



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

ALTERNATIVE DISPUTE RESOLUTION

[LRC CP 50 – 2008]



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Law Reform Commission

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However, full responsibility for this publication lies with the Commission.

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Medical Practitioners Act 2007	2007, No. 25	Irl
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Ombudsman Act 1980	1980, No. 26	Irl
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Shirayama Shokusan v Danovo Ltd	[2003] EWHC Ch 3006	Eng
The Health Board v BC and the Labour Court	[1994] ELR 27	Irl
Thompson v Commissioner of Police of the Metropolis	[1998] QB 498	Eng
Unilever plc v Proctor & Gamble Co	[2001] 1 All ER 783	Eng

Venture Investment Placement Ltd v Hall	[2005] EWHC 1227	Eng
Walker v Wilshire	[1889] 23 QBD 335	Eng
Waterhouse v Perkins	[2001] NSWSC 13	Aus

INTRODUCTION

A Background to the project

1. This Consultation Paper forms part of the Commission's *Third Programme of Law Reform 2008-2014*,¹ under which the Commission is committed to examining, and exploring reform options for, the main processes of alternative dispute resolution (ADR)² and associated key principles. As the Consultation Paper indicates, the main ADR processes are mediation and conciliation. A number of new processes have also emerged in specific areas, such as collaborative lawyering in the family law setting. Because this is a fast moving and emerging area, in respect of which there is no clear framework of relevant principles, the Consultation Paper also places significant emphasis on exploring the key principles of ADR, including its voluntary nature, the need for confidentiality, its efficiency and the transparency and quality of the process.

B The Commission's approach to alternative dispute resolution

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

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

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

¹ See *Report on the Third Programme of Law Reform 2008 - 2014* (LRC 86 – 2007). Project 5 in the Third Programme commits the Commission to examine the main processes of alternative dispute resolution, on which the Commission began work under its *Second Programme of Law Reform 2000-2007*.

² In the Consultation Paper, the Commission sometimes uses the full title Alternative Dispute Resolution and sometimes the acronym ADR.

encourage parties to reach a solution through agreement, especially in disputes where emotional issues combine with legal issues, provided that this alternative process meets fundamental principles of justice.

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

4. In addition to the recognition by the legal profession and the courts that some disputes would 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) *The response to delays in the court process and related services*

5. The court process in Ireland has responded to the problem of delay - and the connected development of ADR processes - with important initiatives. For example, the Commercial Court list in the High Court, which was established in 2004 to deal with large commercial disputes,³ uses active judicial case management to improve the efficiency of the litigation process itself and also encourages the use of mediation and conciliation. Similarly, the Smalls Claims Court in the District Court is a mediation process for certain consumer disputes (which can be filed on-line and is available for a small handling fee), under which the first step is to seek informal resolution of the dispute using a document-only approach.⁴ In a wider setting, the Family Mediation Service, which forms part of the statutory Family Support Agency,⁵ provides an important alternative resolution facility in the context of family conflicts.

(4) *Efficiency, including cost efficiency*

6. The research presented in this Consultation Paper 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

³ See Chapter 7, below.

⁴ See Chapter 8, below.

⁵ See Chapter 5, below.

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 is not successful it obviously involves additional expense. On the whole, careful and appropriate use of ADR processes is likely to reduce the overall financial costs of resolving disputes.

7. In addition, the other aspect of efficiency – timeliness – may be of great value to the parties. The Commission is also conscious of other values associated with ADR processes, including party autonomy and respect for confidentiality, which are discussed in detail in the Consultation Paper. The point of noting the narrow issue of financial cost is primarily to indicate that the research referred to in this Consultation Paper 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.⁶

(5) Other benefits of ADR, including flexibility

8. The Commission appreciates that ADR processes also bring additional benefits that are not available through the litigation process. ADR processes may, for example, lead to a meeting between parties where an apology is offered.⁷ 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. A

⁶ The Commission does not, in this respect, ignore the indications in the research of indirect cost savings that may arise from speedy resolution of, for example, large commercial disputes (whether in the reduced time required of senior management or long term savings through the preservation of business relationships).

⁷ In the sense that ADR may involve a meeting between those in dispute and an apology from a wrongdoer it involves a passing resemblance to restorative justice, but that is where the similarity ends. The Commission emphasises that ADR is associated solely with civil disputes and has no connection with restorative justice, which is connected with criminal law. The Commission's *Third Programme of Law Reform 2008-2014*, Project 15, concerns restorative justice.

memorial to victims of a perceived wrong can also emerge from a mediated agreement. The flexibility offered by ADR processes is an important aspect of a civil justice system in its widest sense.

(6) *An integrated approach to dispute resolution*

9. In making these general points, the Commission wishes to make clear 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 detailed discussion in the Consultation Paper points out, while mediation and conciliation should be clearly delineated as quite different from litigation as such, they can also be appropriately linked to litigation. The Commission agrees 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.

(7) *Individual and collective dispute resolution*

10. The discussion of dispute resolution in the preceding paragraphs largely envisages individual disputes, such as a boundary dispute between neighbours or a family law dispute. In preparing this Consultation Paper, and in particular in determining the scope of the analysis, the Commission was acutely aware that disputes do not always involve two parties only. The Commission had previously examined multi-party litigation, such as the Army deafness claims of the 1990s,⁸ and was therefore conscious that legal processes, such as litigation, must resolve collective disputes as well as individual disputes. The Commission discusses in the Consultation Paper the successful resolution through mediation of the English Group Litigation concerning organ retention by Alder Hey Hospital, Liverpool.⁹

11. In this respect, the Consultation Paper includes a discussion and analysis of the many different forms in which dispute resolution takes place in a collective setting as well as the individual setting. For example, the long-established mediation and conciliation services of the Labour Relations Commission and the Labour Court¹⁰ almost invariably involve the resolution of

⁸ See the Commission’s *Report on Multi-Party Litigation* (LRC 76 - 2005).

⁹ See paragraph 1.14, below.

¹⁰ See Chapter 4, below.

industrial relations disputes directly affecting a collective group of employees and, sometimes indirectly, the general public.

(8) Collective disputes and regulatory bodies, including Ombudsmen

12. Quite often, the distinction between individual and collective disputes is blurred and the solutions found are not ordinarily described as alternative dispute resolution. For example, the Commission has recently completed an analysis of multi-unit apartment complexes and made proposals for reform.¹¹ In apartment complexes, the individual disputes between unit owners, developers and property managing agents over, for example, the level of property management fees could, at one level, be dealt with through litigation or mediation. Because of the scale and diversity of the problems, other solutions may also be required. In this, respect, the National Consumer Agency, which is primarily a regulatory body, played a type of dispute resolution role by facilitating discussion between relevant representative bodies through a Consumers Forum on Apartment Complexes. This Forum produced template forms of contracts to be used by unit owners and property managing agents that have the potential to prevent future disputes in this area.¹²

13. The intervention of the National Consumer Agency in this way is comparable to how an Ombudsman can exercise his or her powers to ensure appropriate resolution of disputes. It has often happened that an Ombudsman may receive a series of individual complaints about a particular problem and that these complaints are investigated collectively in order to prevent future recurrences.¹³

14. The Commission notes that, similarly, a professional body with regulatory or disciplinary functions, such as the Medical Council,¹⁴ may be required to oversee the individual conduct of its profession against certain criteria in order to prevent poor practices that could, in turn, lead to disputes with clients. The regulatory body may also be required, in some instances, to engage in ADR processes concerning poor professional conduct.¹⁵

¹¹ See the Commission's *Report on Multi-Unit Developments* (LRC 90 - 2008).

¹² See the discussion in Chapter 8, below.

¹³ See also Chapter 8, below.

¹⁴ See Chapter 6, below.

¹⁵ See the discussion of the relevant provisions of the *Medical Practitioners Act 2007* in Chapter 6, below.

(9) The main focus of the Consultation Paper

15. The Commission notes, therefore, that ADR, in the sense just discussed, can be said to encompass a very wide area of law and legal processes. In this respect, the Commission considered that, to provide as full an analysis as possible of ADR, it was necessary to provide an overview of the application of ADR in these different settings. In some places, the Consultation Paper provides a general overview of ADR processes in a specific setting by way of describing their long-standing use – this is the case in the discussion of employment disputes and ADR.¹⁶ In that area of its use, the Commission does not make any specific suggestions for reform, for the simple reason that those engaged in using ADR in that setting – notably the Labour Relations Commission – are fully conscious of the need to develop and refine their ADR processes. Similarly, while the Commission refers in the Consultation Paper to the use of arbitration as an alternative to litigation, it is clear that the future development of this long-established area of dispute resolution will be debated in the Oireachtas in the immediate future¹⁷ and that it would therefore be inappropriate to make reform proposals on arbitration in the Consultation Paper.

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

C Outline of Consultation Paper Chapters

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

¹⁶ See Chapter 4, below.

¹⁷ The *Arbitration Bill 2008* proposes significant reforms of the statutory code on arbitration.

18. In Chapter 1, the Commission presents a general overview of ADR. The Commission examines the literature on the nature of disputes and discusses the appropriateness of ADR in resolving disputes. The Commission provisionally recommends that the key principles underlying ADR, in particular mediation and conciliation, should be set out in statutory form.

19. In Chapter 2, the Commission examines ADR processes and terminology. The Commission provides an overview of the ADR spectrum which is made up by a body of ADR processes, including preventive (such as partnering), facilitative (mediation), advisory (conciliation) and determinative (expert determination). The Commission explains why it is necessary to ensure that the more commonly used ADR terms, in particular mediation and conciliation, are clearly defined.

20. In Chapter 3, the Commission examines several of the main objectives and principles of ADR in particular in connection with mediation and conciliation. These include: the voluntary nature of ADR, the principle of confidentiality, principles of self-determination and party empowerment, the objective of ensuring efficiency, flexibility, neutrality and impartiality of the mediator or facilitator and quality of process to consumers. The Commission also summarises the objectives and principles in the 2008 EC Directive on Certain Aspects of Mediation in Civil and Commercial Matters.

21. In Chapter 4, the Commission outlines the use of ADR in the employment law setting, notably through the Labour Relations Commission and the Labour Court. As already noted, the Commission does not make any recommendations in this area, and the discussion is for the purposes of indicating the suitability of ADR in a specific context.

