



Tithe an  
Oireachtais  
Houses of the  
Oireachtas

## **Tithe an Oireachtais**

An Comhchoiste um Dhlí agus Ceart, Cosaint agus  
Comhionannas

Tuarascáil maidir le héisteachtaí i ndáil le Scéim an Bhille  
Idirghabhála

*Meitheamh 2012*

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## **Houses of the Oireachtas**

Joint Committee on Justice, Defence and Equality

Report on hearings in relation to the Scheme of the  
Mediation Bill

*June 2012*

**31/JDAE/007**



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## **Chairman's Preface**

The Joint Committee on Justice, Defence and Equality received 16 submissions on the Heads of the Mediation Bill and having considered these, held public hearings to examine in further detail some of the main points raised. These hearings took place on 9<sup>th</sup> and 23<sup>rd</sup> May 2012.

It was apparent in the course of this process that awareness of mediation and its benefits was very low generally and needed to be addressed if the legislation is to be as effective as possible.

Society needs to be informed of the potential benefits of mediation in dispute resolution and that it is not always necessary for disputes to be resolved through litigation.

It is clear from the excellent submissions made and the frank discussions during the public hearing process that mediation should be viewed as an empowering process for those involved in a dispute.

During the hearings, it was suggested that the various groups involved in mediation should come together to discuss their different perspectives.

The Committee was very pleased to be informed that such a discussion took place at the Edward M Kennedy Institute for Conflict Intervention and recognised that this was an important initiative for the mediation sector and has never been done before.

I would like to express my thanks to all those who took part in this process and all the points raised in your submissions have been noted.

I look forward to the publication of the Bill and further engagement with the Minister as the Bill progresses through the Houses.

I would also like to thank the Members of the Joint Committee for their participation and hope that this process will result in legislation that is progressive and which has the desired effect.



A handwritten signature in black ink, which appears to read 'D. Stanton', written over a horizontal line.

David Stanton T.D.  
Chairman  
June, 2012



## **Introduction**

The Minister for Justice and Equality forwarded the Heads of the Mediation Bill to the Joint Committee giving it an opportunity to comment on the proposed legislation.

The Committee decided to invite written submissions from stakeholders on the Heads of the Bill and total of 16 submissions were received from various organisations and individuals. The submissions raised a number of views on the proposed legislation and the Committee has decided that it should publish these submissions to bring the views expressed into the public domain. These submissions are at Appendix 4.

To explore some of the points raised in the submissions, the Committee agreed to invite the following groups/individuals to a meeting on 9<sup>th</sup> and 23<sup>rd</sup> May 2012. The transcript of these meetings are contained in Appendix 3.

Those attending the public hearings were:

### **Centre for Effective Dispute Resolution in Ireland**

Mr. Greg Hunt	Director
Ms. Nicola White	Practice Manager

### **Family Mediation Ireland**

Mr. Eoin Cullina	Mediator
Ms. Caroline Holmes	Mediator

### **Dublin Solicitors Bar Association**

Ms. Geraldine Kelly	President
Mr. John Glynn	Vice- President
Mr. William Aylmer	Council Member
Ms. Josepha Madigan	Member Family Law Committee

### **Irish Commercial Mediation Association**

Mr. Austin Kenny	Chairman
Ms. Helen Kilroy	Council Member
Mr. David Nolan SC	Council Member

### **The Chartered Institute of Arbitrators**

Mr. Pat Brady	Chairman
Mr. Bill Holohan	Member
Ms. Anne-Marie Blaney	Public Relations Officer

**Mediate Ireland**

Mr. Mark Small

Managing Director

Ms. Mary O'Dwyer BL

Mediator

**The Mediators' Institute of Ireland**

Ms. Karen Erwin

President

Mr. Gerry Rooney

President (Elect)

The Committee wishes to express its thanks to all those who participated in this process and valued the opportunity to engage with interested parties.



## **Observations**

All those who participated in this process broadly welcomed the proposed legislation and were of the view that this legislation would provide for greater access to justice for citizens.

The proposed mediation legislation aims to encourage and facilitate the use of mediation in civil, commercial and family law disputes. This aim was welcomed by participants. It was noted however that the use of mediation is already well-established in the family law setting. In particular, solicitors in family law disputes already have a statutory duty to advise their clients about the option of mediation before commencing litigation. In addition, the Family Mediation Service, which has now been integrated into the Legal Aid Board, has been offering an effective mediation service for families facing relationship breakdown since 1986.

While some of the principles applicable to mediation in family law disputes may be applied to mediation in civil disputes generally, there are some considerations particular to the resolution of family law disputes. Notably, in family law dispute mediation, where children are involved, there is a strong need for child-centred mediation practice.

The following are some of the main points raised:

### **Public Awareness**

The Committee was told that public awareness of both the option of mediation and the procedures involved in mediation needs to be raised.

It was submitted that a large number of parties involved in disputes seek recourse through the Courts system without considering mediation because they are neither aware of nor do they fully understand the process.

While access to the Courts is still an option, such experience can be a long, costly and traumatic. It was put to the Committee that mediation can result in a resolution using a non-adversarial process in a shorter time and at a significantly lower cost to both parties.

Raising awareness of the mediation process is essential and it must be distinguished from other methods such as arbitration. It was suggested that arbitration is similar to litigation whereas mediation focusses less on what has happened and is not concerned with issuing judgements.

The Committee was told that awareness of the mediation process is more important now because "...the courts will have power to direct parties to attend mediation information sessions on first application after they have issued proceedings."

Head 4 of the Heads provides that solicitors must, prior to commencing civil proceedings on behalf of a client, advise the client to consider using mediation; and also requires that the solicitor must provide the client with information concerning mediation services. Some consideration might be given to strengthening the duty to provide information – for example by requiring in addition that the Court Service should also make such information available to potential litigants.

In the same context, in order to enhance awareness about the potential for mediation among prospective litigants, it might also be worth exploring whether a statutory duty to attend at least one mediation session should be provided.

### **Regulation of mediators**

The Committee asked contributors if there was a regulatory body where a client could go if he or she has a difficulty with a mediator or the mediation process.

It was acknowledged that the absence of any regulation of mediation practice is one of the main difficulties. The Committee was reminded that very often mediators deal with very vulnerable people who are under enormous stress and it is vital that protections are in place for all clients.

The Committee was told that some organisations have their own internal complaints procedure, to allow a person to complain about the mediator.

It was submitted to the Committee that it would be desirable to have an umbrella group that would ensure all mediators would be subject to a disciplinary and grievance procedure.

One witness told the Committee "In the UK, the Civil Mediation Council, CMC, has its own complaints procedure, so again, if we exhaust our procedures and other organisations exhaust their procedures, the CMC can be appointed."

It is noted by the Committee that, as a direct result of these Committee hearings where both members and respondents highlighted the number of organisations in the sector and the different perspectives on mediation and on the draft Bill, that a roundtable discussion took place involving many of the major

organisations on 23<sup>rd</sup> May 2012. This meeting, which was facilitated by the Edward M Kennedy Institute for Conflict Intervention was a very important initiative and has never happened before in Ireland. The Committee warmly welcomes this development and would strongly encourage further such discussion and debate especially in the context of the development of regulation of the sector.

The Committee recognises that a tension can exist between innovation and flexibility which can exist in the diverse approaches in the practice of mediation as an informal dispute resolution approach and the need for standards through legislation, regulation and codes of practice.

Mediation legislation and regulation, encompassing both law of mediation and law in mediation, has evolved, over time, in some other jurisdictions. The development of a variety of regulatory mechanisms, depending on context used etc should be explored here but this will require a wide and deep understanding of the role of mediation and mediation law.

Any consideration of the regulation of mediators must also address the issue of access to civil mediation for those on low incomes; in other words, to address the potential cost of non-family dispute mediation. There is no equivalent of the Family Mediation Service for civil or commercial dispute mediation.

### **Code of Conduct**

It was submitted that it be mandatory for all mediators to publish a Code of Conduct under which they practice.

It was also suggested that "The Minister should also have the power to publish a default code of practice and recognise codes of practice published and promoted by recognised bodies" and that the words "if any" be removed from the draft heads.

A clear Code of Conduct would allow clients to be informed throughout the mediation process, what the process is aiming to achieve and what it is not aiming to achieve.

The Committee was told that it is essential that clients are assured of a quality service when engaging in the mediation process.

### **National Register**

The Committee was also told that in Ireland the general public cannot access a single list or register of mediators allowing any person to put up a sign and call themselves a mediator.

The general public cannot know if that person has any training or is following any particular code of conduct.

It was recommended that consideration be given to introduce a national register of persons with appropriate qualifications, skills and experience who work as mediators under approved code or codes of conduct.

### **Confidentiality**

This is seen as the cornerstone to successful mediation.

It was put to the Committee that the integrity and success of mediation relies on the confidence the parties have that everything discussed in mediation will be, within reason, completely confidential.

It was suggested to the Committee that head 10 should be amended to provide statutory protection for mediators against being called as a witness in subsequent legal proceedings unless it is overwhelmingly in the interests of justice that the mediator give evidence.

### **Withdrawal of Mediator**

It was noted by some of those making submissions that the Heads appear to place an obligation on a mediator to give reasons should they wish to withdraw as a mediator.

This was identified as a matter of great concern and any such requirement on a mediator could seriously undermine the mediation process.

One speaker informed the Committee that no other jurisdiction provides that a mediator must give reasons for withdrawal. However, a possible middle ground would be that if all parties waived confidentiality.

### **Ireland – a centre for international mediation**

The Committee was told that given our stance on neutrality and our language Ireland would be the perfect place for international dispute resolution.

It was stated that the Law Reform Commission of Ireland, and the Centre for Effective Dispute Resolution in Ireland recommended one Bill that would be applicable to both domestic and cross-Border mediation.

It was stated that "At present we have SI 209 of 2011 which transposes the European Communities (Mediation) Regulations 2011.

One consideration would be to incorporate that into the Bill in order that it would be applicable in both jurisdictions, domestic and cross-Border.

This Bill has attracted attention internationally because it is very advanced compared to what applies in other jurisdictions.

It may be a lost opportunity not to make the provisions of this Bill applicable to international mediation that takes place in Ireland. People would be attracted to come to Ireland because we would have this protection in place."

These are just some of the points raised in the course of this process. For more detailed information on the points raised reference should be made to the transcript of proceedings at Appendix 3 and the submissions made at Appendix 4.

The Committee recommends that the Minister for Justice and Equality give consideration to the issues raised in his final drafting of the Bill and hopes that he is in a position to address the concerns raised. The Committee looks forward to future engagement with the Minister on this Bill.

## Appendix 1

### **List of Members**

Deputies:     Dara Calleary (FF)  
                     Michael Creed (FG) [*Convenor*]  
                     Alan Farrell (FG)  
                     Anne Ferris (LAB) [*Vice-Chairman*]  
                     Tom Hayes (FG)  
                     Seán Kenny (LAB)  
                     Finian McGrath (IND)  
                     Jonathan O'Brien (SF)  
                     David Stanton (FG) [*Chairman*]

Senators:     Ivana Bacik (LAB)  
                     Paul Bradford (FG)  
                     Martin Conway (FG)  
                     Rónán Mullen (IND)  
                     Katherine Zappone (IND)



## Appendix 2

### ORDERS OF REFERENCE

#### **a. Functions of the Committee – derived from Standing Orders [DSO 82A; SSO 70A]**

- (1) The Select Committee shall consider and report to the Dáil on—
  - (a) such aspects of the expenditure, administration and policy of the relevant Government Department or Departments and associated public bodies as the Committee may select, and
  - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee may be joined with a Select Committee appointed by Seanad Éireann to form a Joint Committee for the purposes of the functions set out below, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.
- (3) Without prejudice to the generality of paragraph (1), the Select Committee shall consider, in respect of the relevant Department or Departments, such—
  - (a) Bills,
  - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 164,
  - (c) Estimates for Public Services, and
  - (d) other matters as shall be referred to the Select Committee by the Dáil, and
  - (e) Annual Output Statements, and
  - (f) such Value for Money and Policy Reviews as the Select Committee may select.
- (4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies, and report thereon to both Houses of the Oireachtas:
  - (a) matters of policy for which the Minister is officially responsible,
  - (b) public affairs administered by the Department,
  - (c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
  - (d) Government policy in respect of bodies under the aegis of the Department,



- (e) policy issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,
  - (f) the general scheme or draft heads of any Bill published by the Minister,
  - (g) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
  - (h) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
  - (i) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in paragraph (4)(d) and (e) and the overall operational results, statements of strategy and corporate plans of such bodies, and
  - (j) such other matters as may be referred to it by the Dáil and/or Seanad from time to time.
- (5) Without prejudice to the generality of paragraph (1), the Joint Committee shall consider, in respect of the relevant Department or Departments—
- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 105, including the compliance of such acts with the principle of subsidiarity,
  - (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
  - (c) non-legislative documents published by any EU institution in relation to EU policy matters, and
  - (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.
- \*(6) A sub-Committee stands established in respect of each Department within the remit of the Select Committee to consider the matters outlined in paragraph (3), and the following arrangements apply to such sub-Committees:
- (a) the matters outlined in paragraph (3) which require referral to the Select Committee by the Dáil may be referred directly to such sub-Committees, and

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\* By Order of the Dáil of 8<sup>th</sup> June 2011, paragraph (6) does not apply to the Committee on Justice, Defence and Equality.

- (b) each such sub-Committee has the powers defined in Standing Order 83(1) and (2) and may report directly to the Dáil, including by way of Message under Standing Order 87.
- (7) The Chairman of the Joint Committee, who shall be a member of Dáil Éireann, shall also be the Chairman of the Select Committee and of any sub-Committee or Committees standing established in respect of the Select Committee.
- (8) The following may attend meetings of the Select or Joint Committee, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:
  - (a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
  - (b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
  - (c) at the invitation of the Committee, other Members of the European Parliament.

**b. Scope and Context of Activities of Committees (as derived from Standing Orders [DSO 82; SSO 70])**

- (1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders.
- (2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.
- (3) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 26. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.
- (4) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Dáil Standing Order 163 and/or the Comptroller and Auditor General (Amendment) Act 1993.
- (5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—
  - (a) a member of the Government or a Minister of State, or
  - (b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle / Cathaoirleach whose decision shall be final.

## Appendix 3



# DÁIL ÉIREANN

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AN COMHCHOISTE UM DHLÍ AGUS CEART, COSAINT AGUS COMHIONANNAS

JOINT COMMITTEE ON JUSTICE, DEFENCE AND EQUALITY

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*Dé Céadaoin, 09 Bealtaine 2012*

*Wednesday, 09 May 2012*

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The Joint Committee met at 14.30 p.m.

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## MEMBERS PRESENT:

Deputy Dara Calleary,	Senator Ivana Bacik,
Deputy Alan Farrell,	Senator Paul Bradford,
Deputy Anne Ferris,	Senator Martin Conway,
Deputy Seán Kenny,	Senator Rónán Mullen.
Deputy Finian McGrath,	
Deputy Jonathan O'Brien,	

In attendance: Deputies Mattie McGrath and John Paul Phelan and Senator Catherine Noone..

DEPUTY DAVID STANTON IN THE CHAIR.

### **Business of Joint Committee**

**Chairman:** Senator Ivana Bacik has been delayed. Is it agreed that we go into private session to discuss a number of matters? Agreed.

*The joint committee went into private session at 2.35 p.m. and resumed in public session at 2.50 p.m.*

### **Mediation Bill 2012: Discussion**

**Chairman:** The purpose of this meeting is to have discussions with some of those who have made written submissions on the heads of the Mediation Bill. Each group will be called upon as follows: the Centre for Effective Dispute Resolution in Ireland, the Dublin Solicitors Bar Association, Family Mediation Ireland, the Irish Commercial Mediation Association, the Chartered Institute of Arbitrators, and Mediate Ireland.

Before we begin I ask everybody to turn off their mobile phones as they interfere with our sound system. Unfortunately, silent mode is not sufficient and I ask that mobile phones be turned off completely.

On behalf of the committee I welcome: Mr. Greg Hunt and Ms Nicola White from the Centre for Effective Dispute Resolution in Ireland; Mr. Eoin Cullina and Ms Caroline Holmes from Family Mediation Ireland; Ms Geraldine Kelly, Mr. John Glynn, Mr. William Aylmer and Ms Josepha Madigan from the Dublin Solicitors Bar Association; Mr. Austin Kenny, Ms Helen Kilroy and Mr. David Nolan, SC, from the Irish Commercial Mediation Association; Mr. Pat Brady, Mr. Bill Holohan and Ms Anne-Marie Blaney from the Chartered Institute of Arbitrators; and Mr. Mark Small and Ms Mary O'Dwyer, BL, from Mediate Ireland. You are all very welcome. I thank you all for your attendance at today's meeting and for the information you have supplied to the committee. It is of great assistance to us in our work in the Oireachtas.

In terms of the format for today's meeting, each organisation will be asked to make brief opening remarks of approximately five minutes which will be followed by a question and answer session. We will have one-on-one engagement in that one member of the committee will engage with one group.

Before we begin, I draw the attention of witnesses to the position on privilege. Witnesses are protected by absolute privilege in respect of the evidence they give to the committee. However, if they are directed by it to cease giving evidence on a particular matter and they continue to do so, they are entitled thereafter only to qualified privilege in respect of their evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given and are asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against a person or an entity by name or in such a way as to make him, her or it identifiable. Members should be aware that under the salient rules of the Chair, they should not comment on, criticise or make charges against a person outside the Houses or an official by name or in such a way as to make him or her identifiable.

I call Mr. Greg Hunt from the Centre for Effective Dispute Resolution in Ireland to make his opening statement.

**Mr. Greg Hunt:** I thank the Chairman of the committee for inviting CEDR Ireland to take part in this meeting. My name is Greg Hunt and I am director of CEDR Ireland as well as being a member of the Irish Commercial Mediation Association, ICMA, Council and a member of the Chartered Institute of Arbitrators. I point out that both this opening statement and our responses to the heads of the Bill are the views solely of CEDR Ireland and independent of the views of both the ICMA and the Chartered Institute of Arbitrators. I am pleased to be joined by my colleague, Nicola White, who is the practice manager of CEDR Ireland.

We commend the Minister, Deputy Shatter, on introducing the Bill and we firmly believe that if and when implemented, such legislation will dramatically increase access to justice for citizens. We believe also it will serve to promote Ireland as an international centre for dispute resolution.

We have a number of concerns about certain heads of the Bill which I will summarise quickly. In head 2, a mediator is defined as “a person who assists parties to reach a voluntary agreement to resolve their dispute whilst acting at all times in accordance with the principles of impartiality, integrity, fairness and confidentiality, with respect for all parties involved in the mediation”. We have concerns around the use of the terms “integrity” and “fairness” in this context. We are concerned to have these terms in statute because what would be meant by “fairness” and “integrity” is often arguable and we believe such terms could potentially create unnecessary satellite litigation. That concern also extends to head 7.

Head 4 deals with the duty on a solicitor to provide information and advice on mediation. We welcome the provision in head 4 as we believe it will promote early dispute resolution. However, regarding head 4(2)(a), which provides for a written statement, we believe a person should also have to include in the written statement their reasons for not attempting mediation prior to litigation. We suggest that would be beneficial in assisting the courts in two ways: first, in deciding whether to adjourn proceedings for the parties to consider mediation where the reasons stated for not attempting mediation prior to litigation are, in the court’s opinion, unreasonable, and second, in deciding whether to impose a cost sanction for an unreasonable refusal to consider mediation pursuant to head 17. We believe such a requirement in the written statement would place a stronger obligation on the parties to give real consideration to mediation prior to the commencement of litigation.

Head 6.4 of the Bill states: “Where a mediator proposes to withdraw from a mediation process, he or she shall give reasons to the parties for his or her withdrawal.” We have serious concerns regarding that provision. We believe that, as is the practice in most jurisdictions and as per the Law Reform Commission’s recommendations in its final report on alternative dispute resolution, ADR, mediators should not have to give reasons to the parties for their withdrawal. There is no benefit to be achieved by a mediator disclosing reasons for their withdrawal.

Head 9 is on the code of practice for mediators. We firmly believe that if the Bill is passed, the Minister must prepare and publish or approve a code of practice as there is a danger the mediation movement could be derailed by a loss of consumer confidence if quality assurance mechanisms are not introduced to ensure clients are protected from incompetent mediators.

Head 10, which states that mediation communications are to be confidential, does not adequately protect mediators from being called as witnesses. In England and Wales there has



been an increase in satellite litigation concerning confidentiality and mediation in cases where all parties have waived the confidentiality of the mediation and the mediator was still called as a witness. We suggest head 10 should be amended to provide statutory protection for mediators against being called as a witness in subsequent legal proceedings unless it is overwhelmingly in the interests of justice that the mediator give evidence.

We welcome the provision in head 14 on effective mediation on limitation and prescription periods. However, we believe the terms of the head are vague on when the clock stops at the start of the mediation. The head states the period beginning on the day on which the dispute is referred to a mediation process is the day when the suspension of the limitation period will commence. There are many definitions for when a mediation begins and further clarity is required in that regard.

Head 19 is on liability for civil damages. We have concerns about the explanatory note accompanying this head which states the mediator will be performing a quasi-judicial function and therefore should have protection from civil liability. We do not agree that mediators perform a quasi-judicial function.

The Mediation Bill is a significant step in the promotion and development of dispute resolution in Ireland and provides a real opportunity to enhance access to justice for citizens. We thank the Chairman of the committee for inviting us to give our views today and look forward to our continuing involvement.

**Chairman:** I thank Mr. Hunt for being precise and brief. I call on Ms Geraldine Kelly from the Dublin Solicitors Bar Association to make her opening statement.

**Ms Geraldine Kelly:** The Dublin Solicitors Bar Association, DSBA, welcomes the publication of the general scheme of the Mediation Bill 2012 and is grateful for the opportunity to address the joint committee on this important proposal for legislation. The DSBA has represented Dublin solicitors since its foundation in 1936. It is the largest Bar association in the State, having more than 3,000 members.

Conflict is an everyday reality of the human condition. Most conflict between people is resolved by them without outside intervention. Unresolved human conflict results in disputes which can arise in every forum, from childish rows in the school playground to war between nations.

We are fortunate in Ireland to have an effective and highly respected civil justice system. The practice of mediation is not new here but is one of the most effective and valued non-judgmental methods of dispute resolution. Its integration into the civil justice system through primary legislation is an important and welcome step forward.

The DSBA is particularly pleased that consistent with the concept of mediation as understood by most European Union member states, the United States and other jurisdictions, the proposed legislation will put its core principles of voluntariness, confidentiality, self-determination, impartiality and flexibility on a sound statutory footing and will implement important recommendations made by the Law Reform Commission in November 2010. The Dublin Solicitors Bar Association has long promoted the use of mediation for civil and commercial dispute resolution. Our members participate in mediation every day as legal advisers to and advocates for clients in mediation, mediators and, on occasion, parties. Since January 2004, our members have represented parties in most of the disputes before the commercial list of the High Court

which have been referred to and settled following mediation.

Many DSBA members are already certified or practitioner members of the Mediators Institute of Ireland, MII. Some years ago, the DSBA established its own panel of family lawyer mediators comprising 46 resolution trained and accredited family law solicitor and barrister mediators whose professional training is recognised by the MII and who are regularly appointed to mediate separating couples' and other family law disputes. One of this group of 46 is an elected member of the council of the Mediators Institute of Ireland.

The DSBA is proud to be one of the principal sponsors of the successful mediation training film, "Talk is Cheap: Commercial Mediation in Ireland", produced in November 2011 and released by the Irish Commercial Mediation Association, ICMA. Many of our members are also members of the ICMA and one of our council members is a founding member who co-ordinated that association's submission on the Law Reform Commission's consultation paper on alternative dispute resolution in November 2008. In March 2012, the DSBA hosted a continuing professional development seminar for members to view the training film and hear presentations from speakers on the various roles of the mediator, the parties and their representatives in mediation. The association also collaborated with the Law Society of Ireland's continuing professional development Skillnet programme in June 2011 to produce and deliver a two-day training course for solicitors in advising and representing their clients in mediation.

Key ingredients in successful mediation are the skill and competence of the mediator. Equally, a mediator who lacks the requisite levels of skill and competence as a mediator is unlikely to facilitate a successful outcome and may even cause a dispute to escalate. The proposed legislation usefully provides that mediators must provide certain minimum information about their qualifications and that the Minister may publish or approve codes of conduct for mediators. The DSBA urges the joint committee to ensure a code of conduct for mediators is prepared and published with the Bill and, in particular, to ensure uniform complaints and disciplinary procedures are adopted for mediators, as recommended by the Law Reform Commission.

The DSBA welcomes the extension of the statutory duties regarding mediation on legal advisers before issuing proceedings in all civil and commercial disputes, provided this is simple, cost effective and straightforward. While mediation is not new, it is still unfamiliar to the general public and although the process remains voluntary, it may be difficult for parties to decide to refer disputes to mediation if they do not fully understand the process. For this reason, further consideration should be given to the extent of the information available about mediation and when and by whom it should be given to parties in dispute. This is particularly so in view of the proposal that the courts will have power to direct parties to attend mediation information sessions on first application after they have issued proceedings.

Confidentiality is one of the core principles of mediation. The DSBA notes the proposal not to adopt the Law Reform Commission's recommendation that a mediator as well as the parties be entitled to withdraw without explanation. The general scheme does not provide the policy reasons that it is considered inappropriate to permit a mediator to withdraw without giving reasons to the parties. The DSBA is concerned that such obligation on a mediator is inconsistent with the confidentiality principle and would seriously undermine the integrity of the process and stated aim of the proposed legislation to facilitate the early and cost effective resolution of civil disputes.

Given the rate of participation of State parties in litigation before the courts, the commitments given in recent programmes for Government and statements made in the Report of the

Special Group on Public Service Numbers and Expenditure Programmes published in July 2009 and the high cost of litigation generally in Ireland, the DSBA submits that consideration be given to introducing statutory requirements that all State contracts contain an alternative dispute resolution clause and that all State parties will not unreasonably refuse any offer made to refer a dispute to mediation before issuing or defending proceedings in any matter or claim to which they are party.

The DSBA has many constructive suggestions which would be helpful in advancing the legislation. Many of the Bill's provisions should be addressed carefully and in tandem with the legal services Bill. I thank the Chairman and members for giving us an opportunity to contribute to this discussion and for listening to our suggestions. The DSBA is available at any time to discuss and provide assistance in any aspects of the Bill.

**Chairman:** I thank Ms Kelly and invite a representative of Family Mediation Ireland to make an opening statement.

**Mr. Eoin Cullina:** I planned to make some opening remarks in Irish. However, given that several colleagues are from other jurisdictions, I will address the joint committee in English.

Family Mediation Ireland's position on the Bill is grounded in the perspective of family mediation. While we are conscious that the draft heads of the Bill are general and relate to all mediation, the experience from which we speak is one of working with couples and families who are experiencing separation or dispute. In this regard, we have one or two key observations on the draft heads.

On the mandatory mediation information sessions that were suggested in the context of family mediation in the Law Reform Commission report to which previous speakers referred, it is our strong submission that such sessions should be included in an amendment of the heads. We are guided by our colleagues in the United Kingdom and other jurisdictions where couples who seek to go through the family dispute process are obliged to attend information sessions. They are not forced to attend or participate in mediation but merely required to attend an information session.

The greatest difficulty facing all of us who work as mediators is the low level of public awareness of what mediation means. We must consider, from the family context, the position in which the nation finds itself. The country is in immense financial difficulty and we know disputes have a snowball effect in terms of public expenditure and the personal finances of families. It is our belief that if families are given an opportunity to avail of an information session, they will elect to do so. This option will deliver better outcomes for families.

We speak of this issue from personal experience. More than 90% of information sessions provided by Family Mediation Ireland convert directly into mediation. When people are provided with information we assume they are opting to go down the mediation route, a decision that will have significant benefits for their personal finances. One must also take account of the ripple effect of opting for mediation on the coffers of the State, for example, in respect of the citizens information service and other bodies funded by the State to assist people who have experienced disputes or the breakdown of a relationship. The potential cost savings of mediation are substantial.

We concur with previous speakers on the requirement that mediators should not be called as witnesses. Save for extreme circumstances, for example, in the case of negligence on the part

of a mediator, mediators should not come before the courts in any capacity. Mediation works for our service for the simple reason that people trust that when they come into the room, anything they say, within reason, will be treated with a veil of confidentiality. This provides great support and comfort and must be reflected in the heads of the Bill. We suggest that amendments be made to reflect this position.

On the individual submissions that have been made, I do not propose to go through the heads of the Bill individually. However, I will outline the following general points in respect of the legislation. The Department should require that solicitors and barristers of prospective litigants provide certification in seeking to issue their proceedings. If I turn up at a courthouse seeking to launch legal proceedings against anyone, but especially in a family context, I should provide certification that I have attended an information session.

The Department should issue certificates to mediators who are deemed suitably qualified to provide mandatory mediation information sessions. While this course of action may be best reserved for the proposed code of practice, it could also be considered in the main body of legislation. Pursuant to the proposed code of practice, mediators could be licensed by the Department. We suggest, as will others who appear before the joint committee, that a mechanism for providing for a national list of suitably qualified mediators be worked into the legislation. No such structure is suggested in the heads of the Bill.

If mediators are working in conjunction with the courts in any capacity or dealing with couples who are working through the courts system, they should have a minimum level of legal training or knowledge of the courts system. This is not the case at present in terms of the broad church of mediation in this country. Insertions have also been made in respect of the training relationships and the further training required for people who are working as mediators privately or in the service of the State. The Bill provides a wonderful opportunity to set down in stone clear regulation in that regard. This is extremely important for us, as mediators, because bad mediators would do a dreadful disservice to our profession. Accordingly, better legislation and regulation is required. This purpose is best served through the Mediators' Institute of Ireland, which should, where possible through the code of practice, be established as a national body that would be in a position to certify training bodies and set down best standards as to how mediation should operate. There are other incentives which potentially could be available to the Oireachtas. For example, citizens are allowed to take back certain moneys from their taxes in respect of refuse charges or medical bills. If the State is prepared to afford this to citizens, why would it not go so far as to have consolidated taxes legislation to allow people to subvent or allow some degree of reduction on their spend towards mediation? If the State were to invest in the mediation process, this ripple effect would save money for the State and the parties alike further down the line.

It is our view that the multi-unit developments legislation, which has previously come before the Houses, is flawed and that the new Bill, if enacted, should rectify any difficulties that arise from it, especially in respect of reporting to a court. As stated, it is our view that this should not happen under any circumstances save extreme circumstances.

That concludes my submission in respect of the points that have been raised. If we were to ask for only one point to be taken on board today, it would be the requirement that couples who go through family proceedings should attend a mandatory information session and receive certification as to having attended, and this should be presented to the courts before people are allowed to take legal proceedings.

**Chairman:** I thank Mr. Cullina for an interesting presentation. I invite the Irish Commercial Mediation Association to make an opening statement.

**Mr. Austin Kenny:** The Irish Commercial Mediation Association, formed in 2003, is an organisation that operates solely for the purpose of growing the awareness of and use of mediation. It is a voluntary, non-profit organisation and over the years we have worked closely with many other organisations in mediation, including some mentioned previously.

Two of the key pieces of work we believe we have done in the past ten years are, first, a survey in regard to the use of commercial mediation, on which my presentation is clearly focused, and, second, a short film we produced recently, which is very much an education tool. We believe anybody who has an interest in mediation, whether members of the committee, parties setting out into litigation or advisers, would benefit from watching this short film. It is easy to watch, is in a modern, drama-documentary style, and is there for all to see on our website.

We undertook a survey in 2009 from which we learned a great deal. The survey was of approximately 5,000 professional firms throughout the country, which we believed to be the best source on mediation. From that survey, we learned that almost 50% of participants saw mediation as the preferred route to dispute resolution. We realised the mediation that was taking place at that point in time was highly successful, with a success rate in excess of 70%, so it is a good space in which to be.

The reasons mediation is successful and is sought after can be synthesised into three points: first, it saves money for the parties; second, it saves the time and stress for the parties that comes with litigation; and third, it saves important business relationships. This is central to many of our discussions around the flexibility mediation as a process offers. We must get home this point that the flexibility offered by mediation is important.

Equipped with this information, we considered the key objective of the enactment of this Bill of creating a wider use of mediation across the community, whether it be family, business or other mediation. To achieve this, the Bill needs to be embraced, in the first instance, by what we consider the principle gatekeepers of mediation, namely, the legal community, so it is important that Bills and Acts are drafted in such a way. The second group is the users, which from our point of view is the business community, including the public sector and Government as well as private business and so forth.

The approach we take to this is very important. The sledgehammer approach through tough legislation will not work with mediation. We have heard it said throughout Europe that we should have statute-encouraged or court-encouraged mediation, and it is important to keep that philosophy in mind. If we do that, we have a better chance of protecting in legislation what we consider to be the core values of mediation. Those core values, some of which will be discussed today, include, first, the voluntary nature and, second, the confidentiality of mediation. We want to make a strong point on the need to protect confidentiality in order that the parties, whether family, community, workplace or commercial, when sitting in a room, know they are in a confidential place where the mediator can work with them to glean information in a confidential manner - confidential as between the parties as well as the fact it is a confidential process - in order to get traction to move them closer to resolving the dispute. That is very important.

The third value is self-determination. Anything contained in this legislation has to be about providing the parties with their own opportunity to resolve their dispute. The critical point, as we all know, is that the best people to resolve a dispute are the parties themselves, no matter

what. If they cannot achieve that, the next step is for a mediator to facilitate or work with them to achieve it. The next steps are litigation or arbitration, which have their own difficulties, as we know.

