Hall v Pertemps Group Ltd* [2005] EWHC 3110 (Ch) LRC CP 50-2008 at 3.120; *Chantry Vellacott v The Convergence Group* [2007] EWHC 1774 (Ch), [2007] All ER (D) 492 (Jul) LRC CP 50-2008 at 3.119; *Brown v Rice and Patel* [2007] EWHC 625 (Ch). LRC CP 50-2008 at 3.113-3.116; and *Carleton Seventh Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB) LRC CP 50-2008 at 11.67.

41 [2008] EWHC 786 (QB).

42 Cumbria sued DEFRA for £4.5 million but settled at mediation for £3.9 million. Lakeland sued DEFRA for £1.72 million but settled through mediation for £1.4 million. The disputes arose from the 2001 foot and mouth outbreak.

they had been reasonable to settle, but that the discounts they had been forced to concede were as a result of Baines Wilson's negligent advice.[43]

3.20 Baines Wilson sought disclosure of a wide range of documentation relating to the mediation. Cumbria and Lakeland took a neutral stance over disclosure but DEFRA opposed it, arguing that it might reveal generally their attitude towards claims of this kind and there are a number similar such cases confronting DEFRA. In appearing in these proceedings, DEFRA expressly declined to waive its asserted privilege and its right to confidentiality. The judge was shown the agreement to mediate but no documentation claimed to be privileged.

3.21 The Court considered the extent and force of the confidentiality provision in the mediation agreement, not a topic covered by direct authority in relation to mediation confidentiality. The main source material for the debate on this was Toulson and Phipps' textbook on confidentiality (with some passing references to *Rush & Tomkins v Granada Television*[44]). Kirkham J relied on a passage which stated:

> "Mediation and other forms of dispute resolution have assumed unprecedented importance within the court system since the Woolf reforms of civil procedure. Formal mediations are generally preceded by written mediation agreements between the parties that set out expressly the confidential and "without prejudice" nature of the process. However, even in the absence of such an express agreement, the process will be protected by the "without prejudice" rule set out above."

3.22 Kirkham J found that on the grounds of the 'without prejudice' privilege and based on contracted confidentiality as between the parties, it would be wrong to order disclosure of the mediation documents. In particular, the judge wanted mediators to be free to conduct mediations without fear that their notes might be disclosed to others.[45] Kirkham J saw this as an exception to the general rule that confidentiality is not a bar to disclosure of material to a court.[46] This lends some support to an idea occasionally expressed that mediators may themselves have privilege in their own papers that cannot, in normal circumstances, be waived by the parties.[47]

(b) Farm Assist Limited (In Liquidation) v The Secretary of State for the Environment Food and Rural Affairs (No. 2)

3.23 In the English Technology and Construction Court case *Farm Assist Ltd v The Secretary of State for the Environment Food and Rural Affairs (No.2)*[48] Ramsey J considered whether a mediator should be called as a witness at a trial at which one of the parties to a mediation sought to set aside the agreement reached at the mediation. The dispute between the parties concerned an allegation that a settlement was entered into at a mediation under economic duress.

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43 Allen 'Mediation: Protection by Privilege and Confidentiality: A Review of Cumbria Waste Management and another v Baines Wilson' (May 2008) *New Law Journal*. Available online at: www.cedr.com. On the role for mediation in the resolution of professional negligence claims see Erwin "Mediation & Professional Negligence Claims" (June 2010) 2 *The Mediators Institute of Ireland Ezine* 2.

44 [1989] AC 1280.

45 Both mediators reportedly took the view that the privilege belonged to the parties and not to them, though the second mediator said that she would normally counsel against the parties agreeing to share such matters with the court. She also drew attention to the fact that the disclosure sought was so broad as to encompass any notes made by the mediator or by parties in private mediation sessions.

46 Similarly, in *Rudd v Trossacs Investments* [2004] 72 O.R. (3d) 62 (Ont. S.C.J.) the Ontario Divisional Court upheld the confidentiality of mediations by refusing to compel a mediator to testify about communications between parties at a mediation.

47 Cornes 'Privilege and Confidentiality in Mediation' (May 2008) *Mediation: Quarterly Update*. Online article available at: www.mediatewithcornes.co.uk.

48 [2009] EWHC 1102 (TCC); [2009] B.L.R. 399 (TCC). For a discussion on this case see Carey "New guidance on evidence of mediation proceedings" (2009) 16(9) CLP 205.

3.24 In a case management conference, the parties agreed they should write jointly to the mediator in an attempt to discover whether she had retained any notes or documents from the mediation, whether she has any factual (or other) recollection of the mediation and invite her to disclose to the parties such notes or documentation she may have retained. The mediator informed the parties that, as the mediation occurred many years ago and in the intervening period she had conducted up to 50 further mediations per year, she had very little factual recollection of the mediation. Also, her file contained only administrative correspondence, the mediation agreement and copies of the Position Statements plus a small lever arch file of papers. She had no personal note on the mediation which was "unsurprising given that this was a mediation that settled on the day". She concluded by stating that: "Accordingly I genuinely believe that, even where it appropriate for me to become involved in this matter again, there is little I can do to assist either side."

3.25 Despite this response, DEFRA wanted to take a witness statement from the mediator. In further correspondence, the mediator stated that she did not believe that she could help and would not devote further time unless required by the court to do so. DEFRA then issued a witness summons on the mediator seeking her attendance at the trial. The mediator applied to have the witness summons set aside or varied under Civil Procedure Rule 34.3 (the English Rules of Court) on the basis that:

- her evidence was subject to express provisions of confidentiality and non-attendance pursuant to the Mediation Agreement signed by all parties dated 24 March 2003; and
- in any event, the evidence was confidential and/or legally privileged and/or irrelevant.

3.26 Ramsey J stated that the issue in this case was whether the settlement agreement arising from the mediation should be set aside for economic duress. He held that, "in the interests of justice", the mediator should give evidence and refused the application to set aside the witness summons as the mediator's evidence was necessary for the Court properly to determine what was said and done in the mediation.[49] He noted that "The parties have waived any without prejudice privilege in the mediation which, being their privilege, they are entitled to do."[50] Therefore, the privilege belonged only to the parties and not to the mediator.

3.27 Whilst the mediator said clearly that she has no recollection of the mediation, Ramsey J held that this did not prevent her from giving evidence.[51] In relation to the confidentiality clause in the agreement to mediate, it has held that calling the mediator to give this evidence would not be contrary to the express terms of the mediation agreement which, in this case, limited her appearance to being a witness in proceedings concerning the underlying dispute.[52] As noted by Allen:

> "What is evident from this case is that there is no suggestion that the mediator owns part of the privilege as well as the parties, and thus possesses no veto over disclosure of what happened to the judge, even if it involves what the mediator reportedly said in confidence in the expectation that it would be kept confidential."[53]

3.28 It should be noted that the underlying action settled before the judge gave judgment on this issue, so that strictly speaking his judgment may be of persuasive force only, and not binding.

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49 [2009] EWHC 1102 (TCC) at 53.

50 *Ibid.*

51 Ramsey J stating "Frequently memories are jogged and recollections come to mind when documents are shown to witnesses and they have the opportunity to focus, in context, on events some years earlier." *Ibid.*

52 Ramsey J noted that "The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced" at 44.

53 Allen "Peering behind the veil of mediation confidentiality, a new judicial move in *Malmesbury v Strutt and Parker*" (April 2008). Online article available at www.cedr.co.uk. See also Brooke "Farm Assist Ltd v DEFRA: Can a mediator be compelled to give evidence of what happened at a mediation?" (July 2009). Online article available at www.civilmediation.org.

(c) Summary

3.29 The issue of confidentiality in mediation or conciliation has yet to come before the Irish Courts. As noted by Carey, it is likely, given their persuasive authority, that the English authorities cited above, setting out the exceptions to the general principles of the 'without prejudice' rules regarding confidentiality and non-admissibility of 'without prejudice' communications, would be followed in Ireland in the absence of a distinct form of privilege for mediation.[54]

3.30 Unsurprisingly, it has been reported in the UK that most full time mediators see the need for judicial protection for mediation, and deplore the recent trend in the English courts to open up mediation in support satellite litigation.[55] As noted by the New Jersey Supreme Court in *Lehr v Affitto* "[t]he mediation process was not designed to create another layer of litigation in an already over-burdened system."[56] The Commission agrees that it is:

> "... better to have privilege in mediation regulated by legislation, with all the difficulties of drafting that entails, rather than leaving it to the common law to develop it case by case using tools rooted in rules relating to without prejudice negotiations *simpliciter* and not always appropriate to the task of creating a clear and consistent approach to mediation."[57]

3.31 Before turning to examine a distinct form of privilege for mediation and conciliation, the Commission discusses the confidentiality provision in the 2008 Directive on Mediation.

(3) Confidentiality in the 2008 EC Directive on Mediation

3.32 Article 7 of the 2008 Directive states that:

> 1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
>
> (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
>
> (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.[58]

3.33 The Commission received a number of submissions detailing some of the strengths and weaknesses of this provision. Indeed, it is important to note from the outside, that this provision is a diluted version of the original provision. In the draft text of what ultimately became the 2008 Directive, mediators were specifically placed under an absolute bar over giving evidence in relation to:

- party invitations or willingness to participate in a mediation;
- party's statements, admissions and settlement proposals made during a mediation;
- mediator proposals for settlement and any party's expression of willingness to accept it; or
- any document prepared solely for the purpose of a mediation.[59]

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54 See Carey "Is a Mediation Privilege on the Horizon?" (2007) 14(5) CLP 102For a detailed discussion on the relevant case-law on "without prejudice" rule and mediation see CP LRC 50-2009 at paragraphs 3.104 - 3.125.

55 Kallipetis "Note for ERA Conference on EU Code of Conduct for Mediators" Paper delivered in at the ERA Conference on Cross Border Mediation, Trier, Germany 15th May 2009.

56 382 N.J. Super. 376, 391, 889 A.2d 462, 472 (N.J. 2006).

57 Cornes 'Mediation Privilege and the EU Directive: An Opportunity?' (2008) 74 *Arbitration* 4.

58 Article 7 of the 2008 Directive.

3.34 The draft text went further by providing that such evidence could not be ordered by a court and if offered should be treated as inadmissible, in both proceedings related to the mediated dispute and other litigation. Such evidence could only be admitted to the extent required to implement or enforce a mediated settlement agreement; for overriding public policy reasons or where *the mediator and the parties* agreed. It also provided that otherwise inadmissible evidence would not be rendered admissible simply because it was used in a mediation.[60]

3.35 The final text of Article 7 of the 2008 Directive provides that the mediator may not veto an admission of what happened at the mediation because Article 7(1) states that "... unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence." Therefore, where parties agree, a mediator is not protected under the Directive to object to giving evidence in subsequent proceedings. This provision is in direct contrast to the position set out in the *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law 2002*, where the European Commission stated that "As a rule the third party [the mediator] should not be able to be called as a witness… within the framework of the same dispute if ADR has failed."[61]

3.36 Recital 7 of the 2008 Directive states that nothing prevents Member States from enacting stricter measures to protect the confidentiality of mediation.[62] Conway has stated: "... it is to be encouraged that Ireland adopts such stricter measures in order to fully protect the confidential nature of the process which in turn increases to maintain parties' confidence, trust and faith in the process itself."[63]

(4) Distinct Form of Privilege for Mediation & Conciliation

(a) Rationale for Mediation and Conciliation Privilege

3.37 The Commission considers that provision of a distinct form of confidentiality privilege for mediation and conciliation processes would be consistent with both the parties' fundamental expectation that mediation and conciliation processes are protected by confidentiality and with the State's desire to foster and support these process as a mechanism for resolving civil and commercial disputes other than through litigation. A distinct form of privilege for mediation and conciliation processes could also provide greater certainty in judicial interpretation because of the courts' familiarity with other privileges. Examples of categories of privilege include the absolute privileges over confidential communications made by a parishioner to a priest (sacerdotal privilege)[64] or communications with a marriage guidance counsellor.[65] The Commission notes, however, that a distinct form of privilege for mediation and conciliation could not be an absolute privilege as there would be circumstances in which the privilege could be waived and a number of necessary exceptions to the privilege.

3.38 As the Commission noted in its Consultation Paper, in *Cook v Carroll*[66] the High Court approved four criteria favoured by the leading American writer of the early 20th Century Wigmore[67] as privilege for communications arising from the confidential nature of the relationship between the communicants. According to these criteria, privilege may be established where the court is satisfied that:

1. the communication was confidential;

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59 See Allen "Peering behind the veil of mediation confidentiality, a new judicial move in *Malmesbury v Strutt and Parker*" (April 2008). Online article available at www.cedr.co.uk

60 *Ibid.*

61 *Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters* COM/2002/0196 Final at para. 82. Available at http://eurlex.europa.eu/.

62 Article 7(2) of the 2008 Directive.

63 Conway "Recent Developments in Irish Commercial Mediation: Part I" (2009) 27ILT 43.

64 *Cook v Carroll* [1945] IR 515.

65 *ER v JR* [1981] 1 IR 125.

66 [1945] IR 515.

67 Wigmore *Anglo-American System of Evidence* (3rd ed. Vol. viii Boston 1940) at paras 2380-91.

2. confidentiality is essential to the satisfactory maintenance of the relationship;
3. the relationship is one the community deems necessary to foster; and
4. the likely harm caused by mandatory disclosure outweighs the benefit to be gained in the instant case by it.[68]

3.39 In *Rudd v Trossacs Investments*[69] the Ontario Divisional Court upheld the confidentiality of mediations by refusing to compel a mediator to testify about communications between parties at a mediation. In reaching its decision the Court applied the Wigmore criteria in determining that communications made at a mediation are privileged. In this case, the plaintiff's lawyer had brought a motion seeking an order to compel the mediator to testify about the communications at the mediation. Lederman J ordered that the mediator be examined as a witness on a pending motion. The Divisional Court disagreed with the motion judge and set aside the order. Swinton J, writing on behalf of the court, found that the motion judge failed to conduct an analysis based on the *Wigmore* criteria for privilege. Rather, he focussed solely on without prejudice settlement privilege. Applying the *Wigmore* criteria, namely that the communications must originate in a confidence that they will not be disclosed, confidentiality must be essential to the maintenance of the relationship in which the communications arose, the relationship must be one which ought to be "sedulously fostered" and the injury caused by the disclosure of the communications must be greater than the benefit gained, the Divisional Court found that the communications at the mediation were, in fact, protected by privilege.[70]

3.40 As noted in the Consultation Paper, counsel for the defendant in the English High Court case *Brown v Rice & Patel*,[71] argued for the existence of a "mediation privilege", distinct from the "without prejudice" rule, under which (at least) a mediator could not be required to appear as a witness or produce documents and under which the parties could not waive the mediator's entitlement not to give evidence in respect of the contents of mediation. It was argued that this should build on a category of privilege in matrimonial cases, protecting confidential communications made with a view to matrimonial conciliation. The Court in *Brown* noted that the possible existence and desirability of a distinct privilege attaching to the entire mediation process was dealt with in Brown and Marriott *ADR Principles and Practice*[72] and stated that "It may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts but that is not something which arises [in this case]."[73] Indeed, proponents for introducing a distinct form of privilege suggest that:

> "[I]f participants cannot rely on the confidential treatment of everything that transpires during [mediation], then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, noncommittal manner more suitable to poker players in a high stakes game than to adversaries attempting to arrive at a just solution of a civil dispute."[74]

3.41 The Commission considers that mediation and conciliation communications should be subject to a distinct form of private privilege. The rationale for introducing a mediation and conciliation privilege can be found by examining the rationale behind the principle of legal privilege. The latter privilege "assists and enhances the administration of justice by facilitating the representation of clients by legal advisers…. thereby inducing the client to retain the solicitor and seek his advice and encourage(s)… full and frank

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68 Healy *Irish Laws of Evidence* (Round Hall 2004) at 396.

69 (2004), 72 O.R. (3d) 62 (Ont. S.C.J.).

70 Hayward "Mediation Confidentiality Preserved: Rudd v. Trossacs Investments" (May 2006). Online article available at www.thelitigator.ca.

71 [2007] EWHC 625 (Ch). See Carey "Is a Mediation Privilege on the Horizon?" (2007) 14(5) CLP 102; and Dowling-Hussey "Mediation Privilege Revisited" (2009) 16(10) CLP 216.

72 Brown and Marriott *ADR Principles & Practice* (Sweet & Maxwell, London, 1999), paras 22-079 to 22-097.

73 [2007] EWHC 625 (Ch).

74 *Lake Utopia Paper, Ltd. v. Connelly Containers, Inc.,* 608 F.2d 928, 930 (2d Cir. 1979).

disclosure of the relevant circumstances to the solicitor."[75] It can be argued that a mediation and conciliation privilege will also assist and enhance the administration of justice by facilitating full and frank disclosure and communication between disputing parties in an attempt to resolve their dispute with the assistance of a neutral and independent third party. The Commission now turns to outline the proposed mediation and conciliation privilege.

3.42 *The Commission recommends that confidentiality in mediation and conciliation should be subject to a distinct form of privilege.*

(5) Mediation and Conciliation Communications

3.43 The Commission considers it important, for the purposes of a statutory mediation and conciliation privilege, to determine what is meant by a mediation and conciliation communication. The UNICITRAL Model Law on International Conciliation sets out the following forms of communications which are protected under Article 10 of the Law:

(a) an invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;

(b) views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute;

(c) statements or admissions made by a party in the course of the conciliation proceedings;

(d) proposals made by the conciliator;

(e) the fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator; and

(f) a document prepared solely for purposes of the conciliation proceedings.[76]

3.44 Under the Trinidad and Tobago *Mediation Act 2004*, 'confidential information' includes:

(a) oral or written, communications, made in the mediation process, including any memoranda, notes or work-product of the mediator, mediation party or non-party participants;

(b) an oral or written statement made or which occurs during mediation or for purposes of considering, conducting, participating, initiating, continuing or reconvening mediation or retaining a mediator; and

(c) any other information expressly intended by the source not to be disclosed, or obtained under circumstances that would create a reasonable expectation on behalf of the source that the information shall not be disclosed.[77]

3.45 For the purposes of a distinct form of privilege for mediation and conciliation communications, the Commission recommends that mediation or conciliation communications include statements and proposals that are made orally, through conduct, or in writing or other recorded activity.[78] The Commission further recommends that communications to initiate mediation or conciliation and other non-session communications arising out of or in connection with a mediation or conciliation are considered mediation and conciliation communications for the purposes of the privilege.

3.46 *The Commission recommends that mediation or conciliation communications include statements and proposals that are made orally, through conduct, or in writing or other recorded activity by a mediator, conciliator, party or non-party participant.*

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[75] *Grant v Downs* (1976) 135 CLR 674.

[76] UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002).

[77] Article 10 of the *Republic of Trinidad and Tobago Mediation Act 2004*. SI No. 8 of 2004.

[78] This would include mediator or conciliator notes, e-mails, voicemails, computer databases and tape recordings.

3.47 *The Commission recommends that mediation or conciliation communications include communications to initiate mediation or conciliation and other non-session communications arising out of or in connection with a mediation or conciliation.*

(6) Holders of the Privilege

3.48 As the Commission previously noted, one of the criticisms of Article 7 of the 2008 Directive is that a mediator can be compelled to give evidence if all the parties involved in the mediation agree. A similar position was set out in the Explanatory Memorandum to the Council of Europe's 1998 Recommendation No. R (98) 1 on family mediation, which states that any mediation privilege belongs to the parties jointly, not to the mediator or the process. It can be waived by the parties and the mediator could be compelled to testify in legal proceedings.[79]

3.49 The Commission considers that mediators and conciliators should be afforded statutory protection against being called as witnesses in subsequent legal proceedings because "By compelling disclosure of mediation communications, a mediator could often be placed in the position of 'tie-breaker' in the dispute."[80] The Commission favours the provisions set out section 4(b) of the US *Uniform Mediation Act* ('UMA') which states that in a mediation proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

3.50 Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.[81] The UMA effectively makes the mediator's involvement as a witness in subsequent proceedings entirely a matter for the mediator's discretion.[82] This position somewhat reflects Article 10 of the UNICITRAL Model Law on International Conciliation which provides that "A party to the conciliation proceedings, the conciliator and any third person, including those involved in the administration of the conciliation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence."[83]

3.51 The Commission considers that mediators and conciliators should be afforded protection in the processes and that parties should not be in a position to compel a mediator or conciliator as a witness in subsequent proceedings without the mediator's or conciliator's consent.[84] The Commission recommends that all party and non-party participants in a mediation or conciliation are holders of the privilege. This would clearly include mediators and conciliators. On the issue of non-party participants, the Commission recommends that parties may agree that a non-party participant be allowed to participate in a mediation

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79 Explanatory Memorandum to Recommendation No. R (98) *Family Mediation in Europe* at 40 and 41 and 42.

80 Sharp "Lawyer and Mediation Confidentiality: Navigating the Complex and Confusing Waters" (2008) 7 Appalachian J L 179.

81 Drafted by the National Conference of Commissioners of Uniform State Laws and approved by it and recommended for enactment in all the states, August 10–17, 2001 and amended August 1–7, 2003 Available at *http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm*. See also Tomeo "Be Careful What You Say: One Courts Look at Confidentiality under the Uniform Mediation Act" (2007) 31 Seton Hall Legis J 65.

82 However, this has been criticised by a number of commentators who point out that it is often going to be the mediator who has the best (sometimes the only) evidence on enforcement issues.

83 *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* (United Nations 2002).

84 Unless one of the exceptions to the privilege apply. See paragraph 3.57 below.

or conciliation. The Commission recommends that non-party participants would include experts, lawyers, friends, support persons, potential parties, and others who participate in the mediation or conciliation.[85]

3.52 *The Commission recommends that :*

- *a party involved in mediation or conciliation may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication;*
- *a mediator or conciliator may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication; and*
- *a non-party participant may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication of the non-party participant.*

3.53 *The Commission recommends that parties may agree that a non-party participant be allowed to participate in a mediation or conciliation.*

3.54 *The Commission recommends that a non-party participant, in the context of a mediation or conciliation, includes a qualified legal practitioner, an expert witness, a potential party or friend of a party or potential party.*

(7) Waiver of the Privilege

3.55 It is evident from the Commission's examination of case law in relation to confidentiality in mediation and conciliation in England and Wales, that a re-occurring catalyst for satellite litigation is when one or both parties seek to waive the confidentiality protection. On the issue of waiver, the Commission considers that, for the purposes of giving evidence in any subsequent civil litigation, and, or alternatively, any recommenced civil proceedings out of which the mediation and conciliation arose, the confidentiality privilege may be waived under the following circumstances. Where a party wishes to waive the confidentiality privilege, it must be expressly waived by all parties to the mediation or conciliation. In the case of the privilege of a mediator or conciliator, the waiver must be expressly waived by the mediator or conciliator. On the case of the privilege of a non-party participant, the waiver must be expressly waived by the non-party participant.

3.56 *The Commission recommends that the confidentiality privilege may be waived during any subsequent civil litigation, and, or alternatively, any recommenced civil proceedings out of which the mediation and conciliation arose if:*

- *In the case of the privilege of a party, it is expressly waived by all parties to the mediation or conciliation;*
- *In the case of the privilege of a mediator or conciliator, it is expressly waived by the mediator or conciliator; and*
- *In the case of the privilege of a non-party participant, it is expressly waived by the non-party participant.*

(8) Exceptions to the Privilege

3.57 In its 1994 *Consultation Paper on Family Courts* the Commission stated that:

> "It is possible that the courts will extend privilege to statements made in the course of mediation in other contexts. There is a strong public interest in fostering mediation. However, it is doubtful whether such a privilege could be regarded as absolute. There may, for example, be cases where the protection of a child from a serious threat of injury would justify a court in setting aside the privilege."[86]

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85 District Court of Almelo, 29 September 2004, LJN AT4104, case number 61101 HA ZA 03/910 The right of the mediator to claim confidentiality applied only in respect of what the parties had told him during the conclusion of a mediation agreement and not in respect of what he had been told by third parties present at the mediation.

86 Law Reform Commission *Consultation Paper on the Family Courts* (LRC CP March 1994) at 56.

3.58 In its subsequent 1996 *Report on Family Courts* the Commission recommended that "information arising during the course of mediation should, subject to a number of exceptions, be inadmissible as evidence in any subsequent court proceedings. Statutory provisions to this effect should be enacted."[87] According to Kallipetis:

> "There are obvious situations where in a particular case the wider concept of justice would justify removing a party's reliance on privilege... surely the balance of public interest should be in favour of preserving a process which is widely recognised as being more beneficial to disputants than litigation rather than providing a remedy for an individual case."[88]

3.59 Article 7(1) of the 2008 EC Directive on Mediation sets out the following exceptions to the confidentiality of mediation:

> (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
>
> (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.[89]

3.60 The Commission considers that there are circumstances under which a mediation or conciliation privilege should be overridden and now turns to examine such exceptions.

(i) Implement or enforce agreement reached at mediation or conciliation

3.61 As the Commission noted in the Consultation Paper and, as set out in Article 7(1)(b) of the 2008 Directive, if there is a dispute as to whether or not there has been a settlement above, it may be necessary to look to the detail of the mediation or conciliation to determine the terms of that settlement.[90] This exception is also set out in Article 9 of the UNICITRAL Model Law on International Conciliation which states that "Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement."[91]

(ii) Prevent physical or psychological injury or ill-health to a person

3.62 As noted above, the 2008 EC Directive provides an exception for the protection of confidentiality "to prevent harm to the physical or psychological integrity of a person."[92] Similarly, under the UMA where a party issues a threat to impose physical harm to a person during a mediation section 6(a)(3) of the Act states that there is no privilege for a mediation communication that is "a threat or

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87 Law Reform Commission *Report on Family Courts* (LRC 52-1996) at 99.

88 Kallipetis "Note for ERA Conference on EU Code of Conduct for Mediators" Paper delivered in ERA Conference on Cross-Border Mediation Trier, Germany, 15th May 2009.

89 Article 7 of the 2008 Directive. The *"Feasibility Study into Cross Border Mediation in Family Matters"* (Hague Conference of Private International Law Permanent Bureau, 2007) also sets out the general disclosure exceptions to confidentiality as follows: where all parties agree that information can be shared; where it is required by law; where it is required for the purposes of enforcing an agreement; where it is required for the purposes of implementing an agreement; where it is required for the mediator to be able to respond to a claim of misconduct; and where it is necessary to prevent harm or abuse at 2.5.2.

90 See LRC CP 50-2008 at 3.113. See also *Tomlin v Standard Telephones & Cables* [1969] 3 All ER 201; and Allen "Does mediation need further privilege? Thoughts on two recent cases" 157 NLJ 1342. Available at www.cedr.co.uk. See LRC CP 50-2008 at paragraphs 3.113- 3.166.

91 Article 9 of the UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Section 6 of the UMA also states that there is no privilege for a mediation communication that is "in an agreement evidenced by a record signed by all parties to the agreement".

92 Article 7(1)(a) of the 2008 Directive.

statement of a plan to inflict bodily injury or commit a crime of violence". The mediator has a discretion whether to breach privilege and is himself expected to gauge the seriousness of the threat.

(iii) Disclosure required by law

3.63 A mediation or conciliation communication is not privileged when disclosure is required by law. Mediators and conciliators should be familiar with the legal requirements in relation to mandatory disclosure. In particular, all mediators and conciliators should be fully familiar with the reporting requirements which set out in the *Children First: national guidelines for the protection and welfare of children*.[93] Codes of ethics for mediators and conciliators should set out clear guidelines in relation to the issues of voluntary and mandatory disclosures stemming from mediation or conciliation communications. There needs to be clarity on the responsibilities of mediators and conciliators on this issue.

3.64 Furthermore, the Commission notes that there should be no privilege for a mediation or conciliation communication that is intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity. The Commission considers that this exception should not cover mediation or conciliation communications constituting admissions of past crimes, or past potential crimes, which remain privileged unless required by law. Furthermore, it should be noted that Finlay CJ in *Murphy v Kirwan*[94] stated that "... the essence of the matter is that professional privilege cannot and must not be applied so as to be injurious to the interests of justice and to those in the administration of justice where persons have been guilty of conduct of moral turpitude or of dishonest conduct, even though it may not be fraud."[95]

(iv) To prove or disprove a claim or complaint of professional misconduct or negligence filed against a mediator or conciliator

3.65 The Commission is aware that many mediators and conciliators exclude negligence in their agreement to mediate/conciliate and exclude the ability of the parties to issue proceedings against them. Section 50 of the Mediators Institute of Ireland's Code of Ethics and Practice states that a:

> "Mediator may have to breach confidentiality without the consent of any or all of the Clients and / or Parties in the following circumstances .. To enable the Mediator to defend themselves from a complaint, disciplinary process, negligence or other proceeding against them arising from the mediation."

3.66 Similarly, Section 6(a)(5) of the UMA states that there is no privilege for a mediation communication that is "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator." This is an important provision as the question arises as to whether a party may provide evidence of professional misconduct or negligence occurring during a mediation or conciliation. The failure to provide an exception for such evidence would mean that a mediator or conciliator could act unethically or in violation of standards without concern that evidence of the misconduct would later be admissible in a proceeding brought for recourse.

3.67 In a 2005 case in the District Court of Arnhem (Germany), the matter in dispute was the quality of the work performed professionally by the mediator, since it was argued that the mediator had made serious errors. [96] The defence claimed that the duty of confidentiality prevented this aspect of the dispute from being submitted to the courts. The District Court held that the duty of confidentiality contained in the mediation agreement between the parties (standard mediation agreement) did not apply in a professional liability proceedings.

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[93] *Children First: national guidelines for the protection and welfare of children*. (Office for the Minister of Children and Youth Affairs, Department of Health and Children, July 2010). These guidelines were first introduced in 1999 and were revised in July 2010.

[94] [1994] I.R. 293. This case involved a lawyer-client privilege. See Noctor "Legal Professional Privilege & The Public Safety Exception" (1999) 17 ILT 230.

[95] *Ibid.* at 300.

[96] 25 May 2005 LJN AU0366, case number 122055 / HA ZA 04-2431.

3.68 The Commission considers it important that in ensuring the quality of mediation and conciliation processes, parties should be in a position to air grievances against a mediator or conciliator. However, the mediator or conciliator must be in a position to defend themselves when such allegations are made. Therefore, a mediation or conciliation communication may not be privileged in instances where it is required to prove or disprove a claim or complaint of professional misconduct or negligence by a mediator or conciliator. Furthermore, the Commission considers that this exception would ensure that a mediator or conciliator could not hide behind the confidentiality privilege to render a disciplinary investigation into their conduct ineffective.

(b) Conclusion

3.69 The Commission considers that a distinct form of privilege for mediation and conciliation cannot be absolute. As discussed above, there are a number of circumstances when a mediation or conciliation communication should not be protected. The Commission recommends that the confidentiality privilege does not apply - where disclosure of the content of the agreement resulting from mediation or conciliation is necessary in order to implement or enforce that agreement; where disclosure is necessary to prevent physical or psychological injury or ill health to a person; where disclosure is required by law; where the mediation or conciliation communication is used to attempt to commit a crime, or to commit a crime, or to conceal a crime; or where disclosure is necessary to prove or disprove a claim or complaint of professional misconduct or negligence filed against a mediator or conciliator. Furthermore, the Commission recommends that evidence introduced into it used in a mediation or conciliation that is otherwise admissible or subject to discovery in civil proceedings outside of a mediation or conciliation shall not be or become inadmissible because it was introduced into or used in a mediation or conciliation.

3.70 *The Commission recommends that the confidentiality privilege does not apply - where disclosure of the content of the agreement resulting from mediation or conciliation is necessary in order to implement or enforce that agreement; where disclosure is necessary to prevent physical or psychological injury or ill health to a person; where disclosure is required by law; where the mediation or conciliation communication is used to attempt to commit a crime, or to commit a crime, or to conceal a crime; or where disclosure is necessary to prove or disprove a claim or complaint of professional misconduct or negligence filed against a mediator or conciliator.*

3.71 *The Commission recommends that evidence introduced into it used in a mediation or conciliation that is otherwise admissible or subject to discovery in civil proceedings outside of a mediation or conciliation shall not be or become inadmissible because it was introduced into or used in a mediation or conciliation.*

(9) Party expectations of confidentiality outside of proceedings

3.72 The Commission notes that the UMA rightly recognises a distinction between disclosure of mediation communications in a subsequent civil litigation and the disclosure of mediation communications where there is no subsequent civil litigation. This distinction is set out because parties may reasonably expect that they can discuss their mediation or conciliation experience with spouses, family members and others without the risk of civil liability that might accompany an affirmative statutory duty prohibiting such disclosures. Such disclosures often have salutary effects-such as bringing closure on issues of conflict and educating others about the benefits of mediation or the underlying causes of a dispute. In contrast, parties may prefer absolute non-disclosure to any third party, in other situations, parties may wish to permit, even encourage, disclosures to family members, business associates, even the media. The Commission considers that these decisions are best left to the good judgment of the parties, to decide what is appropriate under the unique facts and circumstances of their disputes.

(10) Conclusion

3.73 The Commission concurs with the view that "Confidentiality is essential to the mediation process; without it parties would not be willing to make the kind of concessions and admissions that lead to settlement."[97] Public confidence in, and the voluntary use of, mediation and conciliation can be expected to expand if people have confidence that the mediator or conciliator will not take sides or

[97] Johnson "Confidentiality in Mediation" (2002) 30 Fla St U L Rev 489.

disclose their statements, particularly in the context of other investigations or any subsequent civil litigation. Indeed, the public confidence rationale has been extended in the United States to permit the mediator to object to testifying, so that the mediator will not be viewed as biased in future mediation sessions that involve comparable parties.[98] The Commission recognises that all the issues stemming from confidentiality and disclosures in a mediation and conciliation cannot be addressed fully in statutory provision. Furthermore, the Commission strongly suggests that codes of ethics for mediators and conciliators sure ensure clarity on these issues to supplement the statutory provisions, especially in relation to disclosures which mediators and conciliators are required to make by law.

E Self-Determination

(1) Consultation Paper

3.74 As the Commission noted in the Consultation Paper, mediation and conciliation processes are based on the underlying concept of party autonomy which permits the parties to retain virtually all of the power over the resolution and outcome of their dispute.[99] This principle is known as self-determination and it is purported that:

> "... it offers procedural justice protections, providing parties with fairness and dignity.... and parties' perceptions of procedural justice are enhanced when they actively participate in the process and voluntarily consent to an outcome that is free of any coercive influences."[100]

3.75 In the Consultation Paper, the Commission provisionally recommended that parties to mediation or conciliation should be fully informed about the process by the neutral and independent mediator or conciliator before they consent to participate in it, that their continued participation in the process should be voluntary, and that they understand and consent to the outcomes reached in the process.[101] The Commission also provisionally recommended that parties should be encouraged to seek independent advice, legal or otherwise, before signing an agreement entered into at conciliation or mediation.[102]

3.76 The 2008 EC Directive also explicitly provides for the principle of self-determination where it states that "The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time."[103] Similarly, the UNICITRAL Model Law on International Conciliation addresses the principle of self determination and the sets out that:

> 1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the conciliation is to be conducted.
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> 2. Failing agreement on the manner in which the conciliation is to be conducted, the conciliator may conduct the conciliation proceedings in the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.[104]

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98 *NLRB v. Macaluso*, 618 F.2d 51 (9th Cir. 1980) (public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator's testimony).

99 LRC CP 50-2008 at 3.141.

100 Nolan-Haley "Self-determination in International Mediation: Some Preliminary Reflections" (2006) 7 Cardozo J Conflict Resol 277 at 278. See also Nolan-Haley "Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking" (1999) 74 Notre Dame L Rev 775.

101 LRC CP 50-2008 at 3.152.

102 LRC CP 50-2008 at 3.153.

103 Recital 13 of the 2008 Directive.

104 *UNICITRAL Model Law on International Conciliation* at Article 6.1 and 6.2.

3.77 The Commission now turns to examine this principle in more detail and, in particular, the issues of capacity and informed consent in a mediation or conciliation as these issues are intrinsically linked to the principle of self-determination.

(2) Capacity to Participate

3.78 Party capacity to participate in a mediation or conciliation is an aspect of self-determination that extends to a continuum of potential obstacles to full participation by a broad range of persons. Mental illness, domestic violence, abuse, duress, fraud, and stress associated with conflict may impact a party's ability to use the process effectively and to make informed decisions which may have serious legal and personal consequences for them. The Commission considers it important to note from the outset that, the issue of capacity is relevant to all mediations, and is not just an issue for elder mediations, although it may be a heightened issue in that setting.[105]

3.79 The Commission considers that the determination of a party's capacity, legal or mental, to participate in a mediation or conciliation should not be determined by a legal or medical professional outside of the process. It is the responsibility of the mediator or conciliator to determine the capacity of the party to participate at all stages during the process. It should be noted that under the *Scheme of Mental Capacity Bill 2008* "it shall be presumed unless the contrary is established that a person has capacity."[106] Therefore, the Commission suggests that mediators and conciliators should presume that all parties have the capacity to participate in the mediation or conciliation process with the appropriate accommodation.

3.80 The Commission considers that if, at any point in the mediation or conciliation process, a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating actively in the process, the mediator or conciliator should explore with the party the circumstances and potential accommodations, modifications, or adjustments that would enable the party's participation. If no accommodation, modification, or adjustment can reasonably be provided that enables the person's participation to at a reasonable level, the mediator or conciliator should postpone or terminate the session. Accommodations might include changing the place or time of the session, including a support person, keeping the sessions short, or using techniques and strategies helpful for communication with persons with memory loss or confusion.[107] As set out in the 2008 Scheme of a Bill "a person shall not be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success."[108]

3.81 The capacity to make a decision is defined in Head 2(1) of the 2008 Scheme of a Bill as "the ability to understand the nature and consequences of *a decision* in the context of available choices *at the time* the decision is to be made". This reflects the international move towards a functional approach to capacity.[109] In its 2006 Report on *Vulnerable Adults and the Law* the Commission describes the functional approach as involving an "issue-specific and time-specific assessment of a person's decision making ability."[110] It recognises, for example, that a person may have the capacity to decide their living arrangements but not have the capacity to enter into a financial arrangement. It is important to note that under the 2008 Scheme of a Bill that "a person is not to be treated as unable to make a decision merely because he or she makes an unwise decision."[111]

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105 See Chapter 6 below for a discussion on elder mediation.

106 Head 1(a) of the 2008 Scheme of a Bill. The Commission understands that a *Mental Capacity Bill*, building on the 2008 Scheme of a Bill, may be published by the end of 2010 or in early 2011. See also Morrissey "Advance Directives in Mental Health Care: Hearing the Voice of the Mentally Ill" (2010) 16(1) MLJI 21.

107 Wood 'Addressing Capacity: What is the Role of the Mediator?' (July 2003). Online article available at: http://www.mediate.com/articles/woodE1.cfm.

108 Head 1(c) of the 2008 Scheme of a Bill.

109 This is particularly evident from Head 5 and Head 6 of the 2008 Scheme of a Bill.

110 Law Reform Commission *Report on Vulnerable Adults and the Law* (LRC 83- 2006) at 46.

111 Head1(d) of the 2008 Scheme of a Bill. Under the 2008 Scheme of a Bill a person lacks the capacity to make a decision if he or she is unable: (a) to understand the information relevant to the decision; (b) to retain that

3.82 The Commission considers it is important to note that there is a duty on mediators and conciliators to continually assess for capacity at every stage where a party must make a decision during the process. For example, does the party have the capacity to understand and sign the agreement to mediate or conciliate? Does the party have the capacity to understand the process? Does the party have the capacity to engage in negotiations with the other side? Assessing the capacity of a party must occur throughout the mediation and conciliation process. The Commission concurs with the view that:

> "The assessment of mediation readiness, or mediation capacity - and the subsequent planning of process adaptations or whatever other methods will ensure such capacity - is an ethical obligation of the mediator. This needs to be carried out through respectful screening processes."[112]

3.83 Therefore, the Commission considers that all mediators and conciliators must have a broad understanding of the concept of capacity and have appropriate training in screening and assessing capacity.[113] Furthermore, the Commission recommends that in determining the capacity of parties in a mediation or conciliation, the guiding principles set out in the *Scheme of Mental Capacity Bill 2008* should be followed.[114]

3.84 *The Commission recommends that a mediator or conciliator shall ensure, at all stages in the mediation or conciliation process, that a party has the capacity to engage in the process by reference*

(a) In the case of a natural person, to the test of capacity in the Scheme of the Mental Capacity Bill 2008; and

(b) In the case of any other person, to whether that person (whether unincorporated or incorporated) is acting within their powers.

(3) Informed Consent

3.85 In its Consultation Paper, the Commission provisionally recommended that parties to mediation or conciliation should be fully informed about the process by the neutral and independent mediator or conciliator before they consent to participate in it, that their continued participation in the process should be voluntary, and that they understand and consent to the outcomes reached in the process.[115] The issue of informed consent is intrinsically linked with the issue of party capacity and the principle of self-determination. As noted in the Consultation Paper "... the principle of informed consent provides the structural framework through which this value [of self-determination] is measured in mediation."[116]

3.86 The Commission considers it extremely important that parties in a mediation or conciliation fully understand and consent to the process, the outcomes of the process, and that the implications of enforceability and confidentiality should be explained to the parties prior to their engagement in the process. It also agrees with the view that:

> "Consent theoretically guards against coercive behaviour by third-party facilitators and honors party participation. Apart from its fairness, justice, and human dignity values, consent matters a

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information; (c) to use or weigh that information as part of the process of making the decision; or (d) to communicate his or her decision (whether by talking, using sign language or any other means) or, if the decision requires the act of a third party to be implemented, to communicate by any means with that third party.

112 Hedeen "Ensuring Self-Determination through Mediation Readiness: Ethical Considerations" (2003). Online article available at: http://www.mediate.com/articles/hedeenT1.cfm.

113 See also Chapter 11 below on the issue of training for mediators and conciliators.

114 *A Mental Capacity Bill* is expected to be published in the near future (see Government Legislation Programme, September 2010).

115 LRC CP 50-2008 at paragraph 3.152.

116 Nolan-Haley "Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking" (1999) 74 Notre Dame L Rev 775 at 789.

great deal in mediation [and conciliation] because of its instrumental value. Consent is linked to sustainability – it implies a commitment to honor one's promise."[117]

3.87 Indeed, the 2004 European Code of Conduct for Mediators provides that:

> "The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it. The mediator shall in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including in particular any applicable provisions relating to obligations of confidentiality on the mediator and on the parties." [118]

3.88 The responsibility for ensuring that the principle of self-determination is protected and that informed consent is given by the parties, both at the outset of the process and throughout the process, rests with the mediator or conciliator and, if present, the parties' legal representatives involved in the process.

3.89 *The Commission recommends that parties involved in a mediation or conciliation should be fully informed by the mediator or conciliator:*

(a) about the process, that is, mediation or conciliation as the case may be, before they agree to participate in it;

(b) that their continued participation in the process is voluntary; and

(c) that they understand and consent to any agreed outcomes reached in the process.

(4) Seeking Independent Advice During a Mediation or Conciliation

3.90 In the Consultation Paper, the Commission provisionally recommended that parties should be encouraged to seek independent advice, legal or otherwise, before signing an agreement entered into at conciliation or mediation.[119] As noted in the European Commission's 2002 Green Paper on ADR:

> "... the parties' agreement is the essential and, from a certain standpoint, the most sensitive stage of the procedure.' Indeed, care must be taken to ensure that the agreement concluded is genuinely an agreement… It would therefore appear that there is a need for a period of reflection before the signing or a period of retraction after the signing of the agreement."[120]

3.91 This reflects the Council of Europe's 2002 Recommendation on mediation in civil matters which recommended that "Mediation processes should ensure that the parties be given sufficient time to consider the issues at stake and any other possible settlement of the dispute."[121] Article 4 of the EU Commission's Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes states that:

> "The parties should have access to the procedure without being obliged to use a legal representative. Nonetheless the parties should not be prevented from being represented or assisted by a third party at any or all stages of the procedure."[122]

3.92 The Commission agrees with this point and considers that parties should be encouraged to seek independent advice, legal or otherwise, before signing an agreement entered into at conciliation or

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117 Nolan-Haley "Mediation Exceptionality" (2010) 78 Fordham L. Rev. 1247 at 1251.

118 2004 European Code of Conduct for Mediators 1.1.

119 LRC CP 50-2008 at paragraph 3.153.

120 *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final. Available at http://eurlex.europa.eu/.

121 Council of Europe, Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters.

122 Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes 2001/210/EC C4.

mediation.[123] The Commission considers that there is a fundamental distinction between a mediator or conciliator providing legal information to parties and a mediator or conciliator providing legal advice to parties. The Council of Europe's 1998 Recommendation 98(1) 1 on family mediation states that "the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person."[124] Information-giving involves maintaining a relationship of impartiality with the parties. Information should be given as a resource without any attempt to recommend how it should be acted upon.[125]

3.93 Furthermore, the Commission considers that it is a decision for the party to determine whether they will have advisors present during the mediation or conciliation. A mediator or conciliator should not be permitted to restrict an advisor from being present during a mediation or conciliation.[126] Other jurisdictions have legislated to this effect. For example, section 10 of the UMA provides that "An attorney or other individual designated by a party may accompany the party to and participate in a mediation."

3.94 It is important to note that, regardless of whether a legal or other adviser is present, the parties remain in control of the process. Indeed, it has been suggested that in other jurisdictions there are concerns about the conduct of some members of the legal profession in ADR processes, particularly in mediation. Some lawyers may be happy to exclude or limit the parties' direct participation in the process, and may be more focused on the legal risks involved than facilitating a resolution. It seems likely that this behaviour reflects an adversarial culture and a lack of understanding of ADR. The Commission considers that where advisers are present at a mediation or conciliation, the parties' right to self-determination must not be diminished by the involvement of the advisors in the process. It is important that all parties and non-party participants understand their role within the process.

3.95 *The Commission recommends that parties may be encouraged by a mediator or conciliator to seek independent advice, legal or otherwise, before signing an agreement entered into during a mediation or conciliation.*

(5) Conclusion

3.96 Litigation effectively delegates power and control of the resolution of the dispute to a third party and the parties involved do not retain full control over the dispute. Some litigating parties become relatively passive, disempowered and often disillusioned by the entire process.[127] The Commission emphasises, of course, that there are many cases in which parties to a dispute will, for a multitude of personal and legal reasons, wish to hand over control of the dispute to an arbitrator or a court. In contrast, mediation and conciliation, through the principles of self-determination and party autonomy, allow the parties to retain full control over their dispute. Thus, these ADR processes, unlike litigation, are said to empower citizens to determine the outcome to their own dispute.

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123 The Boston Bar Association has expressed doubts about the ability of a lawyer to review an agreement effectively when that lawyer did not participate in the give and take of negotiation. Boston Bar Ass'n, Op. 78-1 (1979).

124 Council of Europe, Recommendation 98(1) 1 of the Committee of Ministers to Member States on Family Mediation.

125 Explanatory Memorandum to Recommendation No. R (98) 1 at 46 and 47.

126 See Stulberg, *Fairness and Mediation*, 13 Ohio St. J. on Disp. Resol. 909, 936-944 (1998); McEwen, Rogers, and Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317 (1995). In the United States, some statutes permit mediators to exclude lawyers from mediation sessions, particularly in family mediation sessions. The Commission does not agree with this approach. See Cal. Fam. Code § 3182.

127 LRC CP 50-2008 at 3.140.

F Efficiency

3.97 In the Consultation Paper, the Commission examined the cost and time efficiencies associated with mediation and conciliation[128] and provisionally recommended that any bodies responsible for providing ADR processes, in particular mediation and conciliation, should periodically review the procedures involved to ensure disputes are being dealt with expeditiously and appropriately.[129]

3.98 In its the Consultation Paper, the Commission stated that while neither mediation nor conciliation can be viewed as a simple solution to the inevitable delays and costs involved in litigation, they may provide many parties with an efficient mechanism for the resolution of disputes and access to justice.[130] As noted in 2009 by the Minister for Justice and Law Reform "Mediation [and conciliation] always has the potential to save on court time and legal costs and that is why rules of court, for example, continue to be developed to facilitate adjournment of proceedings in our courts to permit mediation."[131] Similarly, the 2008 EC Directive states that mediation and conciliation can provide cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties.[132] However, the Commission agrees with the observation made in the Explanatory Memorandum to the Council of Europe's Recommendation No. R (98) 1 on family mediation that:

> "The reduction of costs should not be considered to be the principal rationale for promoting mediation as an alternative dispute resolution process. Rather, the reduction of costs should be seen as an important benefit when it is achieved."[133]

3.99 The Commission now turns to examine the principle of efficiency in more detail, both the cost efficiency and time efficiency afforded by these processes.

(1) Costs of Mediation or Conciliation

3.100 As noted in the 2010 Jackson *Final Report of the Review of Civil Litigation Costs in England and Wales* "Mediation is not, of course, a universal panacea. The process can be expensive and can on occasions result in failure."[134] Mediation and conciliation do not come free of charge and, as the Commission noted in the Consultation Paper, it is important to recognise that the potential benefits of mediation and conciliation noted must be balanced against the reality that mediation and conciliation can also be seen as an additional layer on civil litigation where it does not lead to a settlement.[135] The Commission also accepts that: "There is truth to this assertion in cases where mediation is undertaken for improper strategic purposes, rather than with the intention of entering into good faith bargaining."[136]

3.101 Therefore, it is important that parties to a mediation and conciliation are fully informed of the costs involved in participating in these processes at the outset of the processes. This will also assist in protecting the principle of self-determination and party autonomy. This issue was recognised in the 2004 EU European Code of Conduct for Mediators:

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128 See LRC CP 50-2008 at 3.157-3.176.

129 LRC CP 50-2008 at 3.176.

130 LR CP 50-2008 at paragraph 3.175

131 Speech by Mr Dermot Ahern, T.D., Minister for Justice and Law Reform at the Law Reform Commission's Annual Conference *'Reforming the Law on Personal Debt'*, 18th November, 2009. Available at: www.justice.ie

132 Recital 6 of the 2008 Directive.

133 Council of Europe, Explanatory Memorandum to Recommendation No. R (98) 1 at 8.

134 Lord Justice Jackson, *Review of Civil Litigation Costs Final Report* (The Stationary Office, January 2010).Chapter 36 at 361.

135 LRC CP 50- 2008 at paragraph 3.166

136 Speech delivered by the Honourable Warren K. Winkler Chief Justice of Ontario "Access to Justice, Mediation: Panacea or Pariah?" (2007). Available at http://www.ontariocourts.on.ca/coa/en/ps/speeches/access.htm.

"Where not already provided, the mediator must always supply the parties with complete information on the mode of remuneration which he intends to apply. He/she shall not accept a mediation before the principles of his/her remuneration have been accepted by all parties concerned."[137]

3.102 The Hague Conference's 2007 *Feasibility Study on Cross-Border Mediation in Family Matters*[138] also states that, generally, mediators are required to inform parties at an early stage in discussion about the fees and costs associated with the mediation. It is often recommended that such information is put in writing before the mediation begins. Furthermore, in most codes of conduct it is stressed that the fees charged by a mediator or conciliator should not be contingent on the outcome of the mediation or conciliation.[139] The Commission endorses the Council of Europe's 2002 Recommendation on mediation in civil matters which states that where "mediation gives rise to costs, they should be reasonable and proportionate to the importance of the issue at stake and to the amount of work carried out by the mediator."[140]

3.103 *The Commission recommends that the financial cost of a mediation or conciliation should be borne by the parties, and should be on the basis of a written agreement to that effect entered into at the beginning of the mediation or conciliation. This should not be interpreted as preventing a party to civil proceedings in the High Court or Circuit Court from submitting to taxation of costs any bill of costs arising from the proceedings.*

3.104 *The Commission recommends that the financial cost of mediation and conciliation should be reasonable and proportionate to the importance of the issue or issues at stake and to the amount of work carried out by the mediator or conciliator.*

(2) Duration of Mediation or Conciliation

3.105 In addition to the potential cost effectiveness of mediation and conciliation, another aspect of efficiency provided by these processes relates to the length of time it takes to resolve a dispute through such ADR processes compared to traditional litigation. Reducing the delay to litigants in resolving their disputes and subsequently decreasing case backlogs in the courts is, unsurprisingly, one of the key motivators for jurisdictions around the world to integrate mediation and conciliation into their civil justice systems.[141] Furthermore, the then Chief Justice of the US Supreme Court, Burger CJ, suggested that "People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible."[142]

3.106 The Commission is aware that the duration of a mediation or conciliation will greatly vary depending on the number and nature of issues in dispute and the complexity involved. Nevertheless, both processes are expected to be a relatively brief intervention, and not an opportunity for ongoing or longer-

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137 European Code of Conduct for Mediators at 3.4.

138 Feasibility Study into Cross Border Mediation in Family Matters (Hague Conference of Private International Law Permanent Bureau, 2007).

139 See for example, the Model Standards of Conduct for Mediators 2005 adopted by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution. Standard VIII Fees and Other Charges, at para. B(1); and the Oregon Mediation Association Core Standards of Mediation Practice, Revised 23 April 2005 at VII Fees.

140 Council of Europe, Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters. Available at: https://wcd.coe.int/ViewDoc.jsp?id=306401&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

141 South "What's driving the interest in mediation globally: Lessons from recent experiences" (September 2008) *IBA Mediation Committee Newsletter*.

142 US Chief Justice Warren Burger: "Our Vicious Legal Spiral" (1977) 22 *Judges Journal* 49.

term professional support.[143] On the issue of the right time to attempt mediation and conciliation, it was suggested in the Jackson 2010 *Review of Civil Litigation Costs Final Report* that:

> "It is important that mediation is undertaken at the right time. If mediation is undertaken too early, it may be thwarted because the parties do not know enough about each other's cases. If mediation is undertaken too late, substantial costs may already have been incurred. Identifying the best stage at which to mediate is a matter upon which experienced practitioners should advise by reference to the circumstances of the individual case."[144]

3.107 The Commission considers that once a dispute has been submitted to mediation or conciliation it should be dealt with in the shortest possible time commensurate with the nature of the dispute.

3.108 *The Commission recommends that where a dispute has been submitted to mediation or conciliation, the parties and the mediator or conciliator should seek to complete the process in the shortest time practicable, relative to the nature of the dispute.*

(3) ADR Efficiency & Public Sector Disputes

3.109 In the 2009 *Report of the Special Group on Public Service Numbers and Expenditure Programmes*, the Group noted the practice of different state organisations pursuing legal cases against one another. An example of such a case is *Aer Rianta v Commissioner for Aviation Regulation*.[145] The Group recommended that:

> "This duplication unnecessarily increases the burden of legal costs borne by the State. The Group proposes that there should be compulsory arbitration of legal disputes involving State bodies. Any State body wishing to resolve a legal dispute with another State body would be required to inform the relevant Minister who would then be responsible for mediating a solution or arranging for other forms of independent mediation. Legislative change should be initiated to implement this proposal if necessary." [146]

3.110 The Group noted that the revised and updated Code of Practice for the Governance of State Bodies provides that where a legal dispute involves another State body, every effort should be made to mediate, arbitrate or otherwise before expensive legal costs are incurred and that the Department of Finance should be notified of such legal issues and their costs.[147]

3.111 Governments in a number of other jurisdictions have committed to using ADR processes, such as mediation and conciliation, for the resolution of disputes to which they are a party. In England, there has been a major impetus by the Government itself to resolve Government disputes through ADR rather than litigation.[148] As noted in the Consultation Paper, the UK Lord Chancellor announced in 2001 that government departments and agencies would adopt *'The Pledge - Settling Government Disputes through Alternative Dispute Resolution.'* The overriding objective for the launch of the ADR pledge was that by committing itself to the use of ADR methods to resolving disputes, where appropriate, government could be seen to lead by example. Under the terms of the ADR Pledge, all UK Government departments and agencies have made the following commitments:

- ADR will be considered and used in *all* suitable cases wherever the other party accepts it;

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143 Explanatory Memorandum to Recommendation No. R (98) 1 at 48.

144 Lord Justice Jackson's *Review of Civil Litigation Costs Final Report* (The Stationary Office, January 2010).Chapter 36 at 361.

145 [2003] IEHC 168.

146 *Report of the Special Group on Public Service Numbers and Expenditure Programmes Volume II* (Government Publications, 2009) at 209.

147 *Ibid.*

148 See *Royal Bank of Scotland v Secretary of State for Defence* [2003] EWHC 1479 Ch. and *Cowl v Plymouth City Council* [2001] EWCA Civ 1935.

- In future, Departments will provide appropriate clauses in their standard procurement contracts on the use of ADR techniques to settle their disputes. The precise method of settlement would be tailored to the details of individual cases;
- Government departments will put in place performance measures to monitor the effectiveness of this undertaking;
- Departments will improve flexibility in reaching agreement on financial compensation, including using an independent assessment of a possible settlement figure;[149] and
- Central Government will produce procurement guidance on the different options available for ADR in Government disputes and how they might be best deployed in different circumstances. This will spread best practice and ensure consistency across Government.[150]

3.112 An example of a case where the UK Government successfully used ADR to resolve dispute included the Ministry of Defence settling high profile cases of British soldiers who were injured or killed in non-combat situations. The resolution of this case meant that injured parties or families did not have to undergo the stress of a court case to secure a ruling on compensation.[151]

3.113 In Australia, the Attorney-General is responsible for policy relating to the performance of legal work for the Commonwealth. To that end, the Attorney-General issued the *Legal Services Directions 2005* under section 55ZF of the *Judiciary Act 1903*. The Directions require that claims are to be handled and litigation conducted in accordance with the Commonwealth's obligation to act as a model litigant. That obligation is articulated at Appendix B of the Directions. Among other things, the Model Litigant Obligation imposes a requirement on Government agencies to:

- deal with claims promptly and not cause unnecessary delay;
- pay legitimate claims without litigation;
- endeavour to avoid, prevent and limit the scope of legal proceedings wherever possible including considering ADR in all cases and participating in ADR where appropriate; and
- participate fully and effectively in ADR and, wherever practicable, ensure that agency representatives have authority to settle the matter or clear instructions on possible terms of settlement.[152]

3.114 In the United States the *Administrative Dispute Resolution Act 1996* requires each federal agency to adopt a policy that addresses the use of ADR and case management.[153] This Act firmly established ADR within the federal government as the preferred method for dispute resolution.[154] The 1996 Act required each agency to designate "a senior official to be the dispute resolution specialist of the

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149 According to the Annual Pledge Report 2007/08 monitoring the effectiveness of the UK Government's commitment to using alternative dispute resolution, during the reporting period 2007/08, ADR was used in 374 cases with 271 leading to settlement, saving costs estimated at £26.3 million. *Annual Report Monitoring the Effectiveness of the Government's Commitment to using ADR 2007/2008* (Department of Constitutional Affairs, April 2009).

150 See the Office of Governance Commerce website for further information on the ADR pledge at www.ogc.gov.uk.

151 *Annual Report Monitoring the Effectiveness of the Government's Commitment to using ADR 2006/2007* (Department of Constitutional Affairs 2007). It is interesting to note that up to December 2007, the Irish Department of Defence and the State Claims Agency paid €187.1 million in Army deafness cases. In addition to compensation, legal costs amounted to €97.9 million, a total spend of €285 million.

152 Federal Register of Legislative Instruments F2008C00581 Appendix B at 22.

153 28 USC § 654(a)(1)–(3) (2006).

154 See Miller 'Alternative Dispute Resolution: A Public Procurement Best Practice that has Global Application'. Paper given at the International Public Procurement Conference, 21-23 September 2006.

agency"[155] who would "training on a regular basis" that encompassed "the theory and practice of negotiation, mediation, arbitration, or related techniques. The dispute resolution specialist shall periodically recommend to the agency head agency employees who would benefit from similar training".[156] Therefore, instead of drafting one ADR policy applicable across all federal agencies, US Congress chose to mandate that each agency develop their own policy that accounts for that agency's portfolio, end-users, and unique bureaucratic characteristics.[157]

3.115 In 2009, a study was conducted of the expenditure of Irish public bodies on legal fees, and it examined the potential cost savings for the State if mediation was undertaken in disputes in which the State was a party.[158] The study examined the legal expenditure of a number of Irish Government departments and it estimated that the Government spends approximately €300 million in litigation and associated legal expenses annually.[159] The study detailed the use of mediation by the Department of Justice in the State of Oregon which introduced a pilot programme in 1998, to encourage the appropriate use of mediation in order to more efficiently and effectively resolve civil cases involving the State of Oregon.[160]

3.116 Relying on data from over 500 cases across a diverse range of disputes involving state agencies, bodies and departments over a two-year period, the Oregon Department of Justice noted savings of up to 85% of litigation costs per case.[161] It found that in a typical case, the cost of mediation was $9,537 in contrast to the $60,557 required to proceed to a full hearing at trial or other adjudicated procedure. The Irish study recommended that the Government should design and implement customised early dispute management and mediation dispute resolution processes based on the Oregon Model to achieve similar cost-savings.[162]

3.117 The Commission considers that there is a strong case in favour of the Government introducing ADR into its Departments and agencies as a mechanism for resolving disputes to which they are a party.[163] In a submission received by the Commission, it was suggested that the Government should require all Departments and State Agencies to:

- secure Department of Finance and/or Attorney General prior approval for any litigation expenditure; and

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155 *Ibid.* § 2(b).

156 *Ibid.* § 2(c).

157 See also Interagency ADR Working Group *"Report for the President on the Use and Results of Alternative Dispute in the Executive Branch of the Federal Government"* (April 2007). Available at www.adr.gov.

158 Connolly & Gorman *An Analysis of the Irish Public Body Legal Spend* (FriaryLaw, 2010). The authors undertook an audit of public body legal spend, based on 437 Freedom of Information requests, and examined the results in the light of a programme in the US state of Oregon which used mediation instead of litigation in disputes involving the State.

159 *Ibid.* at 3. See also Coulter "Mediation Could Save State €200 million" *The Irish Times*, March 6th 2010.

160 ORS 183.502

161 *Collaborative Dispute Resolution Pilot Project* (January 30, 2001, State of Oregon Department of Justice).Following the pilot programme and its demonstrated success of the mediation model, the State of Oregon has, in the period 2001-2009 rolled out mediation into every area of dispute resolution involving the State.

162 See Coulter "Mediation Could Save State €200 million" *The Irish Times*, March 6th 2010.

163 The Commission notes that the Department of Finance maintains a "Scheme of Conciliation and Arbitration for the Civil Service" whose purpose is to "provide means acceptable both to the State and to its employees for dealing with claims and proposals relating to the conditions of service of civil servants and to secure the fullest co-operation between the State, as employer, and civil servants, as employees, for the better discharge of public business."

- direct that such approval not be given for any such expenditure until a Minister, First Secretary or Principal Officer has certified that mediation or conciliation has been attempted; and
- satisfy Department of Finance and/or Attorney General as to why the matter cannot be resolved other than by going to trial.

3.118 The Commission considers it a matter for the Government to determine the most appropriate way to integrate ADR into the policies and procedures of its Departments and of State Agencies and does not propose to make a specific recommendation on this issue. The Commission recommends, however, that the Government should commit in principle to the integration and use of ADR processes, such as mediation and conciliation, in resolving appropriate disputes both internally within the public sector and where the State is a party to a civil dispute. As noted by Lord Woolf: "Today sufficient should be known about alternative dispute resolution to make the failure to adopt it, in particular when public money is involved, indefensible."[164] It is important to note that ADR is not a panacea for all public sector disputes, it has its limitations and it is not always appropriate. However, as noted by a former Attorney General of the United States:

> "ADR provides for effective public participation in government decisions, encourages respect for affected parties, and nurtures good relationships for the future. Every ADR proceeding that reduces time or litigation costs, or narrows issues, or averts future complaints enables us to conserve our limited resources which must accomplish so much."[165]

3.119 In this respect, the Commission acknowledges that the Government has already indicated, through for example the comments of the Minister for Justice and Law Reform in 2009 already cited, that it is fully amenable to this in principle. In addition, the Commission notes that the 2007 Government Works Contracts developed by the Department of Finance commit to ADR resolution processes also. It is also clear that ADR clauses have become commonplace in contracts involving State bodies, such as in the contract at issue in *Health Service Executive v Keogh, trading as Keogh Software.*[166]

3.120 *The Commission recommends that the Government should commit to the integration and use of ADR processes, such as mediation and conciliation, in resolving disputes both internally within the public sector and where the State is a party to a civil dispute.*

G Legal Aid for Mediation and Conciliation

3.121 The Legal Aid Board is an independent, publicly funded organisation. It has been in existence since 1979 and was set up as a statutory body under the *Civil Legal Aid Act 1995*. Legal aid and advice are provided by solicitors employed by the Board through a network of law centres.[167] A complementary service is provided by solicitors in private practice who are engaged by the Board on a case-by-case basis. The service is provided on a nationwide basis through 33 full-time and 12 part-time law centres, and includes 3 full-time centres comprising the Refugee Legal Service. According to its Annual Report 2008:

- the number of applications for legal services increased by almost 18% in 2008;
- the number of cases in which legal aid and advice was provided in 2008 was 14,917;
- the Board facilitated further training for both its own solicitors and private solicitors in the collaborative law dispute resolution model. It also co-hosted, with the Law Society of Ireland, a symposium on alternative dispute resolution in family matters with the stated aim of making non

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164 *Cowl v Plymouth City Council* [2001] EWCA Civ 1935.

165 "Letter to D Leah Meltzer", (12 March 2004). Available at: www.adr.gov.

166 [2009] IEHC 419. See the discussion at paragraphs 4.04ff, below.