22. In Chapter 5, the Commission examines the role of ADR in resolving family law disputes, which the Commission previously addressed in its 1996 *Report on Family Courts* (LRC 52 – 1996). This includes a discussion of the need for information meetings for separating or divorcing couples. The Commission also discusses the recent emergence of collaborative lawyering in the family law setting. The Commission also discusses the appropriateness of mediation for resolving family probate disputes.

23. In Chapter 6, the Commission examines how ADR could assist in the resolution of medical disputes. Among the matters explored is the potential of ADR in providing alternative non-monetary redress, including an apology, in medical negligence claims.

24. In Chapter 7, the Commission discusses ADR in the context of commercial disputes. The Commission examines in particular the role of the Commercial Court in encouraging the use of mediation and explores whether the innovations it has developed could be applied to a wider commercial setting.

25. In Chapter 8, the Commission examines the development of ADR in resolving consumer disputes. The Commission examines, for example, whether the Small Claims Court procedure could be expanded to resolve more consumer disputes.

26. In Chapter 9, the Commission explores the potential role for ADR in the resolution of specific types of property disputes, in particular between neighbours. The Commission considers whether ADR has any role to play in the resolution of planning application disputes.

27. In Chapter 10, the Commission addresses the accreditation and regulation of mediators and the various non-statutory and statutory schemes for assuring the quality of mediators.

28. In Chapter 11, the Commission examines the role of the Court in the development of ADR. The Commission explores the issue of costs sanctions and mediation and the precise manner in which mediators report back to the Courts. The Commission also considers whether mediation costs should be recoverable as legal costs.

29. Chapter 12 contains the provisional recommendations made by the Commission in the Consultation Paper.

30. This Consultation Paper is intended to form the basis of discussion and therefore all the recommendations made are provisional in nature. The Commission will make its final recommendations on ADR following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of its Final Report, those who wish to do so are requested to make their submissions in writing by post to the Commission or by email to info@lawreform.ie by **31 October 2008**.

CHAPTER 1 ALTERNATIVE DISPUTE RESOLUTION IN CONTEXT: ORIGINS & DEVELOPMENT OF ADR

A Introduction

1.01 In this chapter the Commission presents an overview of alternative dispute resolution (ADR). In Part B the Commission examines the nature of disputes and discusses the appropriateness of ADR in resolving disputes. In Part C the Commission summarises the development of ADR.

B Resolution of Disputes

(1) *The Nature of Disputes*

1.02 The majority of people in Ireland are likely to become involved in a civil dispute at least once during their lifetime. Disputes are an inevitable element of human interaction and society needs to develop efficient and innovative methods of dealing with them.

1.03 A dispute is a product of unresolved conflict. Conflict can simply be viewed as “the result of the differences which make individuals unique and the different expectations individuals bring to life.”¹ While conflict is inevitable, disputes need not be. Miller and Sarat note that:

“Disputes are not discrete events like births or deaths; they are more like such constructs as illnesses and friendships, composed in part of the perceptions and understandings of those who participate in and observe them. Disputes are drawn from a vast sea of events, encounters, collisions, rivalries, disappointments, discomforts, and injuries. The span and composition of that sea depend on the broad contours of social life ...The disputes that arrive at courts can be seen as the survivors of a long and exhausting process.”²

¹ Fiadjoe *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish 2004) at 8.

² Miller & Sarat “Grievances Claims and Disputes: Assessing the Adversary Culture” (1980-1981) 15 *Law & Society Review* 525 at 527.

(i) Development of a Dispute

1.04 Disputes often begin as grievances. “A grievance is an individual’s belief that he or she is entitled to a resource which someone else may grant or deny.”³ For example, if a consumer purchases a product which they believe is defective, they may respond to such a belief in various ways. They may, for example, choose to ‘lump it’ and not return to the shop to complain so as to avoid potential conflict. They may redefine the problem and redirect blame elsewhere, for example to a family member for damaging the product. They may register a claim to communicate their sense of entitlement to the most proximate source of redress, in this instance, the shop assistant, the party perceived to be responsible.⁴

1.05 For something to be called a dispute, it must have moved past the solitary awareness of one person, the consumer, to a joint recognition with at least one more person, such as the shop assistant. Both parties need not agree on the nature of the dispute, its origin, or its substance, but they must agree that there is a dispute. If only one person sees a problem, it is not yet a dispute.⁵ If one party accepts the entitlement of the other, that the consumer should be refunded, there is no dispute. It is only when there is partial or total rejection of the other party’s claim, for example, if the shop assistant rejects the belief that product was defective when it was purchased, that a dispute is born.⁶

1.06 It is important to distinguish disputes from differences. A dispute may be viewed as “a class or kind of conflict which manifests itself in distinct justiciable issues.”⁷ A “justiciable problem” is defined as “a matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being ‘legal’ and whether or not any action taken by the respondent to deal with it involved the use of any part of the civil justice system.”⁸ Justiciable problems are, for the most part, those that people face in

³ Miller & Sarat “Grievances Claims and Disputes: Assessing the Adversary Culture” (1980-1981) 15 *Law & Society Review* 525 at 527.

⁴ *Ibid.*

⁵ Marshall “Would ADR Have Saved Romeo and Juliet?” (1998) 36 *Osgoode Hall Law Journal* 4 at 775.

⁶ Miller & Sarat “Grievances Claims and Disputes: Assessing the Adversary Culture” (1980-1981) 15 *Law & Society Review* 525 at 527.

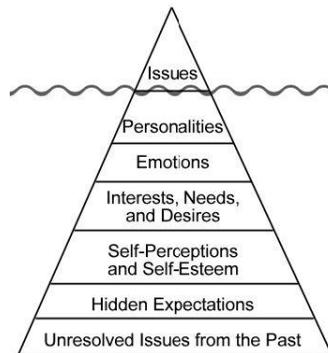
⁷ Brown & Marriott *ADR Principles and Practices* (2nd ed Sweet & Maxwell London 1999) at 2.

⁸ Genn & Paterson *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (Hart 2001) at 87.

their every day lives, such as child support, consumer, education, employment, health, and welfare benefits.

(ii) The Dispute Iceberg

1.07 The dynamics of a dispute are often compared to an iceberg.⁹ The iceberg model below serves to illustrate that only a fraction of the issues in a dispute are immediately accessible.¹⁰ The submerged part of the iceberg represents the personal interests of the party, the fundamental underlying factors contributing to any given conflict, which do not always surface during formal rights-based processes such as litigation or arbitration.¹¹



1.08 Interest-based dispute resolution processes expand the discussion beyond the parties' legal rights to look at these underlying interests; they address parties' emotions, and seek creative solutions to the resolution of the dispute. The focus of these processes is on clarifying the parties' real motivations or underlying interests in the dispute with the aim of reaching a mutually acceptable compromise which meets the interests of both parties.

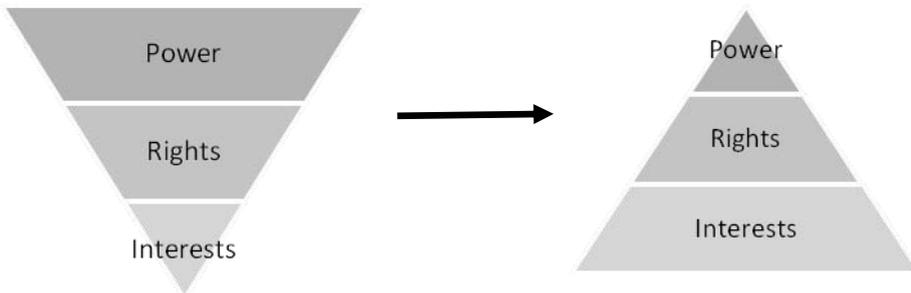
1.09 Preventive, facilitative and advisory dispute resolution processes explore below the surface of the iceberg and can be described as interest-based resolutions. Determinative processes such as arbitration can be described as rights-based processes which focus on the positions and issues of the parties illustrated at the tip of the iceberg. These processes tend to narrow

⁹ See Van Riemsdijk "Cross-Cultural Negotiations Interactive Display." Paper delivered at The Expanding ADR Horizon Conference, 27th April 2007, Trier.

¹⁰ The iceberg diagram is taken from Gugel "The Iceberg Model for Conflict Dynamics" Tubingen Institute for Peace Education. Available at http://www.dadalos.org/frieden_int/grundkurs_4/eisberg.htm.

¹¹ Cloke & Goldsmith *Resolving Conflicts at Work* (Jossey-Bass 2000) at 114.

issues, streamline legal arguments, and predict judicial outcomes or render decisions based on assessments of fact and law.¹²



Moving From a Distressed to an Effective Dispute Resolution System¹³

1.10 A simple example can illustrate the idea of the dispute iceberg. Two neighbours are in dispute over a tree. Each neighbour takes the position that the tree is on their land. This represents the tip of the iceberg and the main issue. No compromise is possible, since the tree cannot be sawn in half. It turns out, however, that the interest of one neighbour is in using the fruit of the tree and the interest of the other is in having the shade. Without exploring the underlying expectations and interests of the parties, no compromise would be possible. Characteristic of almost every conflict is that the party standpoint or the claim (the self-chosen solution to the conflict) is not considered acceptable by the other. However, one or more interests are often behind each standpoint and, once they have become known, can form the key to a possibly effective solution.¹⁴

(2) Dispute Resolution & Civil Justice

1.11 The process of resolving a dispute has also been represented in the shape of a pyramid, which moves from the most common response at the base

¹² *Dispute Resolution Systems: Lessons from Other Jurisdictions*. A Report by the Ontario Institute on Governance (March 12, 1999) at 5. Available at http://www.iog.ca/publications/dispute_res.pdf.

¹³ See Goldberg Sander & Green *Dispute Resolution* (Little Brown & Co. 1985).

¹⁴ Pel "Court-annexed Mediation in the Netherlands. The execution of the nation-wide project - Mediation and the Judiciary". Paper presented at Southeast European Regional Conference on Alternative Dispute Resolution Slovenia, November 2002. Available at http://www.rechtspraak.nl/NR/rdonlyres/B9573CE2-503B-4D3A-B281-C6563D459D84/0/JustVerkEngvertalingno9_2000.pdf.

of the pyramid to the least common response at its apex. As the pyramid¹⁵ below illustrates the most common response to disputes that arise is for a disputant to take no action at all. Reasons for this may include that the issue is small ('more trouble than its worth') or that the disputant does not feel empowered to pursue a course of action. In a larger number of matters disputants will attempt informal negotiation. Indeed, many disputes are heard by school principals and shop keepers – i.e. in the forum that are part of the social setting within which the dispute arose. Such forums process a tremendous number of disputes.¹⁶ Fewer still disputants will seek legal advice. This may be because of the cost and time involved in consulting with a solicitor. ADR processes occupy the second tier of the pyramid. Court based-litigation occupies the apex. In other words, ADR processes, and to an even greater extent, the courts will resolve a small percentage of disputes and probably the more complex ones with more significant financial, personal or social consequences.