The fourth core value is the capacity to allow flexible outcomes. We have heard from judges that courts can only rule on what they see before them. We want mediation in place to allow the flexibility for parties to create their own answers, which is particularly important in difficult economic times.

The last point concerns the profession of mediation and how the mediation resource can evolve in this country through firms and organisations that will deliver back and serve this legislation when it comes to pass. We need to have appropriately qualified and regulated mediators and we need a code of ethics and practice so everybody understands the work a mediator does. While we want professionalism from mediators, as has been alluded to, we would like to have walk-away status for the mediator. That is unusual when one is talking about a profession in that we expect a professional to stand up and be accountable for the advice he or she has given. A mediator does not give advice; it is not an advisory capacity. Therefore, we do not need to start applying restrictions on the mediator or to put the mediator in a position that does anything other than facilitate the work of the mediator between the parties. The objective of the exercise is to get the parties to come to their own solution.

We have proposed a number of changes to the legislation, although I do not propose to go through them all as I am sure we will have plenty of time for discussion. Within those, we would like to see mediation described as a structured process, which it is, although it sometimes does not have that name or tag. With regard to lawyers coming forward and presenting to courts, we would like to see this opened up more in order that it is not just at the outset of litigation but can be considered at all stages. With regard to confidentiality and the work of the mediator, we do not like the sense that the mediator would be seen to be giving legal advice or even assessing whether a party has a capacity to be in mediation. There are a number of other points but I will not go over my time. I thank members for their attention.

**Chairman:** Thank you for a very interesting presentation. I call the Chartered Institute of Arbitrators to make a presentation.

**Mr. Pat Brady:** I thank the committee for inviting us. I am Mr. Pat Brady, chairman of the Chartered Institute of Arbitrators in Ireland. The chartered institute is a worldwide body and the largest of its kind solely dedicated to alternative dispute resolution, ADR, including here in Ireland. We represent arbitrators, mediators, adjudicators and other ADR professionals. We train mediators, mainly workplace and commercial mediators, to an international standard. We have an independent code of conduct and I take issue with some earlier comments made about confining the representation of arbitrators to another organisation. We, too, have outlined our comments on the Bill, which in general we welcome, and we will be happy to answer any questions.

I thought it might be helpful to the committee to make some general comments on alternative dispute resolution, ADR, which might provide context and also indicate the opportunity represented by this Bill. ADR has a long tradition, some would say dating back to Solomon. The Romans had an arbitration system. Chaucer refers to a mediator in *The Canterbury Tales*, appropriately named Prudence, and some say the first arbitration board in history, the Ouzel Galley Society, was set up in Dublin in 1705.

Surveying the current landscape, there is increasing acceptance of the potential of ADR as a means of providing effective, quick and cheap solutions to problems arising in business, in the workplace and elsewhere. One should bear in mind that this legislation was in the programme for Government and in the programme of the previous Government under the heading of reducing legal costs.

Looking briefly at some recent and imminent developments, in 2010, the new Arbitration Act strengthened the power of the arbitrator and, therefore, of arbitration, and limited the extent of court intervention and supervision. The Construction Contracts Bill 2010, which is on Second Stage in the Dáil, aims to provide rapid binding, if interim, solutions to disputes arising in the construction sector. Both parts of the island have also transposed the EU directive on transnational mediation. Somewhat outside this process, the Government is radically overhauling the disputes resolution machinery on employment rights where it introduced a mediation stage which is known as early resolution. In the context of EU developments, it is also worth noting that, by January 2015, two further measures are proposed to give consumers access to alternative dispute resolution vehicles in the case of complaints, one of which is specifically related to online purchases.

My colleague, Mr. Bill Holohan, produced a document on ADR in Ireland, a copy of which we will leave for the benefit of the committee and which gives an overview of the current position. The point is there is a recognition in all these initiatives that traditional legal remedies are insufficiently effective, either because they are too cumbersome or too costly. The European Union reckons unresolved customer complaints cost 0.4% of Union GDP. While the Oireachtas committee understandably must address the detail in the Bill, and we will turn to that briefly, we have concerns that the great potential represented by the ADR movement may fail to realise its potential for the want of public awareness of its availability. Part of our mission as an institute is to promote alternative dispute resolution, and in a series of meetings with a wide cross-section of business, trade unions and others, the overwhelming reaction to the idea of effective ADR clauses as an insurance policy against litigation is one of incredulity. This is obviously in the context of sectors, which is most of them, where it has not been the tradition to use ADR.

In November last, we held an event with the world president of the institute, Professor Doug Jones, on the topic of ADR in Australia. The biggest lesson to emerge was that in Australia, ADR, especially mediation, is primarily client driven. Clients tell lawyers they want mediation or other ADR vehicles, not the other way around. We believe that is the way it should be and we should move towards educating the public who will inform the lawyers, although I also agree with the points made by my colleague, Mr. Austin Kenny, on this.

The welcome provisions in this Bill requiring lawyers to inform clients of the ADR option are only one half of the picture. Business organisations, consumer groups, citizens advice services, the trade union movement and others need to be brought to a point where they clearly and fully understand the potential of this Bill to make their lives easier when disputes arise.

In that context, I conclude with a cautionary tale. When the automatic referral to mediation pilot scheme was introduced at London Central County Court in the 1990s, research by Professor Hazel Genn showed that in approximately 80% of cases one or both parties objected to it. Other research shows that people are not as enthusiastic about mediation as the Government, the judges and the mediation community think they ought to be.

I invite my colleague, Mr. Bill Holohan, to add to these comments.

**Mr. Bill Holohan:** I will be brief and will not repeat points made. As the committee will be aware from another context, I am a practising solicitor of almost 30 years but today I appear, so to speak, as a repentant solicitor and arbitrator. Having spent 30 years litigating, having studied Sun Tzu's *The Art of War*, and having learned the lesson of Machiavelli that one should never leave a wounded prince on the battlefield, I came to the conclusion that there had to be a better way. Pádraig Pearse said education was the murder machine but even though he was a practising barrister, he had not experienced as a party the litigation machine in this country. I have seen people bitterly divided as a result of disputes, not only those that started out as issues between them but also as a result the litigation process itself, which of its very nature is adversarial and drives people apart.

I had a Pauline conversion on the way to the Four Courts five years ago and went and became an accredited mediator. Since being elected to the committee of the chartered institute, I have been strong in advocating mediation. I was also a founder member of *commercialmediators.ie*, my particular area of experience being in commercial mediation.

My colleague, Ms Blaney, will go through some of the headlines in terms of our submission and focus on certain aspects. If I can focus on one issue, in particular, it would be, as Mr. Brady mentioned, the need to ensure clients are fully informed. In certain areas of the law, there is a formulaic requirement to certify a practitioner has discussed ADR options with the client or informed him or her about them. That is not enough. As per the Bill, there should be a requirement the clients sign an affidavit stating they have been informed, but also that they have decided not to go through ADR, in particular mediation, for specified reasons, and those reasons should have consequences, especially in the court's discretion on costs.

I was consulted recently by a person of high net worth who had been through bitter family law proceedings. The person had gone through High Court litigation with intermittent appeals to the Supreme Court on various points throughout a five year process. The end result, notwithstanding that many of the spouse's claims were not sustained, was that this gentleman was ordered to provide, as precondition to getting his divorce, a fund of €1 million to cover his spouse's legal costs alone, and he is also faced with a claim for a similar amount from his own solicitors, the marital assets pool having a value of some €9 million and the bank borrowings being approximately €7 million. They face almost potential insolvency, with costs of €2 million, to achieve a result that could have been achieved through a mediation process. Mediation was offered at the outset but it was rejected by one spouse who wanted their day in court.

Everybody is entitled to have access to the court and the European Convention on Human Rights would guarantee that, as would the Constitution, but there should be consequences for an unreasonable failure to mediate. There is decided case law in the United Kingdom on it. The principles are clear, but that should be incorporated in legislation here. One cannot force people to drink if they come to the lakeside of mediation, but they should certainly be given the opportunity to linger long and consider the opportunity.

**Chairman:** Time is tight and I ask Ms Blaney to be as brief as possible.

**Ms Anne-Marie Blaney:** Our comments and suggested amendments to the draft heads of Bill are itemised in the 18 points submitted in our memorandum to the committee. We submit that there are two key issues, if I could extract those, which relate to the role of the professions to promote the use of mediation and the importance of regulation and minimum standards on which the draft is silent.



Head 4 addresses a duty on solicitors to provide information and advice on mediation services and at points one to four, inclusive, in our submission, we propose amendments to ensure those mediation services are provided by licensed and accredited mediators or organisations of such persons. This also envisages the filing of a statement, signed by a party and solicitor prior to commencing civil proceedings, that mediation has been considered. We submit it is important to add a requirement to state the reason mediation has not been adopted. It is submitted this prevents a formulaic adherence to the exercise, and clients will make a fully informed choice not to proceed with mediation and will be cognisant of all the implications, including the potential implications on the matter of costs.

Head 12 of the Bill addresses the court's invitation to parties to consider mediation. Obligatory attendance at an information session on mediation and its advantages as distinct from obligatory participation in dispute resolution through the mechanism of mediation will not detract from the overall voluntary nature of mediation. We submit there should be provision for the Minister to specify by statutory instrument approved bodies such as CI Arb which would provide such information sessions.

The second key issue is regulation and minimum standards. Heads 6, 8 and 9, and a new head 9(8) which we propose be inserted, are important in this context. Head 6 addresses mediation conditions and codes of practice. We submit that it should be mandatory for mediators to declare the code of conduct under which they practice and, therefore, remove the words "if any" from the draft heads. The Minister should also have the power to publish a default code of practice and recognise codes of practice published and promoted by recognised bodies, such as the Chartered Institute of Arbitrators. In addition to point 12, we submit that head 8 requires the mediator to give details of experience. No attempt whatsoever is made at regulating the profession, the training of mediators and the administration of the profession or any other method of quality control of the mediator's profession. It is particularly surprising that there is no reference to minimum training requirements or standards. There is a need for statutory provision providing for the licensing, regulation and supervision of the mediation profession, such as a statutory scheme providing for the licensing, regulation and supervision of trained, qualified, accredited mediators, accredited by recognised bodies.

In addition to the CPD details, head 8 addresses the provision of details regarding continuing professional development and as part of statutory provisions providing for the licensing, regulation and supervision, CPD should be mandatory. The words "if any" should be removed in clauses 8(2)(b) and 8(2)(c). On the issue of the Minister publishing a code of practice, a general default code of practice could be promulgated, as mentioned, but allowance made for specific approved codes. We propose inserting an additional clause at head 9(8) which would read: "A mediator shall, prior to the commencement of the mediation process, provide to the parties in writing, details of the published or approved code of practice to which he or she adheres which, code of practice shall be deemed to form part of the terms on which the mediator is engaged by the parties." This would make the published or approved code part of the contract of engagement. I express our gratitude to the committee for listening to our submission.

**Chairman:** I thank Ms Blaney. I invite Mr. Mark Small, Mediate Ireland, to make his presentation.

**Mr. Mark Small:** I thank the committee for inviting Mediate Ireland to appear before the committee. I am the managing director of Mediate Ireland. I am accompanied by Ms Mary O'Dwyer, BL, senior mediator with the company. We welcome the introduction of the Mediation Bill which has the potential to significantly reduce the backlog of cases before the courts

and, more important, in the current economic climate, can help to reduce the costs of litigation. We have a number of concerns which we have included in our written submission which are based on our experience in dealing with a wide variety of mediations, including family, commercial, workplace and financial. We have experience in dealing with individuals, SMEs, multinationals and semi-State bodies.

In the interest of keeping our opening statement brief I wish to highlight our two main concerns with the draft general scheme as proposed. These relate to confidentiality and a national register of mediators. I will deal first with confidentiality which is dealt with under section 10 of the draft general scheme. Generally speaking, litigation is held in an extremely adversarial environment and arbitration which is a widely used form of alternative dispute resolution in Ireland can also suffer from the same problem. Mediation is unique in that it helps to create a non-adversarial environment leading to a more successful and longer lasting resolution of disputes. International research has shown that eight out of ten mediations are successful and we have found that to be the case in our mediations. A vast majority of mediators internationally and in Ireland agree that the reason for the success of mediation is largely due to the confidential nature of the process and that this confidentiality increases the party's willingness to constructively engage in the mediation process. There can be many people involved in a mediation. However, they form three groups - the parties to the dispute, the mediator, or mediators in some cases, and the non-parties, including all the advisers and support personnel attending the mediation. These can include solicitors, barristers, financial advisers, family or friends.

Head to head provides that confidentiality can be waived if expressly waived by all the parties. This is ambiguous in that one would not be confident of to whom this applies. Does it apply to the mediator and non-parties also? If not, this would severely limit the effectiveness of the mediation process and make it pointless or purely a fishing exercise to wait for the litigation. The committee needs to re-examine this section in the draft general scheme.

The Law Reform Commission published a draft mediation Bill in 2010. Section 7 of that draft relating to confidentiality was much clearer in stating that the mediator parties and non-parties may refuse to disclose and may prevent any other person from disclosing a mediation communication. It went on to say that mediator parties and non-parties must all waive confidentiality. We believe, and it is echoed almost unanimously among the committee, that confidentiality is the cornerstone of a successful mediation. We strongly recommend that the committee take note of section 7 of the Law Reform Commission draft mediation Bill 2010.

The second issue is the need for a national register of mediators. This has not been covered in the draft general scheme and we consider it is of vital importance to the general public. Mediators can come from all backgrounds. I have a commercial background, my colleague, Ms Mary O'Dwyer, is a barrister. There is no one profession that makes better or worse mediators. However, initial training and, more important, ongoing training is essential to a successful mediator.

In Ireland there is no place where the general public can access a single list or register of mediators. The result is that any person can put up a sign and call themselves a mediator. There is no way in which the general public can know if that person has any training or is following any particular code of conduct. A similar situation existed in regard to architects until the enactment of the Building Control Act 2007 which provided for a national register. We recommend that the committee consider provisions to enable a national register similar to the way the architects register was introduced. There are a number of groups who maintain a list of mediators. For example, the Irish Commercial Mediators Association, Mediators Institute of Ireland, Char-

tered Institute of Arbitrators and Mediate Ireland. In some cases these are public lists or, in our case, a private company list.

We are not suggesting that the word “mediator” should be protected as there needs to be scope to allow development of mediation in other areas, such as community, social and sports mediation. However, words such as “registered” or “certified mediator” should be used to identify a person who has achieved a specified level of training, adheres to a particular code of conduct and participates in ongoing education. This would go some way towards protecting the general public when engaging a professional to help resolve disputes. It would then be up to a member of the public to decide what level of mediator he or she wishes to use.

I thank the Chairman and members for inviting us to appear before the committee. We are happy to answer any questions.

*Deputy Ann Ferris took the Chair.*

**Vice Chairman:** I have just taken the Chair because the Chairman has a question in the House. As Deputy Dara Calleary is the lead questioner for the Centre for Effective Dispute Resolution he may wish to ask a few questions. As the Chairman requested, perhaps members would keep their questions short and sharp.

**Deputy Dara Calleary:** I welcome the groups and thank them for their submissions. Given that we have had ten groups submitting their thoughts on mediation, who mediates the mediators? All joking aside, that is an issue to which they might all give consideration. We have had differing views on some aspects of the legislation. In the event of a complaint about a mediator in this process, given that it is going to assume such importance, to where does a person go? Is there an ombudsman for mediation? In regard to the CEPD submission, its representative expressed concern about including the terms “integrity” and “fairness” in the legislation. What are the international norms around the inclusion of such specific language?

**Ms Nicola White:** I am a practice manager with the Centre for Effective Dispute Resolution. I was involved with the Law Reform Commission’s report on ADR and the draft Bill. We had this debate ourselves on such terminology. In the Uniform Mediation Act, the US decided to leave out those terms because they felt it may lead to satellite litigation and was more suited to a code of practice or a code of ethics. There are some references to “what is integrity?” and “treating parties equally”, but It also provides that a mediator can give a recommendation. What happens if the recommendation favours one party more? We believe those terms would be more suited to a code of practice rather than to the Bill.

**Deputy Dara Calleary:** It has been widely said that mediation services could become an important part of the economy. Is there anything in the Bill that would inhibit that commercial potential? In Ms White’s view, is there anything we could do to promote Ireland as a centre for mediation?

**Ms Nicola White:** The goal of those involved in mediation, many of whom are present, is to promote Ireland as a centre for mediation. It is the perfect place for international dispute resolution due to our language and stance on neutrality. Together with the Law Reform Commission of Ireland, we recommended one Bill that would be applicable to both domestic and cross-Border mediation. At present we have SI 209 of 2011 which transposes the European Communities (Mediation) Regulations 2011. One consideration would be to incorporate that into the Bill in order that it would be applicable in both jurisdictions, domestic and cross-Border. This Bill has

attracted attention internationally because it is very advanced compared to what applies in other jurisdictions. It may be a lost opportunity not to make the provisions of this Bill applicable to international mediation that takes place in Ireland. People would be attracted to come to Ireland because we would have this protection in place.

**Deputy Dara Calleary:** It is a matter for concern that while people who wish to opt out of mediation must provide a written statement setting out detailed reasons for opting out of the process, the Centre for Effective Dispute Resolution, CEDR, as well as many other groups agree that if a mediator wishes to opt out, he or she is not required to give the reasons. Effectively, the mediator will be allowed to walk away because many groups cite confidentiality as the reason. Where is the fairness of imposing a restriction on a client who may not wish to get involved in the process and forcing him or her to give written reasons for opting out yet allowing the mediator to walk away if he or she has a problem and without having to give a justifiable explanation?

**Ms Nicola White:** The reason is based on the principle of confidentiality and maintaining confidentiality in mediation. Where we recommend that parties give reasons for not going to mediation is to tie in with cost sanctions that are applicable already for a refusal to mediate. Under the Bill, a party may withdraw from mediation and may or may not give reasons. It is up to the parties themselves why they are not sticking with the process. Under the Bill, a mediator must give reasons. For the report, I spent four years researching this issue at the Law Reform Commission of Ireland. I am not aware that a mediator must give reasons in any other jurisdictions.

The reason is that in the process of mediation, a mediator will meet each party privately and quite often in that private session, he may become aware of information and realise it is not appropriate to continue with the mediation. If the mediator had to state the reason for withdrawal, he would be breaching the confidentiality that exists between the mediator and a party in a private session. I do not believe there is any benefit to a mediator disclosing reasons. It may prevent parties from being open and frank in a caucus, given the whole purpose of the private meeting is to get to the real root of the conflict. If parties, though the mediator, might tell the other side what they are saying in that situation, it would damage the process.

**Deputy Dara Calleary:** To return to my first question, where does a client go if he or she has a difficulty with the mediation process?.

**Mr. Greg Hunt:** If somebody has a problem with a mediator from the Centre for Effective Dispute Resolution, CEDR, we have our own internal complaints procedure, to allow a person to complain about the mediator. Mediators are often members of other professional bodies as well. Many of our mediators are members of the Chartered Institute of Arbitrators or similar professional institutions who also have their own professional conduct committees and ways to escalate complaints about an individual through them. In the UK, the Civil Mediation Council, CMC, has its own complaints procedure, so again, if we exhaust our procedures and other organisations exhaust their procedures, the CMC can be appointed.

We do not shy away from inserting into our own contracts as well other alternative dispute resolution, ADR, bodies to come in and mediate if we are involved in a dispute. Obviously we may potentially know the mediator, because we know many mediators but there will always be an opportunity to appoint somebody whom we do not know. It is a community that looked after itself in many ways, but ultimately the professional conduct committees and bodies within each organisation will act and the Civil Mediation Council will be able to step in and help resolve

any complaints at a later stage.

**Ms Nicola White:** From my experience with the Law Reform Commission of Ireland, which looked at this issue, bodies like CEDR, the Chartered Institute of Arbitrators and so on have developed great codes. The Mediators Institute of Ireland, MII, in particular has put a significant effort into the code of practice and the disciplinary code. The problem, which was the concern of the Law Reform Commission of Ireland, is what happens if one is not a body to one of these professional institutes. A person may do training of 60 hours or 40 hours, become a sole practitioner and not a member of the Chartered Institute, CEDR or the MII. Our main concern is to have an umbrella that would ensure all mediators would be subject to a disciplinary and grievance procedure.

**Vice Chairman:** I thank the representatives from CEDR and Deputy Calleary. I call on Senator Ivana Bacik to question the Dublin Solicitors Bar Association.

**Senator Ivana Bacik:** I thank all the groups for making detailed and comprehensive submissions on the Bill. I welcome the opportunity to engage with everybody. I was glad to hear the Dublin Solicitors Bar Association, DSBA, representatives say mediation is appropriate for everything from childhood playground disputes to war between nations. That covers a range.

I wish to follow up on one of Deputy Calleary's point in relation to head 6 and the issue of withdrawing from mediation without reason. I heard the earlier speaker say no other jurisdiction provides that a mediator must give reasons for withdrawal. I see in the explanatory note that it is undesirable from a policy perspective that a mediator be permitted to withdraw without any explanation but I see in the DSBA submission that it states similarly said that a mediator should be free to withdraw without reason. For example, if something arises in a private consultation with one party, it might breach confidentiality to reveal it as the reason for withdrawing. The Law Society of Ireland has suggested a middle ground. Do the witnesses believe where a mediator is to have a statutory duty to give a reason to the parties before withdrawing, it is appropriate to state they should only be obliged to do so if the confidence of a party or parties would not be breached? Does that address the difficulty or should there be a blanket rule that they should not have to give reasons?

**Ms Geraldine Kelly:** I will ask my colleague, Mr. William Aylmer, to answer that question.

*Deputy David Stanton resumed the Chair.*

**Mr. William Aylmer:** I am William Aylmer, council member of the Irish Commercial Mediation Association. It may be a middle ground but I think the key point is the party would have to consent to the confidentiality being breached. In fact, the party would have to waive confidentiality. The concern from our point of view is that while the Law Reform Commission of Ireland recommended that all parties, including the mediator, be entitled to withdraw without giving reason, it seemed to make that recommendation on the basis of the voluntarist principle of mediation rather than the confidentiality principle. To compound the difficulty, the general scheme does not outline the policy reasons it considered for making it appropriate that the mediator would be required to give reasons. It may be easier to deal with this point and address it if we were to understand those policy reasons. The key issue is it would require a party to waive the right to confidentiality. It may be a middle ground.

Deputy Calleary made the point about ensuring the Bill, when enacted, would facilitate as far as possible Ireland being a centre for international mediation. One reason is that interna-

tional mediators might be invited to co-mediate with Irish mediators in significant international commercial disputes and we feel strongly that a mediator who is accustomed to practising in England and Wales or in other jurisdictions would shy away from accepting a nomination or an appointment to co-mediate in a significant commercial dispute in Ireland if he felt he would be required to disclose his reasons before being entitled to withdraw. His concern would be, as we have said, on the basis that to do so would be to breach confidentiality.

**Senator Ivana Bacik:** I have one follow up question. In head 6, it states the mediator must set out the terms in writing under which mediation takes places. The point was raised by the Dublin Solicitors Bar Association, DSBA, that there is no provision for sanction on mediators if they do not comply with the section. Should there be a provision and what should it be if so?

**Mr. William Aylmer:** It is very difficult to say what sanction should be imposed on the mediator if he or she fails to comply. It is something we thought consideration might be given to, although it may be more appropriate that consideration be given in a code of conduct or disciplinary procedure rather than primary legislation.

**Chairman:** I apologise for having to leave earlier but there was a parliamentary question in the Dáil I was scheduled to ask. We need somebody to mediate between us and the Chamber.

**Deputy Jonathan O'Brien:** I thank all the groups for attending. I will focus on head 4, as there are different opinions on it. We have gone from the provision of a statement that mediation has been considered to outlining reasons this was not an option. A submission has suggested providing certificates stating that people have attended a mandatory information session. Will the witnesses provide some more information on those sessions? It was indicated that in England the process is mandatory, with an obligation to attend.

**Mr. Eoin Cullina:** Yes. The position in England changed earlier this year and we are fortunate to be able to work closely with a group of family mediators in London. They are very experienced mediators from different organisations. We have been able to plug into them and ask how mandatory information sessions have been going. Such sessions are going well because there is an impetus.

Head 4 is somewhat muddled and we must ask a basic question. If we assume mediation is good for people and it works, we should consider how to put the information in the hands of the clients. To date, the system we have operated under in a family context in Ireland has been certificates under the Family Law (Divorce) Act 1996. A solicitor would send certificates to the court indicating that he or she has spoken to the clients and told them about mediation. Despite the fact that we have had that for many years, there has been an abysmal conversion rate with regard to people going to mediation. If we learn from our cousins in England - I am thankful some of them are here today - the position appears to be improving by virtue of the fact that the people attend the information session. Nobody is forcing mediation in these cases, and people are merely learning about it, as couples do when they come to work with us. We sit the couples down and explain mediation.

It is voluntary because we take it that the couple are there because they want to be. That is invariably the case. It is impartial in that the couples understand we are not judges and will not tell them their business or what to do. Confidentiality sections are important because of a third element, namely, privacy. Whatever options are instigated in the room should be free in looking to fix the problem by means of separation, for example. It is the same with a sibling or commercial dispute. If somebody violates the sacred bubble that is in place, people will not

want to come to mediation. Unfortunately, that is where the draft heads fall short. The concept should be tightened.

With regard to head 4, it is our submission that the people who are best placed to provide certification that the clients understand mediation are the clients themselves. Mediation is about self-empowerment. If I decide to take litigation against anybody, I should be obliged to present a certificate to indicate I understand there is an alternative and I have at least attended a session of my own free will and taken on board that information. If people want to proceed and take the risks of going through the courts - with the following cost implications - that is their own business. The most the State can do in this regard is ensure that the citizen is properly informed. Our previous system has not worked and the statistics speak for themselves.

**Deputy Jonathan O'Brien:** Mr. Cullina's group provides these information sessions.

**Mr. Eoin Cullina:** Yes.

**Deputy Jonathan O'Brien:** How successful are they?

**Mr. Eoin Cullina:** The success rate is in excess of 90%. The cases which have not worked out and proceeded directly to mediation from private information sessions are invariably those where there is an underlying serious issues, such as domestic violence. That may not surface for some time. The information sessions are there to be used. The experience of our colleagues in the United Kingdom is that the information sessions are proving very effective in bringing people to the mediation process, thereby giving better results.

**Deputy Jonathan O'Brien:** Are we looking at the same type of percentage in England?

**Mr. Eoin Cullina:** I am not sure of the percentages in England and cannot speak for that. From the last point of contact with our colleagues in England, it seems they are seeing a definite change, with people becoming more aware of the process and taking the option of not going down the litigation route.

**Deputy Jonathan O'Brien:** I presume this option just relates to the family area.

**Mr. Eoin Cullina:** That is our point of contact. A question could be raised as to whether this should be for all types of mediation in civil litigation or just the family area. We would take the lead from the Law Reform Commission report. It is great that Ms Nicola White is here as she was instrumental in preparing that report. It is extremely unfortunate that the LRC recommendations have not been followed to the effect that these information sessions in the family context should be mandatory. Much evidence was included in the report as to why this should be so and we know the process is working in other jurisdictions internationally and in states within the United States, not to mention the United Kingdom. Why should we not follow suit if it is tried, trusted and working? If that concept is not included in this Bill, the Legislature would be making a grave omission, following on with the failed policies from the family legislation.

**Deputy Anne Ferris:** I welcome everybody. Listening to the various presentations, it seems there is a thread going through each. The elements sought include confidentiality, a code of conduct in practice and a register of mediators. Near the beginning there was mention of alternative dispute resolution, ADR, which includes mediation. Will the witnesses explain the difference between ADR and mediation?

**Mr. Pat Brady:** Alternative dispute resolution is a generic term for all processes outside the

court system. There is some question as to whether arbitration is, strictly speaking, alternative dispute resolution but in general terms, it is everything that does not drag a person to court. The other processes are adjudicative, whereas mediation is one of a number of participative processes, including conciliation and so on.

**Deputy Anne Ferris:** That would be part of work disputes and solutions. Would it cover all types of disputes in every area?

**Mr. Pat Brady:** Yes, it has the potential to do so as the Bill is drafted. The Arbitration Act, for example, does not include employment disputes but this legislation would do so. There are some conditions relating to workplace disputes but it would be covered. We may appear to be a fractious bunch but we are all united in that the potential of this legislation is enormous for Ireland Inc. and how disputes are resolved. We have seen the benefit of the resolution of a long-running intercommunal dispute and in principle there is no reason not to extend this way of business into everyday matters. That would have a similar premium for business dispute resolution in all its forms. That is why I was at some pains to express some concerns.

There are two stages, with the first getting this legislation right. As has been correctly observed, there is a high degree of agreement around the table. The next level comes after this legislation, when we must ask what must happen to achieve what the Government has defined as a primary purpose of the Bill, which is to reduce costs. Deputy Calleary made an interesting observation and a number of people in the room have been canvassed on the idea of presenting a more united front to the potential users of mediation. With the greatest respect to this committee, if it is bewildered by the range of organisations then potential users of the system will be utterly bewildered to say nothing of the duplicated and wasted efforts to get the message out to business. There are three legs to the stool. As Mr. Austin Kenny has said, one is the legal community. I have been engaged with the business community and have witnessed an incredulous response. The mediation community must rock up and face some questions on how it proposes to ensure the public interest objectives of the legislation turns into a reality. I hope that there will be an initiative, in due course, to turn it into a reality.

**Deputy Anne Ferris:** Earlier the need for a national register of mediators was mentioned a few times. As Mr. Pat Brady has said, it would allow users to access a service online or whatever and make choices but would depend on where they work and live and on what mediation organisations charge for their services. Is there a difference between what organisations charge? Should there be-----

**Mr. Pat Brady:** A national register?

**Deputy Anne Ferris:** Yes. There should be a cost guide like the one used for legal services where litigation costs are stipulated. Should there be guidelines to allow a consumer or user to know the exact price for a service? Organisations providing the same service charge various prices, resulting in a disparity of €100 or more. There have been a lot of cases where people have been confused by charges and they think that if they pay more they will receive better value and a better service. That is not necessarily the case. I would like the delegations to comment on charges.

The delegations mentioned that mediation should be client driven and I agree. If somebody opts for mediation, whether they are neighbours, an employer and employee or a couple, is one mediator enough? Can people choose two mediators with one being their own as in the case of a collaborative divorce?



**Mr. Pat Brady:** The Deputy asks hard questions. I will make a comment while I think of an answer to the Deputy's second question.

Earlier I commented on presenting greater clarity on who does what. That is highly desirable. I think Mr. Small referred to it also. Obviously, if we were starting from scratch we would not start from here. It seems to me that an overriding objective that we all share is that potential users of mediation easily find the answer to all of their questions such as who is suitably qualified, do they operate under a code of conduct and what they charge. The Bill does comment on charging.

With regard to the second question on whether to use one or more mediators, that is a matter of individual choice. Family mediation is quite different from commercial mediation so perhaps I will defer to someone else.

**Mr. Bill Holohan:** I will add to Mr. Pat Brady's comments on the first point. I am reminded of the words of Oscar Wilde that a cynic is man who knows the price of everything, and the value of nothing. It depends on who one gets and his or her experience. That is why, as part of the submissions, we favour a register. We also favour publishing the details of mediators' training, experience, continual professional development, the refresher courses that they attended, etc., in order that people can choose a suitably-qualified mediator. Mediators have different experiences. Recently, we ran courses on workplace mediation and afterwards we asked participants to comment on their experience. One of the comments made was that there is a new wild west territory. Someone from a commercial background did not know about it and they had not experienced the intensity of relationships in a workplace mediation process which might be even more intense in a family law situation. There are different skills even in the mediation community. We want to ensure that skill levels and costs are transparent but costs vary. For example, the Chartered Institute of Arbitrators operates schemes that involve an element of *pro bono* work on debt mediation with the Society of St. Vincent de Paul, etc. It is horses for courses.

**Deputy Anne Ferris:** I have a final question for Mr. Bill Holohan. He mentioned qualifications and getting what one pays for. What minimum qualification should a mediator possess? Should it be somebody from a legal area such as a solicitor or barrister? Does he think a minimum qualification is necessary? What can be done to stop Joe Soaps like myself putting a plaque on their door and claiming to be a mediator?

**Mr. Bill Holohan:** There should be an accreditation process following a specified minimum number of hours incorporating specified elements of training. There are different accreditation bodies but, broadly speaking, they all adhere to that concept and principle. There are some very experienced mediators who have never undergone formal training because they have grown over the years. In terms of setting a standard, in the same way as Mr. Mark Small referred to architects, grandfather provisions were included in the 2007 Act to allow those regarded as grandfathers of the architectural industry to qualify even though they had never sat an exam. Similarly, there are people like that in the mediation community. In terms of the future, it should be based on clearly defined and maintained standards.

**Deputy Anne Ferris:** Would examinations be attached to that process?

**Mr. Bill Holohan:** Correct.

**Deputy Anne Ferris:** That is great and I thank the Chairman.

**Chairman:** Does Mr. Small wish to comment briefly?

**Mr. Mark Small:** With regard to the Deputy's question on a list or register of mediators, my organisation would not favour what I would call a "PR" list. How would one maintain it and how would it be structured? Again, I will refer to the list of architects that purely contains the name of the person, the contact details and specific registration number. I want a purely separate listed register because all of us are members of different bodies. Individual bodies can have a "PR" list and let each association, such as the Irish Commercial Mediation Association, Mediate Ireland or Chartered Institute of Arbitrators, have different information on their lists. We need to separate the register from the "PR" type of register because it would not be beneficial. There would also be a question over who maintains it. I think it would be more beneficial to have a single list done that way.