167 Legal aid means representation by a solicitor or barrister in civil proceedings in the District, Circuit, High and Supreme Courts. Legal aid is available also for representation before the Refugee Appeals Tribunal. Legal aid is not granted automatically. If a person requires representation for a court case, the Board will consider if it is reasonable for to grant legal aid. This procedure is called the merits test.

court-based dispute resolution a real option for those experiencing family law problems; and

- family law continues to constitute the predominant area where the Board provides legal advice. Of the 'advice only' cases handled in 2008, almost 70% were in the family law area.[168]

3.122 The Commission is aware that advice on mediation and collaborative practice is given by the Legal Aid Board when appropriate. For example, the Terms and Conditions of the Legal Aid Board Private Practitioner Scheme for the Circuit Court states that when meeting the client for the first time the solicitor should, insofar as it has not already been done, ascertain the relevant background information and should also:

- explain to the client the dispute resolution options available and the advantages and disadvantages of each option including, where appropriate, marriage guidance counselling, mediation, negotiated separation and the collaborative law process,
- that the terms of Section 5 / Section 6 of the *Judicial Separation and Family Law Reform Act 1989* or Section 6 / Section 7 of the *Family Law (Divorce) Act 1996* are complied with, by giving the client names and addresses of persons qualified to help effect a reconciliation and to provide a mediation service, and
- advise the client of the potential costs implications of remedies that might be pursued.[169]

3.123 Furthermore, the appropriateness of ADR for resolving the dispute is also a factor which is considered when granting legal aid. In determining the merits of a case for legal aid, the Board takes into account the following:

- the prospect of success in the proceedings;
- the availability of any method, other than court proceedings, for dealing satisfactorily with the problem, for example, mediation; and
- the probable cost to the Board of providing legal services as measured against the likely benefit to you if you are successful in the proceedings.[170]

3.124 In England and Wales, the Legal Services Commission ('LSC') which is responsible for the legal aid scheme and helps people in need to receive legal advice, assistance and representation, provides publicly-funded family mediation for financially eligible clients. The English *Family Law Act 1996* amended the English *Legal Aid Act 1988* and introduced a requirement that those seeking public funding for court proceedings must first be referred by their lawyer to a State-registered family mediator, to receive information about mediation and to regard it as an alternative to contested court proceedings. At this preliminary meeting, which the applicant may attend separately or with the other party, as preferred, the mediator explains the help that can be offered through mediation and makes an assessment with the client of the suitability of the dispute for mediation.[171] At the pre-mediation information meeting the mediator must:

- engage with each party/both parties and, if they choose to come together, understand their issues and explain the mediation process carefully;
- assess their eligibility for legally aided mediation according to income and other factors;

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168 *Legal Aid Board Annual Report 2008*. Available at www.legalaidboard.ie

169 Circuit Court Term's & Conditions – Information for Private Practitioners. Online information available at: http://www.legalaidboard.ie/lab/publishing.nsf/Content/CC_Stages_1_to_3

170 See section 28 of the *Civil Legal Aid Act 1995*.

171 Section 29 of the 1996 Act. A number of other States including Queensland, Victoria and New South Wales have also developed mediation and conferencing schemes in which family law clients must participate as a condition of a grant of State-funded legal aid.

- assess whether mediation is suitable. Cases involving a history of domestic violence and continuing risk are not normally suitable for mediation, whereas situations involving perhaps a single incident and low risk may be suitable, especially if both parties want to come to mediation;
- provide information on other services, if mediation is not suitable; and
- confirm both parties' willingness to take part in mediation, having understood the principles and benefits.[172]

3.125 In 2008, the LSC spent £13.8m on family mediation, which it claims saved the legal aid fund approximately £10m.[173] The use of family mediation to resolve disputes has been steadily growing from around 400 cases per year in 1999 to 17,000 cases in 2008 in which 68% reached full or partial settlement. As noted by the Commission in its Consultation Paper, the English National Audit Office published a report in 2007 on mediation and family breakdowns.[174] In the period from October 2004 to March 2006, 29,000 people who were funded through legal aid attempted to resolve their family dispute through mediation. The average cost of legal aid in non-mediated cases was estimated at £1,682, compared with £752 for mediated cases, representing an additional annual cost to the taxpayer of some £74 million. Mediated cases were reported to be quicker to resolve, taking on average 110 days, compared with 435 days for non-mediated cases.[175] Over 95% of mediations were complete within 9 months and all mediations were complete within 12 months. By contrast, the average elapsed time between applying for other legal help for family-related matters and the date of the final bill was 435 days, or over 14 months. Only 70% of these cases were complete within 18 months.[176]

3.126 In New South Wales, Legal Aid NSW was established under the *Legal Aid Commission Act 1979* and is an independent statutory body.[177] It also provides other services that aim to avoid court disputes such as family dispute resolution (mediation) and community legal education programs. In order to use the dispute resolution service at least one person must have a grant of legal aid. A grant of legal aid will cover the cost of the family mediation, including the costs of the party's lawyer.[178] From 2008 to 2009, Legal Aid NSW conducted mediations in 2,294 family disputes, achieving full or partial settlement in 84.7% of them.[179]

3.127 In Ireland, publicly funded family mediations are available through the Family Mediation Service, but as the Commission noted in its Consultation Paper there is a waiting list of several months to use this service. As previously noted, the Legal Aid Board maintains a number of panels of private solicitors and barristers to complement its law centre service. The Commission considers that it may be of merit to consider extending the panels at the Legal Aid Board to include a panel of accredited mediators. This panel could conduct legally aided mediations in appropriate civil disputes.

> "Studies of the work of the family law courts have found that only 3 to 4% of all those seeking resolution of their family disputes in the courts use the FMS. This is an intolerable under-use of a State-sponsored service, which contributes to the greater anxiety of the parties involved, the

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172 Parkinson "Family Mediation in England and Wales" (2005). Online article available at www.rln.lt/download.php/fileid/227.

173 Baksi "Family Mediation Pilot Achieves Mixed Results" (January 2010) *Law Society Gazette*. Online article available at: www.lawgazette.co.uk.

174 *Legal aid and mediation for people involved in family breakdown* (National Audit Office, HC 256 Session, 2007).

175 *Ibid.*

176 *Legal aid and mediation for people involved in family breakdown* (National Audit Office, HC 256 Session, 2007) at 8.

177 See Legal Aid NSW at www.legalaid.nsw.gov.au.

178 "Family Dispute Resolution: Working Out What's Best for my Children". Publication by Legal Aid NSW available at: http://lacextra.legalaid.nsw.gov.au/Publications/FileUpload/Doc/ImprintFile49.pdf

179 *Annual Report 2008-2009* (Legal Aid New South Wales, 2009).

slowing up of the courts system and ongoing psychological and physical suffering for some parties, which may ultimately increase costs to the State… A natural synergy exists between the work of the board [Legal Aid Board] and the work of the FMS, having a common objective, a partly shared client base and an existing relationship."[180]

3.128 Furthermore, if publicity funded mediations were to be available through the Legal Aid Board, the Commission considers that parties to an appropriate non-family civil cases could also benefit from this referral service to a Legal Aid Board mediator.[181] The Commission endorses the view that:

> "For reason of equality before the law and access to law, it is unacceptable for some categories of the population to be excluded from a service on financial grounds. For those with limited financial means, member states should be encouraged to make legal aid available for parties involved in the mediation in the same way that it would provide for legal aid in litigation."[182]

3.129 As previously noted, the Commission considers that it may be of merit to consider extending the panels at the Legal Aid Board to include a panel of accredited mediators and conciliators. This panel could conduct legally aided mediations or conciliations in appropriate civil disputes.

3.130 *The Commission recommends that consideration should be given to extending the panels at the Legal Aid Board to include a panel of accredited mediators and conciliators. This panel could conduct legally aided mediations or conciliations in appropriate civil disputes.*

H Flexibility

3.131 In its Consultation Paper, the Commission examined two aspects of flexibility: procedural flexibility afforded by ADR processes and flexibility of outcomes that can be achieved through mediation and conciliation.[183] The Commission provisionally recommended that ADR mechanisms should aim at preserving the flexibility of the process.[184] This provisional recommendation reflects the position stated in the European Commission's 2002 Green Paper on ADR that:

> "ADRs are flexible, that is, in principle the parties are free to have recourse to ADRs, to decide which organisation or person will be in charge of the proceedings, to determine the procedure that will be followed, to decide whether to take part in the proceedings in person or to be represented and, finally, to decide on the outcome of the proceedings."[185]

3.132 In the Consultation Paper, the Commission noted that an important advantage of ADR is its flexibility in achieving consensual and mutually satisfactory resolutions which are not available through traditional adversarial litigation.[186] The Commission referred to the case study of the Alder Hay Children's Hospital mediation as an excellent example of the creative remedies which can be agreed through mediation.[187] To summarise, Alder Hey Children's Hospital in Liverpool had, over a period of decades,

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180 Colley "Legal Aid Board is keen to move mediation into the mainstream" *The Irish Times*, June 14, 2010.

181 Under the LSC mediation scheme, parties are not free to choose any mediator to conduct the mediation. Only quality assured mediators meeting the criteria of the Legal Services Commission can conduct publicly funded family mediation.

182 "*Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters"* (adopted by European Commission for the Efficiency of Justice on 7 September 2007) at paragraphs 33-35.

183 LRC CP 50-2008 at paragraphs 3.178-3.183.

184 LRC CP 50-2008 at 3.184.

185 *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final. Available at http://eurlex.europa.eu/.

186 LRC CP 50-2008 at 3.177.

187 LRC CP 50-2008 at 1.15.

retained organs of children who had died there. This had occurring without obtaining any consent to retention from the parents. From a legal perspective, each non-consensual retention involved a justiciable assault. To deal with the mass nature of the claims (over 1,000), the claimants were organised as a group litigation. This claim had the potential to take up enormous court time. In addition, however, the emotional element of the claim was, arguably, not suitable for litigation. The claimants and defendants agreed to mediation through the Centre for Effective Dispute Resolution (CEDR). The settlement included financial compensation but it was accepted that the ability to discuss non-financial remedies ensured a successful conclusion. The families involved produced a 'wish list' and this resulted in the provision of a memorial plaque at the hospital, letters of apology, a press conference and contribution to a charity of the claimants' choice. These remedies were essential to the successful conclusion of the case and the need of the participants to achieve what they felt to be a just resolution. This case demonstrates that "Mediation is a process that seeks to help the parties find a solution to their problems that they 'can live with'. Mediation is not tied to traditional judicial remedies. It can be, and often is, highly imaginative."[188]

3.133 The Commission is aware that, due to the principle of flexibility, no two mediations or conciliations are ever conducted in the same manner. Furthermore, the flexible outcomes reached through these processes represent the manifestation of individualised justice for parties. Therefore, the principle of flexibility is of paramount importance to the success of mediation and conciliation. The Commission reiterates its provisional recommendation that ADR mechanisms should aim at preserving the flexibility of the process.

3.134 *The Commission recommends that ADR mechanisms should aim at preserving the flexibility of the process.*

I Neutrality & Impartiality

(1) Consultation Paper

3.135 In its Consultation Paper, the Commission provisionally recommended that the requirement of neutrality and impartiality be included in any general statutory formulation that concerns mediation and conciliation.[189] The principles of neutrality and impartiality are fundamental to the success of ADR processes and mediators and conciliators "should ensure that the principle of equality of arms be respected during the mediation and conciliation process."[190] The Explanatory Memorandum to the Council of Europe's 1998 Recommendation No. R (98) 1 on family mediation defines mediator neutrality as requiring that:

> "…the mediator does not impose settlements or guide the parties to reach particular solutions. It is up to the parties to reach their own agreed, joint decisions, and the mediator's role is to facilitate this process. Parties may make decisions which they consider to be appropriate to their own particular circumstances. This recognises the power of the parties to reach their own agreements about their own affairs in a way that suits them best."[191]

3.136 In the Consultation Paper, the Commission noted that neutrality in the broadest sense of the term includes issues such as a lack of interest in the outcome of the dispute, a lack of bias towards one of the parties, a lack of prior knowledge of the dispute and/or the parties, and the idea that the mediator or conciliator will be fair and even-handed.[192] Adopting a neutral stance also helps mediators and

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188 Speech by Mr Wong Yan Lung, Hong Kong Secretary for Justice, at the Hong Kong Mediation Council Annual Dinner, 17 March, 2006. Available at: http://www.doj.gov.hk/eng/archive/pdf/2006/sj20060317e.pdf.

189 LRC CP 50-2008 at 3.187.

190 Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters.

191 Explanatory Memorandum to Recommendation No. R (98) 1 at 38 and 39. It is evident from this definition that the principle of neutrality is intrinsically link with the principle of self-determination.

192 LRC CP 50-2008 at 3.185. See Field "Neutrality and Power: Myths and Reality" (2000) 3 *ADR Bulletin* 1 at 16-19; Douglas "Neutrality in Mediation: A Study of Mediator Perceptions" (2008) 8 Queensland U. Tech. L. &

conciliators establish trust, credibility, and respect.[193] Furthermore, it has been asserted that neutrality also connects mediation and conciliation with the authority and legitimacy of formal legal adjudicative processes through comparisons with the idea of judicial impartiality. It is commonly thought that if a mediator or conciliator is unable to maintain a neutral stance, codes of ethics and standards of practice should require that he or she withdraw from the case.

3.137 In relation to the principle of impartiality, Article 3 (b) of the 2008 EC Directive on Mediation defines a 'mediator' as "any third person who is asked to conduct a mediation in an effective, *impartial* and competent way." Impartiality is said to refer to "an even-handedness, objectivity and fairness towards the parties during the process."[194] Furthermore it has been suggested that:

> "Mediator impartiality instills trust, enables the parties to collaborate and share information with the mediator and other parties, protects mediation agreements from subsequent challenges, and helps prevent abuses of the process. In addition, an appearance of impartiality promotes public confidence in the fairness of the process."[195]

3.138 The Explanatory Memorandum to the Council of Europe's Recommendation No. R (98) 1 on family mediation defines mediator impartiality as requiring that the mediator:

> "… does not take sides or favour the position of one party over the other… Unlike a lawyer, who acts for one of the parties and represents that party's point of view, the mediator is not acting for either party, nor should there be a previous or existing professional or personal relationship between the mediator and one of the parties."[196]

3.139 While few would argue that it is almost always best for mediators to be impartial as a matter of practice, the inclusion of such a requirement in the Uniform Mediation Act (UMA) in the United States drew considerable controversy. Some mediators persistently urged the Uniform Law Commissioners, who drafted the UMA, to enshrine this principle in the Act; for these, the failure to include the notion of impartiality in the Act would be a distortion of the mediation process. Other mediators urged the drafters not to include the term 'impartiality' for a variety of reasons. One pressing concern was that including such a statutory requirement would subject mediators to an unwarranted exposure to civil lawsuits by dissatisfied parties. In this regard, mediators with a more evaluative style expressed concerns that the common practice of so-called 'reality checking' would be used as a basis for such actions against the mediator. A second major concern was over the workability of such a statutory requirement.[197] For these and other reasons, the drafting Committee decided that impartiality, like qualifications, was an issue that was important but that did not need to be included in a uniform law. Rather, out of respect for the

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Just. J. 139; and Astor "Mediator Neutrality: Making Sense of Theory & Practice" (2007) 16 *Social and Legal Studies* 22.

193 See Cohen, Dattner & Luxenburg "The Limits of the Mediator's Neutrality" (1999) 16(4) *Mediation Quarterly* 341; Cobb & Rifkin "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991) 16(1) *Law and Social Inquiry* 35; Cobb & Rifkin "Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation" (1991) 11 *Studies in Law, Politics and Society* 69; and Mulcahy, "The Possibilities and Desirability of Mediator Neutrality - Towards an Ethic of Partiality?" (2001) 10(4) *Social and Legal Studies* 505.

194 Boulle *Mediation: Principles, Process, Practice* (Butterworths Sydney 1996) at 19.

195 See Henikoff & Moffitt, "Remodeling the Model Standards of Conduct for Mediators" (1997) 2 Harv Negotiation L Rev 87, 102-103. The authors suggest that for the sake of the integrity of the mediation process, the mediator must at all times be free from bias toward the parties and their interests, as well as the outcome of the mediation.

196 Explanatory Memorandum to Recommendation No. R (98) 1 on family mediation. The Recommendation was adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies.

197 Scholarly research in cognitive psychology has confirmed many hidden but common biases that affect judgment, such as attributional distortions of judgment and inclinations that are the product of social learning.

importance of the issue, the drafting Committee decided that it was enough to flag the issue for states to consider at a more local level, and to provide model language that may be helpful to states wishing to pursue the issue.[198]

3.140 The Commission considers that the principles of neutrality and impartiality must be included in any general statutory formulation that concerns mediation and conciliation. These principles are fundamental to protecting the integrity and transparency of these ADR processes. The Commission considers that it may appropriate to consider introducing a statutory duty on mediators and conciliators to disclose any conflict of interests. This would ensure that the principles of neutrality and impartiality are properly adhered to. The Commission now turns to examine mediator and conciliator conflicts of interest.

3.141 *The Commission recommends that the principles of mediator and conciliator neutrality and impartiality must be included in any general statutory formulation that concerns mediation and conciliation.*

(2) Duty to Disclose Conflict of Interests

3.142 The Commission considers that disclosure by a mediator or conciliator of any potential and actual conflict of interests fulfills the reasonable expectations of the parties to neutrality and impartiality. One may reasonably anticipate many situations in which parties are willing to waive a conflict of interest; indeed, depending upon the dispute, the very fact that a mediator or conciliator is familiar to both parties may best qualify the mediator or conciliator to that dispute. That choice, however, properly belongs to the parties.

3.143 The EU Commission's 2001 Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes states that the mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests. The duty to disclose is a continuing obligation throughout the process.[199] Such circumstances include: any personal or business relationship with one of the parties; any financial or other interest, direct or indirect, in the outcome of the mediation; or the mediator, or a member of his or her firm, having acted in any capacity other than mediator for one of the parties. In such cases the mediator may only accept or continue the mediation provided that he/she is certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality and that the parties explicitly consent.[200]

3.144 Section 9 of the UMA entitled "Mediator's Disclosure of Conflict of Interest" states that before accepting a mediation, an individual who is requested to serve as a mediator shall:

> (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and
>
> (2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.
>
> (b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.
>
> (c) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.[201]

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198 See Exon "How can a Mediator be Impartial &Fair?" (2006) J Disp Resol 387.

199 Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes 2001/210/EC.

200 *Ibid.*

201 Section 9(1)(f) of the UMA states that a mediator is not required to have a special qualification by background or profession. It is clear that the duty to disclose under the UMA is a continuing one.

3.145 Similarly, Article 5 of the UNICITRAL Model Law on International Conciliation places the following duty of disclosure on conciliators:

> "When a person is approached in connection with his or her possible appointment as conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence… A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her."[202]

3.146 The Commission considers that it is fundamental to the integrity and transparency of mediation and conciliation processes, that a mediator or conciliator must disclose to the parties any potential or actual conflict of interests which they are aware of at the start of the processes and or which they become aware of during the process.

3.147 *The Commission recommends that a mediator or conciliator should disclose to the parties any actual or potential conflict of interest he or she may have.*

J Enforceability

3.148 As the Commission noted in its Consultation Paper, currently in Ireland (with some exceptions) no formal means exist by which mediated settlement agreements are enforceable, except those concluded during court proceedings, such as family proceedings, which may be ruled by the court.[203] In the Consultation Paper, the Commission provisionally recommended that a Court may enforce any agreement reached at mediation or conciliation.[204]

3.149 The 2008 EC Directive on Mediation obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. Article 6 of the 2008 Directive states that:

> "Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability."

3.150 As outlined in Article 6(2) of the 2008 Directive:

> "The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made."

3.151 This provision requires that it should be possible for a written settlement agreement negotiated at a mediation to be enforceable by a court. The Commission examines the issue of enforceability of agreements reached at mediation and conciliation in more detail in Chapter 3.

K Limitation Periods

3.152 In its Consultation Paper, the Commission invited submissions as to whether the parties in a mediation or conciliation may agree in writing to suspend the running of any limitation period.[205] Article 8

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202 Article 5.5 of the *UNICITRAL Model Law on International Conciliation*.

203 LRC CP 50-2008 at 3.215. See also Stewart and Moore "Mediation in Ireland— An improving environment" (2005) 12(5) CLP 115.

204 LRC CP 50-2008 at 3.217.

205 LRC CP 50-2008 at 3.220.

of the 2008 EC Directive on Mediation addresses the effect of mediation on limitation periods. It states that:

> "Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process."

3.153 It has been argued that effective provision for mediation requires certainty that the recourse to mediation suspends the limitation periods for initiating procedures in the courts. If that were not the case, the parties' action could be extinguished by the time it becomes clear that the mediation will not resolve the dispute. As is well known, the application of limitation periods and the complexities that can arise can lead to difficult issues and uncertainty.The Commission examines the issue of limitation periods in relation to mediation and conciliation in more detail in Chapter 3.

L Quality and Transparency of Procedure

3.154 To the extent that mediation resolves a dispute which may otherwise have been decided by litigation in court, the questions of the training quality and accountability of mediators are crucial matters that must be considered. In its Consultation Paper, the Commission invited submissions as to whether the 2004 European Code of Conduct for Mediators should be given a statutory basis in Ireland, including in the form of a Code of Practice.[206] As previously noted, the 2004 Code of Conduct for Mediators has been published on the European Commission's website in order to promote its use by practitioners. The Code does not have the force of law but in the Commission's view it was appropriate to consider whether the general content of the Code should be given some statutory force in Ireland. This issue is examined in detail by the Commission in Chapter 11 of the Report.

[206] See LRC CP 50-2008 at 3.192.

CHAPTER 4 ADR & THE CIVIL JUSTICE SYSTEM

A Introduction

4.01 In the chapter the Commission examines the integration of mediation and conciliation into the civil justice system. In Part B the Commission discusses the enforceability of mediation and conciliation clauses. In Part C the Commission explores referral methods to mediation and conciliation where there is no mediation or conciliation clause between the parties. In Part D the Commission discusses the manner in which parties engage in mediation or conciliation after litigation has begun. In Part E the Commission considers whether the parties in a mediation or conciliation may agree in writing to suspend the running of any limitation period. In F the Commission examines the enforceability of agreements reached through mediation or conciliation. In Part G the Commission examines the issues of costs and the guidelines to be used when imposing a costs sanction for an unreasonable refusal to consider mediation or conciliation. The Commission also considers whether mediation costs should be recoverable as legal costs. In Part H the Commission discusses the manner in which mediators and conciliators should report to the Courts.

B Enforceability of Dispute Resolution Clauses

(1) Power to stay proceedings

(a) Overview

4.02 As the Commission noted in its Consultation Paper, mediation and conciliation clauses are now regularly included in commercial contracts, supplementing more traditional clauses that referred to arbitration only as the appropriate mechanism for resolving disputes. The clause usually stipulates that the parties will refer any dispute that arises out of the contract to either mediation or conciliation, where these processes do not result in a settlement, the parties are still free to have the dispute arbitrated or they can issue court proceedings.[1] The benefit of including such a clause in a contract has been described in this way:

> "Mediation provisions in contracts put the dispute resolution framework in place at the relationship's beginning, not when a conflict arises. The parties to a contracted mediation become used to the process. Their minds actually become attuned to meeting, discussing, and identifying disputes and then resolving them because of an identity of interest – the preservation of the relationship to achieve agreed goals."[2]

4.03 There is currently no statutory provision in this jurisdiction providing for a stay in proceedings where there is a mediation or conciliation clause in a contract between the parties. The question arises as to whether the court should refuse to enforce the clause and stay proceedings to allow the parties attempt mediation? Arguably, it a court was to refuse to enforce the mediation clause, then the purpose for which such clauses are incorporated into contracts would be effectively negated.[3]

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1 See LRC CP 50-2008 at 2.32 for examples of single and multi-tiered ADR clauses.

2 Runesson and Guy *Mediating Corporate Governance Conflicts and Disputes* (The International Finance Corporation, World Bank Group, 2007) at 6. Available at www.ifc.org.

3 Lee "The Enforceability of Mediation Clauses in Singapore" (1999) Sing J Legal Stud 229 at 231.

(b) Stay of proceedings and ADR Clauses

4.04 As noted in the Consultation Paper, in *Re Via Networks (Irl) Ltd*[4] the Supreme Court indicated that, in a suitable case, it would be willing to uphold an ADR clause, although the case itself involved an arbitration clause.[5] The enforceability of a dispute resolution clause was definitively established by the High Court in *Health Service Executive v Keogh, trading as Keogh Software.*[6] In this case, the defendant had an extensive software services and maintenance contract with the plaintiff, the HSE, which was at the time of the case in use at approximately 180 sites around the State in connection with radiology, accident and emergency and hospital billing. A dispute arose between the parties, in which the defendant asserted that it had been underpaid by the HSE, and the defendant then ceased to supply the support staff for the software system. The HSE then requested the defendant to supply it with the computer source codes for the software system, which the defendant refused. A contract between the parties included a dispute resolution clause, under which the defendant agreed that the source code, which were held by a third party company, could be released to the HSE "on the decision of an independent expert whose appointment will be mutually agreed, or, failing mutual agreement, who will be appointed by the President for the time being of the Law Society." The dispute resolution clause also provided that:

> "The independent expert's decision will be final and binding on all parties to this agreement and shall not be subject to appeal to a court in legal proceedings except in the case of manifest error."

4.05 Both parties applied to the High Court for interlocutory relief, the HSE seeking a mandatory injunction requiring the defendant to supply the support services contracted for, the defendant seeking to be paid the fees it claimed were owed and to have the dispute resolution clause and expert determination process suspended. Laffoy J stated, in applying the principles set out in the *Via Networks* case, that there was no reason for the parties to depart from the dispute resolution mechanism provided for in the agreement, and she refused all relief applied for by both parties. She noted that "an examination of the... agreement clearly demonstrates that its terms are designed to facilitate speedy resolution of a dispute. In all probability, bringing that [ADR] process to conclusion is more expeditious than procuring a determination on a contested interlocutory application in this Court." Laffoy J therefore ordered that the application to the court should be stayed "pending the completion of the dispute resolution procedures" in accordance with the ADR clauses entered into by the parties.

4.06 It is also notable that, in the *Health Service Executive* case, Laffoy J referred to the decision of the English High Court in *Cable and Wireless plc v IBM plc*[7] (although, ultimately, she did not have to rely on it to support her conclusion). In the *Cable and Wireless* case, the agreement under which the dispute arose provided that the parties should attempt in good faith to resolve any dispute promptly through negotiations but, if the matter was not resolved through negotiation, the parties should attempt in good faith to resolve the dispute or claim through an alternative dispute resolution (ADR) procedure as recommended to the parties by a designated institution, but that the ADR procedure which was being followed should not prevent any party from issuing proceedings. In the *Health Service Executive* case, Laffoy J quoted the following passage from the judgment of Colman J in the *Cable and Wireless* case:[8]

> "*The reference to ADR is analogous to an agreement to arbitrate*. As such, it represents a freestanding agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings. The jurisdiction to stay, although introduced by statute in the field of arbitration agreements, is in origin an equitable remedy… However, the availability of the remedy whether of a stay or an adjournment or case management order must be a matter for the discretion of the court."

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4 [2002] 2 IR 47.

5 See LRC CP 50-2008 at 7.14.

6 [2009] IEHC 419.

7 [2002] EWHC 2059 Comm, [2002] C.L.C. 1319. See also the discussion of this case in the context of certainty, below.

8 [2002] EWHC 2059 Comm, [2002] C.L.C. 1319, at 1327 (emphasis added in this Report).

4.07 Laffoy J commented: "In that case [*Cable & Wireless*], in accordance with the practice in the Commercial Court of England and Wales the proceedings were adjourned." While, ultimately, Laffoy J was not required to express a specific view on the decision in *Cable & Wireless,* the reference to it, and in particular the use of the passage from the judgment of Colman J which indicates that an ADR clause "is analogous to an agreement to arbitrate" is another significant indicator of the intention of the courts in Ireland to give effect to ADR clauses. Indeed, as already mentioned, Laffoy J made an order staying the proceedings "pending the completion of the dispute resolution procedures."

4.08 The *Cable & Wireless* case nonetheless gives rise to the need to discuss the important distinction between dispute resolution clauses which are simply *an agreement to agree* to use dispute resolution and *an agreement to attempt* a dispute resolution process. This distinction relates to the issue of certainty because a contract clause must be sufficiently certain in order to be enforceable.[9] For example, in the English High Court case *Halifax Financial Services Ltd v Intuitive Systems Ltd*[10] McKinnon J held that a clause which provided for a specific set of steps involving negotiations and mediation was not binding. It was held that it was no more than:

> "[A] provision for the parties to negotiate, hopefully towards an agreement. Only if the negotiations fail does any question of arbitration arise and only then if the parties at that stage agree to arbitration. The parties have, in fact, in no sense bound themselves to any method of determining any dispute between them."

4.09 In the English High Court case *Cable and Wireless plc v IBM plc*[11] (which was cited by Laffoy J in a different context in the *Health Service Executive* case, above) Colman J reversed this judicial trend and held that a clause that specifically referred disputes to ADR, but was vague in terms of the precise procedure that should be used, was enforceable.[12] He stated that:

> "For the courts now to decline to enforce contractual reference to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR [the Civil Procedure Rules 1998] and as reflected in the judgment of the Court of Appeal in *Dunnett v Railtrack plc*."[13]

4.10 The English High Court case *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd*[14] provides further clarity on the enforceability of mediation clauses where the clause is merely 'an agreement to agree to mediation' as opposed to an enforceable clause to mediate. This case

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9 See Sutter "The Progress from Void to Valid for Agreements to Mediate" (2009) 75 *Arbitration* 28-32. The English case *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 W.L.R. 297 has traditionally been relied on as the authority for the proposition that an agreement to negotiate is unenforceable. In the English Court of Appeal, Lord Denning MR stated: "If the law does not recognise a contract to enter into a contract (where there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force ... It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law ... I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract."

10 [1999] 1 All E.R. (Comm) 303 HC.

11 [2002] EWHC 2059 Comm.

12 LRC CP 50-2008 at 7.21.

13 [2002] EWHC 2059 Comm. at paragraph 1. In *Dunnett v Railtrack plc* [2002] EWCA Civ 2002; [2002] 2 All ER 850, the English Court of Appeal had awarded costs *against* the successful defendant because of an unreasonable refusal to consider mediation. This was taken as an important indicator of the serious effects of not engaging in ADR: see the discussion in the Consultation Paper, paragraphs 11.44-11.51. Subsequently, in *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576, [2004] 4 All ER 920, the English Court of Appeal set down specific criteria on the issue of such costs sanctions, and this issue is discussed at paragraphs 4.109-4.116, below.

14 [2008] EWHC 3029 (TCC).

arose from an application to the courts by the plaintiff for summary judgement in respect of (a) the enforcement of an adjudicator's decision and (b) the payment of a net sum shown on an architect's interim certificate. The defendant sought a stay of proceedings in order that the disputes could be the subject of mediation. The underlying contract between the parties in this case contained the following provisions:

> Article 6A: If any dispute or difference arises under or in connection with this contract where the parties have agreed to do so, the dispute or difference may be submitted to mediation in accordance with the provisions of Clause 39B.
>
> Clause 39B: 39.1 - either party may identify to the other any dispute or difference as being a matter that it considers to be capable of resolution by mediation and, upon being requested to do so, the other party shall within seven days indicate whether or not it consents to participate in the mediation with a view to resolving the dispute or difference. The objective of mediation under Clause 39 shall be to reach a binding agreement in resolution of the dispute or difference.
>
> 39.2 - the mediation or selection method for the mediator shall be determined by agreement between the parties.

4.11 Counsel for the defendants argued that the plaintiff's applications for summary judgment should be stayed for mediation in accordance with the parties' agreement as set out in clauses 39.1 and 39.2. Coulson J held that, if the parties have agreed a particular method by which their disputes are to be resolved, the Court has an inherent jurisdiction to stay proceedings brought in breach of that agreement. In this instance, however, Coulson J gave two reasons why he was unable to grant a stay. Firstly, the mediation provisions contained in clauses 39.1 and 39.2 were nothing more than "an agreement to agree" and therefore lacked certainty. Secondly, even if there had been a binding agreement to mediate, Coulson J stated that he would only have granted a stay in circumstances where (a) the claimant was not entitled to summary judgment and (b) a reference to mediation was considered as the best way of resolving the dispute.

4.12 It is clear from this and other cases that a stay of proceedings will only be granted by the courts where the mediation provisions in the underlying contract are sufficiently certain. In that respect, such provisions need to be not only mandatory (and not permissive), but must also be reasonably well defined as to the agreed process.[15] Indeed, this was the position in the *Health Service Executive* case, discussed above. The appropriateness of mediation in resolving the dispute may also be taken into consideration by a court when deciding to stay proceedings. Indeed, a Maryland court based its denial of an enforcement request concerning a mediation clause on the basis that the requesting party failed to show that there were contractual issues in need of mediation.[16] The Court stated: "As a matter of fairness and practicality the court cannot retrospectively enforce a mediation clause after determining, with the benefit of hindsight, that mediation would have been futile."[17]

4.13 In a significant decision relating to the drafting and enforcement of commercial dispute resolution clauses, the New South Wales Court of Appeal held in *United Group Rail Services v Rail Corporation of New South Wales*[18] that a clause requiring senior representatives of the parties to "meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference" was not uncertain in law and was therefore valid and enforceable. Allsop P held that:

> "An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete. It may be referable to a standard concerned with conduct assessed by subjective standards, but that does not make the standard or compliance

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15 Cornes "To Stay or Not to Stay' *Mediation"* (February 2009) *Mediation Quarterly Update* Online article available at: http://www.mediatewithcornes.co.uk.

16 Hillock v. Wyman, No. CV-01-303, 2003 WL 21212014, at *2 (Me. Super. Ct. 2003).

17 *Ibid.*

18 [2009] NSWCA 177.

> with the standard impossible of assessment ... To say, as Lord Ackner did, that a party is entitled not to continue with, or withdraw from, negotiations at any time and for any reason assumes that there is no relevant constraint on the negotiation or the manner of its conduct by the bargain that has been freely entered into. Here, the restraint is a requirement to meet and engage in genuine and good faith negotiations. ... that expression has, in the context of this contract, legal content."[19]

4.14 The Court of Appeal cited very old English authority that a commercial court should eschew "subtleties and niceties" in construing a business document, which should be given operation by the application of common sense.[20] The affirmation of the enforceability of an agreement to negotiate in good faith (as part of a dispute resolution clause) provides important clarity in this area of the law, as dispute resolution clauses of this nature are fairly common in international commercial agreements.[21]

4.15 The Commission agrees with the view of the Australian judge Giles J in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*,[22] where he stated that "[m]ediation is a valuable means of resolution of disputes, and agreements to mediate should be recognised and given effect in appropriate cases". However, careful provision must be given to the drafting of dispute resolution clauses to ensure their enforceability in the courts. In the United States, in early cases where parties sought to enforce a mediation clause, defendants objected successfully to enforcement arguing that it would be impossible to determine whether a party was in compliance or to supervise participation.[23] As noted by one commentator:

> "Until the mid-1980s, courts refused to enforce mediation agreements on the theory that a court could not use its equity powers to order a futile gesture... but enforcement is gradually becoming routine, and little is heard today about futile acts, vain orders, or the problem of adequate remedies."[24]

4.16 The Commission considers that, as mediation and conciliation are non-binding processes, and given that the parties are still free to have the dispute arbitrated or litigated where mediation or conciliation does not result in a settlement, parties should be permitted to apply to court to stay proceedings to allow parties to attempt to resolve their dispute through such processes where there is a mediation or conciliation clause in an underlying contract between the parties. For the purposes of clarity, the Commission recommends that a mediation or conciliation clause means a contract clause, in writing, entered into by the parties in which they agree to submit to mediation or conciliation (or both) any dispute which has arisen or may arise between them in respect of a dined legal relationship, whether contractual or not. The Commission adds that "writing" should, to avoid any doubt, be defined to include electronic communications, such as by way of email or the internet.

4.17 In such a clause, ADR is voluntary in the sense that the parties consented to the inclusion of the clause in the agreement, and thus the process, at the outset of their relationship. In determining participation, as the Commission has previously noted, all that is required of the parties would be to show up to the mediation or conciliation. Parties could not be compelled to participate in the process and can withdraw at any stage of the process. The Commission concurs with the view that "ADR processes, in particular mediation are here to stay. It would not make sense if the push to have matters resolved by ADR were hampered by an inability to enforce a contractual clause referring disputes to an ADR

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19 Judgment at para 65 per Allsop P.

20 *Hamilton v Mendes* [1761] Eng R 56; 2 Burr 1198 at 1214 per Lord Mansfield; and *Glynn v Margetson* [1893] AC 351 at 359 per Lord Halsbury LC.

21 Peiris "An Agreement To Negotiate In Good Faith Is Enforceable - NSW Court Of Appeal Rejects "Walford v Miles" - Construction Of Dispute Resolution Clauses" (August 2009) *Mondaq Business Briefing*.

22 (1995) 36 N.S.W.L.R. 709 at 716–717.

23 Folberg et al. *Resolving Disputes: Theory, Practice and Law* (Aspen Publishers, 2010) at 501.

24 Katz "Getting to the mediation table kicking and screaming: Drafting an enforceable mediation clause" (2008) 26 *Alternatives* 10.

process."[25] Therefore, the Commission recommends that if any party to a mediation clause or conciliation clause commences any proceedings in any court against any other party to such clause in respect of any matter agreed to be referred to mediation or conciliation, any party to the proceedings may, at any time after proceedings have been commenced, apply to the court to stay the proceedings. The Commission also recommends that the court, unless it is satisfied that the mediation clause or conciliation clause is inoperative, is incapable of being performed or is void, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, should make an order staying the proceedings.

4.18 *The Commission recommends that a mediation or conciliation clause means a contract clause, in writing, entered into by the parties in which they agree to submit to mediation or conciliation (or both) any dispute which has arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. The Commission also recommends that "writing" should, to avoid any doubt, be defined to include electronic communications, such as by way of email or the internet.*

4.19 *The Commission recommends that if any party to a mediation clause or conciliation clause commences any proceedings in any court against any other party to such clause in respect of any matter agreed to be referred to mediation or conciliation, any party to the proceedings may, at any time after proceedings have been commenced, apply to the court to stay the proceedings.*

4.20 *The Commission recommends that the court, unless it is satisfied that the mediation clause or conciliation clause is inoperative, is incapable of being performed or is void, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, should make an order staying the proceedings.*

(2) Severability of mediation and conciliation clauses

4.21 In relation to arbitration, the doctrine of sevarability means that even where the agreement containing an arbitration agreement is alleged to be invalid, the arbitration agreement itself can be valid and thus the question as to the validity or otherwise of the main agreement can be referred to arbitration. In *Doyle v Irish National Insurance Co plc*[26], Kelly J held that the arbitration clause survived the voidance of the contract and the defendant was, accordingly, entitled to have the dispute referred to arbitration.

4.22 The English Court of Appeal placed a limit on the doctrine of sevarability in the case of *Soleimany v Soleimany*[27] in which it was decided that contracts for illegal adventures which are illegal or tainted in their very purpose (such as a contract of co-operation between highwaymen) could not be the subject of arbitration. However, the Court of Appeal in *Fiona Trust & Holding Corporation & Ors v Yuri Privalov & Ors*[28] required the parties in this case to proceed to arbitration where one party to the contract containing that arbitration clause had purported to rescind the contract as a whole following allegations of bribery. It was held that if a contract were to be invalid for reasons such as bribery, unless that bribery relates specifically to the arbitration clause, the clause survives and the validity of the contract as a whole is to be determined by the arbitrators, not the court. In doing so, it stressed the sevarability of an agreement to arbitrate from the larger contract of which it was part.

4.23 The Irish courts have not, as yet, had the opportunity to embrace the sevarability principle so fully. While the High Court has employed it in repudiation cases such as *Parkarran v M & P Construction*[29]

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25 Lee "The Enforceability of Mediation Clauses in Singapore" (1999) Sing. J. Legal Stud. 229 at 247. See also Shirley "Breach of an ADR Clause – A Wrong without Remedy?" (1991) *Australian Dispute Resolution Journal* 117; and Shirley "Enforcing and ADR Clause - Are Good Intentions All You Have?" (1988) 26 *American Business Law Journal* 575.

26 [1998] 1 I.R. 89.

27 [1999] 3 All ER 847.

28 [2007] E.W.C.A. Civ. 20 (Court of Appeal, January 24, 2007]. See Carey 'New Guidance on the scope of arbitration clauses' (2007) 14(4) CLP 72.

29 [1996] 1 I.R. 83 (repudiation of contract for alleged fundamental breach did not extend to arbitration clause).

and *Doyle v Irish National Insurance Company*[30], it remains to be seen whether the Irish courts will go so far where illegality of the contract containing the arbitration clause is alleged. Moreover, the question of the severability of mediation and conciliation clauses has yet to become before the courts. At this stage in the development of mediation and conciliation in Ireland, the Commission considers that it is a matter for the Court, having regard to the circumstances of each individual case, to determine the severability of mediation and conciliation clauses and that it would not be appropriate to make a recommendation on this issue.

4.24 *The Commission recommends that it is a matter for the court, having regard to the circumstances of each individual case, to determine the severability of mediation and conciliation clauses.*

C Mediation or conciliation where there is no referral clause

4.25 There are primarily two main points at which a dispute may be referred to mediation or conciliation, namely prior to the issuing of legal proceedings or referral during legal proceedings. The Commission concurs with the view that "Whatever efforts the Judiciary make to promote mediation as a way of settling disputes, a genuine 'mediation culture' will only develop if the sphere of activity of mediation is extended during the period before matters are brought before the courts."[31] Indeed, as noted by Lord Judge, Lord Chief Justice of England and Wales:

> "... if only the parties had come together at an early stage, long before they saw their counsel, long before they got to the door of the court, they could have resolved their dispute at a fraction of the cost and without the emotional expenditure and commitment of time and energy required by the litigation."[32]

4.26 Measures to encourage pre-litigation dispute resolution include: the use of dispute resolution clauses in contracts; a commitment to a dispute resolution pledge, whereby companies, governments or other organisations pledge not to use litigation to resolve disputes that may arise without first attempting ADR; solicitors advising clients, when appropriate, to consider using mediation or conciliation; requiring parties to attempt dispute resolution as a pre-requisite to filing a claim; and formal pre-action protocols.[33] The Commission now turns to examine several of these options.

(1) Provision of Information on ADR

4.27 Recital 25 of the 2008 EC Directive on Mediation states that:

> "Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation."

4.28 The 2007 Courts Service *Report on Family Law Reporting Pilot Project* recommended that the Courts Service should commission or prepare comprehensive information booklets on the various options available for the resolution of family law disputes, including the option of ADR, and the reliefs available in the District Court and Circuit Court and how to apply for them.[34]

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30 [1998] 1 I.R. 89 (repudiation of insurance contract non-disclosure of material fact (misrepresentation) did not impugn arbitration clause).

31 Speech by Justice Indra Hariprashad- Charles "The Role and Responsibilities of the Judge/Master in the Mediation Process". (January 2004). Speech available at: http://www.eccourts.org/publications/speechpres/otherspeeches/MedRoleandResponJan2004.pdf.

32 Speech by Lord Judge, Lord Chief Justice of England and Wales at the Civil Mediation Council Conference, 14th May 2009.

33 Goldschmid *"Discussion Paper: Major Themes of Civil Justice Reform"* Prepared for the Civil Justice Reform Working Group January, 2006. Available at www.bcjusticereview.org.

34 *Ibid.* Recommendation 8 at 62.

4.29 In the UK, the Courts Service has produced a series of user-friendly guides to mediation, various web-based materials were developed, and a number of interviews for local radio and advice on improving existing information were carried out. Articles were placed in the press and information was distributed in supermarkets and advice was provided to mediators on self-promotion.[35] This was intended to increase the number of cases being mediated and increase the national awareness of mediation. Furthermore, a National Mediation Helpline has been established and it is operated on behalf of the Ministry of Justice in conjunction with the Civil Mediation Council.[36] When a person calls the helpline, they are asked a series of questions to ascertain how appropriate their dispute is for mediation. Once this information has been obtained, the National Mediation Helpline adviser refers their request via email to one of the accredited mediation organisations. They in turn contact the person to discuss their dispute and, if all parties agree to proceed with mediation, they will try to arrange a suitable time and venue for the mediation meeting. If the person has not already obtained the other parties consent to mediation, the accredited mediation organisation will contact them to discuss the possibility of mediation. If the other parties do not agree to mediate the provider will close the file.

4.30 *The Commission recommends that the Courts Service should commission or prepare comprehensive information booklets on the various dispute resolution processes which are available for the resolution of disputes, including the processes of mediation and conciliation.*

(2) Role of Legal Representatives

(a) ADR & Legal Education

4.31 Before discussing the duty on legal representatives to advise their clients on the options of ADR, it is necessary to discuss how the legal profession should be educated on ADR in order to provide such information. As the Commission noted in its Consultation Paper, it is important that those entering the legal profession, and other relevant professions such as engineering, are educated on ADR. The Commission provisionally recommended that the relevance of ADR, including mediation and conciliation, should be incorporated into third level programmes in law and other disciplines and the professional programmes conducted by the Law Society of Ireland and the Bar Council of Ireland.[37] As noted by Ward LJ in the English case *Burchall v Bullard:*

> "The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate."[38]

4.32 One concern relating to the integration of ADR into the civil justice system is that lawyers may block the potential of ADR by approaching these processes with a traditional litigious mindset that is competitive in nature.[39] Indeed, the Australian Law Reform Commission has raised the concern of excessive 'adversarialism' as an issue of professional practice for lawyers.[40] It noted that "education plays an essential role in shaping the legal culture… Systematic reform and the maintenance of high standards of performance… require a healthy professional culture, one that values lifelong learning, takes ethical

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35 Sayers "Family Mediation in England and Wales". Presentation to The Committee on Legal Affairs Presidency of the Council of the European Union *"Mediation: Pushing the Boundaries"*, October 2007.

36 The Helpline receives over 7,800 calls a month. See www.nationalmediationhelpline.com

37 See LRC CP 50-2008 at 10.61.

38 [2005] E.W.C.A.Civ 358.

39 Douglas "Shaping the Future; The Discourses of ADR & Legal Education" (2008) 8 *Queensland University of Technology Law and Justice Journal* 1 at 121.

40 See Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System* (2000) Report No 89 at 3.30.

concerns seriously, and embraces a services ideal."[41] According to Lord Clarke, former Master of the Rolls in England and Wales:

> "The reason why mediation is not used as much as it might be (if it is not) is lack of education. What is required is education of judges, lawyers (both solicitors and barristers) and, perhaps most important, repeat clients such as liability underwriters. Put another way: education, education, education."[42]

4.33 The Commission considers that education plays a fundamental role in shifting our legal culture from a predominantly adversarial system to a modern civil justice system in which ADR processes, in particular mediation and conciliation, are appropriately integrated within it. In order to promote a culture of ADR in Ireland and within the legal profession, the Commission considers that legal education must incorporate the teaching of ADR into its core curriculum. As noted by one commentator: "Outside the world of law schools ADR is increasingly adopted in our legal and justice system and to ensure that lawyers of the future are prepared for changing paradigms of practice law schools need to value the place of ADR in their legal curriculum."[43] It has been reported that nearly every law and business school in Australasia, England and the United States teaches dispute resolution as either a compulsory or elective undergraduate subject.[44] Furthermore, the Commission suggests that those involved in the administration of justice, including judges, country registers, and relevant court personnel, should also be properly informed about such processes.[45]

4.34 The Commission firmly considers that education on ADR should not only emphasise the importance and value of ADR processes, such as mediation and conciliation, but education should also put ADR in its context and should include when not to use ADR and set out the limitations of various ADR processes.

4.35 *The Commission recommends that the relevance of ADR, including mediation and conciliation, should be incorporated into all third level programmes in law, the professional programmes conducted by the Law Society of Ireland and the Bar Council of Ireland, and other relevant professional course of education, including engineering and accountancy.*

(b) Duty of solicitor to advise client concerning mediation or conciliation

4.36 As the Commission noted in its Consultation Paper, individuals "should be empowered to find a satisfactory solution to their problem which includes the option of a court-based litigation but as part of a wider 'menu of choices.'"[46] Many studies have highlighted the importance of lawyers as gatekeepers to

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41 The Australian Law Reform Commission *Report on Managing Justice A review of the federal civil justice system* (Report No. 89 -1999) at 8-9. Available at http://www.austlii.edu.au/au/other/alrc/publications/reports/89/.

42 Speech by Lord Clarke of Stone-Cum-Ebony, Master of the Rolls of England and Wales entitled *"Mediation: An Integral Part of our Litigation Culture"* at the Littleton Chambers Annual Mediation Evening, (Gray's Inn, 8th June, 2009). See also Schmitz "Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn about ADR and What They Must Learn" (1999) 1 *Journal of Dispute Resolution* 29.

43 Douglas "Shaping the Future; The Discourses of ADR & Legal Education" (2008) 8 *Queensland University of Technology Law & Justice Journal* 1 at 138.

44 Spencer & Altobelli *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, 2005). See also Morris "Moulding of Lawyers: ADR and Legal Education" (1999) 17 *Windsor Yearbook of Access to Justice* 271; Bryce "ADR Education from a Litigator/Educator Perspective" (2007) 81 *St. John's Law Review* 1; and Acton "Impact of Mediation on Legal Education and on the Profession" (1999) 17 *Windsor Yearbook of Access to Justice* 256.

45 For example, in England and Wales, the Courts Service has published a 40 page 'Mediation Manual' for court staff, court managers, area directors and the small claims mediators with step-by-step guidance on how to respond to requests and arrange mediations. See www.judiciary.gov.uk.

46 See LRC CP 50-2008 at 1.12.

the justice system, including access to ADR and the courts.[47] It is important that lawyers fully inform their clients of all the available options for resolving their dispute and, in particular, of the potential benefits that ADR processes may offer them, prior to issuing proceedings. As noted in the Law Society of Northern Ireland's booklet on ADR, "Whether or not clients have asked for ADR, a solicitor may be failing in his/her professional duty for not advising on the possibility of alternative dispute resolution."[48] Indeed, as noted by the former US Supreme Court Chief Justice Warren Burger:

> "The obligation of the legal profession is to serve as the healers of human conflicts. To fulfil this traditional obligation of our profession means that we should provide the mechanisms that can produce an acceptable result in the shortest possible time with the least possible expense and with a minimum of stress on the participants. That is what a system of justice is all about."[49]

4.37 Rule 3.7.1 of the CCBE Code of Conduct for Lawyers in the European Union states that:

> "The lawyer should at all times strive to achieve the most cost effective resolution of the client's dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution." [50]

4.38 Similarly, Rule 11 of the International Bar Association International Code of Ethics states that "Lawyers shall, when in the client's interest, endeavour to reach a solution by settlement out of court rather than start legal proceedings."[51]

4.39 The *Judicial Separation and Family Law Reform Act 1989* introduced the first statutory duty in Ireland for solicitors to advise their clients in judicial separation proceedings to discuss reconciliation, mediation and making a separation agreement. The 1989 Act also required solicitors to give their clients the names and addresses of persons qualified to help effect a reconciliation between spouses who had become estranged, and the names and addresses of "persons and organisations qualified to provide a mediation service."[52] Where a solicitor acting for an applicant or respondent fails to certify that he or she has advised the client as to these possibilities, the court has the power to adjourn the proceedings for such period as it deems reasonable to allow the solicitor to discuss these matters with his or her client.[53] The *Family Law (Divorce) Act 1996* imposes a similar duty on solicitors in divorce applications. It has, however, been suggested that the 1989 and 1996 Acts appear to have had little impact on the use of mediation by those whose relationships have broken down and that "some judges express scepticism as to whether the option of mediation is seriously discussed by many solicitors with their clients."[54]

4.40 The English judiciary has strongly indicated that legal advisers should be discussing the options of ADR with their clients. Ward LJ in the English case *Burchell v Bullard* stated that:[55]

> "The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do."

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47 Genn *"Solving Civil Justice Problems What might be best?"* Paper presented at Scottish Consumer Council Seminar on Civil Justice, January 19th 2005. Available at www.scotconsumer.org.uk.

48 See *Law Society of Northern Ireland Booklet on ADR* at http://www.lawsoc-ni.org/download/adr/Booklet.pdf.

49 Burger *"Isn't There a Better Way"* (March, 1982) 68 *American Bar Association Journal* 274 - 277 at 274.

50 Council of Bars and Law Societies of Europe *Code of Conduct for Lawyers in the European Union* at www.ccbe.org.

51 See www.int-bar.org/images/downloads/International_Ethics.pdf.

52 Section 5(1) of the 1989 Act.

53 Section 7 of the 1989 Act.

54 Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service, October 2007) at 40.

55 [2005] E.W.C.A.Civ 358.

4.41 In *Ali v Lane*[56] and *Haycocks v Neville*[57], the English Court of Appeal exhorted professional advisers to use their influence to prevent clients from litigating over minor boundary disputes. The Court emphasised that in such cases the professional advisers should regard themselves as under a duty to ensure that their clients are aware of the potentially disastrous consequences of litigation of this kind and of the possibilities of alternative dispute procedures.

4.42 In 2005, a practice advice was jointly issued by the Civil Litigation Committee and ADR Committee of the Law Society of England and Wales which related to the giving of information on mediation and other dispute resolution options to clients before, and during the process of resolving any disputes between the client and third parties.[58] It recommends that solicitors should in appropriate cases, and at appropriate times, explain to clients whether there are ADR techniques that might be used other than litigation, arbitration or other formal processes; what those alternative processes involve, and whether they are suitable in the circumstances. It also provides that solicitors should keep the suitability of mediation and other ADR techniques under review during the case and advise clients accordingly. The 2005 practice advice also states that solicitors should be aware that failure to provide information and advice at the appropriate stage may have costs or other consequences.[59] The English *Solicitors' Code of Conduct 2007* also provides in Rule 2.02(1)(b) (Client Care) an obligation on solicitors to "give the client a clear explanation of the issues involved and the options available to the client." Guidance is given in the notes to Rule 2 at paragraph 15 which states that:

> "When considering the options available to the client (2.02(1)(b)), if the matter relates to a dispute between your client and a third party, you should discuss whether mediation or some other alternative dispute resolution (ADR) procedure may be more appropriate than litigation, arbitration or other formal processes. There may be costs sanctions if a party refuses ADR – see Halsey v Milton Keynes NHS Trust and Steel and Joy [2004] EWCA (Civ) 576."

4.43 In its 2009 Report to the Australian Attorney General entitled *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction,* the National Advisory Alternative Dispute Resolution Council recommended the introduction of legislation requiring legal practitioners to provide a prospective party to proceedings in federal jurisdiction with:[60]

- information about the requirement to take genuine steps to resolve the dispute before commencing court or tribunal proceedings;
- information about the services available outside the court or tribunal which may assist the person in resolving the dispute;
- information about the advantages of resolving the dispute without commencing court or tribunal proceedings and the benefits of ADR processes;
- an estimate of the lawyer's costs;
- an estimate of the costs of other parties for which the litigant may be liable if unsuccessful in the proceedings, and
- an estimate of the timeframe for proceedings, including for its commencement and conclusion.[61]

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56 [2006] EWCA Civ 1532; [2007] 02 EG 126.

57 [2007] EWCA Civ 78; [2007] 12 EG 156.

58 See www.lawsociety.org.uk.

59 See also Breger "Should an Attorney Be Required to Advise a Client on ADR Options?" (2000) 13 *Georgetown Journal of Legal Ethics* 427.

60 Lawyers in some states in the United States also have an explicit duty to advise clients about alternative dispute resolution processes. States such as Colorado, Texas, Georgia, Hawaii, Arkansas, and California have enacted rules that deal with this duty.

61 Report by NADRAC to the Attorney General '*The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction'* (Commonwealth of Australia, 2009) recommendation 2.11.

4.44 The Commission approves of this recommendation and considers that a similar statutory duty should be imposed on legal practitioners in Ireland. The Commission considers that the current statutory duty on solicitors to advise clients on ADR is too narrowly restricted to family disputes. The Commission recommends that a solicitor acting for any person should, prior to initiating any civil or commercial proceedings, advise the person to consider mediation and conciliation where such process or processes are appropriate for the resolution of the dispute. As previously noted, it has been suggested that the similar duty on solicitors in the family setting appears to have little impact on the use of mediation by those whose relationships have broken down and that "some judges express scepticism as to whether the option of mediation is seriously discussed by many solicitors with their clients."[62] Therefore, the Commission considers that it may be necessary to supplement a statutory duty on legal practitioners to advise on ADR options with pro-active steps to be taken in order to ensure compliance. The Commission now turns to examine this issue.

4.45 *The Commission recommends that a solicitor acting for any person should, prior to initiating any civil or commercial proceedings, advise the person to consider mediation and conciliation where such process or processes are appropriate for the resolution of the dispute.*

(3) Requirement to file a mediation and conciliation certificate

4.46 It has been suggested in a number of submissions received by the Commission that there should be a requirement to file a form of certificate when issuing civil proceedings signed by the party on whose behalf proceedings are being initiated, stating that ADR options had been explained to them and that they have considered settling the case by mediation or conciliation. The form of certificate could have an attachment giving some basic information on mediation and conciliation processes. A corresponding document should be required when filing a defence.

4.47 Similarly, in its 2009 Report to the Australian Attorney General entitled *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction,* the National Advisory Alternative Dispute Resolution Council recommended that legislation be introduced which would require parties to a proceeding in a federal court or tribunal to lodge with the court or tribunal a statement:

- that they have taken genuine steps to resolve the dispute before commencing the proceedings;
- that they have considered the services available outside the court or tribunal which may assist them to resolve the dispute, or issues in dispute;
- that they obtained advice about estimated costs, costs exposures and timeframes for the proposed proceedings;
- setting out what ADR processes they have engaged in, if any; and
- if they have not attended an ADR process, or taken other genuine steps to resolve the dispute, the reasons why they did not do so.[63]

4.48 This filing requirement also forms part of a 2009 Practice Direction on Mediation in Hong Kong which requires parties to legal proceedings to consider using mediation to resolve their dispute.[64] The Practice Direction applies to all High Court (Court of First Instance) and District court civil proceedings begun by writ, except for those in the Personal Injuries and Construction and Arbitration Lists and a small number of District Court cases. It requires each party's solicitor to file a 'Mediation Certificate' with the court stating whether the party is willing to attempt mediation and, if not, why not. The party themselves must sign the Mediation Certificate confirming that they understand the Practice Direction and the availability of mediation. The party's solicitor will also have to sign the Mediation Certificate confirming

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62 Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service, October 2007) at 40.

63 Report by NADRAC to the Attorney General '*The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction'* (Commonwealth of Australia, 2009).

64 *Practice Direction 31 on Mediation*. Available at: legalref.judiciary.gov.hk/doc/whats_new/prac_dir/html/PD31.pdf

that they have explained to their client (i) the availability of mediation; (ii) the Practice Direction; and (iii) the respective costs positions of mediation as compared to litigation.

4.49 In light of this, the Commission has concluded, and recommends, that, where any person commences or becomes a party to any civil or commercial proceedings, he or she must when the first document commencing the proceedings is filed with the court, sign a certificate (to be called a 'Mediation and Conciliation Certificate') stating that mediation or conciliation (or both), has been considered as processes for settling the dispute. The Commission also recommends that a solicitor, if any, acting for any person who commences any civil or commercial proceedings, must, when the first document commencing the proceedings is filed with the court, and at the same time as their client, sign the Mediation and Conciliation Certificate, stating that the solicitor has advised the person to consider mediation and conciliation, where appropriate, for the resolution of the disputes. The Commission considers that these recommendations will promote compliance by legal representatives to discuss meaningfully with their client the ADR options available to them. It will also assist in educating clients on the full spectrum of dispute resolution options available to them in resolving their dispute.

4.50 *The Commission recommends where any person commences or becomes a party to any civil or commercial proceedings, he or she shall, when the first document commencing the proceedings is filed with the court, sign a certificate (called a 'Mediation and Conciliation Certificate') stating that mediation or conciliation (or both), has been considered as processes for settling the dispute.*

4.51 *The Commission recommends that a solicitor, if any, acting for any person who commences any civil or commercial proceedings shall, when the first document commencing the proceedings is filed with the court, and at the same time as their client, sign the Mediation and Conciliation Certificate, stating that the solicitor has advised the person to consider mediation and conciliation, where appropriate, for the resolution of the disputes.*

(4) Conclusion

4.52 The Commission considers that measures to encourage pre-litigation dispute resolution should to be promoted in Ireland. As noted by Lord Woolf: "Where there exists an appropriate alternative dispute resolution mechanism which is capable of resolving a dispute more economically and efficiently than court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they have made use of that mechanism."[65] As noted above, measures recommended by the Commission include the dissemination of information on ADR; the introduction of a statutory duty on solicitors to advise their clients on the options of ADR in appropriate civil cases prior to the commencement of civil or commercial proceedings; and a requirement to file a Mediation and Conciliation Certificate with the court in civil or commercial proceedings. None of these measures compel any person to attempt an ADR process prior to litigation; rather they seek to empower individuals, through education, to decide whether a particular dispute resolution process would be more appropriate than litigation for them in resolving their dispute. As noted by Lord Neuberger of Abbotsbury, Master of the Rolls of England and Wales:

> "Promoting and facilitating the use of ADR for those cases where it will be of genuine advantage to the parties – because of, for instance, its informality, the flexibility of its processes and the availability of remedies not available to the litigation process – is of benefit not only to those litigants but also to the justice system. It is of benefit because it ensures that only those cases which truly call for, truly require, formal adjudication utilise the limited resources available to the justice system."[66]

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[65] Lord Woolf *Access to Justice, Interim Report* (1995) at Chapter 4.7. 2.

[66] Speech by Lord Neuberger of Abbotsbury, Master of the Rolls of England and Wales entitled *"Equity, ADR, Arbitration and the Law: Difference Dimensions of Justice"*, The Fourth Annual Keating Lecture, Lincoln's Inn, 19 May 2010.

D Referral to Mediation or Conciliation After Litigation Has Begun

(1) Consultation Paper

4.53 In its Consultation Paper, the Commission provisionally recommended that "in civil claims generally, courts should be permitted, either on their own motion initiative or at the request of a party to such claims, to make an order requiring the parties to consider resolving their differences by mediation or conciliation."[67] This provisional recommendation was based on Order 63A, r.6(1)(b)(xiii) of the *Rules of the Superior Courts 1986*, inserted by the *Rules of the Superior Courts (Commercial Proceedings) 2004*[68] which states that a High Court judge in the High Court Commercial List:

> "... may, of his own motion or on the application of any of the parties, adjourn the matter before it for a period not exceeding 28 days for the purpose of allowing the parties to consider whether or not the proceedings ought to be referred to mediation, conciliation or arbitration."

Similarly, Article 5.1 of the 2008 EC Directive on Mediation provides that:

> "A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available."

4.54 In its Consultation Paper, the Commission noted that there is an important distinction to be made between, on the one hand, mandatory *attendance* at an information session about ADR processes or at a mediation session and, on the other hand, mandatory *participation* in an ADR process. While a Court could compel attendance at a mediation or conciliation, it could never compel a party to fully participate in the process to reach a settlement. That is why the wording of the 2008 EC Directive should be carefully construed where it states that a court may "invite the parties to use mediation in order to settle the dispute." In such circumstances, the parties would be invited to use mediation to attempt to settle the dispute through mediation rather than having to actually settle the dispute through mediation.

(2) Role of the Court in Encouraging ADR

4.55 In its Consultation Paper, the Commission acknowledged and commended the manner in which the High Court's Commercial Law List has operated in a proactive manner to exemplify that mediation and conciliation are not alone "alternatives" to litigation but have also become important elements of an integrated approach to the resolution of civil disputes. Indeed, the Irish judiciary have, increasingly, commended the use of ADR for the resolution of appropriate civil disputes. The Commission considers that this level of judicial encouragement is key to the integration of mediation and conciliation into the civil justice system. For example, Denham J stated in *O'Brien v Personal Injuries Assessment Board*[69] that:

> "The establishment of alternative methods of resolving issues, alternative to court proceedings, has great merit in that issues more appropriate to alternative methods of resolution may be decided outside the courts. Thus, for example, the resolving of family law issues by mediation may be very beneficial and more appropriate for the family than the adversarial court process... Thus, parties may be well served in general by having alternative methods of resolving issues."

4.56 Similarly, in *Lombard and Ulster Banking Ltd v Mercedes-Benz Finance Ltd* MacMenamin J noted that:

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67 LRC CP 50-2008 at 3.92.

68 SI No.2 of 2004. See generally: Holmes "Two years on – The Commercial Court" 2 (2006) 1 *Journal of Civil Practice and Procedure* 1 at 15; Hayes "The Commercial Court" (2005) 23 *Irish Law Times* 317; Jacobs and Roulston "In the Know" (2004) 98 *Law Society Gazette* 4; Mr. Justice Peter Kelly "The Commercial Court" (2004) 9 *Bar Review* 1; Stauber "Commercial Courts: Twenty-First Century Necessity?" (2007) 1 *Judicial Studies Institute Journal* at 154.

69 [2008] IESC 71, [2009] 3 IR 243.

> "It might well have been thought in this era of mediation and alternative dispute resolution that an action between two substantial finance houses regarding the financing of a hire purchase transaction of three rather elderly second hand Mercedes tractor truck units would be more redolent of litigation of another era; the more so when the sum originally at stake was just in excess of the lower end of the High Court money jurisdiction. The fallacy of such a presumption is demonstrated by the instant case which was fought out with tenacity and vigour over three days in the High Court." [70]

4.57 In light of the increasing judicial support for ADR in Ireland, it is necessary to examine the referral options for parties to engage in processes, such as mediation and conciliation, after civil or commercial proceedings have commenced.

(a) Rules of Court Providing for Mediation & Conciliation

4.58 An increasing number of legislative provision has been made in recent years empowering a court either on its own motion initiative or at the request of a party, to adjourn proceedings to allow parties to consider using mediation or conciliation. For example, Order 56A, rule 2 of the *Rules of the Superior Courts 1986*, inserted by the *Rules of the Superior Courts (Mediation and Conciliation) 2010*[71] provides that:

> "The Court, on the application of any of the parties or of its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the Court considers just and convenient and:
>
> (i) invite the parties to use an ADR process to settle or determine the proceedings or issue, or
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> (ii) where the parties consent, refer the proceedings or issue to such process, and may, for the purposes of such invitation or reference, invite the parties to attend such information session on the use of mediation, if any, as the Court may specify."[72]

4.59 Similarly, High Court Practice Direction 51 'Family Law Proceedings' states at 8(iv) that at the first hearing of a case, the High Court, either on the application of one of the parties or of its own motion, shall:

> "... then or at any time thereafter, consider and recommend as it may think appropriate such forms of Alternative Dispute Resolution as may be helpful to resolve or reduce the issues in dispute between the parties. Such forms of Alternative Dispute Resolution may, inter alia, include conciliation, mediation or arbitration in respect of some or all of the issues arising in the proceedings."