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

1.13 As one commentator noted:

"We are living in a time of social and legal evolution and it appears as if a single civil adversary court style process will not be adequate to satisfy all of the desiderata of a good justice system. With

¹⁵ Cappelletti "Alternative Dispute Resolution Processes within the Framework of the World Wide Access to Justice Movement" (1993) 56 *The Modern Law Review* 287.

¹⁶ See Galanter "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 *UCLA L Rev* 4.

specialisation in some areas...and varying claimant preferences in others... it certainly appears that a modern civil justice system ought to permit some menu of choices for particular kinds of processes.”¹⁷

1.14 The concept of such a ‘menu of choices’ emphasises the importance of taking into account the preferences of those in dispute and increasing avenues to access to justice. It also reflects the American concept of ‘fitting the forum to the fuss.’¹⁸ This involves allocating civil justice problems to the most appropriate process, depending on what the parties involved wish to achieve.

1.15 In this respect, “access to justice” encompasses access to a range of processes.¹⁹ Justice may sometimes require a decision from a High Court judge who has heard and considered evidence and legal arguments from both sides after an adversarial hearing. In another case, justice might mean an apology and change of administrative process in response to a particular problem. It is clear that in that sense there are circumstances in which ADR can provide resolutions which a court cannot.²⁰

Case Study: Alder Hey Children’s Hospital

An example from England is the huge controversy and individual grievances of over 1,000 people, which arose from the discovery that Alder Hey Children’s Hospital in Liverpool had, over a period of decades, retained organs of children who had died there. This had occurring without obtaining any consent to retention from the parents. From a legal perspective, each non-consensual retention involved a justiciable assault. To deal with the mass nature of the claims (over 1,000), the claimants were organised as a group litigation. This claim had the potential to take up enormous court time. In addition, however, the emotional element of the claim was, arguably, not suitable for litigation. The claimants and defendants agreed to mediation through the Centre for Effective Dispute Resolution (CEDR). The settlement included financial compensation but it was accepted that the ability to

¹⁷ Menkel-Meadow “*Institutions of Civil Justice*”. Paper prepared for the Scottish Consumer Council Seminar on Civil Justice (15 December 2004), available at www.scotconsumer.org.uk/civil.

¹⁸ See paragraphs 1.55 to 1.57 below for a discussion on this concept.

¹⁹ See *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final. Available at <http://eurlex.europa.eu/>.

²⁰ See Lammy “*Speech on key issues for Government*” delivered at Centre for Effective Dispute Resolution Conference: The First Mediators’ Congress, November 2003, London. Available at <http://www.dca.gov.uk/speeches/2003/dl201103.htm>.

discuss non-financial remedies ensured a successful conclusion. The families involved produced a 'wish list' and this resulted in the provision of a memorial plaque at the hospital, letters of apology, a press conference and contribution to a charity of the claimants' choice. These remedies were essential to the successful conclusion of the case and the need of the participants to achieve what they felt to be a just resolution.

1.16 The Alder Hey example provides another reason why ADR can be suitable in some cases. Mass litigation involving over 1,000 claimants is likely to take a long time to resolve and the Court should be free to deal with claims that will not overburden its available resources.²¹

(3) *Appropriate Dispute Resolution*

1.17 There is increasing recognition that while many disputes can be resolved, there is no single formula to decide which resolution process is suitable for or appropriate to a conflict situation. "There are many variations in relation to disputes: the range of subject matters is very wide; within any category, a multitude of issues can arise; various factors can influence parties who disagree; and there are some conflicts which are not readily amenable to dispute resolution processes."²² Therefore, one of the more challenging aspects of alternative dispute resolution is to determine which process is most appropriate for a particular dispute.

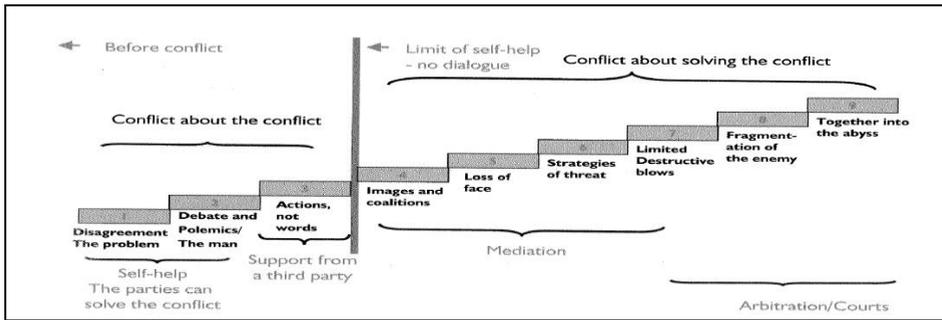
1.18 The potential for dealing constructively with conflicts often depends on the type of conflict and its stage of development. Glasl has identified nine stages of conflict development.²³

1.19 Using this analysis and depending on which level the dispute is at, a specific process is appropriate for its resolution. The earlier a dispute resolution mechanism is introduced in a dispute, the more effective it is likely to be in resolving that dispute. The longer a dispute continues, the more parties tend to become entrenched in their positions. In addition, both the financial and emotional costs continue to escalate while party control over the outcome decreases.

²¹ See Law Reform Commission *Report on Multi-Party Litigation* (LRC 76-2005).

²² Brown & Marriott *ADR Principles and Practices* (2nd Ed Sweet & Maxwell London 1999) at 3.

²³ See Glasl *Confronting Conflict: A First-Aid Kit for Handling Conflict* (Hawthorn Press June 1999). Table below is taken from this source.



1.20 When deciding which dispute resolution process to use, there are two key questions which must also be addressed.

(a) Is the dispute suitable for ADR?

1.21 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 to ensure that justice is accessible, efficient, and effective.

1.22 In 1999, the Lord Chancellor's Department in its *Alternative Dispute Resolution - A Discussion Paper*²⁴ set out a number of situations in which certain forms of ADR could be considered appropriate for the resolution of a dispute. These included:

- Mediation or conciliation may be helpful where parties wish to preserve an existing relationship;
- Parties involved in a sensitive family or commercial dispute may prefer to use a form of ADR to keep sensitive information private;
- Arbitration may be suitable in cases where there is no relationship to preserve, and a rapid decision is needed;
- Trade association arbitration schemes, regulators and ombudsmen may provide a cheaper alternative for an individual seeking redress against a company or large organisation, but they may be limited in the redress they can provide;
- Early neutral evaluation might be applicable in cases where there is a dispute over a point of law, or where one party appears to have an unrealistic view of their chances of success at trial;

²⁴ *Alternative dispute Resolution – A Discussion Paper* (Lord Chancellor's Department, November 1999).

- Mediation or determination by an expert might be best where there is a technical dispute with a great deal of factual evidence;
- Mediation has achieved settlement in many apparently intractable multi-party cases; and
- Any form of ADR will be worth considering where the cost of court proceedings is likely to equal or exceed the amount of money at issue.²⁵

1.23 However, ADR is not a panacea for all disputes, it has its limitations and it is not always appropriate. In some cases power imbalances may exist which put the parties on an unequal footing, allowing one party to place undue pressure on the other. The result may be that one party may impose their solution on the other side. This could arise from the relative economic positions of the parties or from the nature of the personal or business relationship between them.²⁶ In such cases ADR may not be appropriate.

1.24 It has also been suggested that “cases based on allegations of fraudulent conduct or illegal behaviour are not conducive to mediation because the polarised positions that characterise these disputes inhibit discussion. Moreover, they often place the mediator in an impossible ethical position.”²⁷

1.25 In other cases there may be uncertainties in the law which is important to clarify, either because there is a lot at stake in a particular case, or because its outcome could affect a number of other cases.²⁸ Sometimes legal precedents need to be relied on, or to be established for future cases. There are cases in which public interest dictates that a public hearing should take place and a public decision be made.

1.26 It is important to note, therefore, that the courts will always remain central and indispensable to our civil justice system for a number of reasons. Firstly, while the courts should be viewed as the ultimate port of call to resolve a dispute, they must always be available should other ADR processes fail. The

²⁵ *Alternative dispute Resolution – A Discussion Paper* (Lord Chancellor’s Department, November 1999) at 4.9.

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

²⁷ Speech delivered by The Hon. Warren Winkler Chief Justice of Ontario “*Access to Justice, Mediation: Panacea or Pariah?*” (2007). Available at <http://www.ontariocourts.on.ca/coa/en/ps/speeches/access.htm>.

²⁸ *Modern Law for a Modern Scotland A Report on Civil Justice in Scotland* (Scottish Executive, February 2007) at 29.

Commission notes in this respect the constitutional right of access to the courts under Article 40.3 of the Constitution.²⁹ Thus, other forms of dispute resolution are often seen to be conducted ‘in the shadow of the court’. Furthermore, there will be cases where fundamental rights, such as those enshrined in the Constitution, will require judicial protection. Finally, courts can also be seen to perform an important function in preserving peace and stability in society as a whole.

1.27 While the courts will always retain a central place in the civil justice system, it is increasingly recognised throughout the world that in many instances there may be alternative and perhaps better ways of resolving civil disputes. Other less formal means of dispute resolution may be quicker, cheaper and better suited to the needs of the parties involved. “Where there exists an appropriate alternative dispute resolution mechanism which is capable of resolving a dispute more economically and efficiently than court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they have made use of that mechanism.”³⁰ Once it is determined that the dispute is suitable for ADR, the next step is to consider the goals of the parties involved.

(b) What are the goals of the parties?

1.28 One of the key questions to be asked when selecting a dispute resolution process is what process can best satisfy the interests and goals of the party to the dispute.³¹ This outcome-oriented approach asks what should happen as a result of the choice of the particular dispute resolution process.³²

1.29 The criteria which might influence the parties’ choice of process could include the following:

- the need or desire for confidentiality or privacy,
- whether a precedent is required,
- where a reputation or good name is at risk,
- the costs involved,

²⁹ See Hogan and Whyte (eds) *JM Kelly: The Irish Constitution* (4th ed Butterworths 2003).