**Deputy Anne Ferris:** Is Mediate Ireland in favour of the grandfather clause contained in the Bill?

**Mr. Mark Small:** I think so. I would reference my father who has just retired. He was probably one of the best mediators around. He does not have any formal training but looked after a lot of multinational issues. We must allow people that practice as mediators, and are members of organisations, who have no formal training to exist as mediators. We seek a way to deal with what will happen over the next 50 years.

**Deputy Anne Ferris:** I thank Mr. Small.

**Mr. Eoin Cullina:** I wish to respond to the Deputy.

**Chairman:** Briefly.

**Mr. Eoin Cullina:** Collaborative divorces and co-mediation were mentioned earlier. The system that Family Mediation Ireland primarily uses in family cases is co-mediation. For example, a male and a female mediator will work with a couple going through a separation. It has also been used effectively in commercial mediation. Many commercial mediators, including David Richbell who is one of the leading commercial mediators in England, strongly advocate co-mediation. It allows for a counterbalance. It allows for security checks and balances for the mediation team and one mediator is not loaded with the full responsibility of handling a mediation. Collaborative divorce is slightly different but we advocate co-mediation.

**Senator Rónán Mullen:** Ba bhreá liom fáilte a cur roimh na grúpaí éagsúla agus ár mbuío-chas a ghabháil leo as ucht an méid atá ráite acu. I have a few brief questions. I am not sure who I should direct them to. Maybe I will just throw them out there. If people feel a question is of particular interest to them, they can respond to it. My first question is about head 5, which relates to the duties of barristers.

**Chairman:** I have to stop the Senator for a moment. He is aware that we have a one-on-one system going here.

**Senator Rónán Mullen:** Yes.

**Chairman:** That has been organised. Perhaps the Senator can hold his questions until that process has been finished. We will invite him in again.

**Senator Rónán Mullen:** That is no problem.

**Chairman:** I call Deputy Finian McGrath, who wishes to ask a question of Mediate Ireland.

**Deputy Finian McGrath:** Yes. I welcome all the groups. I thought their oral and written submissions were excellent. I am strongly supportive of mediation because it can save time, stress and money for many people.

**Chairman:** I would like the Deputy to ask focused questions of Mediate Ireland.

**Deputy Finian McGrath:** Okay. I will direct my first question at Mr. Small and Ms O'Dwyer. Most people agree that the mediation system saves time, money and stress. I do not think anyone has mentioned that the integrity of the mediator has to be sacrosanct. How can that integrity be guaranteed in the interests of the person, the group and the consumer? Can it be done through strong regulation?

**Mr. Mark Small:** One can over-regulate in this regard, as in any area. It could be dangerous to put it on a statutory framework or to try to define anything. Our belief is that during the mediation process, if one cannot quantify it one should not try to agree it. Many people speak about unquantifiable matters like respect or love. Similarly, integrity is a very difficult thing to quantify. We would have great difficulty if we tried to legislate for it. However, it may be possible to cater for this and other matters within a code of practice. A great deal of emphasis is placed on one's experience and track record. People within the mediation community, which is quite small, know what is going on. The question of the register arises again in this context. It could be possible to remove someone from the register for a gross breach of discipline or integrity. It could be done through a hearing or appeals process which would be organised on that basis. It would be difficult to try to regulate it.

**Deputy Finian McGrath:** In his submission, Mr. Small suggested that this committee should look at "confidentiality which is dealt with under section 10 of the draft general scheme".

**Mr. Mark Small:** Yes.

**Deputy Finian McGrath:** He also proposed that the committee should adopt section 7 of the 2010 draft Mediation Bill as a kind of recommendation. Is that right?

**Mr. Mark Small:** I would not like to tell someone how to suck eggs. It would be much more appropriate for Ms White to comment on that.

**Deputy Finian McGrath:** Would it represent a more positive and appropriate way of proceeding?

**Mr. Mark Small:** Yes. That particular part of the 2010 legislation was really clear and very straightforward.

**Deputy Finian McGrath:** Okay.

**Mr. Mark Small:** It referred to all the specific parties, the mediator and the non-parties. It highlighted the specific requirements of each of them. It was much clearer. As I said in our submission, the current head 10 is very ambiguous in what it is trying to achieve.

**Deputy Finian McGrath:** I understand that Mediate Ireland has said in the past that 90% of mediations are completed in one day. That is its track record, as far as I know. Where did Mediate Ireland get that figure? How many cases were examined to come up with it?

**Mr. Mark Small:** The figure in question relates to the last couple of years. We have suggested that all our mediations are done in a day. I know this is different from the way Family Mediation Ireland works. Mediation takes place over multiple days in the family situation. We believe that the groundwork associated with a particular agreement can be done, and a framework can be drawn up, within a day. However, certain elements of it may need to be tweaked thereafter. We have dealt with a significant number of cases over the last year. I would estimate that 90% of them have been done in a single day.

**Deputy Finian McGrath:** Okay.

**Mr. Mark Small:** That is the nature of what it is. I cannot emphasise enough that someone can say almost anything to the mediator in confidence. The co-mediation model we use is also beneficial. It involves a specialist in a particular area - finance, human resources or medicine - working with a highly-qualified mediator. On that basis, we are able to hone in on an agreement or draw up the terms of an agreement very quickly. As I have said, it can all be done in a day. If one cannot agree the context or framework for an agreement in a day, one is not going to agree.

**Deputy Finian McGrath:** The demand for mediation seems to be increasing nationally and internationally. Part of the reason for that is the reduced costs that are associated with mediation. What about the cost to the company, the consumer or the person? Is the mediation service potentially, basically or essentially for well-off people who have lots of money? How can mediation be used by people who do not necessarily have the required clout, finances or resources?

**Mr. Mark Small:** A survey that was conducted by the Irish Commercial Mediation Association - Mr. Kenny can correct me if I am wrong in this regard - found that a commercial mediation process is 83% cheaper than a litigation process. Significant cost reductions are associated with mediation. Mediate Ireland provides half-day mediation when the dispute relates to a single issue for as little as €750 plus VAT. A limit has to be placed on what can be done in such cases. That is our way of doing it. It is very limited. The €750 figure applies to both parties. Each of them pays €375. I do not think this is the high-cost issue that people are suggesting it is. It is significantly cheaper than a litigation process. I emphasise that half-day mediation has to focus on a single issue that may have arisen. It is open to everyone.

**Ms Caroline Holmes:** I am a founder member of an organisation that does *pro bono* work in Limerick. Our colleagues who work for the Family Mediation Service, which is not represented here today, also offer a free mediation service. My colleague referred to doing *pro bono* work. I am aware that CEDR Ireland undertakes *pro bono* work. People who need to access mediation can avail of free mediation services.

**Deputy Finian McGrath:** That is grand. I have a final question on the broader question of mediation. Some people might be concerned that a broad attempt is being made to replace the Labour Relations Commission without providing for a rights commissioner. Would that be in the zone? Were mediators involved in the background before a final resolution was found to the long dispute involving the Vita Cortex workers in Cork? Is that part of the game here? Are people involved in trade unions being undermined?

**Chairman:** Sorry, we cannot get into specific cases.

**Deputy Finian McGrath:** I know. The question is-----

**Chairman:** I heard the question.

**Deputy Finian McGrath:** Is an attempt being made to replace-----

**Chairman:** I want to make one point please.

**Deputy Finian McGrath:** Yes.

**Chairman:** We cannot get into specific disputes. The Deputy's question was perfectly valid. I am merely pointing out that we should not get into specific disputes.

**Deputy Finian McGrath:** I will repeat my major question. Is a broad attempt being made to replace the Labour Relations Commission or the rights commissioner-based approach to these situations? That is all I wanted to ask.

**Mr. Mark Small:** I understand the question. A distinction needs to be drawn between the work of the Labour Relations Commission and mediation. There seems to be a confusion between the two types of mediation. There is mediation in the Labour Relations Commission but an element of recommendation is also given subsequent to that. In the mediation provided by Mediate Ireland, absolutely no recommendation is given by the mediators. That is the type of mediation that most people in this room are talking about. The making of a recommendation is a different process. In its 2010 report, the Labour Relations Commission mentioned that the process in question can be defined as "conciliation". There is a complete lack of understanding of the fact that the two processes are very distinct. The Labour Relations Commission listens and acts as a referee in a mediation-type process. At the end of that process, the person will make a recommendation on the basis of what he or she feels. If mediation - as we define it - breaks down, no recommendation is made. We say that the mediation has ended and everyone goes their separate ways.

**Deputy Finian McGrath:** Mediate Ireland states on its website that the increase in the number of mediations it has been undertaking "is probably as a result of the significant delays experienced in progressing a case through a Rights Commissioner and the Labour Relations Commission".

**Mr. Mark Small:** Yes.

**Deputy Finian McGrath:** That is my point.

**Mr. Mark Small:** We say that on the basis of our experience in dealing with multinationals and some semi-State bodies we have been dealing with recently. We understand that the standard Labour Relations Commission process can take up to 18 months. It takes slightly less than that. Mediate Ireland, presumably like most of the organisations that are represented at this meeting, could have a mediator on site for a mediation process in a matter of days or weeks.

**Deputy Finian McGrath:** I thank Mr. Small.

**Ms Caroline Holmes:** As a former head of HR, I note the employment tribunal would often revert to a company and suggest mediation. In such cases, resolution could be quicker and cheaper. The sooner one tries to resolve a dispute, be it familial or commercial, the better. This can obviate the need for going to the Labour Relations Commission, etc.

**Mr. Pat Brady:** To clarify a point for Deputy Finian McGrath, yet another mediation system, known as early resolution, was introduced as part of the current Government's blueprint for reform of employment rights procedures. Those concerned clearly did not want to use the term "mediation". The option of private mediation still exists and it is legally possible to settle

a matter, even a matter under one of the employment rights statutes, at mediation subject to certain consent conditions. There is nothing in this that will do other than help in the process of resolving disputes.

I have urged a number of trade unions to review their internal complaints mechanisms and replace them with mediation. There is no part of Irish life that could not be improved by adopting the general principles that underlie this legislation. If anything, it is of help to complainants. One can gain access to the rights commissioner quite quickly these days but it can take 83 weeks to get to an employment appeals tribunal. The early resolution mechanism and private mediation could obviate the need for such an approach.

**Deputy Finian McGrath:** Okay.

**Senator Rónán Mullen:** I have three questions. My colleague from the Law Library, Mr. David Nolan, SC, may be able to assist me with my first question, which relates to head 5, concerning the duty of the barrister regarding mediation. We are awaiting legislation, the Legal Services Regulation Bill, in the Seanad. It has not come through the Dáil yet. It might bring a lot of changes.

How does Mr. Nolan envisage the process working out in terms of a barrister's responsibility to advise clients about the possible use of mediation as an alternative to litigation? Is this just a provision in the proposed legislation that would lead to one other box being ticked by barristers in terms of their being required to show they have just given advice to a client? Barristers enter the process and are briefed at different stages of proceedings. Would the procedure be more extensive?

**Mr. David Nolan:** The Senator has raised a very interesting and important point. In many ways, I am wearing two hats, one as a representative of the Bar Council and another as a representative and member of the ICMA. Our views have been well set out in the submission papers, which have already been received by the members of the joint committee. The role of the barrister is up for some determination and discussion given that the Legal Services Regulation Bill is going through the Houses. The provisions contained in the mediation legislation should be seen in light of that. Placing a separate obligation on the barrister is perhaps unwarranted.

My difficulty is that if the barrister or solicitor whom one approaches for advice advises that mediation is not appropriate, it is somewhat contradictory to place an obligation on him to go against his own advice. Lest there be any doubt about this, let me state I am a big fan of mediation. As with my colleague, I have had a road-to-Damascus experience. Mediation works because it is flexible and cheap and it empowers the parties concerned to reach their own solution.

Everybody in attendance comes with clean hands regarding this matter. I am not certain this committee understands exactly what mediation is about.

**Chairman:** This is why we are here today.

**Mr. David Nolan:** If members cannot be brought to a mediation - it may not be a bad idea to carry out a mock mediation exercise for the committee – they should watch the DVD.

Deputy McGrath raised the issue of the timeframe. Mediations are carried out in a day in the vast majority of cases. I know nothing about family law mediation, which is a very separate matter. The mediations to which I refer are carried out in a single day. Everybody around this table understands litigation can proceed for months, if not years.

The ICMA made a presentation to 24 judges of the High Court. At the end of the presentation, the President of the High Court said there is no good or bad time for mediation. It can be at the start or middle of the process or, as was the case with certain very protracted litigation before a judge for two years, right at the end of a two-year period. Mediation is a process that everybody should be embracing. The big job is to sell the news to the public. My fear is that this legislation could be constrictive and restrictive.

I urge the committee to consider seriously the issue of the Statute of Limitations, head 14. I urge it very strongly not to introduce a stop on the statute. This has caused a nightmare with the Personal Injuries Assessment Board Act.

As I stated, mediations can be organised at the drop of a hat. They can be organised within a week or month or a very short period. If the parties are proceeding to mediation, there is no need to stop the statute. If one asks the mediator to become involved in stopping the statute somewhere along the line and restarting it, one is giving the mediator a statutory responsibility. The whole point of the Statute of Limitations is to bring certainty. If one introduces a provision whereby it is impossible to know where it starts and ends, there is uncertainty. I can tell the members from bitter experience that one is bringing on the satellite litigation which my friends from CEDR warned us against.

There is no need to stop the statute. With most commercial matters, the relevant period is six years. With regard to personal injuries matters, one is straight into the PIAB. With family matters, the family practitioners all know what the statute is. There is absolutely no need for what is suggested.

**Senator Rónán Mullen:** That was very interesting. I note many people have been to Damascus lately. I hope it will be safe to travel there again soon.

I have two brief questions, on heads 9 and 10. This matter has been referred to already. Head 9 provides that the Minister may prepare and publish a code of practice. Is the shared view of the delegates that the word “may” should really read “must”? That is a reasonable question.

**Mr. Austin Kenny:** There is an EU code of practice at present. There is no statutory framework for mediation. The Mediators Institute of Ireland has a well thought-out code of practice and ethics that can be considered. There is no need to rehash that space. A lot of work has been done on it in Europe and locally.

**Chairman:** Does that answer the Senator’s question?

**Senator Rónán Mullen:** Yes. My final question is on head 10, which concerns confidentiality of mediation and communications. Anybody following debates in this country in recent years will know we are all pondering the limits to confidentiality. I was struck by the exception whereby it was considered that disclosure would be allowed were necessary to prevent physical or psychological injury to a party. Bearing in mind that the delegates are at the coalface, it struck me that “psychological injury” could be interpreted very broadly. How workable is the concept? Is it a Pandora’s box?

**Mr. William Aylmer:** It may be more in the contemplation of the mediators who work on disputes involving separating couples than those who work on commercial disputes, which comprise my area. If a mediator envisages or comes by information from one or other of the parties in a mediation that gives rise to an imminent danger to a party, there may be a concern

he or she should take steps to ensure that injury does not happen. I do not know if that is a statutory obligation to report but it is worthy of consideration.

**Mr. Eoin Cullina:** My colleague is right. It has more meaning in family mediation. It is not so much the direct admissions that take place in a family mediation whereby there is awareness of a physical or psychological threat to a party; sometimes there can be indirect flags that might come out in the course of a mediation. In that regard it is clear that we have a duty to report. There is substantive legislation in place that places an onus upon all of us, lawyers and barristers, to report to the authorities where there is a case of imminent danger.

Looking at the child care legislation, the Garda Síochána has an automatic out for the recovery of children from aircraft or boats. Confidentiality is all well and good but it can be lifted by court order. We have a duty as mediators. Confidentiality is good in as far as it is not used as a mask to hide criminality or to continue to perpetrate a crime against one or other of the parties in a mediation. Sometimes it might not be explicit, it might be under the surface, but where mediators have that concern, as unfortunately I have had in the past, the duty is clear under the present law. I see nothing in this provision that would countermand anything already in legislation.

**Senator Rónán Mullen:** Can we get an example of where the psychological injury might cause the mediator to make a decision?

**Mr. Eoin Cullina:** In a general context, if someone openly admitted in private caucus, where the mediators are just one party in a mediation, that something in his or her behaviour was leading to an immediate physical or psychological concern for the other party in the mediation, we must decide where to draw the line in the sand. Would it be something slight, like not doing chores at home, or is it someone who tends by his or her own admission to be abusive in a certain context stopping short of physical violence? It is a difficult decision we must make as family mediators every day. In some cases, people clearly cross the line and go into the realm of perpetrating a physical or psychological injury to another person. In that case, it could affect another party in the case or, indeed, could affect children. We have a duty to break confidentiality in that regard. That is clear under statute and in the law as it stands today.

**Ms Josepha Madigan:** It is important to reiterate that mediation is not a panacea and that for each mediator dealing with separating couples, screening processes are put in place for the suitability of parties to enter mediation in the first instance. During these intake sessions, it might become apparent there are different levels and forms of abuse, from intimidation and bullying to an equilibrium between the parties that is not evident unless the mediator has experience in ascertaining and evaluating power struggles. The psychological issues and abuse issues are very important in the screening. In any separating couple dispute, the mediators will be trained in that regard.

**Mr. Austin Kenny:** We wanted to pick up on another point regarding confidentiality of the mediator.

**Ms Helen Kilroy:** It is in our submission, on the question of privilege. The law reform report recommended clarity would be given that communications in a mediation environment attract legal, professional privilege, meaning the parties do not have an obligation to disclose them in a court environment. The best practice locally is that lawyers advise clients that without prejudice discussions generally attract privilege but there has been uncertainty about it and we invite the committee to look at chapter 3(d) of the report, which makes clear provisions.



That is consistent with Mr. Small's remarks on section 7 of the draft Bill that was attached to the law reform report. It addresses both confidentiality and privilege.

**Chairman:** We have already had the withholding information Bill hearings, which were interesting, especially in family law. The Irish Commercial Mediation Association claimed several thousand legal professionals were surveyed. How many responded?

**Ms Helen Kilroy:** There was a very low response rate, which was a negative when we presented that at our conference in 2009. We got a response rate of close to 5%, a very low rate.

**Deputy Anne Ferris:** It was said several thousand legal, accounting and other professionals surveyed, along with 5,000 firms. How many of the 5,000 responded?

**Mr. Austin Kenny:** We had a response rate of 4%. That seems low but in survey terms, 10% is an enormous response. This was done in 2009, the very early stages of commercial mediation. It is arguable we were being preached back to by the converted. We realise there are many unconverted.

**Deputy Anne Ferris:** Almost half of respondents choose mediation, the success rate was 70% and the cost 70% lower than litigation. It is hardly scientific though if there is only a return of 4% on the 5,000.

**Mr. Austin Kenny:** We presented the survey in light of that. It was a small survey done by us. We are a *pro bono* volunteer body. Subsequently there have been two key surveys that we have access to, the EU survey on litigation costs, which confirmed much of the information, particularly on cost and duration of litigation, and another from France by FIDAL in association with the American Arbitration Association, one of the largest mediation organisations in the world. The same facts are coming through, with success rates even higher than those we stated and the reduction in costs is stressed, along with the potential for repairing relationships. The same language is coming back, even if the figures are slightly askew.

**Chairman:** What sort of cases would mediators in the commercial and business world deal with?

**Mr. Austin Kenny:** It could be any sort of commercial dispute. It could be internal between business partners, a boardroom dispute between directors or a construction site that has gone wrong and everyone is suing everyone else. Any commercial deal or business can see disputes arise.

**Chairman:** What percentage of cases go the mediation route instead of the litigation route?

**Mr. Austin Kenny:** The same EU survey tells us 0.5% of cases across Europe go to mediation. We made a presentation a while ago asking why any process, with all these compelling benefits across family and workplace, has such a low take-up. Europe's response is to get this started with cross-border transactions. The use of mediation is quite low generally.

**Chairman:** However, we hear a lot about business costs in this country being so high and this could be part of that.

**Mr. Austin Kenny:** Absolutely.

**Chairman:** So we must advertise and inform people about the mediation process.

**Deputy Jonathan O'Brien:** We spoke about mandatory information sessions on the family side. What is Mr. Kenny's opinion of mandatory information sessions in the commercial sector?

**Mr. Austin Kenny:** It is not a bad idea. In the commercial world, and even in every aspect of our lives, information is very easy for us to find now. Doctors will say patients come to them knowing more about their problem than they do and it is the same with lawyers. The information society is feeding that. Everybody has information and, therefore, I do not know whether information sessions should be mandatory. I do not think I would be against it. I fully take on board what has been said and there is probably a need in family law.

With regard to the delivery of information, if lawyers are compelled to give the information, then clearly they need training and, therefore, the Law Society and the other professional bodies need to be taken on board to make sure solicitors and barristers are sufficiently trained about mediation. One does not know probably an awful lot about it. There is misunderstanding and misuse of the word "mediation" right across society, particularly by the media. Newspapers recently reported on the volume of mediation work undertaken by the Labour Court but it is conciliation work, not mediation work and, therefore, there is a misunderstanding. I take Mr. Brady's point earlier that as a service to the community, mediation providers need to get together and get co-ordinated around that message right across society.

**Mr. Bill Holohan:** Mr. Kenny referred earlier to solicitors and barristers being the gatekeepers and they are. Cork solicitors have a particular reputation. The group I am involved in in Cork has been trying to educate our colleagues. We had a seminar last year and one chap in his late 50s of a more conservative bent who had been through mediation convinced more people with one simple sentence, "You know, it worked and it wasn't bad". The difficulty is educating the lawyers as to the benefits in order that they, in turn, can inform their clients and educating them as to their role. The natural inclination of lawyers is to argue and to try to get the best deal as they say "I'll do better for you" and so on. They do not understand that there is a better way, which is to be a solutions provider for their clients. If one gets a reputation as somebody who can produce results in a short period, one will have a better future than someone who undertakes a huge volume of work and possibly never gets paid for it.

**Deputy Anne Ferris:** Whatever about mediation being mandatory, as Family Mediation Ireland representatives said earlier, there should be a mandatory mediation information session at the very least. People should have to have this session at the outset and then decide what road they will take. That would be important along with the public information campaign.

**Mr. Greg Hunt:** There has been a great deal of talk about solicitors and they are important gatekeepers. Other gatekeepers include professional bodies and institutions and trade associations. We provide more than 100 schemes for trade bodies, including everything from travel to funeral to motor care to caravan disputes with consumers where nobody even goes near a lawyer. They go to the trader who then refers them to the trade association, which, in turn, refers them to independent arbitration, adjudication, mediation, etc. It is not just about getting to the lawyers; it is about getting to the businesses because there is a range of cases from somebody who wants to go to mediation for an apology rather than money to a €1 billion construction project and everything in between. Mediation can be used for all of it. It is about getting to the right people and education is key.

**Mr. Mark Small:** I refer to Mr. Holohan's point about the training of the legal profession. There needs to be clarity on the two different types of training. There is training to be a media-

tor. However, significantly, there is also training to be an advocate within a mediation process. Two years ago, we identified this as an issue and we started a programme of training our mediators. Some people have attended our training programme for advocacy, which is different. It is different as a solicitor and a judge. The problem people are beginning to understand is that many solicitors and barristers who come to the training do not understand the difference between an advocate in a mediation context and advocate in a court context. They are used to the former and there needs to be an education process about the latter. We have trained more than 300 people in this area, including for the Law Society. It is important that people understand that difference.

**Mr. Greg Hunt:** I would like to make an offer and a challenge to everyone. Let us get together and take this forward. It has been mentioned a few times.

**Chairman:** That would be useful. I thank everybody for attending. I hope witnesses will excuse members coming and going but they are busy, as there are many demands on them. I have learned a great deal not only about the upcoming legislation but also about mediation. There is not enough known about it. It is an exciting, valuable, useful, cost effective and stressless process. I would ask the media to do their bit to inform and educate the public, businesses and others about this process.

I thank the representatives for their input into the draft heads of the Bill. This is a new process where we consider the draft legislation before it is published. This will be the fifth or sixth report of the committee and the Minister and the Department have accepted many recommendations from the committee as we work closely with them. We have been requested by them to publish a report on the draft legislation before the end of the month. We will invite the witnesses to the launch. If they are available, they will be more than welcome to attend. The report will go to the Minister, who will then hopefully publish the Bill. The debate will commence in the Dáil before the Bill is sent to the committee for Committee Stage. I invite them at any stage in the proceedings to feel free to make a submission to us. Members would be most interesting in maintaining engagement with the various groups.

I thank everyone for their attendance and for their interesting and valuable input, time and expertise.

The joint committee adjourned at 4.50 p.m. until 3.30 p.m. on Wednesday, 16 May 2012.

# DÁIL ÉIREANN

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**AN COMHCHOISTE UM DHLÍ AGUS CEART, COSAINT AGUS COMHIONANNAS**

**JOINT COMMITTEE ON JUSTICE, DEFENCE AND EQUALITY**

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*Dé Céadaoin, 23 Bealtaine 2012*

*Wednesday, 23 May 2012*

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The Joint Committee met at 13.40 p.m.

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## MEMBERS PRESENT:

Deputy Dara Calleary,  
Deputy Michael Creed,  
Deputy Alan Farrell,  
Deputy Finian McGrath,  
Deputy Jonathan O'Brien,

Senator Ivana Bacik,  
Senator Martin Conway,  
Senator Katherine Zappone.

DEPUTY DAVID STANTON IN THE CHAIR.

## BUSINESS OF JOINT COMMITTEE

### **Business of Joint Committee**

**Chairman:** Apologies have been received from Deputies Anne Ferris and Seán Kenny. Members will have received submissions on the heads of the Mediation Bill 2012 and the opening statements we received have been circulated. I request members to ask brief and focused questions.

*The joint committee went into private session at 1.51 p.m. and resumed in public session at 1.52 p.m.*

### **Mediation Bill 2012: Discussion with Mediators Institute of Ireland**

**Chairman:** The purpose of this meeting is to have a discussions with the Mediators Institute of Ireland on its written submissions on the heads of the Mediation Bill. Before we begin I ask everybody to turn off their mobile telephones as they interfere with our sound system. Unfortunately, silent mode is not sufficient and I ask that mobile telephones be turned off completely.

On behalf of the committee I welcome Ms Karen Erwin, president of the Mediators Institute of Ireland and Mr. Gerry Rooney, president elect. You are both very welcome. I thank you for your attendance at today's meeting and for the information you have supplied to the committee. It is of great assistance to us in our work in the Oireachtas. In terms of the format for today's meeting, you will be invited to make brief opening remarks of approximately five minutes which will be followed by a question and answer session.

Before we begin, I draw the attention of witnesses to the position on privilege. Witnesses are protected by absolute privilege in respect of the evidence they give to the committee. However, if they are directed by it to cease giving evidence on a particular matter and they continue to do so, they are entitled thereafter only to qualified privilege in respect of their evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given and are asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against a person or an entity by name or in such a way as to make him, her or it identifiable. Members should be aware that under the salient rules of the Chair, they should not comment on, criticise or make charges against a person outside the Houses or an official by name or in such a way as to make him or her identifiable.

I call on the president of the Mediators Institute of Ireland, Ms Erwin to make her opening statement.

**Ms Karen Erwin:** Chairman and members thank you very much for inviting us here today. We are pleased to have an opportunity to discuss issues with members and answer their questions. As members will be aware, we have submitted a 17 page submission which sets out our views on the generality of mediation, what it is, how it works and its fundamental principles. Later on in the submission we deal with the heads of the Bill and we would be happy to answer questions. I am accompanied by Mr. Gerry Rooney, the president elect, who will take over from me as president of the institute in November. We have no idea who will answer the questions. If they get too difficult I might pass them to my left.

The Mediators Institute of Ireland is a unique body in mediation terms, not only in this country, but elsewhere. As an institute we welcome mediators from all background and if I

might say, none. Our mediators practise across the whole range of mediation. That is different from how mediation services operate in England and what is turning out to be the case in Northern Ireland. In those jurisdictions, for example, they tend to have a civil and commercial mediation group, then they might have a separate group dealing with family issues, a separate group dealing with restorative justice and perhaps workplace issues. The Mediators Institute of Ireland was founded about 20 years ago and at that time, it was founded to work with separating couples and family mediation, but as it grew during the past 12 years it opened up more to workplace issues and to commercial and civil cases, which in mediation terms is usually referred to as commercial.

I took over as president about seven years ago and at that time we decided to have a root and branch review of how we could assure the quality of mediation and mediators. Mr. Rooney was involved very closely with me on this work because he had particular experience of accreditation of mediators and mediation training courses abroad as well as what was on offer in Ireland. At all times we have tried to assure quality - quality assurance of both the training of mediators and continuous professional development, as is common with most professional organisations, quality of the actual practise of mediation, quality in regard to ethics and ethical issues, practice issues and quality in regard to independent regulation.

The way we have tried to bring about independent regulation is by best practice. In our disciplinary, complaints and appeals procedures, we have a panel of three people, of whom the chairperson and one of the other two members of the three person panel must not be a mediator. The third person on the panel is a mediator who will come from the speciality of mediation, which is the subject matter of the complaint or disciplinary action. The standard mediation principles would be put to the complaints, disciplinary or appeals panel but the people deciding on the issue would be entirely independent of both the Mediators Institute of Ireland and of the mediators themselves.

We are a voluntary body under the charities legislation. None of the executive directors or council members is entitled directly or indirectly to any finances. We have a part-time administrator who works five days a week, mornings only, though as the authors of our own success, we find that is not sufficient and we are now looking to see if we can expand.

Our funding comes purely from our membership subscriptions, our annual conference which we hold in November each year or any education courses or assessments that we run. We are entirely self funding. We have almost 600 members. I would imagine by the end of this year that will rise to 700. Although I did not have a chance to check the precise number, about 90% are mediators who would have qualified and most of them would have an annual practising certificate. They would have passed our 60 hours of training course, they would have passed an assessment of skills and then each year they must apply for annual membership. To become a member, they must pay the renewal fee but in addition, they also have to show that they have done continuing professional development.

We are unique in professional organisations in that our continuous professional development, CPD, divides into three elements. The first is what one would expect, attendance at conferences or courses. The second element is the actual practise of mediation and I will make a note of that because there are not enough mediations to go around. Although some mediators have a number of mediations in train, many mediators have none. We are worried that a person might embark on mediation when he or she has not done so for perhaps two or three years. To get over the practise element, we run role plays as necessary.

The third element of CPD is that one must have reflective practice. It is not good enough simply to mediate; one must reflect on how it is one mediates, which includes sharing experiences with other practitioners and keeping up to date with best practice. We regularly conduct what we call sharing and learning groups comprising practitioners engaged in mediation work across the board, including commercial mediation, workplace mediation and mediation involving separating couples. There is no mediator from whom one cannot learn something. We are strongly of the view that mediators, in order to serve the parties for whom they are providing a mediation service, must not keep themselves in silos. The issues that evolve during a mediation may cross the boundaries of a particular type of mediation to encompass intergenerational mediation, workplace issues and commercial matters. The mediator must not only be properly trained and accredited but must also have awareness across a range of disciplines.

The Mediators Institute of Ireland is different from other mediation bodies in that we serve as the professional association of mediators. I am a member of council of the Irish Commercial Mediation Association which, like the MII, is voluntary, but its role is specifically to promote mediation in commercial disputes. Mediators must sign up to a code of ethics and practice on an annual basis in order to have their practising certificate renewed. In other words, practitioners must declare that they will be subject in their work to the code of ethics and practice. Equally, if there is a complaint or a disciplinary issue against a practitioner, he or she will be bound by that declaration. The final requirement for a practising certificate is that one has professional indemnity insurance.

One of the difficulties mediators face in the course of their work is that there is currently no regulation of mediation practice. As such, we are absolutely delighted at the prospect of this legislation. In the absence of regulation, any person, even without training, can set up as a mediator. Depending on the type of mediation involved, one often deals with vulnerable people who are under enormous stress. They require and are entitled to be dealt with by practitioners who are properly trained and abreast of the most up-to-date methods and practices. Moreover, where a mediator makes a mess of a case or behaves inappropriately, customers must have recourse to an independent body that will call the practitioner to account. The volume of complaints to the Mediators Institute of Ireland is, unfortunately, rising. As such, there is a pressing necessity to have a process in place by which people can be called to account for inappropriate behaviour. Whether or not a complaint is justified is for the independent panel to decide.

Mediation is an incredibly difficult concept to explain. For instance, colleagues and I are frequently asked whether we meditate, to which one can only reply that some of us do and others do not. The other major difficulty is that mediation tends to get lumped into alternative dispute resolution. While the latter is indeed an alternative to litigation, some of the processes involved are almost identical to litigation. To clarify, litigation and arbitration are two sides of the same coin. Whereas one might describe arbitration as an alternative, it is basically the same as litigation, being highly process driven, focused on looking at the past and seeking to persuade an independent third party to adjudicate as to which party to a dispute is right. The difference between litigation and arbitration is that in the case of the former, the adjudicator is a judge who may have no background in the subject matter of the dispute, whereas in arbitration, the arbitrator is generally called on the basis that he or she has knowledge of the subject matter. That is seen a good deal in construction cases, for example, where arbitration is quite prevalent and an arbitrator is chosen on the basis of his or her relevant expertise.