4.60 While the inclusion of mediation and conciliation in specific legislative acts and practice directions is to be welcomed, the Commission considers that it is appropriate at this stage in the development of ADR processes to make further provision in primary legislation so that any court may, either on the application of any party involved in civil proceedings or of its own motion, and where the court considers it appropriate having regard to all the circumstances of the case, invite the parties to consider using mediation or conciliation to attempt to settle civil proceedings as defined in the Commission's proposed legislative framework. This could help promote consistency in all courts in encouraging parties to consider ADR. As noted by one commentator, "While there is no compulsion to do

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70 [2006] IEHC 168.

71 SI No.502 of 2010. See also section 6(7)(b) of the *Enforcement of Court Orders Act 1940* as inserted by the *Enforcement of Court Orders (Amendment) Act 2009.*

72 Where the parties decide to use an ADR process, the Court may make an order extending the time for compliance by any party with any provision of these Rules or any order of the Court in the proceedings, and may make such further or other orders or give such directions as the Court considers will facilitate the effective use of that process.

so, one would be brave to disregard judicial invitations to the parties to engage in good faith in a mediation conference."[73]

4.61 The Commission recommends that where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the Court should adjourn the proceedings and may make an order extending the time for compliance by any party with the provisions of the relevant Rules of Court or of any order of the Court in the proceedings, and may make such other orders or give such directions as the Court considers will facilitate the effective use of mediation or conciliation. The Commission recommends that it should be made clear that, in such cases, the general principles set out in the *Mediation and Conciliation Bill* (in Part 2 of the Bill) will apply. The Commission also recommends that where a party involved in a civil proceeding wishes to apply to the court to adjourn proceedings for the purposes of considering using mediation or conciliation to attempt to settle the proceedings, the application should be made not later than 28 days before the date on which the proceedings are first listed for hearing.

4.62 *The Commission recommends that a court may, either on the application of any party involved in civil proceedings or of its own motion, and where the court considers it appropriate having regard to all the circumstances of the case, invite the parties to consider using mediation or conciliation to attempt to settle civil and commercial proceedings. The Commission also recommends that, in such cases, the general principles set out in the Mediation and Conciliation Bill (in Part 2 of the Bill) will apply.*

4.63 *The Commission recommends that where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the Court should adjourn the proceedings and may make an order extending the time for compliance by any party with the provisions of the relevant Rules of Court or of any order of the Court in the proceedings, and may make such other orders or give such directions as the Court considers will facilitate the effective use of mediation or conciliation.*

4.64 *The Commission recommends that where a party involved in a civil proceeding wishes to apply to the court to adjourn proceedings for the purposes of considering using mediation or conciliation to attempt to settle the proceedings, the application should be made not later than 28 days before the date on which the proceedings are first listed for hearing.*

(b) Judicial Referral to Mediation or Conciliation against the Wishes of One or Both Parties

4.65 In its Consultation Paper, the Commission noted that while encouragement of ADR by the Courts is a welcome development in Ireland, a more difficult question is whether parties who resist judicial indications to consider ADR should be compelled to consider or attempt an ADR process and whether this would go against the voluntary nature of processes such as mediation and conciliation. The Commission notes that requiring parties to invest substantial amounts of time and money in mediation under such circumstances may well be inefficient.[74] The Commission is also aware that, in some instances, where mediation or conciliation does not reach a full settlement it may nonetheless still be beneficial for the parties. As noted by Coulson J in *Fitzroy Robinson Ltd v Mentmore Towers Ltd*: [75]

> "I am in no doubt that ADR, even if it had been unsuccessful, would have brought about a considerable narrowing of the issues between the parties. In its absence, the parties adopted diametrically opposed positions in the run-up to the trial."

4.66 In the Consultation Paper, the Commission notes that, in some States, judges may order a mediation or conciliation without the consent of the parties. For example in the English High Court case *Shirayama Shokusan v Danovo Ltd*[76] Blackburn J granted an order for mediation which had been applied for by the defendant despite the resistance of the claimant. He concluded that the court "does have jurisdiction to direct ADR even though one party may not be willing." The Australian National Advisory Alternative Dispute Resolution Council in its 2009 Report *The Resolve to Resolve – Embracing ADR to*

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73 Keane "Cost of Saying No" (2005) *Law Society Gazette* at 28-33.

74 See LRC CP 50-2008 at 11.03.

75 [2009] EWHC 1552 (TCC).

76 [2003] EWHC (Ch) 3006.

Improve Access to Justice in the Federal Jurisdiction also recommended the introduction of legislation to provide that judges or tribunal members may, at any time during court or tribunal proceedings, order a party to attend a facilitative or advisory ADR process without the parties' consent. The parties' consent would continue to be required for determinative processes such as arbitration.[77]

4.67 As the Commission has previously noted, section 15 of the *Civil Liability and Courts Act 2004* provides that mediation in a personal injuries action can be initiated at the request of one of the parties.[78] A court may, however, at the request of one party and at any time before the trial of the action direct that the parties meet and attend a mediation conference if it considers that the holding of a meeting "would assist in reaching a settlement in the action." In the High Court decision *McManus v Duffy*[79] Feeney J directed that the plaintiff and defendant should engage in mediation under section 15 of the 2004 Act, even though the defendant argued that it was an unwilling participant and that mediation was not likely to result in settlement of the action. Feeney J considered the language used in section 15 of the 2004 Act and noted that *assist* was a very wide term, and different from *likely*, and that this implied that the test under section 15 was whether there were benefits to be gained from mediation, as distinct from a likelihood of reaching a settlement. Feeney J considered the relevant English authorities, in particular the decision of the English Court of Appeal in *Halsey v Milton Keynes NHS Trust*.[80] The importance of the *Halsey* decision is that the Court clarified the factors which it would take into account in deciding whether a party's refusal to mediate is unreasonable and, as such, the circumstances in which even a successful party could be penalised as to costs for unreasonably refusing ADR. The Commission considers the costs sanctions aspect of the *Halsey* case below.[81] In *Halsey* the Court of Appeal listed 6 factors which may be relevant to the question of whether a party has unreasonably refused ADR. These are:

- the nature of the dispute;[82]
- the willingness of the parties;
- the merits of the case;
- the extent to which other settlement methods have been attempted;
- whether the costs of mediation or conciliation would be disproportionately high; and
- whether mediation or conciliation has a reasonable prospect of success.

4.68 In *McManus*, Feeney J noted that even though the defendant felt that mediation was unlikely to succeed, this did not mean unwillingness to proceed. While Feeney J was reported to have noted the 6 factors in *Halsey*, he held that, in Ireland, the issue under section 15 of the 2004 Act was whether mediation was *likely to assist*, not whether mediation had a reasonable prospect of success. As noted by one commentator: "This represents a much diluted threshold from that in *Halsey* and, indeed, it is difficult

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77 Report by NADRAC to the Attorney General *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Commonwealth of Australia, 2009) recommendation 2.11.

78 Order 5A, rule 9(1) of the *Circuit Court Rules 2001*, inserted by the *Circuit Court Rules (Personal Injuries) 2005* (S.I. No. 526 of 2005) states that a request by a party for a direction of the Court under section 15 of the 2004 Act that a mediation conference be held shall be made by motion to the Court on notice to the opposing party or parties, grounded upon an affidavit sworn by or on behalf of the moving party.

79 The account of Feeney J's judgment in this case, which has not been published on the Courts Service website, is based on Carty, "Landmark mediation decision will impact on costs" (2008) *Gazette Law Society of Ireland* (March 2008), p.21.

80 [2004] EWCA Civ 576, [2004] 4 All ER 920. For further discussion of the *Halsey* case, see the Consultation Paper at paragraph 11.10, and paragraphs 4.111-4.113, below.

81 See paragraphs 4.111-4.113, below.

82 As noted by Dyson LJ "Even the most ardent supporters of ADR acknowledge that the subject matter of some disputes renders them intrinsically unsuitable for ADR." The Commission agrees that some disputes are not appropriate for mediation, for example, family disputes where domestic violence is alleged, where there are allegations of child sexual or physical abuse, or where power imbalances exist between the parties.

to conceive of a case where mediation will not "assist", even if it has little reasonable prospect of success."[83] Whatever the merits of that argument, it is clear that in *McManus*, Feeney J simply applied the statutory test set out in section 15 of the 2004 Act so that he could order the parties to attend a mediation conference because mediation would potentially assist the parties, and their expert witnesses, in a fuller understanding of the differences between the parties.

4.69 The Commission considers that, if a court were to compel parties to enter into a mediation or conciliation to which they objected, that would be likely to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. The Commission recognises, however, that in some instances parties who resist mediation and are then ordered by the Court to attend change their feelings towards the process once they reach the table and the process is fully explained to them. As the Commission noted in its Consultation Paper, in situations where attendance at mediation is made mandatory the principle of voluntariness remains because even where participation in the process is required, continued participation is not. Parties are free to withdraw from the process at any time they choose, and even where a full settlement is not reached, the process can still be beneficial to some parties. Indeed, Lightman J has noted that:

> "The Court of Appeal refers to the fact that a party compelled to take part in mediation may be less likely to agree a settlement than one who willingly proceeds to mediation. But that is not the point. Such is the impact of mediation that parties who enter it unwillingly often become infected with the conciliatory spirit and settle. Even if only a small percentage of those who have been forced to mediate settle, it is better than never giving the process a chance." [84]

4.70 The Commission considers, however, that when determining whether it is appropriate to adjourn proceedings for the purposes of allowing the parties to consider ADR, where one or both parties have indicated that they do not wish to engage in mediation or conciliation, the Court should in general follow the criteria set out in *Halsey.* The main criterion that should be considered by the Court is whether, taking into account all the circumstances of the case, mediation or conciliation has a reasonable prospect of success. This approach is also reflected in the views expressed by the High Court and, on appeal, the Supreme Court in *J & E Davy v Financial Services Ombudsman.*[85] This case concerned a complaint made by a credit union to the Financial Services Ombudsman about alleged mis-selling of financial products by Davys, a financial services firm, to the credit union. Part 7B of the *Central Bank Act 1942*, as inserted by the *Central Bank and Financial Services Authority of Ireland Act 2004*, established the Office of the Financial Services Ombudsman. Section 57BK(1) of the 1942 Act, as inserted by the 2004 Act, provides that the "principal function of the Financial Services Ombudsman is to deal with complaints made under this Part [Part 7B] by mediation and, where necessary, by investigation and adjudication." Section 57CA(1) of the 1942 Act, as inserted by the 2004 Act, provides that "[o]n receiving a complaint the Financial Services Ombudsman shall, as far as possible, try to resolve the complaint by mediation." Section 57CA(2) of the 1942 Act, as inserted by the 2004 Act, provides that: "[p]articipation in the mediation by the parties to a complaint is voluntary, and a party may withdraw at any time. The Financial Services Ombudsman may abandon an attempt to resolve the complaint by mediation on forming the view that the attempt is not likely to succeed." Where the Financial Services Ombudsman considers that mediation is not appropriate, the Ombudsman proceeds to deal with the matter by adjudication. In the *J & E Davy* case, the Financial Services Ombudsman had considered whether the complaint in this case was appropriate for mediation but had concluded that it was not and had proceeded to make an adjudication. The applicant applied for judicial review and claimed, among other matters, that the Ombudsman should have dealt with the complaint by mediation. The High Court and, on appeal, the Supreme Court dismissed this aspect of the applicant's claim. In the High Court, Charleton J commented that: "mediation

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83 Carey "Reasonableness and Mediation: A New Direction?" (2010) 28 ILT 207.

84 Lightman "Breaking down the barriers" *The Times* July 31 2007. Available at http://business.timesonline.co.uk/tol/business/law/article2166092.ece. See also Sautter "Halsey-mediation one year on" (2005) 155 NLJ 7176.

85 [2008] IEHC 256, [2008] 2 ILRM 507; [2010] IESC 30, [2010] 2 ILRM 305.

need only be embarked upon where that carries a reasonable prospect of achieving results."[86] On appeal, the Supreme Court unanimously[87] held that the Ombudsman was obliged by the legislative provisions to engage in mediation and had, in that respect, failed to comply with the statutory duty imposed. Nonetheless, the Supreme Court concluded that it would not grant the applicant's claim for an injunction to quash the Ombudsman's adjudication. Notably, the Supreme Court held that to do so would be in conflict with the Ombudsman's statutory duty to act expeditiously in dealing with complaints. Delivering the Courts' judgment, Finnegan J stated: "To resort to mediation at this stage will further delay the Ombudsman's adjudication." Finnegan J also noted that 20 previous complaints had been made involving the applicant, so that they were very familiar with the Ombudsman's processes and it was "relevant that Davy did not require or suggest mediation." In those circumstances, and notwithstanding that the legislation required mediation "as the first response to a complaint" the Supreme Court refused judicial relief in the exercise of its discretion to do so. In the light of this increasingly well-defined approach to ADR already indicated by the courts in Ireland, the Commission considers that it should conclude, and so recommends, that the general legislative framework on mediation and conciliation which it proposes in this Report should recognise that the courts, as part of their existing role which integrates ADR into the civil justice system, are empowered to *encourage* parties to *consider* ADR in appropriate cases where a court considers that mediation or conciliation has a reasonable prospect of success in resolving the dispute or that it is likely to assist the parties in resolving their dispute or issues in dispute.

4.71 *The Commission recommends that, in deciding whether it is appropriate having regard to all the circumstances of the case to invite the parties to consider using mediation or conciliation to attempt to settle the proceedings, the court should consider in particular whether mediation or conciliation has a reasonable prospect of success and whether it is likely to assist the parties in resolving their dispute or issues in the dispute.*

(3) Court-Annexed Mediation Scheme

4.72 In the Consultation Paper, the Commission provisionally recommended that a pilot Court-annexed mediation scheme should be established in the District Court based on the principles of the voluntary participation of the litigants.[88] Such procedural requirements are consistent with the concept that court-annexed mediation should remain a wholly consensual process.[89] The Commission examined a number of court-annexed schemes in other jurisdictions including England, New South Wales, Ontario, Slovenia, and Germany.[90]

4.73 In a number of submissions received by the Commission it was suggested that it may be more appropriate to introduce a court-annexed mediation scheme in the Circuit Court. The reasons for this included that:

- the nature of disputes which are filed in the Circuit Court, especially in the area of family law, are more appropriate for mediation than the nature of disputes which are filed in the District Court; [91]
- the civil jurisdiction of the District Court in contract and most other matters is where the claim or award does not exceed €6,348.69; in contrast the limit of the Circuit Court's jurisdiction relates

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86 [2008] IEHC 256, [2008] 2 ILRM 507, at paragraph 61 of the judgment.

87 Finnegan J delivered the sole judgment for the Court (Murray CJ, Denham, Hardiman and Geoghegan JJ concurring).

88 See LRC CP 50-2008 at 3.98.

89 *Final Report on Civil Justice Reform* (Civil Justice Reform Judiciary of Hong Kong, 2004) at 438. Available at http://www.civiljustice.gov.hk/.

90 See LRC CP 50-2008 at 3.25 – 3.90.

91 The Circuit Court and High Court have concurrent jurisdiction in family proceedings. The Circuit Court has jurisdiction in a wide range of such proceedings, including judicial separation, divorce, nullity and in appeals from the District Court. In hearing such cases, the Circuit Court has jurisdiction to make related orders, including custody and access orders, maintenance and barring orders. Applications for protection and barring orders may also be made directly to the Circuit Court.

mainly to actions where the claim does not exceed €38,092.14. The limit of the civil jurisdiction of the Circuit Court would allow for a greater number of disputes to go to mediation;

- the waiting time for a civil trial in the Circuit Court is between 3-30 months.[92] In the District Court the waiting time from receipt of civil application to date of listing for hearing is between 4-12 weeks.[93] Given the greater delays in the Circuit Court, it may be more appropriate to establish a court-annexed mediation scheme in the Circuit Court;[94] and
- there are 26 Circuit Court offices throughout Ireland with a County Registrar in charge of the work of each office. This structure could make the establishment of a court-annexed scheme more convenient in terms of planning and implementing such a scheme compared to establishing a court-annexed scheme in the District Court.

4.74 Ireland remains one of a few common law jurisdictions which has not established a court-annexed mediation scheme.[95] It is the Commission's view that a voluntary court-annexed scheme would be a positive development in Ireland and it recommends that, in light of the above points, a pilot Court-annexed mediation scheme should be established in the Circuit Court based on the principles of the voluntary participation of the litigants.

4.75 *The Commission recommends that a pilot Court-annexed mediation scheme should be established in the Circuit Court based on the principles of the voluntary participation of the litigants.*

E Limitation Periods

4.76 In its Consultation Paper, the Commission invited submissions as to whether the parties in a mediation or conciliation may agree in writing to suspend the running of any limitation period. It should be noted that the issue of suspending limitation periods is only relevant in cases where the mediation or conciliation is conducted before the commencement of civil proceedings. Article 8 of the 2008 EC Directive addresses the effect of mediation on limitation periods. It states that:

> "Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process."

4.77 Recital 24 of the 2008 Directive stresses that the Directive does not aim to harmonise limitation periods of the Member States. In particular, the Directive does not set out any minimum period for suspending the limitation period following the end of a mediation. Some EU Member States have already stipulated in their legislation that recourse to mediation suspends limitation periods. For example, Article 1730, section 3 of the Belgian Judicial Code states that, in the event of a voluntary mediation, the limitation period is suspended from the beginning of the mediation onwards. Unless the parties agree otherwise, the limitation period starts running again one month after the end of the mediation. In Italy, limitation periods are governed by the Code of Civil Procedure. By virtue of Article 40 of LD 5/2003, the limitation period is suspended throughout the mediation process provided the mediation is conducted by a

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92 Waiting time is the time from receipt of notice of trial to the listing for hearing: see *Courts Service Annual Report 2009* at 74.

93 *Courts Service Annual Report 2009* at 75.

94 The Commission notes that the court process in Ireland has responded to the problem of delay - and the connected development of ADR processes - with important initiatives. For example, the Commercial Court list in the High Court, which was established in 2004 to deal with large commercial disputes, uses active judicial case management to improve the efficiency of the litigation process itself and also encourages the use of mediation and conciliation. Similarly, the Smalls Claims Court in the District Court is a mediation process for certain consumer disputes (which can be filed on-line and is available for a small handling fee), under which the first step is to seek informal resolution of the dispute using a document-only approach.

95 Other common law jurisdictions which have established court annexed mediation schemes include: England, United States, Canada, Australia, and New Zealand.

registered mediator. In Austria section 22 of the 2004 legislation on mediation enacted (ZivMediatG, 2004) provides that mediation conducted by a registered mediator suspends the limitation period.

4.78 It has been suggested in a number of submissions received by the Commission that effective provision for mediation and conciliation requires certainty that the recourse to these processes suspends the limitation periods for initiating procedures in the courts. If that were not the case, the parties' action could be extinguished by the time it becomes clear that the mediation or conciliation does not resolve the dispute.[96] Indeed, McCarthy J, in supporting the need for suspension periods for mediation, stated in *Realm Communications Ltd v Data Protection Commissioner*[97] that:

> "The position might be different if, of course, the Oireachtas had, say, provided for a suspension of the running of the time during a period of attempted mediation (something which in the event that the unprecedented concept of a condition precedent were to be introduced, might not be irrational)."

4.79 In light of this, the Commission recommends that where the subject-matter of a mediation or conciliation involves a dispute to which any limitation period (within the meaning of the Statutes of Limitations) may apply, the parties to the mediation or conciliation may agree in writing to suspend the running of any relevant limitation period from the commencement of the mediation or conciliation to the termination of the mediation or conciliation, and such agreement in writing shall operate to suspend the running of any relevant limitation period. This is to ensure that parties who choose mediation or conciliation to resolve their dispute are not prevented from initiating subsequent judicial proceedings in relation to that dispute by the expiry of limitation periods. However, mediation and conciliation must not become tactics for delaying proceedings by suspending limitation periods. For this reason, the Commission considers it very important that there is clarity for both parties about whether and when time has stopped running. Without such clarity, there is a risk of satellite litigation around the confusion that may result.

4.80 The Commission also recommends that, for the purposes of suspending the running of limitation periods, a mediation or conciliation commences on the day on which the parties agree in writing to suspend the running of any limitation periods. It is equally important for parties to a mediation or conciliation to determine when a mediation or conciliation is concluded for the purposes of limitation periods. The Commission recommends that for the purposes of suspending the running of limitation periods, the termination of a mediation or conciliation occurs

(*a*) by the conclusion of an agreement by the parties, on the date of that agreement, or

(*b*) by a declaration of the mediator or, as the case may be, the conciliator in writing, after consultation with the parties, to the effect that further efforts at mediation or conciliation are no longer justified, on the date on the declaration, or

(*c*) by a declaration of a party or parties in writing addressed to the mediator or conciliator to the effect that the mediation or conciliation is terminated, on the date of the declaration.

4.81 *The Commission recommends that where the subject-matter of a mediation or conciliation involves a dispute to which any limitation period (within the meaning of the Statutes of Limitations) may apply, the parties to the mediation or conciliation may agree in writing to suspend the running of any relevant limitation period from the commencement of the mediation or conciliation to the termination of the mediation or conciliation, and such agreement in writing shall operate to suspend the running of any relevant limitation period.*

4.82 *The Commission recommends that for the purposes of suspending the running of limitation periods, a mediation or conciliation commences on the day on which the parties agree in writing to suspend the running of any limitation periods.*

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96 See also Heijmans 'Effective Cross-border Mediation in Europe' *Association of Corporate Counsel European Briefing* June 2006. Online article available at: http://www.crowell.com/pdf/newsroom/EUBriefingsArticle.pdf.

97 [2009] IEHC 1.

4.83 *The Commission recommends that for the purposes of suspending the running of limitation periods, the termination of a mediation or conciliation occurs:*

(a) by the conclusion of an agreement by the parties, on the date of that agreement, or

(b) by a declaration of the mediator or, as the case may be, the conciliator in writing, after consultation with the parties, to the effect that further efforts at mediation or conciliation are no longer justified, on the date on the declaration, or

(c) by a declaration of a party or parties in writing addressed to the mediator or conciliator to the effect that the mediation or conciliation is terminated, on the date of the declaration.

F Enforceability of Agreements

4.84 In its Consultation Paper, the Commission provisionally recommended that a Court may enforce any agreement reached at mediation or conciliation.[98] The 2008 EC Directive on Mediation obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. Article 6 of the 2008 Directive states that:

> "Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability."

4.85 Furthermore, Article 14 of the UNICITRAL Model Law on International Conciliation states that "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement]."[99]

4.86 The enforceability of outcomes is an important feature of dispute resolution processes. A decision of a court is legally binding and is enforceable by the parties to the dispute and enables the final resolution of a dispute.[100] It is important to note that mediation and conciliation processes are not binding in themselves, but agreements reached through those processes can be made binding. For example, a mediated agreement *can be* in a binding contract, which can then be enforced in court.[101] It has been argued that mediated agreements may prove to be longer lasting than imposed settlements, such as court orders, because the parties have voluntarily participated in drawing up the terms of the agreement and are, therefore, more likely to adhere to the terms of the agreement.

> "For example, a structured settlement with payment terms within a party's ability to pay is much more likely to be paid and useful to the other party than a court money judgment which leaves the prevailing party with the unhappy task of moving forward with collection actions as the loser simply cannot make the payment."[102]

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98 See LRC CP 50-2008 at 3.217.

99 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002).

100 See Thompson "Enforcing Rights Generated in Court-Connected Mediation - Tension between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice" (2003) 19 Ohio St J on Disp Resol 509.

101 In *Thakrar v Ciro Citterio Menswear plc* (in administration) [2002] EWHC 1975 (Ch) the Court held that a mediated settlement was an enforceable contract.

102 Speech delivered by Edna Sussman entitled *"The Final Step: Issues in Enforcing Mediation Settlement Agreement"*, Fordham Law School, New York, 2008.

4.87 However, while a mediated agreement is the outcome of a voluntary agreement between the parties, there are many reasons that might cause a party to depart from an agreement reached. These reasons might include, for example: a change of heart after the mediation is over; there actually was no agreement with respect to a material term or there was a lack of agreement on the interpretation of a term; external factors intervene, such as a change in a party's economic situation; or impossibility of performance for a variety of reasons.[103] The Commission notes that the absence of enforcement powers and procedures can mean a lack of finality for the parties involved in the process and:

> "When enforcement action must be taken on a settlement agreement some of the primary goals of mediation are defeated - speed, economy, and the maintenance of relationships. The degree to which these goals are undermined can be impacted by the enforcement mechanisms available."[104]

4.88 As noted in Recital 19 of the 2008 EC Directive "mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties." The Commission turns now to examine the principle of enforceability in more detail.

(1) Self Determination & Enforceability

4.89 The Commission considers that the enforceability of agreements reached through mediation or conciliation is intrinsically linked to the principle of self-determination. It is for the parties to determine whether an agreement reached through mediation or conciliation is to be a legally enforceable contract or a non-binding agreement. The Commission considers that the issue of enforceability should be discussed by the mediator or conciliator with the parties at the earliest stage in the process so that all parties can consent in writing in the agreement to mediate or conciliate the intended enforceability of any agreement which may be reached during the process. Parties can decide whether an agreement reached through mediation will be:

- a verbal non binding agreement, with nothing put in writing except perhaps the fact that they have resolved the dispute;
- a written non-binding agreement setting out the terms of the agreement;
- a written agreement signed by all parties and the mediator/conciliator which would be an enforceable contract between the parties; or
- a written agreement that is to be made into a court order.

4.90 It is important to note that those attending the mediation or conciliation must have the capacity and authority to enter into a legally binding agreement. If any such persons with the necessary authority are absent, their written authority or consent must be obtained.

4.91 *The Commission recommends that the parties alone shall determine, either at the beginning of any mediation or conciliation or when agreement (if any) is reached, the enforceability, or otherwise, of any mediated or conciliated agreement that arises from the mediation or conciliation process.*

(2) Enforcement as a contract

4.92 As previously noted by the Commission, mediation and conciliation processes are not binding in themselves, but agreements reached through those processes can be made binding.[105] In many jurisdictions, including Ireland, the principal method for enforcing a settlement agreement reached at a mediation or conciliation is as a contract. This has been described as "an unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract which it

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103 *Ibid.*

104 *Ibid.* See also Deason "Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality" (2001) 35 *UC Davis Law Review* 1.

105 In *Thakrar v Ciro Citterio Menswear plc (in administration)* [2002] EWHC 1975 (Ch), the English High Court held that a mediated settlement was an enforceable contract.

is trying to enforce."[106] It is important to note that basic contract principles, including that a contract obtained through fraud, duress or coercion will not be enforced, apply also to settlement agreements which are reached through mediation and conciliation.

4.93 The Commission is aware that abbreviated settlement agreements or memoranda of understanding, often prepared at the mediation session as a shorthand recording of the terms agreed, are frequently argued to be only agreements to make an agreement and therefore non-binding. However, in the United States the courts have enforced settlement agreements where all of the material terms had been the subject of mutual consent,[107] and the mere fact that a later more complete document is contemplated will not defeat enforcement.[108] The language used in the agreement can be critical in this determination. Where the parties made the settlement "subject to" a formal agreement, as contrasted with "to be followed" by a formal agreement implementing the terms agreed to, enforcement was denied.[109] The fact that a few ancillary issues remain to be resolved will not generally defeat the enforcement of a settlement agreement. Once again, the parties must determine whether the memoranda of understanding is "subject to" a formal agreement as contrasted with "to be followed" by a formal agreement. The impact of this choice will determine whether the memoranda of understanding will be binding or not on the parties. This highlights the need for the mediator or conciliator to properly discuss the issue of enforceability with the parties at the outset of the process and also before they sign any agreement to ensure that the enforceability of the agreement reflects the wishes of the parties.

4.94 Furthermore, consistent with the general contract law principle which recognises the validity of oral contracts (subject to important exceptions such as those connected with contracts for the sale of land), courts in the United States will enforce a mediation settlement agreement, in the absence of an executed written agreement, if persuaded that there was a meeting of the minds as to all material terms and the parties intended to be so bound.[110] However, Article 6 of the 2008 EC Directive on Mediation states that "Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of *a written agreement* resulting from mediation be made enforceable" which thus envisages a written agreement as a pre-condition to enforcement. The Commission accepts that this general approach should be followed and recommends that for a mediated settlement agreement or conciliation settlement agreement to be an enforceable contract, it must be in writing and signed by all the parties and, as the case may be, by the mediator or conciliator.

4.95 *The Commission recommends that a mediated or conciliated agreement is enforceable as a contract at law where it is in writing and signed by all the parties and, as the case may be, by the mediator or conciliator.*

(3) Enforcement by a Court

4.96 The Commission recognises that, although parties will in most cases voluntarily comply with the terms of an agreement reached in mediation or conciliation, a formally enforceable agreement can be desirable for parties as it would enable them to give an agreement resulting from mediation or conciliation a status similar to that of a judgment without having to commence judicial proceedings. Indeed, the Working Group on Mediation for the Department of Justice in Hong Kong noted that:

> "The introduction of a separate enforcement mechanism tailored for mediated settlement as an alternative to contract litigation certainly has its advantages. Apart from being speedy and less

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106 Speech delivered by Edna Sussman entitled *"The Final Step: Issues in Enforcing Mediation Settlement Agreement"*, Fordham Law School, New York, 2008.

107 *Harkader v Farrar Oil Co.,* 2005 WL 1252379 (Ky. App. 2005).

108 *Claridge House One Condominium Ass'n. v Beach Plum Properties,* 2006 WL 290439 (N.J. Super. A.D. 2006; *Chesney v Hypertension Diagnostics*, 2006 WL 2256590 (Minn. App. August 8, 2006).

109 *Golding v Floyd,* 539 S.E.2d 735 (Va. 2001); *Quinlan v Ross Stores*, 932 So.2d 428 (Ct App. Fla. 1st Dist. 2006).

110 *White v Fleet Bank of Maine,* 875 A.2d 680 (Me. 680); *Standard Steel, LLC v Buckeye Energy, Inc.,* 2005 WL 2403636 (W.D. Pa. 2005).

costly, a separate enforcement mechanism may also offer greater confidentiality protection since reduced contract litigation would lessen the reliance on evidence procured from mediation sessions."[111]

4.97 As previously noted, the 2008 EC Directive on Mediation states that Member States "shall ensure that it is possible for the parties, or one of them with the explicit consent of the others, to request that the content of the written agreement be made enforceable… by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the member state where the request is made."[112]

4.98 The Commission notes the existing and long-standing practice of the Courts that, where the parties so apply, any settlement, whether mediated or otherwise achieved, can be ruled to make it binding and enforceable. This is subject, of course, to certain mandatory or statutory requirements. For example, under Article 41.3.2º of the Constitution and the related requirements of the *Family Law (Divorce) Act 1996*, the Court must be satisfied, in ruling any settlement, whether mediated or otherwise, that the rights of the child are fully represented, that the settlement is based on full and mutual disclosure of assets, and that one party has not been overborne by the other in reaching the settlement. Where a mediated settlement agreement or a conciliation settlement agreement becomes an order of the court, the court is notified of the terms of the agreement, and should either party feel later that the agreement has been breached, they can apply to the court to enforce it. It has been suggested that enforcing a court order is considerably easier than enforcing a contract because a contract must first be proved.[113] The Commission recognises that this would be an attractive mechanism for enforcing mediated settlement agreements and conciliation settlement agreement, especially for some parties in commercial and family disputes who wish for a definite degree of finality.

4.99 The Commission accepts that such agreements may be difficult to draft as court orders unless the mediation or conciliation had taken place as part of the litigation process. In such cases, the issues being resolved would have already been framed in justiciable terms, and the agreement reached at mediation or conciliation could be presented as a consent order. The Commission considers that if an agreement reached through mediation or conciliation is to become an order of the Court there must be some judicial oversight before turning the agreement into a court order. The Commission considers that there may be a number of factors which the Court may wish to consider including whether it is practicable for the terms of the agreement to be enforced by the Court. For this reason, it is very important that those drafting the agreements ensure that the provisions of the agreement are framed in justiciable terms. Furthermore, the Commission recommends that where an application for enforcement concerns any written agreement reached at mediation or conciliation that affects the rights or entitlements (including financial or property rights or entitlements) of the parties, or, where relevant, any dependent of the parties, the court may, in its discretion, enforce the terms of that agreement where it is satisfied that the agreement adequately protects those rights or entitlements having regard to all the circumstances (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland).[114]

4.100 *The Commission recommends that a Court may, on the application of the parties to any written agreement reached at a mediation or conciliation, enforce the terms of that agreement where it is satisfied that is appropriate to do so.*

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111 *Report of the Working Group on Mediation* (Department of Justice Hong Kong, February 2010) at 7.186.

112 Article 6 of the 2008 EC Directive.

113 Doyle "*Advising on ADR: the essential guide to appropriate dispute resolution" (*Advice Services Alliance, June 2000) at 112.

114 This includes, for example, any agreement connected with a divorce (which is subject to the requirements of Article 41.3.2º of the Constitution and the *Family Law (Divorce) Act 1996*) or connected with the sale of goods (which is subject to, for example, the *Sale of Goods and Supply of Services Acts 1893 and 1980* and Regulations such as the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (SI No.27 of 1995)).

4.101 *The Commission recommends that where an application for enforcement concerns any written agreement reached at mediation or conciliation that affects the rights or entitlements (including financial or property rights or entitlements) of the parties, or, where relevant, any dependent of the parties, the court may, in its discretion, enforce the terms of that agreement where it is satisfied that the agreement adequately protects those rights or entitlements having regard to all the circumstances (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland).*

G Costs: Sanctions and Recovery

4.102 The general principle concerning the financial cost of mediation or conciliation is that the parties should share the cost, regardless of the outcome. By contrast, in the context of litigation, general principle is that costs "follow the event", in other words the losing party must pay the successful party's costs as well as their own.[115] The Commission now turns to examine the issues of costs sanctions and recoverable costs associated with mediation and conciliation.

(1) Cost Sanctions: Good Faith Requirement

4.103 In its Consultation Paper, the Commission provisionally recommended that a Court should not impose a good faith requirement in mediation or conciliation as this would risk undermining key principles, including the right to self-determination, the voluntary nature of the process, the neutrality of the mediator or conciliator and the confidentiality of the process. The Court should, however, encourage parties to mediate and conciliate in good faith.[116]

4.104 Proponents of a good faith requirement suggest that there are a number of reasons to compel such a standard for participation. These include: protecting parties against abusive and inappropriate behavior in mediation or conciliation; putting participants on notice of acceptable behavior in mediation and conciliation; and protecting the efficiency of the processes. They argue that good faith requirements are necessary for the mediation or conciliation process to work effectively as a creative, collaborative dispute resolution process in which parties take into account differing perspectives and positions.[117] "Despite difficult definitional and policy issues inherent in the enforcement of a good-faith requirement, the legitimate objectives of ADR - including inter alia efficiency, effectiveness, party satisfaction, and fairness - require a duty of good faith participation."[118]

4.105 The Commission, however, does not support these arguments. The Commission considers that an explicit requirement of good faith in mediation or conciliation may threaten the distinction between these processes and litigation; and, in particular, the objective of party empowerment.[119] A further negative consequence of introducing a statutory good faith requirement would be that participants in a mediation or conciliation may feel uncertain about what actions mediators, conciliators or courts would consider bad faith. Most good faith elements depend on an assessment of a person's state of mind which, by definition, is subjective.[120] The prospect of adjudicating bad-faith claims by using mediator or

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115 Order 99 Rule 1(4) of the *Rules of the Superior Courts 1986*.

116 See LRC CP 50-2008 at 11.36.

117 Izumi & LaRue "Prohibiting Good Faith Reports under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent" (2003) 1 *Journal of Dispute Resolution* at 70.

118 Winston "*Participation Standards in Mandatory Mediation Statutes:*"You Can Lead a Horse to Water" (1996) 11 Ohio St J on Dis Res 187.

119 Boettgger "Efficiency Versus Party Empowerment – Against a Good-Faith Requirement in Mandatory Mediation" (2004) 23 Rev Litig1 at 2. See also Biller "Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process" (1996) 18 Campbell L Rev 281; and Kovach "good Faith in Mediation –Requested, Recommended or Required – A New Ethic" (1997) 38 *South Texas Law Review* 2 at 575.

120 Lande "Using Dispute System Design To Promote Good-Faith Participation in Court-Connected Mediation Programs" (2002) 50 UCLA L Rev 69 at 87. See also Pittman "Mediation: A Duty to Participate in Good Faith" (1993) 39 *Mississippi Lawyer* 3.

conciliator reports has the potential to distort the process by damaging participants' faith in the confidentiality of mediation or conciliation communications and the mediators' and conciliators' impartiality.[121] The Commission concurs with the view that:

> "The requirement has negative consequences, converting the shield into a sword and diverting attention from the true goals of the process. Rather than increasing dialogue, the requirement may shut down constructive communication and chill some of the passionate and useful exchange that can occur in mediation. Worse, it can induce dishonesty and nurture an environment where bargaining is superficial and disingenuous."[122]

4.106 The Commission supports the view that objectively verifiable actions, such as complete refusal to consider mediation or conciliation, could attract some form of sanction. The Commission does not, however, consider it appropriate that subjective matters, such as the state of mind of the parties, should result in any sanction, including costs sanctions. As noted by one commentator:

> "A requirement of good faith participation, which is inherently vague and subjective, unduly entrenches on the voluntariness of settlement and … it is only when such vague aspirations are converted into legal mandates enforceable by sanctions that I think a good faith requirement is inconsistent with the objectives of mediation."[123]

4.107 By contrast, as the Commission noted in its Consultation Paper, a judicial recommendation that parties enter into the process in good faith is quite different.[124] In that respect, the Commission considers that parties can and should seek a commitment of good faith from each other by including a good faith provision in the mediation or conciliation agreement. The mediator or conciliator can remind both parties of their previous commitment throughout the process.

4.108 *The Commission recommends that there should not be a statutory provision imposing a mandatory good faith requirement of parties in a mediation or conciliation.*

(2) Criteria for Imposing a Costs Sanction

4.109 In its Consultation Paper, the Commission stated that rather than applying any costs sanctions based on the subjective behaviour on the parties during a mediation or conciliation (which requires the mediator or conciliator to take on a form of adjudicatory role in reporting to the Court), the Commission considered that costs sanctions should be based on the unreasonable refusal of a party to mediate or conciliate.[125]

4.110 On this issue, the Commission invited submissions as to whether, in general, costs sanctions should be imposed on a party by a Court for an unreasonable refusal to consider mediation or conciliation and whether a Court should apply the following factors in determining that a party has unreasonably refused to consider mediation or conciliation: the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of mediation would have been disproportionately high; whether any delay in setting up and attending mediation would have been prejudicial; and whether mediation had a reasonable prospect of success.[126]

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121 *Ibid.* See Zylstra "Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled" (2001) 17 J Am Acad Matrimonial Law 69.

122 Izumi & LaRue "Prohibiting Good Faith Reports under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent" (2003) 1 *Journal of Dispute Resolution* at 74. See also Bennight "Enforceable Good Faith Requirements in Mediation Would Be Worse than the Status Quo" (1998) 4 *Dispute Resolution Journal* 3 at 2.

123 Sherman "Good Faith Participation in Mediation: Aspirational, Not Mandatory" (1997) 4 *Dispute Resolution Magazine* 2 at 14.

124 Kovach "Good Faith in Mediation – Requested, Recommended or Required? A New Ethic" (1997) 38 S Tex L Rev 575 at 598.

125 LRC CP 50-2008 at 11.37.

126 See LRC CP 50-2008 at 11.71.

4.111 The Commission discussed in its Consultation Paper the English Court of Appeal decision in *Halsey v Milton Keynes NHS Trust*.[127] As already noted,[128] the *Halsey* decision clarified the factors which an English court will take into account in deciding whether a party's refusal to mediate is unreasonable and, as such, the circumstances in which a successful party could be penalised as to costs for unreasonably refusing ADR. The Court of Appeal listed 6 factors which may be relevant to the question of whether a party has unreasonably refused ADR. These are:

- the nature of the dispute;
- the merits of the case;
- the extent to which other settlement methods have been attempted;
- whether the costs of mediation or conciliation would have been disproportionately high;
- whether any delay in setting up and attending mediation or conciliation would have been prejudicial; and
- whether mediation or conciliation had a reasonable prospect of success.[129]

4.112 The Commission considers that, in general terms, the guidelines set out in *Halsey* are appropriate in the context of determining whether costs sanctions could or should be applied. In particular, they allow the Court to determine whether to impose cost sanctions without having to explore the subjective intentions of the parties during a mediation or conciliation. As Dyson LJ noted in *Halsey*: [130]

> "… parties are entitled in an ADR to adopt whatever position they wish and if, as a result the dispute is not settled, that is not a matter for the court… if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement."

4.113 The Commission considers that the fundamental issue which a Court should consider when imposing a costs sanction for an unreasonable refusal to consider mediation or conciliation is whether, taking into account the circumstances of the case, mediation or conciliation had a reasonable prospect of success.[131] The burden should be on the refusing party to satisfy the court that mediation or conciliation had no reasonable prospect of success.

4.114 In its Consultation Paper the Commission also provisionally recommended that that family law cases should not be subject to costs sanctions for unreasonable refusal to consider mediation.[132] In submissions received by the Commission, it was felt that some that family law cases should not be given special protection on this issue. The Commission considers that family law cases, although many may be suitable for mediation or conciliation, should not generally be subjected to a costs sanction for an unreasonable refusal to consider mediation or conciliation. It should, however, be left to the discretion of the Court to determine if parties in some family law cases, an example of which might include a family probate dispute, should be subject to a costs sanctions for an unreasonable refusal to consider mediation or conciliation where a Court considers that a mediation or conciliation had a reasonable prospect of success.

4.115 *The Commission recommends where a court has invited parties to consider using mediation or conciliation, the court, in awarding costs in the proceedings connected with that invitation (or, as the case*

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127 [2004] EWCA. Civ. 576, [2004] 4 All ER 920. See LRC CP 50-2008 at 11.54-11.65.

128 See paragraph 4.68, above.

129 For a detailed discussion on each of these factors see LRC CP 50-2008 at 11.58-11.65.

130 [2004] EWCA. Civ. 576, [2004] 4 All ER 920 at para. 14.

131 Indeed, as previously noted by the Commission this criterion should also be employed by a Court when determining if proceedings should be adjourned to allow the parties to consider using mediation or conciliation. See paragraphs 4.65 - 4.71 above.

132 LRC CP 50-2008 at 11.72.

may be, any appeal in those proceedings) may, where it considers it just, have regard to any unreasonable refusal of any party to consider using mediation or conciliation where such a process had, in the Court's opinion, a reasonable prospect of success.

4.116 *The Commission recommends that, except where the Court determines otherwise, family law cases should not be subject to costs sanctions for unreasonable refusal to consider mediation or conciliation.*

(3) Recovery of Mediation and Conciliation Costs

4.117 As the Commission noted in its Consultation Paper, the costs of preparing and participating in a mediation or conciliation may be substantial for parties, especially if they have separate legal costs incurred stemming from the mediation or conciliation such as paying for legal representative at the process.[133] The Commission, in its Consultation Paper, invited submissions as to whether to whether mediation or conciliation costs should be recoverable costs of any subsequent litigation.[134] The Commission considers that a distinction must be made between a mediation or conciliation which occurs independently of civil proceedings and a mediation or conciliation which occurs during the litigation process. It is suggested that where a process is attempted prior to litigation and settlement is not achieved, the costs for such a mediation or conciliation would not form part of the recoverable costs of a case.

4.118 In the English High Court case *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd*[135] the issue of recovering pre-litigation costs, including costs incurred in a mediation, was examined by the English High Court (Technology and Construction Court). Coulson J in this case drew a distinction between pre-action mediations (as in *Lobster Group*) and mediations that take place after litigation has started (as in *National Westminster Bank v Feeney*[136]):

> "… unlike the costs incurred in a pre-action protocol [under the English Civil Procedure Rules 1998], I do not believe that the costs of a separate pre-action mediation can ordinarily be described as 'costs of and incidental to the proceedings'. On the contrary, it seems to me clear that they are not. They are the costs incurred in pursuing a valid method of alternative dispute resolution … Both the course of the mediation itself and the reasons for its unsuccessful outcome are privileged matters known only to the parties. As a matter of general principle, therefore, I do not believe that the costs incurred in respect of such a procedure are recoverable …"

4.119 Coulson J went on to concede, however, that it was much easier to see why the cost of post-litigation mediations might be recoverable: there was greater proximity to the proceedings and, on that basis, a mediation could well be regarded as 'negotiations with a view to settlement' and so, recoverable.[137] Coulson J also examined this issue in *Roundstone Nurseries Ltd v Stephenson Holdings Ltd.*[138] where the Court had to consider whether it had jurisdiction to award costs in relation to a mediation that had failed. In this case a party was ordered to pay the costs thrown away by its late withdrawal from mediation. In considering whether to make such an order, the court considered the conduct of the parties and in particular whether or not the party who withdrew from the mediation was justified in doing so. Reiterating the distinction between pre-litigation and post-litigation mediations, Coulson J stated that:

> "The costs of a separate, stand-alone ADR process, particularly if it takes place before the proceedings are commenced, will not usually form part of 'the costs of or incidental to the

133 LRC CP 50-2008 at 11.79.

134 LRC CP 50-2008 at 11.84.

135 [2008] EWHC 413 (TCC); [2008] 1 BCLC 722.

136 [2006] EWHC 90066 (Costs).

137 Carle "United Kingdom: The Costs Of Mediation – Who Picks Up The Tab At The End Of The Day?" (March 2008), online article available at http://www.mondaq.com/article.asp?articleid=58414.

138 [2009] EWHC 1431 (TCC).

litigation'. Often it is agreed by the parties that each party will bear their own costs of such a mediation, with the result that the costs cannot subsequently be sought by one or other party in the proceedings."[139]

4.120 In the New South Wales Supreme Court case *Mead & Anor v Allianz Australia Insurance Ltd*[140] Bergin J declined to interpret the term "cost of these proceedings" as including the costs of the mediation. First, Bergin J found that such a construction would be inconsistent with the agreement to mediate that the parties in that case had made. He stated that, when the parties entered into that agreement, "they regarded the mediation as a separate aspect of their litigious process; that is, they saw it as necessary to make a separate application for costs of the mediation". Secondly, Bergin J was of the view that, as a matter of policy, it would not be appropriate to hold that "costs of the proceedings" included mediation costs in circumstances where there was a consensual order for mediation, a mediation agreement and subsequent compromise.

4.121 In *Newcastle City Council v Wieland*[141] the New South Wales Court of Appeal considered whether the phrase "costs of the proceedings" includes the costs associated with mediation and the Court moved away from the findings in *Mead*. Ipp J focused on the proper construction of the words "costs of the proceedings" under the *Civil Procedure Act 2005*. The Court determined that the mediation was part of "the proceedings" because the mediation occurred as a result of a court order. Ipp J also identified some policy reasons for regarding mediation costs as costs of the proceedings. He referred, in particular, to the argument that a mediation may enable settlement and thereby mitigate further costs and allow better use of judicial and court resources. In agreeing with Ipp J, Hodgson J thought that where the parties clearly express an intention that the costs of a court ordered mediation are to be dealt with separately from the costs of the proceedings, then the court will give effect to that agreement but this requires a clear expression of intention from the parties.[142]

4.122 The Commission recommends that where a court has invited parties to consider using mediation or conciliation, the court may, in the absence of an agreement by the parties as to financial cost, make such order for costs incurred by either party in connection with the mediation or conciliation process as it considers just, including an order that both parties bear the costs equally. The discretion to order that both parties bear the costs equally emphasises that the court is free to depart from the standard rule in civil proceedings that "costs follow the event," that is, that the losing party pays their own legal costs and those of the successful party.

4.123 *The Commission recommends that where a court has invited parties to consider using mediation or conciliation, the court may, in the absence of an agreement by the parties as to financial cost, make such order for costs incurred by either party in connection with the mediation or conciliation process as it considers just, including an order that both parties bear the costs equally.*

H Content of Mediators and Conciliators Reports to Court

4.124 In the Consultation Paper, the Commission provisionally recommended that the content of a mediator's or conciliator's report to the court should be restricted to a neutral summary of the outcome of the mediation or conciliation.[143] The Commission noted that the issue of a mediator or conciliator reporting to the court raises a number of questions concerning confidentiality. In some jurisdictions, including Ireland, mediators' reports can be used by the Courts to determine whether costs should be awarded against a party who refused to partake in the mediation process.[144]

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139 *Ibid* at 46.

140 [2007] NSWSC 500.

141 [2009] NSWCA 113.

142 Thompson *"Court Ordered Mediation - Mediation costs as costs of the proceedings"* (May 2009). Online article available at: www.middletons.com.

143 See LRC CP 50-2008 at 11.78.

144 See section 16 of the *Civil Liability and Courts Act 2004*.

4.125 The Commission considers that the content of mediators' or conciliators' reports to the Court should be narrowly restricted. Confidentiality during a mediation session is essential to protect the integrity of the process. For the mediation or conciliation to be effective, a mediator or conciliator must have the trust of all participants, both in joint sessions and in private caucuses. Requiring mediators or conciliators to report on the conduct of the parties to the court imperils the confidentiality of the process.

4.126 The Commission noted in its Consultation Paper that some jurisdictions have placed an obligation on a mediator or conciliator to make a neutral summary of the outcome of the process and make it available to the court if requested.[145] The Commission favours this approach and considers that a neutral summary could include:

- name the parties that attended the mediation or conciliation;
- set out whether the mediation or conciliation resulted in a settlement agreement; and
- set out the terms of any settlement agreement.

4.127 *The Commission recommends that the content of a report to the court, if any, by a mediator or conciliator should be limited to a neutral summary of the outcome of the mediation or conciliation.*

[145] See LRC CP-50 2008 at 11.76.

CHAPTER 5 EMPLOYMENT DISPUTES & INDUSTRIAL RELATIONS: THE ROLE OF ADR

A Introduction

5.01 In this Chapter, the Commission discusses the role of ADR in the employment setting. In Part B the Commission provides an overview of employment disputes. In Part C the Commission discusses the use of ADR in the resolution of workplace disputes and the importance of internal organisational dispute resolution systems. In Part D the Commission examines the provision of mediation and conciliation clauses in employment contracts.

B Employment Disputes & ADR: An Overview

5.02 As the Commission noted in its Consultation Paper, Ireland has a comprehensive set of statutory bodies which are responsible for the resolution of employment grievances and disputes outside of the court system.[1] The Commission reiterates in this Report that it does not propose that its general legislative framework for mediation and conciliation would affect the well-established, and well-trusted, statutory mediation and conciliation processes to deal with collective disputes that operate within, for example, the Labour Relations Commission and the Labour Court under the *Industrial Relations Act 1990.* In addition, the detailed statutory Codes of Practice that have been developed under the 1990 Act already provide guidance on the detailed processes that are to be put in place to settle specific forms of grievances and other matters arising in the industrial relations and employment setting. Similarly the Commission does not propose that its general legislative framework for mediation and conciliation would affect the mediation arrangements already in place in the Equality Tribunal under the *Employment Equality Acts 1998 to 2008* or the *Equal Status Acts 2000 to 2008*. As the remaining elements of this Chapter indicate, however, the Commission's proposed framework for mediation and conciliation may be of relevance in the context of employment-related disputes that do not fall within these existing legislative codes.

(1) Nature of Workplace Disputes

5.03 It has been suggested that, after death and divorce, the loss of a job is considered the third most stressful life event an individual will experience.[2] Conflict is an inevitable part of everyday working life and it is has been noted that:

> "People get 'stuck' in conflict at work for a number of reasons. Conflict defines us, validates our behaviour and strengthens our bonds with allies. It is very difficult to move on from conflict without compromising this identity and losing face. Yet remaining in conflict makes us lose perspective and the opportunity of self development. It is also toxic to the person involved and those surrounding the conflict."[3]

5.04 As the Commission noted in its Consultation Paper, the dynamics of a dispute are often compared to an iceberg.[4] The iceberg model serves to illustrate that only a fraction of the issues in a

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1 For a detailed discussion on the role of ADR in these statutory bodies see LRC CP 50-2008 at 4.12 – 4.71.

2 Hippensteele "Revisiting the Promise of Mediation for Employment Discrimination Claims" (2009) 9 Pepp Dis Resol L J 211 at 220.

3 Pienaar *"Overcoming resistance to workplace mediation"* (2009). Online article available at: www.adrgroup.co.uk.

4 See Van Riemsdijk *"Cross-Cultural Negotiations Interactive Display."* Paper delivered at The Expanding ADR Horizon Conference, 27th April 2007, Trier, Germany.

dispute are immediately accessible.[5] The submerged part of the iceberg represents the personal interests of the party, the fundamental underlying factors contributing to any given conflict, which do not always surface during formal rights-based processes such as litigation or arbitration.[6] In a workplace dispute, such underlying factors to the dispute may include the personalities or cultural backgrounds and differences of the parties and quite often these factors tend to be the catalyst in the escalation of workplace disputes. As noted by one commentator "Those who populate the workplace today are better educated, more sophisticated, more diverse and more demanding... Getting to grips with workplace conflict inside organisations today is an increasingly important matter, at both organisational and individual level."[7]

5.05 Furthermore, in the context of employment disputes, if they remain unresolved, they can have negative consequences for individual, team and overall organisational performance, whether in the private sector or public sector.[8] Indeed, the capacity to resolve workplace disputes effectively contributes to the quality of the working environment and has a significant impact on organisational performance in terms of reducing days lost, enhancing productivity and improving management-employee relations.[9] Therefore, many organisations try to ensure that any disputes and claims are dealt with speedily, fairly, with minimal disruption for the organisation in the best way possible to the mutual satisfaction of all parties involved. While many potential disciplinary or grievance issues can be often be resolved informally, where such informal negotiation fails, public sector and private organisations should have procedures in place which the parties can avail of, including mediation and conciliation, when appropriate.

5.06 The Commission is aware from submissions received that, while a huge number of workplace disputes are processed annually by statutory bodies, many workplaces are increasingly incorporating ADR processes into organisational procedures. It has been suggested that "ADR offers a means of bringing workplace justice to more people, at lower cost and... it also helps to clear the backlog of cases at statutory dispute resolution institutions and is thus assisting government agencies to meet their societal responsibilities more effectively."[10]

C Private Workplace ADR & Dispute System Design

5.07 It has been suggested that, historically, organisations reacted to conflict; they did not systematically plan how to manage it. They used existing administrative or judicial forums to address it.[11] Organisations are, however, increasingly introducing dispute design systems which represent a systematic approach to preventing, managing, and resolving conflict that focuses on the cause of conflict within the organisation.[12] "A healthy system should only use rights-based approaches (arbitration or

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5 See Gugel "The Iceberg Model for Conflict Dynamics" Tubingen Institute for Peace Education. Available at http://www.dadalos.org/frieden_int/grundkurs_4/eisberg.htm.

6 Cloke & Goldsmith *Resolving Conflicts at Work* (Jossey-Bass 2000) at 114.

7 Doherty & Teague "The Essential Guide to Alternative Dispute Resolution" (IBEC, 2008). See also Berger "Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment" (2003) 5 U Pa J Lab & Emp L 487.

8 Buckley *"Employment Cases on the Rise"* (August 2009). Online article available at:http://www.hrri.ie/hrri/index.php?option=com_content&view=article&id=156:employment-cases-are-on-the-climb&catid=34:legal-resources&Itemid=56.

9 Speech by Minister Martin at the Launch of the Labour Relations Commission's Strategic Plan 2008-2010, 19th March 2008, Dublin. Available at:. http://www.entemp.ie/press/2008/20080319b.htm.

10 Bendeman "ADR in the Workplace- The South African Experience" (2007) 7 *African Journal on Conflict* 1 at 139. See also Bourgeois "Resolving Employment Cases through Mediation" (2007) 70 *Texas Bar Journal* Issue 7.

11 Bingham et al. "Mediation in Employment and Creeping Legalism: Implications for Dispute Systems Design" (2010) J Disp Resol 129 at 2.

12 *Ibid.*

litigation) as a fallback when disputants reach an impasse; parties should not generally resort to power-based approaches."[13] Therefore, ADR interest- based processes such as mediation and conciliation are important features of these dispute resolution design systems. Such processes are said to:

> "... have helped resolve workplace disputes by bringing common sense, goodwill and professionalism to the fore, as well as providing a safe environment for emotions to be expressed... Differences and problems need to be freely aired. Sustainable and enduring solutions are the product of free and constructive discussion in which everyone has the opportunity to contribute freely."[14]

5.08 In promoting the use of early dispute resolution, section 33 of the *Employment Law Compliance Bill 2008*, which is currently (November 2010) before the Oireachtas, proposes that "Employers and employees shall endeavour as far as possible to resolve at workplace level, in accordance with any arrangements in place for resolution of disputes or differences between them, any disputes or differences relating to the application of any employment legislation." This is an important provision given that:

> "The weakening of collective forms of employment regulation, and a parallel individualisation of employment relations and expansion of individual rights, has occurred in Ireland alongside a significant increase in the number of individual employees pursuing legal claims - the result being that established dispute-resolution agencies are coming under strain... in many non-union workplaces this independent 'voice' mechanism is not available, so they are more likely to seek redress through the judicial process in relation to issues such as discrimination and bullying."[15]

5.09 Indeed, the Labour Relations Commission has stated that there has been a recent "explosion" in disputes between employers and employees caused by the enormous rise in joblessness.[16] Its Annual Report 2009 states that there were 14,596 referrals to the Labour Relations Commission in 2009, a 33% increase compared to 2008.[17]

5.10 It is evident from these figures that there is an opportunity for a greater number of disputes to be resolved internally through the use of ADR processes. The introduction of ADR into an organisation's internal grievance and disciplinary procedures and conflict management system brings a number of benefits. These include: greater transparency within the workplace, procedural flexibility, efficiency and confidentiality which provides privacy for the parties and protection for the organisation's reputation. ADR can also offer greater sensitivity to the needs of the particular workplace and their employees, especially in highly sensitive and personal disputes such as sexual harassment claims. Furthermore, in facilitative and advisory ADR processes, an agreement reached in a workplace dispute may contain a wide range of novel outcomes which would not normally form part of a court agreement and which may provide solutions that better suit each parties' needs. As the Commission noted in its Consultation Paper, the success of mediation in statutory bodies such as the Equality Tribunal is evident from the personalised, creative and flexible settlement agreements which have been created by the parties themselves and which would not have been available as remedies if the parties had litigated the claims.[18] Many of the

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13 See Bingham et al. "Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace" (2009) 14 Harv Negot L Rev 1.

14 Speech by Hon Kate Wilkinson, Minister of Labour, to commemorate 100 years of employment mediation, New Zealand Parliament House, 30 June 2009.

15 Dobbins ***"Ireland: Individual disputes at the workplace – alternative disputes resolution"*** (February 2010). Available at: http://www.eurofound.europa.eu/eiro/studies/tn0910039s/ie0910039q.htm. See also Hippensteele "Revisiting the Promise of Mediation for Employment Discrimination Claims" (2009) 9 Pepp Dis Resol L J 211.

16 See Walsh "Mediators Can't Cope with Surge in Disputes" *Irish Independent*, 23 September 2010. There were 9,700 cases referred to rights commissioners in the first seven months of 2010, more than the total for 2007.

17 *Annual Report 2009* (Labour Relations Commission, 2010).

18 See LRC CP 50-2008 at 4.53.

outcomes of the Employment Equality Mediation Agreements reached in 2008 demonstrate this point. They included:

- assurance that an employee's visual impairment would not impede their future promotion prospects;
- agreement to nominate an employee for a specific training course;
- agreement to grant an employee a backdated promotion;
- offer to pay an employee's counselling fees and acknowledgement of distress caused; and
- goodwill gesture of €1,250 and restaurant Voucher to the value of €100.[19]

5.11 Some of the flexible and creative outcomes of the Equal Status Mediation Agreements reached in 2008 were:

- an apology and a €400 voucher for a hardware store;
- access was granted to a person with a disability through hotel grounds to a public beach;
- an apology for upset caused and a donation of €2000 to charity; and
- an apology and a year's membership of a fitness club to a person with a disability.[20]

5.12 It is evident from these outcomes that the issuance of an apology is a remedy which is often sought from a claimant in a workplace dispute - a remedy which is not available through traditional adversarial litigation. As the Commission noted in its Consultation Paper, "Apology leads to healing because through apologetic discourse there is a restoration of moral balance – more specifically, a restoration of an equality of regard."[21] It can be "…one of the most effective means of averting or solving legal disputes."[22]

5.13 Furthermore, it is notable that 68% of the cases referred to mediation at the Equality Tribunal in 2008 reached successful completion.[23] As the Commission noted in its Consultation Paper, arrangements reached through agreement are more likely to be adhered to than solutions imposed by a court.[24] In 2009, a total of 251 claims were referred to mediation at the Tribunal with two-thirds of mediated cases reaching agreement or were not being pursued further, a success rate in line with international norms.[25]

5.14 The Labour Relations Commission is also an example of a statutory body providing creative and flexible remedies to parties in a workplace dispute through its mediation and conciliation services. In 2008, the Labour Relations Commission chaired 1,726 conciliation conferences and it secured a settlement in 80.48% of all cases, "demonstrating the continuing effectiveness of the process as a vital element of the dispute resolution infrastructure in the Irish economy."[26]

5.15 Given the evident success of mediation and conciliation offered by the Equality Tribunal and the Labour Relations Commission in resolving employment disputes through ADR processes such as mediation and conciliation, it can be suggested that the remedies sought in many employment disputes are required to be tailored to the specific needs of the parties. The Commission considers that given the flexibility of remedies which can be agreed at mediation and conciliation, organisations should be

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19 *Equality Tribunal Mediation Review 2008* at 20. See www.equalitytribunal.ie.

20 *Ibid.*

21 Taft "Apology Subverted: The Commodification of Apology" (2000) 109 *Yale Law Journal* 1135 at 1137.

22 Tanick and Ayling "Alternative Dispute Resolution by Apology: Settlement by Saying I'm Sorry" *Hennepin Lawyer* (1996) at 22.

23 *Equality Tribunal Mediation Review 2008* at 3. See www.equalitytribunal.ie.

24 See LRC CP 50-2008 at 5.41.

25 *Equality Tribunal 2009 Annual Statistics*. See www.equalitytribunal.ie.

26 *Labour Relations Commission Annual Report 2008* at 17. See www.lrc.ie.

encouraged to design and implement dispute design systems which incorporate mediation and conciliation processes so as to promote the early resolution of employment disputes.

5.16 In the UK, the Chartered Institute of Personnel and Development conducted a survey exploring how workplace organisations use mediation. The survey found that 35% of organisations train either managers, employees, or employee representatives to act as mediators; and 51% use external mediation.[27] The benefit most frequently mentioned as a result of using mediation was that of improving relationships between employees (83%), followed by reducing or eliminating the stress involved in using more formal processes (71%).[28] Furthermore, 49% of respondents saw mediation as giving benefit in avoiding the costs of defending employment tribunal claims.[29]

5.17 There were concerns by some respondents in the survey that mediation should not simply be seen as part of a formal process, but part of the organisational culture and "the framework of people management, not an isolated process." One person suggested that the important thing is to "ensure that mediation is part of the language used in conditions of employment [and] insist it is a stage before formal grievance."[30] The Commission agrees with this viewpoint and considers that in relation to workplace disputes there should be a concerted effort to move from grievance-orientated cultures in organisations towards an effective dialogue approach.

5.18 The English courts have also recognised the role for mediation in the resolution of workplace disputes. In the English Court of Appeal case *Vahidi v Fairstead House School Trust Ltd*[31] the Court stressed the appropriateness of mediation for resolving workplace disputes, stating that "[o]ne shudders to think of the cost of this appeal and of the trial which apparently took as long as 9 days. As the courts have settled many of the principals in stress at work cases, litigants really should mediate the cases such as the present." In another English Court of Appeal case *McMillan Williams v Range*[32] both of the parties had to pay their own costs as a result of their failure to mediate after the Court recommended it. This case involved a firm of solicitors suing a former employee for repayment of advance salary/commission. The plaintiff won the case at the County Court but, on appeal by her former employers, the plaintiff lost. When permission was given to appeal, a recommendation was made by the Court to mediate, which both parties chose to ignore. The recommendation was made having regard to the disproportionality of the costs of the appeal to the amount at stake. In the light of the recommendation to mediate and the parties' subsequent behaviour, no order was made as to the costs of the appeal.

5.19 The Commission agrees with the view that:

> "Mediation [and conciliation] should not be seen as a universal default option for tackling the whole gamut of workplace issues... but [they] can contribute to building an organisational culture that focuses on managing and developing people. It is seen as a means of improving relationships between colleagues and can offer a solid basis for sustainable high-performance working."[33]

5.20 The Commission considers that dispute-avoidance and problem-solving activities, coupled with dispute-resolution process, need to be further integrated into Irish workplaces. Organisations should strive to solve disputes and grievances close to their point of origin so as to promote the early resolution

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27 *"Workplace Mediation: How Businesses Use It"* (Chartered Institute of Personnel and Development, July 2008) at 2. Available at: www.cipd.co.uk.

28 In 9% of instances where mediation was used, employment tribunal claims were withdrawn.

29 *"Workplace Mediation: How Businesses Use It"* (Chartered Institute of Personnel and Development, July 2008) at 2. Available at: www.cipd.co.uk

30 *Ibid.* at 13. See also Vahey "Conflict in the Workplace and the Role of Mediation" (2009) 6(4) IELJ 104.

31 [2005] EWCA Civ 06.

32 [2004] EWCA Civ 294.

33 *"Workplace Mediation: How Businesses Use It"* (Chartered Institute of Personnel and Development, July 2008) at 14. Available at: www.cipd.co.uk.

of employment disputes. These could build on the statutory codes of practice already developed by the Labour Relations Commission and given statutory effect under the *Industrial Relations Act 1990*.