³⁰ Lord Woolf *Access to Justice, Interim Report* (1995) at Chapter 4.7. 2.

³¹ Sander & Rozdeiczer “Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach” (2006) 11 *Harv Negot L Rev* 1 at 2.

³² *Ibid.* at 10.

- the time the process might take,
- the importance of preserving relationships,
- the desire for non-legal solutions,
- the desire for an opinion or evaluation by a third party,
- the desire to have their 'day in court',
- the complexity of the issue,
- the need for a final and binding determination, and
- the number of parties involved.³³

1.30 To take a hypothetical case where Mary is going through a separation with John.³⁴ She brings her problem to her solicitor and asks for advice on how to proceed. Her choice of procedure will partly depend on the goals that she wants to achieve. Does she want to preserve a good relationship with John? Does she want John to participate in raising their children or, on the contrary, does she want to prevent him from seeing them? How important is it for her to maximise her monetary income from the separation? Does she want to come to a flexible agreement with John in relation to maintenance and the family home that meets both their needs? Does she want to resolve matters as quickly as possible?

1.31 Without knowing what Mary really wants, it is impossible to make an informed decision about the preferable process. If Mary wishes to preserve and even enhance her relationship with John, mediation or collaborative lawyering may be the best options. On the other end of the spectrum, litigation often threatens to destroy relationships. However, a future amicable relationship with John may not be what Mary wants. On the contrary, she may prefer her children to have as little contact as possible with John. In such a case, she should probably go to court and request it to grant very limited visitation rights to John. Depending on the goals of a party to a dispute, the most appropriate dispute resolution process can be determined.³⁵

³³ *The Civil Justice System in Scotland – A Case for Review? The Final Report of the Civil Justice Advisory Group* (Scottish Consumer Council, 2005) at 48.

³⁴ Example based on case study in Sander & Rozdeiczer "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach" (2006) 11 Harv Negot L Rev 1.

³⁵ See Sander & Rozdeiczer "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach" (2006) 11 Harv Negot L Rev 1.

1.32 The role of the legal profession should not be overlooked in relation to assessing the appropriateness of ADR. Many disputants may not be aware of the full spectrum of dispute resolution processes which are available to them and, when assessing a client case, solicitors should also assess whether ADR is appropriate. As noted by the Former US Chief Justice Warren Burger:

“The obligation of the legal profession is to serve as the healers of human conflicts. To fulfil this traditional obligation of our profession means that we should provide the mechanisms that can produce an acceptable result in the shortest possible time with the least possible expense and with a minimum of stress on the participants. That is what a system of justice is all about.”³⁶

C The Development of ADR: An Overview

1.33 The concept of ADR is not a new phenomenon. For centuries, societies have been developing informal and non-adversarial processes for resolving disputes. In fact, archaeologists have discovered evidence of the use of ADR processes in the ancient civilizations of Egypt, Mesopotamia, and Assyria.³⁷ Furthermore, it can be argued that many of the modern methods of ADR are not modern alternatives, but merely a return to earlier ways of dealing with such disputes in traditional societies. The court system itself was once an alternative dispute resolution process, in the sense that it superseded older forms of dispute resolution, including trial by battle and trial by ordeal. This section will look at some of the more relevant periods in the development of ADR.

(1) ADR in Classical Times

1.34 One of the earliest recorded mediations occurred more than 4,000 years ago in the ancient society of Mesopotamia when a Sumerian ruler helped avert a war and developed an agreement in a dispute over land.³⁸ Further evidence reveals that the process of conciliation among disputants was very important in Mesopotamian society.³⁹ During the First Century BC a merchant

³⁶ Burger “*Isn’t There a Better Way*” (March, 1982) 68 *American Bar Association Journal* 274 - 277 at 274.

³⁷ Nelson “*Adapting ADR to Different Cultures*” (Dec 15, 2001). Online article available at <http://www.gowlings.com/resources/publications.asp?pubid=776>.

³⁸ See Fuller “*Mediation - Its Forms and Functions*” (1971) 44 *S Cal L Rev* 305 at 325.

³⁹ Nelson “*Adapting ADR to Different Cultures*” (Dec 15, 2001). Online article available at <http://www.gowlings.com/resources/publications.asp?pubid=776>.

organisation advocated that commercial disputes be resolved outside of the court process through a confrontation between the creditor and debtor in the presence of a third party referee. The role of the referee was to help facilitate conciliation. In this way, the referee would suggest alternative settlements, if the options put forward by the parties themselves were rejected. If the dispute was not resolved according to this manner, the dispute could be brought before the court.

1.35 The development of ADR in the Western World can be traced to the ancient Greeks. As Athenian courts became overcrowded, the city-state introduced the position of a public arbitrator around 400 B.C.⁴⁰ The arbitral procedures were structured and formal. The arbitrator for a given case was selected by lottery. His first duty was to attempt to resolve the matter amicably. If he did not succeed, he would call witnesses and require the submission of evidence in writing. This can be described as the modern day process of med-arb.⁴¹ The parties often engaged in elaborate schemes to postpone rulings or challenge the arbitrator's decision. An appeal would be brought before the College of Arbitrators, who would refer the matter to the traditional courts.⁴²

1.36 The Classical Greek epic poem *The Iliad*, contains several examples of mediation and arbitration in Greek culture. One such example concerns the negotiation of an agreement between a murderer and the victim's family. Traditional law required that the accused make an offer to the victim's family which was laid out in public view for all to assess. Some negotiation regarding the offer occurred. However, the final assessment of the offer was made by a respected elder whose decision would be accepted by all.⁴³ This example incorporates the modern processes of restorative justice and arbitration.

(2) ADR in Traditional Societies

1.37 Arbitration was an important feature of Irish Brehon Law. A 'brithem'⁴⁴ who had trained in a law-school but had not been appointed by the king as the

⁴⁰ Barrett *A History of Alternative Dispute Resolution* (Jossey-Bass San Francisco 2004) at 7.

⁴¹ See the discussion of the process on med-arb in Chapter 2, below.

⁴² Barrett *A History of Alternative Dispute Resolution* (Jossey-Bass San Francisco, 2004) at 7.

⁴³ Nelson "Adapting ADR to Different Cultures" (Dec 15, 2001). Online article available at http://gowlings.com/resources/publications.asp?Pubid=776#N_2_.

⁴⁴ Brithem is an agent noun from breth, and so means 'maker of judgements' Kelly *A Guide to Early Irish Law* Volume III (Dublin Institute for Advanced Studies, 1998) at 51.

official judge for the area earned his living by arbitrating disputes between parties who had agreed to be bound by the decision.⁴⁵ They simply judged the amount of fines due from those guilty, and left it to extended families, patrons or chiefs to enforce payment. If a brithem left a case undecided he would have to pay a fine of 8 ounces of silver. Founded in the maxim 'to every judge his error', he would have to pay a fine for an erroneous judgment.⁴⁶

1.38 There are many other examples of ADR processes which have developed in traditional societies as mechanisms for resolving disputes. The Bushmen of Kalahari, a traditional people in Namibia and Botswana, have sophisticated systems of resolving disputes that avoid physical conflict and the courts.

“When a serious problem comes up everyone sits down – all the men, all the women – and they talk, and they talk and they talk. Each person has a chance to have his or her say. It may take two or three days. This open and inclusive process continues until the dispute is literally talked out.”⁴⁷

This process incorporates negotiation, mediation, and consensus building and bears some resemblance to the parliamentary filibuster.

1.39 Hawaiian islanders of Polynesian ancestry use a form of mediation called ‘ho’oponopono’ for resolving disputes. This process involves a family coming together to discuss interpersonal problems under the guidance of a respected leader.⁴⁸ Similarly, the Abkhazian people of the Caucasus Mountains of Georgia have long practised mediation by elders to resolve disputes within their group and among tribes in surrounding areas.⁴⁹

1.40 In Nigeria, the Yoruba live in modern cities but continue to revert to traditional methods of resolving disputes. Courts are seen as the last resort as it is generally considered a mark of shame on the disputants when a matter ends up in the courts. They are viewed as ‘bad people’ who should favour

⁴⁵ *A History of Arbitration in Ireland* The Dublin International Arbitration Centre at www.dublinarbitration.ie.

⁴⁶ *Ibid.*

⁴⁷ *Ury Must We Fight? From the battlefield to the schoolyard – A new perspective on violent conflict and its prevention* (Jossey Bass 2002) at 40.

⁴⁸ Barrett *A History of Alternative Dispute Resolution* (Jossey-Bass San Francisco, 2004) at 3.

⁴⁹ *Ibid.* at 4.

reconciliation.⁵⁰ Family disputes are generally brought before the 'baale', who is an elderly head of the district. After both disputants state their case, the elders ask questions and then try to work towards a compromise in which both sides accept some of the blame. The elders have a variety of techniques for reaching an agreement: subtle blackmail, precedent, proverbs, and even magic. "The only real power behind the elders' decisions is cultural: they can threaten social excommunication or use emotional blackmail."⁵¹

1.41 India also has a long tradition of using ADR processes. The most popular method of dispute resolution, 'panchayat', began 2,500 years ago and is widely used for resolution of both commercial and non-commercial disputes.

1.42 Similarly, since the Western Zhou Dynasty in China 2,000 years ago the post of mediator has been included in all governmental administration. Today in China it is estimated that there are 950,000 mediation committees with 6 million mediators. Article 111 of the Constitution of the People's Republic of China states "People's Mediation Committees (PMC) are a working committee under grassroots autonomous organizations - Residents Committee, Villagers Committee - whose mission is to mediate civil disputes." Today, these Committees handle between 10 and 20 million cases per year, ranging from family disputes to minor property disputes. Chinese citizens are not forced to use the PMCs and can bypass them for the courts. But since the committees are tasked with settling matters in no longer than a month, PMCs can be an efficient way to administer justice. Judgments also can also be appealed to the courts.⁵²

1.43 It is well-documented that mediation has a long and varied history in all the major cultures of the world. Both the Koran and the Bible⁵³ provide references to the resolution of disputes through arbitration or mediation.

⁵⁰ Barrett *A History of Alternative Dispute Resolution* (Jossey-Bass San Francisco, 2004) at 5.