The focus in mediation is less on what happened in the past, and we are not concerned with issuing judgments. In short, it is not an adjudicative process and we do not pronounce who is



right and who is wrong. That is not to say that the past is not important in mediating a dispute, in fact it is vital in terms of building the context of the mediation. There is often a cathartic effect for those in mediation in being able to tell their story - what happened to them, when it happened, and the consequences for them of the other party's actions. In some commercial disputes, in particular, it could be the first time the two parties have spoken to each other in a very long time. For instance, I took part in a commercial mediation recently where the dispute arose five years ago, was handed off to the two sets of lawyers and the two parties had not spoken directly to each other, or listened to each other, in all that time. The story-telling aspect is very important in order to ascertain the context of the dispute and for everybody to understand what happened and the issues arising from it. At the end of that story-telling exercise, no blame is apportioned and no adjudication is made. Instead, the focus is on what happens next and how we move forward. It is in this regard that mediation can prove particularly effective, the fundamental principle being that the mediator empowers the parties to begin designing and developing their own solution. They are, after all, the experts in the dispute. Parties may come to the mediation process, particularly in a commercial mediation, with five sets of lever arch files on each side, but it is the individuals themselves who know what has gone on and can look at all the possibilities for resolution. The flexibility in the process allows them to design their own solution.

**Chairman:** Thank you, Ms Erwin. We will now have questions from members, beginning with Deputy Dara Calleary.

**Deputy Dara Calleary:** I thank the delegates for their interesting perspective on this issue. The Mediators Institute of Ireland is the 11th organisation to make a presentation to the committee. On the last occasion, at which representatives of several groups attended together, there were noticeable differences between them, with some of them seeming to go to great lengths to differentiate themselves from each other. One of my questions to them was who mediates the mediators. I absolutely agree with the delegates today that we must have trained and accredited professionals. In regard to the 60-hour basic skills requirement, is that independently audited by the Further Education and Training Awards Council, FETAC, Higher Education and Training Awards Council, HETAC, or any other outside agency?

**Mr. Gerry Rooney:** No, we have our own standard for accreditation. Having done a great deal of research internationally, we found that the 60-hour training requirement provides a solid basis for training mediators. We have an accreditation policy committee which sits regularly and monitors standards as they emerge. Before a training provider can register as a trainer with the MII, it must meet the framework standards, as set out on our website, which are quite stringent. We require that those providing training are accredited and experienced mediators in addition to having both the knowledge and skills that are required to assist mediators. Our activity does not fit into a FETAC or HETAC framework because we are not ourselves a training provider. Rather, our role is to oversee the standards.

**Deputy Dara Calleary:** In the context of the responsibilities that may potentially be assigned to MII under the legislation, would it submit to discussing with FETAC or HETAC the possibility of one or other of those bodies playing some type of role in terms of providing an absolutely independent overview of its courses?

**Mr. Gerry Rooney:** We would welcome any independent review of the standards we provide. We do not necessarily view mediation skills themselves as requiring a specific academic qualification; for instance, I have trained mediators who are only semi-literate. We would be concerned not to put up barriers that prevent people from gaining skills in mediation. Gener-



ally speaking, however, it would be very positive to have a body such as HETAC or FETAC overseeing the implementation of our standards.

**Deputy Dara Calleary:** I have concerns in regard to Nos. 63 to 66, inclusive, which deal with the capacity of a mediator to walk away from a mediation. As I put it to the other groups, where does this leave the client? All of the power is proposed to be given to the mediator to walk away and perhaps leave the clients stranded. Ms Erwin referred to five lever arch files of documentation. If a mediator is getting into the middle of that and encouraging people to talk to each other for the first time in five years, say, only then to walk away before the process is concluded, that is a cause for concern.

**Ms Karen Erwin:** I am pleased to have the opportunity to answer that question. It is a tricky one and it concerns a balancing of rights. The Deputy, who has clearly read the paper very well, will know one of the principles and fundamental aspects of mediation is confidentiality. The very reason the parties open up to a mediator is because they know the matter will not go any further. Mediators rarely, if ever, walk away from a case. It would be most unusual for them to do so. To my knowledge, they only do so in the most extreme circumstances. We refer in the paper to just two examples, one of which concerns elder or child abuse and the other of which concerns commercial information from a party in respect of which confidentiality would have to be breached if one were to tell the other party one was leaving because of certain circumstances. With regard to child protection and elder abuse, one is not allowed to tell the other party one must walk away and report them. A significant set of issues arises in this regard. It is, of course, a matter of balancing rights.

**Chairman:** Could Ms Erwin expand on that point?

**Ms Karen Erwin:** My understanding is that where there is abuse - including family abuse, although I do not practice in that area - one is not allowed to notify the abusing party that one has been made aware of it. To do so might, in itself, result in prejudice and give rise to difficulties. The mediator ought to walk away from the mediation and report to, notify or even ask questions of the relevant authority. It would be completely inappropriate to carry on in the circumstances described, even for the day, with the mediation. One might have to extricate oneself, call for advice and obtain help. Then, if one were allowed, one could return the next day or the day after. However, one would not be able to say to the relevant party, who might be in a different room, why one did what one did. It puts the mediator in the most invidious position possible because he or she is trying to encourage communication and dialogue between the parties.

If I were a mediator in a commercial dispute, according to a model closer to the shuttle model of mediation, and a party told me something that made me realise I had a conflict of interest, I would have to step back professionally from the mediation. The information is given in confidence and, therefore, one would have an inordinate problem going to the other party. While I understand Deputy Calleary's point, I believe it is a question of balancing rights. The Law Reform Commission considered this very closely and accepted the Deputy's point, the public policy point, but ultimately said the only acceptable approach would involve the protection of confidentiality. Fortunately, what the Deputy describes happens extremely rarely.

**Deputy Dara Calleary:** Given the highly charged circumstances in which mediators work, vexatious complaints could be made against one by a party that does not like the way the process is going. How does one separate a complaint of this kind from a complaint pertaining to a mediator who is not doing his or her job professionally enough?

**Ms Karen Erwin:** That is an interesting question. We have a complaints committee. When a complaint is submitted, it usually comes to me first, as president. Mr. Rooney will be in this position in November. I listen to the complaint submitted and must then assess whether it is about mediation. In telephone calls I have received from individuals about complaints about mediation, I have heard them refer to an appeal. I tell them there is no appeal in mediation. It turned out the cases concerned facilitation, with which we cannot deal.

At present, we have no screening process that allows us to say a complaint is vexatious and frivolous. Once a claim is legitimately made, in writing and on time, we must deal with it. We must get two outsiders and an independent mediator to adjudicate. If complaints continue at the current rate, that will be difficult.

**Deputy Dara Calleary:** How many complaints are received annually?

**Ms Karen Erwin:** We have had about seven over three or four years. Some are complaints that are not upheld and others are complaints that are out of time. Some appear to be complaints but actually are not as they concern something different. One complaint, concerning a breach of confidentiality, proceeded to the complaints panel procedure. It did not give rise to disciplinary action but it might have done. We had no disciplinary complaints yet but it is only a matter of time.

**Senator Katherine Zappone:** I thank Ms Erwin for her excellent exposition on the institute and her submission. Given that the institute has been around for a long time and that its work has been to establish a practice of quality mediation, I can imagine the challenge that had to be faced over the years. Ms Erwin indicated a number of recommendations in terms of the heads of the Bill. Could she identify one or two of the key strengths of the Bill and a primary weakness or two?

**Ms Karen Erwin:** I will begin with the second question first because the first obviously concerns quality assurance. My greatest concern - Mr. Gerry Rooney may have different ones - is the lack of confidentiality that could arise, either by giving reports to the court or by having to give people reasons one has pulled away from mediation.

**Mr. Gerry Rooney:** I concur that confidentiality is a key aspect of mediation. Anything that could affect or challenge that would represent a challenge in encouraging parties to enter mediation.

**Senator Katherine Zappone:** With the enactment of the legislation, what changes might be required in the practice of the institution?

**Ms Karen Erwin:** We would have to examine our code of ethics and practice. I do not envisage us reducing it but we would obviously have to ensure there was nothing Members wanted in the Bill that was not in our code, thus requiring its inclusion.

**Deputy Jonathan O'Brien:** Ms Erwin admitted it is difficult to define mediation. At a previous meeting, a number of groups suggested that we should consider mandatory information sessions. Could Ms Erwin give us her opinion on that? She raised concerns about head 4. It was suggested that when parties are signing a statement of consideration, that statement should include the reasons they did not take up the option of mediation. What is the view of the delegation on that?

**Ms Karen Erwin:** There should be mandatory information sessions. The Law Reform

Commission suggested it for separating couples cases. I would go further and stipulate that there ought to be a mandatory information session before issuing proceedings. In that way, one would certainly know the individual had the relevant information.

I make the point about solicitors because I am a solicitor myself. Not all solicitors necessarily know about or practice mediation. What they are giving is some rote definition as opposed to listening to what the case is about and deciding whether it is suitable for mediation, how long it might take and how much it might cost. One is really asking somebody to give an opinion on something about which he may know nothing. It has proved entirely unsuccessful in cases involving separating couples and this is why the mandatory information provision was introduced. Without it, the procedure did not work.

**Deputy Finian McGrath:** I welcome the delegation and apologise for being late. On the broader issue of the integrity of the mediator, let me address an issue that arises in my job. If a public body or big company hires a mediator, perhaps to facilitate the request of residents in respect of a big local project, is there pressure on that mediator to deliver the result his or her hirer wants rather than to operate in the public interest? There are many infrastructural projects around this country in which roads and footpaths are being dug up, and public bodies often call in a mediator to get rid of the concerns of local residents. That is one issue I have come across both as a councillor and as a Deputy. How does Ms Erwin defend the integrity of mediators in this regard?

**Ms Karen Erwin:** Inherently, there can be a conflict of interest from the mediator's point of view. This happens with more than just public bodies; it happens every day with organisations that pay mediators to deal with workplace disputes. Company X pays the mediator and then the two parties take part in mediation. It is nice, as a mediator, to bring home a win, which will get one more work from the company. Mediators are trained not to take account of this. Within the mediation room, they must be completely impartial in terms of who is paying them, how and where. It is not relevant within the room. Provided one is mediating and therefore facilitating the parties to come to their own agreement, one does not have as much influence as people might think, because one is facilitating them to come to an agreement. There is always an inherent conflict.

**Mr. Gerry Rooney:** An inherent part of the mediation process is that the mediator engages the parties in an agreement to mediate in which terms of reference are set, so at the outset the mediator ought to be seen as an honest broker with both parties' interests at heart and not as representing one party or the other. The parties probably will not enter the mediation process unless they all agree to the agreement the mediator crafts with the parties. That is key in demonstrating the independence of the mediator and providing the parties with a process that can give them solutions or opportunities to achieve solutions.

**Deputy Finian McGrath:** From my experience - I will not name anybody, Chairman-----

**Chairman:** Please.

**Deputy Finian McGrath:** For example, when councils hire mediators, my experience is that although the mediator sits down to meet the residents and deal with all the issues, nine times out of ten the result is in favour of the council. There is a lack of trust among some citizens in this regard. I wonder about that.

**Mr. Gerry Rooney:** Obviously I cannot answer on any specific issue, but-----

**Deputy Finian McGrath:** I could tell you, but do not think my Chairman would let me.

**Mr. Gerry Rooney:** Both research and our own practice inform us that what makes mediation successful - it never fails, perhaps - is the relationship that the mediator builds with the parties. If there is a feeling that a mediator has made a decision on behalf of one party over another, it is probably not mediation, in a real sense, that the parties have been offered. Time and again, it is not the content or expert knowledge of the mediator that is important but the ability of the mediator to build a relationship with the parties and manage the process and the content of the dispute so that all parties are satisfied that their interests are being met. If they are not, the parties decide whether they want to withdraw from the process. We have very high success rates for mediation, but in many cases in which mediation does not result in a resolution, the nature of the dispute may well change, which shows that the parties find the process itself helpful. To return to the core part of the Deputy's question, it is what the mediator sets up at the outset that determines the outcome.

**Chairman:** I have one or two questions. Under Head 11, Ms Erwin discussed whether the mediated agreement reached by the parties was legally binding and enforceable, and said it might be better to use the word "binding" than the word "enforceable". I ask her to tease this out a little. What would she like to see happening in this regard?

**Ms Karen Erwin:** I hope I can remember what I said. I know the Chairman wants me to be brief.

**Chairman:** It has to do with situations in which parties arrive at a mediated agreement. How binding is it, and how is it enforced?

**Ms Karen Erwin:** Whether a mediated agreement is binding depends on the mediator and the parties. Personally, what I say in my agreements to mediate is that failing anything else, it will be binding on the parties. I do not talk about enforceability. When the parties are coming to a mediated agreement, they must then decide whether it will be binding on them. Nine times out of ten, it is binding on them. However, "binding" is different from "enforceable", because if it is binding it is similar to a legal contract. If the provisions in the document are breached, a party can issue proceedings - assuming they do not want to go through the mediation process again - for breach of contract. If on the other hand the document is directly enforceable, a party will not have to issue proceedings for breach of contract, because the document itself is enforceable. The concern of the Mediators Institute of Ireland is that if the documents are made enforceable, we are really limiting mediation only to lawyers. Most mediated agreements are crafted in the mediation process itself and, frequently, signed within the mediation room. The parties may or may not have been represented by lawyers or union representatives, but there is an agreement which is binding on the parties, if that is what they want. However, if the document is enforceable, the recourse is straight to the High Court without breach of contract proceedings, and most mediators will not feel comfortable drafting such agreements. A concern we have about the directive on mediation in civil and commercial matters, which was transposed onto the statutory instrument, is that mediated agreements for cross-border disputes are directly enforceable. I am concerned about this. If documents become enforceable, we will end up having to have solicitors in every mediation - not necessarily when people agree on the heads of an agreement, or a non-binding agreement, but thereafter. The parties will have to take the agreement and go somewhere else, and then, much as happens frequently with separating couples, it will all start to unravel. I think it would be a disservice to mediation if this were to be provided for.

**Chairman:** Deputy Calleary asked about the FETAC and HETAC qualifications. Are the certificates issued by the institute internationally recognised, and is there cross-border recognition of certificates from other jurisdictions by the institute?

**Mr. Gerry Rooney:** It is a general weakness in mediation internationally that there is no overarching body that recognises or certifies mediators per se. Mediators who qualify under the institute are recognised, for example, in Northern Ireland, where people value the MII certification. Mediation bodies in the UK have examined our standards and are trying to copy some of what we have achieved. However, there is no one body internationally that recognises any standard of mediation.

**Ms Karen Erwin:** There is one body, the International Mediation Institute, of which we are a member and a qualifying reviewer. If a person has MII certification - that is, if we have approved him or her - once he or she has extra hours, he or she may well be approved by that institute. However, as Mr. Rooney said, there is no overarching international body.

**Chairman:** Ms Erwin mentioned cross-border disputes. How do they work? I am not talking about Northern Ireland, because she has covered that, but what about disputes between parties in Ireland and another European country? Is there a way of dealing with that?

**Mr. Gerry Rooney:** There is the EU directive on cross-border mediation across Europe. That has the effect that agreements made in one jurisdiction can be upheld in another jurisdiction, so one does not need to take the route of proving or enforcing them. Ultimately, when the parties choose a mediator, they contract that mediator and there is an agreement to mediate, so they accept the mediator's bona fides in providing that service. That is an acceptable norm internationally. Once the parties agree to the mediator, that sets it up as being a reasonable approach to the dispute.

**Chairman:** It was mentioned that there is an onus on mediators to determine capacity, especially in situations involving older people. Could the witnesses expand on that? We dealt with capacity legislation earlier in the year and issued a report on it; I do not know whether the witnesses are aware of that. What are their views in this regard?

**Ms Karen Erwin:** It is a tricky issue. I am about to receive international accreditation in elder mediation and it is really tricky, so I am aware of the work the committee has been doing. Under that draft legislation, I understand, capacity will be presumed and will be determined on a moment-in-time basis as and when decisions are made. Just because one is incapacitated today does not mean one will be incapacitated tomorrow. A mediator is not qualified to reach a view on whether somebody has capacity, but if there is a presumption of capacity, in my view, the onus is on the mediator to satisfy himself or herself that the person concerned is not demonstrating a lack of capacity. In other words, one accepts the presumption unless one has reason to believe otherwise. The term used in the heads of the Bill is "ensure" - that is, the mediator will ensure - and the mediator cannot do that. We do not have the qualities and qualifications to do that. Under the capacity legislation there are processes that are put in place and supports to help a person to have capacity, to ensure the least prejudicial situation for him or her.

**Chairman:** The institute's submission also referred to online mediation, which again brings us to the 21st century, the Internet and so forth. With respect to people who cannot be in the same room if mediation goes on for a while, confidentiality is an issue. Is online mediation taking place now? Will Ms Erwin comment on that?



**Ms Karen Erwin:** There is a differentiation between online in a typed format or online on the telephone. I was at a conference last week and reference was made to doing small commercial disputes online. They never see people at all. One party is at this end of the line and the other is at that end. They now have a specialist approved by the British civil service which approves four telephone providers. I have never seen this but I have the name of one. An elder mediation case is an intergenerational mediation where there is a mother or father and a number of siblings. If, for example, the mother is becoming unwell with Alzheimer's dementia and all the family wants to get together to decide how best to look after the parent, somebody could be on Skype call from Australia and somebody else in America on a conference call. They would be bound confidentiality wise because they would all have to sign up to the agreement to mediate before they started. Everybody within the mediation has, therefore, signed the agreement to mediate, which allows for that confidentiality.

Confidentiality means different things in different types of mediations. For example, in an elder mediation, if one was going to look at a nursing home, that obviously would not be confidential but other financial elements would be.

**Chairman:** Two issues were raised at the previous hearing on the Bill. The first is that mediation is relatively new and unknown among citizens, particularly among businesses and families. The second is the cost of mediation versus the cost of litigation. The committee was informed that there is a huge difference and businesses would benefit significantly from taking the mediation route, yet many do not know about mediation or are unsure or afraid of the process. Could Ms Erwin give us an example of a cost comparison between mediation and litigation? What is happening about informing people regarding mediation services?

**Ms Karen Erwin:** When one deals with arbitration and litigation because one is asking a judge or an arbitrator to decide, one has to go into all the history and the documents to prove what happened and that takes ages. One must get statements from witnesses and so on. One has to get five Lever Arch folders. When one is mediating, all one is interested in is what the person has in his or her head at the time and, therefore, one cuts out all the preparation time trying to persuade the judge. I could get a telephone call this afternoon and mediate it next week. At the end of the day, mediation is flexible. There is no court time, papers or stenographers and we can use a hotel meeting room. The parties agree and the mediator sits down and writes out the agreement there and then and it is done. Time is money and significant amounts are saved.

When I gave my presidential address at our last conference, I quoted figures for the amount spent on the Courts Service report on mediation and it was incredible.

**Mr. Gerry Rooney:** The costs can be significant. Legal costs of €60,000 can be incurred by both parties combined. A day's mediation if the parties are willing to resolve the issues is quantifiable and clear. The MII is proactive in providing information to all communities interested in mediation and dispute resolution. For example, we attend meetings of chambers of commerce and we have briefing pamphlets for different areas of mediation. At our conference last year, Mr. Mark Fielding of ISME attended and he made a strong point that business does not survive without relationships. The benefit of mediation as a dispute resolution process is it allows relationships to continue. Disputes are resolved by the parties maintaining a relationship. The message is slowly becoming more prevalent in the business community that mediation is a way forward.

**Chairman:** Mr. Rooney said the typical cost for a group in litigation is €60,000. What is the cost of mediation for a day?

**Mr. Gerry Rooney:** I would not like to be quoted saying €60,000 is typical. In the example I had, the combined costs of both parties had exceeded €60,000 and when they looked at the potential costs if they carried on, it was high. The MII does not want to declare what the fees would be for this professional service but it would be in the low thousands, perhaps less than €5,000. That is significant.

**Senator Ivana Bacik:** I apologise for arriving late from another meeting. I welcome the delegation. I would also like to address the issue of costs. Mr. Rooney referred to the combined costs of all parties for one day in litigation. In mediation, are parties typically legally represented or that does depend on the type of mediation? Clearly, they bear their own costs when they are not represented and these would be much lower than the cost of the attendance of solicitors and counsel for court.

Confidentiality was another issue raised at our first hearing on the legislation. Is that enforceable or it is mutually agreed? Would it be a good idea to make an additional provision to enforce the duty of confidentiality?

I am impressed by the online mediation through Skype calls and so on. That is arm length's mediation. That is a huge advance given the costs of court appearances and, for example, the logistical difficulties of bringing all the witnesses physically to one place. That is a huge advantage to emphasise.

**Mr. Gerry Rooney:** What is happening in the UK regarding on-line mediation is exceptional. Limited time telephone mediation of an hour is used and there is a high percentage of resolutions for these small cases. That demonstrates a good opportunity for businesses.

Not all cases involve legal representation. It depends on the value of the claim, where the parties have positioned themselves and what is at stake. Increasingly, mediations in which I am involved have lawyers engaged. Whether they attend the mediation or not depends on the parties. If they engage lawyers, there is a cost. It is invariably agreed in the mediation that both parties agree the costs. I could have responded to this earlier when Deputy McGrath asked which side a mediator takes if both parties are paying. The mediator is less likely to be accused of taking one side or the other. Invariably, if there is an agreement with the parties, the costs are typically asked for in a resolution through a legal route, but when the costs of the mediator are discovered, it is easier for the parties to agree them because they are not as high as the legal costs or going to the Taxing Master. Lawyers are involved. We do not necessarily preclude them *per se* but the disputes are up to the parties to resolve. Having them engage through the mediation process is where the success lies.

**Deputy Michael Creed:** Senator Bacik beat me to the punch. I was going to ask whether mediators mediate in the presence of people's legal representatives. How willing are their legal advisers to expose them to mediation as opposed to litigation or arbitration? I appreciate Ms Erwin is a solicitor. Is there a hostility to this approach from conventional legal practitioners? Is there a higher probability of success in mediation in the absence of people being hand held by their legal advisers?

**Ms Karen Erwin:** Not necessarily. It depends on the type of mediation. For example, in many of the mediations I do, I keep the parties in the room with me for almost all of the time. It is only if we arrive at an impasse that I would separate them whereas if I am doing a commercial mediation, they tend to separate much more quickly, although I try to keep them together. Lawyers can be incredibly helpful, particularly in commercial mediations, if they understand

## JOINT COMMITTEE ON JUSTICE, DEFENCE AND EQUALITY

the principles of mediation and they are with the mediator. They can do huge volumes of work to the benefit of the parties and, therefore, to the benefit of the resolution of the dispute. Where lawyers are not aware of mediation, do not understand it and see it as a threat to their income, that is more problematic but, as we educate people and mediation is spreading more widely, lawyers are beginning to see its benefits.

The mediation Bill is helping because it is bringing a focus on mediation. There is also case law whereby people might be forced to pay costs if they have not considered mediation. These are all sticks and carrots. We are getting to a point where it will be easier, but there is nothing better than when lawyers are working with us. It is great.

**Chairman:** I thank Ms Erwin and Mr. Rooney for their attendance, the information they forwarded to the committee, answering questions and engaging in such a proactive and positive way. This will prove helpful to us in our work. Our plan is to publish a report in a few weeks giving our views on this matter. It will be launched in Leinster House and forwarded to the Minister as per his request. The committee has published a number of reports. I thank the clerk to the committee and his staff who have been supportive.

The joint committee went into private session at 2.45 p.m. and adjourned at 2.55 p.m. *sine die*.



# Appendix 4

## **SUBMISSIONS RECEIVED**

Centre for Effective Dispute Resolution (CEDR Ireland)

The Mediators Institute of Ireland

Mr. Con Mangan

Family Mediation Ireland

County Registrars' Association

The Dublin Solicitors Bar Association (DSBA)

Irish Commercial Mediation Association

The Chartered Institute of Arbitrators (Irish Branch)

Law Reform Commission

Mediation Solutions

Mediate Ireland

Ms. Julie Sadlier

Law Society of Ireland

The General Council of the Bar of Ireland

Ms. Karen Quirk

A & L Goodbody



16<sup>th</sup> April 2012

To: Alan Guidon  
Clerk to the Joint Committee on Justice, Defence and Equality

**Re: Written Submission on the Heads of the Mediation Bill**

Dear Mr. Guidon

Please find enclosed CEDR Ireland's written submission on the Heads of the Mediation Bill. CEDR Ireland would welcome the opportunity in due course to make an oral submission to the Committee.

Kind regards

Nicola White  
Practice Manager  
CEDR Ireland

Email: [nwhite@cedr.com](mailto:nwhite@cedr.com)

Telephone: 087 4148848



CEDR Ireland

Submission to Joint Committee on Justice,  
Defence and Equality on the Draft General  
Scheme of Mediation Bill 2012

16<sup>th</sup> April 2012



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## **1. About CEDR Ireland**

1.1 CEDR Ireland was established in 2011 to give CEDR a formal presence in the Republic of Ireland and Northern Ireland, where we have operated successfully for more than 20 years. As part of Europe's leading commercial mediation body, we have worked with Irish businesses regularly for more than 20 years. In this time we have accredited more than 300 commercial mediators and helped numerous businesses to resolve internal and external conflict. From our Dublin office we are able to provide access to leading mediators and arbitrators from Ireland and overseas, and access to our flagship and internationally renowned mediation, negotiation and conflict management programmes.

1.2 CEDR Ireland's Practice Manager is Nicola White. Nicola was the legal expert and principal researcher for the Law Reform Commission's Consultation Paper and Final Report on Alternative Dispute Resolution: Mediation and Conciliation. She was also involved in the drafting of the Law Reform Commission's Draft Mediation and Conciliation Bill which was included in the Final Report and which forms the basis for the Draft General Scheme of Mediation Bill 2012.



## **2. Introduction**

2.1 CEDR Ireland welcomes the opportunity to comment on the proposed legislation as it impacts on development of mediation in Ireland. CEDR Ireland commends the Minister for introducing the Bill and CEDR Ireland firmly believes that the proposed legislation could have a dramatic impact in increasing access for justice for many citizens and providing citizens with more choice and value in terms of how to resolve their disputes. Furthermore, CEDR Ireland believes that the Bill will serve to promote Ireland as an international centre for dispute resolution. However, CEDR Ireland does have a number of concerns in relation to certain Heads of the Bill which we will outline below.



### **3. Review of Heads of Bill**

CEDR Ireland wishes to comment on the following Heads of the Bill:

#### **3.1 *Head 2: Interpretation***

Pursuant to Head 2 of the Bill a mediator is defined as ‘a person who assists parties to reach a voluntary agreement to resolve their dispute whilst acting at all times in accordance with the principles of impartiality, integrity, fairness and confidentiality, with respect for all parties involved in the mediation.’ CEDR Ireland has concerns as to use of the terms ‘integrity’ and ‘fairness’. While all mediators should conduct themselves in such a manner, it is concerning to have those terms in statute form because it is often arguable what would be meant by fairness and equally, and would potentially create unnecessary satellite litigation.

#### **3.2 *Head 4: Duty on solicitor to provide information and advice on mediation***

CEDR Ireland welcomes the provisions in Head 4. CEDR Ireland believes that these provisions will promote early dispute resolution and ensure that clients have a menu of options available to them in terms of how to resolve their dispute.

In relation to Head 4.2(a) which states that ‘A person commencing civil proceedings shall, when making application to the court, include a written statement signed by the person and his or her solicitor in the person’s presence, confirming that (i) mediation has been considered as an alternative means of settling the dispute, and (ii) the solicitor has complied with the requirements of subhead (1)’, CEDR Ireland suggests that it would be beneficial that a person would also have to include in the written statement their reasons for not attempting

mediation prior to litigation. CEDR Ireland suggests that this would be beneficial in assisting the Courts in two ways. Firstly, in deciding whether to adjourn proceedings for the parties to consider mediation where the reasons stated for not attempting mediation prior to litigation are, in the Court's opinion, unreasonable. Secondly, it will assist the Court in deciding whether to impose a cost sanction for an unreasonable refusal to consider mediation pursuant to Head 17 of the Bill. Furthermore, CEDR Ireland believes that such a requirement in the written statement would place a stronger obligation on the parties to give real consideration to mediation prior to the commencement of litigation.

### **3.3 *Head 6: Mediation Conditions***

Head 6.4 of the Bill states that 'Where a mediator proposes to withdraw from a mediation process, he or she shall give reasons to the parties for his or her withdrawal.' It states in the Explanatory Note which accompanies this Head that 'It is undesirable from a policy perspective that a mediator be permitted to withdraw without any explanation.'

CEDR Ireland has serious concerns in relation to this provision. CEDR Ireland believes that, as is the practice in most jurisdictions, mediators should not have to give reasons to the parties for his or her withdrawal. During a mediation, most mediators conduct a private meeting with the parties. These meetings are completely confidential between the party and the mediator and the mediator cannot disclose any information to the other party without the expressed consent of the party in question. These private meetings are fundamental to bringing about a successful resolution of the dispute because the party can speak openly and frankly to the mediator without being concerned that the information will be disclosed. However, during these private meetings a mediator may become aware of information from a party which would result in a mediator deciding that it was



no longer appropriate to continue the mediation. For a mediator to then go and disclose the information because this is his or her reason for withdrawing, would be a fundamental breach of the confidentiality which is afforded to mediation. CEDR Ireland believes that there is no benefit to be achieved by a mediator disclosing his or her reasons for withdrawing. The Law Reform Commission in its Final Report on Mediation and Conciliation recommended that 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. CEDR Ireland suggests that the Law Reform Commission's recommendation on this issue should be followed.

### **3.4 Head 7: *Role of mediator***

Head 7.2(c) states that a mediator shall 'act with impartiality towards the parties and serve all parties equally.' As noted at paragraph 3.1. above, CEDR Ireland has concerns in relation to putting into statute a requirement to act with 'impartiality' and 'serve all parties equally'. Such terms are difficult to define in practice. While CEDR Ireland agrees that a mediator must act in such a manner during a mediation, CEDR Ireland believes that including these terms in statute may give rise to problems and that it would be more appropriate to include such a provision in a Code of Practice, rather than in legislation.

Similarly, in the United States 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. 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 law.

### **3.5 Head 9 - Code of practice for mediators**

Head 9(1) of the Bill states that ‘the Minister may (a) prepare and publish a code of practice, or (b) approve of a code of practice drawn up by another body, for the purpose of setting and maintaining standards for the provision and operation of mediation services.’ CEDR Ireland firmly believes that if mediation is to be put on a statutory footing, the Minister must prepare and publish a code of practice or approve a code of practice drawn up by another body. As noted by the Law Reform Commission in its Final Report on Mediation and Conciliation, a statutory Code of Conduct for mediators and conciliators 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. Furthermore, the Commission considered that a statutory Code of Conduct for Mediators and Conciliators would also promote minimum standards amongst all mediation and conciliation professional bodies. CEDR Ireland would suggest that a Code of Practice be prepared and published by the Minister.

### **3.6 Head 10 – Mediation communications to be confidential**

CEDR Ireland believes that Head 10 of the Bill does not provide adequate protection for mediators in relation to confidentiality. The Law Reform Commission had recommended that a distinct form of privilege be introduced for mediation communications. The holders of the privilege would be the parties and the mediator. This would ensure that if the parties waived the privilege, a mediator could not be compelled to give evidence in any subsequent litigation unless the mediator also waived the privilege. The Law Reform Commission suggested that a mediation privilege would 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.

Head 10(1) of the Bill provides that ‘mediation communications shall be confidential and shall not be admissible as evidence in any court or other proceedings except where, in the case of a mediation communication of a party, confidentiality is expressly waived by all the parties.’ This provision does not adequately protect mediators from being called as witnesses in subsequent proceedings. In England and Wales, there has been an increase in satellite litigation concerning confidentiality and mediation, in cases where all parties have waived the confidentiality of the mediation and the mediator has been called as a witness.

CEDR Ireland agrees with the Law Reform Commission’s view in its Final Report, where it was stated that ‘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.’ CEDR Ireland suggests that Head 10 of the Bill

should be amended to provide statutory protection for mediators against being called as witness in subsequent legal proceedings unless where it is overwhelmingly in the interests of justice that the mediator to give evidence.

### ***3.7 Head 14 – Effect of mediation on limitation and prescription periods***

CEDR Ireland greatly welcomes this provision. However, CEDR Ireland believes that the terms of the Head are vague in relation to when the ‘clock stops’ at the start of the mediation. It states in the Head that ‘the period beginning on the day on which the dispute is referred to a mediation process’ is when the suspension of the limitation period will commence. However, one’s interpretation on when a dispute is referred to a mediation process may vary. Is it on the date when both parties agree to use mediation, is it on the date when both parties agree to the appointment of the mediator or is it on the date when the mediation takes place?

As noted by the Law Reform Commission in its Final Report mediation must not become a tactic for delaying proceedings by suspending limitation periods. For this reason, the Commission considered 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. CEDR Ireland agrees that such clarity is required and suggests that the recommendation of the Law Reform Commission on this issue be supported. The recommendation stated that for the purposes of suspending the running of limitation periods, a mediation commences on the day on which the parties agree in writing to suspend the running of any limitation periods.

### ***3.8 Head 19 – Liability for civil damages***

CEDR Ireland has concerns in relation to the Explanatory Note which accompanies this Head. It states in the Note that the mediator will be performing a quasi-judicial function under the Bill and therefore should have protection from

civil liability. CEDR Ireland would disagree that mediators perform a quasi-judicial function.