5.21 *The Commission recommends that organisations should consider designing and implementing internal dispute handling systems which incorporate mediation and conciliation processes so as to promote the early resolution of employment disputes.*

D ADR Clauses in Employment Contracts

5.22 As the use of mediation and conciliation in resolving workplace disputes increases, organisations may wish to include clauses, incorporating references to mediation and conciliation, in their key policies and employment documentation, including employment contracts.[34] In the High Court case *Clayton v Hawkins*[35] the plaintiff secured by consent an extension of a High Court order freezing the assets of his former personal assistant and housekeeper who allegedly misappropriated up to €1.8 million of his money. The Court was told that that there was a clause in the defendant's employment contract which allowed for mediation and it might be open to the defendant to apply for a stay on the proceedings pending any mediation. This case demonstrates that mediation clauses are now being included in employment contracts.[36]

5.23 As the Commission has already noted in this Report, there is an important distinction to be noted between mandatory *attendance* at an information session about ADR processes or at a mediation session and mandatory *participation* in an ADR process. Where an employment contract includes a provision for mediation or conciliation, parties cannot be compelled to participate in the process and remain entitled to seek address through a statutory body or the courts. The Commission agrees with the view that it may be beneficial for employers to include a contract clause which provides for a mandatory attendance at an information session on ADR prior to the commencement of a legal claim. This would provide parties to the dispute with an opportunity to become aware of the menu of options which are available to them to resolve their employment dispute.

E Conclusion

5.24 While the Commission acknowledges and commends the contribution of the statutory bodies which are responsible for the resolution of employment grievances and disputes outside of the court system, non-statutory dispute resolution mechanisms for resolving workplace disputes should also be available for the resolution of workplace disputes and such mechanisms should be established internally within organisations. Indeed, the Commission notes that its proposed legislative framework on mediation and conciliation may be used where the statutory bodies have not been engaged in the resolution of a dispute; this approach is entirely consistent with the statutory codes of practice developed under the *Industrial Relations Act 1990*, which encourage employers and employees to resolve disputes at local, workplace, level.

5.25 The proactive engagement with conflict, although initially seen as a less favourable option, may often produce positive results which is why early dispute resolution in workplace disputes is important. Through engaging in difficult conversations and dealing with conflict situations, employees are likely to be more satisfied, reducing the stress and dissention in the workplace; and thus increasing job satisfaction and improving productivity.[37] ADR processes, such as mediation and conciliation, can assist in engagement in difficult conversations and can result in the early resolution of workplace disputes. As

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34 *"Model clauses for mediation and employment policies"* (Centre for Effective Dispute Resolution, September 2009). Available at: www.cedr.co.uk.

35 High Court, 18 January 2010. See "Clayton has asset-freezing order at €1.8 million extended" *The Irish Times* 19 January 2010.

36 For a detailed discussion on the enforceability of mediation and conciliation clauses see Chapter 4 at 4.18.

37 Howell & Massie *"A different light- the benefit of workplace conflict"* (February 2009). Online article available at: www.cedr.com.

suggested by one commentator, “Mediation [and conciliation] has a unique in its ability to take people in conflict on a journey of discovery, unpicking misunderstandings, gaining insight into how behaviour is interpreted and providing a safe process to slowly rebuild trust and communication.”[38]

[38] Pienaar *“Overcoming resistance to workplace mediation”* (2009). Online article available at: www.adrgroup.co.uk.

CHAPTER 6 FAMILY DISPUTES & ADR

A Introduction

6.01 In this chapter the Commission examines the role of ADR in resolving family law disputes. In Part B the Commission provides an overview of the nature of family law disputes in Ireland. In Part C the Commission examines the appropriateness of mandatory information sessions on ADR for those involved in a family law dispute. In Part D the Commission explores the initiative of parenting plans. In Part E the Commission examines the issues which arise in family mediation. In Part F the Commission discusses the development of collaborative practice. In Part G the Commission explores the role for ADR, in particular mediation, in the resolution of family probate disputes. In Part H the Commission discusses the emerging area of elder mediation.

B Family Disputes in Ireland

6.02 In Ireland, it has long been recognised that "family law litigants face a particularly hard road through the legal system. Separation, divorce, domestic violence, child custody and access, and other family law disputes are painful and difficult experiences."[1] The number of family law applications to the courts continues to increase. In 2008, there were 25,057 family law applications to the District Court, 6,914 applications to the Circuit Court, and 85 applications to the High Court, giving a total of 32,056 court applications in the area of family law in 2008.[2] In 2009, there was a 25% increase of the number of applications to the District Court relating to custody and access.[3] Despite the evident increases in family law applications to the Courts, research has indicated that:

> "The adversarial nature of proceedings does little to resolve conflict in families' lives but rather compounds and increases that conflict in many cases. Alternatives, such as mediation and collaborative law, should be better supported and encouraged, and be widely available countrywide."[4]

6.03 As noted by Davy "All practitioners in every family law case should set out to achieve reasonable terms of settlement, by resolving matters in an amicable manner, and in a manner which avoids or minimises further personal damage to each individual involved."[5] The Irish courts have also echoed similar sentiments in relation to family law disputes. In a District Court family law case, the judge was reported as stating to parties in a family law dispute that: "You have chosen to go down the court route, the adversarial route, and that may not always be for the best. There are alternative means of dealing with these problems. You should seriously consider the mediation route."[6]

6.04 The client profiles at the Family Mediation Service (FMS) serves to highlight that evolving nature of family disputes in Ireland. In 1986, the client profile at the FMS was married couples who had

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1 Matthews "Call for Radical Reform of Family Law Court System" [2009] 12(4) IJFL 99.

2 *Courts Service Annual Report 2008* at 24-25.

3 *Courts Service Annual Report 2009* at 67.

4 Matthews "Call for Radical Reform of Family Law Court System" [2009] 12(4) IJFL 99.

5 Davy "Problems Associated with Collaborative Practice" (2009) 9 Judicial Studies Institute Journal 1 at 18. Available at: www.jsijournal.ie.

6 "Quarrelling Parents Advised to Try Mediation" (Spring 2009) 3 *Family Law Matters* 1 at 9. Available at www.courts.ie.

decided to separate. In 2009, the client profiles had greatly diversified and included married couples who had decided to separate, unmarried couples who had decided to separate, same sex couples who had decided to separate, parents who had never lived together but have a child or children together, second or third relationship separating – additional issues for step parents and children, mediation for non-Irish nationals, mediation for culturally diverse couples, mediation for couples living in different jurisdictions, mediation between foster and natural parents, mediation between grandparents and natural parents, mediation between in-laws, and elder mediation.[7]

6.05 It is evident from these categories of disputes that the resolution of family disputes through traditional litigation may not always be the most suitable avenue for parties to embark upon. ADR processes such as mediation, conciliation and collaborative practice provide important alternative avenues for the resolution of family disputes. The Commission its 1996 *Report on Family Courts* concluded that mediation services are not intended to replace the court system, but rather to divert appropriate cases from it. Some cases will and should be resolved in court and may not be appropriately resolved by ADR processes. Such cases, as previously noted by the Commission, include those where there is serious violence against one of the spouses, or where there are allegations of child sexual or physical abuse.[8]

6.06 With these exceptions in mind, the Commission considers that ADR processes remain under-utilised in this jurisdiction in resolving appropriate family law disputes, many of which the Commission considers are ripe for mediation and conciliation. The Commission concurs with the view of the President of Ireland that:

> "While happiness and misery are not always easy to measure there can be little doubt that the experience of being an active participant in a process that drives towards consensus has to be a considerable improvement on being a passive participant in a process where outcomes are imposed with all the potential for longitudinal resentment that can seriously blight many lives, but especially the lives of children."[9]

6.07 The Commission now turns to examine the important role of ADR in the resolution of family disputes in Ireland.

C Information Meetings

(1) Consultation Paper on ADR & Report on Family Courts

6.08 In its Consultation Paper, the Commission reiterated the recommendations in its *Report on Family Courts*[10] in relation to providing information to those who have begun, or who are considering, family law proceedings.[11] The Commission recommended in its 1996 Report that a Family Court Information Centre be established at various regional courts, with responsibility for providing objectively presented information relating to available alternatives to litigation, the implications of separation, court processes and case management information and information on available support services. The Commission also recommended that any legal information received should be information only, and not advice.[12] In addition, the Commission recommended that, where proceedings for judicial separation have been instituted, the parties should be required within two weeks to attend the proposed Family Court Information Centre, if they had not already done so, to receive information as appropriate concerning the

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7 Paper delivered by Polly Phillimore, Service Director Family Mediation Service, Independent Colleges, December 8th, 2009.

8 Law Reform Commission *Report on Family Courts* (LRC 52-1996) at 9.23.

9 Remarks by President McAleese at the Mediator's Institute of Ireland '*Mediation Works' Conference*, Royal Hospital, Kilmainham, Dublin, 27 May 2007. Available at: www.president.ie.

10 Law Reform Commission *Report on Family Courts* (LRC 52-1996).

11 *Ibid.* at 55-59.

12 See Recommendation 22 in the Law Reform Commission's *Report on Family Courts* (LRC 52-1996) at 132.

various family support services available, including welfare service and to receive information and advice concerning the availability and purpose of mediation.[13] This information would be given by an official with appropriate knowledge and counselling skills who would act under the auspices of the court. The Commission recommended that this information should be augmented by an appropriate video, and by the provision of a full information pack and that there should be emphasis throughout on the need to give priority to the interests of any dependent children and on the importance of avoiding any damage or distress to them.[14]

6.09 In relation to other family law proceedings before the Court, including custody, access, maintenance and barring and safety order applications, the Commission recommended that the opportunity should be presented to the parties to attend the proposed Family Court Information Centre to receive similar free information and advice.[15] This should not be compulsory, but that the court would be obliged to consider at the beginning of the hearing whether to adjourn proceedings, if appropriate, to require the parties to attend the proposed Information Centre to receive the relevant information and advice. The Court should not, however, adjourn proceedings for this purpose unless satisfied that no additional risks would be involved in respect of any family members whose safety or welfare was in issue.[16]

6.10 The Commission also recommended that the parties should not be required to attend the session together, that attendance at information sessions should be free of charge and that attendance should be certified by the proposed Information Centre.[17] Where the appropriate certificate of attendance or waiver has not been obtained, the Court would have the right, at its discretion, to adjourn the case until the parties had attended the proposed Information Centre. Where one or both of the parties still refused to attend, the court would proceed with the hearing, but written information would be sent to the parties.[18]

6.11 These recommendations have not yet been implemented and the Commission considers that they remain relevant and appropriate for implementation. As noted by the current Chief Justice: "For mediation as a process to take hold in this country there is a need to heighten public consciousness as well as that of legal practitioners and other professions of its usefulness, its value and its availability."[19] The Commission now turns to examine the option of introducing mandatory information sessions for parties in a family law dispute in more detail.

(2) Mandatory Information Sessions

6.12 International research has indicated that voluntary participation in information sessions on ADR is quite low, and so the trend has been to make them mandatory for all parents who seek the assistance of the courts for disputes about their children, or at the very least to provide courts with the authority to order the information session.[20] Several jurisdictions now mandate that separating couples attend an

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13 See Recommendation 23 of the Law Reform Commission's *Report on the Family Courts* (LRC 52-1996) at 132.

14 *Ibid.*

15 See recommendation 24 of the Law Reform Commission's *Report on the Family Courts* (LRC 52-1996) at 132.

16 *Ibid.*

17 See Recommendations 25-28 of the Law Reform Commission's *Report on the Family Courts* (LRC 52-1996) at 133.

18 *Ibid.*

19 Speech by the Chief Justice, Mr Justice John Murray, at the launch of the Dublin Solicitors Bar Association Family Mediation Group, Dublin, 2 March, 2010. See also Coulter "Change to Mediation a Governmental Task" *Irish Times*, 2 March 2010.

20 See Kelly "The United States experience", keynote address at the Proceedings of the International Forum on Family Relationships in Transition Legislative, Practical and Policy Responses, December 2005. Available at http://www.aifs.gov.au/.

information session on ADR prior to the commencement of legal proceedings.[21] As the Commission noted in its Consultation Paper, there is an important distinction to be noted between mandatory *attendance* at an information session about mediation or at a mediation session and mandatory *participation* in a mediation.[22] A party can be compelled to attend an information session but participation in an ADR process cannot be compelled as this goes against the fundamental principle of voluntariness in processes such as mediation and conciliation.

6.13 The Commission considers that, given the low uptake of family mediation in Ireland, coupled with the general lack of public awareness of this option, attendance at an information session on family dispute resolution, should, in general, be a statutory mandatory requirement for parties in family law proceedings. The Family Law Reporting Committee also strongly favoured the introduction of compulsory information sessions at which parties to family law proceeding could be made aware of the full range of alternative dispute resolution models including mediation, conciliation and the collaborative law approach, any or all of which may be of assistance in securing an acceptable resolution in a family law dispute.[23]

6.14 The Commission recommends that attendance at an information session should take place either before or after an application is submitted to the court to commence legal proceedings. The Commission recognises that there may be family law disputes which would not be appropriate for resolution through an ADR process.[24] Therefore, the Commission recommends a party to a family law proceeding would not be required to attend an information session under the following circumstances:

- Where the proceedings involve an application for a safety order, a barring order or a protection order under the *Domestic Violence Act 1996*; or
- Where a party satisfies the court that his or her personal safety, or the safety of his or her children is or are at risk.

6.15 The Commission considers that the information sessions may be provided by an accredited mediator, an accredited conciliator, a solicitor trained in the collaborative practice model or mediation, or by a member of staff at appropriate organisations such as the Family Mediation Service, the Legal Aid Board, Family Resource Centres or the Courts Service. The Commission considers that this information should be augmented by an appropriate video, and by the provision of a full information pack and that there should be emphasis throughout on the need to give priority to the interests of any dependent children and on the importance of avoiding any damage or distress to them. The Commission further recommends that the person providing the information session may give those attending the information session one of the following certificates:

- A certificate stating that the person did not attend the information session; or
- A certificate stating that the person attended the information session.

6.16 The Commission recommends that in instances where a party to a family law proceeding fails to attend the information session and is not subject to one of the exceptions stated above, the Court may in its discretion adjourn the case until the party has attended the information session. The Court should not, however, adjourn proceedings for this purpose unless satisfied that no additional risks would be involved in respect of any family members whose safety or welfare was in issue. Where one or both of the

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21 See LRC CP 50-2008 at 5.07-5.13.

22 LRC CP 50 -2008 at 3.09.

23 *Report of the Family Law Reporting Committee to the Board of the Courts Service* (2009) at 33. The Family Law Reporting Project Committee by the Board of the Court Service primary function was to consider the recommendations contained in the report made by Dr. Carol Coulter to the Board of the Court Service in October 2007 ("Family Law Reporting Pilot Project") and to make proposals to the Board of the Courts Service in relation to recommendations contained in that report.

24 As the Commission noted in its Consultation Paper some family law cases will and should be resolved in court and may not be appropriately resolved by mediation. Such cases, as previously noted by the Commission, include those where there is serious violence against one of the spouses, or where there are allegations of child sexual or physical abuse. LRC CP 50-2008 at 5.43.

parties still refused to attend, the Court would proceed with the hearing, but written information would be sent to the parties.

6.17 *The Commission recommends that attendance at an information session on family dispute resolution processes including mediation, conciliation, and collaborative practice should, in general, be a statutory mandatory requirement in family law cases.*

6.18 *The Commission recommends that attendance at an information session may take place either before or after an application is submitted to the court to commence family law proceedings, but, in any event, not later than 28 days before the date on which the proceedings are first listed for hearing.*

6.19 *The Commission recommends that a party in family law proceedings shall not be required to attend an information session where: (a) where the proceedings involve an application for a safety order, a barring order or a protection order under the Domestic Violence Act 1996; or (b) where a party satisfies the court that his or her personal safety, or the safety of his or her children is or are at risk.*

6.20 *The Commission recommends that the person providing the information session shall provide each party who is to attend the information session with one of the following certificates: (a) a certificate stating that the person attended the information session; or (b) a certificate stating that the person did not attend the information session.*

6.21 *The Commission recommends that where a party has not attended an information session and where the proceedings do not involve an application for a safety order, a barring order or a protection order under the Domestic Violence Act 1996; or where a party does not satisfy the court that his or her personal safety, or the safety of his or her children is or are at risk, a court may in its discretion adjourn the family law proceedings until the party has attended an information session.*

D Parenting Plans

6.22 In its Consultation Paper, the Commission invited submissions as to whether separating and divorcing parents should be encouraged to develop parenting plans.[25] The Family Mediation Service, which forms part of the Department of Social Protection, describes a parenting plan as:

> "…a carefully devised schedule which lays out how to share time with the children, how to manage responsibilities, and how to make decisions about the children. School arrangements, child care, holidays, and pocket money can all be part of a parenting plan. It is a plan that is individual to each family and takes into account everyone's needs and interests."[26]

6.23 The Commission noted in its Consultation Paper that in some states completion of parenting plans and parenting education programmes are mandatory.[27] For example, in Australia parenting plans were given legislative recognition in the *Family Law Act 1975* as amended by the *Family Law Reform Act 1995*. Parents of a child were encouraged to agree about matters concerning the child rather than seeking an order from a court and, in reaching their agreement, to regard the best interests of the child as the paramount consideration.[28]

6.24 The Commission noted that the arguments in favour of the use of parenting plans were based on the premise that the process of developing a parenting plan encourages joint parental responsibility and can prevent future disputes arising by ensuring that potentially contentious issues have been identified and dealt with in as positive a way as possible.[29] Furthermore, the Family Mediation Service

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25 See LRC CP 50-2008 at 5.30.

26 *What is a Parenting Plan?* Family Mediation Service. Available at. http://www.fsa.ie/familymediation/parentingplan.html.

27 See LRC CP 50-2008 at 5.21-5.28.

28 Section 63B of the of the *Family Law Act 1975* , as amended by the *Family Law Reform Act 1995*.

29 *Letter of Advice to the Attorney-General on Parenting Plans Part 2* (Family Law Council of Australia and the National Alternative Dispute Resolution Advisory Council of Australia, March 2000). Available at www.ag.gov.au.

suggests that parenting plans provide continuity for children in their relationship with each parent and provide a structure so that everyone is clear about future living arrangements. Moreover, clearly agreed plans help to reduce conflict.[30]

6.25 For these reasons, the Commission recommends that parents or guardians involved in a family law dispute may (whether as part of a mediation or conciliation process or otherwise) prepare and agree a parenting plan, which provides for parenting and guardianship arrangements for any child of theirs, by reference to the best interests of each child.[31] The Commission further recommends that a parenting plan should not, in itself, be enforceable as a contract but may, with the agreement and consent of the parties, be made subject to a court order, on such terms as the court considers appropriate.

6.26 *The Commission recommends that parents or guardians involved in a family law dispute may (whether as part of a mediation or conciliation process or otherwise) prepare and agree a parenting plan, which provides for parenting and guardianship arrangements for any child of theirs, by reference to the best interests of each child.*

6.27 *The Commission recommends that a parenting plan should not, in itself, be enforceable as a contract but may, with the agreement and consent of the parties, be made subject to a court order, on such terms as the court considers appropriate.*

E Family Mediation

6.28 In its Consultation Paper the Commission provisionally recommended that, where appropriate, mediation should be considered by parties to a family dispute before litigation.[32] The Family Law Reporting Committee agreed with the view of the Commission in its Consultation Paper that, the principal advantage for the parties, for their children and for the court system from the use of mediation in appropriate cases is the possibility that it will encourage the parties to negotiate and settle their cases at the earliest opportunity instead of leaving any settlement discussions until the day of the hearing.[33] The Family Law Reporting Committee did not, however, support the introduction of mandatory mediation in family law cases.[34]

6.29 While the Commission considers that mediation and conciliation have a greater role to play in the resolution of appropriate family law disputes, the Commission considers that it is more appropriate to introduce mandatory information sessions rather than a mandatory mediation requirement for parties to a family law dispute. As noted in the Consultation Paper, a recurring theme in each of the voluntary mediation court annexed schemes examined in the Consultation Paper was the important role which information and education plays in the successful uptake of the schemes. In Manchester, Edinburgh, the Netherlands, and Slovenia, in-court advice on ADR and the processes which are available to the parties have been the catalyst in the development and uptake of the schemes.[35]

6.30 Furthermore, as the Commission noted in its Consultation Paper, there has been a low uptake of mediation offered by the Family Mediation Service ('FMS') in comparison to the number of family law applications to the Court.[36] This may be in part due to the fact that in the FMS "The waiting lists for mediation are beginning to increase, particularly in our larger centres where waiting times are up to six or

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30 *Ibid.*

31 The Commission, in its *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009), provisionally recommended that the term 'guardianship of infants' be replaced with the term 'parental responsibility'.

32 LRC CP 50-2008 at 5.44.

33 *Report of the Family Law Reporting Committee to the Board of the Courts Service* at 32.

34 *Report of the Family Law Reporting Committee to the Board of the Courts Service* at 33.

35 See LRC CP 50-2008 at 3.25 - 3.93 for a discussion on these voluntary schemes.

36 See LRC CP 50-2008 at 5.53.

seven months."[37] It is notable that, in a consultancy study on family mediation commissioned by the Hong Kong judiciary, it was found that found that provision of a totally free mediation service might not be in the best interests of the users, and that some fee-charging was acceptable and might increase the motivation of service users to make better use of the service. It was therefore recommended that, if family mediation were to be offered on a long-term basis, a fee-charging mechanism could be introduced for users able to afford the service.[38] It may be of merit to consider introducing a fee for users of the FMS that can afford to pay, or refer them to private family mediators. This would assist in clearing the waiting lists of the Service and would ensure that parties to a family law dispute who cannot financially afford family mediation has quicker access to the Service.

6.31 The Commission considers that, for ADR processes such as mediation, to develop as a workable dispute resolution option within the court system in Ireland, particularly for family law disputes, it is appropriate to mandate that parties to a family dispute attend an information session on ADR rather than mandate attendance at a particular ADR process. It is important to reiterate, however, the previous recommendation of the Commission that courts exercising the jurisdiction conferred on them may invite the parties to consider using mediation or conciliation to attempt settle the dispute. The Commission considers that judicial engagement, coupled with an increase in the awareness of ADR processes, such as mediation and conciliation, through mandatory information sessions will serve to promote the development and uptake of ADR in family law proceedings.

6.32 *The Commission recommends that mediation and conciliation of family law disputes should not be a mandatory requirement before the commencement of proceedings.*

(1) Legislative Development of Family Mediation in Ireland

6.33 In its Consultation Paper the Commission examined the legislative development of family mediation in Ireland including the relevant provisions referring to mediation in the *Judicial Separation and Family Law Reform Act 1989,* the *Family Law (Divorce) Act 1996* and the *Guardianship of Infants Act 1964* (as amended).[39] The Commission also provisionally recommended the extension to all Circuit Courts of case conferencing in family disputes by County Registrars.[40] In 2008, the *Circuit Court Rules (Case Progression in Family Law Proceedings) 2008* came into effect.[41] The 2008 Rules state that the purpose of case progression "is to ensure that proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of the proceedings and that the time and other resources of the Court are employed optimally."[42] Rule 14 (b) states that at the case progression hearing the County Registrar:

> "may make orders or give directions with respect to pleadings, the exchange of between the parties of statements of issues, the identifying of issues in dispute between the parties, particulars, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions and examination of witnesses, or otherwise, which may be necessary or expedient."

6.34 While the 2008 Rules do not make specific provision for mediation or conciliation, it can be implied from Rule 14(b) that a County Registrar has the discretion to make an order or direction for the parties to consider such processes where appropriate. The Family Law Reporting Committee recommended that the County Registrar should satisfy himself or herself from the case progression

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37 Mr. Pat Bennett, speaking at the Joint Committee on Social and Family Affairs, 14 July 2005. Available at: http://debates.oireachtas.ie

38 *Evaluation Study on The Pilot Scheme on Family Mediation: Final Report* (A Consultancy Study Commissioned by the Judiciary Of the Hong Kong Special Administration Region, January 2004). Available at http://www.judiciary.gov.hk/en/publications/hkpu_finalreport.pdf.

39 See LRC CP 50-2008 at 5.45-5.49.

40 See LRC CP 50-2008 at 5.162.

41 SI No. 358 of 2008.

42 SI No. 358/2008.

process that alternative dispute resolution options such as collaborative law or mediation had been considered, and so certify before sending the case forward for trial.[43]

6.35 As already noted in this Report by the Commission, in 2009, a Practice Direction was introduced concerning family law cases in the High Court.[44] The objective of this Practice Direction is to ensure that the proceedings to which it applies are determined in a manner which is just, efficient and most cost effective and, in particular that

> (i) save in exceptional circumstances, the hearing of such proceedings should be completed in this Court within one year from the date of commencement or earlier in appropriate cases; and
>
> (ii) the parties should have an opportunity of entering into productive discussions at the earliest possible opportunity.[45]

6.36 The Practice Direction applies to family law proceedings generally..[46] Paragraph 8 (iv) of the Practice Direction provides that at the first hearing in the Directions List, the Court, having considered the contents of the Directions List Return, or Returns, and either on the application of one of the parties or of its own motion shall:

> "then or at any time thereafter, consider and recommend as it may think appropriate such forms of Alternative Dispute Resolution as may be helpful to resolve or reduce the issues in dispute between the parties. Such forms of Alternative Dispute Resolution may, inter alia, include conciliation, mediation or arbitration in respect of some or all of the issues arising in the proceedings."

6.37 The Commission welcomes the provision for ADR in the 2009 Practice Direction. Given the increasing provision for mediation and conciliation, the Commission does not consider it necessary to recommend the extension to all Circuit Courts of case conferencing in family disputes by County Registrars. The Commission considers, however, that it would be beneficial for all county registrars to comprehensively understand ADR processes, such as mediation and conciliation. This would ensure that they have a practical understanding of the process and that such an understanding could assist them in selecting appropriate cases for mediation or conciliation

(2) Role of Advisers in Family Mediation

6.38 In its 1996 *Report on Family Courts* the Commission recommended that:

> "The parties should be encouraged to seek independent legal advice before and, as necessary, during the mediation process. Where a party wishes to receive legal advice and is waiting for an appointment to consult a Legal Aid Board solicitor, mediation should be suspended until such advice becomes available. Provisions to this effect should be included in a Code of Practice."[47]

6.39 The Commission reiterated this recommendation in its Consultation Paper by provisionally recommending that parties should be encouraged to seek independent advice, legal or otherwise, before signing an agreement entered into at conciliation or mediation.[48] The role of advisers during a family mediation is of particular importance due to the possible power imbalances which may exist between the parties. As previously noted by the Commission, the fundamental role of a family mediator, regardless of their professional background, is to be a facilitator in the resolution of a dispute. While the mediator is trained and skilled in the mediation process, they correctly don't have a role as legal adviser, financial adviser, counsellor, accountant or child psychologist in a family mediation.

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43 *Report of the Family Law Reporting Committee to the Board of the Courts Service* at 28.

44 High Court Practice Direction 51 – Family Law Proceedings.

45 High Court Practice Direction 51 – Family Law Proceedings at 1.

46 High Court Practice Direction 51 – Family Law Proceedings at 2.

47 Law Reform Commission *Report on Family Courts* (LRC 52-1996). Recommendation 48 at 137.

48 LRC CP 50-2008 at 3.153.

6.40 For this reason, the Commission considers that there is an important role for professional advisers in a family mediation process to support and advise the parties and, where necessary, the mediator should encourage the parties to engage the relevant advisers. Such advice is particularly relevant and necessary where a party to a mediation or conciliation does not have a legal representative or other professional adviser involved in the process. Indeed, the Family Law Reporting Committee noted, from submissions it had received, that an increasing number of legal practitioners, both barristers and solicitors, are now accredited mediators and that these practitioners are developing a mediation model for family law cases based on international best practice in this area. Under this model, legal practitioners who are experienced family law practitioners and accredited mediators, will attend and participate in all mediation meetings. It has also been suggested that:

> "Legal practitioners have expressed great concern regarding mediators working on financial issues, such as pensions, insurance policies and succession rights following divorce and separation. In particular, it was noted that mediators are not qualified to deal with such matters and that any agreement which parents reach in this regard raises great difficulty for legal practitioners when they are requested to formalise the agreement. Indeed, difficulties raised by legal professionals in relation to financial issues have great potential to undo any progress which has been made in relation to issues concerning children as well."[49]

6.41 Arguably, if advisers were involved throughout the family mediation process, such concerns and practical problems in terms of formalising agreements reached through mediation may be reduced. It should be noted, however, that: "The necessity of legal advice in cases concerning children is far less pressing, particularly if mediation is used to solely resolve such issues. In cases concerning children, the focus is on establishing arrangements which are workable for both parties and for the children, and in this regard, any review of such arrangements by legal advisors is likely to be unproblematic."[50]

6.42 *The Commission recommends that a mediator or conciliator in a mediation or conciliation process involving a family law dispute shall advise any party who does not have a legal representative or other professional adviser involved in the process to consider seeking independent advice, whether legal or otherwise.*

(3) Enforcement & Review of Mediated Agreements

6.43 The Commission also examined in its Consultation Paper whether a court should review all mediated settlements in relation to custody and access arrangements for children.[51] The Commission reiterated the recommendation in its 1996 *Report on Family Courts* that there should be no extension of the courts' powers to review agreed arrangements concerning custody of or access to children.[52] The Commission recommended that, instead, there should exist a more general power in the courts to review and, if necessary, vary, on the application of either party, the terms of agreements concerning maintenance and property on the following grounds:

(a) that facts have come to light since the agreement was entered into which, had either party been aware of them at the time, could reasonably be expected to have effected a material change in the terms of the agreement, or

(b) that the economic circumstances of the parties have altered since the agreement in a manner which could not reasonably have been anticipated by the parties at the time of the agreement, and which makes it unreasonable to insist on the application of the original terms of the agreement.[53]

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49 See O'Callaghan "The Role of Mediation in Resolving Disputed Contact Cases: An Empirical View" (2010) 13(2) IJFL 47.

50 *Ibid.*

51 LRC CP 50-2008 at 5.70-5.73.

52 Law Reform Commission *Report on Family Courts* (LRC 52 1996) at 137.

53 *Ibid.*

6.44 In these circumstances, the Commission recommended in 1996 that the court should have the power to confirm, cancel or vary any terms in the agreement, but should not disturb transactions which have already been concluded under the provisions of the original agreement.[54] The Commission also recommended that, in every case where an application is made to a court to have an agreement that affects the parties' financial or property relationships recorded or made a rule of court, the court should not grant the application unless it is satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of the parties and of any dependent children.[55] The 2007 Report for the Courts Service *Family Law Reporting Pilot Project* took a different position and recommended that:

> "Cases that ended in a mediated or negotiated settlement should be separately listed and ruled. Consideration should be given to establishing a court of limited jurisdiction, presided over by the county registrar, who could rule such consents."[56]

6.45 The Family Law Reporting Committee considered this recommendation and noted the existing and long-standing practice of the Courts that, where the parties so apply, any settlement, whether mediated or otherwise achieved, can be ruled to make it binding and enforceable. It also noted that having regard to Article 41.3.2º of the Constitution and the *Family Law (Divorce) Act 1996*, the Court will always have to be satisfied, in ruling any settlement whether mediated or otherwise achieved, that the rights of the child are fully represented, that the settlement is based on full and mutual disclosure of assets, and that one party has not been overborne by the other in reaching the settlement. Because of this, the Committee concluded that settlements should not, be ruled without the court having the opportunity to make such enquiries as it sees fit in that regard. Moreover, having regard to the foregoing, the Committee did not consider that such settlements could be ruled by a court of limited jurisdiction presided over by a County Registrar. Accordingly the Committee did not support that particular recommendation.[57]

6.46 The Commission is aware that many parties engaged in family mediation do not wish to finalise a legally binding mediated agreement. The primary reason for this is that some couples wish to adhere to the terms of the agreement on a 'trial basis' initially and it provides the necessary flexibility for altering the terms of the agreement at a later stage, should the circumstances, financial or otherwise, of one or both of the parties change. For parties who wish, on the other hand, to have their agreement enforced by a Court, the Commission recommends that a court may, in its discretion, enforce the terms of an agreement reached through a mediation or conciliation where it is satisfied that the agreement adequately protects the rights or entitlements of the parties and their dependents, if any, that the agreement is based on full and mutual disclosure of assets, and that one party has not been overborne by the other in reaching the agreement and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland, including Article 41.3.2º.

6.47 *The Commission recommends that a court may, in its discretion, enforce the terms of an agreement reached through a mediation or conciliation where it is satisfied that the agreement adequately protects the rights or entitlements of the parties and their dependents, if any, that the agreement is based on full and mutual disclosure of assets, and that one party has not been overborne by the other in reaching the agreement and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland, including Article 41.3.2* º.

(4) Voice of the Child in Family Mediation

6.48 In its Consultation Paper, the Commission invited submissions as to whether children should participate in mediation proceedings affecting them.[58] The Commission agreed in its Consultation Paper

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54 *Ibid.* Recommendation 51 at 137.

55 *Ibid.* Recommendation 52 at 137.

56 Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service, October 2007) at 61.

57 *Report of the Family Law Reporting Committee to the Board of the Courts Service* at 34.

58 See LRC CP 50-2008 at 5.56-5.66 for a discussion on the voice of children in family mediation.

with the American Model Standards for Family and Divorce Mediation on this issue which provide that: "Except in extraordinary circumstances, the children should not participate in the process without the consent of both parents and the children's court appointed representative."[59] The use of the phrase "extraordinary circumstances" in the Model Standards sets a deliberately high barrier, and does not force a parent to involve a child if that parent is opposed to it and a child's participation is a matter for parents to decide after proper consultation and discussion.[60]

6.49 The Family Mediation Service *Code of Ethics and Professional Conduct* sets out several provisions which address the welfare of children in mediation proceedings and which the Commission consider appropriate. The relevant provisions state that mediators must encourage the clients to consider their children's own wishes and feelings. Where appropriate, they may discuss with the clients whether and to what extent it is proper to involve the children themselves in the mediation process in order to consult them about their wishes and feelings. If, in a particular case, the mediator and clients agree that it is appropriate, to consult any child directly in mediation, the mediator should be trained for that purpose, must obtain the child's consent and must provide appropriate facilities."[61] On the issue of child participation in mediation, the Commission further concurs with the view that:

> "As regards children's rights, the core focus must be on integrating the child's views into the process and it is clear that this could be routinely facilitated by enabling the child to attend a mediation session, in accordance with the child's age and maturity, with both parents during the decision-making process itself, or alternatively to be given an opportunity to meet with the mediator privately in order to convey his or her views which could be subsequently considered within the process."[62]

6.50 Indeed, Articles 9 and 12 of the 1989 UN Convention on the Rights of the Child, which was ratified by the State in 1992, declares the child's right to express an opinion and to have that opinion taken into account in any matters or procedures affecting them. Article 9 states: "The right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." Article 12 states: "The rights of a child who has the capacity to form his or her own views to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." Furthermore, Article 4 of the 2003 Brussels II EC Regulation[63] concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility also recognises the right of the child to be heard, in accordance with his or her age and maturity, on matters relating to parental responsibility over the child.

6.51 In relation to child protection, the Commission considers it is very important to note that, in a mediation or conciliation which involves or affects children, the mediator or conciliator must ensure that, when they have a concern which is 'reasonable and in good faith'[64] as to the welfare and safety of the child, they adhere to the disclosure policies set out in the *Children First: National Guidelines for the Protection and Welfare of Children*.[65] As stated in the Guidelines:

> "The wider community also has a responsibility for the welfare and protection of children. All personnel involved in organisations working with children should be alert to the possibility of

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59 Available at http://www.afccnet.org/pdfs/modelstandards.pdf.

60 See Schoffer "Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation" (2005) 43 *Family Court Review* at 326.

61 *Family Mediation Service Code of Ethics and Professional Conduct* (2002). Sections 5.16-5.19.

62 O'Callaghan "The Role of Mediation in Resolving Disputed Contact Cases: An Empirical View" (2010) 13(2) IJFL 47.

63 Council Regulation (EC) No 2201/2003 of 27 November 2003.

64 See *Protections for Persons Reporting Child Abuse Act 1998.*

65 *Children First: national guidelines for the protection and welfare of children*. (Department of Health and Children, 2010).

child abuse. They need to be aware of their obligations to convey any reasonable concerns or suspicions to the health board and/or An Garda Síochána and to be informed of the correct procedures for doing so."[66]

6.52 Furthermore, it states that "A proper balance must be struck between protecting children and respecting the rights and needs of parents/carers and families; but where there is conflict, the child's welfare must come first."[67] Thus, it can be said that where information is given to a mediator or conciliator with respect to the welfare and safety of a child in a confidential setting and the mediator or conciliator has a reasonable concern for the welfare and safety of the child, the mediator or conciliator must put the child's welfare first and breach the confidentiality of the mediation or conciliation to report such concerns to the relevant organisation. Furthermore, mediation and conciliation trainers and providers must ensure that all mediators and conciliators are aware of this obligation. The Commission reiterates its previous recommendation that a statutory Code of Conduct for Mediators and Conciliators must have regard to the involvement, where applicable, of a child or dependent in mediation or conciliation process, and to the requirements of *Children First: National Guidelines for the Protection and Welfare of Children*, published by the Office of the Minister for Children and Youth Affairs in the Department of Health and Children in 2010.[68]

6.53 Returning to the issue of child participation in a mediation or conciliation, the Commission recommends that if a mediator or conciliator in a mediation or conciliation process involving a family law dispute (having consulted the parties) considers that it is appropriate to involve any child or dependent directly in the process, the mediator or conciliator must obtain the consent of the child or dependent and should provide, or ensure there are provided, appropriate facilities for this purpose. The Commission also recommends that the mediator or conciliator in a in a mediation or conciliation process involving a family law dispute (having consulted the parties) may allow a suitably qualified adult, which may include any person who has been appointed as a guardian *ad litem*, to participate in the process as a non-party participant on behalf of any child or dependent.

6.54 *The Commission recommends that if a mediator or conciliator in a mediation or conciliation process involving a family law dispute (having consulted the parties) considers that it is appropriate to involve any child or dependent directly in the process, the mediator or conciliator must obtain the consent of the child or dependent and should provide, or ensure there are provided, appropriate facilities for this purpose.*

6.55 *The Commission recommends that the mediator or conciliator in a mediation or conciliation process involving a family law dispute (having consulted the parties) may allow a suitably qualified adult, which may include any person who has been appointed as a guardian ad litem, to participate in the process as a non-party participant on behalf of any child or dependent.*

(5) Screening in Family Mediation

6.56 The Commission expressed the view in its Consultation Paper that mediation is inappropriate for resolving family disputes where domestic violence is alleged, where there are allegations of child sexual or physical abuse, where one of the parties suffers from alcohol or drug dependency, or where power imbalances exist between the parties.[69] Indeed, Women's Aid has stated that it is:

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66 *Children First: national guidelines for the protection and welfare of children*. (Department of Health and Children, 2010) at 1.1.2.

67 *Children First: national guidelines for the protection and welfare of children*. (Department of Health and Children, 2010) at 1.4.1 (ii).

68 See Chapter 11 at 11.26.

69 See LRC CP 50-2008 at 5.67. See also Conneely "Researching the Irish Family Mediation Service: Women in Mediation" (2002) 5(2) IJFL 10; Gerencser "Family Mediation: Screening for Domestic Abuse" (1995) 23 Fla St U L Rev 43; Zylstra "Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators" (2001) J Disp Resol 253; Mack "Alternative Dispute Resolution and Access to Justice for Women" (1995) 17 Adel LR 123.

> "... convinced that neither mediation nor collaborative law are appropriate in cases where domestic violence is present and that their use in these situations could put women at risk and further disadvantage them. This is due to the power imbalance between the parties and the fear and intimidation experienced by women subjected to domestic violence.... Mediation and collaborative law are predicated on the parties having an equal relationship and being able and willing to cooperate with each other. However it is unrealistic to think that a perpetrator of violence would cooperate with his victim in an honest and open way, or that this process would be able to reverse what may have been years of dominance and control."[70]

6.57 It is, therefore, important that all mediators and conciliators are skilled in screening techniques that can assist in determining whether mediation or conciliation is appropriate for the parties and the resolution of the family dispute. Two of the fundamental purposes of screening is to firstly ensure that the parties have the capacity to effectively engage in the mediation and, secondly, to ensure that they can engage in the process safely, both physically and emotionally, in the mediation process. In relation to the issue of domestic violence the Family Mediation Service *Code of Ethics and Professional Conduct* states that:

> "One of the purposes of screening at the intake session is to check out if violence is, or has been present or whether it is alleged that any client has been or is likely to be violent towards another. Where violence is alleged or suspected mediators must discuss whether any client wishes to take part in mediation and provide information about available support services. Where mediation does take place, mediators must uphold throughout the principles of voluntariness of participation, fairness and safety… In addition, steps must be taken to ensure the safety of all clients on arrival and departure." [71]

6.58 The Commission stated in its Consultation Paper that it fully supports the policy of the Family Mediation Service that "the mediator is continually assessing for domestic abuse in the course of mediation and a number of cases will terminate as a result of this."[72] The Commission recommends that a mediator or conciliator in a mediation or conciliation process involving a family law dispute shall obtain initial and further training in screening techniques to assess the appropriateness, throughout the mediation or conciliation process, of mediation or conciliation.

6.59 *The Commission recommends that a mediator or conciliator in a mediation or conciliation process involving a family law dispute shall obtain initial and further training in screening techniques to assess the appropriateness, throughout the mediation or conciliation process, of mediation or conciliation.*

F Collaborative Practice

6.60 As the Commission noted in its Consultation Paper, collaborative practice is an emerging method of advisory dispute resolution. In Ireland, it has emerged in particular in the context of family law disputes, where the parties and their lawyers agree to resolve the issues without litigation.[73] The fundamental difference between settlement negotiations and collaborative practice is said to be that:

> "Instead of being a lawyer-centred negotiation, the negotiation becomes client-centred. The aim is to reach higher, deeper resolution, and not just reach a settlement where the parties are worn out, and the next step both sides have to take is into the court. The creation of a safe

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70 Women's Aid "*Submission to the Family Law Reporting Committee"* (January 2009). Available at: www.womensaid.ie.

71 *Family Mediation Service Code of Ethics and Professional Conduct* (2002). Sections 5.20.

72 Lloyd "The Family Mediation Service: Recent Developments" [2001] 3 IJFL.

73 Walls "Collaborative law a new and better way" *Sunday Business Post* 25 March, 2007. See LRC CP 50-2008 at 5.130-5.157 for an overview of the collaborative practice model.

environment is a huge benefit, and certainly promotes the type of environment which allows a concentration of intellectual energy solely on problem solving."[74]

6.61 Internationally, collaborative practice has also been used in other areas of dispute resolution and is not confined to the family law area. A study to determine whether the collaborative model was, in practice, any different from traditional negotiation concluded that collaborative practice is a separate and distinct ADR process which "fosters a spirit of openness, cooperation, and commitment to finding a solution that is qualitatively different, at least in many cases, from conventional lawyer-to-lawyer negotiations."[75]

6.62 The Commission acknowledged in its Consultation Paper that, although collaborative practice is an emerging ADR process, it has a capacity to provide another method to assist in the resolution of disputes in appropriate cases. For this reason and to ensure clarity in the terms to be used in ADR processes, the Commission has concluded that collaborative practice should be defined in legislation as an advisory and confidential structured process in which a third party, called a collaborative practitioner, actively assists and advises the parties in a dispute in their attempt to reach, on a voluntary basis, a mutually acceptable agreement. In practice in Ireland, collaborative practitioners are often legal practitioners, solicitors and (where appropriate) barristers. Given, however, that this is very much an emerging area, and that collaborative practice in other States operates in areas other than the family law setting, and where other professional advisers are involved, the Commission has concluded that a collaborative practitioner should be defined in broad terms as a suitably qualified professional adviser and, without prejudice to the generality of that requirement, may be a practising solicitor, barrister, accountant or psychologist.

6.63 *The Commission recommends that collaborative practice means an advisory and confidential structured process in which a third party called a collaborative practitioner, actively assists and advises the parties in a dispute in their attempt to reach, on a voluntary basis, a mutually acceptable agreement.*

6.64 *The Commission recommends that a collaborative practitioner means a suitably qualified professional adviser and, without prejudice to the generality of that requirement, may be a practising solicitor, barrister, accountant or psychologist.*

(1) Training for Collaborative Practitioners

6.65 Given that collaborative practice is a relatively new process in Ireland, the Commission emphasised in its Consultation Paper the need to ensure that those engaged in the process are trained in the collaborative process. This involves learning not only the collaborative model, but also the new skills needed to work with clients and the lawyer representing the other party to try and get the best result for both spouses and the family. Indeed, the fundamental paradigm shift from adversarial to collaborative makes this field one of the most appropriate for training.[76] Furthermore, many lawyers new to the concept of collaborative practice will need education on the underlying ethical principles of the process. "At present it is considered inappropriate to adopt collaborative practice unless both solicitors have undertaken appropriate training."[77] For this reason, the Commission recommends that every collaborative practitioner who is engaged in collaborative practice should obtain initial and further training, including continuing professional development, in collaborative practice. The International Academy of Collaborative Professionals (IACP) is an international body promoting the practice of collaborative practice internationally and sets out training standards for those involved in collaborative law which may

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[74] Mallon "Collaborative Practice: An Overview" (2009) 9 Judicial Studies Institute Journal 1 at 6. Available at: www.jsijournal.ie

[75] Macfarlane "Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project" (2004) 179 J Disp Resol 209 at 200.

[76] Macfarlane "Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project" (2004) 179 J Disp Resol 209.

[77] Davy "Problems Associated with Collaborative Practice" (2009) 9 *Judicial Studies Institute Journal* 1 at 18. Available at: www.jsijournal.ie.

serve as model for training in Ireland.[78] The Commission also considers it appropriate for those in professional legal training at the Law Society of Ireland and the Honourable Society of King's Inns to be introduced to the skills of collaborative practice as a part of their educational training.

6.66 *The Commission recommends that every collaborative practitioner engaged in collaborative practice should obtain initial and further training, including continuing professional development, in collaborative practice.*

(2) Code of Practice for Collaborative Practitioners

6.67 Another issue stemming from collaborative practice which the Commission addressed in its Consultation Paper was the potential ethical and professional problems which may arise during the process, including whether the parties' best interests are being fully served by the professional advisers engaged in collaborative practice.[79] As suggested by Davy:

> "With collaborative practice there is a built-in vested interest for solicitors to settle, because if a case does not settle and one or both parties want to litigate, both solicitors have to withdraw from the case, and both parties have to instruct two new solicitors. This may put undue pressure on one side to settle a case on unreasonable terms."[80]

6.68 In this context the Commission invited submission as to whether a statutory Code of Practice or Guidelines for collaborative practice should be introduced.[81] In considering the submissions received on this issue, the Commission considers that it is not currently necessary to introduce a separate statutory Code of Practice for collaborative practitioners. Legal professionals engaged in the collaborative practice model are already subject to a number of rules. For example, solicitors are governed by the *Solicitors Acts 1954 to 2008*,[82] and the Law Society of Ireland's Guide to Professional Conduct of Solicitors in Ireland.[83] The Commission notes that the statutory Code of Practice which it recommends in this Report will focus on mediation and conciliation, but that it will also have direct relevance to collaborative practice in terms of the training issue in particular. To supplement this, the Commission recommends that a voluntary Code of Practice and Ethics should be introduced for collaborative practitioners. As noted by Kovach "New approaches to representation need fresh and different ethical guidelines and rules."[84]

6.69 In the United States, the Association of Collaborative Law Attorneys has developed a set of ethical rules for collaborative lawyers entitled "Principles and Guidelines for Collaborative Law."[85] These guidelines are widely reproduced by collaborative law practice groups in the United States with some variations. These principles contain a mixture of procedural rules and aspirational ethical goals limited exclusively to family law matters. These may serve as a useful template for collaborative practitioners in Ireland. Similarly, the International Academy of Collaborative Professionals actively promotes standards and principles and has adopted documents addressing issues of practice and ethics for collaborative professionals. All of the standards are voluntary guidelines. In addition, the United States *Uniform*

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78 See *Minimum standards for a collaborative basic training* at www.collaborativepractice.com.

79 Walls "Collaborative law a new and better way" *Sunday Business Post* 25 March, 2007. See also Fairman "Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads "(2002) 18 Ohio St J Dis Resol 505.

80 Davy "Problems Associated with Collaborative Practice" (2009) 9 Judicial Studies Institute Journal 1 at 18. Available at: www.jsijournal.ie.

81 LRC CP 50-2008 at 5.157.

82 *Solicitors Act 1954; Solicitors (Amendment) Act 1960; Solicitors (Amendment) Act 1994; Solicitors (Amendment) Act 2002*; and *Civil Law (Miscellaneous Provisions) Act 2008*.

83 These rules would also be applicable to solicitors acting in the capacity of a collaborative practitioner.

84 Kovach "Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards" (2003) 39 Idaho L Rev 416.

85 Association of Collaborative Law Attorneys *"Principles and Guidelines for Collaborative Law*." Available at: www.nocourt.org/principles.html.

Collaborative Act 2009, prepared by the US Uniform Law Commissioners, may serve as another appropriate model for drafting a voluntary code for this jurisdiction.[86] The Commission now turns to examine some of the main provisions of the 2009 Uniform Act.

6.70 Section 9 of the 2009 Uniform Act provides that a lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in proceedings related to the collaborative matter if the collaborative lawyer is disqualified from doing so. Section 12 of the 2009 Uniform Act states that: "during the collaborative law process on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery, and shall update promptly information that has materially changed. Parties may define the scope of disclosure, except as provided by law." Section 13 states that the 2009 Uniform Act does not affect the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or the obligation of a person to report abuse or neglect of a child or adult under the law of this state.

6.71 Section 14 addresses the appropriateness of collaborative practice for the clients. It places a duty on collaborative practitioners to discuss with the prospective party prior to the parties signing a participation agreement the factors which the collaborative lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter and to provide the party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation. The collaborative practitioner must also explain that participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause. This section of the 2009 Uniform Act is of extreme importance as it ensures that the fundamental principles of self-determination and voluntariness are protected. The Commission highlights the importance of this, and recommends that these provisions should be included in any voluntary Code of Practice and Ethics for collaborative practitioners.

6.72 Section 16 of the 2009 Uniform Act addresses the issue of confidentiality in the collaborative practice model and states that a collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by law. Section 17 of the 2009 Uniform Act introduces a distinct privilege for the collaborative law process and it is similar to the privilege provisions set out in the *Uniform Mediation Act 2004*. It states that a collaborative law communication is privileged, is not subject to discovery, and is not admissible in evidence in any subsequent legal proceedings.

6.73 As noted by Pollack "One of the more cogent concerns about the collaborative process is how effective is the screening process, especially with regard to domestic abuse."[87] Section15 of the 2009 Uniform Act addresses the issue of domestic violence between the parties. It states that before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer should make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party and must continue throughout the process to reasonably assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party. The Commission considers that screening both at intake and throughout the collaborative process is a fundamental issue which collaborative practitioners must be aware of and that all collaborative practitioners should be trained in this skill.

6.74 *The Commission recommends that a non-statutory Code of Practice and Ethics should be introduced for collaborative practitioners.*

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86 *Uniform Collaborative Act 2009* (drafted by the National Conference of Commissioners on Uniform State Laws, July 2009) available at : http://www.law.upenn.edu/bll/archives/ulc/ucla/2009am_approved.htm.

87 Pollack "Perceived and Real Disadvantages of Collaborative Practice" (2009) 9 *Judicial Studies Institute Journal* 1 at 12. Available at: www.jsijournal.ie.

(3) Referral to Collaborative Practice

6.75 The Commission recommends that the option of collaborative practice should be explained to parties attending information sessions on dispute resolution and that solicitors should explore this option with clients, where appropriate, and as part of a menu of choices for clients. The Commission considers, however, that it is not appropriate to include the option of adjourning proceedings to allow the parties to consider collaborative practice in primary legislation, or in the statutory Rules of Court, as it is a process which must occur prior to the commencement of litigation. This is because of the generally accepted withdrawal requirement that applies to solicitors, preventing them from acting on behalf of the parties in any subsequent litigation. As noted by Davy "Because of the absolute prohibition against litigation, all cases are excluded where proceedings have been issued, or where they are likely to be issued."[88] Furthermore, it is important to note that, coupled with impractical aspects of referring a case out to collaborative law, there is an "additional cost to the client of closing down the collaborative case and transferring to litigation counsel if the process breaks down... if the matter cannot be concluded to the mutual satisfaction of the parties, and one party, or one attorney, decides to end the process, then *both* parties must bear the cost of hiring and educating successor counsel."[89]

(4) Conclusion

6.76 The Commission reiterates in this context that all dispute resolution processes discussed in this Report carry their own benefits and risks, and collaborative practice is no different. The concerns linked with collaborative practice are most frequently associated with risks resulting from the solicitor disqualification requirement and the appropriateness of the process for certain matters. The Commission agrees with the view that:

> "It is clear that collaborative practice will not be for everybody. There are cases which simply cannot be dealt with in this manner, and will need to proceed to litigation. There will always be a necessity to have available to clients the very fine court system, in order to have the dispute adjudicated."[90]

6.77 As the Commission acknowledged in its Consultation Paper, although collaborative law is an emerging ADR process, it has a capacity to provide another method to assist in the resolution of family disputes in certain circumstances[91] and gives "the public a further option in the quest for deep and lasting resolution, which benefits not only the parties, but their families and arguably also provides a wider societal benefit."[92]

G Family Probate Disputes & ADR

6.78 As the Commission noted in its Consultation Paper "it is clear and unfortunate that grief associated with the death of a loved one creates tensions, and legal proceedings may follow from misdirected anger over the death. Death may cause dormant family disputes to resurface and a dispute supposedly over property may in fact be a dispute over family relationships."[93] The Commission provisionally recommended in the Consultation Paper that a Court should adjourn proceedings when appropriate to allow parties to a dispute arising under section 117 of the *Succession Act 1965* to consider

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88 Davy "Problems Associated with Collaborative Practice" (2009) 9 *Judicial Studies Institute Journal* 1 at 18. Available at: www.jsijournal.ie.

89 Pollack "Perceived and Real Disadvantages of Collaborative Practice" (2009) 9 *Judicial Studies Institute Journal* 1 at 12. Available at: www.jsijournal.ie.

90 Mallon "Collaborative Practice: An Overview" (2009) 9 *Judicial Studies Institute Journal* 1 at 6. Available at: www.jsijournal.ie.

91 LRC CP 50-2008 at 5.156.

92 Mallon "Collaborative Practice: An Overview" (2009) 9 *Judicial Studies Institute Journal* 1 at 6. Available at: www.jsijournal.ie

93 LRC CP 50-2008 at 5.168.

mediation.[94] The Commission now turns to examine the role for ADR in the resolution of family probate disputes.

(1) Estate & Succession Planning

6.79 The use of ADR processes, such as mediation, in probate disputes has largely been reactive and is often used once a dispute has arisen. It has been suggested that there are opportunities available to a testator who seeks to be proactive to arrange for mediation or conciliation of estate disputes by including such dispute resolution clauses in their will. Testators might value mediation or conciliation for multiple reasons, including its potential to preserve family harmony and avoid dissipation of estate assets.[95]

6.80 In some countries, estate lawyers draft wills to include mediation clauses that channel estate disputes away from litigation. Proponents for the inclusion of mediation clauses in wills suggest that: "When a will mandates mediation, the will provides a dispute resolution mechanism designed to preserve family harmony, conserve estate assets, and avoid airing the family's "dirty laundry"- objectives common to many testators."[96] Furthermore, mediation has been promoted in family business succession planning. As noted by one commentator:

> "Family businesses are dynamic and the nexus between family and business is quite complex. Family values, business values, generational perceptions and expectations, succession, and pragmatic business management, wealth, tax, and estate planning issues can all be addressed through the family meeting. Most families agree it is better to make decisions for themselves and to resolve issues in the privacy of a meeting room rather than in a public courtroom."[97]

6.81 In business, succession planning involves identifying and preparing suitable people to replace key members of the management team as they move on. Planning the transition of a business from one generation of a family to the next requires exploration of management, governance, ownership, and many other issues.[98] A family business succession survey compiled in Ireland in 2009 states that two-thirds of family businesses in Ireland will change hands in the next decade. The survey also showed, however, that while 69% of respondents claimed they wanted to keep the business in the family, only 29% had developed a plan to do so.[99] Another succession planning survey carried out by the Irish Small Firms Association in 2008 showed that 67% of owner-managers have no succession plan in place.[100]

6.82 The transfer of a family business can pose challenges to the preservation of the family's wealth, continuity and longevity of the business, and family stability. If there is a combination of these challenges, business and family stress is further magnified, and the potential for family and business conflict is increased dramatically.[101] Family business succession mediation ensures a smoother and more efficient transfer of tangible assets as it allows families to put in place a family charter. This is a strategic plan for family-related issues within the business. A typical charter outlines best practice on matters such as entry principles for family members wishing to join the business; details on when meetings should be

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94 LRC CP 50-2008 at 5.174.

95 Love & Sterk "Leaving More Than Money: Mediation Clauses in Estate Planning Documents" (2008) 65 Wash & Lee Law Rev 539 at 543.

96 *Ibid.*

97 Jernigan & Lord "The Mediator's Role in the Family Business" (2008) *American Journal of Mediation*. Article available at www.americanjournalofmediation.com.

98 Gage et Al. "Holistic Estate Planning & Integrating Mediation into the Planning Process" (2004) 39 *Real Property, Probate & Trust Journal* 509 at 520.

99 For further information on the BDO Simpson Xavier survey, see McGee "Succession Planning" (2009) *Irish Motor Management Journal* at 47.

100 *Small Firms Association Succession Planning Survey* (May 2009). Available at: www.sfa.ie.

101 Jernigan & Lord "The Mediator's Role in the Family Business" (2008) *American Journal of Mediation*. Article available at www.americanjournalofmediation.com.

held; who will be involved in decision making; ownership policies and share buy-out processes. Furthermore, succession mediation allows each family member, even those who are not shareholders or involved in the business, to be involved in drafting the future of the family business. Although it is not legally binding, a family charter is similar in many ways to a shareholders' agreement. A well thought-out family charter should contain clearly articulated principles that can reduce the stress of dealing with conflict should it arise in the business.[102] This preventive dispute resolution process can assist in minimising the likelihood of future conflict in the family.

(2) Section 117 of the Succession Act 1965

6.83 As previously noted, the Commission provisionally recommended in its Consultation Paper that a Court should adjourn proceedings, when appropriate, to allow parties to a dispute arising under section 117 of the *Succession Act 1965* to consider mediation.[103] Where probate disputes are litigated, the applicants will often base their claim on section 117(1) of the *Succession Act 1965* which states that the Court will determine whether the testator has failed in his or her "moral duty to make proper provision for the child" in accordance with his or her means, whether by the will or otherwise.[104] In making an order under section 117, a Court must, in accordance with section 117(2):

> "... consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children."

6.84 An order made under section 117 of the 1965 Act cannot, however, affect the legal right share of the spouse of the deceased or, if the spouse is a parent of the child, any gift that has been left to the spouse of the deceased, or any share on intestacy to which he or she would be entitled (this might arise where, for example, a testamentary gift and/or the residuary gift fails and falls to be distributed on intestacy). This is why most section 117 claims are brought in respect of the last will of the second parent to die.[105] Furthermore, it is important to note that the traditional notions of fairness in relation to 'proper provision' are complicated by the increasing prevalence of non-traditional families. Divorce and remarriage, stepchildren, and children born to unmarried parents have created family structures that are difficult to prioritise in terms of the individual's relationship to the deceased. As noted by one commentator:

> "Disputes over wills and property are costing families throughout Ireland needless heartache and legal bills. In addition to these costs, they are leaving legacies of hatred and court battles for generations to come. Many people are living in quiet desperation over the matter."[106]

6.85 Indeed, while the parties may appear to be arguing over trivial assets of apparently insignificant monetary value, the actual controversy may well run much deeper and "Litigated solutions to these problems ignore the complex emotional issues that may underlie the dispute."[107] Furthermore, it has been suggested that litigation "does not allow flexible solutions to the issues raised which are unique to trust

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102 See Pillow "Charter Reduces Possibility of Family Feud" *Sunday Business Post*, 1 August , 2004.

103 LRC CP 50-2008 at 5.174.

104 See Brady *Succession Law in Ireland* (2nd ed Butterworths, 1995).

105 See Hourican "Section 117 Claims: Practice and Procedure and Matters to Bear in Mind" (2001) 6(3) CPLJ 62.

106 Speech by authors at the launch of Murphy and Dunne, *Inheritance and Succession – The Complete Irish Guide*, September, 2008.

107 Gary "Mediating Probate Disputes" (January 1999) *ABA Real Property & Probate Magazine*. See also Simmel "Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code" (2002) 18 Ohio St J on Disp Resol 197.

and probate matters. These matters frequently involve complex estate and income tax issues, support issues for multiple generations of beneficiaries, and similar matters."[108]

6.86 It has been suggested that mediation is especially suited to probate disputes, as "applying mediation to will contests has the potential to avoid the costs, time delays, and the adversarial, winner-take-all atmosphere of litigation… [and] mediation can resolve the disputes while maintaining the family relationships that may otherwise be devastated by litigation."[109] In some jurisdictions, including Ireland, the use of mediation for resolving probate disputes has lagged far behind its use in other family matters. Indeed, it can be argued that "probate disputes are difficult to mediate because the person whose views are most relevant, namely the testator in a will or the settlor of a trust, is dead and not able to participate in the mediation."[110] Furthermore, as noted by Love and Sterk, the use of mediation is not practical or advisable in all cases. Examples of such cases include:

- legislative limitations in some cases constrain the power of testators to mandate mediation of estate disputes;
- mediation might frustrate an objective that could be significant for some testators (strict, "dead-hand" control of estate assets); and
- in some families, the presence of a stronger character among the beneficiaries might make an adjudicative process more appealing than a consensual process where a weaker party might be overpowered.[111]

6.87 Despite these exceptions, a number of probate mediation programmes have been established in other states, including the United States. The Probate Court in Dallas, Texas, created one of the first formal programmes encouraging the mediation of probate disputes in the United States. Similarly, the California Superior Court in Los Angeles began a programme to encourage the use of mediation of probate disputes in 1997.[112] The programme was based on the view of practitioners that "[c]ontested estate, trust, conservatorship and other matters covered by the Probate Code are uniquely appropriate for court-supervised mediation in the interests of prompt, efficient and economical dispute resolution."[113] Rule 2.1 of the Hawaii Probate *Rules 1996* authorises a court to refer any probate case to mediation at its discretion. The use of mediation to solve probate disputes is governed by the Mediation Rules for Probate, Trust, and Guardianship of the Property which are part of the Hawaii Court Rules. In Washington state, the *Trust and Estate Dispute Resolution Act 1999*. TEDRA 1999 was enacted "to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter, to provide non-judicial methods for the resolution of matters, such as a mediation, arbitration and agreement, and to provide judicial resolution of disputes if other methods are unsuccessful." More specifically, the stated purpose of the 1999 Act is "to provide a binding non-judicial procedure to resolve matters though written agreements among the parties interested in the estate or trust." In 2005, the State of Idaho also enacted a *Trust and Estate Dispute Resolution Act*.[114]

6.88 The Commission, as it noted in its Consultation Paper, considers that family probate disputes are suitable for mediation or conciliation. The development of the probate mediation programmes

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108 Legislative Proposal, Trusts & Estates Section, State Bar of Cal., Enabling Legislation for Court Ordered Probate Mediation 2 (June 9, 2006).

109 Stimmel "Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code" (2002) 18 Ohio St J On Disp Resol 197 at 197.

110 Madoff "Mediating Probate Disputes: A Study of Court Sponsored Programs" (2004) Research Paper No. 32 *Boston College of Law Public Law and Legal Theory Research Paper Series* at 698.

111 Love & Sterk "Leaving More Than Money: Mediation Clauses in Estate Planning Documents" (2008) 65 Wash & Lee Law Rev 539 at 544.

112 These rules are found at Cal LA Super Ct R 10-200-10.210.

113 Cal LA Super Ct R 10-200.

114 Idaho Code Ann. § 15.8.101 *et seq.* (West 2006).

discussed above demonstrates the potential for mediation in resolving such disputes. In dealing with estate matters, there often is a prior history of sibling rivalry, jealously, animosity, prior disputes, and other emotional issues related to family dynamics.[115] ADR processes, such as mediation and conciliation, allow the parties to explore these underlying interests during the resolution of the probate dispute, which can help repair and restore family relationships. Furthermore, it has been suggested that "litigation can take too long, can alienate family members from each other and polarize families into warring camps... sometimes for generations. Most testators want to leave a richer legacy."[116] As the Commission has noted, however, it is important that the intentions of the testator are not overridden during a probate mediation or conciliation process. For this reason, the Commission does not favour mandatory mediation for section 117 applications taken under the *Succession Act 1965*. Rather, the Commission considers that parties to a section 117 application should be informed of the availability of other dispute resolution processes to resolve such a dispute. Therefore, the Commission recommends that parties to an application under section 117 of the *Succession Act 1965* should be required to attend an information session on dispute resolution and reiterates its recommendations in relation to information sessions above in relation to general family disputes.

6.89 *The Commission recommends that attendance at an information session on mediation and conciliation should be a mandatory statutory requirement in proceedings under section 117 of the Succession Act 1965.*

H Elder Mediation

(1) Family Disputes & Elder Transitions

6.90 During the ageing process many older people need to make what can be extremely difficult decisions in response to changes and challenges. The Commission notes that:

> "Aging is a transition that poses physical, legal, financial, and emotional challenges for individuals, families, and professionals. Meeting these challenges can put a tremendous strain on all, as they try to plan for and adapt to the changes. Thus it is not surprising that families frequently avoid making decisions when they are faced with hardened disagreements and/or lack of information. Unfortunately, this avoidance can result in significant financial and emotional costs."[117]

6.91 Indeed, conflict between individuals and within families over these age related changes and challenges are often inevitable, with family members disagreeing on what are the 'best interests' for the older member of the family. Many of the challenges facing families include the tensions of dependence versus independence in multiple areas of life - physical, cognitive, social, domestic and financial - where unwelcome changes make for a period of intense decision-making. There are also often multiple parties involved in decisions including parents, brothers, sisters, spouses, adult grandchildren, trusted friends and legal, medical and financial advisers, and they often have trouble communicating with each other in trying to identify, plan for and act on key questions. Furthermore, siblings dealing with differences in their own geographic, economic and immediate family structures often find working together challenging. A study found that "nearly 40 percent of adult children providing parent care reported serious conflict with a sibling, usually related to lack of sufficient help from that sibling."[118]

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115 Certilman "Throw Down the Muskets, Seek Out the Town Elders" (Spring 2010) 3 *New York Dispute Resolution Lawyer* 1.