⁵¹ *Ibid.*

⁵² Wachter "Overwhelmed Legal System in China Leads to Grassroots Mediation" (February 2008) Columbia Law School Press Release. Online article available at http://www.law.columbia.edu/media_inquiries/news_events/2008/february2008/china_mediation.

⁵³ Matthew 5:9-1; Timothy 2:5-6; Corinthians 6:1-4.

(3) Development of Civil & Commercial ADR

(a) Ireland

1.44 The first Arbitration Act was the “Act for Determining Differences by Arbitration, 1698”.⁵⁴ The 1698 Act provided, inter alia, that “It shall and may be lawful for all merchants and traders and others desiring to end any controversy, suit or quarrel ... by a personal action or suit in equity, by arbitration whereby they oblige themselves to submit to the award or umpirage of any person or persons ... so agreed.” One of Ireland's first recorded arbitral institutions was the Ouzel Galley Society. Its name derived from an Irish merchant ship. In the autumn of 1695 the Ouzel Galley sailed out of Ringsend in Dublin under the command of Capt Eoghan Massey of Waterford. Her destination, it was supposed at the time, was the great Ottoman port of Smyrna in what is now Turkey where the vessel's owners - the Dublin shipping company of Ferris, Twigg & Cash - intended her to engage in a trading mission before returning to Dublin the following year. The Ouzel, however, did not return as scheduled; nor was she seen the year after that. When a third year passed without any sign of her or her crew, it was generally assumed by the people of Dublin that she had been lost at sea.⁵⁵

1.45 In 1698 a panel comprising the city's most distinguished merchants was established to settle the question of insurance. The panel's ruling was that the ship had been lost and that its owners and insurers should receive their due compensation. The galley's complement of 37 crew and 3 officers were declared dead and the insurance was paid out.⁵⁶

1.46 Two years later, however, in the autumn of 1700, the Ouzel made her unexpected reappearance, sailing up the River Liffey. The ownership of the Ouzel's cargo became a matter of dispute. Litigation commenced later that year but was arduously slow. Eventually in 1705 the merchants of Dublin decided to form an arbitration court to hear the dispute and the panel of merchants which had arbitrated in the case in 1698 was formally established as a permanent arbitration body to deal with similar shipping disputes that might arise. In contrast with the court proceedings the arbitration reached a relatively speedy

⁵⁴ 10 Will. 3 c. 14 (Irl). The 1698 Act was repealed (with a saving for any existing arbitrators subject to its terms) by section 8 of the *Arbitration Act, 1954*.

⁵⁵ *A History of Arbitration in Ireland* The Dublin International Arbitration Centre, www.dublinarbitration.ie. See also Moran “A legend to rival the Marie Celeste” *The Irish Times* 11 November 2005.

⁵⁶ *Ibid.*

conclusion.⁵⁷ According to records, "It was resolved that the entire of the pirates' booty would form a fund for the alleviation of poverty among the merchants of Dublin."⁵⁸ The Ouzel Galley Arbitration led to the formation of the Ouzel Galley Society.

1.47 The Ouzel Galley Society thrived until the 1820's. Between 1799 and 1869 for instance it is known to have made 318 awards - the majority of these being made before 1824. The members were generally drawn from among the city's most eminent politicians and businessmen - among them Arthur Guinness and John Jameson. For much of the 18th Century the society met in public houses. In 1783 the society was partially subsumed by the newly formed Dublin Chamber of Commerce. From that year on it declined, in parallel to the decline in the city's fortunes, and it was eventually wound up in 1888.⁵⁹

1.48 Further developments in the field of arbitration in Ireland include the enactment of the *Arbitration Act 1954* (as amended by the *Arbitration Act 1980*) which continues to govern domestic arbitrations and the *Arbitration (International Commercial) Act 1998* which governs international arbitrations. The 1998 Act adopts the UNCITRAL Model Law on International Commercial Arbitration with a few minor amendments. In 1998, the Bar Council opened the Dublin International Arbitration Centre.⁶⁰ In May 2001, the International Centre for Dispute Resolution, a separate division of the American Arbitration Association, the world's largest provider of commercial conflict management and dispute resolution services, opened its European headquarters in Dublin.⁶¹

1.49 Provision for mediation has been made in a number of recent Acts and statutory instruments, including:

- *Judicial Separation and Family Law Reform Act 1989*;
- *Family Law (Divorce) Act 1996*;
- *Employment Equality Act 1998*;

⁵⁷ *A History of Arbitration in Ireland* The Dublin International Arbitration Centre, www.dublinarbitration.ie. See also Moran "A legend to rival the Marie Celeste" *The Irish Times* 11 November 2005.

⁵⁸ *Ibid.*

⁵⁹ *A History of Arbitration in Ireland* The Dublin International Arbitration Centre, www.dublinarbitration.ie. See also Moran "A legend to rival the Marie Celeste" *The Irish Times* 11 November 2005.

⁶⁰ See Chapter 7, below.

⁶¹ *Ibid.* at 7.80.

- *Family Support Agency Act 2001*;
- *Civil Liability and Courts Act 2004*;
- *Residential Tenancies Act 2004*;
- *Rules of the Superior Courts (Commercial Proceedings) 2004*;
- *Equality Act 2004*;
- *Disability Act 2005*;
- *Rules of the Superior Courts (Competition Proceedings) 2005*; and
- *Medical Practitioners Act 2007*.

(b) United States

1.50 In the United States, Chambers of Commerce created arbitral tribunals in New York in 1768, in New Haven in 1794, and in Philadelphia in 1801. These early panels were used primarily to settle disputes in the clothing, printing, and merchant seaman industries. Arbitration received the full endorsement of the Supreme Court in 1854, when the court specifically upheld the right of an arbitrator to issue binding judgments in *Burchell v Marshall*.⁶² Writing for the court, Grier J stated that “Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity.”⁶³

1.51 The federal government has promoted commercial arbitration since as early as 1887, when it passed the *Interstate Commercial Act 1887*. The Act set up a mechanism for the voluntary submission of labour disputes to arbitration by the railroad companies and their employees. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York and authorised mediation for collective bargaining disputes. The *Newlands Act 1913* and later legislation reflected the belief that stable industrial peace could be achieved through the settlement of collective bargaining disputes; settlement in turn could be advanced through conciliation, mediation, and voluntary arbitration. Special mediation agencies, such as the Board of Mediation and Conciliation for Railway Labor 1913⁶⁴ and the Federal Mediation and Conciliation Service 1947 were formed and funded to carry out the mediation of collective bargaining disputes.

⁶² *Burchell v. Marsh* 58 US 344.

⁶³ *Ibid* at 349.

⁶⁴ This was later renamed the National Mediation Board in 1943.

1.52 Beginning in the late 1960's, American society witnessed the start of a significant movement in ADR, in a climate of criticism of the adversarial nature of litigation, and, perhaps, loss of faith in traditional adjudication and the competence and professionalism of lawyers.⁶⁵ It is, however, the Pound Conference held in 1976, which is recognised as being the birthplace of the modern ADR movement.

1.53 The Pound Conference full title was the 'National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.' The Pound Conference picked up on the dissatisfaction with the adversarial system.⁶⁶ According to Subrin,

"There was an unmistakable tone at the Conference that the underlying ideology of liberality of pleading, wide-open discovery and attorney latitude was no longer feasible. The alleged litigation explosion would have to be controlled; the few bad lawyers could not be trusted to control themselves."⁶⁷

1.54 Professor Frank Sander's speech entitled 'Varieties of Dispute Processing', urged American lawyers and judges to re-imagine the civil courts as a collection of dispute resolution procedures tailored to fit the variety of disputes that parties bring to the justice system.⁶⁸ The goal, Sander argued, should be to 'let the forum fit the fuss'. Sander criticised lawyers for tending "to assume that the courts are the natural and obvious dispute resolvers, when, in point of fact there is a rich variety of different processes...that may provide far more effective conflict resolution."⁶⁹ He advocated "a flexible and diverse panoply of dispute resolution processes, with particular types of cases being

⁶⁵ See Shone "Law Reform and ADR: Pulling Strands in the Civil Justice Web" Paper presented at the Australasian Law Reform Agencies Conference April 2006 Wellington New Zealand at 3. Available at <http://www.lawcom.govt.nz/UploadFiles/SpeechPaper/8208298e-fef7-4c6b-a38d-9e65ed2f99f9//Session%20B%20-%20ADR%20-%20Shone.pdf>.

⁶⁶ Stempel "Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty; Fait Accompli, Failed Overture, or Fledging Adulthood?" (1996) 11 Ohio St J on Disp Resolution at 297.

⁶⁷ Subrin "Teaching Civil Procedure While You Watch It Disintegrate" (1993) 59 Brook L Rev 115 at 1158.

⁶⁸ Hensler "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System" (2003-2004) 108 Penn St L Rev at 165.

⁶⁹ Sander "Varieties of Dispute Processing" (1976) 70 *Federal Rules Decisions* 79 at 112-113.

assigned to different processes.”⁷⁰ Sander then outlined the spectrum of disputing methods he regarded as apt, these included;

- adjudication,
- arbitration,
- problem-solving efforts by a government ombudsman,
- mediation or conciliation,
- negotiation,
- avoidance of the dispute.⁷¹

1.55 He stated that we should “reserve the courts for those activities for which they are best suited and to avoid swamping and paralysing them with cases that do not require their unique capabilities.”⁷² He envisioned that “not simply a court house, but a Dispute Resolution Center, where the grievant would first be channelled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case.”⁷³ The room directory in the lobby of such a Center might look as follows:

Screening Clerk	Room 1
Mediation	Room 2
Arbitration	Room 3
Fact Finding	Room 4
Malpractice Screening Panel	Room 5
Superior Court	Room 6
Ombudsman	Room 7

1.56 A screening unit at the centre would “diagnose” disputes, then using specific referral criteria, refer the disputants to the appropriate dispute resolution process, the “door”, for handling the dispute.⁷⁴ Sander’s idea was a catalyst for

⁷⁰ Sander “Varieties of Dispute Processing” (1976) 70 *Federal Rules Decisions* 79 at 131.

⁷¹ *Ibid.* at 114.

⁷² *Ibid.* at 132.

⁷³ Sander “Varieties of Dispute Processing” (1976) 70 *Federal Rules Decisions* 79 at 120.