## **The Mediators' Institute of Ireland**

### **Submissions on the Draft General Scheme of Mediation Bill 2012**

#### **Overview**

1. The Mediators' Institute of Ireland, (the MII) is the professional association of Mediators in Ireland with members from both Northern and Southern Ireland. Established in 1992, the MII promotes the use and practice of quality mediation as a process of dispute resolution in all areas of dispute.
2. The MII is a company limited by guarantee and is a registered charity. It is a not-for-profit organisation and its only source of income is from members' subscriptions, accreditations and a small amount from our Annual Conference and CPD training. The MII has one paid, part-time administrator; otherwise the work of the MII is conducted, in a voluntary capacity, by elected officers.
3. The MII is not a service provider and does not provide mediation training nor Mediator services, but rather accredits mediation training programmes and Mediators. In December 2011, the MII had just under 600 registered members, of which, in excess of 400 were approved by the MII to practice.
4. The MII is presided over by a Council comprised of a President and 21 Council members, which meets four times a year. Most Council members have a particular role and responsibility e.g. communications, accreditation, conferencing, education and training etc.
5. The organisation is managed on a day-to-day basis by the President and a part-time paid administrator. The MII has an Executive Committee comprising the President, President-elect, Secretary, Treasurer, Accreditation director, Registrar and Communication Director.
6. MII approves Mediators' practice across a wide range of mediation settings and the Mediators come from all backgrounds including social services, legal, therapists, accountants, engineers, civil and public servants to name but a few. The MII is a learning organisation committed to standards in mediation and the promotion of mediation in all areas of dispute resolution.
7. From 2005 the MII has undergone a root and branch review including: accreditation processes; Code of Ethics and Practice; continuing professional development requirements; Complaints and Disciplinary procedures as well as the governance of the organisation. We feel it would be helpful to elaborate on certain aspects of this work as it informs our submission to you.

8. We would encourage you to visit the MII website at [www.themii.ie](http://www.themii.ie)
9. The Governance provisions are available under the “About Us” section of the MII website.

## **Training**

10. Some 7 years ago we carried out an international review of mediation training requirements and found a wide divergence – the norm in the US was, and remains, 40-hours training, whereas family mediation in some jurisdictions required hundreds of hours. The MII settled on 60-hours of basic, skills based, mediation training. We believe that this amount of training allows for the appropriate skills to be learnt and absorbed. All information in relation to training and assessment requirements are available on the MII web site.
11. All training programmes approved by The Mediators' Institute of Ireland are assessed against specific criteria based on the competencies required for the various levels of membership. Any training programme seeking approval to MII approved Associate or Certified level must meet the requirements as set out in the Associate/Certified Training Programme Assessment Grid ([www.themii.ie/documents/Training\\_Prog\\_Assessment\\_Grid\\_000.pdf](http://www.themii.ie/documents/Training_Prog_Assessment_Grid_000.pdf)). The MII currently lists 18 approved training programmes and an additional two are currently being assessed.
12. Where direct application has not been made to us by the training provider, but where a person who has attended a particular mediation training programme applies to the MII, we review the course and, where appropriate, deem it to be “equivalent”. If there is a particular aspect of training required in addition to the training that they have completed, they are advised accordingly. At present four equivalent mediation training programmes are recognised by the MII as fulfilling the training requirement for MII Certified Member status.
13. To become an MII Certified Member – the entry level for MII approval to practice - the candidate must have successfully completed an MII approved training programme or equivalent programme and undertaken and passed an MII approved assessment of their mediation skills in line with identified core competencies ([www.themii.ie/documents/Certified\\_Member\\_Competencies\\_000.pdf](http://www.themii.ie/documents/Certified_Member_Competencies_000.pdf)).

As mediation is a skill (as opposed to an academic qualification) the assessment for Certified Member status comprises a one-hour videoed role play ([www.themii.ie/role-play.jsp](http://www.themii.ie/role-play.jsp)) with a personal review and self-critique. This role-play is adjudicated against specific criteria ([www.themii.ie/documents/Certified\\_Member\\_Assessment\\_Form.pdf](http://www.themii.ie/documents/Certified_Member_Assessment_Form.pdf)) by an experienced Mediator.

The assessment is generally conducted as part of the training programme ([www.themii.ie/role-play.jsp](http://www.themii.ie/role-play.jsp)), but where the programme doesn't include an approved assessment or where a person wishes to be assessed separately to

the training programme, they may attend for an MII role play assessment ([www.themii.ie/certified-assessment.jsp](http://www.themii.ie/certified-assessment.jsp)).

### **Certification**

14. Once an individual has completed an approved or equivalent training and has successfully passed the role play assessment they may apply to the MII for Certified Member status.
15. An experienced Mediator may apply for assessment to become a Practitioner member – this advanced assessment is by way of a panel interview by three senior, experienced Mediators. The questions asked in this interview assessment focus on the development of the Mediator in practice and explore the applicant's understanding of and adherence to high ethical standards ([www.themii.ie/assessment.jsp](http://www.themii.ie/assessment.jsp)).

### **Practising Certificate**

16. The MII issues annual practising certificates to Certified and Practitioner members who pay the appropriate fee, have completed the required annual Continual Professional Development requirements, who declare that they have appropriate professional indemnity insurance and who agree to be bound to the Code of Ethics and Practice of the MII.
17. Only Mediators holding a current practising certificate are approved by the MII to practice.
18. The MII website has a search facility for all currently registered MII Mediators which specifies their approval to practice status.

### **Find a Mediator**

19. In order to help the public to find an appropriate Mediator the MII website has an easy to access database search facility for accredited MII Mediators who are available for private work. The database provides information about the Mediator's training, qualifications and specific experience so that a person seeking a Mediator can find one who best suits their needs. The search may be conducted by membership status, location, area of specialism, or by inserting relevant key words to identify Mediators with particular expertise or experience, e.g. *Construction; Bullying*. The MII recommends that a person wishing to find a Mediator contact three Mediators on the list to discuss with them how they might approach the mediation, how much they charge and how and when they would expect payment.
20. The only information that is not available is the fees charged by the Mediator – to have this information would be in breach of competition law. Therefore the MII encourages those looking for a Mediator to select, say, three from the list who appear to fulfil the requirements and then make contact with them and enquire as to the amount of the fees and when they have to be paid.



### **Continuing Professional Development**

21. The MII requires CPD to be carried out every year by those in practice ([www.themii.ie/cpd-requirements.jsp](http://www.themii.ie/cpd-requirements.jsp)). The requirements are split between actual hours of mediation experience, reflective practice on your mediation experience and attendance at courses or the annual conference.
22. Each year the member makes a declaration that they have complied with the CPD requirements and a percentage of members are randomly audited each year to ensure that CPD requirements are being met. Most MII approved Mediators far exceed the requirements.

### **Code of Ethics and Practice**

23. Three years ago the MII undertook a complete and comprehensive review of its Code of Ethics and Practice. The MII Code of Ethics and Practice can be viewed at <http://www.themii.ie/code-of-ethics.jsp>
24. In essence a Mediator may only practice within their competence – this competence varies from time to time depending on the experience of the Mediator in the particular area of practice the subject of the mediation. A Mediator may be very competent in some areas of practice but not so much in others.
25. From 1 January 2013 an MII Mediator will not be deemed to be competent in separating couples mediation unless they complete a 32-hour knowledge course on the topic or have the equivalent learning.
26. The Code of Ethics and Practice gives guidelines as to “customary” practice but the very beauty of mediation is that it is not prescribed by rules and is flexible and adaptable. We recognise that, given the wide range of disputes that can be resolved by mediation, one size does not fit all.
27. If a complaint arises the individual circumstances of the mediation process will be viewed and measured against what a “customary” approach would be in a similar mediation – i.e. how did this mediation complained of measure up to what could reasonably be expected in this type of case.

### **Independent Complaints and Disciplinary Procedures**

28. The MII have established Complaints and Disciplinary procedures ([www.themii.ie/governance.jsp](http://www.themii.ie/governance.jsp)). These by their nature have to be organic and change with experience.
29. The main feature of the procedures is that they are independent of the MII. The panel sitting in judgment of the complaint or disciplinary process comprises three people, two of whom are not Mediators and not connected with the MII. One of these two independent people is appointed by the Chairperson. The third member of the panel will be a senior experienced Mediator whose practice is in the area the subject matter of the complaint.

### **Appeals**

30. The MII will establish an appeals panel of three people to hear an appeal. The appeal may relate to a complaints procedure or to a disciplinary procedure in relation to a mediation process or a decision made by the MII which affects the Applicant.
31. In line with best practice, the Appeals panel comprises three people, two of whom are independent of the MII. The third person would be a senior experienced Mediator who either practised in the particular type of mediation or who would be au fait with the workings of the MII.

## **Fundamentals of Mediation**

### **Self Empowerment**

32. The main difference between mediation and litigation and arbitration is that in the latter two dispute resolution models a third party hears the “evidence” of the parties and decides who is right and who is wrong. From this then flows a decision imposed on the parties.
33. In mediation the fundamental principle is that the parties come together in an attempt to find a solution themselves with the help of a neutral independent third party. Self-determination is paramount.
34. The Mediator will not decide the outcome for the parties to the Mediation and that is what makes mediation so much quicker and more cost effective – neither party has to prove their case. So no pleadings, no discovery of documents, no witness statements, no trial processes. It is “we are where we are so how can we move forwards from here”.

### **Voluntary**

35. The mediation process is voluntary so either party or the Mediator can withdraw at any time. This makes any Mediated Agreement reached very sustainable because the parties didn't have to enter into it. Anecdotally very few Mediated Agreements breakdown.

### **Confidential**

36. This is the bedrock of mediation – the agreement at the very start of the process that what is said in mediation is confidential to those in the process. Where there are private meetings with one party and the Mediator, what is said in those meetings is confidential to those in that meeting unless agreed otherwise.
37. Without the knowledge that this confidentiality is enshrined in the process, many parties would not come into the process or would do so withholding the very information that is needed to get to resolution. It is the trust in the

Mediator and knowing that the Mediator can't be called to give evidence and won't breach the confidentiality that enables the parties to make disclosures to the Mediator which can help the Mediator to work with the parties to come to agreement.

38. The more provisions there are in legislation that threaten this confidentiality and the flexibility of the process, the less likely the process is to continue its present success levels.

### **Flexibility**

The very success levels of the process (anecdotally 80% success rate) derive from the flexibility and adaptability of the process. Therefore the less the process is enshrined in legislation the better. The control of the practice can come from the training, the accreditation, the CPD and the Code of Ethics and Practice.

39. The Code itself should not be enshrined in statute – as the MII has learnt from experience, the Code has to change periodically to adapt to new and different issues that arise as mediation becomes more widely used.

## **Heads of the Bill**

40. **Head 1** – no comment.

41. **Head 2 – “Mediator”** – we note and appreciate that the head has taken some of the wording of the MII definition in the MII Code of Ethics and Practice. However we would like to see the retention of the words “a trained and accredited professional”.

42. We would prefer the term “facilitate” rather than “assist” – the mediation process is a facilitative process whereby the parties are empowered to discuss and to come to agreement on their issues if they so wish.

43. “family law dispute” – this definition is misleading. There are many family disputes which would not give rise to “family law proceedings” in Court. The phrase that has become accepted is “separating couples dispute” – which is descriptive of the disputes which this definition intends to cover and covers married couples, non married couples and same and different gender couples.

44. The MII definition of mediation refers to the prevention or resolution of a dispute in its code of Ethics and Practice. The Bill only refers to dispute resolution – we believe the wording should be broadened to include prevention - this would affect a number of the sections.

45. “Mediation” - see points 3 and 4 above.

46. “non-party participant” – a non party-participant may not participate in the mediation itself. You could have a situation whereby an organisation pays for the Mediation process but does not participate in it but by agreement of the parties and the Mediator is given agreed information in relation to the mediation. Communications establishing the mediation and any documents or information given by agreement to that non-party participant should be afforded the protection given to mediation communications.
47. Definitions of Agreement to Mediate and Mediated Agreement should be included. The Agreement to Mediate refers to the agreement whereby all parties and all non-party participants agree (preferably in writing) the terms of the mediation process.
48. The Mediated Agreement is the agreement arrived at by the Parties within the mediation process.
49. There should be a definition of mediation service provider. A mediation service provider could be a community sector provide or a “for profit” provider.
50. A number of mediations are using a co-mediation model – it is standard practice in community and elder mediation. Accordingly there should be a definition that provisions relating to a Mediator should apply to a Co – Mediator as appropriate.
51. Although the Bill refers only to Mediation (and specifically reject the LRC reference to conciliation) it might want to consider the possibility of parties being informed of other alternative dispute methods like arbitration, conflict coaching, conciliation etc.
52. **Head 3** – there needs to be clarity in relation to employment matters. Many employment disputes arise from differences at work and there may be no formal process initiated with the HR department. Mediation can be used under an employment contract or under a Dignity at Work policy as the “informal” method of resolving the dispute. In the event of the dispute being resolved at mediation the mediated agreement arrived at should be directly enforceable.
53. Employment or workplace disputes not covered by the exclusions referred to in the Bill) can be the subject of a mediation process and this needs to be recognised in the Bill to support the voluntary nature of employment dispute resolution.
54. 3(2) There is an anomaly between the provisions and concept of this Bill with, for example, the Multi Unit Developments Act which provides for a report to be given to the Court. It is suggested that where in existing legislation there are duties on the Mediator which exceed the provisions of this Act, the provisions of this Act should prevail. This will be referred to later in the provisions relating to confidentiality.

- 55. Head 4** The MII is very concerned at this provision. Firstly the Solicitor may not be a trained Mediator and therefore may not be in a position to explain it appropriately. Secondly the solicitor is inherently conflicted in that if the party chooses mediation over litigation the solicitor may have a conflict of interest in relation to the relative amounts of fees to be earned. Thirdly history shows that this provision in relation to family law has been unsuccessful. We strongly advocate that the person or organisation who explains what mediation is and its pros and cons should be a trained accredited Mediator or a mediation service provider.
- 56. 4(1)(b)** it is not clear how the Solicitor would fulfil this provision – i.e. what information would the solicitor have on mediation services; how would the Solicitor give the client objective information to enable the client to select a suitable Mediator or mediation service provider or to suggest three Mediators. By way of example the MII has nearly 600 accredited trained Mediators.
- 57.** Only a practising Mediator or a mediation service provider will be able to give a realistic estimate of the length of time the mediation might take and of the cost of the mediation. Without this information the client is not in a position to make an objective assessment as to the most beneficial approach to the dispute prevention or resolution.
- 58.** The client should also be given the estimated costs of the solicitor and any barristers and any other costs in the event of the matter going to mediation so that they can make an objective comparison.
- 59. (2)(a)** See comments above
- 60. Head 5-** the same points above in relation to the information given by solicitors are repeated as appropriate for barristers.
- 61.** The explanatory note says that “the intention is to make mediation a factor to be considered at all stages of a legal case” – however the provisions of Head 5 relate only to the commencement of the proceedings. To enable the intention of the Bill to be carried out, a provision might be inserted that mediation be considered actively again at different milestone stages of proceedings - for example discovery applications, setting down or appeal. Should the parties decide to explore the use of mediation at any stage / or seek to consider it again their legal representatives should be required to adhere to the previous sections.
- 62. Head 6(1)(b)** add the word “or direction” after “invitation”
- 63. Head 6 (2).** The Agreement to Mediate should be signed by the Mediator(s), any Mediator’s assistant, by all of the parties and all non- party participants. Although the Mediator and some of the non-party participants may be bound by different Codes of Ethics and Practice of different professional bodies, it is an important part of the mediation process that all involved in it sign and are

required to be bound by the same provisions and it avoids any confusion as to one professional body's confidentiality provisions differing from another.

- 64.3(b) and 4** The Mediator needs to be able to withdraw from the mediation at any time and without giving information as to why. So a definite right to withdraw should be given to the Mediator to withdraw – in 4 it says “where the Mediator proposes to withdraw” – this implies that they might not be “allowed” to withdraw.
- 65.** The Mediator should not be forced to disclose why they are withdrawing. During the mediation process (both before and during the mediation session) the Mediator may have separate private (caucus) meetings with the individual parties. What transpires in those meetings is absolutely confidential to what is said between the participants in those private meetings. The Mediator is only allowed to inform the other party of what was said if they have the express agreement of the first party. This is a fundamental provision of mediation. However The MII can see that on occasion there may be circumstances whereby the Mediator could inform the parties why they are withdrawing and they should be entitled to do so. The better place to deal with the practice of how to withdraw would be in the Code of Ethics and Practice.
- 66.** If in a private session the Mediator becomes aware of a reason why they cannot continue it is not open to them to inform the other party without the express permission of the first party. So by way of example if in a meeting with one party you learn of elder or child abuse that has to be reported you cannot inform the other party but you could have to stop the mediation and withdraw.
- 67.** There may be a capacity issue with one of the parties and it could be inappropriate for the other party to be informed of it.
- 68.** In a commercial dispute the Mediator might become privy to very sensitive information about the background to a particular transaction on learning of which the Mediator might have a conflict of interest.
- 69.** Whereas as a general principle it might be undesirable from a policy perspective that a Mediator may be permitted to withdraw from the mediation without explanation, the MII believes this should be secondary to the fundamental provision of confidentiality within the mediation process. Many Mediators already build this into their Agreement to Mediate and explain it to the parties at the start of the process so that there is transparency and clarity.
- 70.6(5)** The draft says the Mediator shall “seek to complete the mediation process as quickly as possible”. The explanatory note says “in the shortest time possible”. The MII would prefer the words “as quickly as practicable as the Mediator deems appropriate in the particular circumstances of the matter”. The mediation process starts from the first phone call and ends when the Mediator closes their file. It is not a “one size fits all” process and that flexibility is a great part of why it is so successful.

- 71.** It can take time to set up a mediation – it is a voluntary process and all of the parties may not have the same enthusiasm at the commencement of the process and may initially be reluctant to commit. They need to be given time and space. However the Mediator needs to be conscious that parties are not abusing the process by unnecessary delay and should take steps to deal with it. This is something that could be better dealt with in the Code of Ethics and Practice.
- 72.** Many Mediators will hold separate pre-mediation meetings with the parties and, to be most effective, some time will need to elapse between the premeditation meetings and the mediation session(s).
- 73.** In some mediations the parties agree to other meetings – separating couples mediations may take a number of sessions to enable the parties to obtain information. Some parties may agree in the mediation to hold one or more review meetings and the process will not finish until those meetings expire. The parties in large measure drive the timing of the process so it might not be in the best interests of the parties or of the mediation process for the Mediator to be laying down timeframes to suit the legislation rather than the parties.
- 74.6(6)** Some parties and some non-party participants may not be physically present for some or all of the process. Due to various circumstances a party may join the mediation electronically. A non party participant may attend the mediation initially but have to leave but be available on the phone later. On line mediation is becoming more popular now so the more appropriate words might be “participate in”.
- 75.6(6)** A problem can occur when one party doesn’t agree to the other party’s wish to bring a particular person to the mediation. Sometimes it is inappropriate to bring a particular person or category of person i.e. another employee in an organisation. To get over these difficulties an additional sentence to the effect that the other party may not unreasonably refuse to allow that other party to bring a particular person to the mediation.
- 76. Head 7 2 (a)** The onus should not be put on the Mediator to “ensure” that at all stages in the mediation process each party has the capacity to engage in the process. The Mediator is not qualified to do this. The onus on the Mediator should be not to proceed with the mediation at all or at that time if they have reason to believe that one of the parties at that time does not have capacity.
- 77.** In elder mediation a party may well have capacity at certain times of the day and not at others so the Mediator has to be mindful of that and arrange the mediation sessions accordingly.
- 78. Head 7 2(d)** See the comments above on the wording “as quickly as possible”.
- 79. Head 7(2) (e)** The Mediator cannot “ensure” that the parties understand and consent to any agreement. The onus on the Mediator to satisfy themselves as

far as is practicable that the parties understand and consent to the agreements reached.

- 80. Head 7 2(f) and 2(g)** Mediation involves the parties making informed decisions in relation to their disputes. The parties should therefore be encouraged to seek professional / appropriate advice (legal, accountancy, pension, tax etc.) prior to the mediation session(s). Many Mediators will include in their Agreement to Mediate that the parties are advised to seek professional advice before the mediation session, during the process and especially prior to signing a binding Mediated Agreement. It is particularly important in separating couples disputes – the parties need to understand what a Court might grant in the event of the dispute going to Court prior to negotiating a financial settlement with their partner or spouse. The onus is put on the parties to seek the advice and not on the Mediator to recommend it – to do so would place the Mediator in a difficult situation on their impartiality.
81. There are a number of options open to the Mediator to enable professional advice to be sought. The Mediated Agreement could be signed and held in escrow by the Mediator for a certain time (for example a week) to enable the parties to take advice. The parties could agree not to sign the agreement until the next mediation session by which time they will have got the professional advice. The Mediated Agreement could be expressed to be non-binding and the parties could agree to instruct their respective lawyers to draw up a “legal” agreement on the basis of the agreements reached in the mediation.
- 82. 7(3)(4)** a fundamental principle of mediation is the right of the parties to determine if they wish to resolve the dispute and, if so, on what terms.
- 83. Head 8.** –The MII is very pleased to see the inclusion of this provision. This information is publicly available for all MII accredited Mediators who hold a current practising certificate. To obtain an annual practising certificate from the MII the Mediator has to declare that they have carried out the appropriate training, been assessed for mediation skills, have carried out appropriate mediation CPD, have professional indemnity insurance and agree to be bound by the Code of Ethics and Practice of the MII which include an independent complaints and disciplinary procedures.
- 84. Head 9 Code of Practice for Mediators** The MII welcomes this provision and will provide whatever assistance it can to further this objective. However it must be remembered that a Code of Ethics and Practice has to be organic and must change as practice changes and develops. If there is an attempt to legislate in a prescriptive way for practice the risk is run that the fundamental flexibility and adaptability of mediation which makes it so successful will be lost.
- 85. Head 10 – 10(2)(a)** The MII agrees with the general principle that mediation communications as defined in the Bill are confidential. However that confidentiality must belong to the Mediator as well as to the parties. If it is possible that the Mediator is likely to be called on to give evidence for one or



more of the parties the Mediator will have to make notes to be in a position to do so and that will influence the flow of the mediation thereby reducing the effectiveness of the process of the parties.

86. Confidentiality is the bedrock of mediation and it is because it is assured that many parties come into mediation and will give the Mediator information within the mediation that will enable an agreement to be reached. Some mediations can continue for many hours and the only way in which a Mediator could be assured of remembering everything that happened within the mediation in case they had to give evidence would be to take notes. This is contrary to good mediation practice – Mediators don't take many notes as they are actively working with the parties.
87. A standard clause found in an Agreement to Mediate is :“The Parties agree that they will not call the Mediator to give evidence in any legal or employment process, Court or Tribunal and they will not call for the production of any documents relating to the mediation.”
88. Another standard clause would be “the mediation is confidential to the parties, their advisors and the Mediator and everything that happens in the mediation process is confidential except as the parties agree in the mediation. Nothing that happens in the mediation can be repeated or used in any Court, Tribunal or other process, investigation or disciplinary procedure. This confidentiality lasts even after the mediation ends unless otherwise agreed by the parties or unless a court orders to the contrary. Nothing in this clause shall prohibit or prevent either party from making or defending their case (in the event that the mediation is not successful in resolving the issues between the parties) on the basis of matters that were in existence prior to the mediation.
89. The Statutory Instrument 209 of 2011 implementing the provisions of the European Directive 2008/52/EC at Section 4 states that
- “A mediator or person involved in the administration of a mediation shall not be compelled to give evidence in civil or commercial proceedings or an arbitration relating to a matter arising out of or connected with a mediation”. There follow some exceptions for public policy, child protection, harm to parties and enforcement of the Mediated Agreement.
- This SI relates to cross border mediations. The MII contends that no lesser protection should be afforded to the confidentiality of mediations taking place in Ireland and that this provision be included in the Mediation Bill.
90. **Head 11** – The MII approves the default position of the Mediated Agreement reached by the parties is legally binding and enforceable except where expressed to be otherwise. It might be better to use the word binding rather than enforceable. I.e. that the parties have arrived at a contract which they can sue on for breach of contract in the event of a default.

91. Having said that, there are situations where parties do not wish the agreements made in the mediation to be legally binding and under the proposal in the Bill that can still happen provided that there is clarity that there is no intention that the agreement is legally binding.
92. The MII is glad that there is no direct enforceability of the Mediated Agreement as provided for in the European directive. This would give rise to concerns for Mediators who are not in legal practice. However it is good to note that a Mediated Agreement in a separating couples case may be directly enforced by the Court on application by the parties.
93. **Head 12** – It is good to see the provision whereby the Court can direct information sessions. The MII suggests that any information session be given by a fully qualified and practising Mediator. Whereas theoretically a person who has learnt from a text book what mediation is and how it works, mediation is a skill not an academic subject. To enable the possible participant to assess the best route for them to resolve their dispute they have to be enabled to have an interactive question and answer session with someone who is conversant with the practice of mediation. That Mediator will be able to assess from that meeting whether or not the case is suitable for mediation from the point of view of that party.
94. It is regretted that the mandatory information session in separating couples cases recommended by the LRC has not been included in the Bill. As said previously, the extant situation whereby Solicitors are bound to inform parties of the benefits of mediation has not worked and the provision of the mandatory information session was to get over that problem.
95. **Head 13** – Any report to the Court should be limited to “the Parties have come to agreement” or “the Parties have not come to agreement”. There should be no elucidation that one of the parties didn't turn up or didn't make an effort to mediate or left the mediation. For the mediation process to work it has to be a safe and confidential space. If the parties believe that the Mediator is not only facilitating the process but could have an effect on any Court proceedings by giving judgments or opinions on the parties roles within the mediation it will inhibit the process.
96. The issue can be overcome by the parties agreeing a statement within the mediation as to what can be said in Court in the report.
97. The Report should be in writing to the Court without the necessity of the Mediator having to attend Court unless the Court specifically directs that that happen.
98. **13 (2) (b)** It is inappropriate in a mediation that the Mediated Agreement or a statement of the terms of the Mediated Agreement should be set out in the Report. The very benefit of mediation is that it is a flexible and adaptable process which can assist the resolution of a variety of issues between the parties. Some of those issues may be specifically pleaded in the proceedings

but in most mediation cases many issues, other than those specifically pleaded surface during the process. The Mediated Agreement may include terms that in no way relate to the matters contained in the Court proceedings. Some of the matters agreed by the parties may include how they will work with each other in the future or may contain commercially sensitive information. It would be entirely inappropriate if that information was likely to be or could be read out in court with all of the attendant publicity. The prospect of that happening would inhibit the parties from coming to Mediated Agreements. It would put Mediated Agreements at a disadvantage to normal out of Court settlements whereby the terms are usually not read out to the Court and the Court has no interest in knowing the terms.

**99.13(3)** It is not clear what the purpose of giving the report to the parties at least 7 days in advance prior to its submission to the Court. Does that give the parties the right to request or demand that the Mediator change the report. Any such request or demand would immediately impair the Mediator's impartiality and draw the Mediator in from being a neutral, independent party to being involved in the parties' litigation.

**100. Head 14-** It is not clear from this section as to when the mediation process begins. The Code of Ethics and Practice says the mediation process starts with the first contact in the case with the Mediator. That is ascertainable from the Mediators point of view but from the parties point of view they may have agreed to go into mediation but the selection of the Mediator may take some time. A better starting point for the Bill would be the date on which the Mediator accepts the request to be the Mediator. So it excludes the initial exploratory conversations with the parties or their advisors in relation to fees and conflicts.

**101.** To make it certain section 14 (2) could be amended to read "The Mediator shall inform the parties in writing of the date on which the mediation process begins and ends."

**102. Head 15-** The MII agrees with this clause as it stands.

**103. Head 16 –** This clause is problematic. Sometimes it is an organisation, service provider or third party which pays the Mediators fees and the parties don't pay at all. In other cases the parties split the costs between them or the parties may agree to split the costs in a particular way where there is a multiparty dispute.

**104.** The term "costs of the mediation" would have to be defined. Whereas outwardly it might be fair to divide the costs of the mediation 50% - 50% (assuming that there are only 2 parties) some parties might wish to have lawyers or other advisors with them and the other party might not. The definition should make it clear that it is the costs of the Mediator and any reasonable and receipted outlays that the Mediator might expend i.e. travel; hire of mediation rooms; refreshments etc.

- 105.** 16(b) The Mediator can inform the person(s) paying for the mediation the rates of their fees before the mediation begins. So they could give their hourly rate and VAT rate and they could estimate an amount of time the case might take. If the Mediator charges by the day or by the half day or has an “overtime” rate this too can be given in advance. However it is the parties who control the length of the mediation so it is not possible to give an accurate assessment in advance of the amount of costs. The Mediator could suggest that what sounds like a similar case might take xx hours, but at the end of the day it is the parties who dictate the length of time in mediation.
- 106.** Some Mediators may seek a sum of money “on account” prior to the mediation and agree to submit a balancing statement at the end of the mediation process. Usually this payment would be made to the Mediator and not to a third party which is adding another layer to the process. Some mediations continue for many months and the Mediator may submit interim fee notes.
- 107.** 16(a) This clause, while well intentioned, would be extremely difficult to police. Firstly what may seem to be a “simple” case may become extremely complex because of the relationship between the parties. What appears a complex case may resolve very quickly between the parties. The real test is the amount of time the Mediator spends on the mediation. Some Mediators charge by the day or half day because they “block – out “the day or half day in their diary.
- 108.** If this clause were to remain you could see a dispute arising subsequent to the mediation whereby one of the parties disputes the complexity of the case and challenges the fee charged. If that dispute itself wasn’t settled by mediation and went to Court the Mediator would have to breach confidentiality to deal with the proceedings. If only one of the parties was challenging the fee the other party’s confidentiality would be breached.
- 109.** The intention is to ensure that the fees charged are reasonable. The giving of the rates of fees in advance and the recommendation that parties and their advisors get quotations from a number of Mediators should get over the issue.
- 110.** **Head 17-** Again portion of this head is problematic. What is “any unreasonable refusal of a party to consider using mediation..” A party could say “yes I considered using mediation and I didn’t unreasonably refuse to consider it.” however having considered it I didn’t think it was the right process for me. It is a voluntary process. I would rather have my case dealt with by a Judge”.
- 111.** Another scenario might be “I went into mediation, went to the first session, took one look at the other party and couldn’t stay in the same room as them. Would never trust them to stick to any agreement made in mediation. I am not wasting my time and money in mediation. See you in court. It is a voluntary process and I am entitled to leave”.

112. In both the above scenarios the party is entitled to leave the mediation.
113. If this clause remains it is likely that the Mediator is called into Court to give their opinion of the intent and demeanour of the parties. This would again completely breach the confidentiality of the mediation process which is the bedrock of why the process is so successful.
114. With no disrespect to the “opinion of the Court” only the parties the non-party participants and the Mediator know what goes on in the mediation and how complex or otherwise the issues or the personalities might be. So what might appear on the face of it appear to have a “reasonable prospect of success” will at many stages during a mediation look like agreement is highly unlikely to be reached. There is at least one moment of impasse in every mediation when no one in the mediation knows if agreement is going to be reached or not so it is impossible to say at the outset whether there is a reasonable prospect of success. Some parties don't wish to be involved in mediation – they would rather go to court – and they should be allowed to do so if that is their wish.
115. The MII agrees that a refusal to attend a mandatory information session or an information session ordered by the Court should result in sanction.
116. 17(2) It is difficult to know what benchmark would be used to assess whether the “costs of mediation would have been disproportionately high”. Because of Competition Law the MII does not know or keep a record of either the charging framework or fee rates charged by Mediators. Parties are encouraged to contact three Mediators to enable them to assess different rates of charge and to ask when the fees need to be paid.
117. In relation to a delay in setting up a mediation and in relation to the conduct of the parties it would be inappropriate for the Mediator to comment on the actions of the parties. Sometimes it can take a long time to set up the mediation sessions due to availability of dates especially when all day and the evening have to be kept free. This may not be as a result of bad faith but it isn't for the Mediator to know that. If the Mediator believes a party is acting in bad faith, then as the person in charge of the process they need to take it up with the party directly. If the Mediator believes it is bad faith they may decide to withdraw from the mediation.
- 118. Head 18 –** The MII agrees with these proposals. However it would be important that safeguards were put in place to ensure the capacity of the child to give consent.
- 119. Head 19 –** Whereas the MII welcomes the limitation of liability enabling them to act free from fear of suit, the situations contemplated do not cover all aspects of a Mediators practice. A typical clause in an Agreement to Mediate is as follows “The Parties agree that the Mediator shall not be liable to the Parties in contract or tort (including negligence and/or breach of statutory duty)

except for fraudulent misrepresentation. The Parties may make a complaint against the Mediator under the terms of the Code of Ethics and Practice of The MII.”

- 120.** The reference in the explanatory note to the Mediator “performing a quasi- judicial function” is not correct. The process is about the parties self determination of their dispute and the Mediator does not in any way act as a Judge or Arbitrator or advisor.
- 121.** The MII is happy to discuss this submission or provide further information as required.

Karen Erwin  
President  
The Mediators’ Institute of Ireland  
16 April 2012

Submission on the Mediation Bill 2012.

This submission is made on my own behalf.

My area of expertise is in personal injury claims and property damage claims. Over the past 9 years I have acted as Regional Claims Manager ( "mediator") between our Insurance company and claimants. In all I have resolved over 3000 claims. A substantial number of those could have ended up in court. It is my job to get agreement that was acceptable to both sides without involving large legal costs. Technically I was not impartial as I was paid by the Insurers. Recent financial regulation legislation has made our role similar to a mediator. In my day to day work I deal with Solicitors/Barristers/Claimants./Insurance Companies.

The mediation bill proposed can definitely be a major help in resolving disputes without the huge costs involved in litigation. However I feel that in my areas of interest a change needs to be made. The main difficulty is in relation to the confidential aspect of mediation and that included in the mediation bill as proposed..