116 Love "*Mediation of Probate Matters: Leaving a Valuable Legacy*" (2001) 1 Pepp Disp Resol L J 255 at 256.

117 Dugan "Elder Decisions in Elder Mediation" (October 2004). Online article available at: http://www.mediate.com/articles/dugan1.cfm.

118 The study is cited Gentry in "Resolving Middle-Age Sibling Conflict Regarding Parent Care" (2001) 19 *Conflict Resolution Quarterly* 1 at 35.

6.92 In the Commission's 2003 *Consultation Paper on Law and the Elderly*[119] it was noted that the National Council on Ageing and Older People had published a number of documents which provide a comprehensive view of the life and lifestyle of older people. Among other issues, the Council had identified the significant risks of abuse, neglect and mistreatment of older people. It had also recorded the natural wish of those over 65 to maximise their independence and autonomy, including the desire to continue living in their own homes.[120] Indeed, as noted by the then Minister for Older People:

> "Older people and particularly those with a cognitive impairment, may often feel excluded from the decision making process, believing that decisions are made for them, rather than with them. Participation is a central component of positive ageing, and it is absolutely right that older people should contribute and influence decision-making in the areas that concern them."[121]

6.93 An emerging type of mediation which advocates the participation of older people with their families in resolving disputes is elder mediation. The Commission notes that, in 2009, the Alzheimer Society of Ireland launched a Dublin-based pilot elder mediation service for families living with dementia. The Society stated that elder mediation services could provide a new model to meet the needs of families dealing with stress and family conflict caused by the challenges of caring.[122] The Commission now turns to provide a brief overview of this process.

(2) Elder Mediation

Elder mediation is a new specialty area within the field of mediation and it brings family members and professionals together to address the major life changes inherent in the aging process.[123] The Commission views elder mediation as a facilitative and structured process in which a professionally trained elder mediator helps facilitate discussions that assist families in making decisions that relate to an older person in the family, who also actively participates in the process. The Commission considers it fundamental to note that for a process to be called 'elder mediation' the older person must be actively involved in the process, as without this active participation by the older person the key principles of mediation, namely self-determination and party autonomy, are not present. A negotiation between family members and professionals on decisions relating to an older member of the family does not constitute elder mediation.

6.94 The Commission considers that elder mediation can be categorised as a preventive process of dispute resolution[124] and is said to be "just as effective, and often more effective, at the beginning of the decision process – when families are fact finding, struggling with options and discovering feelings about their parents or adult children that well up and make clear thinking difficult."[125] This process of preventive elder mediation, before a dispute has arisen among a family, "can strengthen family ties and enable all family members to deal with the changing nature of their relationships and the realities of their situation. It

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119 See LRC CP 23-2003. The Commission's final recommendations in this area were published in its *Report on Vulnerable Adults and the Law* (LRC 83-2006). Based on this, the Government published the *Scheme of the Mental Capacity Bill 2008* and the Commission understands that this, in turn, will lead to a *Mental Capacity Bill*, to be published by the end of 2010 or early 2011.

120 See www.ncaop.ie for a list of relevant material.

121 *"Minister Brady Launches Pilot Project on Elder Mediation"* (June 2009). Press release available at: www.dohc.ie.

122 See www.alzheimer.ie. See also Corry "*Elder Mediation – Challenges for the Pilot Project in Ireland."* Paper delivered at the Elder Mediation Summit and Symposium, Dublin, June 2009.

123 Dugan "Elder Decisions in Elder Mediation" (October 2004). Online article available at: http://www.mediate.com/articles/dugan1.cfm.

124 See LRC CP 50-2008 at 2.16.

125 Larsen & Trippe "Tough Elder Decisions: The Mediation Option" (May 2004). Online article available at: http://www.mediate.com/articles/larsenr3.cfm.

allows family dynamics including sibling rivalries to be addressed at a time when everyone is calm and thoughtful decision making can occur."[126]

6.95 It has also been suggested that elder mediation provides a safe space for family members to face disagreements, hear what is important to each participant and find common ground that may meet everyone's interests. Often, the family generates imaginative solutions that only they could craft with their intimate knowledge of their own situations.[127] Furthermore, it has been suggested that in the context of disputes involving carers, elder mediation, through its voluntary, non-coercive process, has the potential for enhancing elder rights, providing an acceptable form of minimal social intervention, and contributing to the prevention of elder abuse at early stages of relational conflicts between elders and their carers.[128]

6.96 The Commission notes that elder mediation includes a fundamental role for professionals to be involved in the process. This is because mediators can flag issues that the parties may need to consider and provide general information, but mediators may not give legal, financial, or medical advice which may be necessary for the family members to make informed decisions in the mediation process.[129] In this context, elder mediations can involve not just family members but appropriate professional resources such as lawyers, care managers and financial planners. These professionals are encouraged to attend because their expertise, coupled with their insights into the family's needs, are very helpful.[130] Whether professionals actually participate in some or all of the mediation sessions, or simply function in an advisory role between sessions, mediators should generally encourage parties to involve relevant professionals for detailed advice and support.[131] The Commission agrees with the view that "The mediation process for elder-care decisions can and most say, should bring in experts such as social workers, estate-planning specialists and health-care professionals who would typically be called upon as part of a court case."[132]

6.97 The Commission also notes that the issue of party capacity to mediate comes up with some frequency in the context of disputes involving older persons. Mediators need to be concerned when parties face obstacles to self-determination, a core value in mediation. Self-determination encompasses the capacity to make informed decisions. "The maintenance of disputant self-determination is among the most important and defining characteristics of mediation."[133] It has been noted that "far too often when older people face major life transitions and their adult children are embroiled in conflict, important process issues are not addressed. When older family members participate in a decision-making process that allows them to feel heard and understood, they often feel better about the transition. They develop a stronger stake in the evolving solution and may strengthen tender relationships along the way."[134] The Commission considers that elder mediation has a role to play in appropriate cases to assist older persons

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126 *Ibid.*

127 Larsen & Thorpe "Elder Mediation: Optimising Major Family Transitions" (Spring 2006) 7 *Marquette Elder's Adviser* 2 at 293-312.

128 Craig "Elder Mediation: Can It Contribute to the Prevention of Elder Abuse and the Protection of the Rights of Elders and Their Carers?" (1994) 6 Journal of Elder Abuse & Neglect 1 at 83-96.

129 See Johnston *"Elder Mediation & Legal Issues".* Paper delivered at the Elder Mediation Summit and Symposium, Dublin, June 2009.

130 Larsen & Trippe "Tough Elder Decisions: The Mediation Option" (May 2004). Online article available at: http://www.mediate.com/articles/larsenr3.cfm. See also Rhudy & Rodis "Elder Mediation Today: Manual and Resource Guide" (Baltimore, Senior Mediation and Decision Making Inc., 2009).

131 For a detailed discussion on the role of advisors in mediation see paragraphs 3.90 to 3.95.

132 Lauricella "Mediating Elder-Care Disputes" (March 2008) *Wall Street Journal*.

133 Hedeen "Ensuring Self-Determination through Mediation Readiness: Ethical Considerations" (2003). Online article available at: http://www.mediate.com/articles/hedeenT1.cfm. For a detailed discussion on the issue of capacity to mediate see paragraphs 3.78 to 3.95.

134 Larsen & Thorpe "Elder Mediation: Optimising Major Family Transitions" (Spring 2006) 7 *Marquette Elder's Adviser* 2 at 293-312.

and their families in making difficult decisions. The Commission welcomes the development of this area of mediation in Ireland as it empowers older persons to be actively involved in making decisions that affect themselves. The Commission also notes that this process would be subject to the general statutory framework for mediation and conciliation it proposes in this Report. This will especially be the case when the proposed *Mental Capacity Bill*, derived from the *Scheme of the Mental Capacity Bill 2008* (in turn, based on the Commission's *Report on Vulnerable Adults and the Law*)[135] is enacted, because such legislation could give rise to civil proceedings.

[135] LRC 83-2006.

CHAPTER 7 PERSONAL INJURIES & ADR

A Introduction

7.01 In this chapter the Commission examines how ADR could assist in the resolution of personal injuries disputes. In Part B the Commission summarises its provisional recommendations set out in its Consultation Paper in relation to medical disputes and ADR. In Part C the Commission discusses the role for ADR in the resolution of clinical disputes, including medical negligence claims. In Part D the Commission examines the role for the ADR process of early neutral evaluation in the resolution of personal jury claims, including claims arising from medical treatment. In Part E the Commission discusses the role of mediation under the *Civil Liability and Courts Act 2004*. In Part F the Commission considers the need for an open disclosure policy in the healthcare setting and the role of apologies in the resolution of personal injury disputes, particularly disputes arising from medical treatment.

B Consultation Paper

7.02 As the Commission noted in its Consultation Paper medical negligence litigation has long been criticised "as complex, costly, and gruelling for all concerned, yet the number of medical negligence claims being brought in this country has risen sharply in recent years."[1] The Commission recognised that ADR processes such as mediation and conciliation are not suitable in every medical dispute, but the examples from medical negligence litigation in Ireland, notably the organ retention cases discussed in the Consultation Paper[2] indicated the merits of mediation in suitable cases. The Commission noted that mediation may be especially suitable where parties wish to seek redress that is not available through the Courts, for example, where an apology is sought.[3]

7.03 The Commission made two provisional recommendations in relation to medical disputes and ADR. Firstly, the Commission provisionally recommended that that a statutory provision be considered which would allow medical practitioners to make an apology and explanation without these being construed as an admission of liability in a medical negligence claim.[4] Second, the Commission invited submissions as to whether a pre-action procedure providing for mediation in medical negligence claims should be considered.[5] The Commission now turns to examine the role for ADR in the resolution of personal injuries cases, including clinical and medical negligence claims.

C Clinical Claims & ADR: An Overview

7.04 In its Consultation Paper, the Commission invited submissions as to whether a pre-action procedure providing for mediation in medical negligence claims should be considered. The Commission considers that there is a role for ADR, in particular mediation and conciliation, in the resolution of clinical

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1 Moloney "Dealing with Medical Negligence Claims: a review of options for reform" (1999) 5 *Medico-Legal Journal of Ireland* 2 at 79. LRC CP 50-2008 at 6.02.

2 See the discussion of *Devlin v National Maternity Hospital* [2007] IESC 50 at paragraphs 6.08-6.09 of the Consultation Paper,and *O'Connor v Lenihan* at paragraphs 6.15-6.16.

3 See LRC CP 50-2008 at 6.41.

4 See LRC CP 50-2008 at 6.21.

5 See LRC CP 50-2008 at 6.43.

claims and medical negligence disputes. A clinical claim is a civil action against a hospital and/or clinical person. Claims are usually taken by the patient involved in the dispute but may also be taken by members of the patient's family. Such a claim is taken because of an alleged personal injury during the course of clinical care and treatment. As the Commission noted in its Consultation Paper, most civil proceedings in Ireland brought by patients against medical professionals are based on the tort of negligence, which involves a claim that the health care fell below acceptable standards and resulted in personal injury. The principal objective of such proceedings is, therefore, to seek monetary compensation for the patient.[6]

7.05 In Ireland, until the establishment of a Clinical Indemnity Scheme (CIS) under the auspices of the States Claims Agency (SCA), various insurance and indemnity arrangements had meant that each defendant to a claim - hospital, the Health Service Executive (as successor since 2005 of the health boards), consultant, hospital doctor, or nurse - was represented by a separate legal team.[7] As the Commission noted in its Consultation Paper, the Clinical Indemnity Scheme (CIS) was established in 2002, in order to rationalise pre-existing medical indemnity arrangements by transferring responsibility for managing clinical negligence claims and associated risks to the State, via the Health Service Executive (HSE), hospitals and other health agencies. Under the scheme, which is managed by the SCA, the State assumes full responsibility for the indemnification and management of all clinical negligence claims, including those which are birth-related.[8]

7.06 Information collated by the SCA indicates that more than 4,000 adverse incidents occur in Irish hospitals each month ranging from medication errors to slips, trips and falls.[9] In June 2009, the SCA had approximately 4,140 claims under its management. The total outstanding contingent liability against all active claims was approximately €658 million, broken down into two categories: clinical claims of €566 million (86%) and employer liability, public liability and property damage claims of €92 million (14%).[10] Its records also show that 282,045 clinical incidents or near misses were reported by hospitals from January 2004 to August 2009, the equivalent of 4,178 reports every month. Of these, only 3,522 led to civil proceedings.[11] One commentator suggests that: "so few claims are brought, not because of the quality of our health service, but because of the enormous difficulties that such cases pose for plaintiffs to win."[12]

7.07 The Director of the State Claims Agency has stated that the level of costs claimed by lawyers when their clients are awarded damages in medical negligence cases are unsustainable.[13] It has also been suggested that, in smaller medical negligence cases, legal costs very often exceeded the amount of damages. In the average catastrophic injury case such as a cerebral palsy case, it is reported that legal costs could add €1 million, or more, to the cost of resolving it. An analysis of the Clinical Indemnity Scheme's claims portfolio shows the average level of damages in cerebral cases has amounted to €3.7

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6 See LRC CP 50-2008 at 6.06.

7 The States Claims Agency was established in 2001 as a unit within the National Treasury Management Agency (NTMA), pursuant to the *National Treasury Management Agency (Amendment) Act 2000*. The SCA was established in response to the need to manage mass claims such as the Army deafness claims in the 1990's. See *Report on Multi-Party Litigation* (LRC 76-2005), para 1.13.

8 The Commission notes that the *Medical Practitioners (Professional Indemnity) (Amendment) Bill 2009* proposes, for the first time, to make medical indemnity (or other equivalent insurance) compulsory for all registered and practising doctors.

9 Donnellan "More than 4,000 hospital incidents occur every month" The Irish Times, 5th October, 2009. Available at: www.irishtimes.com.

10 *National Treasury Management Agency Annual Report 2008* (NMTA, 2009) at 35. Available at: www.ntma.ie.

11 Donnellan "More than 4,000 hospital incidents occur every month" The Irish Times, 5th October, 2009. Available at: www.irishtimes.com.

12 Boylan "Cost Cutters" (October 2009) Law Society Gazette at 28. Available at www.lawsociety.ie.

13 Donnellan "Costs in negligence cases 'unsustainable'" *The Irish Times*, 10 February 2009.

million.[14] Furthermore, for each euro of compensation paid to claimants, the Clinical Indemnity Scheme paid an additional 56 cent in legal costs. This contrasts with an equivalent figure for the UK's National Health Service Litigation Authority of 43 pence in legal costs for each £1 of compensation paid. Against this background, the Commission considers that there is a greater role for ADR processes in the efficient resolution of medical negligence claims and such processes could also provide greater access to individualised justice for those involved in a medical negligence dispute.[15]

7.08 As noted in the Consultation Paper, many other jurisdictions have successfully incorporated the use of ADR processes into the resolution of medical negligence cases.[16] As noted by one commentator:

> "Good resolutions are not always found through the prism of relevancy and admissibility. Often, in medical negligence cases, resolutions are found in the hearts, minds, and interests of the participants... The enhanced communication provided by mediation allows for conciliation, healing, restoration of relationships, settlement and the avoidance of a destructive process that may adversely affect the emotional and physical well-being of all the participants."[17]

7.09 Mediation programmes such as Chicago's Rush-Presbyterian St. Luke's Medical Centre's hospital-based mediation programme ("The Chicago Rush Hospital mediation model") demonstrates the potential for mediation to resolve medical negligence cases. Established in 1995, the Chicago Rush Hospital mediation model is now one of the most well-regarded and thoroughly researched medical mediation systems in the United States.[18] Since 1995, it has successfully expedited resolution and lowered legal costs associated with medical malpractice cases. In the cases that go into mediation each year, 90% are successfully settled, which produces a 50% reduction in annual defence costs and a 40% to 60% savings in payouts as compared to comparable cases that have gone to trial.[19] The Chicago Rush Hospital mediation is modelled on traditional mediation except that two co-mediators are used instead of a single mediator. The mediation usually commences after discovery has begun or ended so that both sides are fully aware of the facts of the case.

7.10 The Commission considers that since section 15 of the *Civil Liability and Courts Act 2004* already provides for mediation in personal injury cases which are before the courts, it would be appropriate for the State Claims Agency to introduce an ADR policy which would promote the use of mediation and conciliation prior to the commencement of litigation. Due to the complexities involved in a medical negligence case, a model of co-mediation may be appropriate whereby the mediation is conducted by two mediators, perhaps one from a legal background and a professional from a medical background.

7.11 An important issue to highlight in relation to mediating medical negligence claims is that the parties participating in the process must have the authority to settle the dispute at the mediation. It has

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14 *Ibid.*

15 The President of the High Court, Mr Justice Kearns, has established a working group on medical negligence litigation to examine the legal and related systems of managing medical negligence claims, and to make recommendations for improvement as well as draft legislation to give effect to its recommendations. It is to examine all aspects of the process, from pre-action procedures, pleadings, discovery or disclosure and video - link evidence from experts/witnesses, to other forms of resolution such as mediation. At the time of writing (November 2010), the report of the working group has not been published.

16 See LRC CP 50-2008 at Chapter 6.

17 Galton "Mediation of Medical Negligence Claims" (2001) 28 Cap U L Rev 321.

18 Davenport, *Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases* (2006) 6 Pepp Disp Resol L J 81 at 96-97.

19 See Yee "Mandatory Mediation: The Extra Dose Needed to Cure the Medical Malpractice Crisis" (2007) 7 *Cardozo Journal of Conflict Resolution* 393; Metzloff et al "*Empirical Perspectives on Mediation and Malpractice*" (1997) 60 Law & Contemp Probs 107; and Johnson "The Case for Medical Malpractice Mediation Panels" (2000) 46 *Journal of Medicine and Law* 2.

been suggested that conciliation may be more appropriate in resolving medical negligence disputes as the conciliator is providing the parties with a recommendation which the parties may feel more comfortable accepting rather than constructing their own terms of agreements. This may be especially relevant where one of the parties is concerned that if they settle through mediation – they will be responsible for the settlement terms which they may fear will not be agreeable with their superiors.

7.12 *The Commission recommends that the State Claims Agency should, where appropriate, consider and attempt ADR processes, including mediation and conciliation, in the resolution of medical negligence cases.*

D Early Neutral Evaluation (ENE)

(1) The Personal Injuries Assessment Board and Early Neutral Evaluation

7.13 The Personal Injuries Assessment Board (PIAB), which uses the working name the Injuries Board, was established under the *Personal Injuries Assessment Board Act 2003* and provides independent assessment of personal injury compensation for victims of workplace, motor and public liability accidents.[20] This independent assessment equates to an early neutral evaluation of personal injury claims. As noted in the Consultation Paper, in early neutral evaluation, the evaluation is without prejudice and is non-binding as is the case with the Board's assessments.

7.14 The 2003 Act was enacted as a means of reducing the high levels of legal costs associated with personal injuries claims, in particular those based on the tort of negligence.[21] Indeed, the Long Title to the 2003 Act provides that it is an Act to enable, in certain situations, the making of assessments without the need for legal proceedings to be brought for compensation for personal injuries. Therefore, it is evident that the Injuries Board is involved in alternative dispute resolution as it is responsible for assisting the settlement of personal injuries claims prior to the commencement of litigation in a cost and time efficient manner. For example, in 2008, the average timeframe from the date of a respondent consenting to the Board assessing the claim was 7 months. Prior to the introduction of Board, it is reported that cases took on average 36 months to be resolved through the litigation system.[22] Anecdotal evidence suggests that the resolution of personal injury claims overall has increased in both expedience and economy since the establishment of the Board.[23]

7.15 When the Board receives an application for compensation it informs the respondent about the claim. The respondent has 90 days to consent to the Board assessing the claim. Claims are assessed using the medical evidence provided from the claimant's doctor and, if necessary, a report provided by an independent doctor appointed by the Board. Guideline amounts for compensation in respect of particular injuries are set out in the Book of Quantum which was prepared for the Board in 2004. If the respondent does not agree to an assessment by Board or if either side rejects the Board's award, the matter can then be referred to the Courts.[24] It is important to note that the Board has no role in determining liability and does not make any findings of fact relating to fault or negligence.

7.16 In *O'Brien v Personal Injuries Assessment Board*[25] the High Court and, on appeal, the Supreme Court held that refusing to respect a claimant's instruction to communicate directly with an appointed

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20 Medical negligence cases are not assessed by the Board.

21 Ilan "Four Years of the Personal Injuries Assessment Board: Assessing Its Impact" (2009)1 *Judicial Institute Studies Journal* at 54. Available at: www.jsijournal.ie

22 See www.injuriesboard.ie.

23 See the findings set out in Ilan "Four Years of the Personal Injuries Assessment Board: Assessing Its Impact" (2009)1 *Judicial Institute Studies Journal* at 54.

24 If both parties accept the assessment, the Board will issue an Order to Pay to the respondent. If either the claimant or the respondent rejects the assessment, the Board will issue the claimant with an Authorisation. This is a legal document allowing the claimant to proceed with their claim through the Courts if they so wish.

25 [2005] IEHC 100, [2007] 2 IR 1; [2008] IESC 71, [2009] 3 IR 243.

solicitor was not permissible under the 2003 Act. The Supreme Court emphasised in this respect the importance of the claimant's right to legal representation. This does not affect the fact that, under the 2003 Act, the Injuries Board does not award legal costs even where a solicitor has been involved, unless the case falls within the exceptional cases in the 2003 Act in respect of which legal costs may be awarded where the claimants are vulnerable (for example a minor or a person with limited mental capacity).

7.17 In *Plewa and Giniewicz v Personal Injuries Assessment Board*[26] the applicants, both Polish nationals whose English was stated to be limited, had been injured at work and had instructed a firm of solicitors to deal with their application to the Injuries Board under the 2003 Act. After the Board made its award, it declined to award costs to the solicitors instructed by the applicants. On judicial review, Ryan J in the High Court declined to quash the Board's decision. The Court held that the applicants did not come with the exceptional category of vulnerable claimants envisaged by the 2003 Act, especially bearing in mind that their cases were not particularly complex. Ryan J added: "The claims made by the applicants in these cases were straightforward and were the kind of claims intended to be dealt with by the Board and thereby diverted from the courts' burgeoning caseloads."[27] This approach indicates that the early neutral evaluation provided by the Board was seen by Ryan J as assisting the management of what might otherwise be even greater caseloads in the courts, thus contributing to a more effective civil justice system. This acknowledges an aspect of the integrated nature of the civil justice system, which includes the many ADR processes, whether mediation or conciliation, the early neutral evaluation provided under the 2003 Act as well as the resolution process provided in the courts. The Commission emphasises again that each form of dispute resolution has an appropriate role to play in a civil justice system, as Ryan J recognised in the *Plewa and Giniewicz* case.

7.18 The Commission also notes that, under section 51 of the *Personal Assessment Board (Amendment) Act 2007*, where a claimant rejects the Board's assessment that has been accepted by a respondent and where he or she fails in any subsequent proceedings to get more than the amount of the Board's assessment, the claimant will not be entitled to legal costs. as Ryan J also pointed out in the *Plewa and Giniewicz* case, this is similar to the rule that applies in civil proceedings where a defendant lodges, or tenders, a specific amount in court. If the plaintiff subsequently succeeds in their claims but receives less compensation than the sum lodged by the defendant ("fails to beat the lodgment"), the court will often award costs against the plaintiff.

7.19 As the Commission noted, the Board plays the role of that of an early neutral evaluator of personal injury claims in Ireland. Indeed, one of the main purposes of early neutral evaluations is to reduce the costs of litigation by facilitating communications between the parties while at the same time providing them, early in the process with a realistic analysis of their case which fits in with the objective of the Board.[28] In 2008, approximately 8,000 claims initiated at the Board were amicably resolved by the parties themselves to their mutual satisfaction, often referencing the Board's Book of Quantum published under the 2003 Act without the requirement of a full Board assessment or the need to pursue the matter through the courts.[29] In 2008, approximately 7,000 cases were released by Board for adjudication by the Courts.[30] The Commission now turns to the potential role for early neutral evaluation in the resolution of disputes arising from medical treatments, including medical negligence claims.

(2) Medical Negligence Disputes & Early Neutral Evaluation

7.20 As the Commission previously noted, early neutral evaluation is a process in which parties to a dispute appoint a neutral and independent third person or persons who provides them with an unbiased evaluation of the facts, evidence or legal merits of a dispute and provides guidance as to the likely

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26 High Court, 19 October 2010.

27 At paragraph 57 of the judgment.

28 Conner "Primer for Participants in Early Neutral Evaluation" (1999) 70 *Oklahoma Bar Journal* 38.

29 *The Personal Injuries Assessment Board Annual Report & Account 2008* at 13. In 2008, the Board processed 24,722 personal injury claims and made 8,845 awards.

30 *The Personal Injuries Assessment Board Annual Report & Account 2008* at 12.

outcome should the case be heard in court. The evaluation is without prejudice and is non-binding.[31] The purpose of early neutral evaluation is to reduce the costs of litigation by facilitating communications between the parties while at the same time providing them, early in the process with a realistic analysis of their case.[32] It is often described as a means of providing the parties with a 'reality-check' of the strengths and weaknesses of their case.

7.21 As the Commission noted in its Consultation Paper, some states have introduced early neutral evaluation for medical negligence cases. For example, in Wisconsin, Medical Mediation Panels were established in 1986 to provide an objective assessment of the strengths and weaknesses of a medical malpractice claim. All medical malpractice claims must go through this process before they can proceed to court.[33] Each panel consists of a lawyer, a health care provider and a layperson. The early neutral evaluation they provide aims to identify claims without merit as early as possible and to expedite the resolution of those claims that do have merit.[34] Similarly, before a medical malpractice claim can be filed in Maine, a complaint must be filed with a pre-litigation screening panel.[35] Like the Wisconsin Medical Mediation Panels, the screening panels are meant to serve a twofold function of encouraging both the early resolution of claims and the withdrawal of unsubstantiated claims.[36] In England and Wales, a clinical negligence pre-action protocol was developed under the Civil Procedure Rules 1998 to provide a code of good practice to be followed in clinical negligence litigation.[37] The protocol lists a range of alternative mechanisms for resolving clinical negligence disputes, including early neutral evaluation.

7.22 Given the role of the Injuries Board in providing neutral assessments to disputing parties in personal injury actions and the high level of resolutions reached between disputing parties in such actions, the Commission recommends that early neutral evaluations should be used for disputes arising out of medical treatment. An early neutral evaluation of such a dispute could render a non-binding advisory opinion on the merits of the case and provide the parties with a 'reality check' of the strengths and weaknesses of the case. An example of a case which could have benefitted from an early neutral evaluation is the medical negligence case *O'Leary v Health Service Executive*.[38] In this case, the High Court dismissed the plaintiff's medical negligence claim against the treating surgeon and hospital arising out of his treatment for kidney and bladder complaints. Quirke J held that the plaintiff had not established that he had suffered significant and unnecessary pain, suffering, and distress due to alleged negligence by the defendants. It can be suggested that if this claim that gone through the ADR process of early neutral evaluation, the weaknesses in the plaintiff's case would have be set out and it would have provided the plaintiff with the opportunity to assess whether litigating the dispute was financially and emotionally worthwhile. While individuals will always be entitled to seek a remedy from the courts, arguably an early neutral evaluation of the claim can assist them in deciding whether this is the best course to pursue. Furthermore, it may also provide the parties an opportunity to communicate with each other prior to the commencement of litigation and assist them in reaching a mutually acceptable negotiated agreement based on the findings of the early neutral evaluation.

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31 See Kakalik *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND Corporation, 1996).

32 Conner "Primer for Participants in Early Neutral Evaluation" (1999) 70 *Oklahoma Bar Journal* 38.

33 Wis. Stat. § 655.42(1); See also Doran "A Healthy Alternative" (2001) 95 *Law Society Gazette* 2 at 16 for a general discussion on mediation and medical negligence in the United States.

34 See Fraser "Alternative Dispute Resolution in Medical Practice" (2001) 107 *Journal of the American Academy of Paediatrics* 3.

35 Maine Rev. Stats. Title 24, § 2851 and 2853.

36 See LRC CP 50-2008 at 6.38.

37 *Pre-Action Protocol for the Resolution of Clinical Disputes*. (The Stationery Office, Department of Constitutional Affairs, 1998) Available at http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_rcd.htm.

38 [2010] IEHC 211.

7.23 The Commission recommends that the ADR process of early neutral evaluation should be defined as a process that occurs at an early stage of civil proceedings in which the parties state the factual and legal circumstances to an independent third party (the "early neutral evaluator") with suitable knowledge of the subject matter of the dispute, and in which the early neutral evaluator provides an evaluation to the parties as to what the likely outcome of the proceedings would be if the claim proceeded to a hearing in court. The parties are free to accept or reject the evaluation but it may assist them to agree a settlement of the dispute once they have heard the evaluation. The Commission notes that, in many claims arising from the carrying out of medical treatment, the State is the defendant, often now represented by the State Claims Agency. In that respect, early neutral evaluation may assist in the risk assessment process for those claims already engaged in by the State Claims Agency. Therefore, the Commission concurs with the view that:

> "... the State Claims Agency should embrace Alternative Dispute Resolution practices such as mediation in relation to medical negligence actions. Also, at an earlier time period, the State Claims Agency should assess whether there is merit associated with the medical negligence claim that is being advanced and if there is such merit, seek to negotiate an early settlement, thereby minimising legal costs."[39]

7.24 *The Commission recommends the introduction of an early neutral evaluation scheme for personal injury claims, including any claims arising out of medical treatment. The Commission also recommends that early neutral evaluation should be defined as a process that occurs at an early stage of civil proceedings in which the parties state the factual and legal circumstances to an independent third party (the "early neutral evaluator") with suitable knowledge of the subject matter of the dispute, and in which the early neutral evaluator provides an evaluation to the parties as to what the likely outcome of the proceedings would be if the claim proceeded to a hearing in court.*

7.25 *The Commission recommends that the Code of Conduct for Mediators and Conciliators should provide for the use of early neutral evaluation in personal injuries claims.*

E Mediation & the Civil Liability and Courts Act 2004

7.26 The *Civil Liability and Courts Act 2004*, along with the *Personal Assessment Board Act 2003*, were the principal legislative responses by the Oireachtas to the 2002 *Report of the Motor Insurance Advisory Board*, whose main task was to respond to rising insurance costs, alleged insurance fraud and the "compensation culture." Among other matters, the *Civil Liability and Courts Act 2004* amended the *Statute of Limitations 1957* by reducing the general limitation period for personal injuries actions from three years to two years. It also introduced new penalties for fraudulent and exaggerated claims and provided for major procedural changes in personal injuries actions to reduce the time taken and costs involved in processing such actions. For the purposes of this Report, the Commission focuses on section 15 of the 2004 Act. Under section 15 of the 2004 Act, upon the request of any party to a personal injuries action, the court may:

> "(a) at any time before the trial of such action, and
>
> (b) if it considers that the holding of a meeting pursuant to a direction under this subsection would assist in reaching a settlement in the action
>
> direct that the parties to the action meet to discuss and attempt to settle the action, and a meeting held pursuant to a direction under this subsection is in this Act referred to as a 'mediation conference.''

7.27 As the Commission noted in its Consultation Paper, section 15 of the *Civil Liability and Courts Act 2004* provides that mediation in a personal injuries action can only be initiated at the request of one of

[39] Bradley "Cost Associated with the State Claims Agency Clinical Indemnity Scheme" (February 2009). Online article available at: www.mlaw.ie.

the parties. However, should neither party request the holding of a meeting the court cannot compel the parties to consider mediation.[40] One commentator has noted that:

> "By choosing an approach whereby the power to initiate mediation rests with one of the parties, irrespective of the views of the other side, the legislature has created a significant power imbalance in the relationship between the parties, which will cause grave difficulties for the mediation process."[41]

7.28 In 2009, 14,098 personal injury claims were filed in the courts. 7,099 claims were filed in the High Court and 6,999 in the Circuit Court.[42] The Commission is aware that there have been relatively few personal injuries cases in which a mediation conference pursuant to section 15 of the 2004 Act has been requested by a party since the introduction of the 2004 Act. A rare example appears to have occurred in the 2008 High Court decision *McManus v Duffy* in which, as already discussed,[43] Feeney J directed that the plaintiff and defendant should engage in mediation under section 15 of the 2004 Act, even though the defendant argued that it was an unwilling participant and that mediation was not likely to result in settlement of the action.

7.29 The suitability of mediation in resolving personal injury disputes was recognised in the recent English *Review of Civil Litigation Costs Final Report* prepared by Lord Justice Jackson. It states that:

> "There is a widespread belief that mediation is not suitable for personal injury cases. This belief is incorrect. Mediation is capable of arriving at a reasonable outcome in many personal injury cases, and bringing satisfaction to the parties in the process. However, it is essential that such mediations are carried out by mediators with specialist experience of personal injuries litigation."[44]

7.30 Similarly, the English Centre for Effective Dispute Resolution (CEDR) argues that the outcomes which claimants typically seek in personal injury cases are: full or partial vindication in respect of the accident; damages constituting proper compensation; a chance to say what impact the accident has had on them; a response from the defendant delivering some acknowledgement; and a reasonably swift and risk-free outcome. It has been suggested that these objectives are best achieved by ADR, in particular through the mediation process. CEDR suggests that all types of personal injury cases are suitable for mediation, from small claims to substantial group actions and that the mediator adds value at all stages of the process.[45]

7.31 The Commission noted in its Consultation Paper that the Courts have a fundamental role in integrating ADR into the civil justice system by encouraging parties to consider ADR in appropriate cases.[46] The Commission has recommended that that, in civil claims generally, courts should be permitted, either on their own motion initiative or at the request of a party to such claims, to make an order requiring the parties to consider resolving their differences by mediation or conciliation. The Commission recommends that section 15 of the *Civil Liability and Courts Act 2004* should be amended to reflect this position and should provide that upon the request of any party to a personal injuries action, or

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40 LRC CP 50-2008 at 11.04.

41 Corbett "Mediations in Actions for Personal Injury: Is it Good to Talk?" in Binchy and Craven*, Civil Liability and Courts Act 2004: Implications for P.I. Litigation* (FirstLaw, 2005) at 103.

42 *Courts Service Annual Report 2009* at 43.

43 See the discussion of the case at paragraphs 4.68-4.69, above, The account of Feeney J's judgment in this case, which has not been published on the Courts Service website, is based on Carty, "Landmark mediation decision will impact on costs" (2008) *Gazette Law Society of Ireland* (March 2008), p.21.

44 Lord Justice Jackson's *Review of Civil Litigation Costs Final Report* (The Stationary Office, January 2010).

45 CEDR submission to Lord Justice Jackson's *Review of Civil Litigation Costs Final Report* (The Stationary Office, January 2010).

46 See LRC CP 50-2008 at 11.22.

upon its own motion or initiative, the court may direct parties to attend a mediation conference pursuant to the 2004 Act.

7.32 *The Commission recommends that section 15 of the Civil Liability and Courts Act 2004 should be amended to provide that upon the request of any party to a personal injuries action or upon its own initiative the court may direct parties to attend a mediation conference.*

F An Open Disclosure Policy and the Power of an Apology

7.33 As previously noted, the Commission in its Consultation Paper provisionally recommended that medical practitioners should be allowed to make an apology and explanation without these being construed as an admission of liability in a medical negligence claim.[47] The Commission accepted the views that an apology can be "…one of the most effective means of averting or solving legal disputes"[48] But that it "it is an act very much outside the traditional adversarial legal framework".[49] The Commission now turns to discuss the importance of apologies and open disclosure in resolving medical disputes.

(1) Policy of Open Disclosure

7.34 It is a fact of life that patients and their relatives look for a detailed explanation of what led to adverse outcomes during medical care and treatment. They wish to understand what happened, why it happened and what has been done to prevent it happening again. As noted by Lord Woolf in his 1996 Report *Access to Justice:* "Some victims want an explanation or apology rather than financial compensation, but are forced into protracted litigation because there is no other way of resolving the issues."[50] The State Claims Agency has noted that, after a serious adverse event, patients and families often want an acknowledgement of what happened, an explanation, an apology and reassurance it will not happen again. "Failure to communicate with patients appropriately after such events undermines public confidence, suggests preservation of narrow professional interests over patient well-being, and is in breach of professional ethics."[51] Furthermore, it has been suggested that:

> "The victims of medical negligence often meet a wall of silence when they are looking for answers. There are numerous examples where medics have refused to be open and honest after making a mistake, and this leaves the victim or their family with only one course of action – to go to court."[52]

7.35 The Health Service Executive (HSE) Incident Management and Procedure Guidelines state that "Open communication/open disclosure is a vital component of the incident management process. All incidents should be disclosed to persons affected by the Senior Clinician and/or Senior Manager. The person affected by the incident and/or the next of kin, where appropriate, must be kept informed."[53] It has been suggested that "There would be great merit in introducing a positive statutory duty on doctors working for the state/HSE in public hospitals to have a 'legal duty of candour' to patients, so that they

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47 See LRC CP 50-2008 at 6.21.

48 Tanick and Ayling "Alternative Dispute Resolution by Apology: Settlement by Saying I'm Sorry" *Hennepin Lawyer* (1996) at 22.

49 Cohen "Legislating Apology: The Pros and Cons" (2002) 70 U Cin L Rev 819 at 872.

50 Lord Woolf, *Access to Justice, Interim Report* (1995) at paragraph14.

51 Donnellan "More than 4,000 hospital incidents occur every month" *The Irish Times*, 5th October, 2009. Available at: www.irishtimes.com.

52 Dunne "Seeking a clear focus on openness" *The Irish Times*, 17th November, 2009. Available at: www.irishtimes.com.

53 *HSE Incident Management and Procedure* (Health Service Executive, September 2008). Available at: www.hse.ie.

would be obliged to advise them candidly when they know they have caused a patient injury due to avoidable medical error."[54]

7.36 In the UK, the *NHS Redress Act 2006* sets out a framework for the way in which lower value clinical negligence cases (with an upper limit of about £20,000) may be handled by the National Health Service (NHS). The 2006 Act envisages a voluntary redress scheme, including investigations, explanations, apologies and financial redress where appropriate outside the civil litigation process. The redress package envisaged by the 2006 Act must include: an offer of compensation; explanation; apology; and report of action to prevent similar occurrences. The redress package may also include care or treatment. The package is to operate on a voluntary basis, so that it can be accepted with a waiver of the right to litigate, or it may be rejected. The redress scheme is to be operated by the NHS Litigation Authority.[55] The 2006 Act is enabling legislation and, at the time of writing (November 2010) the detailed operational aspects of the redress scheme have yet to be set out in statutory Regulations. Pending this, the House of Commons Health Committee's 2009 *Report on Patient Safety* has observed the progress that has been made in that the NHS Litigation Authority has published guidance on giving apologies and explanations. The 2009 Report stated that this "is welcome and we urge its implementation. We also recommend further consideration be given to the [UK Government Chief Medical Officer's] proposal for a statutory duty of candour in respect of harm to patients."[56]

7.37 In Ireland, the 2008 *Report of the Commission on Patient Safety and Quality Assurance*: *Building a Culture of Patient Safety* stated that:

> "The system of compensation for medical negligence in existence in Ireland is not conducive to an open and honest communication process... Clinicians and risk managers are fearful of the consequences if they inform patients of an adverse event and often the event remains undisclosed and therefore the lessons from the event are never learned or shared with others who may be in similar situations in the future."[57]

7.38 As a general principle, the Commission on Patient Safety and Quality Assurance was of the view that every patient is entitled to open and honest communication regarding his/her healthcare.[58] It recommended that:

- national standards for open disclosure of adverse events to patients should be developed and implemented;
- legislation should be enacted to provide legal protection/privilege for open disclosure. Such legislation should ensure that open disclosure, which is undertaken in good faith in compliance with national standards developed in accordance with the recommendation above, cannot be used in litigation against the person making the disclosure; and
- open communication principles, policies and standards should be included in the education curricula of all healthcare professionals and embedded in codes of professional practice.[59]

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54 Boylan "Cost Cutters" *Gazette Law Society of Ireland*, October 2009, at 28. Available at www.lawsociety.ie.

55 The scheme applies to claims in tort in respect of personal injury or loss arising out of a breach of a duty of care and arising as a consequence of any act or omission of a health care professional. The scheme does not, for example, cover liabilities arising from slipping or tripping caused by the act or omission of non-health care professionals such as maintenance staff.

56 *Patient Safety* Report by the House of Commons Health Committee, Sixth Report of Session 2008-2009 (The Stationary Office, June 2009) at 35. Available at: www.publications.parliament.uk

57 *Report of the Commission on Patient Safety and Quality Assurance:Building a Culture of Patient Safety* (Department of Health & Children, 2008) at 4.

58 *Ibid.*

59 *Ibid.* at 19.

7.39 The Commission supports these recommendations, and is aware that a *Health Information Bill* is being prepared by the Department of Health and Children which is expected to implement the general thrust of the recommendations made in the 2008 Report.

(2) The Power of an Apology

7.40 As previously noted, the Commission in its Consultation Paper provisionally recommended that medical practitioners be allowed to make an apology and explanation without these being construed as an admission of liability in a medical negligence claim.[60] Society places a great value on apologies as a way of redressing wrongs. It can be argued, however, that in Ireland the perception remains that "ordinary decencies like giving an explanation to another person, expressing regret or making an apology are all discouraged either as signs of weakness or as admissions of liability."[61] In the context of clinical claims, the Commission considers that the power of an apology to mitigate litigation and provide individualised access to justice for patients remains under-valued. As noted by Wade:

> "... an apology can recognise that a patient has been harmed, in turn assisting them to understand what happened and why. The healthcare professional, in apologising, accepts blame for injury and explains why their actions were wrong. This validates the victim's beliefs who can then begin or resume a relationship based on these shared values. The offender also treats us differently at the most fundamental level when they apologise to the patient: instead of viewing them as an obstacle to their self-interest, the patient becomes a person with dignity."[62]

7.41 Empirical evidence is now emerging that supports the view that apologies can reduce litigation and promote the early resolution of medical disputes.[63] Indeed, it has been suggested that the health care industry internationally is in the midst of a culture change from age-old "defend and deny" tactics to embracing an apology as a means of suppressing hostile feelings between the patient and the doctor. For example, a study was conducted of a group of patients and their families who had filed medical malpractice suits and the results indicated that 37% of those interviewed might not have commenced litigation if they had been given a complete explanation and apology.[64] Interestingly, they reported that an explanation and apology were more important than monetary compensation.[65] Furthermore, since 2002, the hospitals in the University of Michigan's Health System have been encouraging doctors to apologise for mistakes. Malpractice lawsuits and notices of intent to sue have fallen from 262 filed in 2001, to approximately 130 in recent years.[66] As noted by one commentator, the benefits of an apology is that:

> "... it provides both victims of medical error, the patient and the physician, the opportunity to reach closure more quickly than having to suffer through depositions, motions or trial; it allows

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60 See LRC CP 50-2008 at 6.21.

61 Turlough O'Donnell SC, Brian Walsh Memorial Lecture 2008, Bar Council of Ireland, 20 February 2008.

62 Wade, "ADR & the Irish Healthcare System" (Trinity College Dublin, 2009) at 71.

63 *Discussion Paper on Apology Legislation* (British Columbia Ministry of the Attorney General, 2006) at 2. Available at www.ag.gov.bc.ca.

64 Van Dusen & Spies "*Professional Apology: Dilemma or Opportunity*" (203) American Journal of Pharmaceutical Education 67 (4) Article 114 at 3. See also Wade, "ADR & the Irish Healthcare System" (Trinity College Dublin, 2009) at 73.

65 Van Dusen & Spies "*Professional Apology: Dilemma or Opportunity*" (203) American Journal of Pharmaceutical Education 67 (4) Article 114 at 3. See also Wade, "ADR & the Irish Healthcare System" (Trinity College Dublin, 2009) at 73.

66 "*Doctors urged to apologise for mistakes; Softer approach aims to reduce malpractice lawsuits*" (Associated Press, November 2004).

the doctors to answer the patient's/ family's questions about how this could have happened; and it allows everyone to focus on the relief that the family really needs."[67]

7.42 Indeed, in a 2010 High Court case, the Health Service Executive apologised in Court to the family of a young woman over deficiencies and failures which led to her death from a massive brain haemorrhage. The apology was part of a settlement of court proceedings in the family's claim for mental distress.[68] It is evident from this case that an apology often plays an important role in medical negligence cases. As the Commission noted in its Consultation Paper, it has been suggested that doctors, health authorities, insurers and lawyers have been very reluctant to offer an apology to the patient or their family for fear that it would be taken as an admission of liability because at common law, an apology that admits fault is ordinarily admissible to prove liability. To remove this fear various jurisdictions have introduced statutory provisions for apologies.[69] For example, all Australian states have introduced statutory protection for apologies in the context of medical claims.[70] Similarly, in British Columbia the *Apologies Act 2006*[71] was enacted to "make the civil justice system more accessible, affordable and effective" and to "promote the early and effective resolution of disputes by removing concerns about the legal impact of an apology."[72] Similarly, in England and Wales, section 2 of the *Compensation Act 2006* states that "An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty."

7.43 In Ireland, statutory protection for apologies in defamation actions was introduced by section 24(3) of the *Defamation Act 2009*. This provides the defendant with the opportunity to issue an apology and this is not to be construed as an admission of liability on the part of the defendant. Furthermore, section 24(4) of the 2009 Act provides that "evidence of an apology made by or on behalf of a person in respect of a statement to which the action relates is not admissible in any civil proceedings as evidence of liability of the defendant."

7.44 The Commission considers that a similar statutory provision for apologies made by medical professionals to patients or to a family member of a patient should be introduced. As the only redress through the courts in medical negligence claims is monetary compensation, it is important that the menu of options for redress is widened to include the issuance of an apology and explanation. These remedies are often equally important to claimants in medical negligence claims. An apology may serve to promote more equitable and flexible solutions and mitigate the need to legal recourse. Furthermore, there may be instances whereby a claimant has no legal grounds for monetary compensation as they have suffered no loss – in such cases, alternative redress options such as an apology or explanation should be available to compensate for the loss suffered.

7.45 For example, as the Commission noted in its Consultation Paper, in *Devlin v National Maternity Hospital*[73] the Supreme Court decided the plaintiff was not entitled to damages from the defendant hospital for nervous shock over the retention in 1988 of some of the organs of his stillborn daughter. The Supreme Court noted that grief or sorrow was not a basis to recover damages and upheld the High Court's decision that the plaintiff had not proved any legally recognisable injury or loss to himself as a result of the organ retention.[74] The *Devlin* case deals with circumstances and policies that mirror those which arose at the Alder Hey Children's Hospital in Liverpool where the hospital retained the organs of

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67 Oxholm "Med Mal Mediations in Philadelphia: Report on Drexel Med's First Year" (Winter 2005) *Arbitration & Mediation: A Newsletter of the Pennsylvania Bar Association ADR Committee* at 3.

68 See "HSE apologies in court to family of woman over her death" *The Irish Times*, July 13th 2010.

69 See LRC CP 50-2008 at 6.16.-6.20.

70 See Civil *Law (Wrongs) Act, 2002* (A.C.T.) ss 12-14; *Civil Liability Act, 2002* (N.S.W.) ss.67-69*; Civil Liability Act, 2002* (Tas.), ss.6-7; *Civil Liability Act 2002* (W.A.) SS5AF-H.

71 S.B.C. 2006,c.19.

72 British Columbia, Legislative Assembly, Hansard, Vol. 8, No. 7 (29 March 2006) at 3456. (Hon. W. Oppal).

73 [2007] IESC 50.

74 *Ibid.*

deceased children without the knowledge or consent of their parents. As the Commission noted in its Consultation Paper, the mediation of this dispute by the English Centre for Effective Dispute Resolution (CEDR) resulted in the families receiving an apology from the hospital, in addition to compensation and a memorial for their children.[75] Arguably, if the parties in *Devlin* had mediated that dispute, the plaintiffs might have been afforded redress which was not available to them through litigation.[76] Furthermore, it the claimant in *Devlin* had received an apology and explanation from the hospital prior to the issuance of legal proceedings, this may have reduced the likelihood of the case proceeding to the Supreme Court.

7.46 The Commission recognises that monetary compensation is an important factor where medical negligence has left a patient needing long term treatment and care, which is why the courts will always be available to claimants. It is, nonetheless, evident that many people are motivated to litigate in order to secure an explanation of what went wrong during a medical procedure and ultimately many plaintiffs seek an apology from the health care professional. In light of this, the Commission recommends that a statutory provision be introduced which would allow health care professionals to make an apology and explanation without these being construed as an admission of liability in a personal injuries claim.

7.47 *The Commission recommends that an apology (including an apology made by a health care practitioner in respect of any care or treatment) made by or on behalf of a person who may become or who is a party in a personal injuries action, whether before or after any such action has been initiated in court, in respect of a matter to which any such action may relate or relates—*

(a) does not constitute an express or implied admission of civil liability by that party, and

(b) is not relevant to the determination of civil liability in the action.

7.48 *The Commission recommends that evidence of an apology made by or on behalf of a person as set out above in respect of a matter to which the action relates is not admissible in any civil proceedings as evidence of civil liability of the person.*

7.49 *The Commission recommends that a "health care practitioner" includes a registered medical practitioner, dentist or nurse.*

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75 See Chapter 3 above at 3.132.

76 On the organ retention controversy see also *Report of Dr. Deirdre Madden on Post Mortem Practice and Procedures* (Department of Health and Children, 2005), available at www.dohc.ie.

CHAPTER 8 COMMERCIAL DISPUTES & ADR

A Introduction

8.01 In this chapter the Commission discusses the ability of ADR to resolve commercial disputes. In Part B the Commission provides a general overview of the nature of commercial disputes and the capacity of ADR to provide suitable dispute resolution methods for companies. In Part C the Commission examines the role of the Commercial Court in encouraging the uptake of ADR. In Part D the Commission considers the role for ADR in the resolution of shareholder disputes. In Part E the Commission discusses the role for ADR in the resolution of construction disputes and also the provision for conciliation under the Government Public Works Contracts. In Part F the Commission examines the development of international commercial dispute resolution.

B Commercial Disputes & ADR: An Overview

8.02 In its Consultation Paper, the Commission discussed the extent to which ADR, in particular, mediation and conciliation, can contribute to the resolution of commercial disputes. The Commission noted that while commercial disputes are inevitable, the way they are handled can have a profound impact on the profitability and viability of business.[1] Poorly managed conflict costs money, creates uncertainty and degrades decision quality. As one commentator stated:

> "Conflict is a fact of life even in the best-run organisation. It goes under many names - disagreement, disharmony, dispute, difficulty or difference - but the results of mismanaged conflict are the same: at best unwelcome distraction from a heavy workload; at worst damage which may threaten the very future of the organisation."[2]

8.03 Turning briefly to the specific types of appropriate commercial disputes for ADR, as the Commission noted in its Consultation Paper, Ireland experienced an unprecedented economic expansion during the 1990s and the first years of this century, and it was to be expected that commercial disputes would also increase.[3] Equally, during the current economic downturn it has been suggested that:

> "... such turbulent times will mean disputes and differences, many of them leading to the filing of claims in the courts around the world... This is a time for commercial common sense. Positional litigation will not be validated by Board members or shareholders and lengthy legal battles... In such an environment, lawyers must respond appropriately to client needs through negotiating earlier settlements, reduced costs and sound deals."[4]

8.04 The Commission acknowledged in its Consultation Paper that it is a well-established advantage that ADR processes, such as mediation and conciliation, provide an opportunity for parties in a commercial dispute to consider and resolve all dimensions of the dispute, including legal, financial and

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1 Alexander *Global Trends in Mediation* (Kluwer Law International 2006) at 49.

2 "Conflicting priorities – best practice in conflict management" (CEDR, September 2008). Online article available at: www.cedr.com.

3 Morgan "Commercial Dispute Resolution in Ireland — A Comparative Analysis" (2002) 9 *Commercial Law Practitioner* (9) 200. See also Reichert "Commercial Mediation" (2003) 8 *Bar Review* 4 at 167; Aylmer "The Civil Procedure Rules and commercial mediation – a case for Ireland" (2004) 11 *Commercial Law Practitioner* 14; Williams "Tough Talking" (2003) 97 *Law Society Gazette* 6 at 27.

4 Ahmend" Alternatives in the Financial Crisis" (CEDR, November 2008). Online article available at: www.cedr.com.

emotional aspects, in a private and confidential environment.[5] Commercial disputes often centre on very sensitive commercial details which parties would prefer not to have disclosed in public. The confidentiality afforded by mediation and conciliation is therefore highly attractive in resolving commercial disputes. Furthermore, when commercial disputes arise, the most favourable outcome for those involved is to have the dispute resolved quickly and to maintain a working business relationship with the other party.[6] Indeed, "disputes inevitably arise and when they do, commercial clients will want them resolved and finalised in a manner that is expeditious and as cost-effective as possible. The speedy resolution of disputes is a huge incentive for commercial clients, never more acutely than in recent times, and mediation has been proven useable in the vast majority of commercial disputes, irrespective of how complex a case may seem or how many parties are involved."[7] In the UK, the Centre for Effective Dispute Resolution (CEDR) reported that the value of cases mediated each year is now approximately £5.1bn and that in 2010 the commercial mediation profession will have saved business around £1.4bn in wasted management time, damaged relationships, lost productivity and legal fees. Furthermore, it reports that 89 %of commercial mediations are settling on the day of mediation or shortly after.[8]

8.05 In the current economic climate, the potential role of ADR in the resolution of corporate insolvencies is of particular relevance given that it has been reported that the number of insolvencies rose by 25% in the first three months of 2010 compared to the same time last year. Furthermore, 60 receivers were appointed in the first quarter of this year compared to 35 the same time last year.[9] The Commission considers that ADR processes, such as mediation and conciliation, may be suited to the resolution of appropriate corporate insolvency cases where, for example, claims may need to be settled quickly and where creditors, having already lost money, want to find ways of reaching resolutions cost effectively and, debtors wish to agree a flexible repayment plan that meets their financial circumstances.[10] In the UK, the Chancery Court Guide 2009, which sets out rules by which insolvency cases before it are managed, provides, at Chapter 17, for the general use of alternative dispute resolution (ADR), including, in particular, mediation, and makes it clear that it will refer cases to mediation where appropriate and that the parties' lawyers should consider the use of ADR in all cases.[11]

8.06 Another emerging area for ADR in the commercial context is in the resolution of intellectual property disputes. Indeed, in 1994 the World Intellectual Property Organisation ('WIPO') established an arbitration and mediation centre for the resolution of such disputes. The WIPO asserts that:

> "Disputes interfere with the successful use and commercialization of IP rights. Providing means for resolving them as fairly and efficiently as possible, without disrupting underlying business relationships, is therefore an important challenge for international IP policy. ADR has a number of characteristics that can serve this purpose, and as such offers an important option for resolving IP disputes."[12]

8.07 Generally, the only remedy a court can impose in a trademark or patent infringement case is an injunction against future infringements and, in certain cases, payment of monetary damages.[13] In

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5 See Conway "Recent Developments in Irish Commercial Mediation: Part I" (2009) 27ILT 43.

6 See LRC CP 50-2008 at 7.02.

7 Conway "Recent Developments in Irish Commercial Mediation: Part II" (2009) 27ILT 58.

8 The Fourth Mediation Audit (Centre for Effective Dispute Resolution, May 2010). Available at www.cedr.co.uk.

9 See "Insolvency cases Up 25%" *RTE News*, March 2010. Available at www.rte.ie.

10 Pearson "Mediation and Insolvency" (CEDR, October 2010). Online article available at: www.cedr.com. See also Finch "Corporate rescue processes: the search for quality and the capacity to resolve" (2010) 6 *Journal of Business Law* 502.

11 See *Chancery Guide* (HMCS, 2009). Available at: www.hmcourts-service.gov.uk.

12 "Resolving IP Disputes through Mediation and Arbitration" (April 2006) 2 *WIPO Magazine*. Available at: www.wipo.int.

13 The Commercial Court has jurisdiction to deal with all intellectual property disputes.

mediation, however, the parties are free to fashion any innovative solution that meets their particular needs or interests.[14] Macken J, speaking extra-judicially has noted that the area of intellectual property was a growing one for alternative dispute resolution, and that both lawyers and non-lawyers, like patent specialists, could be involved.[15]

8.08 The Commission now turns to examine the role for ADR, in particular mediation and conciliation, in the resolution of commercial disputes and how corporations can promote the use of ADR internally within their organisational structure.

(1) Internal Corporate Dispute Resolution Strategies

8.09 The Commission, in its Consultation Paper, concurred with the view that the optimal time for businesses to implement strategies to avoid adverse effects of a dispute is before any dispute arises.[16] In other words, it is good corporate governance to establish a framework to prevent and solve emerging disputes that may affect a company's reputation and performance.[17] As suggested by one commentator:

> "Corporate governance concerns not only how a board steers or directs a company and monitors management, but how managers manage. Consequently, a director has a duty of care to endeavour to ensure that there is a mechanism to manage disputes and if conflict arises to resolve it as effectively, expeditiously and efficiently as possible. Mediation, it is believed, can become this management tool."[18]

8.10 Consistent with this standard, many organisations are incorporating dispute avoidance and management processes into their corporate strategies. For example, in 2009, the South African Institute of Directors published the third edition of the King Report on Corporate Governance and a voluntary code which provides for ADR in the commercial context.[19] The Report firmly puts all corporate entities in South Africa on notice to apply ADR processes and to appoint someone to represent the entity in ADR. It further states that ADR is an essential component of good corporate governance and a management tool to manage and preserve stakeholder relationships.

8.11 In 2009, the Irish Commercial Mediation Association (ICMA) conducted a survey entitled "Commercial Mediation Awareness."[20] They surveyed nearly 3,500 professionals - including solicitors, barristers, accountants, and construction industry professionals.[21] Interestingly, 97% of those surveyed had an awareness of commercial mediation. 71% stated that the High Court's Commercial Court had contributed to their awareness of mediation. However, only 35% of the professionals surveyed had advised their clients to consider mediation and only 19% provided names of mediators to clients. This is despite the fact that, when asked, mediation was their preferred form of dispute resolution over conciliation, arbitration and litigation. Therefore, it can be concluded that while there exists a broad awareness about commercial mediation in Ireland, this has not been reflected in the practical uptake of commercial mediation prior to the commencement of commercial proceedings. Arguably, if commercial entities along with their advisors incorporated ADR processes, such as mediation and conciliation, into

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14 See Duty "Resolving IP Disputes Through Mediation" (2001) 3 *Client Times* 1.

15 See Coulter "Options to Avoid Court Sought By Many" *The Irish Times*, 25th September, 2010. Available at: www.irishtimes.com.

16 *JAMS Guide to Dispute Resolution Clauses for Commercial Contracts* (2006). Available at www.jamsadr.com.

17 Runesson and Guy *Mediating Corporate Governance Conflicts and Disputes* (The International Finance Corporation, World Bank Group, 2007) at 44. Available at www.ifc.org.

18 Feehily & Brand "Commercial Mediation in South Africa" (September 2008). Online article available at: www.bowman.co.za.

19 *The King Report III on Corporate Governance in South Africa* (Institute of Directors South Africa, 2009). Available at: www.iodsa.co.za.

20 The Irish Commercial Mediation Association (ICMA) was established in 2003 to promote and develop commercial mediation in Ireland. See www.icma.ie.

21 The response rate to the survey was 4.5%.

their corporate strategies the uptake of such processes could also increase and could result in an early, efficient and structured resolution of commercial disputes.

(2) ADR Clauses

8.12 As the Commission has already noted in this Report, mediation and conciliation clauses are now regularly included in commercial contracts supplementing more traditional clauses that referred to arbitration only as the appropriate mechanism for resolving disputes. In such a clause, ADR is voluntary in the sense that the parties consented to the inclusion of the clause in the agreement, and thus the process, at the outset of their relationship. The clause usually stipulates that the parties will refer any dispute that arises out of the contract to either mediation or conciliation, where these processes do not result in a settlement, the parties are still free to have the dispute arbitrated or adjudicated by a Court. By inserting ADR clauses, businesses establish procedures that will govern the resolution of any disputes that may arise in the course of the contractual relationship, and, as a result, avoid any delay in the resolution of the dispute.[22] The Commission agrees with the view that:

> "It is imperative for the continuing growth of mediation and other methods of ADR that clients entering into small and medium-sized commercial transactions are encouraged to include appropriate ADR clauses in agreements with their employees and with their trading partners."[23]

8.13 The Commission notes that the enforceability of an ADR clause was definitively established by the High Court in *Health Service Executive v Keogh, trading as Keogh Software.*[24]

(3) ADR Corporate Pledge

8.14 Increasingly, global businesses are embracing ADR as an effective means of resolving cross border contract disputes. The International Institute for Conflict Prevention and Resolution has developed "The Pledge", and more than 4,000 companies around the world have committed to the Corporate Policy Statement on Alternatives to Litigation, including 400 of the 500 largest firms in the United States. It is evident from this that commercial ADR is a phenomenon of global significance, and is rapidly becoming an attribute of global commerce.[25] The corporate pledge states that:

> "We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare business the high cost of litigation. In recognition of the foregoing, we subscribe to the following statements of principle on behalf of (company name) and its domestic subsidiaries:
>
> In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation."[26]

8.15 Furthermore, over 1,500 US law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation. Law firms who subscribe to the Policy commit that: first, appropriate lawyers in their firm will be knowledgeable about ADR; and, where appropriate, the responsible attorney will discuss

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22 See Chapter 4 at CHAPTER 4B(1) 4.20 on the enforceability of mediation and conciliation clauses in contracts. See also Carroll "A Simple Mediation Clause Could Avoid Costly Litigation" (July 2010) 24 *The Lawyer* 6. Online article available at: www.cedr.com.

23 Conway "Recent Developments in Irish Commercial Mediation: Part II" (2009) 27ILT 58.

24 [2009] IEHC 419, discussed at paragraph 4.04, above.

25 November 2005 response of the International Institute for Conflict Prevention and Resolution ("CPR Institute") to questions posed by Arlene McCarthy MEP concerning what became the 2008 EC Directive on Mediation, 2008/52/EC. Available at http://www.europarl.europa.eu/comparl/juri/consultations/cpr_en.pdf.

26 Corporate Policy Statement on Alternatives to Litigation.

with the client the availability of ADR procedures so the client can make an informed choice concerning resolution of the dispute.[27] In Singapore, a similar pledge called "Mediate First" was launched in May 2009. There are now several hundred commercial entities in Singapore committed to this pledge which requires that to attempt mediation to resolve their commercial disputes prior to commencing litigation.[28] The Commission considers that these pledges and policies are models which could be incorporated by appropriate commercial bodies in Ireland to encourage their members to consider the use of ADR processes, such as mediation and conciliation, to resolve appropriate commercial disputes.

C Commercial Court & ADR

8.16 In its Consultation Paper, the Commission viewed the ongoing promotion and encouragement of mediation by the Commercial Court in the High Court as important aspects of the integration of ADR into the civil justice system.[29] The Commission concurs with the view that "This Court has made a dramatic impact on civil and commercial dispute resolution practice in Ireland, in particular by reducing litigation times for high-value disputes to a fraction of what would have been expected before the List was introduced."[30] Indeed, this is evident from the following statistics published on the workings of the Commercial Court. Since it was established in 2004, 1,231 cases had been entered into the list. Since 2004, some 1,013 cases had been disposed of (143 cases in the period from 1 January 2010 to 16 June 2010). This left 218 cases outstanding on 16 June 2010. Overall, 25% of cases concluded in less than 4 weeks, 50% in less than 15 weeks and 90% in less than 50 weeks. Interestingly, only 28% of cases went as far as a full hearing, with the remainder being settled outside the court (including cases resolved by mediation or arbitration).[31]

8.17 In relation to the Commercial Court, the Commission in its Consultation Paper invited submissions as to whether mediation and conciliation orders should be introduced in the Court which would set out the necessary proactive steps which parties must follow when considering mediation and conciliation.[32] Such orders are used in the English Commercial Courts. Under the 2006 English *Commercial Court Guide* judges have the power to adjourn the case to encourage and enable the parties to use ADR, or if deemed appropriate, may make an ADR Order in the terms set out in the Guide.[33] The draft ADR Order appended to the 2006 Guide provides for the parties to:

- exchange lists of three neutral individuals available to conduct ADR procedures;
- to endeavour 'in good faith' to agree a neutral to conduct the ADR procedure;
- to take serious steps to resolve their dispute by ADR; and
- if the case is not finally settled, the parties are to inform the Court by letter what steps towards ADR have been taken and why such steps have failed.[34]

8.18 Such ADR orders, therefore, place more pressure on the parties to resolve their dispute through ADR compared to the statutory requirement on parties in the Irish Commercial Court. As noted in

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27 See: http://www.cpradr.org/Portals/0/lawfirmpledge.pdf.

28 See Speech by Mr. Wong Yan Lung, Secretary for Justice of Hong Kong, at the Mediation Roundtable Conference "Changing the Mindset", Singapore, March 2010. Available at: www.info.gov.hk.

29 See LRC CP 50-2008 at 7.25.

30 For a detailed analysis, see Dowling *The Commercial Court* (Thomson Round Hall, 2007). See also Conway "Recent Developments in Irish Commercial Mediation: Part 2" (2009) 27ILT 58 and Feeney "Mediation in Commercial Disputes" (2009) 14(2) *Bar Review* 37.

31 Statistics taken from Doherty "Commercial Law Update" (2010) 17(8) CLP 164.

32 See LRC CP 50-2008 at 7.45.

33 *Admiralty, Commercial and Mercantile Court Guides* (Her Majesty's Courts Service, 2006). Available at http://www.hmcourtsservice.gov.uk.

34 *Commercial Court Guide*, at 168.

the Consultation Paper, the Commercial Court was established in 2004 pursuant to the *Rules of the Superior Courts (Commercial Proceedings) 2004*.[35] Its purpose is to expedite cases of a commercial nature valued at €1 million or more. The 2004 Rules state that the High Court judge exercising the jurisdiction conferred:

> "... may, of his own motion or on the application of any of the parties, adjourn the matter before it for a period not exceeding 28 days for the purpose of allowing the parties to consider whether or not the proceedings ought to be referred to mediation, conciliation or arbitration."[36]

8.19 The 2004 Rules represent the first statutory example in Irish law of the application of ADR in a court setting. By actively selecting cases which are believed to be appropriate for resolution by ADR, the Commercial Court has, on its own initiative, increased the awareness and uptake of mediation in such cases. The 2004 Rules make clear that the judge does not have the power to direct that the parties *attempt* ADR, but its discretion is limited to adjourning the proceedings, to allow the parties to *consider* whether ADR is appropriate for them. This is consistent to the voluntary nature of ADR. The Commission considers that given the evident success of the integration of mediation and conciliation into the Irish Commercial Court, it is not necessary to introduce ADR orders into the Court. The level of judicial activism in the Irish Commercial Court has been extremely effective in promoting the awareness and suitability of mediation and conciliation for resolving appropriate commercial disputes.