⁷⁴ The Hon. Justice Brian J Preston “*The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse*”. Keynote Address at

what later became known as the “Multi-Door Courthouse”. Multi-door courthouses were established, initially on a pilot basis, in Tulsa (Oklahoma); Houston (Texas); and in the Superior Court of the District of Columbia. From these experiments, the idea spread to many courts throughout the world.⁷⁵ “In a relatively short amount of time, the use of ADR processes in American courts has increased to the extent that this once unusual process is now commonplace ...and hailed as the most important tool available to the courts.”⁷⁶

(c) England & Wales

1.57 Sander’s concerns for the future of the civil justice system were echoed in the Woolf Reports on the civil justice system of the 1990’s when the system in England and Wales was viewed as

“... too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants.”⁷⁷

1.58 The then Lord Chancellor appointed Lord Woolf in 1994 to review the rules of civil procedure with a view to improving access to justice and reducing the cost and time of litigation. The aims of the review were “to improve access to justice and reduce the cost of litigation; to reduce the complexity of the rules and modernise terminology; to remove unnecessary distinctions of practice and procedure.”⁷⁸ Perceived problems within the existing civil justice system, summed up by Lord Woolf in his review in England and Wales as “the key problems facing civil justice today...cost, delay and complexity.”⁷⁹

LEADR NSW Chapter Annual Dinner November 2007 Sydney at
[www.lawlink.nsw.gov.au/.../\\$file/Paper_15Nov07_Preston_LEC_Multi_door_Court.doc](http://www.lawlink.nsw.gov.au/.../$file/Paper_15Nov07_Preston_LEC_Multi_door_Court.doc).

⁷⁵ Including Singapore and Nigeria (Lagos, Kano and Abuja).

⁷⁶ Benham & Boyd Barton “Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration” (1995-1996) 12 Ga St U L Rev 623 at 635.

⁷⁷ See Lord Woolf, *Access to Justice, Interim Report* (1995) and Lord Woolf, *Access to Justice Final Report* (1996).

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

1.59 The Woolf Reports led to the enactment of the UK *Civil Procedure Act 1997* and the *Civil Procedure Rules 1998* (CPR). The new CPR Rules apply both to proceedings in the High Court and the County Court. The stated objective of the procedural code is to enable the court to deal with cases justly.⁸⁰ Dealing with a case justly includes, so far as practicable:

- Ensuring that the parties are on an equal footing;
- Saving expense;
- Dealing with the case in ways which are proportionate;
- Ensuring that the case is dealt with expeditiously and fairly; and
- Allotting it to an appropriate share of the court's resources.⁸¹

1.60 The CPR vests in the court the responsibility of active case management by encouraging the parties to co-operate and to use ADR.⁸² Under the CPR a court may either at the request of the parties or of its own initiative stay proceedings while the parties try to settle the case by ADR or other means.

1.61 Since the introduction of the CPR, ADR has significantly developed in England and Wales and the judiciary has also strongly encouraged the use of ADR. The judgments of the Court of Appeal in *Cowl v Plymouth City Council*⁸³ and *Dunnett v Railtrack plc*⁸⁴ both indicated that unreasonable failure to use ADR may be subject to cost sanctions.⁸⁵ Indeed, the CPR have also introduced the possibility for cost sanctions if a party does not comply with the court's directions regarding ADR.⁸⁶

1.62 The English judge, Lightman J who is a strong supporter of incorporating mediation into the justice system, summarised the main developments in relation to ADR since the introduction of the CPR Rules as follows:

- (1) The abandonment of the notion that mediation is appropriate in only a limited category of cases. It is now recognised that there is no

⁸⁰ CPR 1.1(1).

⁸¹ CPR 1.1(2).

⁸² CPR 1.4.

⁸³ [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803.

⁸⁴ [2002] EWCA Civ 303; [2002] 2 All E.R. 850.

⁸⁵ See the discussion on costs sanctions in Chapter 11, below.

⁸⁶ CPR r. 44.5(3).

civil case in which mediation cannot have a part to play in resolving some (if not all of) the issues involved;

(2) Practitioners generally no longer perceive mediation as a threat to their livelihoods, but rather a satisfying and fulfilling livelihood of its own;

(3) Practitioners recognise that a failure on their part without the express and informed instructions of their clients to make an effort to resolve disputes by mediation exposes them to the risk of a claim in negligence;

(4) The Government itself adopts a policy of willingness to proceed to mediation in disputes to which it is a party;⁸⁷

(5) Judges at all stages in legal proceedings are urging parties to proceed to mediation if a practical method of achieving a settlement and imposing sanctions when there is an unreasonable refusal to give mediation a chance; and

(6) Mediation is now a respectable legal study and research at institutes of learning.⁸⁸

(d) *European Developments*

(i) *Council of Europe*

1.63 In 1998 the Committee of Ministers of the Council of Europe adopted a Recommendation on Family Mediation in Europe.⁸⁹ This Recommendation focused on the use of mediation in resolving family disputes. It sets out principles on the organisation of mediation services, the status of mediated agreements, the relationships between mediation and proceedings before the courts and other competent authorities, the promotion of, and access to mediation and, the use of mediation in international matters. In addition, it calls for the government of all Member States to introduce or promote family mediation and to take or reinforce measures necessary for this purpose, and to promote family mediation as an appropriate means of resolving family disputes.

⁸⁷ In March 2001, the Lord Chancellor published a formal pledge committing Government Departments and agencies to settle disputes by ADR techniques. See <http://www.ogc.gov.uk/documents/cp0077.pdf>.

⁸⁸ Speech by Mr Justice Lightman *Mediation: An Approximation to Justice* 28 June 2007. Available at http://www.judiciary.gov.uk/docs/speeches/berwins_mediation.pdf.

⁸⁹ *Family Mediation in Europe* Recommendation No. R (98)1.

(ii) European Commission

(I) Green Paper on Alternative Dispute Resolutions in Civil and Commercial Law 2002⁹⁰

1.64 As a follow-up to the conclusions of the 1999 Tampere European Council, the Council of Justice and Home Affairs asked the European Commission to present a Green Paper on alternative dispute resolution in civil and commercial law other than arbitration. Priority was to be given to examining the possibility of laying down basic principles, either in general or in specific areas, which would provide the necessary guarantees to ensure that out-of-court settlements offer the same guarantee of certainty as court settlements.

1.65 In 2002 the European Commission published a Green Paper on Alternative Dispute Resolutions in Civil and Commercial Law. It deals with the promotion on an EU wide basis of ADR as an alternative to litigation primarily due to the ever increasing number of international disputes but also with the aim of promoting a framework to ensure that disputes can be dealt with in an efficient and cost effective manner.

1.66 The questions in the Green Paper related to the essence of the various means of alternative dispute resolution such as clauses in contracts, limitation periods, confidentiality, the validity of consent given, the effectiveness of agreements generated by the process, the training of third parties, their accreditation and the rules governing their liability.

(II) European Code of Conduct for Mediators 2004

1.67 In 2004, a European Code of Conduct for Mediators was developed by a group of stakeholders with the assistance of the European Commission.⁹¹ It sets out a number of principles to which individual mediators can voluntarily decide to commit. It is intended to be applicable to mediation in civil and commercial matters. Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organisation to respect this code. Adherence to the code is without prejudice to national legislation or rules regulating individual professions.⁹²

⁹⁰ *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final. Available at <http://eurlex.europa.eu/>.

⁹¹ Available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

⁹² For further discussion on the Code of Conduct for Mediators see Chapters 3 and 11, below.

(III) *Directive on Certain Aspects of Mediation in Civil and Commercial Matters 2008*

1.68 In 2008 a European Directive on Certain Aspects of Mediation in Civil and Commercial Matters was agreed. The purpose of the Directive is to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings. The Directive must be implemented by 2011.⁹³

1.69 The Directive applies to processes where two or more parties to a cross-border dispute of a civil or commercial nature attempt by themselves, on a voluntary basis, to reach an amicable settlement to their dispute with the assistance of a mediator. The Directive only applies to cross-border disputes, although it does not prevent Member States from applying the provisions of the Directive to internal mediation processes. Given the broad definition of “cross-border disputes”, the Directive’s provisions on confidentiality and on limitation and prescription periods also apply in situations which are purely internal at the time of mediation but become international at the judicial proceedings stage, for example, if one party moves abroad after mediation fails.

(IV) *Organisation for Economic Co-operation and Development (OECD)*

1.70 The *Organisation for Economic Co-operation and Development (OECD) Recommendation on Consumer Dispute Resolution and Redress* which was adopted by the OECD Council in July 2007 sets out principles for an effective and comprehensive dispute resolution and redress system that would be applicable to domestic and cross-border disputes.⁹⁴ Member countries, including Ireland, are required to review their existing dispute resolution and redress frameworks to ensure that they provide consumers with access to fair, easy to use, timely, and effective dispute resolution and redress without unnecessary cost or burden. In so doing, the Recommendation states that Member countries should ensure that their domestic frameworks provide for a

⁹³ The Directive is available in the Official Journal of the European Union L 136/3 (May 2008). It is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>. For a further discussion on the Directive see Chapter 3, below.

⁹⁴ OECD Recommendation on Consumer Dispute Resolution and Redress This Recommendation was developed by the OECD Committee on Consumer Policy (CCP). Work on its principles was initiated in late 2005. The Recommendation was adopted by the OECD Council on 12 July 2007. It is available at <http://www.oecd.org/dataoecd/43/50/38960101.pdf>. See Chapter 8, below.

combination of different mechanisms for dispute resolution and redress in order to respond to the varying nature and characteristics of consumer complaints.

D Conclusion

1.71 ADR facilitates early settlement of disputes. Early settlement can be both financially and emotionally advantageous to the disputant. It may also mean that an important relationship can be repaired and maintained, something which may be at risk in adversarial litigation. While it is true that lawyers often engage in negotiation and settlement, sometimes on the steps of the court, a successful negotiation often depends on the strength of the legal rights-based arguments, which can only be fully developed following expensive and time-consuming processes such as discovery. This legalistic approach often overlooks other avenues of settlement opportunity, which may better address a client's underlying interests and needs.⁹⁵

1.72 Alternative dispute resolution must be seen as an integral part of any modern civil justice system. "It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required."⁹⁶

1.73 The Commission considers that citizens should be given a variety of options to resolve their disputes in a way which best needs their interests and goals. While litigation must always remain available for clients, this can be a very stressful undertaking and should be seen as the final place for resolving a dispute.⁹⁷ The Commission concurs with the view that, "we should want much more than an effective court system. We should want an integrated civil justice system wherein the courts are a forum of last resort, supported by other, closely related techniques for ensuring the law is open to all."⁹⁸

⁹⁵ See Fiadjoe *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish 2004) at 10.