At the moment a person with a personal injury must apply to the Personal Injuries Assessment Board (PIAB). The Insurance companies can accept or reject the application at this stage. If rejected the claim goes directly to the courts. If accepted the claim is assessed by PIAB and a settlement value is put on the claim. Both the Claimant and the Insurance company can accept or reject the settlement value offer at this stage. However both sides must accept within a time period. If either side rejects the offer then it goes into the court system. Legal fees can escalate at this stage. Quite often offers made by myself and/or PIAB offers are similar to eventual court offers. However the only major difference is that legal fees have escalated.

If mediation is to be successful it should be required to take place before any PIAB application. It would enable and insure that a genuine offer is made before it advances further. This would benefit both the claimant and the Insurance company. The difficulty here is that the mediation process does not allow for the financial offer made in mediation to be disclosed to both PIAB and the Courts, due to confidentiality clause.

**I would propose that the bill should include the following points.....**

**(1) All Personal Injury Claimants and Property Damage claims should be required to go into mediation prior to application to PIAB and Courts.**

**(2) That any financial offer in mediation must be disclosed to both PIAB and the Courts if the claim is not settled in mediation.**

I trust that you will consider my submission in your deliberations on this bill which I welcome.

Yours Sincerely,

Con Mangan







**Mr. Alan Guidon,**  
Clerk to the Committee,  
Joint Committee on Justice Defence and Equality,  
Leinster House,  
Dublin 2.

**BY E-MAIL ONLY**

**16 April 2012**

Dear Mr Guidon,

I refer to your communication of 4 April 2012 inviting a submission from our offices in respect of the Draft Heads of the Mediation Bill.

In this regard our submission is divided as follows:

- Section A** - Biography of Family Mediation Ireland ® and Eoin Cullina.
- Section B** - Observations in respect of the proposed Heads of the Mediation Bill
- Section C** - Suggestions in respect of legislative reform in the area of Mediation

I am happy to contribute to any public hearing where requested to do so by the committee.

In making this submission it should be noted that I am doing so on behalf of Family Mediation Ireland ® a private client mediation practice and limited company and not on behalf of either the Mediator's Institute of Ireland or South and West Mediation Services, organisations of which I am a member. It is important to point out that the views expressed in this submission on behalf of Family Mediation Ireland ® are my own views obtained from private practice as a mediator and not those of any other body or organisation.

Yours sincerely,

A handwritten signature in blue ink that reads "Eoin Cullina".

**Eoin Cullina B.C.L**  
**Managing Director**

Practitioner Member of the Mediator's Institute of Ireland  
Mediator, ADRg

**Family Mediation Ireland ®**  
**The Calmon Clare Building**  
**Gort Road Business Park,**  
**Ennis,**  
**County Clare**

**+353 1 5242217**  
**info@familymediation.ie**

## **Biography**

### **1. Gemini Webstar Limited t/a Family Mediation Ireland ®**

Family Mediation Ireland ® is a private client mediation practice established to provide private client mediation services and training services in the areas of Civil and Commercial Mediation with particular emphasis on Family Mediation. In particular the practice primarily uses the Comediation model.

Family Mediation Ireland's website is one of the most visited mediation websites in the country having amassed some 90,000 visitors since its inception.

The vast majority of cases undertaken by Family Mediation Ireland ® are in the area of family mediation to include disputes relating to:

- Divorce
- Judicial Separation
- Legal separation through deed
- Spousal and child maintenance/financial provision
- Custody, Guardianship and/or Access
- Sibling relationships
- Probate and Inheritance

The practice also engages in other civil and commercial work covering workplace disputes and disputes relating to simple contract.

### **2. Eoin Cullina**

Eoin Cullina is an experienced mediator and Practitioner Member of the Mediator's Institute of Ireland. Eoin is the managing director of Family Mediation Ireland ® a private client mediation practice and limited company.

Eoin holds a Bachelor of Civil Law degree from University College Cork. In 2002 Eoin qualified as a Solicitor. Eoin worked with Anne L. Horgan & Company Solicitors in Cork for two years before completing his solicitor's apprenticeship with William Fry Solicitors in Dublin.

In May of 2002 Eoin joined the Family Law Unit at Holmes O'Malley Sexton Solicitors in Limerick where he worked for five years before moving to Pauline O'Reilly Solicitors, Galway in 2007. Whilst in Galway, Eoin practised extensively in the area of family law at District and Circuit Court level. In 2008 he trained as a Collaborative Lawyer with Pauline Tesler.

Eoin received his mediator and mediator accreditation from Friarylaw & ADR Group. Eoin practices as a mediator throughout Ireland. He has trained over eighty mediators throughout Ireland and has several hundred hours post qualification experience. He has worked with major training institutions such as Friarylaw, CPD Board, The People Company and NUI Galway in providing seminars and training programmes.

He has worked as a mediator with both medium to large corporations and institutions within the state. He is a mediation panellist with the Institute of Certified Public Accountants in Ireland.

He is a former P.R.O. and committee member of the Galway Solicitor's Bar Association. He is a Practitioner Member of the Mediator's Institute of Ireland. He works with Redefine Mediation in the area of workplace disputes.

He is a member of the Law Society of Ireland. He frequently attends mediation training and CPD events in both Ireland and the UK.

He is a founder committee member of South and West Mediation Services Organisation a non-for-profit Mediation Service based in the mid-west.

## **B - Observations in respect of the proposed Heads of the Mediation Bill**

### **Head 1**

None

### **Head 2**

In the definition marked “mediation communications” after the word “orally” the word “,electronically” could be inserted to account for electronic communications made by parties to the process.

### **Head 3**

None

### **Head 4**

Head 4 could contain a requirement that a Solicitor acting for a client seeking to issue proceedings should obtain from the client a certificate that they have attended a Mandatory Mediation Information Session.

This suggestion is based upon a recommendation received from Family Mediation Practitioners at a shared learning group in London earlier this year.

Such sessions could be provided for under legislation by either the department or a body nominated under the proposed code of practice.

Suggested insertion of new section 4 (1) (d): “obtain from the client a certificate of attendance at a Mandatory Mediation Information Session as defined at section (x) of the act herein.”

### **Head 5**

Should contain a similar proposal to that of head 4 above placing a similar obligation on members of the Bar.

### **Head 6**

If enacted Head 6 could prevent mediators from acting for those clients again in the future. By giving a reason for termination impartiality could be broken. This concept could defeat the purpose of mediation.

Head 6 (3) b: could be amended to read “a party or mediator involved”

Head 6 (4): could be deleted.

Head 6 (6): could be amended to read “One or more.....during the mediation process where they have subscribed in writing to the terms of that mediation process”.

### **Head 7**

Head 7 c (iv): could be amended to reflect the suggested change at Head 6 (6) above.

### **Head 8**

None

### **Head 9**

None

### **Head 10**

None

### **Head 11**

The effect of Head 11 (2) should be reversed to stipulate that all agreements concluded at mediation should be without prejudice except where expressly stipulated that the agreement should be legally binding. In the absence of such a provision the agreement should be deemed confidential or subject to mediator privilege.

Head 11 (3) d: could read “the parties have consented to the agreement being placed before the court”

Head 11 (3) e: could read “ the mediator/s have consented to the agreement being placed before the court”

In the absence of such amendments uncompleted mediation discussions could be placed before a court without the mediators knowledge.

### **Head 12**

In the absence of proper Judicial training in the area of mediation Head 12 (5) could ultimately dissipate the intended effect of the legislation. The relative prospects of success of a case is better decided upon at the initial stages of a mediation by mediators rather than by a court holding seisin of a case.

### **Head 13**

Head 13 could be removed in it's entirety. By reporting to a court a mediator automatically loses their impartiality thereby barring themselves from acting for the parties in the future as mediators.

### **Head 14**

Could be amended to read “In reckoning...is referred to a mediation process or the parties execute an Agreement to Mediate...”

### **Head 15**

None

### **Head 16**

None

### **Head 17**

None

### **Head 18**

Head 18 (1) b could be amended to read “Obtain ...of the child and their guardian, and”

Parties occasionally approach us to mediate where one of their children is subject to a Care Order or a third party has been appointed Guardian. Although in this case the HSE must too become a party to the process the wording should still be amended.

### **Head 19**

None

## **Head 20**

None

### **C - Suggestions in respect of legislative reform in the area of Mediation**

-The Department should require prospective litigants to attend Mandatory Mediation Information Sessions prior to issuing proceedings.

-The Department should require the Solicitors/Barristers of prospective litigants to provide certification in seeking to issue their proceedings that their clients have attended Mandatory Mediation Information Sessions.

-The Department should issue certificates to mediators deemed suitably qualified to provide Mandatory Mediation Information Sessions.

-Pursuant to the proposed Code of Practice the Department should subject to the receipt of an appropriate fee issue Mediator's with a licence to practice as a mediator in the courts.

-Mediators recommended/offered by the courts should have a minimum level of legal training as provided for/certified by an organisation such as the Mediator's Institute of Ireland, The Law Society of Ireland, The Bar Council of Ireland or the Department.

- The Department through legislation should provide mediation training bodies with a mechanism to have their accredited mediator training formally recognised/certified by the Department.

- The Department through legislation should regulate any training/education relationships that may exist between Third Level Institutions / Private Training Entities and State sponsored/controlled mediation departments, entities or services.

- The Department through legislation should set/stipulate the qualifications necessary to practice as a mediator in the service of the state/state bodies and thereby qualify/amend/remove any pre-existing training programmes relationships that exist within state institutions where mediation services are offered.

- The Department through legislation could provide a mechanism for the training the Judiciary in mediation skills.

- The Department through legislation could through Consolidated Taxes Legislation provide tax incentives in respect of mediation fees discharged by parties, to encourage mediation over litigation in recognising the reduction of financial stress that the process offers the state.

- The Department through legislation should create a requirement that mediators like other professions ( such as Psychotherapy ) are subject to supervision by another mediator on a regular basis.

- The Department through legislation should remove the requirement placed upon mediators to report to the courts under the Multi Unit Developments Legislation.

- The Department through legislation should remove any requirement placed upon mediators to report to the courts in any capacity save for actions for professional negligence against a mediator or in respect of threats to the welfare of a child or party to the process.

ENDS

## **SUBMISSION ON MEDIATION BILL 2012 ON BEHALF OF THE COUNTY REGISTRARS' ASSOCIATION**

### **Introduction**

I am making this submission on behalf of the County Registrars' Association of which I am the secretary.

County Registrars are all qualified solicitors with a minimum of 8 years experience in legal practice prior to their appointment.

Pursuant to Article 37.1 of the Constitution, County Registrars exercise limited functions and powers of a judicial nature in the Circuit Court. This is the court that deals with most Family Law matters, property disputes where the RV is less than €254 (ie most non-commercial properties), and commercial and other disputes where the amount involved does not exceed €38,100. These powers are conferred by Statute and by Rules of Court. Many of the preliminary matters that arise in Circuit Court cases are decided by County Registrars at their Motions Courts or Courts held to fix dates for hearing. County Registrars also deal with case progression (management) in Family Law and certain Civil proceedings and adjudicate on Circuit Court costs.

We welcome any initiatives that would assist litigants and enable them to get their cases resolved more quickly and economically while freeing judicial time for matters that must be dealt with by Judges. It is essential that the country gets best value for the money invested in the courts system.

### **Recommendations**

**The term 'court'** should be defined so as to include County Registrars as

- There is a County Registrar available in each county, holding regular and frequent courts
- Outside the main cities, there may be long delays between civil sittings of the Circuit Court
- Any appeal from a County Registrar's decision is to the Circuit Court and thus less costly than an appeal to the High Court

The sections that are most particularly affected are:

**Heading 12: reference to mediation.** If mediation is to be used to fullest advantage, it should be considered at an early stage in the proceedings or before proceedings are commenced and the County Registrar's Court is the venue for the majority of preliminary applications in Circuit Court cases. Furthermore, County Registrars are already involved in promoting mediation in the course of case progression hearings.

**Heading 13: report on mediation.** If the case settles as a result of the mediation, the necessary court orders could be made on consent in the County Registrar's Court without the need for the case to be referred to a Judge. If the case needs to be heard, the County Registrar can schedule the hearing for a suitable date. This would save valuable judicial time.

**Heading 15: stay of proceedings.** Similarly, if proceedings can be stayed by the County Registrar without the need for the parties to refer to a Judge, judicial time will be saved and the parties will get a quicker and less costly decision.

### **Summary of recommendations**

Insert a definition of 'court' that includes County Registrars

If you would like me to clarify or give further information, I would be happy to do so

Patricia Casey  
Secretary to the County Registrars' Association  
County Registrar for Carlow

16<sup>th</sup> April 2012



## Draft General Scheme of Mediation Bill 2012 (the “Bill”)

*Submission by the DSBA Business Law & Commercial Litigation & ADR Committee  
16<sup>th</sup> March 2012*

For ease of reference, comments and observations will be made either with regard to specific heads of the Bill or alternatively, where comments and observations have more general application, such comments will be detailed under the General Observations heading below

### **General Observations**

1. The clear intention of the Bill is the early resolution of disputes through mediation. This approach is to be applauded. However, the approach must have regard to the current court rules and procedures. In particular, the Bill focuses on the advice regarding mediation being provided to a client prior to commencing civil proceedings. A solicitor in so advising a client is obliged to give certain information to include various costs estimates and the length of time to bring proceedings to a conclusion. With respect, at such an early stage in the process it may be very difficult for any legal practitioner to give any real estimate as to timing or costs. A host of issues which affect the time/cost matrix would be at best unclear at this early stage given that no pleadings will have been exchanged and the need for experts, discovery, various interlocutory motions may not have been determined.
2. There are references to “mediation processes” at various stages throughout the Bill. Such processes are not defined. For the reasons set out at paragraph 1, where mediation is to be considered prior to the issuing of proceedings by definition there will be no court pleadings to assist the mediator in identifying the issues in dispute. Court rules should be drafted which set out what documents the parties should provide to the mediator as part of the mediation process so as to fully appraise him of the dispute and the other parties to the mediation as to what the issues in dispute are. Such rules could in turn provide for the types of documents needed in various types of legal proceedings (family law, civil and commercial and so on), with the rules also taking into account what would be required where proceedings were already in place and pleadings had been exchanged. It is essential that sufficient pre-mediation information is available to all and that the process by which this is done is clearly defined.
3. We note that the accreditation and regulation of mediators has not been addressed. The LRC report noted that the need for appropriate training and accreditation of mediators is an essential foundation for a fully functioning system of



mediation. This is particularly important in circumstances where under Head 4(1)(b)(ii) a solicitor is required to provide the names and addresses of persons or organisations qualified to provide mediation services. Without a system of training and accreditation, how does a solicitor determine which persons/organisations are best qualified to provide mediation services?

### **Heads of Bill**

4. Head 4(1)(b)(iii) – Having regard to the comments made under General Observations above and where there remains an obligation to advise in relation to costs, such obligations should mirror the terms of section 68 of the Solicitors (Amendment) Act, 1994 (or such amended obligations as may be provided for pursuant to the Legal Services Regulation Bill 2011). This is necessary so as to avoid having differing sets of obligations under differing pieces of legislation.
5. Head 5 – This should be amended so as to say such a certificate is unnecessary where a solicitor has already provided the necessary certificate in accordance with the Bill.
6. Head 6(2) uses the term “shall” – what are the sanctions for the mediator if he/she does not comply with this section. Is the mediator’s nomination terminated?
7. Head 6(b) – Any party to a mediation should be free to withdraw from the mediation without reason. To do otherwise may give rise to potential breaches of confidentiality eg should the mediator be forced to withdraw by virtue of something that came to his attention during the course of the mediation.
8. Head 7(2)(e) – more careful wording should be used to set out the requirement for the mediator to ensure that the parties “understand” the agreement reached. Wording that confirms that the mediator has inquired as to whether or not the parties understand the terms of the agreement might be more appropriate.
9. Head 10 – The fact that mediation communications are to be confidential is of course crucial. However, the issue of information becoming known to a mediator regarding the commission of a criminal offence needs to be dealt with. Are there to be reporting requirements?
10. Head 15 - Consideration might be given to a subsection which would allow for a temporary suspension of a mediation process, where requested by both parties
11. Head 16(1)(a) – it should be open to the parties to agree otherwise in relation to costs, i.e. that one party will bear all or a greater proportion of the costs. In addition, there should be greater clarity as to what is meant by the “fees and costs associated with mediations”. It is assumed that these costs are to be the costs of the mediator and administrative expenses relating to the mediation rather than any professional fees arising as a result of a party to the mediation having legal representation at the mediation.

16 April 2012

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Alan Guidon

Clerk to the Joint Committee on Justice, Defence and Equality

[alan.guidon@oireachtas.ie](mailto:alan.guidon@oireachtas.ie)

## Written Submissions on the Heads of the Mediation Bill

Dear Mr Guidon

Further to your correspondence with the secretary of ICMA, John Doyle, on 4 April 2012 I am pleased to enclose a written submission on the Heads of the Mediation Bill (the "Heads") for your consideration. ICMA would welcome the opportunity in due course to make an oral submission to the Committee.

### Overview

ICMA notes that the Heads draw significantly from the recommendations of the Law Reform Commission's Report on *Alternative Dispute Resolution Mediation and Conciliation* (LRC98/2010) and the draft bill attached to the LRC's report. ICMA had the opportunity to make written submissions to the LRC prior to the publication of its report and is comfortable with many of the LRC's recommendations, including most of those incorporated into the Heads.

Very importantly, what the LRC Report recognises is the delicate balance between improving professional standards and transparency of processes in the context of mediation while not damaging a very central quality of the process, namely its flexibility to meet the needs of the parties on a case by case basis. ICMA welcomes the Committee's aspiration to improve standards and transparency in the mediation process but cautions against any legislative provisions, which would constrain the best use of the process and its flexibility on a case by case basis. The following suggestions and comments are made in this context.

### Submissions -

#### 1. Head 2 - Interpretation

- 1.1 "Civil Proceedings"- The Committee's definition of civil proceedings excludes proceedings before a Tribunal other than a Tribunal of Inquiry. While this provision needs to be read in conjunction with Head 3, which expressly states that the Act does not cut across

existing arbitration proceedings, query whether the definition here should be expanded to refer to an 'Arbitration Tribunal'.

- 1.2 "Mediator" - As a mediator is someone who will contract with the parties to assist them in the resolution of their dispute query should the definition be expanded or varied to reflect the formality of the relationship ... "Mediator means a person who undertakes to assist parties ...

- 1.3 "Mediation" - While a very flexible process one helpful quality of mediation (that differentiates it from un-facilitated settlement talks) is that it is structured. That structure typically involves engagement with the mediator prior to execution of a binding mediation agreement to gain an understanding of the process. The agreement typically sets out the terms upon which the mediation is being conducted. There is often a structured exchange of information by the parties pre the mediation. At the mediation the mediator runs the day and the various joint and private meetings (having regard to their training and/or experience) in the most effective way to help bring clarity to the issues in dispute, choices facing the parties and settlement options. Therefore the word "structured" used in the EU Mediation Directive Definition would be worth adding to the proposed definition.

The Committee might consider whether co-mediation is covered by the proposed definition. Putting mediator in the singular and the plural would address this.

- 1.4 "Mediation Communications" - Sub definition (a) of the phrase Mediation Communications could usefully refer to such statements being made 'in the context of the mediation'.

2. **Head 4 - Duty on Solicitor to Provide Information and Advice on Mediation and  
Head 5 - Duty of Barrister in Relation to Mediation**

- 2.1 In Head 4.1 a plaintiff's solicitor has obligations to advise about mediation before their proceedings are issued. We think a defendant's solicitor should be put under a comparable obligation - whether before filing an appearance or before filing a defence.
- 2.2 In Head 4.2(a) the date of the suggested application to court is not clear and a legal person is not covered by the language used.
- 2.3 ICMA would be interested to understand the Committee's rationale for distinguishing between the duties placed on solicitors and barristers. Head 5 does not seem to impose an obligation on the barrister to set out what the advice was in writing, rather it is just an obligation to record it was given. The explanatory note to Head 5 suggests that the clauses are intended to direct barristers to encourage their clients to consider mediation but the wording of Head 5 does not provide for that.

Would it not be better to require that "any lawyers" advising a client prior to the issue of proceedings must provide the type of advice and guidance set out in clause 4 in relation to mediation whether they are a solicitor or a barrister?

- 2.4 One suggestion that the Committee might consider is whether the obligation on legal advisors, to consider with their client the appropriateness of mediation to resolve a dispute, should be more than an isolated obligation prior to the commencement of proceedings. Arguably a lawyer already has an ongoing obligation, in properly discharging their duties to advise their clients on the best options available to them throughout a dispute, to keep the issue of mediation under consideration even if it is not chosen at the outset. We suggest that the Committee consider amending the duty provisions of Heads 4/5 to encompass an obligation not only to give consideration to mediation at the outset of litigation but also during it; maybe at some given point for example prior to engaging in discovery and/or again prior to setting the matter down for trial.
3. **Head 6 – Mediation Conditions**
  - 3.1 We are concerned about Head 6(4) which places an obligation on a mediator to give reasons to the parties prior to withdrawing from mediation. This could place the mediator in an impossible position where the reason for withdrawal, while legitimate, is based on a confidential disclosure by one of the parties. We do not see a need for such a provision. If a mediator is practising in accordance with the EU Code of Conduct for Mediators (or any other code of conduct), in the proper discharge of their duties to the parties they will behave appropriately both in relation to the continuation of the mediation and a decision that it is appropriate to withdraw from or conclude the mediation. We believe that the Committee should endorse and adopt the LRC's recommendation that no reason need be given for withdrawal by a mediator.
4. **Head 7 – Role of Mediator**
  - 4.1 We are concerned about Head 7(c) (vi) which requires a mediator in advance of mediation to inform the parties of the means by which any agreement made between them may be formalised "*or made enforceable*". This places an obligation on the mediator to provide legal advice to the parties and that is not the mediator's role. This provision should in our view be removed.
  - 4.2 We are concerned about Head 7(2)(a) which requires a mediator to ensure "*that at all stages in the mediation process, each party has the capacity to engage in the process*". This on its face is a very subjective test and would be very difficult to police. The suggestion also cuts across the concept that mediation is a voluntary process which a party is entitled to enter into and participate in if they wish, irrespective of the views of third parties. If the Committee is focussed in this provision on protecting a certain category of party perhaps that needs to be explained and some alternative wording found – if so this should be stated to be for a specific category and be limited in its effect thereafter.
  - 4.3 Head 7(2)(e) requires a mediator to "*ensure that the parties understand and consent to any agreement reached during the mediation process*". While it is good practice for a mediator to read over any proposed wording to a settlement agreement between the parties before it is signed to check if he/she has any further queries, the creation of a statutory obligation compelling the mediator to do so is unlikely, in our view, to benefit or add to the quality of the mediation process. It is our submission that these

are matters which are more appropriately considered in the context of evaluating whether a mediator has acted in accordance with the relevant code of conduct on which they are operating, and should in our view only be considered in that context.

- 4.4 In relation to Head 7(3) and 7(4) which suggests a mediator can only make proposals to resolve a dispute with the consent of the parties, we believe it is very important to underscore what occurs at a mediation. The mediator should listen to all parties in private as to their respective needs and may see a path to resolution that is not obvious to party 1 as they are not aware of what party 2 (or more) is saying. In that scenario it would be typical for a mediator to ask a party 1 a question about whether a particular course of action might be suitable to remedy the dispute. If party 1 agrees the mediator might pose the same question to party 2 (and other parties) without disclosing that party 1 regards it as an acceptable proposition. Then if a mediator gets a satisfactory response from both parties the mediator might suggest to both each party that this is a course of action that each side is willing to go forward with, without disclosing who had the idea. In this way a mediator is not recommending solutions but is consensus building with the parties to shape a solution based on what the mediator is hearing privately and we see this is an important part of the mediation process. We agree that a mediator should not make a recommendation for resolution (without the parties' consent) as to do so would turn the mediation into conciliation. We do query if the Committee should include a provision in the form of (3) and (4) on a statutory footing as to do so may be overly formalistic.

5. **Head 8 - Duty on Mediator to Provide Information on Training**

- 5.1 In terms of sequencing we think it would be sensible for the disclosure obligations in Heads 8.1 and 8.2 to arise before the mediation agreement is signed. So the sections could be merged.
- 5.2 We are concerned about the remit of Head 8(2) which provides that a mediator shall where requested by a party provide the party with certain information including what training the mediator has "*in screening techniques to assess the appropriateness of mediation*", we presume for the particular case. In the context of a commercial dispute, if disputing parties are willing to try to resolve their dispute through the mediation process, provided the mediator has no conflict, as a general proposition, we do not think it appropriate for a mediator to pre judge the case as one which is or is not per se appropriate for mediation. A provision of this kind may have relevance in the context of non commercial disputes. We wish to understand the rationale behind such a provision for a commercial dispute, as it does not in our view seem to respect the voluntary nature of a party's entitlement to select mediation as the appropriate form of alternative dispute resolution process and may then be disregarding the right of self determination in terms of methodology for resolving disputes.

6. **Head 10 - Mediation Communications to be Confidential**

- 6.1 While we welcome the principle of "*confidentiality*" protection proposed to be afforded to Mediation Communications under Head 10 in accordance with the LRC recommendations, we strongly urge the Committee to consider again the LRC's other

recommendation on this issue, namely that such confidential Mediation Communications should also be regarded as legally privileged (i.e. not discloseable to a court or any third party unless the parties agree). This issue is explored by the LRC in Chapter 3.D of its report and the analysis suggests clearly that the label of confidentiality is not sufficient protection. Current best practice in relation to commercial disputes is that lawyers would advise Mediation Communications should be regarded as privileged, as they are communications entered into in the hope of settling a dispute and thus they fall within the legally recognised '*without prejudice privilege*'. The LRC refer to English case law on this point and suggest that Mediation Communications should attract a distinct form of private privilege.

#### *Mediation and Conciliation*

- 6.2 We query the Committee's view on whether mediators should be compellable to give evidence as Head 10(1) infers they can be. We think mediators should not be so compelled, as to do so undermines the parties' confidence in the confidentiality of their private disclosure at mediation.
- 6.3 We are concerned about Head 10(2)(e) and its apparent inconsistency with Head 19. It suggests that the confidentiality protection (which in our and the LRC's view ought to be supplemented by a privilege protection) attaching to Mediation Communications can be lifted in respect of any claim in *negligence* against a mediator or professional complaint against a mediator. While it would be necessary for the parties to be able to refer to the confidential discussions at mediation to advance either a claim or a complaint we are concerned about the reference to *negligence*, given that under Head 19 a mediator is not liable for negligence and the suggested liability is formulated on a much narrower basis. The two provisions as they stand appear to us to be incompatible.
- 6.4 Head 10(2)(a) says the confidentiality protection, (which in our and the LRC's view ought to be supplemented by a privilege protection) attaching to Mediation Communications can be lifted where "*disclosure of the content of the mediation communication is necessary in order to implement or enforce a mediation agreement*". The issue of enforceability and confidentiality of any settlement are a matter for agreement between the parties and we do not believe the position should be pre determined statutorily. We suggest this Head be removed.
- 7. **Head 11 – Enforceability of Mediation Agreements**
  - 7.1 We recommend deleting the provision that requires a mediator to sign a settlement agreement with a view to making it enforceable. The mediator is not party to the contract between the parties and the requirement for the mediator to sign suggests there is no agreement without the mediator's signature and this is not a correct proposition in law.
- 8. **Head 13 – Submission of Mediator's Report to Court**
  - 8.1 With regard to Head 13(2) we suggest removing this requirement. In our view it is inappropriate to compel the mediator to provide a report to court on the outcome of

the mediation and to disclose of the terms of settlement to court could be tantamount to a breach of the settlement if it is stated to be confidential as between the parties and should. The parties' advisors or the parties can tell the court if the matter settled or not. The Committee should note that the Commercial Court Rules had a similar provision which the Court has stopped applying, in recognition of the fact that it compromised the confidentiality of the process.

If the Committee sees value in this reporting point at a minimum it should follow the LRC's recommendation that the terms of settlement not be disclosed.

9. **Head 14 – Effect of Mediation on Limitation and Prescription Periods**

- 9.1 Having considered the views of practitioners we do not believe any 'tolling period' should be provided for – comparable provisions in the area of personal injuries have caused huge practical difficulties. Parties could in any event agree to a suspension of time if they wish to avoid being sued pending the outcome of mediation.

10. **Head 15 – Staying of Court Proceedings Arising from Mediation Clause**

- 10.1 We would like further explanation on why severability of mediation clauses is to be dealt with statutorily, rather than in accordance with the established jurisprudence. As matters stand we do not think that this proposal should be pursued.

11. **Head 16 – Fees and Costs**

- 11.1 Head 16(1) and 16(2) range into what is a matter for the parties to agree contractually and in our view is too prescriptive. It is not uncommon that one party to a mediation will not have to pay a portion of the mediator's fees with the consent of the other party or parties and providing otherwise in statute infringes the flexibility of the parties to agree what they need to agree with a view to the mediation being viable for all concerned.
- 11.2 Head 16(4) does not seem appropriate. Mediation is not part of proceedings and the costs of mediation are not taxable. The Head infers the costs of a case when taxed might include mediation costs and that is confusing and not the case.

We do not see the need for payment of the mediator's fee to third parties unless the parties so choose and that does not need to be provided for statutorily. So this provision needs to be deleted or allow for agreement to the contrary by the parties. Equally the stipulation that fees are paid upfront is overly prescriptive. This provision should be left to the parties to agree or if kept allow for agreement to the contrary by the parties.

12. **Head 19 Liability for Civil Damages**

- 12.1 We have already commented on the issue of the type of claims to be made against mediators and apparent inconsistencies between this provision and Head 10.

We would be very happy to deal with any queries that you may have on this submission and look forward to making an oral submission in due course.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Helen Kilroy'. The signature is fluid and cursive, with the first name 'Helen' and the last name 'Kilroy' clearly distinguishable.

Helen Kilroy

**Irish Commercial Mediation Association**





Chartered  
Institute of  
Arbitrators

**CI Arb**

Irish Branch

[www.arbitration.ie](http://www.arbitration.ie) (Irish Branch) [www.ciarb.org](http://www.ciarb.org) (Worldwide)

### **What we are; an introduction.**

- A worldwide, organisation founded in 1915. Head Office; London. Irish Office 27, Merchant's Quay, Dublin 8
- Approx 12,000 members worldwide and 750 in Ireland.
- Multi-disciplinary membership.
- In Ireland, an all island organisation with a Northern Ireland Chapter
- Main disciplines are arbitration, adjudication and mediation, but also expert determination, conciliation and other third party neutral interventions.
- Three separate membership grades Associate, (full) Member, Fellowship Member. Also Chartered Arbitrator
- Members conduct subject to a Code of Professional Conduct and regulated by a Professional Conduct Committee.
- Operate a series of Professional Practice Guidelines in relation to Mediation (and other ADR disciplines)
- Our mission statement:

*'To promote and facilitate worldwide in a financially self-sustaining manner, the determination of civil and commercial disputes by arbitration, mediation and other alternative means of private dispute resolution through the support of a duly qualified, growing, active and highly regarded membership'.*

- In Ireland we work with other professional bodies (legal profession, engineers, architects, surveyors etc.) business organisations and trade unions etc. on matters of common interest and in relation to:
  - Promoting Alternative Dispute resolution (ADR) in general
  - Promoting CI Arb as the national centre for dispute resolution
  - Organising training courses meetings, lectures and social events

### The Mediation Bill

The CI Arb (Irish Branch) gave a warm welcome to the publication of the outline of the Mediation Bill. This followed the Law Reform Commission Report in 2010 and commitments in the Programme for Government to improving dispute resolution and reducing legal costs to which we fully subscribe.

In a statement we commented;

*This is an important day for Irish business. It would be easy to underestimate the significance of the statutory underpinning of mediation as a means of resolving disputes throughout the economy, in family and employment matters also.*

*Professional mediators, such as our mediator members, deploy a range of skills and techniques which, in the vast majority of cases, aid parties in dispute to resolve their differences in a positive way, that not only keeps them out of the courts and away from crippling legal costs, but which can sometimes avoid the negative destruction of relationships. Many judges have spoken strongly in favour of mediation, not simply as an alternative to the legal system but increasingly as a vital part of it in achieving justice for those involved.*

*We welcome the provision for lawyers and the courts to encourage parties into mediation, (with a possibility of financial consequences if they do not).*

Pat Brady, Chairman, CI Arb (Irish Branch)

We especially welcomed the requirement that mediators have high level and specialised training and operate under a code of conduct and we noted.

*‘CI Arb accredited mediators are trained to an international standard and operate under the Institute’s Code of Conduct and its Charter, and we provide additional training in workplace mediation for example.’*

In relation to the deliberations of the Oireachtas Committee our key concerns are;

- That Mediation should not be seen (in the words of the Law Reform Commission) as ‘second class justice’.
- Therefore, there should be clear criteria governing use of the term ‘Accredited Mediator’. This could take the form of approving organisations which currently provide training to this level, or specifying a number of hours training requirement for ‘Accreditation’.
- To be successful, public awareness of its availability and potential needs to improve. In Australia, for example where mediation and related dispute resolution techniques are deeply embedded it is driven by consumer demand. Accordingly, enactment of the legislation should be accompanied by a major public information campaign to promote the benefits of mediation as an effective dispute resolution technique and an alternative to litigation.

Pat Brady FCI Arb  
Chairman, CI Arb (Irish Branch)

A commentary on the Bill for further consideration now follows.