8.20 As the Commission stated in its Consultation Paper, it is important to note that, given the €1 million jurisdictional threshold involved, most commercial disputes will not qualify for inclusion on the Commercial Court's list. In this respect, the Commission considers that ADR should also be available for the resolution of suitable commercial disputes in small and medium-sized businesses.[37] The Commission considers that the incorporation of dispute resolution systems and ADR clauses into small and medium-sized business strategies may assist in the resolution of commercial disputes at these levels in a cost and time efficient manner for the parties.

8.21 As to whether mediation and conciliation orders should be introduced into the Commercial Court which would set out the necessary proactive steps which parties must follow when considering mediation and conciliation, the Commission has concluded that this is not now necessary in light of the general framework for conciliation which the Commission proposes in this Report.

8.22 *The Commission recommends that it is not necessary to introduce specific requirements concerning mediation and conciliation orders in connection with the High Court's Commercial Court List.*

D Shareholder Disputes & ADR

8.23 In its Consultation Paper, the Commission provisionally recommended that mediation and conciliation may be appropriate for the resolution of shareholder disputes under section 205 of the *Companies Act 1963* and should be considered prior to litigation.[38] This provisional recommendation reiterates the recommendation set out in the 2005 *Report of the Legal Costs Working Group* which recommended that:

> "Mediation…should be encouraged and there may well be strong arguments that applications for example, under section 205 of the Companies At 1963 (minority oppression) should be

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35 SI No. 2 of 2004. See generally: Holmes "Two years on – The Commercial Court" 2 (2006) 1 *Journal of Civil Practice and Procedure* 1 at 15; Hayes "The Commercial Court" (2005) 23 *Irish Law Times* 317; Jacobs and Roulston "In the Know" (2004) 98 *Law Society Gazette* 4; Mr. Justice Peter Kelly "The Commercial Court" (2004) 9 *Bar Review* 1; Stauber "Commercial Courts: Twenty-First Century Necessity?" (2007) 1 *Judicial Studies Institute Journal* at 154.

36 Order 63A, r.6(1)(b)(xiii).

37 The Commission is aware that the Law Society has launched a new arbitration system for business disputes, which it describes as a 'fast, cost-effective' alternative to the courts.

38 See LRC CP 50-2008 at 7.66.

brought before a judge very early in the proceedings so that the availability of mediation is made known to the parties."[39]

8.24 It has been suggested that limited companies are not sufficiently flexible to easily accommodate shareholder disputes. The challenge for the legal advisers as well as the client is to try and bring about a solution which causes as little collateral damage to the company and the shareholders themselves. While litigation may sometimes be necessary to protect shareholders (particularly minority shareholders) rights, other resolution options, such as mediation or conciliation, can often be effective.

8.25 In 2010, the Chief Justice of Hong Kong issued a Practice Direction which sets out the provision for voluntary mediation in shareholder cases the Hong Kong *Companies Ordinance*.[40] Where the petitions are purely disputes between shareholders, not involving the interest of the general body of creditors of the subject company or affecting the public interest, the court encourages the parties to consider the use of mediation as a possible additional means of resolving their disputes in a cost-effective and more expeditious manner. At any stage of the petition, if a party wishes to attempt mediation, this may be initiated by serving a notice ("a Mediation Notice") on the other party or parties, inviting them to agree to mediation. Under the Practice Direction, where a Mediation Notice has been served, an unreasonable refusal or failure to attempt mediation may expose a party to an adverse costs order. Whether a party has acted unreasonably would be determined having regard to all the circumstances of the particular case.[41]

8.26 The Commission considers that mediation and conciliation processes have a role to play in the resolution of appropriate shareholder disputes. For this reason, the Commission recommends that mediation and conciliation may be appropriate for the resolution of shareholder disputes under section 205 of the *Companies Act 1963* and should be considered prior to litigation. Furthermore, the Commission considers it appropriate that dispute resolution clauses incorporating mediation and conciliation should be considered for inclusion in underlying shareholders agreements. This would assist in managing any conflict as it arises between the shareholders and may assist in the early resolution of disputes.

8.27 *The Commission recommends that mediation and conciliation may be appropriate for the resolution of shareholder disputes under section 205 of the Companies Act 1963 and should be considered prior to litigation.*

E Construction Disputes & ADR

(1) ADR Clauses in Irish Government Public Works Contracts

8.28 In its Consultation Paper, the Commission invited submissions as to whether a general statutory framework for mediation and conciliation in commercial disputes should be put in place, which would include small commercial (including consumer) disputes and contracts covered by the Government's Standard Contracts for Public Works. As the Commission noted in its Consultation Paper, in 2004 the Irish government decided to reform public sector construction procurement in Ireland and commissioned replacement of GDLA[42] and IEI[43] Standard Forms of Contracts. In 2007, a suite of construction contracts for use on Public Works contracts was published.[44] The introduction of the 2007

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39 *Report of the Legal Costs Working Group* (Stationary Office, Government Publications, 2005) at 33.

40 Practice Direction 3.3 Voluntary Mediation in Petitions Presented under Sections 168A and 177(1)(f) of the Companies Ordinance, Cap. 32. (January 2010).

41 Practice Direction 3.3 at D16.

42 Government Departments and Local Authorities.

43 Institution of Engineers of Ireland.

44 See: Public Works Contract for Building Works Designed by the Employer Public Works Contract for Building Works Designed by the Contractor; Public Works Contract for Civil Engineering Works Designed by the Employer; Public Works Contract for Civil Engineering Works Designed by the Contractor; Public Works Contract for Minor Civil Engineering and Building Works designed by the Employer (contracts less than €5m);

Public Works Contracts was aimed at reducing overruns and increasing certainties and are now are mandatory for all publicly funded construction projects.[45] The standard contracts and subcontracts of the IEI, RIAI, CIF and SCS provide for the resolution of disputes by conciliation and arbitration. The 2007 Public Sector Contracts follow suit. Clause 13.1 of the 2007 Public Sector Contracts is devoted substantially to the process of conciliation.[46]

8.29 In relation to introducing a general statutory framework for mediation and conciliation specifically in relation to contracts covered by the Government's Standard Contracts for Public Works, the Commission considers that it may not be appropriate to introduce a statutory framework which would apply to such contracts. This is because, in 2008 the Government issued *Arbitration Rules for Use With Public Works and Construction Services Contracts*. At the time of writing (November 2010), there are no equivalent rules in relation to conciliation. The Commission considers that there is a strong case for clearer guidance on conciliation including the need to clarify some of the issues identified in the Consultation Paper.[47] For consistency purposes, the Commission recommends that Conciliation Rules for Use With Public Works and Construction Services Contracts should be issued by the Department of Finance. However, private construction contracts, providing for mediation or conciliation, should be governed by the general statutory framework for mediation and conciliation set out in this Report.

8.30 *The Commission recommends that Conciliation Rules for Use With Public Works and Construction Services Contracts should be issued by the Department of Finance.*

(2) Role for Mediation in Resolving Construction Disputes

8.31 The Commission considers that mediation has a role to play in the resolution of construction disputes. The building of the Boston Highway, known as the "Big Dig," is often quoted in the United States as an example where commercial disputes between contractors and sub-contractors were mediated, on the spot, while the project was ongoing. As noted by one commentator, there are several reasons why mediation is an increasingly popular process for resolution of construction disputes:

> "Mediation is a response to the financial cost and emotional stress to contractors, owners, developers, design professionals, and others who resort to arbitration or litigation to resolve their construction disputes. All too often, arbitration is not a low-cost alternative to litigation... Mediation allows the business executive to minimize legal costs, control the decision-making process, avoid most of the emotional stress, maintain business relationships, and provides the most rapid process for full and final resolution of disputes."[48]

8.32 According to a survey conducted by the Construction Industry Federation of Ireland (CIF), the preferred method of ADR to resolve construction disputes by those surveyed was mediation (52%), followed by conciliation (45%), and arbitration (3%).[49] In 91 mediation cases at the CIF, a settlement was reached in 81% of cases. In contrast, out of 63 conciliations conducted during the same period, the settlement rate was 49%.[50] The CIF has introduced a new standard form sub-contract: "Agreement and Conditions of Sub-Contract for Use in Conjunction with the Forms of Main Contract For Public Works Issued by the Department Of Finance 2007" (the CIF Sub-Contract). The form is intended to be used for

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Short Form of Public Works Contracts for Building and Civil Engineering Works (contracts less than €500,00.00). Available at www.finance.gov.ie.

45 See also Munnelly "Recent developments in construction law: the newly published contracts for publicly funded construction works" (June 2007) 12 *Bar Review* 3 at 118.

46 In England and Wales, commercial disputes arising from construction contracts are litigated in the Technology and Construction Court (TCC).

47 See LRC CP 50-2008 at 7.49-7.58.

48 Tarlow "Mediation of Construction Disputes" (2008). Online article available at: www.ramco-ins.com.

49 Lang "Dispute Resolution: Construction Industry Federation Experience to Date." Paper presented at the Irish Commercial Mediation Association Conference, Dublin, 6th March 2009. Available at www.icma.ie.

50 *Ibid.*

domestic subcontractors engaged by main contractors working on Exchequer funded projects under the GCCC forms of contract. Under the CIF Sub-Contract, for the first time in any standard form building contract regularly used in Ireland, disputes are referred initially through mediation as a mandatory first step for resolution (subsequently, conciliation and then arbitration is specified where the mediation does not succeed.[51] As a result, mediation has now been given a firm contractual base in the construction context. The Commission concurs with the view that "The inclusion of a mediation process in the CIF Sub-Contract is a novel move in the Irish construction sector. It is a process that many industry participants will not be entirely familiar with but given the challenging economic times ahead it is hoped its success in other areas will be repeated in the building context."[52]

8.33 Governments in other jurisdictions have promoted the use of mediation for the resolution of construction disputes. For example, the Taiwanese *Government Procurement Act 1998* established a Dispute Mediation System (DMS) to mediate construction disputes and it resembles a Dispute Review Board (DRB) that was established in the mid 1970s. The DRB is set up at the start of a construction project, and meets regularly at the job site to resolve any disputes as they occur. However, the DMS system does not become active in mediating construction disputes until a specific request is submitted by the contractor.[53] In 1984, the Hong Kong Government pioneered its trial Mediation Scheme to settle construction disputes from 16 selected civil engineering contracts which were administrated by the Hong Kong Institution of Engineers. Since 1989, all major public work contracts such as the Hong Kong Government Airport Core Program (ACP) have included provision for the mediation of disputes.[54] According to the *Report of the Working Group on Mediation*:

> "Mediation has proved to be very effective in reducing the number of claims in public works contracts which would otherwise be referred to arbitration or proceed to litigation. Under the ACP contracts, mediation was a mandatory requirement of the dispute resolution process and 80% of all such disputes were settled by mediation or through negotiation at the mediation stage."[55]

8.34 In 1992, mediation became mandatory in Hong Kong in the form of a four stage dispute resolution process under the ACP General Conditions of Contract. The success rate for the Government construction mediations remains high, of the order of 70% to 80%, with relatively few cases proceeding from mediation to arbitration.[56]

8.35 Furthermore, the commitment of the English courts to ADR can be seen in paragraph 7.2.2. of the Technology and Construction (High) Court Guide which states that: The TCC Pre-Action Protocol (Section 2 above) itself provides for a type of ADR, because it require there to be at least one face-to-face meeting between the parties before the commencement of proceedings. The pre-action protocol meeting may, therefore, present an opportunity for the parties to either engage in informal mediation or, at the very least, to discuss recourse to ADR and the potential efficacy of formal mediation to resolve a construction dispute. King's College London and the Technology and Construction Court (TCC) undertook an evidence-based survey to gather objective data about the use, effectiveness and cost savings associated with mediations that settled construction industry litigation. From June 2006 until May 2008, parties to litigation in the London, Birmingham and Bristol TCC received a survey form. The aim was to find out in

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51 Appendix Part 4 to the CIF Sub-Contract details the "Mediation Procedure" to be followed by the parties in the event of dispute.

52 Stowe "Mediation in Irish Construction" (November 2008) *Construction Magazine*. Online article available at: www.mop.ie. See also Danuri et al "Growth of dispute avoidance procedure in the construction industry: a revisit and new perspectives" (2010) *Construction Law Journal* 349.

53 Tserng & Tang "Analysing dispute mediation cases of infrastructure projects through project life cycle" (December 2009) 5 Structure and Infrastructure Engineering 6 at 515.

54 *Report of the Working Group on Mediation* (Hong Kong Department of Justice, February 2010). Available at: www.doj.gov.hk.

55 *Ibid.* at 15.

56 *Ibid.*

what circumstances mediation offers an effective and efficient alternative to litigation, as well as to determine whether and at what stage the court could or should encourage mediation. The results showed that 35% of those cases that settled after commencing litigation in the TCC used mediation. The vast majority were undertaken as a result of the parties' own initiative, with the parties also agreeing the identity of their mediator. Successful mediations were undertaken throughout the litigation timetable, saving costs of up to £300,000 with 9% of the cases saving more than that amount. The mediation of construction disputes in the TCC is clearly now an established, mature and valuable dispute resolution tool.[57]

8.36 As noted by one commentator "Take the competing interests of owners, general contractors, architects, insurance companies and subcontractors; mix them together in a major construction project; and it's almost inevitable that disputes will occur."[58] Parties to construction disputes should avail of a menu of dispute resolution options to resolve the dispute in a manner which best meets the parties' goals and expectations. The Commission considers that in light of this discussion and the emerging international trend for mediating construction disputes, mediation should also be considered, along with other ADR processes such as conciliation and arbitration, for the resolution of construction disputes.

8.37 *The Commission recommends that professional bodies in the construction sector should incorporate mediation into their suite of dispute resolution options for the resolution of appropriate disputes.*

F International Commercial Dispute Resolution

8.38 As with domestic commercial disputes, international commercial disputes are inevitable. As noted by one commentator:

> "One of the obstacles that hinder trade and investment is a lack of mechanisms to deal swiftly and affordably with commercial disputes. Disputes are inherent in trade and business relationships. Companies will hesitate to engage in commercial relations in a foreign country if they are not sure that there is an appropriate way of solving them."[59]

8.39 To alleviate this concern, many jurisdictions promote themselves as centres for international commercial dispute resolution. Indeed, as noted in the Consultation Paper, in 2001 the International Centre for Dispute Resolution (ICDR) which is the international division of the American Arbitration Association (AAA), the world's largest provider of commercial conflict management and dispute resolution services opened its first European office in Dublin. This office has, however, since closed and operates as a virtual online office.

8.40 In Europe, it has been suggested that the absence of uniform treatment of ADR processes has been regarded by some observers as an inconvenience, and by others as a serious hindrance to commercial growth in the region.[60] Indeed, "As cross-border commercial transactions increase, companies can find themselves embroiled in transnational litigation that renders the price of doing business prohibitively high."[61] The 2008 EC Directive on Mediation, 2008/52/EC, already discussed in

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57 Gould "The Mediation of Construction Disputes: Recent Research" (December 2009). Online article available at: www.fenwickelliott.co.uk.

58 Johnson "Mediation increasingly used to settle construction disputes nationwide" (December 2004) Daily Journal of Commerce.

59 *"Preventing and managing international commercial disputes – Towards a EuroMed Alternative Dispute Resolution Infrastructure."* Closing speech delivered at the Conference on Alternative Dispute Resolution, Rome, 29 September 2007. Available at: www.adrmeda.org

60 Phillips "The European Directive on Commercial Mediation: What It Provides and What It Doesn't" (2009). Online article available at: www.businessconflictmanagement.com.

61 "*The Cost of Non ADR- Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation"* (ADR Center, 2010). Available at: www.adrcenter.com.

detail in this Report, aims to address this issue by providing a framework for cross-border commercial mediation. One of the more relevant principles in the 2008 Directive for international commercial mediation is the enforceability of agreements reached through mediation. It has been suggested that businesses underutilise mediation in international settings in part because of unpredictable enforcement practices predicated on varied national policies.[62] Recital 19 to the 2008 Directive addresses this issue and provides that mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Indeed, as already noted by the Commission in this Report, Article 6 of the 2008 Directive provides that Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable.[63] The content of such an agreement must be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

8.41 Recital 6 to the 2008 Directive adds that agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties and suggests that these benefits become even more pronounced in situations displaying cross-border elements.[64] This principle of enforceability is particularly useful in a region of many languages and laws.[65] However, the Directive does not address whether an agreement to mediate, including for example an agreement that mediation must take place as a condition precedent to arbitration, is enforceable.[66]

8.42 It has been suggested that the 2008 EC Directive will greatly assist in the resolution of international commercial disputes because "nowhere else in the world do issues of mobility, multiculturalism, and regional politics demand a medium for resolving international disputes than in Europe."[67]

8.43 In relation to international commercial conciliation, the United Nations Commission on International Trade Law (UNCITRAL) 2002 Model Law on International Commercial Conciliation provides a structured framework for the resolution of international commercial disputes through conciliation.[68] It has

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62 See Steele "Enforcing International Commercial Mediation Agreements as Arbitral Awards" (June 2007) ULCA Law Review. See also Wang "Mediation in the Globalised Business Environment" 17(2) *Asia Pacific Law Review* 47.

63 This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

64 Recital 6 of the 2008 Directive..

65 For a detailed discussion on the enforceability of agreements reached through mediation see paragraphs 4.84 to 4.101 above.

66 Phillips "The European Directive on Commercial Mediation: What It Provides and What It Doesn't" (2009). Online article available at: www.businessconflictmanagement.com.

67 Collins "Citing the EU Mediation Directive, a Brussels Group Develops Training" (International Institute for Conflict Prevention and Resolution, April 2009). Online article available at: www.cpradr.org. See also Bowen "The Power of Mediation to Resolve International Commercial Disputes and Repair Business Relationships" (May 2005) *Dispute Resolution Journal*.

68 The UNCITRAL was created by the General Assembly in 1966 to enable the United Nations to play a more active role in reducing or removing legal obstacles to the flow of international trade. In 1999, the United Nations Commission on International Trade Law (UNCITRAL) mandated the Working Group on International Arbitration and Conciliation to draft a model law on international commercial conciliation. The Commission adopted the *Model Law on International Commercial Conciliation* in June 2002.

been suggested that "UNCITRAL issued its Model Law on International Commercial Conciliation because of the increased use of conciliation in dispute settlement practice in various parts of the world."[69]

8.44 The Model Law is designed to serve as a template for UN member states to develop their own conciliation laws, or as a supplement to existing laws in countries that have them. The General Assembly's approval constitutes a formal recommendation that member states adopt the model law. The Model Law provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements.

8.45 Article 1(1) of the Model Law states that the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road. A conciliation is considered international under the Model Law if:

> (a) the parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or
>
> (b) the State in which the parties have their places of business is different from either:
>
> (i) the State in which a substantial part of the obligations of the commercial relationship is to be performed; or
>
> ii) the State with which the subject matter of the dispute is most closely connected.[70]

8.46 The Commission has already examined in this Report the main principles set out in the Model Law.[71] As noted in the Consultation Paper, there are a number of international bodies which provide dispute resolution mechanisms, including mediation and conciliation, for resolving international commercial disputes. These include the International Chamber of Commerce, the Permanent Court of Arbitration and the Court of Arbitration for Sport.[72]

G Conclusion

8.47 In this Chapter the Commission has discussed the extent to which ADR, in particular, mediation and conciliation, can contribute to the resolution of commercial disputes – both domestic and international disputes. The Commission acknowledges and commends the manner in which the High Court's Commercial List has been operational in a proactive manner to exemplify that mediation and conciliation are not merely "alternatives" to litigation but have become important elements of an integrated approach to the resolution of commercial disputes. Furthermore, the Commission concurs with the view that:

> "While it is readily accepted, even by the most ardent supporters of mediation, that the process is not a panacea and is not a quick fix for every single situation, there is a growing acceptance

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69 See Slate, Lieberman, Weiner & Micanovic "UNCITRAL: It's Workings in International Arbitration & A New Model Conciliation Law" (March 2005) 73 *Cardozo Journal of Conflict Resolution* 6 at 74 .

70 Article 1(4) of the Model Law.

71 See Chapter 3 above.

72 See LRC CP 50-2008 at 7.78-7.87.

> that mediation should, at the very least, be considered and evaluated as an alternative in every single case."[73]

8.48 This is particularly true in relation to commercial cases. It has been suggested that the reality of commercial litigation in Ireland is that most disputes are solved on ground of costs and expediency by private agreement between the parties following the commencement of the court proceedings and the exchange of pleadings. However, by engaging in mediation or conciliation process at an early stage of the commercial dispute it has been purported that:

> "Effective management of conflict can reduce the amount of time and money spent in trying to sort out a problem, reduce the damage it could cause to those involved and enable decision makers to make smarter choices earlier on. There aren't any silver bullets, but a lot can be done, and it's time that business woke up to the wastage that lack of proper conflict management causes."[74]

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73 Doyle "Mediation in Commercial Disputes" (January 2010). Online article available at: www.dilloneustace.ie.

74 "Conflicting priorities – best practice in conflict management" (CEDR, September 2008). Online article available at: www.cedr.com.

CHAPTER 9 CONSUMER DISPUTES & ADR

A Introduction

9.01 In this chapter the Commission examines the development of ADR in resolving consumer disputes. In Part B the Commission provides a general overview of consumer disputes. In Part C the Commission examines European developments in the area of consumer disputes and examines the mechanisms available to resolve cross-border customer disputes. In Part D the Commission explores the area of online dispute resolution for consumer disputes arising from online transactions. In Part E the Commission discusses the Small Claims Procedure which is available through the District Courts for resolving consumer disputes.

B Consumer Disputes: An Overview

9.02 As the Commission noted in its Consultation Paper, ensuring that consumers have access to fast, effective, and economical redress to disputes is important to society as a whole.[1] It was also recognised by the European Commission in its *Green Paper for Collective Consumer Redress* that:

> "Encouraging active participation of citizens in the good functioning of markets helps protect healthy competitive conditions. In particular, access to redress by consumers when consumer rights are violated by traders promotes consumer confidence in the markets and improves their performance."[2]

9.03 Consumer redress mechanisms form a spectrum that ranges from two-party consumer and business negotiation, through to various third-party processes such as mediation, to litigation.[3] The Commission outlined in its Consultation Paper that, in Ireland, it can be said that there are a number of non-adversarial avenues of redress for consumer disputes. The first step for the consumer is often to partake in direct negotiation with the business once a complaint arises. It is interesting to note the National Consumer Agency reported that 69% of Irish consumers are willing to complain when dissatisfied.[4] Many businesses have internal complaints procedures in place which should be exhausted by the consumer when a complaint arises. According to the National Consumer Agency, almost 3 in 5 Irish consumers believe that having staff members trained in customer service and complaints handling would help in offering better customer service for people with complaints.[5]

9.04 If the consumer remains dissatisfied after completing the internal complaints procedure, the next step might be to lodge a formal complaint with an independent complaints body such as the National

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1 See LRC CP 50-2008 at 8.02.

2 *Green Paper on Collective Consumer Redress* COM (2008) 794 final (European Commission, 2008) at 2. Available at: http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf.

3 Ramsay "Small Claims Courts in Canada: A Socio-Legal Appraisal" in Whelan *Small Claims Courts: A Comparative Study* (Clarendon Press, Oxford, 1990) at 38.

4 *"Consumer Empowerment and Complaining - Market Research Findings 2009"* (National Consumer Agency, August 2009). Available at: www.nca.ie. The National Consumer Agency (NCA) was established under the *Consumer Protection Act* 2007 as the successor to the Office of the Director of Consumer Affairs, on foot of the recommendations in the 2005 *Report of the Consumer Strategy Group*. See LRC CP 50-2008 at 8.14 – 8.17.

5 *"Consumer Empowerment and Complaining - Market Research Findings 2010"* (National Consumer Agency, January 2010)

Consumer Agency. Many of these bodies have ADR mechanisms in place to resolve the dispute. The consumer may also wish to avail of an online dispute resolution mechanism if the consumer transaction stemmed from an online purchase such as provided by eBay. In cases, involving cross-border disputes, the European Consumer Centre (ECC) provides ADR mechanisms for redress. The next stage would be to use the Small Claims Procedure in the District Court if the dispute is within its jurisdiction. Of course, litigation may be required in some instances, and in others, the consumer contract may also include a binding arbitration clause.

9.05 As previously noted by the Commission, where efforts to resolve disputes directly with businesses fail, it is important that out of court ADR mechanisms are available.[6] The importance of providing ADR for consumer disputes lies in the fact that, "The vast majority of consumer disputes involve relatively low priced goods, services or credit, where the costs associated with redress substantially exceed the expected benefits associated with recovery."[7] ADR processes, such as mediation and ombudsmen schemes, can provide consumers with a cost and time efficient mechanism of redress. As noted by the European Commission:

> "In the modern consumer oriented, globalised and digital economy accountability and confidence play a crucial role. Traders should be made accountable for their behaviour if that is detrimental for consumers. Measures to enhance confidence of consumers will contribute to the creation of healthy markets and therefore to innovation and competitiveness. In particular, access to redress by consumers when traders violate their rights promotes consumer confidence and is a stimulus for sound traders' performance."[8]

9.06 According to a 2010 European Consumer Markets Scoreboard survey, Ireland is ranked third in the European Union for resolving disputes with retailers through ADR. Furthermore, it was found that Irish retailers are ranked first in Europe for their awareness of ADR.[9] Indeed, the importance of providing ADR mechanisms for consumer redress was recognised by the Government in its response to the European Commission's *Green Paper on Collective Consumer Redress*:

> "Ireland recognises the importance of ADR as a means of resolving consumer disputes and as stated earlier is of the view that there is considerable merit in further developing and integrating ADR as a preferred method of consumer redress. ADR is in general a more efficient, flexible and cost effective way of disposing of disputes."[10]

9.07 On the issue of consumer disputes and ADR, in its Consultation Paper, the Commission invited submissions as to whether the recommendations in the European Consumer Centre's 2008 Report *The development of Alternative Dispute Resolution (ADR) in Ireland: An analysis of complaints, best practice and future recommendations* should be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes.[11] The Commission also commended the recommendations on online dispute resolution of consumer disputes made by the Information Society

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6 *Make Consumers Count - A New Direction for Irish Consumers* (Report of the Consumer Strategy Group April, Forfas, 2005) at 45. See also *"Consumer protection in the internal market"* (Special Eurobarometer 298, European Commission, October 2008) at 50.

7 Finkle & Cohen "Consumer Redress Through ADR & Small Claims Court: Theory & Practice" (1993) 13 *Windsor Yearbook of Access to Justice* 81.

8 *Consultation Paper for Discussion on the Follow Up to the Green Paper on Consumer Collective Redress* (European Commission, 2009). Available at: http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf.

9 The 2010 EU Consumer Markets Scoreboard monitors the integration of the retail internal market and benchmarks the consumer environment in EU Member states. See *Consumer Markets Scoreboard – Consumers at Home in the Internal Market* – SEC (2010) 385.

10 *"Ireland's Response to the Green Paper on Consumer Collective Redress"* (2009). Available at: http://ec.europa.eu/consumers/redress_cons/responses/MS_Irish_Dept_en.pdf.

11 LRC CP 50-2008 at 8.36.

Commission in its 2002 Report *Building Trust* and by Forfas in its 2002 Report *Legislating for Competitive Advantage in e-Business and Information & Communications Technologies* and invited submissions as to whether they should be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes.[12] Furthermore, the Commission provisionally recommended that the jurisdictional limit of the Small Claims Court be increased to €3,000.[13] The Commission now turns to examine these provisional recommendations and the role of ADR in the resolution of consumer disputes in more detail.

C European Developments

(1) Notified ADR Schemes: EC Recommendations

9.08 ADR has been an important part of the European Commission's concept of consumer policy for a number of years and the Commission has encouraged Member States to establish ADR schemes for resolution of consumer disputes.[14] A recent study on the use of ADR in the European Union found that 750 ADR schemes relevant for business-to-consumer disputes were identified across Member States.[15] It is suggested that such ADR schemes are a low-cost and quick alternative for consumers for settling of disputes with businesses. The vast majority of the ADR procedures are free of charge for the consumer, or of moderate costs below €50. A majority of ADR cases are decided within a period of 90 days.[16] It has been suggested, however, that there are several barriers in relation to the use of these ADR schemes, both for consumers and businesses. On the consumer side, the most significant barrier is the lack of awareness which is an essential pre-requisite to access to redress. Relevant barriers also include non-compliance by business with non-binding decisions of ADR schemes and refusal by business to enter the procedure, which can ultimately undermine consumer trust in such schemes, as well as the absence of ADR schemes in areas or industry sectors where they may be needed. Additional barriers for cross-border ADR from a consumer perspective include in particular finding the right competent scheme and language barriers.[17]

9.09 Five Irish ADR schemes providing for consumer redress have been notified to the European Commission, these are the Financial Services Ombudsman, the Pensions Ombudsman, the Advertising Standards Authority for Ireland, the Direct Selling Association of Ireland, the Chartered Institute of Arbitrators - scheme for tour operators.[18] In 2008, a total of 8,372 ADR cases brought by individual consumers were reported by these notified ADR schemes. The scheme reporting the largest number of cases was the Financial Services Ombudsman's Bureau, with 5,947 cases or slightly more than 70% of all cases. Also, 772 collective cases were reported by the Advertising Standards Authority for Ireland (ASAI).[19]

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12 LRC CP 50-2008 at 8.54.

13 LRC CP 50-2008 at 8.61.

14 See *"Cross-Border Dispute Resolution Mechanisms in Europe: Practical Reflections on the Need & Availability"* (The European Consumer Centres' Network, December 2009). Available at: www.eccireland.ie

15 *"Study on the use of Alternative Dispute Resolution in the European Union: Final Report to DG SANCO"* (Civic Consulting of Consumer Policy Evaluation Consortium, October 2009) at 8. Available at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf

16 *Ibid.*

17 *Ibid.*

18 A notified ADR body is one that complies with one of two European Commission Recommendations (98/257/EC and 2001/310/EC) and is notified to the European Commission by the Department of Enterprise, Trade and Employment. See http://www.entemp.ie/commerce/consumer/nomination.htm#ADR_Ireland.

19 *"Study on the use of Alternative Dispute Resolution in the European Union: Final Report to DG Sanco"* (Civic Consulting of Consumer Policy Evaluation Consortium, October 2009) at 78.

9.10 The European Commission has adopted two Recommendations (98/257/EC and 2001/310/EC) which have established principles for these ADR schemes to follow when resolving consumer disputes. The first Recommendation 98/257/EC outlines the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.[20] The 1998 recommendation contains 7 principles, namely:

- *independence* of the dispute settlement body to ensure the impartiality of its actions;
- *transparency* of the scheme to ensure that the consumer has all the necessary information about the procedure and that the results obtained can be objectively assessed;
- *adversarial* procedure to ensure that the consumer has the possibility to present all their views and are informed about the arguments of the other party;
- *effectiveness* of the procedure to ensure that the consumer will benefit from the advantages of an alternative dispute settlement, including: access without being obliged to use a legal representative; a procedure that is free of charge or of moderate cost and swift; and an active role of the dispute settlement body enabling it to take into consideration any factors conducive to a settlement of the dispute;
- *legality* to guarantee that the decision taken by the dispute settlement body does not deprive the consumer of the protection afforded by the relevant consumer protection legislation;
- *liberty* to ensure that the decision taken may be binding on the consumer only if they are informed of its binding nature in advance and specifically accept this after the dispute in question has arisen; and
- *representation* to ensure that the consumer has the possibility to be represented in the procedure by a third party if they wish.[21]

9.11 The European Commission's Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes also establishes common criteria that these consensual procedures should meet in order to give consumers and businesses confidence that their disputes will be handled fairly, effectively and with rigour.[22] The criteria do not prescribe how such procedures should operate but instead identify a set of principles that such procedures should follow in order to ensure a common minimum standard. The 2001 recommendation contains 4 principles, namely:

- *impartiality* to ensure that those responsible for the procedure have no perceived or actual conflict of interest with either party;
- *transparency* is to be guaranteed by ensuring that information on the procedure, the rules governing the procedure, the cost of the procedure, and the status of any agreed solution for resolving the dispute is made available to the parties;
- *effectiveness* to ensure that disputes are dealt with in the shortest possible time commensurate with the nature of the dispute; and
- *fairness* which concerns the actual and perceived equity of outcomes for parties once they use the ADR process.

9.12 Recital 18 of the 2008 EC Directive on Mediation states that any mediators or organisations coming within the scope the 2001 Recommendation should be encouraged to respect its principles. For this reason, the Commission recommends that its proposed statutory Code of Conduct for Mediators and Conciliators should have regard to the European Commission's Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes and that

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20 Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes 98/257/EC (*Official Journal L 115, 17/04/1998).* See http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF.

21 *Ibid.*

22 Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

such principles should be adapted and applied, to the extent that is appropriate, to all mediations and conciliations. It is also important to note that Recital 11 of the 2008 EC Directive states that "the Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as... consumer complaint schemes."[23]

9.13 *The Commission the recommends that a statutory Code of Conduct for Mediators and Conciliators should have regard to the European Commission's Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes and that such principles should be adapted and applied, to the extent that is appropriate, to all mediations and conciliations.*

(2) European Consumer Centre

9.14 As the Commission noted in its Consultation Paper, in October 2001 the European Commission and Member States established the European Extra- Judicial Network (EEJ-Net).[24] The network aims to help consumers resolve their cross-border disputes through ADR schemes. It operates through clearing houses located in each Member State. In Ireland, the clearing house is the European Consumer Centre (ECC). ECC Ireland gives advice to consumers on their rights and also assists consumers with cross-border disputes by intervening on their behalf with the trader in the other relevant country. ECC Ireland also produces reports and opinion papers, engages in joint projects within the ECC Network, and carries out consumer information campaigns.[25]

9.15 In its Consultation Paper, the Commission invited submissions as to whether the recommendations in the European Consumer Centre's 2008 Report *The development of Alternative Dispute Resolution (ADR) in Ireland: An analysis of complaints, best practice and future recommendations* should be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes.[26] The Commission now turns to re-examine some of the main recommendations set out in the 2008 ECC Report.

(i) Develop consumerconnect.ie to include information on existing ADR bodies, and their function in resolving complaints, in addition to the small claims procedure

9.16 The Commission notes that this recommendation is similar to Recital 25 of the 2008 EC Directive which states that Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. The Commission is aware that the National Consumer Agency has a section on its website which provides consumers with information on how to make an effective compliant and it also informs consumers on various that are available to assist them with their complaints.[27] It also provides information about lodging a complaint in the Small Claims Court. Therefore, the Commission considers that the ECC recommendation on this issue has been implemented and does not require to be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes.

(ii) Develop and publicise specific codes of practice for industry and urge consumers to seek adherence to these codes when choosing a trader

9.17 As the Commission noted in its Consultation Paper, section 2(1) of the *Consumer Protection Act 2007* defines a code of practice as:

> "any code, agreement or set of rules or standards that is not imposed by or under an enactment but purports to govern or define commercial practices of one or more traders

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23 Recital 11 of the 2008 Directive.

24 See *Working Document on the creation of a European Extra-Judicial Network* (European Commission, 2000), available at http://ec.europa.eu/consumers/policy/developments/acce_just/acce_just07_workdoc_en.pdf.

25 See www.eccdublin.ie.

26 LRC CP 50-2008 at 8.36. See *The development of Alternative Dispute Resolution (ADR) in Ireland: An analysis of complaints, best practice and future recommendations* (ECC Ireland, 2008).

27 See http://www.consumerconnect.ie/eng/Get_Your_Rights/.

(whether generally or in respect of a particular trade, business or professional sector or one or more commercial practices) who agree, commit or undertake to abide or be bound by such rules or standards."[28]

9.18 Section 88 of the 2007 Act provides for codes of practice to be submitted to the National Consumer Agency (NCA) for review and approval. The NCA may approve such a code of practice if satisfied it protects consumer interests. Section 89 of the 2007 Act provides that in any proceedings before a court an approved code of practice is admissible in evidence. Under Section 45 of the 2007 Act a trader who misrepresents that he or she is bound by a code of practice as a means of enticing a consumer to purchase a product or service or who fails to comply with a commitment of such a code commits an offence under the 2007 Act.

9.19 Despite statutory provision for codes of practice, it appears that few Irish businesses actually have a code of practice in place. In compiling its 2005 Report, the Consumer Strategy Group received 64 responses to 2,124 requests for codes of practice from both the public and private sectors.[29] The Commission notes that, in other jurisdictions, best practice codes on complaint handling procedures have been drafted both by public institutions or business or consumer organisations.[30] The Commission recommends that codes on complaint handling procedures should continue to be been drafted both by public institutions or business or consumer organisations.

9.20 *The Commission recommends that codes on complaint handling procedures should continue to be drafted both by public institutions or business or consumer organisations.*

(iii) Take on board the 2007 OECD Recommendation on Consumer Dispute Resolution and Redress

9.21 The Organisation for Economic Co-operation and Development (OECD) *Recommendation on Consumer Dispute Resolution and Redress* which was adopted by the OECD Council in July 2007 sets out principles for an effective and comprehensive dispute resolution and redress system that would be applicable to domestic and cross-border disputes.[31] OECD Member countries, including Ireland, are required to review their existing dispute resolution and redress frameworks to ensure that they provide consumers with access to fair, easy to use, timely, and effective dispute resolution and redress without unnecessary cost or burden. In so doing, the 2007 OECD Recommendation states that Member countries should ensure that their domestic frameworks provide for a combination of different mechanisms for dispute resolution and redress in order to respond to the varying nature and characteristics of consumer complaints. The Commission recommends that a statutory Code of Conduct for Mediators and Conciliators should have regard to the Organisation for Economic Co-operation and Development (OECD) Recommendation on Consumer Dispute Resolution and Redress and that its principles should be adapted and applied, to the extent that is appropriate, to all mediations and conciliations.

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28 See Slattery "Consumer Protection Bill 2007" (2007) 14(5) CLP 95; and O'Neill "The Consumer Protection Act 2007 – Enforcing the New Rules" (2008) 26 ILT 46.

29 *Make Consumers Count - A new Direction for Irish Consumers* (Report of the Consumer Strategy Group April, Forfas, 2005) at 67.

30 In 1997, the Australian Competition and Consumer Commission (ACCC) issued *Benchmarks for Dispute Avoidance and Resolution* which is aimed at assisting small businesses in dealing with problems involving consumer complaints. In 2002, Industry Canada, acting on behalf of the federal, provincial and territorial ministers responsible for consumer affairs, published *Consumer Complaints Management. A Guide for Canadian Business.* In 2004, the UK Office of Fair Trading issued *Guidance on the Core Criteria for the Consumer Codes Approval Scheme (CCAS)* which provides some important recommendations with respect to complaint handling schemes.

31 OECD Recommendation on Consumer Dispute Resolution and Redress. This Recommendation was developed by the OECD Committee on Consumer Policy (CCP). Work on its principles was initiated in late 2005. The Recommendation was adopted by the OECD Council on 12 July 2007. Available at http://www.oecd.org/dataoecd/43/50/38960101.pdf.

9.22 *The Commission recommends that that a statutory Code of Conduct for Mediators and Conciliators should have regard to the Organisation for Economic Co-operation and Development (OECD) Recommendation on Consumer Dispute Resolution and Redress and that its principles should be adapted and applied, to the extent that is appropriate, to all mediations and conciliations.*

(3) Collective Consumer Redress

9.23 The European Commission has examined the area of collective consumer redress as it considers that the "expanding mass consumer markets with consumers shopping cross-border and on the internet create a high potential for large groups of consumers being harmed by the same or a similar illegal practice of a trader. Collective redress could be a means to handle this type of claims."[32] It noted in its 2009 *Consultation Paper for Discussion on the Follow Up to the Green Paper on Consumer Collective Redress* that mass claim cases can affect a very large number of consumers. Although sometimes the harm may be low for the individual consumer, the aggregated amount of the damage faced by a very large group of consumers can be high for the size of the market.[33]

9.24 In November 2008, the European Commission published a *Green Paper on Consumer Collective Redress*.[34] The Green Paper sets out 4 options in relation to collective consumer redress in the European Union. These include: (1) No immediate action; (2) co-operation between Member States extending national collective redress systems to consumers from other Member States without a collective redress mechanism; (3) a mix of policy instruments to strengthen consumer redress (including collective consumer alternative dispute mechanisms, a power for national enforcement authorities to request traders to compensate consumers and extending small claims to deal with mass claims); and (4) binding or non binding measures for a collective redress judicial procedure to exist in all Member States. A combination of different elements from these options is also open to consideration. In its response to the European Commission's Green Paper, the Irish Government stated that

> "In so far as the proposal in the Green Paper in relation to the introduction of a possible Community measure in this area is concerned, Ireland would be concerned as the possible consequences of such a measure on our system for the administration of justice particularly given the complexities involved in collective consumer redress."[35]

9.25 Currently, only 13 Member States have a system specifically designed to compensate a group of consumers who are harmed by a breach of consumer protection laws.[36] While Ireland does not have such a system in place, collective redress for consumers is available through various regulators and ombudsman bodies. For example, according to the Advertising Standards Authority for Ireland, if multiple complaints concern the same advertisement, their ADR scheme deals with them on a collective basis: it takes into consideration the opinion of all consumers who filed a complaint and takes one single decision on the matter which is then applicable to all similar claims.[37]

9.26 As the Commission noted in its Consultation Paper, the National Consumer Agency (NCA) also has the capacity to develop collective standards on its own initiative through engagement with consumer and industry groups. For example, arising from an enormous number of individual complaints received by

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32 See http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.

33 *Consultation Paper for Discussion on the Follow Up to the Green Paper on Consumer Collective Redress* (European Commission, 2009) at 4. Available at: http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf.

34 *Green Paper on Collective Consumer Redress* COM (2008) 794 final (European Commission, 2008). Available at: http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf

35 *"Ireland's Response to the Green Paper on Consumer Collective Redress"* (2009). Available at: http://ec.europa.eu/consumers/redress_cons/responses/MS_Irish_Dept_en.pdf

36 These countries include Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden and the UK.

37 *"Study on the use of Alternative Dispute Resolution in the European Union: Final Report to DG Sanco"* (Civic Consulting of Consumer Policy Evaluation Consortium, October 2009) at 49.

the NCA from consumers/owners in apartment complexes about the level of professional fees and associated charges being sought by property managing agents (some of which may have arisen from an understanding deficit by consumers and others from poor governance arrangements),[38] the NCA established a Consumer Forum on Apartment Complexes. This Forum developed guidelines for contracts between property managing agents and owners' management companies in apartment complexes, including a contractual template for professional fees and service charges. This initiative resembles that of an Ombudsman who receives individual complaints and then inquires into them in terms of the general procedural problems that need to be addressed. Indeed, as the Commission has previously noted, Ombudsman schemes can also provide collective redress to consumers and are used successfully as a method of dealing with multi-party scenarios without resorting to litigation.[39] The Commission considers that the aforementioned regulators and ombudsmen schemes play an important role in providing collective redress to consumers through ADR processes, and in turn, increase access to justice for large groups of citizens.

D Online Dispute Resolution

9.27 E-commerce is steadily developing, with more than a third of EU citizens currently making online purchases and it offers immense challenges to traditional dispute resolution methods, as it entails parties often located in different parts of the world making contracts with each other.[40] As noted by the United Nations Conference on Trade and Development:

> "... traditional dispute settlement mechanisms may not provide effective redress in e-commerce transactions, there is a need to consider alternative dispute resolution (ADR) mechanisms that would provide speedy, low-cost redress for claims arising from online interactions … [w]hen ADR takes place using computer mediated communications in the online environment, it is often referred to as online dispute resolution (ODR)."[41]

9.28 The principal types of dispute resolution mechanisms currently offered online are automated negotiation,[42] assisted negotiation,[43] online mediation, and online arbitration. These online dispute resolution processes have the potential to provide a means of online access consumers seeking redress. As the Commission noted in its Consultation Paper, ODR has been identified as a fundamental aspect of consumer protection, as litigation and the common forms of alternative dispute resolution do not meet the needs of customers, predominantly because of distances in transborder cases and disproportionate costs.[44] It has also been suggested that:

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38 See the Commission's *Report on Multi-Unit Developments* (LRC 90-2008), Introduction, paragraphs 7 and 8.

39 See LRC CP 50-2008 at Chapters 6 and 8 for a detailed discussion of the Ombudsman schemes which have been established in Ireland.

40 *Consumer Markets Scoreboard – Consumers at Home in the Internal Market* – SEC(2010)385.

41 *E-Commerce and Development Report* (UNCTAD, 2003) at 177.

42 Automated negotiation involves the parties entering a "blind bidding" procedure whereby they each, in turn, offer or demand an amount of money. When the amounts of the offer and the demand are sufficiently close, the case is settled for the arithmetic mean of the two figures. Cybersettle is the leading company in this field. See www.cybersettle.com

43 Assisted negotiation involves the ODR institution providing the parties with a secure site on which to communicate. As is the case with traditional negotiation, the parties must reach an agreement themselves with no third party having the capacity to decide for them. A good example of an assisted negotiation platform is ECODIR. See LRC CP 50-2008 at 8.45.

44 *Final Report: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary` judicial proceedings - A Study for the European Commission* (The Study Centre for Consumer Law – Centre for European Economic Law, Belgium, 2007) at 87. See generally Mireze "Where Is Everyone Going with Online Dispute Resolution (ODR)" (2002) 2 *International Business Law Journal* 2 at 167-210; Wahab

> "Information technology has the potential to enhance access to some otherwise disadvantaged groups. Barriers that can be removed or reduced through technology include: geographical isolation; mobility impairment; confinement or imprisonment; sight or hearing impairment (through voice recognition software); language difficulties (through translating software); lack of confidence or competence in face to face communication."[45]

9.29 The Commission considers that any introduction of ODR systems should not undermine the fundamental principles of the ADR processes such as self-determination and confidentiality. Indeed it has been noted that "the use of new technology brings risks as well as opportunities. Parties may not be equally well equipped or experienced, resulting in a disparity that could be detrimental to due process. The ease and speed with which communications take place could lead to misunderstandings, omissions or even errors."[46] The Commission concurs with the view that:

> "Amongst the various ODR mechanisms, there are certain principles that have to be followed. The neutrals involved must be impartial and independent. The ODR services must be affordable for the parties. The dispute resolution process must be transparent. The proceedings must be fair. As far as effectiveness is concerned, the dispute resolution process should not be protracted beyond a reasonable period of time, and the result must be implemented."[47]

9.30 The Commission notes that a number of international bodies have addressed the issue of standards for ODR practice, including: the US Federal Trade Commission, the Canadian Working Group on Electronic Commerce and Consumers, the Australian National Alternative Dispute Resolution Advisory Council and the Global Business Dialogue on Electronic Commerce.[48] The Commission considers that it would be appropriate, in the formulation of a statutory Code of Conduct for Mediators and Conciliators, for these guidelines to be examined. Some of the main ODR principles set out in these guidelines include accessibility, affordability, transparency and fairness.[49]

9.31 In the Consultation Paper, the Commission commended the recommendations on online dispute resolution of consumer disputes made by the Information Society Commission in its 2002 Report *Building Trust* and by Forfas in its 2002 Report *Legislating for Competitive Advantage in e-Business and Information & Communications Technologies* and invited submissions as to whether they should be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes.[50] To summarise, in its 2002 Report *Building Trust through the Legal Framework,* the Information Society Commission Legal Affairs Group recommended that, as part of a twin-track process, the Department of Justice and Law Reform should continue to encourage the development of online arbitration systems for both business-to-business (B2B) and for business-to-consumer (B2C) e-

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"Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement" (2004) 12 *International Journal of Law and Information Technology* 1 at 123.

45 *"Dispute Resolution and Information Technology: Principles for Good Practice"* (NADRAC, 2003). See also *"Online-ADR: Background Paper"* (NADRAC, January 2001). Available at: www. nadrac.gov.au.

46 Briner "Using Technology to Resolve Business Disputes" (October 2004) *ICC International Court of Arbitration Special Supplement*.

47 Kao "Online Consumer Dispute Resolution and the ODR Practice in Taiwan – A Comparative Analysis" (July 2009) 5 *Asian Social Science* 7.

48 See for example: *"Dispute Resolution and Information Technology: Principles for Good Practice"* (NADRAC, 2003).

49 See, for example, the National Centre for Technology and Dispute Reoslution Standards of Practice 2009. Available at: www.odrandconsumers2010.org. *See also* Malkawi "Online Alternative Dispute Resolution and Transparency" (2009) 2 *Contemporary Asia Arbitration Journal* 1 at 101: and Braeutigam "What I hear You Writing Is... Issues in ODR: Building Trust and Rapport in the Text-Based Environment" (Fall 2006) 38 *University of Toledo Law Review* 1 at 101.

50 See LRC CP 50-2008 at 8.54.

commerce. Progress in each area would, it considered, reinforce Ireland's attractiveness as an international centre for dispute resolution. The Report also recommended that the Government should continue to encourage the development of online dispute resolution models.[51]

9.32 Similarly, Forfás recommended in its 2002 report *Legislating for Competitive Advantage in e-Business and Information & Communications Technologies* that the Government should assess the possible role of an online ombudsman in providing a conciliation service between consumers and firms trading over the Internet and in adjudicating any disputes arising. The Report also recommended that if Irish courts are to operate as an effective mechanism for the appeal and review of e-ADR, the electronic systems used would have to be integrated or shared. It also stated that mechanisms by which the online ADR and the e-Courts could be integrated, building upon the *27th Interim Report of the Committee on Court Practice and Procedure*.[52] The Commission notes in this respect that the draft *Courts (Consolidation and Reform) Bill* appended to its *Report on the Consolidation and Reform of the Courts Acts*[53] fully facilitates the ongoing development of Information and Communications Technology (ICT) strategies within the courts.

9.33 It should also be noted that the *Digital Agenda for Europe*, which was published by the European Commission in May 2010, states that it will launch an EU-wide strategy to improve ADR systems and proposes the introduction of an EU-wide online redress tool for eCommerce with the aim of improving access to justice online.[54] The European Commission also stated its intention to publish a Green Paper on the issue of ODR for eCommerce in 2011. Therefore, the Commission does not consider it appropriate, at this stage, to make any recommendations on the area of ODR, but it reiterates its view that the recommendations on online dispute resolution of consumer disputes made by the Information Society Commission in its 2002 Report Building Trust and by Forfas in its 2002 Report Legislating for Competitive Advantage in e-Business and Information & Communications Technologies are commendable and they should be given further consideration by the appropriate bodies.

E Small Claims Court

9.34 In its Consultation Paper, the Commission provisionally recommended that the jurisdictional limit of the Small Claims Court be increased to €3,000.[55] In its 2008 *Report on Multi-Unit Developments* the Commission also recommended that the Small Claims Court should have its jurisdiction increased to €3,000.[56] The 2006 *Report of the Legal Costs Working Group* also recommended that consideration should be given to a substantial increase in the jurisdictional limit of the Small Claims Court and that the range of cases dealt with by means of this procedure should be expanded. It recommended that the jurisdictional limit be increased to €3,000.[57]

9.35 As the Commission noted in the Consultation Paper, since its inception as a pilot scheme in 1991 the Small Claims Court, which operates in the District Court, has become an invaluable tool in

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51 *Building Trust through the Legal Framework* (Report by the Information Society Commission Legal Affairs Group, December 2002) at 24. Available at www.isc.ie

52 *Legislating for Competitive Advantage in e-Business and Information & Communications Technologies* (Forfas, 2002). Available at www.forfas.ie

53 LRC 97-2010. See Part 4, Chapter 5 of the draft Bill (sections 226 to 231), Appendix A of the Report.

54 *"A Digital Agenda for Europe"* (COM (2010) 245). See http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf. See also Cortes *Online Dispute Resolution for Consumers in the European Union* (Routledge, 2010).

55 See LRC CP 50-2008 at 8.61.

56 Law Reform Commission *Report on Multi-Unit Developments* (LRC 90-2008) at 167.

57 *Report of the Legal Costs Implementation Advisory Group* (Department of Justice, Equality and Law Reform, 2006). See http://www.justice.ie/en/JELR/LegalCostsImpGrp.pdf/Files/LegalCostsImpGrp.pdf.

allowing consumers to assert their consumer rights.[58] The success of this scheme led to the establishment of the procedure nationwide 1993. The main advantage of the procedure from the consumer perspective is that their only liability in terms of cost is the €15 fee which is payable in respect of their claim.[59] Since 2006, the Small Claims Court operates an online dispute resolution procedure where claims can be filed online. The main advantage of the online initiative is that it makes the procedure more accessible to consumers. Since 2006, the Small Claims Court operates an online dispute resolution procedure where claims can be filed online. The main advantage of the online initiative is that it makes the procedure more accessible to consumers.[60]

9.36 Since January 2010, businesses can also make claims against other businesses through the Small Claims Court.[61] Claims cannot, however, be made in respect of debts, personal injuries or breach of leasing or hire purchase agreements.[62] Introducing this new Small Claims procedure the Minister for Justice and Law Reform noted that:

> "Businesses, as well as consumers, can find themselves in a position where they have a legitimate claim against another business or vendor in relation to a contract in respect of goods or services purchased. The extension of this successful procedure will provide a choice of legal routes to pursue a small claim as the current civil bill system will also remain available. This will allow a business choose whichever route, small claims or civil bill procedure, it considers most economic and appropriate to its circumstances."[63]

9.37 In 2009, there were a total of 3,633 applications in the District Court under the Small Claims procedure. 1,844 of these applications were made online. The number of applications which could not be dealt with under the Small Claims procedure in 2009, increased by 82% to 776 from 426 in 2008.[64] It could be suggested that the one of the reasons that such claims could not be dealt with under the Small Claims procedure is due to the jurisdictional limit of €2,000. Therefore, the Commission recommends that that the jurisdictional limit of the Small Claims Court be increased to €3,000.

9.38 As the Commission noted in its Consultation Paper, in 2007 the European Community adopted a Regulation establishing a European Small Claims Procedure (ESCP).[65] The objective of such a procedure is "to facilitate access to justice"[66] and "… simplify and speed up litigation concerning small claims in cross-border cases."[67] A claim is considered a small claim where its value does not exceed €2,000 and involves civil and commercial matters.[68] The procedure operates in the same way as the

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58 Now regulated by the *District Court (Small Claims Procedure) Rules1999* (S.I. No. 191 of 1999) which inserted O53A into the *District Court Rules 1997* (SI no. 93 of 1997).

59 *Make Consumers Count - A New Direction for Irish Consumers* (Report of the Consumer Strategy Group April, Forfas, 2005) at 51.

60 For more information on the Small Claims Court Online Dispute Resolution Procedure see LRC CP 50-2008 at 8.59.

61 S.I. No. 519 of 2009.

62 It should be noted that the Minister for Justice and Law Reform also requested the Company Law Review Group to review the current system whereby limited liability companies must engage legal representation for court-based proceedings.

63 Press Release "Ahern extends Small Claims Procedure to cover business claims" (Department Justice, Equality and Law Reform, January 2010).

64 *Courts Service Annual Report 2009* at 44.

65 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure . See LRC CP 50-2008 at 8.41.

66 Recital 7 of the 2007 Regulation.

67 Recital 8 of the 2007 Regulation.

Small Claims procedure through local District Court offices.[69] In 2009, Dublin District Court received 25 applications under the ESCP.[70]

9.39 In conclusion, the Commission reiterates the view expressed in the Consultation Paper on the small claims procedure, and recommends that the jurisdictional limit of the Small Claims Court be increased to €3,000

9.40 *The Commission recommends that the jurisdictional limit of the Small Claims Court be increased to €3,000.*

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68 Article 2 of the 2007 Regulation states that it does not apply to matters concerning: (a) the status or legal capacity of natural persons; (b) rights in property arising out of a matrimonial relationship, wills and succession; (c) bankruptcy, proceedings relating to the winding up of insolvent companies, judicial arrangements, compositions and analogous proceedings; (d) social security; (e) arbitration; (f) employment law; (g) Tenancies of immovable property; and (h) violations of privacy and of rights relating to personality, including defamation.

69 Order 53C of the *District Court Rules 1997*.

70 *Courts Service Annual Report 2009* at 44.

CHAPTER 10 PROPERTY DISPUTES & ADR

A Introduction

10.01 In this chapter the Commission explores the potential role for ADR in the resolution of property disputes. In Part B the Commission provides an overview of property disputes and summarises recent legislative provision for ADR in the resolution of property disputes. In Part C the Commission discusses the appropriateness of ADR processes, in particular mediation and conciliation, in the resolution of disputes between neighbours. This Commission considers specifically examines the role for ADR in the resolution of boundary and community disputes. In Part D the Commission considers whether ADR has any role to play in the resolution of planning application disputes. In Part E the Commission summaries recent developments in relation to foreclosure mediation programmes in the United States.

B Property Disputes: An Overview

10.02 It has been suggested that "persons with an interest in the property sector, including the landlord and tenant area and the planning process, are increasingly looking at alternative methods of resolving disputes rather than submitting to an adjudicative process."[1] Indeed, increasing provision for ADR processes, such as mediation and conciliation, has been made in a number of recent Acts and statutory instruments relating to property disputes which the Commission now turns to examine.

10.03 Part 6 of the *Building Control Act 2007* contains provision for mediation. The 2007 Act aims to ensure access to new and reconstructed buildings for those with disabilities; revises procedures relating to the issue of fire safety certificates and to strengthen the powers of local building control authorities;[2] transposes the EU Mutual Recognition of Professional Qualifications Directive into Irish law[3]; and limits the use of the titles 'architect',[4] 'building surveyor'[5] and 'quantity surveyor'[6] to suitably qualified people. Section 57(1) of the 2007 Act provides that any person may complain to the Professional Conduct Committee concerning an action of a registered professional which is alleged to amount to professional misconduct or poor professional performance. The Committee may, "where it considers it appropriate to do so, request the complainant and the registered professional who is the subject of the complaint to seek resolution of the complaint by mediation."[7] Where the mediation does not result in the resolution of the complaint, the Committee will then proceed to consider the complaint.[8]

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1 Morgan & O'Connor "Resolving property disputes, Universal service – a value for money solution?" (2003) 10(4) CLP 96.

2 Section 5 of the 2007 Act, amending section 6 of the *Building Control Act 1990.*

3 2005/36/EC.

4 Part 3 of the 2007 Act, sections 13-27.

5 Part 5 of the 2007 Act, sections 42-55.

6 Part 4 of the 2007 Act, sections 28-41.

7 Section 57(1)(3) of the 2007 Act.

8 Section 57 (1)(4) of the 2007 Act.

10.04 The *Housing (Miscellaneous Provisions) Act 2009*[9] amends and extends the *Housing Acts 1966 to 2004* to provide local authorities with a framework for a more strategic approach to the delivery and management of housing services. That framework provides for the adoption of housing services plans, homelessness action plans and anti-social behaviour strategies; for new, more objective methods of assessing need and allocating housing; and for a more effective management and control regime covering tenancies, rents, etc.[10] Section 70 of the 2009 Act provides for repayment by the management company of amounts due to the housing authority within 2 months of resolution of any dispute between the parties arising from a repayment demand by the authority under section 70(10).[11] Subsection (3) provides for conciliation procedures agreed between the housing authority and the management company or, where such procedures cannot be agreed, for arbitration under the *Arbitration Act 2010*.

10.05 As the Commission has already noted in this Report, Order 19A of the *Circuit Court Rules 2001*, inserted by the *Circuit Court Rules (Case Progression (General)) 2009*,[12] applies to equity proceedings, proceedings on foot of a succession law civil bill, a claim for specific performance or for damages for breach of contract in respect of the construction, extension, alteration or repair of a building or other structure and the other category of proceedings or any other proceedings having or involving any characteristics, designated by the President of the Circuit Court. Order 19A, Rule 7 provides that:

> "The Judge, or the County Registrar at a case progression hearing, may on the application of any of the parties on notice or of his own motion, when he considers it appropriate and having regard to all the circumstances of the case, order that the proceedings or any issue therein be adjourned for such time, ordinarily not exceeding 28 days, as he considers appropriate and invite the parties to use mediation, conciliation, arbitration or other dispute resolution process (each of which process is referred to in this sub-rule as an ADR process) to settle or determine the proceedings or issue."

10.06 Therefore, it can be expected that some claims for damages for breach of contract in respect of the construction, extension, alteration or repair of a building or other structure may be referred to mediation, conciliation or arbitration by a Circuit Court judge or the County Register when it is considered appropriate to do so.

10.07 The *Multi-Unit Development Bill 2009*[13] contains proposals for a comprehensive statutory framework for multi-unit developments and for governance of the property management companies which own and manage the common internal and external areas of such developments. This new framework will apply not only to new developments, but to those under construction and those which have already been completed.[14] Section 21(2) of the 2009 Bill states that where a party makes an application to the Court under the legislation, they must "state the circumstances giving rise to the application and the order or orders that the applicant invites the court to make and whether or not mediation has been attempted."[15]

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9 See Maddox "The Tenant Purchase of Apartments under the Housing (Miscellaneous Provisions) Act 2009" (2010) 15(1) CPLJ 2.

10 The framework also involves a more developed legislative basis for the provision of rented social housing by means of leasing or contract arrangements with private accommodation providers, and expanded opportunities for home ownership by lower-income households through an incremental purchase scheme and a tenant purchase scheme for apartments. The Act also introduces an equity-based approach to the recovery of discounts granted by housing authorities to affordable housing purchasers.

11 Section 70, Subsection (2) of the 2009 Act provides that disputes about a repayment demand relating to a breach of a condition imposed by the housing authority under section 70(7) may be resolved by the management company agreeing to carry out, at its own expense, additional works that both parties agree will secure compliance with the condition concerned.

12 SI No.539 of 2009.

13 Bill No.32 of 2009 (as amended in the Select Committee on Justice, Defence and Women's Rights).

14 See Law Reform Commission *Report on Multi-Unit Developments* (LRC 90- 2008); and Twomey "The Multi-Unit Developments Bill 2009: Adequate protection for property owners?" (2010) 17(7) CLP 123.

15 *Multi-Unit Developments Bill 2009*, as amended in the Select Committee on Justice, Defence and Women's

This provision is in line with the Commission's recommendation in this Report that where a person commences any civil or commercial proceedings, they must sign a 'Mediation and Conciliation Certificate' stating that such processes have been considered for settling the dispute.[16]

10.08 Section 24 of the 2009 Bill which makes provision for mediation is somewhat similar to the provision for mediation set out in section 15 of the *Civil Liability and Courts Act 2004*. Section 24(1)(a) of the 2009 Bill provides that the court upon its own motion or upon the request of any party to an application under section 21, may at any stage during the course of the proceedings, if it considers that the holding of a meeting would assist in reaching a settlement of the matter, direct that the parties to the application meet to discuss and attempt to settle the matter. The meeting is referred to as a "mediation conference."[17] The distinction between this section and section 15 of the *Civil Liability and Courts Act 2004* is that it provides for the court on its own motion or at the request of a party can direct the parties meet to discuss and attempt to settle the matter. Under the *Civil Liability and Courts Act 2004*, it is only on the request of a party that a court can issue such a direction. The Commission considers it important that the courts can, when it considers appropriate, on its own motion make such a direction.

10.09 Section 24(4) of the 2009 Bill provides that the mediation conference will be presided over by a chairperson. Where the parties cannot agree on a chairperson, the court shall appoint one. A chairperson appointed by the court must be a practising barrister or practising solicitor of not less than 5 years standing, or a person nominated by a body prescribed, for the purpose of this section, by order of the Minister.[18] Section 24(5) protects the confidentiality of the mediation conference and states that "the notes of the chairperson of a mediation conference and all communications during a mediation conference or any records or other evidence thereof shall be confidential and shall not be used in evidence in any proceedings whether civil or criminal." Where the court is satisfied that a party to the application did not comply with a direction to engage in the mediation process it may make an order as to costs.[19] It has been suggested that:

> "The National Property Services Regulatory Authority should be the first port of call in terms of providing mediation services in cases of dispute or where owners have concerns in regard to the calculation of management fees. Recourse to the courts is inconsistent with Government policy in this area and contrary to best practice."[20]

10.10 The Commission considers that the inclusion of mediation and conciliation provisions in these legislative provisions demonstrates the increasing recognition of the role of ADR in the resolution of appropriate property disputes. The Commission now turns to examine the role for ADR in the resolution of property disputes between neighbours.

C Neighbour Disputes & ADR

(1) Boundary Disputes

10.11 In its Consultation Paper, the Commission provisionally recommended that the courts should continue to be pro-active in advising parties in property disputes to consider the adjournment of hearings

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Rights.

16 See paragraphs 4.46-4.51, above.

17 *Multi-Unit Developments Bill 2009*, as amended in the Select Committee on Justice, Defence and Women's Rights.

18 These prescribed bodies will provide a choice for the courts in appointing a chairperson of a mediation conference, where the parties themselves do not agree on a chairperson. The list will also indicate in general terms the range of bodies currently available to provide mediation services in the State.

19 *Multi-Unit Developments Bill 2009*, as amended in the Select Committee on Justice, Defence and Women's Rights.

20 Deputy Flanagan, Second Stage debate Dail Eireann on *Multi-Unit Developments Bill 2009*, 8 July 2010.

to allow the parties to consider mediation or conciliation.[21] As noted by Toulson LJ in the English Court of Appeal case *Childs v Vernon*:[22]

> "Boundary disputes between neighbours are wretched affairs: they cause misery and stress; they lead to costs which are often grossly disproportionate to the value being fought over... they put a blight on the properties, because no sane person would want to buy a property affected by a boundary squabble, except perhaps at a significantly discounted price."