⁹⁶ Speech by Sir Anthony Clarke, Master of the Rolls "The Future of Mediation" at the Second Civil Mediation Council National Conference Birmingham, May 2008. Available at http://www.judiciary.gov.uk/docs/speeches/mr_mediation_conference_may08.pdf.

⁹⁷ Fiadjoe *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish 2004) at 1.

⁹⁸ *Civil justice 2000: A vision of the Civil Justice System in the Information Age* (Ministry of Justice November 2001) at 2.11. Available at <http://www.dca.gov.uk/consult/meta/cj2000fr.htm>.

1.74 *The Commission concurs with the view that ADR provides a suitable means of resolving disputes in appropriate circumstances and provisionally recommends that the key principles underlying ADR, in particular mediation and conciliation, should be set out in statutory form.*

CHAPTER 2 ADR PROCESSES & TERMINOLOGY

A Introduction

2.01 In this chapter the Commission examines ADR processes and terminology. In Part B the Commission provides a general overview of ADR terminology and explains why it is necessary to ensure that the more commonly used ADR terms are clearly defined. In Part C the Commission defines the acronym ADR. In Part D the Commission provides an overview of the ADR spectrum which is made up of a body of ADR processes. In Part E the Commission defines and describes the main preventive ADR processes. In Part F the Commission defines and describes the main facilitative ADR processes. In Part G the Commission defines and describes the main advisory ADR processes. In Part H the Commission describes and defines the main determinative ADR processes. In Part I the Commission examines the concept of collective ADR. In Part J the Commission defines and describes judicial ADR processes.

B ADR Terminology: An Overview

2.02 An examination and clarification of ADR terminology is a necessary starting point in any discussion of ADR. The terminology of the mechanisms that make up the spectrum of dispute resolution processes appears to be understood and interpreted in many different ways. One of the questions asked by many is what is meant by conciliation and mediation? Whether they are the same and, if not, what are the differences?¹

2.03 The Rules of the Superior Courts (Commercial Proceedings) 2004² and the Rules of the Superior Courts (Competition Proceedings) 2005³ expressly mention both mediation and conciliation, but do not provide any

¹ The Labour Relations Commission's website describes conciliation as a voluntary mediation process. See www.lrc.ie.

² S.I. No. 2 of 2004, which inserted Order 63A into Rules of the Superior Courts 1986 (S.I. No. 15 of 1986).

³ S.I. No. 130 of 2005 which inserted Order 63B Rule into Rules of the Superior Courts 1986 (S.I. No. 15 of 1986).

definitions of the terms. It must be assumed that those drafting the 2004 and 2005 Rules intended them to have different meanings.⁴

2.04 The Commission considers that the development of clear and consistent definitions of the more commonly used ADR terms would serve several important functions. Four functions were highlighted by the Australian National Alternative Dispute Resolution Advisory Council of Australia:

- i) Common definitions or descriptions of ADR processes guarantee those who use, or make referrals to, ADR services receive consistent and accurate information, and have reasonable and accurate expectations about the processes they are undertaking. This will enhance their confidence in, and acceptance of, ADR services.
- ii) Consistent use of terms for ADR processes helps courts and other referring agencies to match dispute resolution processes to specific disputes. Better matching would improve outcomes from ADR processes.
- iii) A common understanding of ADR terms helps ADR service providers and practitioners to develop consistent and comparable standards.
- iv) Common terms provide a basis for policy and programme development, data collection and evaluation.⁵

2.05 While consistent and clear terminology is necessary, it is important that this does not limit the creativity and innovation that have made ADR services so effective and popular.⁶ Only a very limited number of key terms should be defined in statute, where consistency and compliance are essential. Where diversity and flexibility are important, may be more appropriate to have descriptive terms.⁷

⁴ See Singer *The EU Mediation Atlas* (LexisNexis 2004) at 73.

⁵ *Dispute Resolution Terms* (National Alternative Dispute Resolution Advisory Council of Australia, September 2003). See also Tillett "Terminology in Dispute Resolution: A Review of the Issues and Literature" (2004) 15 *Australian Dispute Resolution Journal* 180.

⁶ The Hon. Daryl Williams, Federal Attorney General *VCAT Mediation Newsletter* No. 6, November 2002.

⁷ *Ibid.*

C Definition of ADR

2.06 In general terms, the Commission understands ADR to represent a broad spectrum of structured processes which are fundamental to any modern civil justice system in providing greater access to individualised justice for all citizens. ADR should not be seen as a separate entity from the court-based arrangements for civil justice but rather should be seen as an integral part of the entire system.

2.07 The acronym ADR is as flexible as the processes it embodies. It has been described as “A halfway house between the certainty of the adversarial system and the flexibility of negotiation.”⁸ Emanating from the United States, the letters ADR evolved originally as an acronym for Alternative Dispute Resolution. Historically this referred to an alternative to the courts. This original view of ADR as an “alternative” dispute resolution mechanism to litigation in the court system is no longer appropriate. Current practice of mediation internationally (and in Ireland in the Commercial Court) demonstrates that ADR and litigation “are not homogenous, separate and opposed entities.”⁹

2.08 A number of other ‘A’ words have been developed which are aimed at identifying ADR as a dispute resolution concept in its own right and not as an alternative, but rather ‘additional’ to some other procedures, including litigation.¹⁰ ‘Amicable’ dispute resolution’ has been proposed to emphasise the non-adversarial objectives and processes of ADR, as has ‘accelerated’ dispute resolution, which underlines one of the main advantages of many dispute resolution processes, in that disputes are often resolved more quickly than traditional litigation. As ADR has developed, importance has been placed on choosing techniques to match the needs of a dispute and the interests of the parties. Thus, ‘appropriate’ dispute resolution is often encouraged as an alternative component of the ADR acronym.

2.09 Moving on from ‘ADR’, BDR for ‘better dispute resolution’, or IDR, for ‘innovative dispute resolution’ have also been promoted in other jurisdictions such as Canada. In some jurisdictions ADR is now so popular that it is no longer an alternative form of dispute resolution but a primary form of dispute

⁸ Applebey “What is Alternative Dispute Resolution?” (1991-1992) 15 *Holdsworth Law Review* 20 at 32.

⁹ Astor & Chinkin *Dispute Resolution in Australia* (2nd ed Butterworths, 2002) at 77.

¹⁰ *Ibid.*

resolution. Within the family law area ADR has been renamed “primary dispute resolution” in Australia for this reason.¹¹

2.10 Furthermore, ADR has come to represent not only a body of processes for dispute resolution but also a body of processes for dispute avoidance and dispute management. This is increasingly evident in the employment sector. Recognising this, it has been argued that the letters should be seen in their own right as describing “a holistic concept of a consensus-oriented approach to dealing with potential and actual disputes. The concept encompasses dispute avoidance, dispute management and dispute resolution.”¹²

2.11 Today, ADR has flourished to the point that it has been suggested that the adjective should be dropped altogether and that ‘dispute resolution’ should be used to describe the modern range of dispute resolution methods and choices.¹³ The Commission has provisionally concluded that at this stage in its development in Ireland it remains appropriate to refer to Alternative Dispute Resolution the Commission.

2.12 *The Commission defines ADR as a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes.*

D Classification of the ADR Spectrum

2.13 Dispute resolution processes can be arranged along a spectrum which correlates with increasing third party involvement, decreasing control of the parties over the process and outcome, and, usually, increasing likelihood of having the relationship between the disputants deteriorate during and after resolution of the dispute.¹⁴

¹¹ See Field “*Alternative Dispute Resolution in Victoria: Supply-Side Research Project*” (Research Report for Consumer Affairs Victoria, February 2007) at 19. Available at www.consumer.vic.gov.au.

¹² Street, *ADR Terminology Responses to NADRAC Discussion Paper* (National Alternative Dispute Resolution Advisory Council, 24 June 2005).

¹³ Shone “Law Reform and ADR: Pulling Strands in the Civil Justice Web”. Paper presented at the Australasian Law Reform Agencies Conference Wellington, New Zealand April 13-16, 2004 at 9.

¹⁴ Fiadjoe *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish 2004) at 21.

2.14 This spectrum can also be grouped into five distinct categories.

Preventive ADR	Facilitative ADR	Advisory ADR	Determinative ADR	Collective ADR	Court-Based ADR
Negotiation	Mediation	Conciliation	Arbitration	Ombudsman Schemes	Early Neutral Evaluation
Partnering		Collaborative Lawyering	Adjudication		Court Settlement Masters
ADR Clauses			Expert Determination		Court Referred ADR
					Small Claims Court

2.15 The Commission now turns to discuss each of these categories of ADR in turn.

E Preventive ADR Processes

2.16 Preventive ADR can be described as conflict avoidance processes that provide for efficient and systematic management of disputes. It is obvious that preventing unnecessary disputes can result in enormous monetary savings for individuals, avoid relationship break-downs and enhance trust and confidence between individuals.

2.17 Preventive ADR is a tool which is widely used in the construction and employment sector. For example, The Advisory Development and Research Service of the Labour Relations Commission advise on and develop specific grievance, disciplinary, and disputes procedures. Section 1(5) of the *Industrial Relations Act 1990, Code of Practice on Dispute Procedures (Declaration) Order 1992*¹⁵ expressly promotes the use of preventive ADR in the workplace:

“The major objective of agreed procedures is to establish arrangements to deal with issues which could give rise to disputes. Such procedures provide for discussion and negotiation with a view to the parties reaching agreement at the earliest possible stage of the procedure and without resort to any form of industrial action.”

2.18 It is becoming increasingly mandatory that, in employment and consumer sectors, organisations must put in place internal structured dispute

¹⁵ S.I. No. 1 of 1992.

resolution procedures to deal with grievances.¹⁶ There are various types of internal dispute resolution processes aimed at resolving grievances fairly, consistently and in a timely manner. These can range from a very formal arbitration procedure to the informal “open door” policy. Normally employees or consumers must first exhaust these internal procedures when a grievance occurs. If no resolution can be reached, the parties may then proceed to use external mechanisms. These internal dispute procedures resolve an overwhelming percentage of grievances and prevent the escalation of the grievance into a full-blown dispute.