# The Mediation Bill 2012

## **Additional Memorandum from The Chartered Institute of Arbitrators (Irish Branch) To the Oireachtas Joint Committee on Justice, Equality & Defence.**

1. **Head 4(1) (b) (i) & (ii) – “Mediation services”** - Section 4 (1) (b) (i) should be amended to read "(i) information concerning mediation services *provided by accredited and licensed mediators*",  
And  
Section 4 (1) (b) (ii) should be amended to read "names of persons *who are accredited and licensed mediators* or organisations *of such persons*, qualified to provide mediation services."
2. **Head 4(1) (b) (ii) – “insofar as is possible”** - It is always possible, even if somewhat imprecise. The words "*insofar as it is possible*" should be deleted. Section 68 of the Solicitors Act 1994, for example, imposes an absolute obligation on a solicitor, as soon as is practicable, to give written estimate as to costs, (even though it does not set out the implications of default).
3. **Head 4(1) (b) (ii) – “where practicable”** - It is always practicable, even if somewhat imprecise. The words "*where practicable*" invite failure to comply and should be deleted. (Perhaps the words "as soon as is practicable" could be used).
4. **Head 4 (2) (i) (a) – a party’s declaration re consideration of mediation to be provided.** In family law legislation, for example, a solicitor’s certificate that they have advised the parties as to counselling / mediation is provided for. This declaration of a party is better and is to be welcomed. However, this should go further than just stating it has been considered and should state why mediation has not been adopted or have failed of as a dispute resolution mechanism. Otherwise it may simply become formulaic. Furthermore, this declaration can then be taken into account and can be considered by the court when considering the question of costs under section 19.
5. **Head 5 – Barrister’s duty to advise on mediation** - Again, there should be a requirement for the client to acknowledge the advice, in writing, and again state why the option of mediation was not pursued. The "double whammy" of a declaration under section 4 and an acknowledgement of counsel’s advices under section 5, will ensure that the client is fully informed as to the mediation options, and has made a fully informed choice not to proceed, cognisant of all the implications (including implications as to costs) of failing to avail of the mediation option.
6. **Head 6 (2) b – the mediator’s Code of Practice** – this provides that parties and mediator sign an agreed statement and makes it an obligation on the Mediator to state the code of practice, (if any), to which he/she adheres. It should be mandatory for Mediators to declare the Code of conduct they practice under - therefore

remove the words '*if any*'. The Minister should have the power to publish a (default) code of practice, and recognise called of practice published by recognised bodies (such as the Chartered Institute).

7. **Head 6 (4) – the Mediator to state reasons for withdrawal** - The parties may withdraw without explanation, but a mediator may not. There is a potential for breach of confidentiality in imposing an obligation on the mediator to state the reasons for their withdrawal. The mediator should be free to withdraw without having to state a reason. Indeed, the LRC report recommended as much. It should be an option, not an obligation. The explanatory notes refer to the nature of the "policy perspective" which allegedly requires this disclosure, but the nature of the "policy perspective" is not stated. As previously mentioned, it could involve compromising if not prejudicing the confidentiality of the parties, that the mediator states reasons. One would have thought that it was undesirable from a policy perspective, that confidentiality would be breached.
8. **Head 6 (6) – participation of non-parties** - allows for one or more non-party participants to be present and assist a party during the mediation process. This should be "*where the parties and the mediator agree ... one or more non-party participants may be present and may assist*" etc.... The LRC report page 41 states: "*on the issue of non-party participants the Commission recommends that parties may agree that a non-party participant be allowed to participate in the mediation.*" This provision in the draft Bill omits the agreement option. It is the job of the mediated minutes the mediation process and the presence of a non-party may inhibit that management, and may inhibit agreement. Accordingly, the admission of a non-party to the mediation should be where the parties and the mediator agree.
9. **Head 7 (2) (a) – the mediator must ensure the parties have the capacity, at all stages of the mediation.** – How is this to be achieved? It would be better that, having established at the outset that the parties had capacity, there would be a presumption that such capacity continues, unless and until the mediator is made aware that they may no longer have such capacity.
10. **Head 7 (2) (e) – mediator must ensure the parties understand any mediated agreement** - in circumstances where the parties are legally represented/advised, the mediator can rely upon the parties representative/advisor to so advise them and to ensure that the party understands the implications of the mediated agreement. Where the parties are not legally advised at the time of mediation, the question then arises as to how the mediator is to "ensure" the parties understand any mediated agreement? It is to be suggested that in the absence of a party being legally advised that the time of entry into a mediation agreement, the mediator should be entitled to make a statement as to their understanding of the nature, purpose and effect of the mediated agreement, which statement is to be regarded as a statement for the purposes of section 19.
11. **Head 7 (3) and (4) – Mediator's suggestions for settlement** - Rather than a mediator suggesting terms after mediation has failed, (when there is a danger that the parties would become intransigent) it should be made clear that the mediator is free, with

the agreement of the parties, to suggest terms for settlement at any point during the mediation.

12. **Head 8(1) requires Mediator to give details of experience.** - Mediators should be accredited and licensed. It may be that there is a trained & accredited mediator, who lacks experience, or an experienced accredited mediator who had no training (apart from accreditation training). The LRC Report recommended this provision with a view to ascertaining knowledge and experience of 'screening' in family law cases. It is recommended that the head would be amended to require disclosure of mediators "training and/or experience".

No attempt whatsoever is made at regulating the profession, the training of mediators, and the administration of the profession or any other method of quality control of the mediator's profession. It is particularly surprising that there is no reference to minimum training requirements or standards (especially in the case of family disputes, when the same draft legislation contains a broadly drafted provision facilitating and encouraging the participation of children in mediation).

The approach taken by the draftsmen in this regard is broadly in line with that of the Law Reform Commission, though surprisingly does not follow its recommendation in relation to specialist training. There should be a statutory provision providing for the licensing, regulation and supervision of the mediation profession, such as statutory scheme providing for the licensing regulation and supervision of trained and qualified and accredited mediators, accredited by recognised bodies. Otherwise, "cowboys" can simply label themselves as "mediators" and potentially cause havoc, at the parties' expense, thereby injuring the reputation of mediation and professionally trained and accredited mediators. An example would be former "money managers" who would now seek to market themselves as "debt mediators".

13. **Head 8 (2)(b)&(c) - provision of details regarding continuing professional development** – as part of statutory provisions providing for the licensing, regulation and supervision, CPD should be mandatory - remove "*if any*" and likewise remove "*if any*" in 8(2) (b) and 8(2) (c).
14. **Head 9 (1) (a) – Minister publishing a Code of Practice** - There could be a general / default Code of Practice promulgated, but allowance made for specific approved Codes, such as the Code of Practice from the Chartered Institute of Arbitrators.
15. **Head 9 (8) – TO BE INSERTED:** - "*(8) A mediator shall, prior to the commencement of the mediation process, provide to the parties, in writing, details of the (published or approved) code of practice to which he or she adheres, which code of practice shall be deemed to form part of the terms on which the mediator is engaged by the parties.*" - This would make the published or approved code part of the contract of engagement.
16. **Head 12 (1) (b) (ii) – attendance at information sessions** - Obligatory attendance at an information session on mediation (and its advantages), (as distinct from obligatory participation in dispute resolution through the mechanism of mediation), will not detract from the overall voluntary nature of mediation. Such a provision would ensure the parties are fully informed in their choices as to whether to proceed with the option of mediation, or not. At the moment, a major difficulty in promoting mediation is the fear of lawyers that it will adversely affect their litigation

practice income, (i.e. reduce the amount of costs they could hope to receive in relation to acting on behalf of the client (as compared to fees that might accrue during litigation)) and there is a tendency to “water down” any mention of mediation. There should be provision for the Minister to specify by statutory instrument, approved bodies, such as CI Arb who would provide such information sessions.

17. **Head 12 (5) – the Court’s consideration of costs – ADD TO THE SECTION:** - *“In the absence of evidence to the contrary, it shall be presumed that mediation has a reasonable prospect of success”*. This would make clear that it is the obligation of a party to litigation who chose not to avail of mediation, to explain why it would have no "reasonable prospect of success."
18. **Head 13 (1) – Mediator’s report to Court** - this requires a mediator to prepare a report for court. The neutral nature of this report should be emphasised, as recommended in the LRC report.



**Chartered Institute of Arbitrators (Irish Branch)**



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ

## **SUBMISSION**

**TO:** Joint Committee on Justice, Defence and Equality

**FROM:** Finola Flanagan, full-time Commissioner, Law Reform Commission

**DATE:** 24<sup>th</sup> April 2012

**SUBJECT:** Heads of the Mediation Bill 2012

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## 1. Introduction

The Law Reform Commission welcomes the opportunity to make a submission to the Joint Committee on Justice, Defence and Equality on the Heads of the Mediation Bill 2012.

I make this submission as full-time Commissioner in the Law Reform Commission.

## 2. Overview of the Commission's 2010 Report on Alternative Dispute Resolution: Mediation and Conciliation

The Commission notes that the Heads of the Mediation Bill 2012 refer extensively to, and draw on, the Commission's 2010 *Report on Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010). The 2010 Report forms part of the Commission's current *Third Programme of Law Reform 2008-2014*, and it followed the publication of its *Consultation Paper on Alternative Dispute Resolution* (LRC CP 50-2008).

### 2.1 Focus on mediation and conciliation

The Report, which contained the Commission's final recommendations in this area, focused on two main alternative dispute resolution (ADR) processes, mediation and conciliation. The Commission recommended in the Report that a *Mediation and Conciliation Act* should be enacted to provide a clear framework for mediation and conciliation, and the Appendix to the Report contained a draft *Mediation and Conciliation Bill* to give effect to the Commission's recommendations.

### 2.2 The circumstances in which mediation and conciliation may be suitable

In the Report, the Commission noted that, while it is difficult to set out general categories of cases that 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;
- 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.

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 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.

### 2.3 Key principles in mediation and conciliation

The Commission placed significant emphasis in the Report on the key principles involved in mediation and conciliation, including:

- the voluntary nature of the processes,
- the autonomy and control of the parties over the processes,
- the need for confidentiality,
- efficiency and flexibility
- the transparency and quality of the processes.

The Commission was also conscious that a number of related processes have also emerged in specific areas, such as collaborative practice in the family law setting. While the



Report and draft Bill therefore concentrated on providing a legislative framework for mediation and conciliation, the Commission also had regard to these emerging developments.

#### *2.4 Mediation and conciliation in the context of court proceedings*

While the Commission focused on mediation and conciliation in the 2010 Report, it was also conscious that these methods of dispute resolution must be seen against the wider background of other methods of resolving civil disputes, bearing in mind that mediation or conciliation may not be suitable for a specific dispute. As noted below, this includes the importance of recognising the right of those with a civil dispute to litigate their claim through the courts; and that, where court proceedings have been initiated the courts retain the discretion to intervene in a suitable case and at an appropriate time to encourage the parties to consider mediation.

#### *2.5 Mediation and conciliation in the context of other dispute resolution techniques*

The Commission was also conscious of the important role of other well-established dispute resolution techniques, again bearing in mind that each of these methods may be the most suitable in specific circumstances.

These include the long-established process of arbitration, governed by the *Arbitration Act 2010*, which now provides that all arbitrations – whether they involve disputes that originate completely in Ireland or have an international dimension – are subject to a single set of rules derived from international Conventions, notably the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985).

In addition, dispute resolution often involves multiple claims (in particular in the context of consumer disputes), and therefore the Commission also noted the importance of dispute resolution techniques to deal with these, which often operate in parallel with mediation, conciliation, arbitration and litigation. These include regulatory forms of dispute resolution through, for example, State agencies such as Ombudsmen or regulatory bodies such as the National Consumer Agency or the Utility Regulators. In addition, many non-statutory industry bodies operate mediation and conciliation schemes at sectoral level. Increasingly, these operate in the context of the growing internet and electronic commerce arena.

The Commission also noted the important development of EU arrangements such as the European Consumer Centre Network (ECC-Net) (originally called the European Extra-Judicial network, EEJ-Net), which includes in Ireland the European Consumer Centre Ireland (ECC Ireland). ECC Ireland provides a mediation-style redress mechanism for consumer disputes with a cross-border element.

### **3. The Commission's approach to alternative dispute resolution, in particular mediation and conciliation**

In preparing its Consultation Paper and Report, the Commission's approach was based on the key objective that civil disputes are resolved in a way that meets the needs of the parties (including, in the context of ADR processes, the need to preserve business or personal relationships) and that also conforms to fundamental principles of justice. This objective involves several related issues, which the Commission described in the Consultation Paper and reiterated in the Report to underline its overall approach to ADR, notably mediation and conciliation.

#### *3.1 The role of the courts in encouraging parties to agree solutions*

The Commission noted 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. 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.

### 3.2 *Delays in the court process and the development of ADR*

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 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.

### 3.3 *The court process and ADR*

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 Small 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. In a wider setting, the Family Mediation Service provides an important alternative resolution facility in the context of family conflicts.

The Commission also noted in this respect that, in its 2010 *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010), it 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. The Commission notes here that the Government’s *Legislation Programme, Spring Session 2012* (April 2012) proposes to publish in 2013 a *Courts (Consolidation and Reform) Bill* based on the Commission’s 2010 Report.

### 3.4 *Efficiency, including cost efficiency*

The Commission noted that 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. 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.

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 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.

### *3.5 Other benefits of ADR, including flexibility*

As already mentioned (heading 2.3, above), the Commission accepted in the Report 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. 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 and to produce flexible outcomes. The Report referred to the successful mediation in England in 2003 concerning 1,000 claimants who had brought proceedings against Alder Hey Children's Hospital, Liverpool, arising from the retention of organs and tissue of children without parental consent. The mediation agreement included financial compensation, but it was accepted that the ability to discuss non-financial matters facilitated the successful outcome. These included: the provision of a memorial plaque to the children at the hospital, letters of apology, support for new clinical processes and legislation, the holding of a press conference and a contribution to a charity of the claimants' choice. The flexibility offered by ADR processes is an important aspect of a civil justice system in its widest sense.

### *3.6 An integrated approach to dispute resolution*

In making these general points, the Commission emphasised in its Report that the word "alternative" in "alternative dispute resolution" should not be seen as preventing the court 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 through the structured innovations of, for example, the Commercial Court or the Small Claims Court.

In that respect, as the Commission made clear in the Report and the draft *Mediation and Conciliation Bill*, while mediation and conciliation should be clearly delineated as quite different from litigation as such, and can be initiated by parties completely independently of litigation, they can also appropriately arise from or otherwise be linked to litigation.

In summary, the Commission acknowledged that an integrated civil justice process should include a combination of ADR processes, such as mediation and conciliation, and the court-

based litigation process. Each process plays its appropriate role in meeting the needs of the parties involved and fundamental principles of justice.

#### **4. Main elements of the Commission's 2010 Report**

The main elements of the Commission's 2010 Report can be divided into three areas in respect of which it made recommendations.

##### *4.1 Terminology, principles, specific areas of application and competence*

First, the Commission examined 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 was to seek to achieve consistency in the use of terminology surrounding ADR and the key underlying principles.

The second area of focus was on the application of mediation and conciliation in specific areas, including family law disputes, commercial disputes and property disputes. The purpose here was to address more specific matters in these settings which the Commission considered may be in need of further clarification or development.

The third area concerned the training and regulation of ADR professionals. The Commission regarded this as a vital aspect of ensuring the quality of justice likely to be achieved through ADR.

##### *4.2 Key recommendations*

The Commission's main recommendations in the 2010 Report include the following:

- i. legislation along the lines of the Commission's draft *Mediation and Conciliation Bill* should be enacted that defines clearly what is meant by mediation and conciliation, including the differences between them (the Commission's draft Bill provides that a mediator may assist the parties to reach an agreement, while a conciliator may also make a proposal to the parties to resolve the dispute).
- ii. The key principles of mediation and conciliation should be set out, including: they are voluntary processes; the parties control them; confidentiality of the processes is required; and their quality must be assured by clearly stated standards.
- iii. Mediation and conciliation can be initiated either: (a) independently of court proceedings or (b) where a court suggests them after court proceedings have begun.
- iv. Where parties include a mediation or conciliation clause in a contract, the courts could stay court proceedings, as occurred in the 2009 High Court decision in *Health Service Executive v Keogh* [2009] IEHC 419.
- v. The Government should make an "ADR pledge," under which Government Departments and State bodies would be required to consider and attempt mediation or conciliation in appropriate cases before initiating court proceedings.
- vi. Parties should, in general, share the cost of mediation or conciliation equally.
- vii. There should be a statutory *Code of Practice for Mediators and Conciliators*, which would set out detailed requirements, based on accepted international standards, for all mediators and conciliators, including training requirements.
- viii. In family law disputes, parents and guardians could agree a "parenting plan" which would set out the details of day-to-day care and contact arrangements with their children, based on the children's best interests.
- ix. In a dispute arising after medical care, health care professionals (such as doctors, dentists and nurses) should be able to make an apology without this being an admission of legal liability.
- x. Other emerging areas of ADR should also be dealt with in the statutory Code of Practice. This would include collaborative practice, where professional advisers actively assist and advise the parties/clients to reach, on a voluntary basis, a

mutually acceptable agreement to resolve their dispute (including in a family law dispute).

## **5. Comments on the Heads of the Mediation Bill 2012**

### *5.1 The Commission's statutory remit*

As the Committee will be aware, the Commission's general statutory remit under the *Law Reform Commission Act 1975* is to make proposals for law reform, as it did in the 2010 Report. The 1975 Act also requires the Commission to record in its Annual Reports the extent to which its recommendations have been implemented, so that the Commission naturally retains a continuing interest in the implementation of its Reports, which currently runs to about 70% of its Reports. It is a matter for the Government and the Oireachtas to determine to what extent the Commission's recommendations are actually implemented. The comments of the Commission should be seen in the light of these general observations.

### *5.2 Specific comments on the draft Heads of the Mediation Bill 2012*

The Commission notes that the Department of Justice and Equality's draft Heads of the Mediation Bill 2012 broadly follow the approach taken in the Commission's 2010 Report and in the draft *Mediation and Conciliation Bill* in the Appendix to that Report. The Commission welcomes in particular that the draft Heads incorporate the following key elements, as recommended in the 2010 Report:

- i. A clear definition of the role of a mediator in assisting the parties to reach an agreement.
- ii. The key principles of mediation, including that: it is a voluntary process; the parties control the process; confidentiality of the process is required; and the quality of the process must be assured by clearly stated standards.
- iii. Mediation can be initiated either: (a) independently of court proceedings or (b) where a court suggests it after court proceedings have begun.
- iv. Where parties include a mediation clause in a contract, the courts may stay court proceedings, which would place on a statutory footing the approach taken in *Health Service Executive v Keogh* [2009] IEHC 419.
- v. Parties should, in general, share the cost of mediation equally.
- vi. There would be a statutory *Code of Practice for Mediators*, which would set out detailed requirements, based on accepted international standards, for all mediators, including training requirements.

The Commission notes that the draft Heads of the Mediation Bill are (as the title indicates) primarily limited to mediation and do not set out in any detail what conciliation involves. The Commission acknowledges that Head 7(4) of the draft Heads provides, in effect, that a mediator may be transformed into a conciliator as defined by the Commission, that is, as being able to make proposals to the parties to resolve the dispute (see the Explanatory Note to Head 7(4)). The Commission considers that there may be a case for further clarification as to the manner in which a mediator may be requested by the parties to take on the role of conciliator.

The Commission also notes that the draft Heads of the Mediation Bill do not contain separate provisions for "collaborative practice" (as the Commission's draft Bill had), but the Commission also notes that these have been incorporated into the general provisions of the draft Heads of the Mediation Bill, and this appears to the Commission to involve an integrated and perfectly sensible approach.

The Commission also notes that the draft Heads do not include the Commission's proposal that, in a medical negligence claim, an apology would not be deemed an admission of liability. The Commission notes that the draft Heads of the Mediation Bill have, in general,

taken an approach that the Bill should contain generally applicable provisions. The Commission notes, therefore, that such a provision on the effect of an apology (for which there was considerable support during the Commission's consultation process leading to the Report) may be more suitably placed in health-related legislation, such as the proposed *Health Information Bill*.

Similar considerations may apply to the Commission's proposal in the 2010 Report that, in family law disputes, parents and guardians could agree a "parenting plan" which would set out the details of day-to-day care and contact arrangements with their children, based on the children's best interests; this could be incorporated into suitable family-related legislation.

The Commission notes that the draft Heads do not include the specific provisions concerning cross-border mediation – as defined in the 2008 EU Directive on Cross-Border Mediation, 2008/52/EC – that were included in the Commission's draft Bill. The Commission acknowledges that the 2008 Directive has now been implemented in the State by the *European Communities (Mediation) Regulations 2011* (SI No.209 of 2011). The Commission considers that there may be a case for integrating the provisions of the 2011 Regulations into primary legislation.

Finally, the Commission also understands that active consideration is being given to the proposal that the Government would make an "ADR pledge," under which Government Departments and State bodies would be required to consider and attempt mediation or conciliation in appropriate cases before initiating court proceedings. The Commission notes in this respect that the draft Heads of the Mediation Bill apply to the State, including Government Departments, as the Commission recommended in its 2010 Report.

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**Your Reference – 2012/6/B/2/3H(1)**

## **HEADS OF MEDIAITON BILL**

**Voluntary** – engagement in the process should remain voluntary so either party or the Mediator can terminate at any time. Although it is regrettable that the LRC did not recommend mandatory mediation information meetings so that clients can make an informed decision whether to engage in the process or not.

**Confidential** – This is crucial at the very outset, as part of the agreement to engage in the process the Mediator offers confidentiality to the clients. This applies to both preliminary meetings, joint mediation sessions and separate meetings. If the clients are assured of confidentiality they are more likely to be open and not withhold information.

**Flexible** to meet the requirements of the clients – no two mediations will be same the Mediator has skills and techniques to manage the process but how the mediator uses these will be dependent on what the clients require. The Mediator should work in a flexible manner to best serve the clients.

**Empowerment** – the self determination of the clients to resolve the dispute is crucial to a successful outcome, they must find the solutions with the Mediator facilitating them developing options and reality testing the options. Agreements reached in Mediation are more likely to be honoured given that the outcome has been produced by the clients and not imposed on them by a third party.

**Self- determination** of the client to reach a resolution – as above this is crucial to a successful outcome, the clients must be determined to resolve the dispute and explore all possible options with the view to coming up with a mutually acceptable solution.

**Head 2** Mediator – change the word assist to facilitate

Mediation – again change the word assist to facilitate

Family Law Dispute – too broad a term, change to separating couples mediation which narrows the term as there are many types of family disputes

Non Party Participant – no non- party participant may participate in the mediation. When the mediator is hired by a company, organisation, college etc. to conduct a mediation but may not engage in the process. In such a case the Mediator must be confident that the decision maker is always in the room and that person must not change.

**Head 4** I would suggest that whoever explains the mediation process to a client should be an accredited Mediator. A Solicitor if not also a mediator may not be fully familiar with the process and therefore not provide accurate information. I would suggest that conflict of interest needs to be considered, if the client chooses to go mediation the Solicitors potential fees will be considerably reduced. The current requirement for Solicitors to provide clients with information about mediation has not been embraced by the legal profession and has proved to be unsuccessful.



**4 (1) b** How will the Solicitor provide the client with addresses of persons and organisations? Will each law firm have a data base of all accredited mediators, will he/she be selective in recommending particular persons or organisations? There is a lack of clarity in this regard.

A Solicitor would not be in a position to provide clients with information regarding the possible length and costs of the mediation process. Only a Mediator could provide such information. It is welcomed that the Solicitor should provide the client with details of costs so that when the client meets with a mediator and is provided with mediation costs informed comparisons can be made.

**Head 5** 5 – As above when information is being provided by solicitors the same requirement should apply to barristers.  
It is welcomed that during legal proceedings mediation should be considered at different stages of the proceedings – last chance mediation is always an option

**Head 6** The Mediator as do the clients have the right to withdraw from the process. This is usually built into the Agreement to Mediate and signed by all parties at the outset.

The Mediator should be able to withdraw without giving the reasons to the participants. This is based on experience when on occasion the mediator may have learned something from one party that if disclosed to all parties may compromise another. In private or joint session the mediator may have reservations about a party's capacity to negotiate. If the mediator decides to withdraw based on information obtained from one party the mediator must seek the permission of that party to divulge why the process is being terminated.

(5) Completing the process in the quickest possible time – mediation should always work at the pace of the client. A mediator is always mindful of a party/parties endeavouring to stall and/or prolong the process for some reason. From the time the mediator is contacted it should be clearly stated and outlined how the process will proceed – the amount of preliminary separate meetings with the parties and their experts if appropriate, an estimate of the amount of joint meetings and finally if they reach agreement and want the agreement recorded in writing, the length of time it will take to draw up the agreement. Some mediations, in particular separating couples mediation may have review meetings built into their agreement.

**Head 7** Subhead (4) The mediator should not take on the role of conciliator or make suggestions to the clients for resolving the dispute. The clients have hired the mediator as a mediator and sought mediation; the mediator should remain within those boundaries.

**Head 8** This is welcomed- mediators should hold a practicing certificate, should have reached practitioner level status with MII although I believe that the bar has

been lowered by MII in recent years. CPD is essential and a requirement to submit details of annual CPD to the accreditation board should be essential.

Supervision should be a requirement for all mediators and would suggest that 1 hour supervision for every 10 hours client work – particularly for mediators working in the area of separating couples mediation. Details of supervision should be required and provided annually when renewing membership.

**Head 9** Code of Practice – This is welcomed I would suggest that those who practice pure mediation should be consulted in this regard. It is important that mediators are involved in drawing up a Code of Practice as they are the only ones who truly know the area. In particular the Family Mediation Service should be involved as they are the longest practicing organisation providing mediation on behalf of the State.

**Head 10** (1) Confidentiality – The Agreement to Mediate outlines the confidentiality of the process the confidentiality of the clients as well as the Mediator. If it was possible that a Mediator may be called to give evidence in Court the recording of the session either written or taped would need to be considered by the Mediator so that in such an event the Mediator can provide the Court with accurate details of the discussions. If the Mediator is so concentrated on note taking this will impact on the informal aspect of the mediation process. It would also restrict the clients from speaking freely if they knew that all they say and divulge will be noted or taped.

The Mediator will also explain that if taking notes what will be noted, who will have access to the notes, who will have access to the Note of Understanding. Experience has shown that many clients ask such questions at the outset.

**Head 11** 11 (2) Many workplace disputes are resolved and the agreement recorded in a Note of Understanding and signed by the parties to the dispute and the Mediator. The clients see this as a contract between them and agree that in the event of a dispute to the terms they will return to mediation rather than engage in a more formal process. It is accepted that clients reaching agreement on couple separation issues wish to have their Note of Understanding converted into a legally binding document and signed by each party.

**Head 12** It is disappointing that the Bill does not recommend mandatory information sessions as is the case in other jurisdictions. At a mandatory information session with a trained mediator, the mediator can determine the appropriateness of mediation at that particular time or not at all. As seen in other jurisdictions other services can be offered in helping clients prepare for mediation on an individual basis before engaging in joint meetings. These services are particularly useful when dealing with high conflict clients.

**Head 13** The Mediator should not be asked to provide a report for the Court nor should she/he be asked to attend Court. If correspondence is requested from the

mediator by the Court it should be limited to 'The clients reached agreement' or 'the clients did not reach agreement'

- Head 16** When the mediator is hired by an organisation the organisation pays the fee the parties who engage in the process do not. If experts are required it needs to be determined who pays their fees. Other times the costs are split equally. The mediator needs to be clear on the mediation costs such as session fee, day or half day, travel, time spent reading documentation, phone calls emails, drafting and finalising the Note of Understanding etc. Clients determine how long the mediation process (the clients pace) will last it is the mediators task to keep them on track and focused, the mediator should inform clients it is not possible to say how long it will take to reach a resolution but can give their best guess based on similar cases previously worked on.
- Head 17** 17 (1) (a) What is a reasonable refusal/unreasonable refusal bearing in mind one of the core principles of mediation which is the voluntary aspect to engage. Experience shows that the majority of clients don't unreasonably refuse to engage they usually have a good reason for not engaging with the other party/parties in mediation.
- Head 18** Agree with heading – at what age is a child deemed to be capable to give consent to be involved in the process.
- Head 19** The explanatory note states that the Mediator will be performing a quasi-judicial function, this is inaccurate. The Mediator at the outset explains to the clients that they will not make judgments or impose decisions, the outcome is the responsibility of the client and the Mediator will facilitate in developing options and reality testing those options. It is welcomed that the Bill recommends that the Mediator should have protection from civil liability.



## **SUBMISSIONS**

### **DRAFT GENERAL SCHEME OF MEDIATION BILL 2012**

#### **Mediation Conditions – Head 06**

Head 6(6) provides that *“One or more non-party participants may be present and may assist a party during the mediation process”*

In order to clarify the status of these persons and their involvement in the mediation process it would be beneficial to indicate that the entirety of the Act applies to such persons. Ultimately the confidential nature of the process is thereby protected.

#### **Role of mediator – Head 07**

Head 7(2.2) provides that in the course of the mediation the mediator shall - *“ensure that at all stages in the mediation process, each party has the capacity to engage in the process”*.

This is a somewhat worrying duty to impose on a mediator and it poses the questions:

- (a) How is a mediator to be suitably trained in this?
- (b) Are they to have special training to establish the capacity of parties?
- (c) And if so who will be responsible for approving such training?

I suggest that this not form part of the mediation process itself with a possible alternative being that the mediator establish to the best of their ability, the capacity of the parties to engage in the process, including non-parties, prior to them signing an agreement to start the process of mediation.

Head 7(4) provides that the mediator with an authority to make proposals to the parties with their consent.

This potentially exposes the mediator to liability and particularly in the absence of the parties having appropriate advice. The inclusion of reference to the direct application of Head 19 to this provision and any proposals made by a mediator hereunder could avoid any such liability.

## **Confidentially - Head 10**

Head 10(1) provides that Confidentiality can be waived if “*expressly waived by all the parties*”.

This is ambiguous in that one would not be confident to whom this applies. Does it apply to the Mediator and non parties also? Naturally if not, this would severely limit the effectiveness of the mediation process.

The original draft bill was much clearer in this saying that, “*the mediator, parties, and non-parties*” must all waive the confidentiality.

## **Enforceability of mediation agreements – Head 11**

Head 11(3a) & (3b) provide that a court may enforce the terms of a mediated agreement where it is satisfied that the parties and their dependents rights and entitlements are protected thereby and the agreement is based on full and mutual disclosure of assets.

In cases where the mediator does not have sufficient knowledge of Family Law and also where the mediator has no powers to request or demand full and frank disclosure of any documentation or information I suggest an express indication that no duty rests with the mediator in satisfying him or herself of same.

## **Effect of mediation on limitation and prescription periods – Head 14**

Head 14(1) provides that limitation periods will be disregarded from the date of referral of the dispute to mediation to 30 days after the mediation process ends.

While at Head 14(2) the mediator is required to inform the parties in writing of the date on which the mediation process ends there is no like requirement with regard to the referral date. It may be appropriate that a similar requirement is placed on the mediator with regard to the initial referral. In circumstances where the dispute is not a court referred mediation it would avoid scope for dispute between parties as to when the matter was first referred and effectively when the limitation period ceased to run in terms of the calculation of statutory time periods which may apply.

## **Suggestion:**

A statutory register of mediators would be beneficial. This could protect the name “Certified Mediator” / “Registered Mediator” and still leave scope for general mediation. This would give more confidence to the general public when choosing a mediator.

Further to your recent telephone calls the following are my brief comments on the draft bill at this point;

I am a solicitor of many years experience in Ireland and abroad. I also have a Friary law mediation training and accreditation and am a member of MII. I am chair of South and West Mediation and a panel member of Mediation Northside's Court Community mediation pilot project. I am also a nominee for the Law Society's mediation panel. I have also been in contact with mediators in other jurisdictions and lawyers who participate in mediation in the course of my work. My views expressed below are my personal observations and not those of any of the organisations with which I am involved ;

I have been doing a lot of work in the area of promoting mediation as a mechanism for effective resolution of the current debt crisis .In this area and indeed in other areas of mediation practice, with which I am familiar, I note a lot of confusion and different definitions of the role of mediator and I am concerned that if the act is too " pure" in its definition of the independent ,facilitative only,role of mediator ,it will limit its benefits for Ireland.

- Many people in banking and government confuse the role of mediator and negotiator and this needs to be addressed in the Bill----is there a role for trained mediators in financial negotiations/mediations in the current crisis and if so what is it and how and where can it be defined. There are many international Farm and other debt mediation models which can inform us.
- There is a practice in the construction industry known as Medrec—mediation with recommendations –and I believe this variation could be very useful in the new Insolvency regime, and in the context of court reports .
- Our litigation system and our national psyche is such that many participants are suspicious of and skilled at manipulating any process that is not fully integrated in our courts based dispute resolution process. Possible solutions here are-
  - Mandatory Mediation— but this then requires court trained and based mediators and an appeal process
  - Mandatory Medrec—In this process the mediator makes as much progress as possible and reports on the areas of progress and makes informed recommendations to the court, leaving the court to make decisions on the areas where mediation was not possible. In my view this is the best of both worlds as quite often mediation can address some but not all of the issues eg some very delicate parenting and family issues without written agreement and if the court is not advised of this and it is forced to approach the whole problem from scratch by one or both parties or their lawyers, because of the confidentiality of mediation argument ,a lot of valuable mediation work and observations are wasted and there can be

duplication of fees and time and possible manipulation of information which will definitely be ,(and is already) used by detractors to make mediation unpopular.

- The solicitor/barrister/ mediator's obligations around ensuring clients have best advice is also in need of further exploration. –If a solicitor mediator advises a client to take legal advice and then that client opts for a solution that gives away a lot of their own rights (of which that mediator is professionally aware whereas a mediator from another discipline is not so aware) does that mediator/as a solicitor have further obligations to the client ?The current thinking is no but I am not sure this can always be the case so in a court based mediation scenario perhaps mediators with legal backgrounds should or could oversee basic legal rights of the participants in some way.This could avoid multi layered costs also if a suitable design could be implemented.