10.12 The Commission acknowledged in its Consultation Paper that these disputes become particularly difficult, not because they involve complex legal problems, but because the "personalities of the parties often lies at the root of the problem."[23] While the Commission noted in its Consultation Paper that parties to a boundary dispute have the same rights of access to the courts as other persons, it is evident that such disputes are ripe for ADR because the cost of litigating a property dispute, both financially and emotionally, can far out-weigh the value of the claim itself.[24] For this reason, the Commission also provisionally recommended that property boundary disputes are appropriate for resolution through mediation and conciliation and that parties should be advised by their legal representatives to consider and attempt mediation or conciliation in such disputes prior to the commencement of litigation.[25] On this issue, the Commission concurs with the view that:

> "Clients must be made aware of the consequences of litigating over boundaries. Nothing in litigation is certain, save the inexorable rise in costs. The longer litigation of this type continues, the more entrenched can be the position of each party and the more emotive their reactions. The solicitor's duty is to provide a balanced perspective to those clients for whom 14 inches means a lot."[26]

10.13 Indeed as the Commission noted in its Consultation Paper, where disputes as to a boundary location arise, a lawyer would do well to follow the advice of Carnwath LJ in *Ali v Lane*[27]:

> "It is sadly a commonplace that boundary disputes can be fought with a passion which seems out of all proportion to the importance of what is involved in practical terms. In such cases, professional advisors should regard themselves as under a duty to ensure that their clients are aware of the potentially catastrophic consequences of litigation of this kind and of the possibilities of alternative dispute procedures."

10.14 Pill LJ echoed similar sentiments in the English Court of Appeal case *Kupfer v Dunne*[28] in which he made a reference to the possibility of imposing a cost sanction in cases where parties to a boundary dispute have not explored the option of ADR prior to litigation. He stated that:

> "This is an extremely unfortunate dispute between neighbours over a trivial area of land. It has led to a very substantial expenditure of costs… There were no sensible discussions between the parties before the litigation began and the significance of that will need to be considered in more detail when the issue of costs is determined."

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21 See LRC CP 50-2008 at 9.26.

22 [2007] EWCA Civ 305. Mummery and Smith LJJ agreed.

23 Powell *"Boundary Dispute Resolution in England & Wales –Surveyors and Lawyers Working Together to Resolve Problems"* (February 2005) International Federation of Surveyors. Online article available at: http://www.fig.net/pub/monthly_articles/february_2005/powell_february_2005.pdf. See also LRC CP 50-2008 at 9.07.

24 See LRC CP 50-2008 at 9.10.

25 See LRC CP 50-2008 at 9.25.

26 Jolly "A Suburban Nightmare" (2010) 30 *Law Society Gazette (Eng & Wales)* 20. See also *Huntley and another v Armes* [2010] EWCA Civ 396.

27 [2006] EWCA Civ 1532; [2007] 2 EG 126.

28 [2003] EWCA Civ 1549, para [3].

10.15 The Commission agrees with the view that "Most property disputes are well suited to mediation, either as an alternative to court proceedings or at an earlier stage. Speed, cost effectiveness and the maintenance of neighbourly relationships are all advantages in the area of property generally, including building contracts, rent reviews, tenancies, valuations, restrictive covenants, easements and rights of way."[29] As noted by Mummery LJ in the English Court of Appeal case *Bradford v James*[30] :

> "By the time neighbours get to court it is often too late for court-based ADR and mediation schemes to have much impact. Litigation hardens attitudes. Costs become an additional aggravating issue. Almost by its own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, possibly for both."

10.16 Mediation of boundary disputes has the potential to preserve a civilised relationship between neighbours and prevent generations of hostility and unnecessary costly litigation between families.[31] The process provides the parties with the opportunity to address any other underlying interests or concerns outside of the boundary issue which may have acted as a catalyst in the escalation of the boundary dispute. Furthermore, mediation can provide the parties with a 'win-win' solution in a more cost effective manner than litigation. As noted by one commentator:

> "... for a Court to be able to answer the legal and factual questions which underlie a boundary dispute it will often need to undertake an examination of the original title deeds, subsequent evidence perhaps going back several decades (and which is almost certainly disputed), and, in all likelihood, the evidence of one or more expert surveyors. These elements of a boundary dispute could lead to a trial lasting for several days, and the costs involved can, in many cases, be more than the value of the disputed land."[32]

10.17 In the English Court of Appeal decision *Pennock v Hodgson*[33], which involved a boundary dispute between neighbours, Mummery LJ also expressed disapproval about escalating costs in neighbour disputes stating that "The unfortunate consequences of a case like this are that, in the absence of any compromise, someone wins, someone loses, it always costs a lot of money and usually generates a lot of ill-feeling that does not end with the litigation. None of those things are good for neighbours."[34]

10.18 The resolution of boundary disputes in England and Wales was considered by Jackson LJ in his 2010 *Review of Civil Litigation Costs.*[35] Although he did not make any specific recommendations about such disputes, Jackson LJ cited with approval the practice adopted by the English High Court judge Oliver-Jones J in any domestic boundary dispute, by which he orders an early hearing at which the parties and their lawyers must attend, and at which there is an early and serious discussion of the costs involved, the nature of the issues, and what realistic alternatives to litigation there might be, for example, mediation. Oliver-Jones J reported that "such cases almost invariably settle thereafter through mediation or otherwise."[36] The Commission concurs with the observations of Jackson LJ in his Report where he states that: "Domestic boundary disputes and similar property disputes between neighbours are

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29 Callanan "Neutralising Property Disputes: The Role of Mediation" (2009) 14(4) CPLJ 98.

30 [2008] EWCA Civ 837, [2008] BLR 538.

31 LRC CP 50-2008 at 9.24.

32 Greatholder "Boundary Disputes" (April 2010), online article available at: www.russell-cooke.co.uk. See also Callanan "Neutralising Property Disputes: The Role of Mediation" (2009) 14(4) CPLJ 98; Highmore & Beswetherick "Where neighbours should fear to tread" (2008) 841 *Estates Gazette* 151; and See also Jolly "A Suburban Nightmare" (2010) 30 *Law Society Gazette (Eng & Wales)* 20.

33 [2010] EWCA Civ 873.

34 See "Mummery slams feuding neighbours- again" (July 2010) *Solicitors Journal*. Online article available at: www.solicitorsjournal.com. See also Gatty "Drawing the Line" (2007) 151 *Solicitors Journal* 3.

35 Lord Justice Jackson *Review of Civil Litigation Costs Final Report* (The Stationary Office, January 2010).

36 *Ibid.* at 4.11.

particularly well suited to mediation. Judicial encouragement in this regard at an early stage is highly beneficial for the parties."[37] The positive role which can be played by the courts in assisting parties in a boundary dispute to consider mediation is illustrated by the 2008 High Court action *Charlton v Kenny.*[38]

10.19 The Commission also considers that surveyors have an important role in assisting in the resolution of boundary disputes. In its *Green Paper on Proposing Reform of Boundary Surveys in Ireland*[39] the Commission on Land Registration recommended that:

> "Surveyors representing landowners on either side of an adjoining boundary should adopt a mediation approach for surveying and mapping by contacting each other to discuss their findings, clarify issues and try to resolve as many of these issues as possible to reduce the incidence of litigation."[40]

10.20 This recommendation mirrors the observations made in 1881 by Thomas M. Cooley, Chief Justice of the Michigan Supreme Court when he stated that "It is always possible, when corners are extinct, that the surveyor may usefully act as a mediator between parties and assist in preventing legal controversies by settling doubtful lines."[41] To conclude, the Commission concurs with the observation that:

> "Boundary disputes are often bitterly contested and by their nature devalue property and poison neighbourly relations. Headline cases involving boundary disputes are particularly difficult and could encompass violence, injunctions, prison and even murder. To the objective person it is clear there are entrenched positions, aggression and intransigence at its core. Mediation as a system, has proved it is adaptable. If the neighbourly relationship looks as if it might be saved, the parties can follow concrete steps for change which can be used again if the relationship meets further difficulties in the future."[42]

10.21 *The Commission recommends that property boundary disputes are appropriate for resolution through mediation and conciliation and that parties should be advised by their legal representatives to consider and attempt mediation or conciliation in such disputes prior to the commencement of litigation.*

10.22 *The Commission recommends that the courts should continue to be pro-active in advising parties in property disputes and to consider the adjournment of hearings to allow the parties to consider mediation or conciliation.*

(2) Community Mediation

10.23 In its Consultation Paper, the Commission provisionally recommended the continued development of mediation and conciliation services by community law centres for the resolution of community and neighbour property disputes.[43] Where people live close together, there is always the potential for disagreements and disputes. In 2004, Community Mediation Works produced *The State of Conflict in Working Class Communities*, a report documenting the types of conflict that typically exist in working-class neighbourhoods and the damaging effects those conflicts have on community and family

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37 Lord Justice Jackson's *Review of Civil Litigation Costs Final Report* (The Stationary Office, January 2010) at 4.12.

38 2006 No.4266P, High Court, 8 to 11 April 2008 (hearing of action) and 15 April 2008 (settlement after mediation). See LRC CP 50-2008 at 9.12 for a discussion of this case.

39 *Green Paper Proposing Reform of Boundary Surveys in Ireland* (Commission on Land Registration, July 2008). Available at: www.irish-surveyors.ie.

40 *Ibid.* at 69.

41 Speech by the then Chief Justice of Michigan, Thomas Cooley entitled "*The Judicial Function of Surveyors"* at The Michigan Engineers' Annual Meeting, January 1881.

42 Callanan "Neutralising Property Disputes: The Role of Mediation" (2009) 14(4) CPLJ 98.

43 See LRC CP 50-2008 at 9.23.

life.[44] In that report, residents spoke of community spirit giving way to pervasive hopelessness and of the profound difficulties they encounter when trying to resolve conflicts both within the community and through the relevant authorities.

10.24 The spectrum of neighbour disputes and anti social behaviour is wide - on the one hand, neighbour nuisance might refer to a dispute between two neighbours, whilst anti social behaviour might threaten the physical or mental health, safety or security of other households or individuals.[45] Examples of disputes that proceed to community mediation generally include: neighbour disputes involving noise, children, harassment, boundaries, parking, or pets; disputes between tenants and their landlords; disputes that involve issues affecting groups of residents; disputes over small amounts of money; disputes about planning applications; and workplace and other interpersonal problems.[46]

10.25 The Commission noted in its Consultation Paper that through community mediation disputes between neighbours within the same community can be effectively and efficiently resolved without recourse to litigation. Indeed, it can be said that "Community mediation offers a voluntary, safe, confidential and impartial way for people to hear and be heard, a neutral space where neighbours can come up with non-confrontational, non-adversarial ways to resolve conflicts."[47] This reflects the principle that members of the local community are the best people to resolve local disputes.

10.26 The Commission is also aware that some community mediation schemes also run peer mediation programmes in local schools. Peer mediation programmes aim to teach teenagers to manage disputes better, and to prevent bullying.[48] The Commission notes that peer mediation and some community mediations are informal processes in which individuals volunteer to act as mediators between students or neighbours. It is important to note that such informal mediation processes would not fall within the remit of the Commission's statutory definition of mediation as a structured process.

10.27 In its Consultation Paper, the Commission commended the work of Ballymun Community Law Centre and Northside Community Law Centre in providing community mediation services to local residents. The Commission is also aware that there are an increasing number of other community mediation initiatives, such as the Mayo Community Mediation Service and the Cork Community Mediation Service, being establishing to assist in the resolution of community disputes. As noted by one commentator, "An important method of empowering the local communities [is] to give control of such law centres to a management committee containing a built-in majority of community representatives, so that the centre remains responsive to local wishes and needs."[49] The Commission considers that such Centres, through their community mediation and other dispute resolution services, play an important role

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44 *The State of Conflict in Working Class Communities* (Community Mediation Works, 2004).

45 See Wahrhaftiq *Community Dispute Resolution: Empowerment Social Justice* (NAFCM Press, 2004); Hedeen "Institutionalizing Community Mediation: Can Dispute Resolution of, by, and for the People Long Endure" (2004) 108 *Penn State Law Review* 1; and Harrington & Merry "Ideological Production: The Making of Community Mediation" (1988) 22 *Law & Society Review* 4.

46 See *"Community Mediation"* (Advice Services Alliance, July 2008). Available at: www.adrnow.org.uk. See also New South Wales Law Reform Commission *Report on Community Justice Centres* (Report No. 106, 2005); and Faulkes and Claremont, "Community Mediation: Myth and Reality" (1997) 8 *Australian Dispute Resolution Journal* 177.

47 "The State Of 'Anti-Social Behaviour' In Working Class Communities: Policy & Practice" (Community Mediation Works, 2010).

48 See Cremin *Peer Mediation: Citizenship and Social Inclusion in Action* (Open University Press, 2007); Sellman *Mediation Matters: Creating a Peaceful School Through Peer Mediation* (LDA, 2009); Haft "Peer Mediation in Schools: Expectations and Evaluations" (1998) 3 Harv Negot L Rev 213; and Evans & Butler "Violence in Our Schools: Conflict Resolution and Peer Mediation as a Preventive Remedy" (1996) 3 *Dispute Resolution Magazine* 1.

49 Daly "Northside Community Law Centre Celebrates 35 Years" *The Irish Times*, 3 May, 2010. Available at: www.irishtimes.com.

in increasing access to individualised justice for local citizens and they significantly contribute to the fabric of community life. Furthermore, the Commission concurs with the view that:

> "Although mediation will not be sufficient to deal with serious antisocial behaviour, which is associated with alcohol and drug abuse, mental health problems, or criminal activity, its cost effectiveness suggests that there is considerable scope to extend mediation in the area of neighbourhood disputes."[50]

10.28 *The Commission recommends the continued development of mediation and conciliation services by community law centres for the resolution of community and neighbour property disputes.*

D Planning Application Disputes & ADR

10.29 In its Consultation Paper the Commission invited submissions on whether ADR, in particular mediation, has a role to play in the resolution of planning application disputes. The Commission noted that there is currently no provision for the use of ADR in the resolution of planning application disputes and that it had been suggested that:

> "It is to be regretted that the Planning Act, a considerable piece of legislation in size and scope, which was enacted to revise and consolidate the law relating to planning and development in Ireland did not take the opportunity to include a form of ADR, like mediation, with a view to streamlining planning applications. The adjudicative, quasi–judicial function of An Bord Pleanála may not be the most beneficial for the planning process in this regard."[51]

10.30 Indeed, as noted by one commentator "It is clear that even at the early stages there is a role for mediation between an applicant and the local planning authority to improve planning proposals actually drafted instead of dealing with disputes regarding proposals at a later stage. This can ensure planning proposals meet a level of acceptance by both sides before it moves on to the next stage."[52] The Commission did note in its Consultation Paper that, in Ireland, informal negotiations between an applicant and a local planning authority often resolve issues or disputes when they have arisen in relation to a planning application. As a result, the Commission was minded to the view that the integration of ADR processes into the planning system may not be necessary. However, it has been suggested that:

> "The non-confrontational character of mediation is of particular benefit to applicants in the context of the planning system... Given there are no rules or strict form for mediation, a pattern can be devised for mediations in the planning system... In terms of confidentiality and the necessity to maintain transparency, the result of the mediation could be publicly known but the proceedings will be kept strictly confidential and will not be used in any appeal or other forum."[53]

10.31 In the UK, the Planning Inspectorate's 2010 Report *Mediation in Planning*[54] stated: "Mediation should not replace the appeal system which is needed to support local decision-making as the planning system is complex and there will always be areas where mediation will not provide a solution."[55] The Report concluded, nonetheless, that mediation could provide an effective tool to tackle a wide range of planning issues. The Report noted that the New Zealand Environment Court, which deals with planning issues, uses mediation to encourage settlement, narrow and settle issues within disputes and reduce

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50 Brown et al. "The Role of Mediation in Tackling Neighbour Disputes And Anti-Social Behaviour" (Stirling: Stirling University Department of Applied Social Science, 2003) at 3.

51 Morgan & O'Connor "Resolving property disputes, Universal service – a value for money solution?" (2003) 10(4) CLP 96.

52 Callanan "Neutralising Property Disputes: The Role of Mediation" (2009) 14(4) CPLJ 98.

53 *Ibid*.

54 Rozee & Powell "*Mediation in Planning: Report Commissioned by the National Planning Forum and the Planning Inspectorate"* (July 2010). Available at: www.planning-inspectorate.gov.uk.

55 *Ibid.* at 1.

complexity in advance of a hearing. As noted in the 2010 Report: "This recognises that 'success' in mediation in planning is not restricted to finding a complete solution but is also valuable in supporting and simplifying later stages in the process and making hearings more efficient."[56] The Report recommended that mediation should be strongly encouraged by Government by providing a policy framework, creating capacity to allow its benefits to be realised and establishing an appropriate regime of incentives and penalties to support the delivery of a new approach to planning. It also concluded that it might be sensible to require mediation to be considered in planning disputes, as is the case in the Irish civil justice system.[57]

10.32 In a number of submissions received by the Commission on this issue, it was suggested that the informal negotiation process between an applicant and a local planning authority is working sufficiently within the planning application process to resolve many potential issues or disputes and there was no role for mediation in the planning application process. However, in light of the findings in the *Mediation in Planning* Report, the Commission considers that there may be a role for a more structured dispute resolution process, such as mediation, in the planning application process. For this reason, the Commission recommends that local planning authorities should consider whether a more formal approach to resolving issues in the planning process, such as the introduction of a mediation scheme, is appropriate.

10.33 *The Commission recommends that local planning authorities should consider whether a more formal approach to resolving issues in the planning process, such as the introduction of a mediation scheme, is appropriate.*

E Mediation and property-related debt

10.34 In May 2010, the Financial Regulator published data on mortgage arrears in Ireland.[58] The data show that at end March 2010 there were just over 791,000 private residential mortgage accounts in Ireland to a value of €118 billion. Of these 32,321 were in arrears for more than 90 days. The data also shows that overall mortgage debt outstanding for private residential mortgages decreased by over €285 million in the first quarter of 2010. [59] As noted by one commentator, "Unfortunately, in a recession, where people are losing their jobs, an increase in the number of mortgage holders in arrears is to be expected and so too is an increase in the number of repossession orders being sought. The key issue for all of us as a society is how we respond to that situation."[60]

10.35 The Commission in its *Consultation Paper on Personal Debt Management and Debt Enforcement*[61] provided a detailed analysis and discussion on the issue of mortgage arrears and repossessions in this jurisdiction and does not purport to reiterate these in this Report. The Commission does not make a recommendation on this area in this Report but considers that mediation has a role to play in the area of personal debt and debt enforcement. As previously noted by the Commission, section 2(1) of the *Enforcement of Court Orders (Amendment Act) 2009*, which amends section 6 of the *Enforcement of Court Orders Act 1940*, provides that:

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56 *Ibid.* at 10. The Land and Environment Court of New South Wales also offers a mediation facility which has been available since 1991. The service is free, voluntary and confidential to parties involved in disputes before the Court.

57 *Ibid.* at 3.

58 The Commission does not examine the substantive law of mortgages in this Report, which was discussed by the Commission in its *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005) at pp.247ff. The relevant recommendations were implemented in the *Land and Conveyancing Law Reform Act 2009*.

59 "13% Increase in Mortgage Accounts in Arrears for more than 90 days" Press release by the Financial Regulator, 27 May, 2010. Available at www.financialregulator.ie.

60 "Finneran Outlines Current Position on Mortgage Arrears" (Department of Environment, Heritage and Local Government, March 2009). Online article available at: www.environ.ie.

61 See LRC CP 56-2009.

> "On hearing the creditor and the debtor and such evidence, if any, as they may respectively adduce, a judge may, if he or she is satisfied that the debtor has failed to comply with the instalment order if he or she considers it appropriate, request the creditor and the debtor to seek resolution by mediation, within such period as the judge may specify."

10.36 Furthermore, the Commission in its *Interim Report on Personal Debt* recommended the introduction, through Rules of Court, of a Pre-Action Protocol for consumer debt cases.[62] It also proposed that the Protocol, applicable solely in defined claims for the recovery of consumer debt, should require certain information to be given by the creditor to the debtor in the form of a "warning letter" in advance of commencing proceedings. In this "warning letter", the creditor plaintiff, in plain language should, along with other requirements, invite the intended defendant before such proceedings are initiated to use mediation, conciliation, arbitration or another dispute resolution process specified by the intending plaintiff, to settle the claim.[63] In its final Report on this area to be published by the end of 2010, the Commission will return to the issue addressed in the 2009 Consultation Paper as to the precise form of a non-judicial debt settlement scheme and its proposal for a Debt Settlement Office.

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[62] See *Interim Report on Personal Debt Management and Debt Enforcement* (LRC 96-2010) at 2.62.

[63] *Ibid.* at 2.63.

CHAPTER 11 ACCREDITATION, TRAINING & REGULATION

A Introduction

11.01 In this chapter the Commission examines the issues of accreditation, training, and regulation of mediators and conciliators. In Part B the Commission examines the options in relation to regulating mediators and conciliators. The Commission discusses the need for a Code of Conduct for Mediators and Conciliators and also examines training and accreditation standards for practising mediators and conciliators.

B Regulation of Mediators & Conciliators

(1) Consultation Paper

11.02 In its Consultation Paper, the Commission noted that the options for the form of regulation of mediators and conciliators in Ireland included:

i) Self-regulation through professional bodies which would admit to full membership or accredit only those practitioners meeting the levels of training established by the professional body;

ii) Self-regulation under an overall regulatory body which would be responsible for formal recognition of practitioners and which would make completion of specified training a condition of recognition; or

iii) A statutory system which would impose minimum mandatory obligations on practising mediators.[1]

11.03 The Commission also considered in its Consultation Paper that, at this stage in the development of ADR in Ireland, it was appropriate to allow the development of this emerging discipline in the existing non-statutory bodies, but that a statutory set of principles would enable further development to occur on a firm foundation and the Commission invited submissions as to whether the regulation of mediators should continue at present on a non-statutory basis, subject to the principles to be set out in a statutory framework for mediation and conciliation.[2] The Commission also provisionally recommended that a non-statutory scheme should be established, under the auspices of the Department of Justice and Law Reform, to provide for the accreditation of organisations, which, in turn, accredit individual practitioners.[3] Such a non-statutory system would be without prejudice to existing arrangements in particular areas (such as family mediation) and could, in time, provide the basis for a more formal statutory structure at some future point. The Commission now turns to examine the issue of regulation in more detail.

11.04 Since the publication of its Consultation Paper, the Commission is aware that there has been a substantial increase in the number of individuals, both accredited and non-accredited, who are practising commercially as mediators and conciliators. For this reason, the Commission considers that there may be merit, in the future, in establishing a statutory scheme under the auspices of the Department of Justice and Law Reform to prescribe mediation and conciliation bodies which satisfy a number of minimum criteria.[4] The Commission does not wish, however, to make a recommendation on this issue in this

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1 See LRC CP 50-2008 at 10.62

2 See LRC CP 50-2008 at 10.65.

3 See LRC CP 50-2008 at 10.63

4 Such bodies would be published by the Department of Justice and Law Reform by a statutory order made by the Minister for Justice and Law Reform so as to provide both the courts and citizens with a list of quality

Report, because such a statutory scheme would be more appropriate once mediation and conciliation have become fully integrated into the civil justice system.

11.05 The Commission considers that, at this stage in the development of ADR in Ireland, it is appropriate to allow the development of this emerging discipline in the existing non-statutory bodies and that regulation of mediators and conciliators should continue by self-regulation through professional bodies which would admit to full membership or accredit only those practitioners meeting the levels of training established by the professional body. However, for the purposes of ensuring a minimum national standard of competency and quality, the Commission recommends that the Minister for Justice and Law Reform should publish a Code of Conduct for Mediators and Conciliators based on the recommendations of a Working Group established by the Minister for this purpose. The Commission considers that the a statutory Code of Conduct for Mediators and Conciliators would have the following objectives:

- the improvement of knowledge, skills and ethical standards;
- the promotion of standards and quality in practice; and
- the protection of the needs of consumers of mediation or conciliation services and the provision of accountability where they are not met.

The Commission now turns to examine this recommendation in more detail below.

11.06 *The Commission recommends that the form of regulation for mediators and conciliators should continue by self-regulation through mediation and conciliation professional bodies which would admit to full membership or accredit only those practitioners meeting the levels of training established by the professional body.*

11.07 *The Commission recommends that the Minister for Justice and Law Reform shall, as soon as practicable after the coming into force of the Mediation and Conciliation Bill appended to this Report, publish a Code of Conduct for Mediators and Conciliators, based on the recommendations of a Working Group established by the Minister for this purpose, which shall provide practical guidance for the purposes of giving effect to, and complying with, the provisions of the Bill.*

(2) Statutory Code of Conduct for Mediators and Conciliators

11.08 In its Consultation Paper, the Commission invited submissions as to whether the European Code of Conduct for Mediators should be given a statutory basis in Ireland, including in the form of a Code of Practice.[5] As previously noted, the 2004 Code of Conduct for Mediators has been made available on the European Commission's website in order to promote its use by practitioners. The Code does not have the force of law but in the Commission's view it is appropriate to consider whether the general content of the Code should be given some statutory basis.

11.09 The Commission considers that, for the purposes of ensuring consistency and promoting transparency, it is appropriate that all mediators and conciliators adhere to a national statutory Code of Conduct. As the Commission noted in its Consultation Paper, there is currently no statutory basis for the general training or accreditation of mediators or conciliators in Ireland. Rather there is a variety of individuals and bodies that use different standards in training and accrediting mediators and conciliators and arguably the standard of training and accreditation differs between such individuals and organisations.[6] The Commission considers that a statutory Code of Conduct for mediators and conciliators would assist in alleviating any concerns in relation to the competency and quality of individual practitioners.

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assured mediation and conciliation bodies from which their members would be available to provide mediation and conciliation services. As the Commission noted in its Consultation Paper, under section 15(4) of the *Civil Liability and Courts Act 2004* a number of mediation bodies are prescribed (by a statutory Oder made by the Minister for Justice, Equality and Law Reform) as bodies which can nominate persons to act as the chairperson of mediation conferences.

[5] See LRC CP 50-2008 at 3.192.

[6] See LRC CP 50-2008 at 10.02.

11.10 The Commission also considers that a statutory Code of Conduct for mediators and conciliation is a necessary requirement to enhance the profile of, and consumer confidence in, the processes of mediation and conciliation, as there is a danger that "the mediation movement could be derailed by loss of consumer confidence, if quality assurance mechanisms are not introduced to ensure that clients are protected from incompetent mediators."[7] Furthermore, the Commission considers that a statutory Code of Conduct for Mediators and Conciliators would also promote minimum standards amongst all mediation and conciliation professional bodies and it would provide practical guidance for the purposes of compliance with the provisions of the proposed statutory framework for mediation and conciliation recommended in this Report.

11.11 Other jurisdictions have introduced national minimum standards for practising mediators and conciliators. For example, in Australia the 2008 National Mediator Standards[8] specify practice and competency requirements for mediators and inform participants and others about what they can expect of the mediation process and mediators. It is important to note that the 2008 Standard is designed to apply to all types of mediation and has been drafted in wide and general terms.[9] In the United States, Model Standards for Mediator Conduct were introduced. The Model Standards were prepared between1992 and 1994 by a joint committee composed of two delegates from each of three entities: the American Arbitration Association, the American Bar Association Section of Dispute Resolution, and the Society of Professionals in Dispute Resolution (which has since merged with two other organizations to form the Association for Conflict Resolution). The Standards were adopted by at least nine states in total or with slight variations. The Standards are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.[10]

11.12 In light of these developments, the Commission has concluded, and recommends, that a Working Group be established to draft a Code of Conduct for Mediators and Conciliators in conjunction with the Department of Justice and Law Reform. The Commission recommends that the Code of Conduct for Mediators and Conciliators must, inter alia, be based on the general principles set out in the Commission's proposed draft Mediation and Conciliation Bill and must have regard to the content of the 2004 European Commission Code of Conduct, the 2008 EC Directive on Mediation in Civil and Commercial Matters, and the UNCITRAL Model Law on International Commercial Conciliation 2002.

11.13 The Commission is aware that one of the main benefits of mediation and conciliation is the flexibility which is inherent in such processes. The Commission advises that the Working Group consider this when drafting a Code and while they must provide for minimum standards in relation to mediator and conciliator conduct and ethics, the Code should not be over cumbersome or prescriptive.[11] The Commission also recommends that the Code of Conduct must:

(a) be consistent with the role of the parties in mediation and conciliation, and the definition and scope of mediation and conciliation,

(b) be consistent with the general principles concerning mediation and conciliation

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7 Spurin "Accrediting Mediators" (2004) 4 *ADR News – The Nationwide Academy of Dispute Resolution Newsletter* 1 at 6.

8 See *Australian National Mediator Standards: Practice Standards*. Available at: http://www.iama.org.au/pdf/FinalPracticeStandards.pdf.

9 See Sourdin "Australian National Mediator Standards: Commentary on Practice Standards" (September 2007). Available at www.nswbar.asn.au; Tania *"From accreditation to quality mediation practice – Next steps?"* (September 2008). Paper delivered at the 9th National Mediation Conference, Perth, Australia; and Alexander *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International, 2009).

10 *Model Standards for Mediator Conduct* is available at www.abanet.org. *See also* Yang "Ethics Codes for Mediator Conduct: Necessary but Still Insufficient" (2009) 22 *Georgetown Journal of Legal Ethics* 1229.

11 Mediation and conciliation bodies can supplement the Code of Conduct through additional guidelines on mediator and conciliator conduct and ethics for its members.

(c) must have regard to the involvement, where applicable, of a child or dependent in mediation or conciliation process, and to the requirements of *Children First: National Guidelines for the Protection and Welfare of Children*, published by the Office of the Minister for Children and Youth Affairs in the Department of Health and Children in 2010);

(d) must be consistent with the requirements, where applicable, of the 2008 Directive on Cross-Border Mediation in the European Union;

(e) must have regard to the 2004 European Code of Conduct for Mediators, published by the European Commission;

(f) must also have regard to the 2001 European Commission Recommendation establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes;[12]

(g) must provide for the initial and further training of mediators and conciliators (including in the context of family law disputes) in order to ensure that mediation and conciliation are conducted in an effective, impartial and competent way in relation to the parties; and

(h) must provide for the relationship between mediation and conciliation and other forms of dispute resolution, including collaborative practice and early neutral evaluation, and the role of such other forms of dispute resolution.

11.14 *The Commission recommends that the statutory Code of Conduct for Mediators and Conciliators must:*

(a) be consistent with the role of the parties in mediation and conciliation, and the definition and scope of mediation and conciliation,

(b) must be consistent with the general principles concerning mediation and conciliation

(c) must have regard to the involvement, where applicable, of a child or dependent in mediation or conciliation process, and to the requirements of Children First: National Guidelines for the Protection and Welfare of Children, published by the Office of the Minister for Children and Youth Affairs in the Department of Health and Children in 2010);

(d) must be consistent with the requirements, where applicable, of the 2008 Directive on Cross-Border Mediation in the European Union;

(e) must have regard to the 2004 European Code of Conduct for Mediators, published by the European Commission;

(f) must also have regard to the 2001 European Commission Recommendation establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes;[13]

(g) must provide for the initial and further training of mediators and conciliators (including in the context of family law disputes) in order to ensure that mediation and conciliation are conducted in an effective, impartial and competent way in relation to the parties; and

(h) must provide for the relationship between mediation and conciliation and other forms of dispute resolution, including collaborative practice and early neutral evaluation, and the role of such other forms of dispute resolution.

11.15 *The Commission recommends that all mediators and conciliators must adhere to the statutory Code of Conduct for Mediators and Conciliators.*

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12 Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

13 Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

(3) Requirement for Training & Accreditation

11.16 In its Consultation Paper, the Commission provisionally recommended that the training and accreditation of mediators is essential to ensure the quality of the process and it invited submissions as to whether this should be included in any statutory framework for mediation.[14] As the Commission has also already noted, in Ireland any person may act as a mediator or conciliator without being registered, certified or even trained and the professional titles of 'mediator' and 'conciliator' are not protected by law. The Commission agrees with the view of the Law Reform Commission of New South Wales that:

> "... no one is automatically qualified to perform the role of a mediator simply by virtue of professional or occupational qualifications in another discipline, or because of appropriate personal qualities. The role requires knowledge and skills of a distinct process. Training is the most effective way for a person to acquire expertise. Failure to undergo training in the process increases the risk that a mediator's behaviour will be incompetent and unethical, and of harm to clients."[15]

11.17 As the Commission noted in its Consultation Paper, there is currently no statutory basis for the general training or accreditation of mediators or conciliators in Ireland. Rather there is a variety of individuals and bodies that use different standards in training and accrediting mediators and conciliators and arguably the standard of training and accreditation differs between such individuals and organisations.[16] The Commission considers it fundamental that issues of training and accreditation of mediation and conciliation are properly addressed. According to the Irish National Accreditation Board:

> "Accreditation can provide competitive advantage and facilitate access to export markets, in addition to acting as a catalyst to raise standards and institute improved work practices... Accreditation is objective proof that organisations have the competence to comply with best practice. It is the internationally recognised system that is used to develop and sustain high standards of performance"[17]

11.18 Article 3 of the 2008 EC Directive on Mediation defines a mediator as "any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation." While there is no requirement in Article 3 for individuals to be trained or accredited under that definition of a mediator, Article 4 (2) of the 2008 EC Directive states that "Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties." Furthermore, recital 16 to the 2008 EC Directive provides that Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services. It is evident from these provisions of the 2008 EC Directive that the issues of training and accreditation must be adequately addressed in order to protect both the mediation process itself and also those engaging in the process.

11.19 The Commission strongly considers that where individuals are commercially and professionally presenting themselves as practising mediators or conciliators, such individuals must have received proper training and accreditation in these processes. The Commission recommends that a requirement that all practising mediators and conciliators must receive training and accreditation should be included in the proposed Code of Conduct and Ethics for Mediators and Conciliators.

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14 See LRC CP 50-2008 at 10.09.

15 Law Reform Commission of New South Wales *Report on Training and Accreditation of Mediators* (Report 67 – 1991) at 3.6.

16 See LRC CP 50-2008 at 10.02.

17 See www.inab.ie.

11.20 It should be noted that in its Consultation Paper the Commission provisionally recommended that all family mediators should receive specialist training in this particular area.[18] As previously noted by the Commission, family disputes give rise to a number of particularly sensitive and unique issues for mediators and conciliators to address, including the appropriateness of mediation or conciliation, the need for ongoing screening in such processes, the role of children in the process, and the potential for power imbalances between the parties.[19] For this reason, the Commission recommends that a mediator or conciliator in a mediation or conciliation process involving a family law dispute should obtain initial and further training in screening techniques to assess the appropriateness, throughout the mediation or conciliation process, of mediation or conciliation.

11.21 Furthermore, as noted by the International Mediation Institute, "post-training education (Continuing Professional Development – CPD) has a crucial influence on competency in any professional field and will be an important element in establishing competency."[20] The Commission concurs with this view and considers that professional mediators and conciliators must also engage in continuing professional development in this field.

11.22 In relation to setting minimum standards for bodies providing training and accreditation of mediators and conciliators the Commission considers that there are a number of options. These include:

- Accreditation under the International Organisation for Standardization 17024:2003 of mediation and conciliation training and accreditation individuals through the Irish National Accreditation Board.[21] ISO 17024:2003 is a general standard from the ISO that sets out the requirements for a body operating a certification scheme for persons and the standards of competence and attributes required of persons being certified. Personnel certification confirms the competence of named individuals to perform specified services or duties. This is achieved through the issuing of a certificate of competence[22].; or
- Accreditation of mediation and conciliation training and accreditation bodies by the Further Education and Training Awards Council (FETAC). The NQAI was placed on a statutory footing under the *Qualifications (Education and Training) Act 1999* and came into full force in June 2001. As well as providing for the establishment of the NQAI, it also provides for the establishment of two awarding bodies – the Further Education and Training Awards Council (FETAC) and the Higher Education and Training Awards Council (HETAC).

11.23 The Commission considers that, at this stage in the development of mediation and conciliation in Ireland, it is more appropriate to guarantee minimum standards of training and accreditation through a statutory Code of Conduct for Mediators and Conciliators rather than through the accreditation of bodies providing mediation or conciliation training and accreditation by an independent body such as the Irish Accreditation Board or FETAC.

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18 LRC CP 50-2008 at 10.65.

19 Cross reference to family mediation chapter

20 Section 10 of the *IMI Mediator Competency Certificate Standards*. Available at www.imimediation.org.

21 The International Organisation for Standardization (ISO) is the world largest standards developing UN-based organization. Since 1947, ISO has published more than 18,000 International Standards, ranging from standards for activities such as agriculture and construction, through mechanical engineering, to medical devices, to the newest information technology developments.

22 The certification body must also describe the certification process, how candidates are evaluated and define periods of recertification. In addition, the personnel certification body must be able to demonstrate how conflict of interest is managed and must have mechanisms in place to objectively evaluate the outcome of the certification process. Once the personnel certification body has all of the organisational and technical measures in place, and has been operating a certification service for a period of time sufficient to have historical records built up, and to be able to demonstrate that the operation is stable (typically three months minimum), it can apply to Irish National Accreditation Board for accreditation.

11.24 The Commission considers that it may be appropriate once mediation and conciliation have become more established within the civil justice system for an independent body, such as the Irish National Accreditation Board or the National Qualifications Authority of Ireland, to be responsible for certifying bodies that train and accredit individuals as mediators or conciliators. Until such time, the Commission recommends that the issues of training and accreditation should be addressed through the proposed statutory Code of Conduct for Mediators and Conciliators.

11.25 *The Commission recommends that mediators and conciliators must receive training and accreditation and that this requirement should be set out in the statutory Code of Conduct for Mediators and Conciliators.*

11.26 *The Commission recommends that a mediator or conciliator in a mediation or conciliation process involving a family law dispute should obtain initial and further training in screening techniques to assess the appropriateness, throughout the mediation or conciliation process, of mediation or conciliation. This requirement should be included in the Code of Conduct for Mediators and Conciliators.*

(4) Enforcement of the Code of Conduct

11.27 The Commission considers that the options for regulating the enforcement of a statutory Code of Conduct for mediators and conciliators include:

- Self regulation by professional mediation and conciliation bodies who adopt the Code and consent to enforce it through disciplinary action. Such bodies will therefore discipline such of its members who have subscribed to the Code and failed to observe the requirements. Among the advantages of this option are that it would not be necessary to create a new administrative framework to enforce the Code.
- Regulation by an overall regulatory body. Those who subscribe to the Code must become members of the regulatory body and such members would be subject to the disciplinary and grievance procedures of the regulatory body if they breach the Code.

11.28 The Commission considers that the most appropriate option, at this stage in the development of mediation and conciliation, would be self regulation by mediation and conciliation bodies who adopt the Code and who will enforce it through disciplinary action. The Commission does not consider it appropriate, at this stage in the development of mediation and conciliation in Ireland, for one mediation or conciliation body to provide the overall regulation for the profession. As noted by one commentator:

> "... an overly restrictive approach does not allow for mediation to develop... [Where there is] only one organisation that can train and register mediators there is in effect a bottleneck that stifles the development of the field. If more organisations had a stake in the field then perhaps more competitive creativity would lead to increased use of mediations."

11.29 The Commission recommends that the Code of Conduct for Mediators and Conciliators should also set out uniform complaints, disciplinary and grievance procedures to be enforced by all professional mediation and conciliation bodies. The Commission considers that this would ensure that such procedures are open and transparent and that all mediators and conciliators would be subject to the same procedures and sanctions for complaints or misconduct.

11.30 *The Commission recommends that, at this stage in the development of mediation and conciliation, regulating the enforcement of the Code should be achieved through self regulation by professional mediation and conciliation bodies who adopt the Code and consent to enforce it through disciplinary action.*

11.31 *The Commission recommends that the Code of Conduct for Mediators and Conciliators should also set out uniform complaints, disciplinary and grievance procedures to be enforced by all professional mediation and conciliation bodies.*

CHAPTER 12 SUMMARY OF RECOMMENDATIONS

The Commission's recommendations in this Report may be summarised as follows:

12.01 The Commission recommends that there should be a statutory framework for specific forms of Alternative Dispute Resolution (ADR) processes, in particular mediation and conciliation, and that the statutory framework should not include a prescriptive definition of ADR. The Commission also recommends that the statutory framework should make clear that it applies to individuals, partnerships, corporate bodies and State bodies. [Paragraph 2.15]

12.02 The Commission recommends that ADR should be considered as comprising a broad spectrum of structured binding and non-binding processes, including mediation and conciliation, but does not include litigation though it may be linked to or integrated with litigation. ADR processes can involve the assistance of a neutral third party and can empower parties to resolve potential or actual disputes. The Commission also recommends that, to avoid any doubt on the matter, the proposed statutory framework should not apply to arbitration within the meaning of the *Arbitration Act 2010*. [Paragraph 2.16]

12.03 The Commission recommends that mediation and conciliation should be clearly and consistently separately defined in legislative form. [Paragraph 2.24]

12.04 The Commission recommends that when provision for mediation is made in legislative form, it should be defined as a facilitative and confidential structured process in which the parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute with the assistance of an independent third party, called a mediator. [Paragraph 2.37]

12.05 The Commission recommends that a mediator may not, at any stage in the mediation process, make a proposal to the parties to resolve the dispute. [Paragraph 2.38]

12.06 The Commission recommends that the parties may, at any time during a mediation process, request the mediator to take on the role of conciliator, thus converting the process into a conciliation process. [Paragraph 2.39]

12.07 The Commission recommends that when provision for conciliation is made in legislative form, it should be defined as an advisory and confidential structured process in which an independent third party, called a conciliator, actively assists the parties in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute. [Paragraph 2.44]

12.08 The Commission recommends that a conciliator may, at any stage in the conciliation process, make a proposal to the parties to resolve the dispute, but he or she may is not empowered to impose such a proposal on the parties. [Paragraph 2.45]

12.09 The Commission recommends that the legislative framework for mediation and conciliation set out in the Mediation and Conciliation Bill attached to the Report should apply to disputes arising within Ireland, and that this is separate from the obligation to implement the 2008 EC Directive on Mediation in Cross-Border Disputes, Directive 2008/52/EC. [Paragraph 2.47]

12.10 The Commission recommends that the legislative framework for mediation and conciliation set out in the Mediation and Conciliation Bill attached to the Report should be applicable to the resolution of civil or commercial disputes that could give rise to civil liability. The Commission also recommends that the process of mediation and of conciliation may be used by the parties either on their own initiative, that is, independently of any civil proceedings in court or any existing statutory scheme, or else arising from an initiative occurring after the initiation of civil proceedings in court, whether that initiative arises from the parties or from the court. The Commission also recommends that the statutory framework for mediation

and should apply to any dispute arising within an employment context that has not been referred to the dispute resolution processes of the Labour Relations Commission or the Labour Court. [Paragraph 2.51]

12.11 The Commission recommends that the Mediation and Conciliation Bill attached to the Report is not to be interpreted as replacing any mediation, conciliation, or other dispute resolution process which is provided for in accordance with any other enactment but may, with any necessary modification, be adapted for such process under any such other enactment. [Paragraph 2.52]

12.12 The Commission recommends that the Mediation and Conciliation Bill attached to the Report should not be interpreted as permitting any mediation or conciliation process to negate or avoid any rights or obligations in respect of which the parties are not free to decide for themselves under the relevant applicable law, including:

(a) mandatory constitutional, statutory or regulatory provisions of Ireland; or

(b) the provisions or principles of international conventions to which Ireland, the Member States of the European Union or the European Union are party. [Paragraph 2.53]

12.13 The Commission recommends that a cross border dispute means any civil or commercial dispute that could give rise to civil liability, but does not include a dispute concerning or arising from:

(a) The civil status of natural persons;

(b) The legal capacity of natural persons;

(c) The guardianship of infants;

(d) Rights, including rights in property, arising out of a matrimonial relationship;

(e) Bankruptcy, proceedings relation to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(f) Any mediation, conciliation or other dispute resolution process engaged in under the statutory remit of the Labour Relations Commission or the Labour Court;

(g) Customs, revenue or taxation matters;

(h) The liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)

(i) Social welfare matters; or

(j) Without prejudice to the matters referred in (a) to (i), any rights or obligations in respect of which the parties are not free to decide for themselves under the relevant applicable law, including:

(i) mandatory constitutional, statutory or regulatory provisions of Ireland; or

(ii) the provisions or principles of international conventions to which Ireland, the Member States of the European Union or the European Union are party. [Paragraph 2.57]

12.14 The Commission recommends that a cross-border dispute be defined as one which arises where at least one of the parties is domiciled or habitually resident in a Member State of the European Union other than that of any other party on the date which:

(a) the parties agree to use mediation after the dispute has arisen;

(b) mediation is considered arising is ordered by the court; or

(c) an obligation to use mediation arises under an enactment. [Paragraph 2.58]

12.15 The Commission recommends that the key principles underlying mediation and conciliation should be set out in statutory form. [Paragraph 3.04]

12.16 The Commission recommends that participation in mediation and conciliation is voluntary, and any party involved in a mediation or conciliation, and the mediator or conciliator, may withdraw from the process at any time and without explanation. [Paragraph 3.12]

12.17 The Commission recommends that confidentiality in mediation and conciliation should be subject to a distinct form of privilege. [Paragraph 3.42]

12.18 The Commission recommends that mediation or conciliation communications include statements and proposals that are made orally, through conduct, or in writing or other recorded activity by a mediator, conciliator, party or non-party participant. [Paragraph 3.46]

12.19 The Commission recommends that mediation or conciliation communications include communications to initiate mediation or conciliation and other non-session communications arising out of or in connection with a mediation or conciliation. [Paragraph 3.47]

12.20 The Commission recommends that :

- a party involved in mediation or conciliation may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication;
- a mediator or conciliator may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication; and
- a non-party participant may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication of the non-party participant. [Paragraph 3.52]

12.21 The Commission recommends that parties may agree that a non-party participant be allowed to participate in a mediation or conciliation. [Paragraph 3.53]

12.22 The Commission recommends that a non-party participant, in the context of a mediation or conciliation, includes a qualified legal practitioner, an expert witness, a potential party or friend of a party or potential party. [Paragraph 3.54]

12.23 The Commission recommends that the confidentiality privilege may be waived during any subsequent civil litigation, and, or alternatively, any recommenced civil proceedings out of which the mediation and conciliation arose if:

- In the case of the privilege of a party, it is expressly waived by all parties to the mediation or conciliation;
- In the case of the privilege of a mediator or conciliator, it is expressly waived by the mediator or conciliator; and
- In the case of the privilege of a non-party participant, it is expressly waived by the non-party participant. [Paragraph 3.56]

12.24 The Commission recommends that the confidentiality privilege does not apply - where disclosure of the content of the agreement resulting from mediation or conciliation is necessary in order to implement or enforce that agreement; where disclosure is necessary to prevent physical or psychological injury or ill health to a person; where disclosure is required by law; where the mediation or conciliation communication is used to attempt to commit a crime, or to commit a crime, or to conceal a crime; or where disclosure is necessary to prove or disprove a claim or complaint of professional misconduct or negligence filed against a mediator or conciliator. [Paragraph 3.70]

12.25 The Commission recommends that evidence introduced into it used in a mediation or conciliation that is otherwise admissible or subject to discovery in civil proceedings outside of a mediation or conciliation shall not be or become inadmissible because it was introduced into or used in a mediation or conciliation. [Paragraph 3.71]

12.26 The Commission recommends that a mediator or conciliator shall ensure, at all stages in the mediation or conciliation process, that a party has the capacity to engage in the process by reference

(a) In the case of a natural person, to the test of capacity in the *Scheme of the Mental Capacity Bill 2008*; and

(b) In the case of any other person, to whether that person (whether unincorporated or incorporated) is acting within their powers. [Paragraph 3.84]

12.27 The Commission recommends that parties involved in a mediation or conciliation should be fully informed by the mediator or conciliator:

(a) about the process, that is, mediation or conciliation as the case may be, before they agree to participate in it;

(b) that their continued participation in the process is voluntary; and

(c) that they understand and consent to any agreed outcomes reached in the process. [Paragraph 3.89]

12.28 The Commission recommends that parties may be encouraged by a mediator or conciliator to seek independent advice, legal or otherwise, before signing an agreement entered into during a mediation or conciliation. [Paragraph 3.95]

12.29 The Commission recommends that the financial cost of a mediation or conciliation should be borne by the parties, and should be on the basis of a written agreement to that effect entered into at the beginning of the mediation or conciliation. This should not be interpreted as preventing a party to civil proceedings in the High Court or Circuit Court from submitting to taxation of costs any bill of costs arising from the proceedings. [Paragraph 3.103]

12.30 The Commission recommends that the financial cost of mediation and conciliation should be reasonable and proportionate to the importance of the issue or issues at stake and to the amount of work carried out by the mediator or conciliator. [Paragraph 3.104]

12.31 The Commission recommends that where a dispute has been submitted to mediation or conciliation, the parties and the mediator or conciliator should seek to complete the process in the shortest time practicable, relative to the nature of the dispute. [Paragraph 3.108]

12.32 The Commission recommends that the Government should commit to the integration and use of ADR processes, such as mediation and conciliation, in resolving disputes both internally within the public sector and where the State is a party to a civil dispute. [Paragraph 3.120]

12.33 The Commission recommends that consideration should be given to extending the panels at the Legal Aid Board to include a panel of accredited mediators and conciliators. This panel could conduct legally aided mediations or conciliations in appropriate civil disputes. [Paragraph 3.130]

12.34 The Commission recommends that ADR mechanisms should aim at preserving the flexibility of the process. [Paragraph 3.134]

12.35 The Commission recommends that the principles of mediator and conciliator neutrality and impartiality must be included in any general statutory formulation that concerns mediation and conciliation. [Paragraph 3.141]

12.36 The Commission recommends that a mediator or conciliator should disclose to the parties any actual or potential conflict of interest he or she may have. [Paragraph 3.147]

12.37 The Commission recommends that a mediation or conciliation clause means a contract clause, in writing, entered into by the parties in which they agree to submit to mediation or conciliation (or both) any dispute which has arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. The Commission also recommends that “writing” should, to avoid any doubt, be defined to include electronic communications, such as by way of email or the internet. [Paragraph 4.18]

12.38 The Commission recommends that if any party to a mediation clause or conciliation clause commences any proceedings in any court against any other party to such clause in respect of any matter agreed to be referred to mediation or conciliation, any party to the proceedings may, at any time after proceedings have been commenced, apply to the court to stay the proceedings. [Paragraph 4.19]

12.39 The Commission recommends that the court, unless it is satisfied that the mediation clause or conciliation clause is inoperative, is incapable of being performed or is void, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, should make an order staying the proceedings. [Paragraph 4.20]

12.40 The Commission recommends that it is a matter for the court, having regard to the circumstances of each individual case, to determine the severability of mediation and conciliation clauses. [Paragraph 4.24]

12.41 The Commission recommends that the Courts Service should commission or prepare comprehensive information booklets on the various dispute resolution processes which are available for the resolution of disputes, including the processes of mediation and conciliation. [Paragraph 4.30]

12.42 The Commission recommends that the relevance of ADR, including mediation and conciliation, should be incorporated into all third level programmes in law, the professional programmes conducted by the Law Society of Ireland and the Bar Council of Ireland, and other relevant professional course of education, including engineering and accountancy. [Paragraph 4.35]

12.43 The Commission recommends that a solicitor acting for any person should, prior to initiating any civil or commercial proceedings, advise the person to consider mediation and conciliation where such process or processes are appropriate for the resolution of the dispute. [Paragraph 4.45]

12.44 The Commission recommends where any person commences or becomes a party to any civil or commercial proceedings, he or she shall, when the first document commencing the proceedings is filed with the court, sign a certificate (called a 'Mediation and Conciliation Certificate') stating that mediation or conciliation (or both), has been considered as processes for settling the dispute. [Paragraph 4.50]

12.45 The Commission recommends that a solicitor, if any, acting for any person who commences any civil or commercial proceedings shall, when the first document commencing the proceedings is filed with the court, and at the same time as their client, sign the Mediation and Conciliation Certificate, stating that the solicitor has advised the person to consider mediation and conciliation, where appropriate, for the resolution of the disputes. [Paragraph 4.51]

12.46 The Commission recommends that a court may, either on the application of any party involved in civil proceedings or of its own motion, and where the court considers it appropriate having regard to all the circumstances of the case, invite the parties to consider using mediation or conciliation to attempt to settle civil and commercial proceedings. The Commission also recommends that, in such cases, the general principles set out in the *Mediation and Conciliation Bill* (in Part 2 of the Bill) will apply. [Paragraph 4.62]

12.47 The Commission recommends that where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the Court should adjourn the proceedings and may make an order extending the time for compliance by any party with the provisions of the relevant Rules of Court or of any order of the Court in the proceedings, and may make such other orders or give such directions as the Court considers will facilitate the effective use of mediation or conciliation. [Paragraph 4.63]

12.48 The Commission recommends that where a party involved in a civil proceeding wishes to apply to the court to adjourn proceedings for the purposes of considering using mediation or conciliation to attempt to settle the proceedings, the application should be made not later than 28 days before the date on which the proceedings are first listed for hearing. [Paragraph 4.64]

12.49 The Commission recommends that, in deciding whether it is appropriate having regard to all the circumstances of the case to invite the parties to consider using mediation or conciliation to attempt to settle the proceedings, the court should consider in particular whether mediation or conciliation has a reasonable prospect of success and whether it is likely to assist the parties in resolving their dispute or issues in the dispute. [Paragraph 4.71]

12.50 The Commission recommends that a pilot Court-annexed mediation scheme should be established in the Circuit Court based on the principles of the voluntary participation of the litigants. [Paragraph 4.75]

12.51 The Commission recommends that where the subject-matter of a mediation or conciliation involves a dispute to which any limitation period (within the meaning of the Statutes of Limitations) may apply, the parties to the mediation or conciliation may agree in writing to suspend the running of any relevant limitation period from the commencement of the mediation or conciliation to the termination of the

mediation or conciliation, and such agreement in writing shall operate to suspend the running of any relevant limitation period. [Paragraph 4.81]

12.52 The Commission recommends that for the purposes of suspending the running of limitation periods, a mediation or conciliation commences on the day on which the parties agree in writing to suspend the running of any limitation periods. [Paragraph 4.82]

12.53 The Commission recommends that for the purposes of suspending the running of limitation periods, the termination of a mediation or conciliation occurs:

(a) by the conclusion of an agreement by the parties, on the date of that agreement, or

(b) by a declaration of the mediator or, as the case may be, the conciliator in writing, after consultation with the parties, to the effect that further efforts at mediation or conciliation are no longer justified, on the date on the declaration, or

(c) by a declaration of a party or parties in writing addressed to the mediator or conciliator to the effect that the mediation or conciliation is terminated, on the date of the declaration. [Paragraph 4.83]

12.54 The Commission recommends that the parties alone shall determine, either at the beginning of any mediation or conciliation or when agreement (if any) is reached, the enforceability, or otherwise, of any mediated or conciliated agreement that arises from the mediation or conciliation process. [Paragraph 4.91]

12.55 The Commission recommends that a mediated or conciliated agreement is enforceable as a contract at law where it is in writing and signed by all the parties and, as the case may be, by the mediator or conciliator. [Paragraph 4.95]

12.56 The Commission recommends that a Court may, on the application of the parties to any written agreement reached at a mediation or conciliation, enforce the terms of that agreement where it is satisfied that is appropriate to do so. [Paragraph 4.100]

12.57 The Commission recommends that where an application for enforcement concerns any written agreement reached at mediation or conciliation that affects the rights or entitlements (including financial or property rights or entitlements) of the parties, or, where relevant, any dependent of the parties, the court may, in its discretion, enforce the terms of that agreement where it is satisfied that the agreement adequately protects those rights or entitlements having regard to all the circumstances (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland). [Paragraph 4.101]

12.58 The Commission recommends that there should not be a statutory provision imposing a mandatory good faith requirement of parties in a mediation or conciliation. [Paragraph 4.108]

12.59 The Commission recommends where a court has invited parties to consider using mediation or conciliation, the court, in awarding costs in the proceedings connected with that invitation (or, as the case may be, any appeal in those proceedings) may, where it considers it just, have regard to any unreasonable refusal of any party to consider using mediation or conciliation where such a process had, in the Court's opinion, a reasonable prospect of success. [Paragraph 4.115]

12.60 The Commission recommends that, except where the Court determines otherwise, family law cases should not be subject to costs sanctions for unreasonable refusal to consider mediation or conciliation. [Paragraph 4.116]

12.61 The Commission recommends that where a court has invited parties to consider using mediation or conciliation, the court may, in the absence of an agreement by the parties as to financial cost, make such order for costs incurred by either party in connection with the mediation or conciliation process as it considers just, including an order that both parties bear the costs equally. [Paragraph 4.123]

12.62 The Commission recommends that the content of a report to the court, if any, by a mediator or conciliator should be limited to a neutral summary of the outcome of the mediation or conciliation. [Paragraph 4.127]

12.63 The Commission recommends that organisations should consider designing and implementing internal dispute handling systems which incorporate mediation and conciliation processes so as to promote the early resolution of employment disputes. [Paragraph 5.21]

12.64 The Commission recommends that attendance at an information session on family dispute resolution processes including mediation, conciliation, and collaborative practice should, in general, be a statutory mandatory requirement in family law cases. [Paragraph 6.17]

12.65 The Commission recommends that attendance at an information session may take place either before or after an application is submitted to the court to commence family law proceedings, but, in any event, not later than 28 days before the date on which the proceedings are first listed for hearing. [Paragraph 6.18]

12.66 The Commission recommends that a party in family law proceedings shall not be required to attend an information session where: (a) where the proceedings involve an application for a safety order, a barring order or a protection order under the *Domestic Violence Act 1996*; or (b) where a party satisfies the court that his or her personal safety, or the safety of his or her children is or are at risk. [Paragraph 6.19]

12.67 The Commission recommends that the person providing the information session shall provide each party who is to attend the information session with one of the following certificates: (a) a certificate stating that the person attended the information session; or (b) a certificate stating that the person did not attend the information session. [Paragraph 6.20]

12.68 The Commission recommends that where a party has not attended an information session and where the proceedings do not involve an application for a safety order, a barring order or a protection order under the Domestic Violence Act 1996; or where a party does not satisfy the court that his or her personal safety, or the safety of his or her children is or are at risk, a court may in its discretion adjourn the family law proceedings until the party has attended an information session. [Paragraph 6.21]

12.69 The Commission recommends that parents or guardians involved in a family law dispute may (whether as part of a mediation or conciliation process or otherwise) prepare and agree a parenting plan, which provides for parenting and guardianship arrangements for any child of theirs, by reference to the best interests of each child. [Paragraph 6.26]

12.70 The Commission recommends that a parenting plan should not, in itself, be enforceable as a contract but may, with the agreement and consent of the parties, be made subject to a court order, on such terms as the court considers appropriate. [Paragraph 6.27]

12.71 The Commission recommends that mediation and conciliation of family law disputes should not be a mandatory requirement before the commencement of proceedings. [Paragraph 6.32]

12.72 The Commission recommends that a mediator or conciliator in a mediation or conciliation process involving a family law dispute shall advise any party who does not have a legal representative or other professional adviser involved in the process to consider seeking independent advice, whether legal or otherwise. [Paragraph 6.42]

12.73 The Commission recommends that a court may, in its discretion, enforce the terms of an agreement reached through a mediation or conciliation where it is satisfied that the agreement adequately protects the rights or entitlements of the parties and their dependents, if any, that the agreement is based on full and mutual disclosure of assets, and that one party has not been overborne by the other in reaching the agreement and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland, including Article 41.3.2 º. [Paragraph 6.47]

12.74 The Commission recommends that if a mediator or conciliator in a mediation or conciliation process involving a family law dispute (having consulted the parties) considers that it is appropriate to involve any child or dependent directly in the process, the mediator or conciliator must obtain the consent of the child or dependent and should provide, or ensure there are provided, appropriate facilities for this purpose. [Paragraph 6.54]

12.75 The Commission recommends that the mediator or conciliator in a mediation or conciliation process involving a family law dispute (having consulted the parties) may allow a suitably qualified adult,

which may include any person who has been appointed as a guardian ad litem, to participate in the process as a non-party participant on behalf of any child or dependent. [Paragraph 6.55]

12.76 The Commission recommends that a mediator or conciliator in a mediation or conciliation process involving a family law dispute shall obtain initial and further training in screening techniques to assess the appropriateness, throughout the mediation or conciliation process, of mediation or conciliation. [Paragraph 6.59]

12.77 The Commission recommends that collaborative practice means an advisory and confidential structured process in which a third party called a collaborative practitioner, actively assists and advises the parties in a dispute in their attempt to reach, on a voluntary basis, a mutually acceptable agreement. [Paragraph 6.63]

12.78 The Commission recommends that a collaborative practitioner means a suitably qualified professional adviser and, without prejudice to the generality of that requirement, may be a practising solicitor, barrister, accountant or psychologist. [Paragraph 6.64]

12.79 The Commission recommends that every collaborative practitioner engaged in collaborative practice should obtain initial and further training, including continuing professional development, in collaborative practice. [Paragraph 6.66]

12.80 The Commission recommends that a non-statutory Code of Practice and Ethics should be introduced for collaborative practitioners. [Paragraph 6.74]

12.81 The Commission recommends that attendance at an information session on mediation and conciliation should be a mandatory statutory requirement in proceedings under section 117 of the *Succession Act 1965*. [Paragraph 6.89]

12.82 The Commission recommends that the State Claims Agency should, where appropriate, consider and attempt ADR processes, including mediation and conciliation, in the resolution of medical negligence cases. [Paragraph 7.12]

12.83 The Commission recommends the introduction of an early neutral evaluation scheme for personal injury claims, including any claims arising out of medical treatment. The Commission also recommends that early neutral evaluation should be defined as a process that occurs at an early stage of civil proceedings in which the parties state the factual and legal circumstances to an independent third party (the "early neutral evaluator") with suitable knowledge of the subject matter of the dispute, and in which the early neutral evaluator provides an evaluation to the parties as to what the likely outcome of the proceedings would be if the claim proceeded to a hearing in court. [Paragraph 7.24]

12.84 The Commission recommends that the Code of Conduct for Mediators and Conciliators should provide for the use of early neutral evaluation in personal injuries claims. [Paragraph 7.25]

12.85 The Commission recommends that section 15 of the *Civil Liability and Courts Act 2004* should be amended to provide that upon the request of any party to a personal injuries action or upon its own initiative the court may direct parties to attend a mediation conference. [Paragraph 7.32]

12.86 The Commission recommends that an apology (including an apology made by a health care practitioner in respect of any care or treatment) made by or on behalf of a person who may become or who is a party in a personal injuries action, whether before or after any such action has been initiated in court, in respect of a matter to which any such action may relate or relates—

(a) does not constitute an express or implied admission of civil liability by that party, and

(b) is not relevant to the determination of civil liability in the action. [Paragraph 7.47]

12.87 The Commission recommends that evidence of an apology made by or on behalf of a person as set out above in respect of a matter to which the action relates is not admissible in any civil proceedings as evidence of civil liability of the person. [Paragraph 7.48]

12.88 The Commission recommends that a "health care practitioner" includes a registered medical practitioner, dentist or nurse. [Paragraph 7.49]

12.89 The Commission recommends that it is not necessary to introduce specific requirements concerning mediation and conciliation orders in connection with the High Court's Commercial Court List. [Paragraph 8.22]

12.90 The Commission recommends that mediation and conciliation may be appropriate for the resolution of shareholder disputes under section 205 of the *Companies Act 1963* and should be considered prior to litigation. [Paragraph 8.27]

12.91 The Commission recommends that Conciliation Rules for Use With Public Works and Construction Services Contracts should be issued by the Department of Finance. [Paragraph 8.30]

12.92 The Commission recommends that professional bodies in the construction sector should incorporate mediation into their suite of dispute resolution options for the resolution of appropriate disputes. [Paragraph 8.37]

12.93 The Commission the recommends that a statutory Code of Conduct for Mediators and Conciliators should have regard to the European Commission's Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes and that such principles should be adapted and applied, to the extent that is appropriate, to all mediations and conciliations. [Paragraph 9.13]

12.94 The Commission recommends that codes on complaint handling procedures should continue to be drafted both by public institutions or business or consumer organisations. [Paragraph 9.20]

12.95 The Commission recommends that that a statutory Code of Conduct for Mediators and Conciliators should have regard to the Organisation for Economic Co-operation and Development (OECD) Recommendation on Consumer Dispute Resolution and Redress and that its principles should be adapted and applied, to the extent that is appropriate, to all mediations and conciliations. [Paragraph 9.22]

12.96 The Commission recommends that the jurisdictional limit of the Small Claims Court be increased to €3,000. [Paragraph 9.40]

12.97 The Commission recommends that property boundary disputes are appropriate for resolution through mediation and conciliation and that parties should be advised by their legal representatives to consider and attempt mediation or conciliation in such disputes prior to the commencement of litigation. [Paragraph 10.21]

12.98 The Commission recommends that the courts should continue to be pro-active in advising parties in property disputes and to consider the adjournment of hearings to allow the parties to consider mediation or conciliation. [Paragraph 10.22]

12.99 The Commission recommends the continued development of mediation and conciliation services by community law centres for the resolution of community and neighbour property disputes. [Paragraph 10.28]

12.100 The Commission recommends that local planning authorities should consider whether a more formal approach to resolving issues in the planning process, such as the introduction of a mediation scheme, is appropriate. [Paragraph 10.33]

12.101 The Commission recommends that the form of regulation for mediators and conciliators should continue by self-regulation through mediation and conciliation professional bodies which would admit to full membership or accredit only those practitioners meeting the levels of training established by the professional body. [Paragraph 11.06]

12.102 The Commission recommends that the Minister for Justice and Law Reform shall, as soon as practicable after the coming into force of the *Mediation and Conciliation Bill* appended to this Report, publish a Code of Conduct for Mediators and Conciliators, based on the recommendations of a Working Group established by the Minister for this purpose, which shall provide practical guidance for the purposes of giving effect to, and complying with, the provisions of the Bill. [Paragraph 11.07]

12.103 The Commission recommends that the statutory Code of Conduct for Mediators and Conciliators must:

(a) be consistent with the role of the parties in mediation and conciliation, and the definition and scope of mediation and conciliation,

(b) must be consistent with the general principles concerning mediation and conciliation

(c) must have regard to the involvement, where applicable, of a child or dependent in mediation or conciliation process, and to the requirements of Children First: National Guidelines for the Protection and Welfare of Children, published by the Office of the Minister for Children and Youth Affairs in the Department of Health and Children in 2010);

(d) must be consistent with the requirements, where applicable, of the 2008 Directive on Cross-Border Mediation in the European Union;

(e) must have regard to the 2004 European Code of Conduct for Mediators, published by the European Commission;

(f) must also have regard to the 2001 European Commission Recommendation establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes;[1]

(g) must provide for the initial and further training of mediators and conciliators (including in the context of family law disputes) in order to ensure that mediation and conciliation are conducted in an effective, impartial and competent way in relation to the parties; and

(h) must provide for the relationship between mediation and conciliation and other forms of dispute resolution, including collaborative practice and early neutral evaluation, and the role of such other forms of dispute resolution. [Paragraph 11.14]

12.104 The Commission recommends that all mediators and conciliators must adhere to the statutory Code of Conduct for Mediators and Conciliators. [Paragraph 11.15]

12.105 The Commission recommends that mediators and conciliators must receive training and accreditation and that this requirement should be set out in the statutory Code of Conduct for Mediators and Conciliators. [Paragraph 11.25]

12.106 The Commission recommends that a mediator or conciliator in a mediation or conciliation process involving a family law dispute should obtain initial and further training in screening techniques to assess the appropriateness, throughout the mediation or conciliation process, of mediation or conciliation. This requirement should be included in the Code of Conduct for Mediators and Conciliators. [Paragraph 11.26]

12.107 The Commission recommends that, at this stage in the development of mediation and conciliation, regulating the enforcement of the Code should be achieved through self regulation by professional mediation and conciliation bodies who adopt the Code and consent to enforce it through disciplinary action. [Paragraph 11.30]

12.108 The Commission recommends that the Code of Conduct for Mediators and Conciliators should also set out uniform complaints, disciplinary and grievance procedures to be enforced by all professional mediation and conciliation bodies. [Paragraph 11.31]

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[1] Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

APPENDIX: DRAFT MEDIATION AND CONCILIATION BILL 2010

DRAFT MEDIATION AND CONCILIATION BILL 2010

ARRANGEMENT OF SECTIONS

PART 1

PRELIMINARY AND GENERAL

Section

1. Short title and commencement

2. Interpretation and non-application to arbitration

PART 2

MEDIATION AND CONCILIATION: GENERAL

3. Purpose of Part 2

4. Mediation and conciliation: role of parties and general scope

5. General role of mediator, conciliator and non-party participants

6. General principles that apply to mediation and conciliation

7. Confidentiality privilege for mediation and conciliation

8. Mediation and conciliation process

9. Financial cost of mediation and conciliation

10. Enforceability of mediation and conciliation agreements: general

11. Limitation periods

PART 3

MEDIATION AND CONCILIATION: CIVIL PROCEEDINGS IN COURT

12. Purpose of Part 3

13. Staying court proceedings arising from mediation or conciliation clause

14. Duty of solicitor to advise client concerning mediation or conciliation

15. Confirmation that mediation or conciliation considered by litigants in civil proceedings

16. Court inviting parties to consider mediation or conciliation

17. Enforceability of mediation and conciliation agreements: role of court

18. Award of costs of mediation and conciliation where connected to proceedings

19. Content of report to court by mediator or conciliator

PART 4

MEDIATION AND CONCILIATION: SPECIFIC INSTANCES

20. Purpose of Part 4

CHAPTER 1

Family Law Disputes and Proceedings

21. Duty of mediator and conciliator in family law dispute as to independent advice

22. Parenting plan

23. Involvement of child or dependent in mediation or conciliation process in family law dispute

24. Information session concerning family law dispute resolution processes

25. Enforceability of mediation and conciliation agreements in family law dispute: role of court

CHAPTER 2

Personal Injuries Disputes and Proceedings

26. Effect of apology in personal injuries proceedings

27. Mediation conference in personal injuries proceedings

28. Early neutral evaluation in personal injuries claims

PART 5

CROSS-BORDER MEDIATION IN THE EUROPEAN UNION

29. Purpose of Part 5

30. Meaning of cross-border dispute

31. Parties in cross-border dispute

32. Application of this Act to cross-border dispute: general

33. Enforceability of agreement resulting from cross-border mediation

34. Confidentiality of cross-border mediation

35. Effect of cross-border mediation on limitation periods

PART 6

CODE OF CONDUCT FOR MEDIATORS AND CONCILIATORS AND TRAINING ISSUES

36. Code of Conduct for mediators and conciliators

37. Training of mediators and conciliators in family law disputes

38. Training of collaborative practitioners

ACTS REFERRED TO

Arbitration Act 2010	2010, No.1
Companies Act 1963	1963, No.33
Civil Liability and Courts Act 2004	2004, No.31
Domestic Violence Act 1996	1996, No.1
Statutes of Limitations	
Succession Act 1965	1965, No.27

DRAFT MEDIATION AND CONCILIATION BILL 2010

BILL

Entitled

AN ACT TO FACILITATE THE SETTLEMENT OF CIVIL AND COMMERCIAL DISPUTES BY MEDIATION AND CONCILIATION; TO SET OUT THE PRINCIPLES APPLICABLE TO MEDIATION AND CONCILIATION IN GENERAL; TO SET OUT SPECIFIC ARRANGEMENTS FOR MEDIATION AND CONCILIATION CONNECTED WITH CIVIL PROCEEDINGS IN COURT; TO SET OUT SPECIFIC ARRANGEMENTS FOR MEDIATION AND CONCILIATION IN CONNECTION WITH PARTICULAR DISPUTES; TO GIVE EFFECT TO DIRECTIVE NO. 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 MAY 2008 [1] ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS; TO PROVIDE FOR A STATUTORY CODE OF CONDUCT FOR MEDIATORS AND CONCILIATORS AND FOR TRAINING ISSUES; AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

PRELIMINARY

Short title and commencement

1.—(1) This Act may be cited as the Mediation and Conciliation Act 2010.

(2) This Act comes into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Explanatory note
This is a standard section setting out the short title and commencement arrangements.

Interpretation and non-application to arbitration

2.— (1) In this Act —

"Code of Conduct for Mediators and Conciliators" has the meaning assigned by *section 36*;

[1] O.J. No. L.136, 24/5/2008, p.3

"conciliation" has the meaning assigned by *section 4(2)*;

"cross-border dispute" has the meaning assigned by *section 30*;

"Directive on Cross-Border Mediation in the European Union" means Directive No. 2008/52/EC of the European Parliament and of the Council of 21 May 2008[2] on Certain Aspects of Mediation in Civil and Commercial Matters;

"dispute" has the meaning assigned by *section 4(4)*;

"family law dispute" means a dispute that could give rise to family law proceedings in court;

"family law proceedings" means proceedings under a "family law enactment," "civil partnership law proceedings" or "cohabitancy proceedings," each within the meaning of *section 5* of the *Courts (Consolidation and Reform) Bill 2010*;[3]

"mediation" has the meaning assigned by *section 4(1)*;

"mediation or conciliation communications" include —

(*a*) statements and proposals that are made orally, through conduct, or in writing or other recorded activity by a mediator, conciliator, party or non-party participant, and

(*b*) communications to initiate mediation or conciliation and other non-session communications arising out of or in connection with a mediation or conciliation;

"Minister" means the Minister for Justice and Law Reform;

"non-party participant," in the context of a mediation or conciliation, includes a qualified legal practitioner, an expert witness, a potential party or friend of a party or potential party,

"party" or, where relevant, "parties" includes a natural person and a legal person and, without prejudice to the generality of that definition, includes the State, a Government Department, a local authority, any other body established by or under an enactment (including a company), and an unincorporated body (including a partnership or club).

(2) Subject to *section 35*, this Act does not apply to arbitration within the meaning of the Arbitration Act 2010.

Explanatory note

Subsection (1) sets out a number of definitions for the purposes of the Bill.

"Code of Conduct for Mediators and Conciliators": this definition refers to the statutory Code of Conduct for Mediators and Conciliators to be made under *section 36* of the Bill, which implements the recommendation in paragraph 11.07.

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[2] O.J. No. L.136, 24/5/2008, p.3

[3] The reference to *section 5* of the *Courts (Consolidation and Reform) Bill 2010* is to the section in the draft *Courts (Consolidation and Reform) Bill 2010* in the Commission's *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

"Conciliation": the definition of conciliation (see *section 4(2)*) implements the recommendation in paragraph 2.44.

"Cross-border dispute": the definition of "cross-border dispute" (see *section 30*) implements the recommendation in paragraph 2.57 and refers to the disputes dealt with in the 2008 EU Directive on Certain Aspects of Mediation, 2008/52/EC, which *Part 5* of the Bill proposes to implement.

"Dispute": the definition of dispute (see *section 4(4)*) implements the recommendation in paragraph 2.51, which is based on the general definition of "civil and commercial matters" in the 2000 EU "Brussels I" Regulation No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and (in respect of mandatory statutory requirements) the text in the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (SI No.27 of 1995).

"Family law proceedings": the definition of "family law proceedings" for the purposes of *Part 5, Chapter 1* of the Bill refers to the definition in *section 5* of the draft *Courts (Consolidation and Reform) Bill 2010* in the Commission's *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

"Mediation": the definition of mediation (see *section 4(1)*) implements the recommendation in paragraph 2.37.

"Mediation or conciliation communications": the definition of mediation or conciliation communications, which is connected with the specific form of confidentiality privilege for mediation and conciliation set out in *section 7*, implements the recommendations in paragraphs 3.46 and 3.47.

"Non-party participant": the definition of non-party participant implements the recommendation in paragraph 3.54: see also *section 5(3)* on the involvement of a non-party participant in a mediation or conciliation.

"party" or "parties": the definition of "party" or "parties" implements the recommendation in paragraph 2.16 that, to avoid any doubt the Bill applies to disputes involving a natural person (an individual) and also a legal person, whether the State, a Government Department, a local authority, any other body established by or under an enactment (such as a company) and an unincorporated body (including a partnership or club).

Subsection (2) implements the recommendation in paragraph 2.16 that, to avoid any doubt, the Bill does not, in general, apply to or affect arbitration within the meaning of the *Arbitration Act 2010*. This is subject to the provisions in *section 35* of the Bill, which involve the implementation of Article 8 of the 2008 EU Directive on Certain Aspects of Mediation, 2008/52/EC.

PART 2

MEDIATION AND CONCILIATION: GENERAL

Purpose of Part 2

3.— This Part sets out—

(*a*) the general scope of mediation and conciliation,

(*b*) the role of the parties, mediators, conciliators and non-party participants,

(*c*) the general principles that apply in mediation and conciliation,

(*d*) the nature and scope of the specific confidentiality privilege that applies in mediation and conciliation,

(*e*) the main elements of the mediation and conciliation process,

(*f*) the financial cost of mediation and conciliation,

(*g*) the enforceability of mediation and conciliation agreements in general (subject to the specific provisions in *Part 3*) and

(*h*) the effect of mediation and conciliation on statutory limitation periods concerning civil proceedings in court.

Explanatory note

This section describes the general purposes of *Part 2* of the Bill. Purpose clauses have been used from time to time, for example, in the *Education Act 1998.* They have also been used in the draft *Courts (Consolidation and Reform) Bill 2010* in the Commission's *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

Mediation and conciliation: role of parties and general scope

4.— (1) For the purposes of this Act, "mediation" means a facilitative and confidential structured process in which the parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute with the assistance of an independent third party, called a mediator.

(2) For the purposes of this Act, "conciliation" means a facilitative and confidential structured process in which an independent third party, called a conciliator, actively assists the parties in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.

(3) The process of mediation and of conciliation may be used by the parties either —

(*a*) on their own initiative, that is, independently of any civil proceedings in court, or

(*b*) arising from an initiative occurring after the initiation of civil proceedings in court, whether that initiative arises from the parties or from the court.

(4) "Dispute" means any civil or commercial dispute that could give rise to civil liability, but—

(*a*) this Act does not apply to any mediation, conciliation or other dispute resolution process engaged in under the statutory remit of the Labour Relations Commission or the Labour Court (notwithstanding which, this Act does apply to any dispute arising within an employment context that has not been referred to the dispute resolution processes of the Labour Relations Commission or the Labour Court), and

(*b*) without prejudice to *subparagraph (a)*, and subject to *Part 4*, this Act is not to be interpreted as replacing any mediation, conciliation or other dispute resolution process which is provided for in accordance with any other enactment (but this Act may, with any necessary modification, be adapted for any such process under any other enactment), and

(*c*) without prejudice to *section 17*, this Act is not to be interpreted as permitting any mediation or conciliation process to negate or avoid any rights or obligations in respect of which the parties are not free to decide themselves under the relevant applicable law, including —

(i) mandatory constitutional, statutory or regulatory provisions of Ireland, or

(ii) the provisions or principles of international conventions to which Ireland, the Member States of the European Union or the European Union are party.

Explanatory note

Subsection (1) implements the recommendation in paragraph 2.37 that mediation should be defined as a facilitative and confidential structured process in which the parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute with the assistance of an independent third party, called a mediator.

Subsection (2) implements the recommendation in paragraph 2.44 that conciliation should be defined as a facilitative and confidential structured process in which an independent third party, called a conciliator, actively assists the parties in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.

Subsection (3) implements the recommendation in paragraph 2.51 that mediation and conciliation may be used by parties either on their own initiative, that is, independently of any civil proceedings in court, or, alternatively, arising from an initiative occurring after the initiation of civil proceedings (whether the initiative arises from the parties or the court).

Subsection (4) implements the recommendations in paragraphs 2.51, 2.52 and 2.53 that the legislation should, in general, apply to civil and commercial disputes. This term is not confined to the scope of "civil and commercial matters" within the meaning of the 2000 EU "Brussels I" Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which determines the scope of "cross border disputes" under the 2008 EC Directive on Mediation, which *Part 5* of the Bill proposes to implement. Nonetheless, the scope of the term "civil and commercial matters" in this section is subject to three provisos. The first proviso relates to where employment disputes are being dealt with through the mediation or conciliation processes of the Labour Relations Commission or the Labour Court (any other employment-related dispute may, however, use the processes in this Bill). The second proviso is that the Bill (with the exception of *Part 4*, which contains additional provisions for family law and personal injuries disputes) is not intended to be interpreted as replacing any mediation, conciliation or other dispute resolution process which is already provided for in accordance with any other enactment. A number of existing statutory provisions already provide

for varying forms of mediation or dispute resolution outside the scope of civil proceedings in court. These include dispute resolution processes concerning: equality matters under the *Employment Equality Acts 1998 to 2008* and the *Equal Status Acts 2000 to 2008*; landlord and tenant disputes under the *Residential Tenancies Act 2004*; assessment of needs under the *Disability Act 2005*; and resolution of certain complaints by mediation under the *Medical Practitioners Act 2007*. The section provides that, in such instances, this Bill may, with any necessary modification, be adapted for any such process under any such other enactment. The third proviso is that mediation or conciliation cannot be used to avoid any mandatory constitutional or statutory requirements. This part of the section takes account of the provisions in *section 17* of the Bill on the enforceability of mediation and conciliation agreements, and has also adapted the comparable text used in the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (SI No.27 of 1995).

General role of mediator, conciliator and non-party participant

5.— (1) A mediator and, as the case may be, a conciliator shall comply with the Code of Conduct for Mediators and Conciliators published under *section 36*.

(2) A mediator may not, at any stage in the mediation process, make a proposal to the parties to resolve the dispute.

(3) A conciliator may, at any stage in the conciliation process, make a proposal to the parties to resolve the dispute, but he or she is not empowered to impose such a proposal on the parties.

(4) The parties may agree that a non-party participant be allowed to participate in a mediation or conciliation.

Explanatory note

Subsection (1) implements the recommendation in paragraph 11.15 that a mediator and, as the case may be, a conciliator must comply with the Code of Conduct for Mediators and Conciliators published by the Minister for Justice and Law Reform under *section 36* of the Bill.

Subsection (2) implements the recommendation in paragraph 2.38 that a mediator, by contrast with a conciliator (see *subsection (3)*, below), may not, at any stage in the mediation process, make a proposal to the parties to resolve the dispute.

Subsection (3) implements the recommendation in paragraph 2.45 that a conciliator, by contrast with a mediator may, at any stage in the conciliation process, make a proposal to the parties to resolve the dispute but that he or she is not empowered to impose such a proposal on the parties.

Subsection (4) implements the recommendation in paragraph 3.53 to provide for the involvement in a mediation or conciliation of a "non-party participant," defined (in *section 2* of the Bill) to include a qualified lawyer, expert, potential party or friend of a party or potential party.

General principles that apply to mediation and conciliation

6.— The following principles shall apply to a mediation and to a conciliation under this Act—

(*a*) participation in mediation and conciliation is voluntary, and any party involved in mediation or conciliation, and the mediator or conciliator, may withdraw from the process at any time and without explanation,

(*b*) the specific form of confidentiality privilege set out in *section 7* shall apply to communications made during mediation and conciliation,

(*c*) the parties involved in a mediation or conciliation shall be informed, in accordance with *section 8*, of their right to determine the outcome of the mediation or conciliation,

(*d*) where a dispute has been submitted to mediation or conciliation, the parties, and the mediator and, as the case may be, the conciliator, shall seek to complete the process in the shortest time practicable, relative to the nature of the dispute, and

(*e*) a mediator or conciliator shall be neutral and impartial, including by complying with *section 8(4)*.

Explanatory note

This section implements the recommendation in paragraph 3.04 that the legislation on mediation and conciliation should set out the key principles underlying mediation and conciliation.

Paragraph (a) implements the recommendation in paragraph 3.12 that participation in mediation and conciliation is voluntary, and any party involved in mediation or conciliation, and the mediator or conciliator, may withdraw from the process at any time and without explanation.

Paragraph (b) implements the recommendation in paragraph 3.42 that a specific form of confidentiality privilege (defined in *section 7* of the Bill) shall apply to communications made during mediation and conciliation.

Paragraph (c) implements the recommendation in paragraph 3.89 concerning the right to self-determination, the details concerning which are set out in *section 8(1)*.

Paragraph (d) implements the recommendation in paragraph 3.108 where a dispute has been submitted to mediation or conciliation, the parties, and the mediator and, as the case may be, the conciliator, must seek to complete the process in the shortest time practicable, relative to the nature of the dispute.

Paragraph (e) implements the recommendation in paragraph 3.141 concerning the neutrality and impartiality of a mediator or conciliator: see also the duty to disclose any conflict of interest in *section 8(4)*.

Confidentiality privilege for mediation and conciliation

7.— (1) A party involved in mediation or conciliation may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication.

(2) A mediator or conciliator may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication.

(3) A non-party participant may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication of the non-party participant.

(4) The confidentiality privilege referred to in *subsections (1) to (3)* may be waived during any subsequent civil litigation (and, or alternatively, any recommenced civil proceedings out of which the mediation or conciliation arose) if—

(*a*) in the case of the privilege of a party in *subsection (1)*, it is expressly waived by all parties to the mediation or conciliation,

(*b*) in the case of the privilege of a mediator or conciliator in *subsection (2)*, it is expressly waived by the mediator or conciliator, and

(*c*) in the case of the privilege of a non-party participant in *subsection (3)*, it is expressly waived by the non-party participant.

(5) The confidentiality privilege referred to in *subsections (1) to (3)* does not apply where disclosure of the content of any agreement resulting from mediation or conciliation is necessary in order to implement or enforce that agreement.

(6) The confidentiality privilege referred to in *subsections (1) to (3)* does not apply where disclosure is necessary to prevent physical or psychological injury or ill-health to a party.

(7) The confidentiality privilege referred to in *subsections (1) to (3)* does not apply where disclosure is required by law.

(8) The confidentiality privilege referred to in *subsections (1) to (3)* does not apply where the mediation or conciliation communication is used to attempt to commit a crime, or to commit a crime, or to conceal a crime.

(9) The confidentiality privilege referred to in *subsections (1) to (3)* does not apply to a mediation or conciliation which is sought or offered to prove or disprove a civil claim concerning the negligence or misconduct of a mediator or conciliator based on conduct occurring during a mediation or conciliation, or a complaint to a professional body concerning such negligence or misconduct.

(10) Evidence introduced into or used in a mediation or conciliation that is otherwise admissible or subject to discovery in civil proceedings outside of a mediation or conciliation shall not be or become inadmissible or protected by privilege in such civil proceedings solely because it was introduced into or used in a mediation or conciliation.

Explanatory note

This section implements the Commission's specific recommendations that follow from the general recommendation in paragraph 3.42 (implemented in *section 6(b)* of the Bill) that a specific form of confidentiality privilege shall apply to communications made during mediation and conciliation.

Subsection (1) implements the recommendation in paragraph 3.52 that a party involved in mediation or conciliation may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication.

Subsection (2) implements the recommendation in paragraph 3.52 that a mediator or conciliator may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication.

Subsection (3) implements the recommendation in paragraph 3.52 that a non-party participant may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication of the non-party participant.

Subsection (4) implements the recommendation in paragraph 3.56 concerning the waiver in any civil litigation of the specific confidentiality privilege that arises in mediation and conciliation.

Subsection (5) implements the recommendation in paragraph 3.70 that the specific confidentiality privilege that arises in mediation and conciliation does not apply where disclosure of the content of any agreement resulting from mediation or conciliation is necessary in order to implement or enforce that agreement.

Subsection (6) implements the recommendation in paragraph 3.70 that the confidentiality privilege that arises in mediation and conciliation does not apply where it is necessary to prevent physical or psychological injury or ill-health to a person.

Subsection (7) implements the recommendation in paragraph 3.70 that the confidentiality privilege that arises in mediation and conciliation does not apply where disclosure is required by law.

Subsection (8) implements the recommendation in paragraph 3.70 that the confidentiality privilege that arises in mediation and conciliation does not apply where the mediation or conciliation communication is used to attempt to commit a crime, or to commit a crime, or to conceal a crime.

Subsection (9) implements the recommendation in paragraph 3.70 that the confidentiality privilege that arises in mediation and conciliation does not apply to a mediation or conciliation which is sought or offered to prove or disprove a civil claim concerning the negligence or misconduct of a mediator or conciliator based on conduct occurring during a mediation or conciliation, or a complaint to a professional body concerning such negligence or misconduct.

Subsection (10) implements the recommendation in paragraph 3.71 that evidence introduced into or used in a mediation or conciliation that is otherwise admissible or subject to discovery in civil proceedings outside of a mediation or conciliation shall not be or become inadmissible or protected by privilege in such civil proceedings solely because it was introduced into or used in a mediation or conciliation.

Mediation and conciliation process

8.— (1) The parties involved in a mediation or conciliation shall be fully informed by the mediator or conciliator—

(*a*) about the process, that is, mediation or conciliation as the case may be, before they agree to participate in it,

(*b*) that their continued participation in the process is voluntary, and

(*c*) that they understand and consent to any agreed outcomes reached in the process.

(2) The parties may, at any time during a mediation process, request the mediator to take on the role of conciliator, thus converting the process into a conciliation process.

(3) The parties may be encouraged by a mediator or conciliator to seek independent advice, including legal advice, before agreeing to or signing any agreement entered into during conciliation or mediation.

(4) A mediator or conciliator shall disclose to the parties any actual or potential conflict of interest he or she may have.

(5) A mediator or conciliator shall ensure, at all stages in the mediation or conciliation process, that a party has the capacity to engage in the process, by reference —

(*a*) in the case of a natural person, to the test of capacity in the *Scheme of the Mental Capacity Bill 2008*,[4] and

(*b*) in the case of any other person, to whether that person (whether unincorporated or incorporated) is acting within their powers.

Explanatory note

Subsection (1) implements the specific recommendations that follow from the general recommendation in paragraph 3.89 (implemented in *section 6 (c)* of the Bill) concerning self-determination, namely, that the parties involved in a mediation or conciliation must be fully informed by the mediator or conciliator: (a) about the process before they agree to participate in it; (b) that their continued participation in the process is voluntary; and (c) that they understand and consent to any agreed outcomes reached in the process.

Subsection (2) implements the recommendation in paragraph 2.39 that the parties may, at any time during a mediation process, request the mediator to take on the role of conciliator, thus converting the process into a conciliation process.

Subsection (3) implements the recommendation in paragraph 3.95 that the parties may be encouraged by a mediator or conciliator to seek independent advice, including legal advice, before agreeing to or signing any agreement entered into during conciliation or mediation.

Subsection (4) implements the specific recommendation in paragraph 3.147 that follows from the general recommendation in paragraph 3.141 (implemented in *section 6 (e)* of the Bill) concerning the neutrality and impartiality of a mediator or conciliator, namely, the requirement to disclose to the parties any actual or potential conflict of interest of the mediator or conciliator.

Subsection (5) implements the recommendation in paragraph 3.84 that a mediator or conciliator must ensure, at all stages in the mediation or conciliation process, that a party, whether an individual or an undertaking, has the capacity to engage in the process.

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[4] This refers to the *Scheme of the Mental Capacity Bill 2008* published by the Department of Justice and Law Reform in September 2008. The Commission understands that a *Mental Capacity Bill* based on the 2008 Scheme of a Bill will be published by the end of 2010 or in early 2011. The proposed mental capacity legislation would implement the key recommendations in the Commission's *Report on Vulnerable Adults and the Law* (LRC 83-2006).

Financial cost of mediation and conciliation

9.— (1) The financial cost of a mediation or conciliation shall, subject to *subsection (2)* and *section 18*, be borne by the parties, and shall be on the basis of a written agreement to that effect entered into at the beginning of the mediation or conciliation.

(2) (*a*) Subject to *paragraph (b)*, the financial cost of mediation and conciliation shall be reasonable and proportionate to the importance of the issue or issues at stake and to the amount of work carried out by the mediator or conciliator.

(*b*) Nothing in *paragraph (a)* shall be interpreted as preventing a party to civil proceedings in the High Court or Circuit Court from submitting to taxation of costs any bill of costs arising from the proceedings.

Explanatory note

Subsection (1) implements the recommendation in paragraph 3.103 that, in general, the financial cost of a mediation or conciliation is to be borne by the parties on the basis of a written agreement to that effect entered into at the beginning of the mediation or conciliation. This is subject to: (a) *subsection (2)*, which sets out a test that the cost be reasonable and proportionate; and (b) *section 18* of the Bill, which provides for costs orders in limited circumstances where parties involved in civil proceedings accept an invitation from a court to consider mediation or conciliation.

Subsection (2) implements the recommendation in paragraph 3.104 that the financial cost of mediation and conciliation be reasonable and proportionate to the importance of the issue at stake and to the amount of work carried out by the mediator or conciliator. It also provides that this is subject to the entitlement of a party involved in civil proceedings in court to submit a bill of costs to taxation of costs ("taxation of costs" involves a decision by a Taxing Master in the High Court or County Registrar in the Circuit Court as to whether the legal costs were reasonable in the circumstances).

Enforceability of mediation and conciliation agreements: general

10.— (1) The parties alone shall determine, either at the beginning of any mediation or conciliation or when agreement (if any) is reached, the enforceability, or otherwise, of any mediated or conciliated agreement that arises from the mediation or conciliation process.

(2) Subject to *subsection (1)* and *section 17*, a mediated or conciliated agreement is enforceable as a contract at law where it is in writing and signed by all the parties and, as the case may be, by the mediator or conciliator.

Explanatory note

Subsection (1) implements the recommendation in paragraph 4.91 that the parties alone have the power to determine, either at the beginning of any mediation or conciliation or when agreement (if any) is reached, the enforceability, or otherwise, of any mediated or conciliated agreement that arises from the mediation or conciliation process. This emphasises the control of the parties over the mediation or conciliation process.

Subsection (2) implements the recommendation in paragraph 4.95 that a mediated or conciliated agreement is enforceable as a contract at law where it is in writing and signed by all the parties and, as the case may be, by the mediator or conciliator. This enforceability is subject to the general requirement in *subsection (1)* concerning the role of the parties to agree enforceability. It is also subject to those situations, referred to in *section 17*, where the subject matter of the dispute may require a court order. This can arise, for example, in family law disputes where specific aspects of a case may require court approval of any settlement.

Limitation periods

11.— (1) Where the subject-matter of a mediation or conciliation involves a dispute to which any limitation period (within the meaning of the Statutes of Limitations) may apply, the parties to the mediation or conciliation may agree in writing to suspend the running of any relevant limitation period from the commencement of the mediation or conciliation to the termination of the mediation or conciliation, and such agreement in writing shall operate to suspend the running of any relevant limitation period.

(2) For the purposes of suspending the running of limitation periods, a mediation or conciliation commences on the day on which the parties agree in writing to suspend the running of any limitation periods.

(3) For the purposes of suspending the running of limitation periods, the termination of a mediation or conciliation occurs —

(*a*) by the conclusion of an agreement by the parties, on the date of that agreement, or

(*b*) by a declaration of the mediator or, as the case may be, the conciliator in writing, after consultation with the parties, to the effect that further efforts at mediation or conciliation are no longer justified, on the date on the declaration, or

(*c*) by a declaration of a party or parties in writing addressed to the mediator or conciliator to the effect that the mediation or conciliation is terminated, on the date of the declaration.

Explanatory note

Subsection (1) implements the recommendation in paragraph 4.81 that where the subject-matter of a mediation or conciliation involves a dispute to which any limitation period (within the meaning of the *Statute of Limitations 1957*, as most recently amended by the *Statute of Limitations (Amendment) Act 2000*) may apply, the parties to the mediation or conciliation may agree in writing to suspend the running of any relevant limitation period from the beginning of the mediation or conciliation to the termination of the mediation or conciliation, and such agreement in writing will operate to suspend the running of any relevant limitation period. This follows the general approach in Article 8 of the 2008 EU Directive 2008/52/EC on Mediation in Cross-Border Civil and Commercial Matters.

Subsection (2) implements the recommendation in paragraph 4.82 that for the purposes of suspending the running of limitation periods, a mediation or conciliation commences on the day on which the parties agree in writing to suspend the running of any limitation periods.

Subsection (3) implements the recommendation in paragraph 4.83 that for the purposes of suspending the running of limitation periods, the termination of a mediation or conciliation occurs: (a) by the conclusion of an agreement by the parties, on the date of that agreement, or (b)

by a declaration of the mediator or, as the case may be, the conciliator in writing, after consultation with the parties, to the effect that further efforts at mediation or conciliation are no longer justified, on the date on the declaration, or (c) by a declaration of a party or parties in writing addressed to the mediator or conciliator to the effect that the mediation or conciliation is terminated, on the date of the declaration.

PART 3

MEDIATION AND CONCILIATION: CIVIL PROCEEDINGS IN COURT

Purpose of Part 3

12.— This Part sets out—

(*a*) the role of the courts in staying (that is, bringing to an end) court proceedings where the parties have agreed to submit a dispute to mediation or conciliation by a mediation or conciliation clause,

(*b*) the provisions required for any mediation or conciliation process that may become connected with civil proceedings in court, including where the process may arise after civil proceedings have been initiated,

(*c*) the duty of a solicitor to advise a client concerning mediation or conciliation,

(*d*) the obligation of litigants to confirm that they considered mediation or conciliation,

(*e*) the role of the court in inviting parties to consider mediation or conciliation,

(*f*) the role of the court in the enforceability of mediation and conciliation agreements,

(*g*) the limited circumstances in which an award of costs may be made concerning mediation and conciliation connected to civil proceedings and

(*h*) the content of a report to a court by a mediator or conciliator.

Explanatory note

This section describes the general purposes of *Part 3* of the Bill.

Staying court proceedings arising from mediation or conciliation clause

13.— (1) In this section, “mediation or conciliation clause” means a contract clause, in writing, entered into by the parties in which they agree to submit to mediation or conciliation (or both) any dispute which has arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) If any party to a mediation or conciliation clause commences any proceedings in any court against any other party to such clause in respect of any matter agreed to be referred to mediation or conciliation, any party to the proceedings may at any time after proceedings have been commenced apply to the court to stay the proceedings.

(3) The court, unless it is satisfied that the mediation or conciliation clause is inoperative, is incapable of being performed or is void (which may include that the clause purports to deal with a matter which is excluded or not otherwise permitted by virtue of *section 4(4)*), or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

(4) It is a matter for the court, having regard to the circumstances of each individual case, to determine the severability of a mediation or conciliation clause.

(5) In this section—

(*a*) a mediation or conciliation clause may be in the form of a mediation or conciliation clause within a written contract or in the form of a separate written agreement, and

(*b*) the requirement of writing is met by an electronic communication if the information contained in it is accessible so as to be useable for subsequent reference.

(6) In this section, "electronic communication" means any communication that the parties make by means of data messages; and "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, messages communicated over the internet, electronic data interchange (EDI), electronic mail (email), telegram, telex or telecopy.

Explanatory note

This section implements the recommendations in paragraphs 4.18, 4.19 and 4.20 that a court must, in general, stay (that is, bring to an end) any proceedings where the parties have agreed, in writing, to submit to mediation or conciliation (or both) any dispute which has arisen or which may arise between them, using a mediation clause or conciliation clause. This mandatory requirement, which mirrors a court's powers under the *Arbitration Act 2010*, is subject to certain conditions. The section also implements the recommendation in paragraph 4.24 that it remains a matter for the court, having regard to the circumstances of each individual case, to determine the severability of mediation and conciliation clauses. The definition of "writing" in the section includes electronic communication, such as over the internet or by email.

Duty of solicitor to advise client concerning mediation or conciliation

14.— A solicitor, if any, acting for any person shall, prior to initiating any civil or commercial proceedings (which, without prejudice to the generality of the scope of such proceedings, shall include a claim under section 205 of the *Companies Act 1963* or a dispute concerning the boundary between two adjoining lands), advise the person to consider mediation and conciliation where such process or processes are appropriate for the resolution of the dispute.

Explanatory note

This section implements the recommendation in paragraph 4.45 that a solicitor acting for any person must, prior to initiating any civil or commercial proceedings, advise the person to consider mediation and conciliation where such process or processes are appropriate for the resolution of the dispute. The general scope of the term "civil and commercial proceedings" is sufficiently wide to encompass claims under section 205 of the *Companies Act 1963* and boundary disputes. Nonetheless, these have been included in this section to reflect the specific recommendations in paragraph 8.27 (claims under section 205 of the *Companies Act 1963*) and paragraph 10.21 (boundary disputes).

Confirmation that mediation or conciliation considered by litigants in civil proceedings

15.— (1) Where any person commences any civil or commercial proceedings, he or she shall, when the first document commencing the proceedings is filed with the court, sign a certificate, referred to in this section as a "Mediation and Conciliation Certificate," stating that mediation or conciliation (or both) has (or have) been considered as processes for settling the dispute.

(2) Where any person becomes a party to any civil or commercial proceedings, he or she shall, when the first document relevant to that party in connection with the proceedings is filed with the court, sign a Mediation and Conciliation Certificate stating that mediation or conciliation (or both) has (or have) been considered as processes for settling the dispute.

(3) A solicitor, if any, acting for any person who commences any civil or commercial proceedings shall, when the first document commencing the proceedings is filed with the court (and at the same time as the person), sign the Mediation and Conciliation Certificate, stating that the solicitor has advised the person to consider mediation and conciliation, where appropriate, for the resolution of the dispute.

Explanatory note

This section implements the recommendations in paragraph 4.50 and 4.51 that parties involved in civil proceedings must sign a Mediation and Conciliation Certificate, which confirms that they have considered mediation or conciliation (or both) as processes for settling the dispute. The section also provides that, where a solicitor acts for any person commencing civil or commercial proceedings, he or she must also sign (at the same time) the Mediation and Conciliation Certificate confirming that the solicitor advised the person concerning mediation and conciliation as processes for settling the dispute

Court inviting parties to consider mediation or conciliation

16.— (1) A court may, either on the application of any party involved in civil proceedings or of its own motion, and where the court considers it appropriate having regard to all the circumstances of the case, invite the parties to consider using mediation or conciliation to attempt to settle the proceedings.

(2) Where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the Court shall adjourn the proceedings and may make an order extending the time for compliance by any party with any provisions of the relevant Rules of Court or of any order of the Court in the proceedings, and may make such other orders or give such directions as the Court considers will facilitate the effective use of mediation or conciliation.

(3) Where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the provisions of *Part 2* apply to the mediation or conciliation.

(4) Where a party involved in civil proceedings wishes to apply to the court under this section, the application shall be made not later than 28 days before the date on which the proceedings are first listed for hearing, shall be on motion to the Court on notice to the other party or parties.

(5) In deciding whether it is appropriate having regard to all the circumstances of the case to invite the parties to consider using mediation or conciliation to attempt to settle the proceedings under this section, the court shall consider in particular whether mediation or conciliation has a reasonable prospect of success and whether it is likely to assist the parties in resolving their dispute or issues in the dispute.

(6) The power conferred by *subsection (1)* is without prejudice to any other power (whether contained in an enactment, Rules of Court or otherwise) which the court may, in its discretion, exercise at any time during the course of proceedings in connection with inviting or facilitating parties to settle a dispute.

Explanatory note

Subsection (1) implements the recommendation in paragraph 4.62 that a court may, either on the application of any party involved in civil proceedings or of its own motion, and where the court considers it appropriate having regard to all the circumstances of the case, invite the parties to consider using mediation or conciliation to attempt to settle the proceedings.

Subsection (2) implements the recommendation in paragraph 4.63 that where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the Court must adjourn the proceedings and may make an order extending the time for compliance by any party with any provisions of the relevant Rules of Court or of any order of the Court in the proceedings, and may make such orders or give such directions as the Court considers will facilitate the effective use of mediation or conciliation.

Subsection (3) implements the recommendation in paragraph 4.63 that where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the provisions of *Part 2* of the Bill apply to the mediation or conciliation.

Subsection (4) implements the recommendation in paragraph 4.64 that where a party involved in civil proceedings wishes to apply to the court under this section, the application must be made not later than 28 days before the date on which the proceedings are first listed for hearing, is to be on motion to the Court on notice to the other party or parties.

Subsection (5) implements the recommendation in paragraph 4.71 that, in deciding whether it is appropriate having regard to all the circumstances of the case to invite the parties to consider using mediation or conciliation to attempt to settle the proceedings under this section, the court shall consider in particular whether mediation or conciliation has a reasonable prospect of success and whether it is likely to assist the parties in resolving their dispute or issues in the dispute.

Subsection (6) confirms, to avoid any doubt, that the power conferred by *subsection (1)* is without prejudice to any other power of the court concerning its role in advising parties of the benefit of any form of process to settle their dispute. This includes existing statutory powers of the courts in: family law proceedings under, for example, the *Family Law Act 1995* or the *Family Law (Divorce) Act 1996*; large commercial cases in the High Court's Commercial Court List under the *Rules of the Superior Courts 1986* (SI No.16 of 1986) (as amended by the *Rules of*

the Superior Courts (Commercial Proceedings) Rules 2004 (SI No.2 of 2004)); or personal injuries actions under the *Civil Liability and Courts Act 2004*. This also includes the use of the court's inherent powers to regulate its own proceedings of encouraging parties to settle civil proceedings. As the Commission notes in the Report, the courts often use their existing inherent powers to encourage resolution of disputes, and this can take the form simply of adjourning the proceedings at an opportune point, with a suggestion that the parties might consider resolving the dispute, or aspects of it, during the adjournment.

Enforceability of mediation and conciliation agreements: role of court

17.—(1) A court may (subject to *subsection (2)*), on the application of the parties to any written agreement reached at mediation or conciliation, including an agreement made in accordance with *section 10*, enforce the terms of that agreement where it is satisfied that it is appropriate to do so.

(2) Where an application under *subsection (1)* concerns any written agreement reached at mediation or conciliation that affects the rights or entitlements (including financial or property rights or entitlements) of the parties, or, where relevant, any dependent of the parties, the court may, in its discretion, enforce the terms of that agreement where it is satisfied that the agreement adequately protects those rights or entitlements having regard to all the circumstances (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland).

Explanatory note

Subsection (1) implements the recommendation in paragraph 4.100 that a court may, on the application of the parties to any written agreement reached at mediation or conciliation, including an agreement made in accordance with *section 10* of the Bill, enforce the terms of that agreement where it considers it to be appropriate to do so.

Subsection (2) implements the recommendation in paragraph 4.101 that the general rule in *subsection (1)* is subject to certain limits. These limits are required to ensure that account is taken of existing statutory or constitutional requirements. Thus, where an application is made to a court to enforce any written agreement reached at mediation or conciliation that affects the rights or entitlements (including financial or property rights or entitlements) of the parties, or, where relevant, any dependent of the parties, the court may, in its discretion, enforce the terms of that agreement where it is satisfied that the agreement adequately protects those rights or entitlements having regard to all the circumstances (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland). This includes, for example, any agreement connected with a divorce (which is subject to the requirements of Article 41.3.2º of the Constitution and the *Family Law (Divorce) Act 1996*) or connected with the sale of goods (which is subject to, for example, the *Sale of Goods and Supply of Services Acts 1893 and 1980* and Regulations such as the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (SI No.27 of 1995)).

Award of costs of mediation and conciliation where connected to proceedings

18. —(1) Where a court has invited parties to consider using mediation or conciliation in accordance with *section 16*, the court, in awarding costs in the proceedings connected with that invitation (or, as the case may be, any appeal in those proceedings) may, where it considers it

just, have regard to any unreasonable refusal of any party to consider using mediation or conciliation where such a process had, in the Court's opinion, a reasonable prospect of success.

(2) Where a court has invited parties to consider using mediation or conciliation in accordance with *section 16*, the court may, in the absence of an agreement by the parties as to financial cost made in accordance with *section 10*, make such order for costs incurred by either party in connection with the mediation or conciliation process as it considers just, including an order that both parties bear the costs equally.

(3) *Subsection (1)* does not apply to family law proceedings, except where the Court otherwise determines.

Explanatory note

Subsection (1) implements the recommendation in paragraph 4.115 that, where a court has invited parties to consider using mediation or conciliation under *section 16*, the court, in awarding costs in the proceedings connected with that invitation (or, as the case may be, any appeal in those proceedings) may, where it considers it just, have regard to any unreasonable refusal of any party to consider using mediation or conciliation where such a process had, in the Court's opinion, a reasonable prospect of success.

Subsection (2) implements the recommendation in paragraph 4.123 that, where a court has invited parties to consider using mediation or conciliation under *section 16* of the Bill, the court may, in the absence of an agreement by the parties as to financial cost made in accordance with *section 10*, make such order for costs incurred by either party in connection with the mediation or conciliation process as it considers just, including an order that both parties bear the costs equally. The discretion to order that both parties bear the costs equally emphasises that the court is free to depart from the standard rule in civil proceedings that "costs follow the event," that is, that the losing party pays their own legal costs and those of the successful party.

Subsection (3) implements the recommendation in paragraph 4.116 that, in family law proceedings, unreasonable refusal of any party to consider using mediation or conciliation should not give rise to costs sanctions, except where the Court otherwise determines.

Content of report to court by mediator or conciliator

19. — The content of a report to the court, if any, by a mediator or conciliator shall be limited to a neutral summary of the outcome of the mediation or conciliation.

Explanatory note

This section implements the recommendation in paragraph 4.127 that the content of a report to the court, if any, by a mediator or conciliator is to be limited to a neutral summary of the outcome of the mediation or conciliation. This reinforces the general confidentiality privilege of a mediator or conciliator provided for under *section 7* of the Bill.

PART 4

MEDIATION AND CONCILIATION: SPECIFIC INSTANCES

Purpose of Part 4

20.— This Part sets out—

(*a*) the provisions that apply to mediation and conciliation in specific instances, that is, family disputes, medical and personal injuries disputes,

(*b*) in the case of family disputes, attendance at information sessions, the use of parenting plans, the specific duties of a mediator and conciliator, the enforceability of mediation and conciliation agreements and the involvement of children and dependents, and

(*c*) in the case of medical and personal injuries disputes, the effect of an apology, attendance at a mediation conference and early neutral evaluation.

Explanatory note

This section describes the general purposes of *Part 4* of the Bill.

CHAPTER 1

Family Law Disputes and Proceedings

Duty of mediator and conciliator in family law dispute as to independent advice

21. — Without prejudice to *section 5*, a mediator or conciliator in a mediation or conciliation process involving a family law dispute shall advise any party who does not have a legal representative or other professional adviser involved in the process to consider seeking independent advice, whether legal or otherwise.

Explanatory note
This section implements the recommendation in paragraph 6.42 that, without prejudice to the general duties of a mediator or conciliator in *section 5* of the Bill, a mediator or conciliator in a family law dispute must advise any party who does not have a legal representative or other professional adviser to consider seeking independent advice, whether legal or otherwise.

Parenting plan

22. —(1) Without prejudice to *section 17*, parents or guardians involved in a family law dispute may (whether as part of a mediation or conciliation process or otherwise) prepare and agree a parenting plan, which provides for parenting and guardianship arrangements for any child of theirs, by reference to the best interests of each child.

(2) A parenting plan prepared and agreed under this section is not, in itself, enforceable as a contract but may, with the agreement and consent of the parties, be made subject to a court order, on such terms as the court considers appropriate.

Explanatory note

Subsection (1) implements the recommendation in paragraph 6.26 that parents or guardians involved in a family law dispute may (whether as part of a mediation or conciliation process or otherwise) prepare and agree a parenting plan, which provides for parenting and guardianship arrangements for any child of theirs, by reference to the best interests of each child. The Commission, in its *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009), has provisionally recommended that the term "parental responsibility" should replace the term "guardianship of infants." The Commission intends to publish its Report on this area by the end of 2010.

Subsection (2) implements the recommendation in paragraph 6.27 that a parenting plan is not, in itself, enforceable as a contract but may, with the agreement and consent of the parties, be made subject to a court order, on such terms as the court considers appropriate.

Involvement of child or dependent in mediation or conciliation process in family law dispute

23. — (1) If a mediator or, as the case may be, a conciliator, in a mediation or conciliation process involving a family law dispute (having consulted the parties) considers that it is appropriate to involve any child or dependent directly in the process, the mediator or conciliator shall obtain the consent of the child or dependent and shall provide, or ensure there are provided, appropriate facilities for this purpose.

(2) The mediator or, as the case may be, a conciliator, in a mediation or conciliation process involving a family law dispute (having consulted the parties) may allow a suitably qualified adult (which may include any person who has been appointed as a guardian *ad litem*) to participate as a non-party participant on behalf of any child or dependent.

Explanatory note

This section implements the recommendation in paragraph 6.54 that if a mediator or conciliator in a family law dispute considers (having consulted the parties) that it is appropriate to involve any child or dependent directly in the mediation or conciliation process, the mediator or conciliator must obtain the consent of the child or dependent and must provide, or ensure there are provided, appropriate facilities for this purpose. It also implements the recommendation in paragraph 6.55 that a mediator or conciliator (having consulted the parties) may allow a suitably qualified adult (which may include any person who has been appointed as a guardian *ad litem*) to participate as a non-party participant on behalf of any child or dependent.

Information session concerning family dispute resolution processes

24. —(1) Each party in family law proceedings, and in proceedings under section 117 of the Succession Act 1965, shall, subject to *subsection (3)*, attend an information session on family law dispute resolution processes, including mediation and conciliation.

(2) Attendance at an information session may take place either before or after an application is made to a court to commence family law proceedings, but, in any event, not later than 28 days before the date on which the proceedings are first listed for hearing.

(3) A party in family law proceedings shall not be required to attend an information session where —

(*a*) the proceedings involve an application for a safety order, a barring order or a protection order under the Domestic Violence Act 1996, or

(*b*) he or she satisfies the court that his or her personal safety, or the safety of his or her children or dependents, is or are at risk.

(4) The person providing the information session shall provide each party who is to attend the information session with one of the following certificates —

(*a*) a certificate stating that the person attended the information session or

(*b*) a certificate stating that the person did not attend the information session.

(5) Where a party has not attended an information session and the circumstances do not fall within *subsection (3)*, a court may in its discretion adjourn family law proceedings until the party has attended an information session.

Explanatory note

Subsection (1) implements the recommendation in paragraph 6.17 that each party in family law proceedings must, subject to the exceptions in *subsection (3)*, attend an information session on family dispute resolution processes, including mediation and conciliation. It also implements the recommendation in paragraph 6.89 that each party in proceedings under section 117 of the *Succession Act 1965* (which concerns claims that a deceased parent did not make adequate provision for a child in a will or during the parent's lifetime) must also attend an information session on family dispute resolution processes.

Subsection (2) implements the recommendation in paragraph 6.18 that attendance at an information session may take place either before or after an application is made to a court to commence family law proceedings, but, in any event, not later than 28 days before the date on which the proceedings are first listed for hearing. This time limit mirrors that in *section 16(4)* of the Bill.

Subsection (3) implements the recommendation in paragraph 6.19 that a party in family law proceedings need not attend an information session where: (a) the proceedings involve an application for a safety order, a barring order or a protection order under the *Domestic Violence Act 1996* or (b) he or she satisfies the court that his or her personal safety, or the safety of his or her children or dependents, is or are at risk.

Subsection (4) implements the recommendation in paragraph 6.20 that the person providing the information session must provide each party who is to attend the information session with one or other of the following two certificates: (a) a certificate stating that the person attended the information session, or (b) a certificate stating that the person did not attend the information session.

Subsection (5) implements the recommendation in paragraph 6.21 that where a party has not attended an information session and the circumstances do not fall within *subsection (3)*, a court

may in its discretion adjourn family law proceedings case until the party has attended an information session.

Enforceability of mediation and conciliation agreements in family law dispute: role of court

25. — (1) Without prejudice to the generality of *section 17*, and subject to *subsection (2)*, a court may, in its discretion, enforce the terms of an agreement reached through a mediation or conciliation process involving a family law dispute.

(2) A court may enforce the terms of an agreement under *subsection (1)* where it is satisfied that the agreement adequately protects the rights or entitlements of the parties and their dependents, if any, that the agreement is based on full and mutual disclosure of assets, and that one party has not been overborne by the other in reaching the agreement (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland, including Article 41.3.2º).

Explanatory note
This section implements the recommendation in paragraph 6.47 that, without prejudice to the generality of *section 17* of the Bill, a court may, in its discretion, enforce the terms of an agreement reached through a mediation or conciliation process involving a family law dispute. The court must be satisfied that the agreement adequately protects the rights or entitlements of the parties and their dependents, if any, that the agreement is based on full and mutual disclosure of assets, and that one party has not been overborne by the other in reaching the agreement (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland, including Article 41.3.2º).

CHAPTER 2

Personal Injuries Disputes and Proceedings

Effect of apology in personal injuries proceedings

26. — (1) An apology (including an apology made by a health care practitioner in respect of any care or treatment) made by or on behalf of a person who may become or who is a party in a personal injuries action, whether before or after any such action has been initiated in court, in respect of a matter to which any such action may relate or relates—

(*a*) does not constitute an express or implied admission of civil liability by that party, and

(*b*) is not relevant to the determination of civil liability in the action.

(2) Evidence of an apology made by or on behalf of a person under *subsection (1)* in respect of a matter to which the action relates is not admissible in any civil proceedings as evidence of civil liability of the person.

(3) In this section, "health care practitioner" includes a registered medical practitioner, dentist or nurse.

Explanatory note
This section implements the recommendations in paragraphs 7.47, 7.48 and 7.49 that an apology made by or on behalf of a person who may become or is a party in a personal injuries action (including an apology made by a doctor, dentist or nurse) in respect of a matter to which the action relates: (a) does not constitute an express or implied admission of civil liability by that party, and (b) is not relevant to the determination of civil liability in the action. This section is based on similar wording in section 24 of the *Defamation Act 2009*.

Mediation conference in personal injuries proceedings
27. — Section 15 of the Civil Liability and Courts Act 2004 is amended in subsection (1) by inserting "or upon its own initiative" after "party to a personal injuries action".

Explanatory note
Section 15 of the Civil Liability and Courts Act 2004 provides that a court may, on the request of any party to a personal injuries action, direct that the parties to the action meet to discuss and attempt to settle the action at a mediation conference. This section implements the recommendation in paragraph 7.32 that section 15 of the 2004 Act be amended to provide that a mediation conference may also be ordered by the court on the court's own initiative.

Early neutral evaluation in personal injuries claims

28. — (1) Without prejudice to the generality of *section 36(3)*, the Code of Conduct for Mediators and Conciliators shall provide for the use of early neutral evaluation in personal injuries claims, including any claims arising from carrying out medical treatment.

(2) In this Act, "early neutral evaluation" means a process —

(*a*) that occurs at an early stage of civil proceedings in which the parties state the factual and legal circumstances to an independent third party (the "early neutral evaluator") with suitable knowledge of the subject matter of the dispute, and

(*b*) in which the early neutral evaluator provides an evaluation to the parties as to what the likely outcome of the proceedings would be if the claim proceeded to a hearing in court, and

(*c*) in respect of which the parties are free to accept or reject the evaluation but which may assist them to agree a settlement of the dispute once they have heard the evaluation.

Explanatory note

This section implements the recommendation in paragraph 7.25 that the Code of Conduct for Mediators and Conciliators) published by the Minister for Justice and Law Reform under *section 36* of the Bill) must provide for the use of "early neutral evaluation" in personal injuries claims, including any claims arising from carrying out medical treatment. This process would The section defines early neutral evaluation as a process: (a) that occurs at an early stage of civil proceedings in which the parties state the factual and legal circumstances to an independent third

party (the "early neutral evaluator") with suitable knowledge of the subject matter of the dispute; and (b) in which the early neutral evaluator provides an evaluation to the parties as to what the likely outcome of the proceedings would be if the claim proceeded to a hearing in court, and (c) in respect of which the parties are free to accept or reject the evaluation but which may assist them to agree a settlement of the dispute once they have heard the evaluation. In many of the claims involved in this section, notably claims arising from carrying out medical treatment, the State is the defendant, often now represented by the State Claims Agency. In that respect, early neutral evaluation may assist in the risk assessment process for those claims already engaged in by the State Claims Agency.

PART 5

CROSS-BORDER MEDIATION IN THE EUROPEAN UNION

Purpose of Part 5

29. — This Part sets out—

(*a*) the relevant provisions required to give effect to the 2008 Directive on Cross-Border Mediation in the European Union and

(*b*) the scope and application of the general provisions concerning mediation and conciliation in *Parts 2, 3 and 6* of the Bill that apply to Cross-Border Mediation in the European Union.

Explanatory note

This section describes the general purposes of *Part 5* of the Bill, which is to implement the 2008 Directive on Cross-Border Mediation in the European Union, 2008/52/EC, and to ensure that this is integrated into the general framework set out in the Bill.

Meaning of cross-border dispute

30. — (1) In this Part, "cross-border dispute" means any civil or commercial dispute that could give rise to civil liability, but does not include a dispute concerning or arising from —

(*a*) the civil status of natural persons,

(*b*) the legal capacity of natural persons,[5]

(*c*) the guardianship of infants,[6]

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[5] The *Scheme of the Mental Capacity Bill 2008* (in respect of which a *Mental Capacity Bill* may be published by the end of 2010 or in early 2011), which would implement the thrust of the Commission's *Report on Vulnerable Adults and the Law* (LRC 83-2006), includes a test to assess the mental capacity of adults and proposes to establish a statutory framework for adult guardianship.

(*d*) rights, including rights in property, arising out of a matrimonial relationship,

(*e*) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings,

(*f*) any mediation, conciliation or other dispute resolution process engaged in under the statutory remit of the Labour Relations Commission or the Labour Court (notwithstanding which, this Part does apply to any such cross-border dispute arising within an employment context that has not been referred to the dispute resolution processes of the Labour Relations Commission or the Labour Court),

(*g*) customs, revenue or taxation matters,

(*h*) the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*),

(*i*) social welfare matters, or

(*j*) without prejudice to the matters referred to in paragraphs (*a*) to (*i*), any rights or obligations in respect of which the parties are not free to decide themselves under the relevant applicable law, including —

(i) mandatory statutory or regulatory provisions of Ireland, or

(ii) the provisions or principles of international conventions to which the Member States of the European Union or the European Union are party.

(2) Without prejudice to the generality of *subsection (1)*, this Part does not apply to attempts made by a court to settle a dispute in the course of judicial proceedings concerning the dispute in question, including where the court uses its powers referred to in *section 16(6)*.

Explanatory note

This section implements the recommendation in paragraph 2.57 that, while the legislation should apply generally to civil and commercial disputes, with limited exceptions (see *section 4(4)*), the scope of mediation for "cross-border disputes" should be limited to the categories provided for in Article 1 of the 2008 EU Directive on Certain Aspects of Mediation, 2008/52/EC (the 2008 Directive). The definition also reiterates the provision in Article 2 of the 2008 Directive that that the 2008 Directive is not intended to apply where proceedings have been initiated and the court assists the parties to settle the dispute using its inherent powers, or in the exercise of any other specific statutory power to do so (as provided for in *section 16(6)* of the Bill). The definition of the scope of "civil and commercial matters" in this section is based on the definition in the 2000 EU "Brussels I" Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and is narrower than the definition for the purposes of the scope of mediation and conciliation concerning disputes arising in Ireland: see *section 4(4)* of the Bill.

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[6] The Commission, in its *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009), has provisionally recommended that the term "parental responsibility" should replace the term "guardianship of infants." The Commission intends to publish its Report on this area by the end of 2010.

Parties in cross-border dispute

31. — (1) In this Part, a cross-border dispute arises where at least one of the parties is domiciled or habitually resident in a Member State of the European Union other than that of any other party on the date on which —

(*a*) the parties agree to use mediation after the dispute has arisen,

(*b*) mediation is considered arising from an order of a court made under *section 31*, or

(*c*) an obligation to use mediation arises under an enactment.

(2) Without prejudice to *subsection (1)*, for the purposes of *section 33* and *section 34* a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in *subsections (1)(a), (b)* or *(c)*.

(3) For the purposes of *subsections (1)* and *(2)*, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Explanatory note

This section implements the provisions of Article 2 of the 2008 Directive and the recommendation in paragraph 2.58.

Application of this Act to cross-border dispute: general

32. — (1) In this Part, mediation has the same meaning as in *section 4(1)*, but is limited to the definition of "cross-border dispute" in *section 30*.

(2) *Part 2*, *Part 3* and *Part 6* apply to cross-border mediation, subject to any necessary modifications.

Explanatory note

This section implements the provisions of Articles 3 and 5 of the 2008 Directive.

Enforceability of agreement resulting from cross-border mediation

33. — (1) Without prejudice to the generality of *section 32*, *section 17* applies to cross-border mediation, subject to any necessary modifications.

(2) Subject to their respective jurisdictional limits, the District Court, the Circuit Court or the High Court are each competent to enforce an agreement resulting from cross-border mediation in accordance with *subsection (1)*.

(3) Nothing in this section affects the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with *subsection (1)*.

Explanatory note

This section implements the provisions of Article 6 of the 2008 Directive.

Confidentiality of cross-border mediation

34. — Without prejudice to the generality of *section 32*, *section 7* applies to cross-border mediation, subject to any necessary modifications.

Explanatory note

This section implements the provisions of Article 7 of the 2008 Directive.

Effect of cross-border mediation on limitation periods

35. — (1) Without prejudice to the generality of *section 32*, *section 11* applies to cross-border mediation, subject to any necessary modifications and subject to *subsections (2)* and *(3)*.

(2) Parties who choose mediation in an attempt to settle a cross-border dispute shall not subsequently be prevented from initiating arbitration (within the meaning of the Arbitration Act 2010) in relation to that dispute by the expiry of any limitation period during the mediation process.

(3) This section is without prejudice to provisions on limitation or prescription periods in international agreements to which Member States of the European Union are party.

Explanatory note

This section implements the provisions of Article 8 of the 2008 Directive.

PART 6

CODE OF CONDUCT FOR MEDIATORS AND CONCILIATORS AND TRAINING ISSUES

Code of Conduct for Mediators and Conciliators

36. — (1) The Minister shall, as soon as practicable after the coming into force of this Act, publish a Code of Conduct for Mediators and Conciliators, based on the recommendations of a Working Group established by the Minister for this purpose, which shall provide practical guidance for the purposes of giving effect to, and complying with, the provisions of this Act.

(2) Without prejudice to the generality of *subsection (1)*, the Code of Conduct for Mediators and Conciliators shall—

(*a*) be consistent with the role of the parties in mediation and conciliation, and the definition and scope of mediation and conciliation, as set out in *section 4*,

(*b*) be consistent with the general principles concerning mediation and conciliation as set out in *section 5*,

(*c*) have regard to the involvement, where applicable, of a child or dependent in a mediation or conciliation process (in particular in a family law dispute in accordance with *section 23*), and to the requirements of *Children First: National Guidelines for the Protection and Welfare of Children*, published by the Department of Health and Children in 2010 (or any equivalent replacement document),

(*d*) be consistent with the requirements, where applicable, of the Directive on Cross-Border Mediation in the European Union

(*e*) have regard to the European Code of Conduct for Mediators, published by the European Commission in 2004 (or any equivalent replacement document),

(*f*) have regard to the Recommendation establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes,[7] which shall be adapted and applied, to the extent it is appropriate, to all the mediation and conciliation processes under this Act,

(*g*) have regard to the Recommendation on Consumer Dispute Resolution and Redress published by the Organization for Economic Cooperation and Development in 2007 (or any equivalent replacement document),

(*h*) provide for the initial and further training of mediators and conciliators in order to ensure that mediation and conciliation processes are conducted in an effective, impartial and competent way in relation to the parties (including the requirements set out in *section 37*),

(*i*) provide for the relationship between mediation and conciliation and other forms of dispute resolution, including collaborative practice and early neutral evaluation, and the role of such other forms of dispute resolution, and

(*j*) provide for uniform complaints, disciplinary and grievance procedures concerning mediators and conciliators, and the relevant enforcement procedures within professional bodies of which mediators and conciliators are members.

Explanatory note

Subsection (1) implements the recommendation in paragraph 11.07 that the Minister for Justice and Law Reform must, as soon as practicable after the coming into force of this Bill, publish a Code of Conduct for Mediators and Conciliators, based on the recommendations of a Working

[7] Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

Group established by the Minister for this purpose. In respect of cross-border mediation in the European Union, it also implements the provisions of Article 4 of the 2008 Directive. The Code of Conduct will provide practical guidance for the purposes of compliance with the provisions of the Bill.

Subsection (2) implements the recommendations in paragraphs 9.13, 9.22, 11.14, 11.25 and 11.31, and it sets out 10 specific matters which the Code of Conduct must deal with. These are: (a) it must be consistent with the role of the parties in mediation and conciliation, and the definition and scope of mediation and conciliation, as set out in *section 4* of the Bill; (b) it must be consistent with the general principles concerning mediation and conciliation as set out in *section 5*; (c) it must have regard to the involvement, where applicable, of a child or dependent in a mediation or conciliation process (in particular in a family law dispute in accordance with section 23), and to the requirements of *Children First: National Guidelines for the Protection and Welfare of Children*, published by the Office of the Minister for Children and Youth Affairs in the Department of Health and Children in 2010); (d) it must be consistent with the requirements, where applicable, of the 2008 Directive on Cross-Border Mediation in the European Union; (e) it must have regard to the 2004 European Code of Conduct for Mediators, published by the European Commission; (f) it must also have regard to the 2001 European Commission Recommendation establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes; (g) it must also have regard to the 2007 Recommendation on Consumer Dispute Resolution and Redress, published by the Organization for Economic Cooperation and Development (OECD); (h) it must provide for the initial and further training of mediators and conciliators (including in the context of family law disputes) in order to ensure that mediation and conciliation are conducted in an effective, impartial and competent way in relation to the parties; (i) it must provide for the relationship between mediation and conciliation and other forms of dispute resolution, including collaborative practice and early neutral evaluation, and the role of such other forms of dispute resolution; and (j) it must provide for uniform complaints, disciplinary and grievance procedures concerning mediators and conciliators, and the relevant enforcement procedures within professional bodies of which mediators and conciliators are members.

Training of mediators and conciliators in family law disputes

37. — Without prejudice to the generality of *section 36(3)* and the requirements of the Code of Conduct for Mediators and Conciliators (including any requirements arising by virtue of *section 36(2)(f)*), a mediator or conciliator in a mediation or conciliation process involving a family law dispute shall obtain initial and further training in screening techniques to assess the appropriateness, throughout the mediation or conciliation process, of mediation or conciliation.

Explanatory note

This section implements the recommendation in paragraph 11.26 that a mediator or conciliator in a mediation or conciliation process involving a family law dispute must (in addition to any other requirements concerning training) obtain initial and further training in screening techniques to assess the appropriateness, throughout the mediation or conciliation process, of mediation or conciliation in the family law dispute.

Training of collaborative practitioners

38. — (1) Without prejudice to the generality of *section 36(3)* and the requirements of the Code of Conduct for Mediators and Conciliators (including any requirements arising by virtue of *section 36(2)(h)*), every collaborative practitioner who is engaged in collaborative practice shall

obtain initial and further training (including continuing professional development) in collaborative practice.

(2) In this Act, "collaborative practice" means an advisory and confidential structured process (which is neither mediation or conciliation within the meaning of this Act) in which a third party, called a "collaborative practitioner", actively assists and advises the parties in a dispute (including in a family law dispute) in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.

(3) In this Act, "collaborative practitioner" means a suitably qualified professional adviser, and without prejudice to the generality of that requirement, may be a practising solicitor, barrister, accountant or psychologist.

(4) To avoid any doubt, more than one collaborative practitioner may be involved in collaborative practice to assist and advise actively the parties in a dispute (including a family law dispute) in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.

Explanatory note

This section implements the recommendation in paragraph 6.66 that every collaborative practitioner who is engaged in collaborative practice must obtain initial and further training (including continuing professional development) in collaborative practice.

The section also implements the recommendations in paragraphs 6.63 and 6.64 that the term "collaborative practice," which has developed in Ireland most notably in the context of family law disputes, should be defined in broad terms (this allows this process to be developed outside the family law context, which is the situation in other countries). Collaborative practice is closely connected with mediation and conciliation, but the key difference is that a "collaborative practitioner" may "actively assist and advise" a party in the dispute. By contrast, as provided for in *section 5(1)* of the Bill, a mediator must remain neutral, and neither advise or assist the parties. Under *section 5(2)* of the Bill, a conciliator must remain neutral, although he or she may actively advise and assist the parties to reach a settlement, but may not act as professional adviser to either of them.

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ADDRESS
35-39 Shelbourne Road Dublin 4 Ireland

TELEPHONE
+353 1 6377600

FAX
+353 1 6377601

EMAIL
info@lawreform.ie

WEBSITE
www.lawreform.ie