In my view the definition ,role and obligations of mediator under the act need to follow best international practice but also be tailored for our 2012 society in Ireland- . Things have moved on a lot here even since the LRC reviewed mediator.

I would be delighted to elaborate further ,if required ,as I am concerned that if mediation is not properly rolled out here,it's huge benefits to advancing how we prevent and solve disputes and consequently advance and modernise our society and economy,will be lost.

Regards

Julie Sadlier.

—

**LAW SOCIETY OF IRELAND**

**GENERAL SCHEME  
OF THE  
MEDIATION BILL, 2012**

**SUBMISSION TO THE  
JOINT OIREACHTAS COMMITTEE ON  
JUSTICE**



**Submission of the Law Society of Ireland (the Society)**  
**on the General Scheme of the Mediation Bill, 2012**

The Society welcomes the recent publication of the General Scheme of the Mediation Bill 2012 and notes that the Minister for Justice, Equality and Defence has requested the Joint Oireachtas Committee on Justice to consider the General Scheme of the Bill and report to the Minister by 1st June 2012 with its comments on the proposed legislation.

The following are the preliminary submissions of the Society on the proposed legislation. The Society looks forward to the publication of the Mediation Bill 2012 in due course, at which time it will make such further detailed submissions as may be appropriate following due consideration of the Bill.

**Head 4 – Duty on solicitor to provide information and advice on mediation**

The Society notes that Head 4 seeks to extend the proposed duty on solicitors beyond the existing obligations contained in a number of family law statutes, including those dealing with judicial separation and divorce. The Society submits that the operation of this requirement to date may not have had a significant impact in promoting the use of mediation in family disputes.

There may be a number of reasons for this, including lack of understanding of the process among solicitors, barristers and their clients, a power imbalance in the relationships between separating spouses and/or lack of confidence in the quality and availability of family mediators.

The Society considers that, in order to make the proposed duty more effective in promoting the use of mediation in all civil disputes, solicitors should have a further duty to provide the client with information on the mediation process and on its possible advantages for resolving their dispute without commencing and/or continuing court proceedings. This should be in addition to the proposed duty to advise the client prior to commencing civil proceedings on their behalf, to consider using mediation as an alternative means of resolving the dispute and provide certain other information.

The Society submits that the client is not able to properly consider using mediation as a viable alternative unless and until he/she has a minimum level of understanding of the process and of its possible advantages over court proceedings for resolving their dispute, namely its confidentiality, flexibility, informality, scope and relative cost.

The Society submits further that such additional duty would be wholly consistent with the proposed duty on a mediator to explain mediation and with the proposed provision in Head 12 (dealing with court invitations to parties to consider mediation) that a court may direct parties to attend an information session on the use and operation of mediation. It would seem odd that a court could require parties to attend an information session on the use and

operation of mediation after commencing litigation while the parties' legal advisers would have no duty to inform their clients of the nature of the process and its possible advantages over litigation before issuing proceedings.

The Society notes that, while the Law Reform Commission did not recommend such further duty, such recommendation has been made in other common law jurisdictions.

The proposed duty on barristers under Head 5 will help to promote the use of mediation in family law disputes. In the current regime, a barrister does not usually meet the client before proceedings are drafted and issued.

The Society submits that, in order to increase the impact of the proposed duty in promoting the use of mediation, consideration should be given to requiring counsel to meet the client in person before proceedings are issued, to reinforce the information and advice given by the solicitor on mediation. While this obligation may incur some additional cost to the client, the Society submits that the potential benefits justify any additional cost.

The proposed legislation provides that, where a person commencing civil proceedings fails to include the required Statement when making application to the court, it may adjourn the proceedings for such time as it deems necessary for the person to provide the Statement. The Society submits that the court should be required to adjourn proceedings until such Statement is made. A discretion whether to adjourn or not would dilute the obligation on claimants and their solicitors to make the required Statement and would be contrary to the intended purpose of the provision.

## **Head 6 - Mediation conditions**

The Society notes the proposed provision, for 'policy' reasons, that a mediator who proposes to withdraw shall give reasons to the parties. The General Scheme does not outline the policy reasons for the proposed provision. The Society requests that the relevant policy reasons be outlined before making final submissions on the point.

The LRC recommended, in accordance with the principle of voluntariness, that a mediator as well as a party be entitled to withdraw without explanation.

The Society submits that a requirement on a mediator to give reasons to the parties before being entitled to withdraw from mediation could offend against the fundamental principle of confidentiality in mediation. Where the reasons for the mediator wishing to withdraw are relevant or common to all parties, then no difficulty arises. However, where a mediator's reasons relate to one party only, a requirement that such reasons be disclosed to all parties would offend against a mediator's absolute duty to maintain the confidence of that party. The proposed provision should be amended to provide that a mediator shall have discretion whether to give reasons. Alternatively, if a mediator is to have a statutory duty to give reasons to the parties before being entitled to withdraw, he should only be obliged to do so if the confidence of a party or parties in mediation would not be breached.

## **Head 7 - Role of mediator**

In family mediation generally, only the two parties are present, which is appropriate given the nature of the disputes. The Society submits that it may not be appropriate for non-party participants to be present. It should be a matter for the mediator to determine whether it is appropriate for non-party participants to be involved. In that regard it is not clear what is intended by the term “accompany” and this should be considered further.

Also, it is generally the case that an agreement or understanding reached in mediation of a family dispute is not a legally binding agreement and that any such agreement or understanding requires to be implemented with the assistance of legal representatives.

## **Head 8 - Duty of mediator to provide information on training, etc**

Because many mediators may have other professional qualifications of relevance and assistance in the mediation of disputes, it may be preferable that mediators are required to provide information as to their other professional qualifications, in addition to their qualifications as a mediator.

In addition, it may be prudent to require that details on the specific experience of the mediator should be provided (e.g. number of mediations undertaken, hours of mediation, type of cases, etc). This is important so that a person who wishes to choose a mediator can determine whether a particular mediator is appropriate to deal with their dispute.

## **Head 10 - Mediation communications to be confidential**

In relation to Head 10(2)(b), the Society submits that this should be extended to include disclosure to prevent physical or psychological injury to a third party.

## **Head 11 – Enforceability of mediation agreements**

Generally speaking in family mediation, any agreement or understanding reached between the parties is not legally enforceable between the parties. In many “Agreements to Mediate” which are used by mediators in family disputes, this is expressly acknowledged by the parties. The Society submits that express provision should be made for this.

Also the correlation between sub-headings (2) and (3) needs to be clarified, in particular to clarify whether an agreement which is expressly stated to be not legally binding can be the subject of an application to the Court under Head 11(3).

## **Head 12 – Court inviting parties to consider mediation**

In relation to family disputes, there is a view that there should be a mandatory requirement to attend at a mediation information/assessment meeting prior to instituting proceedings at all. This is obviously subject to the exceptions in cases such as domestic violence or similar cases where urgent relief may be required by the parties. Such a compulsory requirement is used in other jurisdictions.

There is a concern that certain cases, which might have been successfully resolved in mediation, may not go to mediation or may be delayed in availing of such an opportunity where proceedings have already been issued. Furthermore the issuing of proceedings in family law cases (particularly in cases containing detailed “negative pleadings”) can have the effect of further polarising parties which may, in turn, impact negatively on the possibility of a case being referred to and resolved in mediation.

The Society submits that consideration should therefore be given to a mandatory requirement to attend a mediation information/ assessment session prior to the issuing of proceedings in family disputes (subject to necessary exceptions as outlined above), which session should be in addition to the duty on a solicitor referred to above to provide information and advice on the mediation process and the possible advantages of the process over litigation.

## **Head 13 - Mediator report to Court**

In the family law context and perhaps in other contexts, the requirement for the mediator to report to Court seems unnecessary and, in some circumstances, potentially damaging.

In that regard the provision seems to require that the mediator would report that either the parties have not reached an agreement or that an agreement has been reached by way of a statement setting out the terms agreed between the parties.

If the matter is before the Court, then there is no reason why these issues cannot be addressed by the parties’ legal representatives. If an agreement has been reached, typically in family law cases that agreement would be formalised by the legal representatives with a view to ruling those terms before the Court. If no agreement is reached, then typically the mediation ends and the litigation may continue. The requirement that the mediator prepare a report to the Court setting out that agreement has not been reached might encourage the Court to then query why mediation did not produce an agreement. This may bring the mediator into dangerous territory given the confidential, privileged and *without prejudice* nature of the mediation process.

While the explanatory note to this Head states that the requirement of the mediator to report to Court is not intended to impinge on the overall confidentiality of the mediation process, it

begs the question whether the preparation of such a report by the mediator is a largely unnecessary and pointless exercise.

Furthermore, in relation to a mediator's report setting out the terms agreed by the parties, if the agreement or Memorandum of Understanding flowing from the mediation is specifically stated to be non-binding and subject to implementation by the parties' legal representatives, then some conflict or confusion might arise between the terms agreed in mediation and any required variations on those terms which might arise when the terms come to be implemented by the legal representatives.

## **Head 16 - Fees and costs**

In relation to Head 16(1), there is an issue as to whether or not the issue of costs in mediation can be determined or ordered by the Court. If entry into mediation is voluntary, then presumably the discharge of the costs associated with that process must also be voluntary unless the parties agree to submit the issue of the discharge of costs of mediation to the Court for determination.

Also, it may need to be clarified as to whether or not the legal costs incurred in mediation would be included in the costs of the proceedings and recoverable on that basis. If the matter is referred by agreement between the parties or by the Court for mediation, then the legal costs incurred in the mediation process may be viewed as part of the costs of the proceedings generally.

## **Head 17 - Facts to be considered by Court in awarding costs**

Head 17(3) indicates that the possibility of a costs penalty shall not apply to family law proceedings in certain specified circumstances. However, it may well be that in certain cases the circumstances referred to may be temporary only and may be resolved whether by interim relief or otherwise in the context of those proceedings. In those circumstances it could be argued that a failure to consider using mediation to resolve the remaining issues in the proceedings should be taken into account by the Court in relation to costs.

The Society would be happy to explain or expand on any aspect of this preliminary submission on the Heads of the Mediation Bill. The Society can be contacted through the relevant Committee Secretary, Ms Colleen Farrell, at [c.farrell@lawsociety.ie](mailto:c.farrell@lawsociety.ie) or by telephone at 01-6724998.



**BAR COUNCIL SUBMISSION  
ON HEADS OF MEDIATION BILL  
TO JOINT COMMITTEE ON  
JUSTICE DEFENCE AND EQUALITY**

27<sup>th</sup> April 2012



## **BAR COUNCIL SUBMISSION ON HEADS OF MEDIATION BILL TO JOINT COMMITTEE ON JUSTICE DEFENCE AND EQUALITY**

### **INTRODUCTION:**

The Bar Council welcomes the introduction of a statutory framework for mediation. The role that mediation can play is fully recognised in the Report of the Law Reform Commission entitled *'Alternative Dispute Resolution: Mediation and Conciliation'*.

Whilst the Bar Council welcomes the Heads of Bill, there are a number of observations and comments which it wishes to make and where it is felt that amendments are necessary and should seriously be considered. We intend the comments and observations made below to be constructive and to assist the Committee's consideration of the Heads of Bill.

In the short time frame involved since publication of the Heads of Bill it has not been possible to prepare more detailed submissions. The Bar Council would like the opportunity to elaborate on and to add to these submissions if the opportunity arises and would be prepared to attend before and make an oral submission to the Committee, if the Committee felt that would be helpful.

### **BAR COUNCIL SUPPORT OF MEDIATION AND ARBITRATION**

For at least the last 10 years, the Bar Council has been promoting the use of mediation as a process to its members in appropriate cases. Its efforts have included measures to

increase the awareness of the mediation process, the encouragement of members to undergo training and obtain recognised accreditation as members and hosting mediation training programmes conducted by internationally recognized bodies. These efforts have been very successful and for the past number of years the Bar Council has made available, through its website, a list of barristers who are accredited mediators. This list indicates the accrediting body and details of the practice area of the barrister listed. There are currently in excess of 170 barristers on the list of accredited mediators. Members of the Bar also participate in mediations as advocates and courses have been held by the Bar with a particular focus on training for barristers seeking to represent clients during a mediation process.

The efforts of the Bar Council in relation to mediation should be seen as part of a wider effort to promote the role of Ireland in dispute resolution generally. The Bar Council has been very active in promoting Dublin as a seat for international arbitration and, to this end, hosted the ICCA (International Council for Commercial Arbitration) Conference 2008, which said Conference provided much of the inspiration for the Arbitration Act 2010.

The Bar Council was also very active with other interested bodies in establishing Arbitration Ireland in June 2010: this is a body which seeks to promote Ireland abroad as a seat for arbitration.

The key feature of promotion of Ireland in arbitration is the adherence to international best practice. Accordingly, the Arbitration Act 2010 brings into force the UNCITRAL Model Law (2006) for all arbitrations, both domestic and international.

#### **THE EU DIRECTIVE ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS.**

In line with the policy that has already been adopted in relation to arbitration, it is the view of the Bar Council that legislation in relation to mediation should enshrine



international best practice. To that extent, the Bar Council believes that the legislation should adhere to all of the principles set out in the EU Directive on certain aspects of mediation in civil and commercial matters.

## **RELATIONSHIP WITH LAW REFORM COMMISSION BILL:**

It may be noted that the Heads of Bill do not follow the format of the Law Reform Commission Bill. Whilst we do not have any difficulty in principle with the Heads of Bill departing from the suggestions of the Law Reform Commission for good reason, it is suggested nonetheless that the reasons for any significant changes should be articulated.

## **HEAD 2 – Interpretation:**

The definition in Section 4(1) of the Law Reform Commission Bill of ‘*mediation*’ is closer to the definition contained in Article 3 of the Mediation Directive.<sup>1</sup> The definition in the Law Reform Commission Bill is as follows:-

*“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.”*

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<sup>1</sup> Art.3(a) of the Directive states: “ ‘*Mediation*’ means 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. The process may be initiated by the parties or suggested or ordered by a court or prescribed by the laws of a Member State”

For the sake of clarity and uniformity, and in recognition of an international consensus on the issue, it is suggested that either the definition contained in the Law Reform Commission Bill or the definition in the EU Directive should be followed.

#### **HEAD 4 – Duty on solicitor to provide information and advice on mediation:**

The Law Reform Commission Bill requires a solicitor to advise a person to consider mediation and conciliation where such process or processes are appropriate for the resolution of the dispute. Head 4 of the Bill does not include the phrase '*where appropriate for the resolution of the dispute*'. There seems little point in requiring a solicitor to suggest mediation where it is clearly not appropriate on the particular facts of a case. Whilst it is certainly desirable to require proper consideration to be given to alternative dispute resolution mechanisms prior to the issue of proceedings, it is unhelpful to require a solicitor to advise a client to consider using mediation when the solicitor has formed a professional judgement that it is not appropriate for the particular facts of the case (for instance in a case involving bad faith on one side and where urgent injunctive relief may be required). Making it mandatory to advise somebody of a course of action which, on the particular facts of a case, may not be appropriate, would be against the public interest, contrary to the duty of the lawyer to always advise in the best interests of the client and finally (and not least) is an unduly heavy-handed approach to a process which is attractive because of its voluntariness and consensual nature.

The appropriateness of mediation may become an option during the course of the proceedings. There may be cases where mediation, although not a realistic or viable option before the commencement of proceedings, may become an option during the course of the proceedings. The Bill should allow for that possibility.

## **HEAD 5: Duty of barrister in relation to mediation:**

There is no equivalent to this provision in the Law Reform Commission Bill. The Bar Council does not believe it should be mandatory for a barrister to advise the client on the possible use of mediation as an alternative to litigation or that should be required to furnish a certificate that such advice was so furnished.

The Heads of Bill apply this requirement to every type of dispute, irrespective of whether mediation is appropriate for the resolution of that dispute. In advising a client, a barrister must use his/her professional judgement in relation to the most appropriate remedies for the client. If a barrister believes that mediation is not appropriate for the particular dispute then why should he be required nonetheless to advise the client on the use of mediation? It would be completely wrong for legislation to interfere with the nature of the advice furnished to the client.

The Bar Council is in favour of provisions which encourage solicitors and barristers to have regard to the possible use of mediation both before and after the issue of proceedings. However, the Bill should not trespass into the relationship between barristers and solicitors and their clients by insisting that particular advice should be given irrespective of the particular facts of the case and irrespective of the professional judgement formed by the solicitor or barrister.

If a solicitor is required where appropriate to advise a client to consider mediation, there does not appear to be any need to place a similar requirement on a barrister instructed by a solicitor.

The Explanatory Note suggests that the provision would also apply where there was direct access by the client to the barrister (i.e. without going through a solicitor). The Code of Conduct for barristers essentially prohibits a barrister from acting in contentious matters otherwise than through a solicitor. Section 71 of the Legal Services Regulation



Bill requires the proposed Legal Services Regulation Authority to engage in a public consultation process with regard to the retention or removal of restrictions on a barrister receiving instructions in a contentious matter, directly from a person who is not a solicitor. This bill has not yet been enacted and has not yet commenced its Committee Stage. We believe, therefore, that it is completely premature, therefore, to suggest that the requirement in Head 5 is necessary where there is direct access.

#### **HEAD 6: Mediation conditions:**

The Bar Council believes that the requirements in Head 6 in relation to mediation conditions are unnecessarily prescriptive. It is unnecessary to require the mediator to sign the mediation agreement (Section 6(2)). The mediator is not a witness and not a party and, therefore, there should be no need to sign the agreement, although the mediator may, of course, choose to do so.

The requirement in Section 6(4) that where a mediator proposes to withdraw from a mediation process, he shall give reasons for his or her withdrawal is a very unhelpful provision. A mediator may learn during private sessions or one of the parties something which requires him or her to withdraw from the mediation. If that information was given in confidence, the mediator cannot and should not disclose that information to the other side, even by implication. We strongly disagree with this provision. At worst, it may involve a serious breach of confidentiality and at best it would involve the mediator in preserving confidentiality by giving oblique and anodyne reasons. Such lack of frankness on the part of the mediator would be destructive of the relationship and the process. Therefore, we would suggest the deletion of this provision.

## **HEAD 8: Duty on Mediator to provide information on training etc.**

Whilst the Bar Council sees the value of a mediator providing information to parties on training and experience, the reference in Head 8(2)(a) to “training in screening techniques to assess the appropriateness of mediation” seems unnecessary.

## **HEAD 10 – Mediation communications to be confidential**

The Bar Council agrees that confidentiality is essential to the mediation process. The same exceptions should apply as apply to ordinary legal privilege and we suggest that the Bill should make this clear.

Head 10(2) (c) seems to suggest a mediation communication can be opened up in a civil claim concerning negligence or misconduct of a mediator occurring during a mediation. However, this appears to be inconsistent with the immunity provided in Head 19. This is open to great abuse – an allegation of negligence (for which a mediator is not liable) is made and confidentiality is destroyed at the behest of one party).

## **HEAD 13 – Submission of mediator’s report to court**

This Head would appear to require revision. Normally, in cases where the court requires a report (which is not very common), what happens is that the mediator submits a very simple report saying that an agreement was reached or that it was not. It is, and we believe should be, up to the parties to furnish terms of settlement to the court and not up to the mediator.

#### **HEAD 14 – Effect of mediation on limitation and prescription periods:**

The Bar Council has some concerns that this provision may add some uncertainty to the question of limitation periods and also may potentially be abused by some litigants.

If such a provision is to be introduced, it is submitted that for clarity, the limitation period should only be suspended from the commencement of the mediation, which should be defined as the day upon which the mediation agreement is signed. The period of suspension should be a specific period of time from that commencement, say 30 days.

#### **HEAD 19: Liability for civil damages**

The reference in the Explanatory Note to the mediator performing “a quasi-judicial function” is, we believe, inappropriate and should be deleted. The internationally accepted role of a mediator is not “quasi-judicial”. We suggest that the mediator should not be sued except for the grave misconduct set out under this head – not because his/her role is “quasi-judicial” but rather because public policy demands this. Frequent litigation or the threat of litigation against a mediator would weaken or subvert the process of mediation.

We are grateful to the Committee for affording the Bar Council the opportunity of making these comments and observations. We would be very happy to assist the Committee and the Minister further in their consideration and preparation of the Bill.

Dated 27 April 2012

Dear Sir/ Madam,

I set out hereunder my submission in relation to the Mediation Bill 2012.

### Professional Background

I make these submissions in the capacity of a practising mediator. I have worked virtually exclusively in mediation for the past ten years both with the Family Mediation Service (FMS) and in the capacity of a private Mediator. I am currently with FMS now working under the auspices of the Legal Aid Board on a pilot Mediation Program operating in Dolphin House, East Essex St, Dublin. This is one of the busiest family Law District Courts in Ireland. The pilot mediation program is operating ancillary to the Courts and offers disputants an opportunity to mediate their disputes around custody, access and guardianship. The project is running for just over a year and is considered “ a successful initiative” (See interim report of Mr Paul Ward, Law School U.C.D). The writer also holds a Master’s Degree in Mediation and Conflict Resolution the subject of which was a comparative study of Mediation and Litigation looking specifically at parenting outcomes for males. Finally my profession of origin is a Solicitor. I practised as a Solicitor for over ten years before training in Mediation.

### GENERAL

I should start by saying that I was present at the recent Committee hearing on the 2012 Bill in Dáil Eireann at which various mediator representative bodies were invited to make oral submissions on the Bill. The debate was helpful and insightful. I welcome the general thrust and tenor of the Bill encouraging as it does people to mediate their disputes with all the consequent benefits for society. I do not propose to go through all sections of the Bill here and comment on them seriatim. I intend to merely highlight those sections which I believe may prove problematic in practice.

### SECTION 4 – DUTY OF SOLICITOR TO PROVIDE INFORMATION

I endorse the suggestion made in the debate of compulsory information sessions. It is not sufficient for Solicitors to merely impart information about the mediation process. The Judicial Separation and Family Law Reform Act 1989 is demonstrable proof of the failure of this system. The Dolphin House Mediation Project shows very positive evidence of the consequence of holding mediation information sessions. Our experience is that if a second party chooses to attend an information session, there is a strong likelihood of couples reaching agreement ( See Mr Paul Ward’s interim Report). Our sessions are offered by experienced, trained mediators who not only impart information about the process but also screen the capacity of the parties to meaningfully participate in the process. Each party to the dispute is seen individually. At the end of process the parties themselves should have a keen understanding of the process and all that it entails and the mediator should have a good idea of the parties ability to engage. Herein lies, I believe, the secret in successful information sessions.

### SECTION 6 – MEDIATOR MUST OFFER REASONS FOR WITHDRAWAL

As a Family Mediator, I have a difficulty with the proposal that a mediator must advance a reason for his/ her withdrawal from the process. Family mediation tends understandably to be an emotionally fraught process. My concern is that in so requiring a mediator, disputants will have yet another axe to wield at each other. The reality is that if two parties cannot mediate a settlement, it is usually

because one or both parties cannot for whatever reason reach a middle ground. It may be difficult for a mediator to advance a reason for withdrawal without some construction being put by one or other party that he or she is further to blame for the breakdown of the process. Surely it beholds us to ensure that at least in family mediation things will not be made worse by the parties efforts to try and mediate?

#### SECTION 9 – CODE OF PRACTICE

Section 9 enables the Minister to draw up a code of practice for the purpose of maintaining and setting standards. I would urge that there be widespread consultation in this regard. The question in my mind is whose code of practice or what code of practice will receive endorsement? Is it sufficient to say that when you have completed a weekend training course that you are now qualified to be let loose as a mediator on an unsuspecting public? Speaking as a supervisor and trainer of student mediators for many years, I would urge that a certain minimum education, skills, knowledge and academic credential are a prerequisite to training as a mediator. My belief is that inherent in any certification or qualification process must also be a minimum number of practice hours, e.g., forty hours. Practice is certainly one of the keys to performance. Ongoing CPD should also be mandatory and a suitable third level University or Institute might prescribe and regulate training and keep a register of practitioners qualified to mediate in certain areas.

#### SECTION 10 - MEDIATION COMMUNICATIONS TO BE CONFIDENTIAL

In principle I support the notion of confidentiality attaching to the mediation process. I also support mandatory disclosure in cases where a child's life is at risk or a person's life is at risk. Disputants, however, must to some degree feel it is a process they enter to largely free from legal constraints. One may ask whether s.10(2) however will not make projects such as the Dolphin House Project, practically speaking, unworkable? In Dolphin House disputants are often before the courts on other charges. Parties often have information about the other's criminal activities. Will an errant father who knows that his ex-partner has information that could be used against him be more or less likely to engage in a mediation process? Mandatory disclosure is also required where a mediation communication is used to threaten a party. Threats in this situation are frequently issued in the heat of the moment. Is a mediator being seriously asked to report all such threats?

The above are just some of my concerns. If you should for any reason wish to speak or email me, please feel free to do so.

Karen Quirk



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# **SUBMISSION**

**TO THE JOINT COMMITTEE ON JUSTICE, DEFENCE AND EQUALITY**

**IN RELATION TO THE DRAFT GENERAL SCHEME OF MEDIATION  
BILL 2012**

**APRIL 2012**

## 1. Introduction

A&L Goodbody welcomes the publication by the Minister for Justice and Law Reform of the draft general scheme of the Mediation Bill 2012. The Bill serves to heighten public awareness, as well as that of legal practitioners, in relation to the availability of mediation as a viable and effective alternative to litigation for those involved in civil and commercial disputes.

A&L Goodbody is a leading Irish law firm providing legal services to the corporate sector across the island of Ireland. In addition to our offices in Dublin and Belfast, we also have offices in London, New York and Palo Alto. The Firm provides a full range of business legal services to a large and diverse domestic and international client base in both the private and public sectors.

A&L Goodbody operates the most extensive range of specialist services available in Ireland through over thirty specialist practice groups. Both the emphasis and operation of these practice groups continually evolve and develop in anticipation of external market developments and specific client needs.

## 2. A&L Goodbody Experience & Expertise

We have one of Ireland's largest and most experienced, litigation and dispute resolution practices, headed by Liam Kennedy. In this area of practice, we have over 20 Partners, approximately 50 talented solicitors and several qualified paralegals.

We focus on helping clients to manage risk in all areas of their business. We are skilled in resolving disputes whether by way of litigation, mediation, arbitration or expert determination. In consultation with our clients, we apply our experience and knowledge of the law in developing a strategy for tackling a dispute. Both are applied in a manner best suited to the needs of each individual client.

In recognition of the growing demand for alternatives to litigation, the Firm's dispute resolution capability is evidenced by having qualified and experienced mediators and ensuring that all our solicitors advising in dispute resolution, are trained in mediation.

We routinely advise clients on Mediation and represent clients at Mediation hearings. Our Partners in this area are at the forefront of practice bodies dedicated to promoting Mediation as an effective method of resolving disputes. Four partners of the Firm are accredited by the Centre for Effective Dispute Resolution (CEDR) as Mediators. For several years, the Firm has hosted an annual mediator training course conducted by CEDR. CEDR is one of the leading UK mediator training organisations.

### 3. Key Issues in the Bill for consideration

- The definition of 'mediator' and 'mediation' needs to be reconsidered.
- The Bill does not deal with 'conciliation'.
- All mediation communications shall be confidential, except in extraordinary circumstances.
- A mediator is required to give reasons for his withdrawal from the mediation process.
- A mediator is required to inform parties of his qualifications and experience.
- The time given to apply to court to stay the proceedings should not be limited.
- Specific provisions are required for mediators on the process to be followed when obtaining the consent of a child.

### 4. Scope of the Bill

#### 4.1. Definitions (Head 2)

'Mediator' – We agree that the inclusion of a definition of mediator is helpful. However, the Bill defines a mediator as a *'person who assists parties to reach a voluntary agreement'*. 'Person' is too general a term.

We recommend that the definition of mediator be amended to refer to a person who has received training to act as a mediator and who is accredited by one of the training bodies recognised and approved by the Minister for Justice. This would bring the definition of mediator in line with Head 8 of the Bill which places a duty on the mediator to provide parties with information on his training and experience in mediation matters.

'Mediation' – We recommend that the word 'structured' is inserted after 'confidential' to bring the definition of mediation in line with the definition contained in the EU Mediation Directive which is included as a footnote in the Bill as a possible alternative definition and the Law Reform Commission's ("LRC") definition of mediation.

'Non-party participate' – The explanatory note provides that this definition implements the recommendation in paragraph 3.54 of the LRC Report. However, the LRC definition of a 'non-party participate' includes a *'qualified legal practitioner, an expert witness, a potential party or friend of a party or potential party'* rather than just a *'person, other than a party or mediator'*. We suggest that the LRC's definition is implemented in full.

'family law proceedings' – The Bill does not include a definition of family law proceedings.

The explanatory note provides that the reference to family law proceedings will have its ordinary, and well-understood, meaning. We recommend that a definition of family law proceedings be included.

#### 4.2. [Scope and application \(Head 3\)](#)

Subhead 1 (b) sets out that the Act shall not apply to '*an employment-related dispute referred that falls under the functions currently exercised by.....*' This sentence is incomplete. We recommend that the words '*....to statutory dispute-resolution processes...*' are inserted after '*referred*'.

#### 4.3. [Mediation conditions \(Head 6\)](#)

Subhead 4 requires a mediator to give reasons for his or her withdrawal from a mediation process. The essence of mediation is that it is a voluntary process. If the mediator is required to give reasons for his withdrawal, this could undermine the confidence of potential users of the process.

The Mediators Institute of Ireland's Code of Ethics and Practice provides at section 62 that Mediation is voluntary and any party to mediation, including the Mediator, may leave the process at any time without having to give reasons. We agree with this approach.

The explanatory note provides that '*It is undesirable from a policy perspective that a mediator be permitted to withdraw without any explanation.*' However, the explanatory note does not outline the policy reasons for requiring a mediator to provide an explanation for his withdrawal.

#### 4.4. [Role of mediator \(Head 7\)](#)

Subhead 4 allows the parties to request the mediator, at any time during the mediation process, to make proposals to resolve the dispute, which the parties can then accept or reject. Such a request effectively converts the process into a conciliation process.

A similar provision is included in the LRC Bill at section 8(2). However, the LRC provision refers specifically to requesting the mediator to take on the role of conciliator, thus converting the process into a conciliation process. Also, the LRC Bill made legislative provision for both mediation and conciliation, and included a definition of conciliation and specific provisions in relation to a conciliation process.

The Bill does not deal with conciliation and as such subhead 4 is not sufficient as a stand alone provision.

We recommend that the provision is expanded in detail to ensure, at the very least, that the parties understand the meaning of conciliation, and the consequences of agreeing to allow the mediation process to be converted into a conciliation process.

#### 4.5. [Duty on mediator to provide information on training \(Head 8\)](#)

The Bill requires the mediator to provide details of continuing professional development undertaken by him or her. We agree with this requirement.

However, the requirement for a mediator to provide a party with information regarding specialist training should be limited to family law disputes as recommended by the LRC Report. The LRC's recommendation for a mediator involved in a family law dispute to obtain initial and further training in screening techniques was made on the basis of the particularly sensitive and unique issues that a mediator must assess in a family law dispute. In addition, Subhead 2(a) does not require the mediator to obtain any further training in screening techniques which would be advised where there is the strong potential for power imbalances between the parties.

#### 4.6. [Mediation communications to be confidential \(Head 10\)](#)

Confidentiality is a fundamental expectation of parties engaging in mediation. To ensure the continued success of mediation, and to avoid unnecessary recourse to litigation, it is important that confidentiality is safeguarded, and is breached only in the most exceptional circumstances.

We do not agree that the use of a mediation communication to threaten a party to the mediation process is of sufficient magnitude to permit the confidentiality of the mediation process to be breached. The nature of any dispute means that threats may be exchanged between the parties. In such circumstances it is often difficult to determine when threats would reach such a level as to warrant a breach of confidentiality. We recommend the deletion of subhead 2(d)(iv).

We also recommend that a similar provision to Article 4(1) of the European Communities (Mediation) Regulations, 2011 in respect to cross-border disputes is inserted in this Head. Article 4(1) provides that neither the mediator nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration about what takes place during a mediation. We recommend that this provision should also be put in place in respect of exclusively domestic mediations.

#### 4.7. [Staying court proceedings to facilitate mediation process \(Head 15\)](#)

The Bill imposes a restriction on the time given to parties to apply to the court to stay the proceedings before delivering any pleadings. This restriction goes against the fundamental

principle of voluntariness in mediation. We recommend that the provision is amended to reflect the provision contained in the LRC Bill which provides that an application to the court to stay the proceedings can be made at '*any time after the proceedings have been commenced*'.

#### 4.8. [Involvement of a child in mediation in family law dispute \(Head 18\)](#)

The Bill provides that a mediator must obtain the consent of the child if they consider it appropriate for the child to be directly involved in the mediation process. As stated in the explanatory notes, obtaining a child's consent gives rise to issues concerning the age of the child from whom consent is being sought, and the capacity of the child to give consent. We agree that the Head needs to be expanded in detail to set out specific provisions for the guidance of mediators in relation to obtaining a valid consent and/or the legal capacity of children, and the process to be followed when obtaining a child's consent.

We also recommend that the Head is expanded to include section 24 of the LRC Bill. This provision provides for each party involved in a family law dispute to attend an information session on family law resolution processes. Given the general lack of public awareness for alternative dispute resolution processes, an information session would serve to make parties aware of the availability of viable and effective alternatives to litigation.