2.19 Preventive ADR processes include negotiation, partnering, ADR clauses, joint problem solving, and systems design.

(1) Negotiation

2.20 Negotiation is any form of voluntary communication between two or more people for the purpose of arriving at a mutually acceptable agreement. Negotiation is something that occurs in everyday life, without most of us really being aware that we are engaging in a process. For example, it may consist of a simple and informal conversation between a parent and a child regarding an increase in pocket money. On the other end of the spectrum, negotiation can be a highly structured and formal process between parties and their solicitors on the steps of the courthouse. Indeed, the majority of disputes, justiciable and non-justiciable, are resolved by this process and negotiation is at the core of all ADR processes.

2.21 Ury and Fisher note that “Negotiation is a basic means of getting what you want from others. It is a back and forth communication designed to reach an agreement when you and the other side have some interest that are shared and others that are opposed.”¹⁷ By contrast, in adversarial negotiations the sides often begin from fixed positions with the two sides make offers and counteroffers supported by arguments until reaching a settlement. “To a large extent, the settlement will reflect the relative power of the parties”¹⁸ and may result in a win-lose situation.

¹⁶ See Chapter 4 and Chapter 8, below.

¹⁷ Fisher & Ury *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed Penguin Books 1991) at xvii.

¹⁸ Barrett *A History of Alternative Dispute Resolution* (Jossey-Bass San Francisco 2004) at 205.

2.22 Principled negotiation refers to the interest-based approach to negotiation.¹⁹ The essence of this approach is that parties concentrate on solving the problem by finding a mutually-beneficial solution rather than on defeating the other side. The four fundamental principles of principled negotiation are :

- 1) separating the people from the problem;
- 2) focusing on interests, not positions;
- 3) inventing options for mutual gain; and
- 4) insisting on objective criteria.²⁰

2.23 In most settlement negotiations, parties are influenced consciously or unconsciously by their assessment of their alternatives to a negotiated agreement. The better their alternatives, the more they may push for a more favourable settlement. The worse their alternatives, the more accommodating they may be in the settlement negotiations. This is sometimes referred to using the acronym which refers to “best alternative to a negotiated agreement.”²¹ BATNAs are important to negotiation because a party cannot make an informed decision about whether to accept a negotiated agreement unless they know what their alternatives are. Fisher and Ury outline a simple process for determining a party’s BATNA:

- develop a list of actions you might conceivably take if no agreement is reached;
- improve some of the more promising ideas and convert them into practical options; and
- select, tentatively, the one option that seems best.²²

2.24 In effect, the BATNA is the best result the party can hope to achieve if a settlement cannot be negotiated. For example, when negotiating a pay rise, having another job offer with a different employer at a higher rate of pay may be a powerful BATNA. The concept of determining a party’s BATNA is also used in mediation and conciliation.

¹⁹ See Fisher & Ury *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed Penguin Books 1991).

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.* at 108

(2) Partnering

2.25 Partnering is a co-operative arrangement between two or more parties. It is based on the promotion and recognition of mutual goals and it requires all parties to agree on how they will make decisions, including strategies for resolving disputes during the lifetime of the project.

2.26 When partnering is successful, it can enhance communication and trust in business relationships such as in the context of a building or public infrastructure project. In that setting it addresses concerns of other stakeholders, such as private developers, community groups, governmental organisations and regulatory authorities, since they can be invited to participate in the partnering process. This can help build widespread support for a project.²³

2.27 Partnering is used extensively in the construction industry. It was first used by the US Army Corps of Engineers in the late 1980s and was first applied in the UK in the North Sea oil and gas industries in the early 1990s.²⁴ Successive UK construction industry review reports emphasised the importance of partnering arrangements in order to facilitate and enhance team work across contractual boundaries.²⁵

2.28 Partnering is also promoted within the employment sector. The National Centre for Partnership and Performance was established by the Irish Government in 2001 to promote and facilitate workplace change and innovation through partnership.²⁶

2.29 Joint problem solving, consensus building and systems design are concepts which are similar to partnering. They involve determining, in advance, what processes will be used for handling conflicts which arise within an organisation or between organisations and individuals.

²³ Clay et al "Creating Long-Term Success Through Expanded Partnering" (Feb-Apr 2004) 59 *Dispute Resolution Journal* 42 at 47.

²⁴ Skeggs "Project Partnering in the International Construction Industry" (2003) 20 *International Construction Law Review* 456. Available at www1.fidic.org.

²⁵ See Latham *Constructing the team* The Latham report: Final report of the government/industry review of procurement and contractual arrangements in the UK construction industry (Department of the Environment, July 1994). For an example of an international partnering success see Carlisle "MTRC - Tseung Kwan O Extension : Case Study" available at www.johncarlislesea.com.

²⁶ See Chapter 4, below 4.74.

(3) ADR Clauses

2.30 An ADR clause is a contractual clause requiring the parties to attempt to settle any dispute arising out of the contract using an ADR process or processes. The Law Society of Ireland offers the following standard clause for mediation:

“If any dispute arises in connection with this agreement, the parties will attempt to settle it by mediation. Unless otherwise agreed between the parties, the mediator will be nominated by Notice in writing (“mediation request”) must be given by one party to the other party [ies] to the dispute requesting a mediation. The mediation will start not later than [] days after the date of the mediation request. [No party will commence court proceedings / arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation.]”²⁷

2.31 Similarly, the International Centre for Dispute Resolution offers the following short form model standard clause for international commercial contracts:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules."²⁸

2.32 ADR clauses can also be ‘multi-tiered’ or ‘stepped’ which means that the parties agree to move along the ADR spectrum and they are required to engage in distinct and escalating stages of dispute resolution often finishing in final and binding resolution by arbitration or litigation. In other words, if one process fails, another dispute resolution process is attempted in order to resolve the dispute. For example Clause 38 (a) of the RIAI Articles of Agreement²⁹ states that:

“If a dispute arises between the parties with regard to any of the provisions of the Contract such dispute shall be referred to conciliation in accordance with the Conciliation Procedures published by the Royal Institute of Architects of Ireland in agreement with the Society of Chartered Surveyors and the Construction Industry

²⁷ *Recommended Mediation Clause* Arbitration and Mediation Law Society Committee. Available at www.lawsociety.ie.

²⁸ *Guide to Drafting International Dispute Resolution Clauses* International Centre for Dispute Resolution. Available at www.adr.org.

²⁹ Royal Institute of the Architects of Ireland Articles of Agreements (2002 edition).

Federation. If a settlement of a dispute is not reached under the Conciliation Procedures either party may refer the dispute to arbitration.”³⁰

2.33 The Commission notes that ADR clauses must be carefully drafted as the Courts have shown a strong willingness to enforce them.³¹

F Facilitative ADR Processes

2.34 Facilitative processes involve a neutral and independent third party providing assistance in the management of the process of dispute resolution. The neutral and independent third party has no advisory or determinative role in the resolution of the dispute or in the outcome of its resolution but assists the parties in reaching a mutually acceptable agreement by encouraging parties to define the issues with the aim of finding common ground between the parties. This category of ADR includes the process of mediation.

(1) Mediation

2.35 The mediation process consists of the neutral and independent third party meeting with the parties who have the necessary authority to settle the dispute. The mediator begins the process by explaining the process to the parties, assessing the appropriateness of mediation to the situation and ensuring that the parties are willing and able to participate. This is known as a joint session.

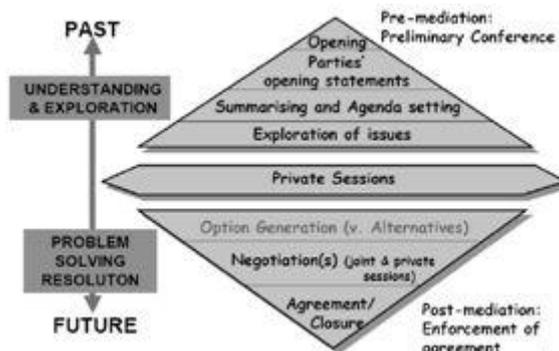
2.36 The neutral and independent third party then meets with each party privately to discuss their respective positions and their own underlying needs and interests. These private meetings are known as caucus. Information which is provided by the party to the third party during a caucus is strictly confidential, unless a party expressly consents to the third party informing the other party of such information.

2.37 Once all parties have expressed their views and interests to the mediator in private, the mediator will try to establish areas of common ground and provide the parties with the opportunity of exploring proposals for a mutually acceptable settlement. When an agreement is reached between the parties, the mediator will draft the terms of agreement, ensuring that all parties

³⁰ Clause 38 (a) of the Royal Institute of the Architects of Ireland’s Articles of Agreement. (2002 Edition).

³¹ For more information on the enforceability of ADR clauses see Chapter 7, below.

are satisfied with the agreement, and have all parties sign the agreement.³²
This final session is known as the closing joint session.³³



2.38 The parties are not bound by any positions taken during a mediation until a final agreement is reached and signed, at which point it becomes an enforceable contract. Mediation aims to achieve a ‘win-win’ result for the parties to a dispute. Some of the proclaimed advantages of mediation include: speed, privacy, cost, flexibility, informality, party-control, and preservation of relationships.

2.39 Several varieties of mediation have been developed. Shuttle mediation is a form of mediation where the mediator goes between the parties and assists them in reaching an agreement without meeting "face to face".³⁴ Transformative mediation does not seek resolution of the immediate problem, but rather, seeks the empowerment and mutual recognition of the parties involved.³⁵ Therapeutic mediation is an assessment and treatment approach that assists families in dealing with emotional issues in high conflict separation and divorce. The focus is on the parties themselves as opposed to the

³² See Stitt *Mediation: A Practical Guide* (Cavendish, 2004); and Boule *Mediation: principles, process, practice* (Butterworths, 2001).

³³ Diagram below taken from the ACC Europe Annual Conference: The Growing Role of In-house Counsel: Lawyers as Business Partners, June 2007 Munich Germany.

³⁴ See Liebmann *Community and Neighbourhood Mediation* (Cavendish Publishing Ltd. 1998) at 59.

³⁵ See Bush & Folger *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994).

dispute.³⁶ In evaluative mediation the third party plays a more advisory role in assisting in the resolution of the disputes. The mediator allows the parties to present their factual and legal arguments. After evaluating both sides, he or she may then offer his or her own assessment of the dispute or put forward views about the merits of the case or particular issues between parties. This form of mediation mirrors conciliation.³⁷ Community mediation is mediation of a community issue.³⁸ Peer mediation is a process whereby young people, trained in the principles and skills of mediation, help disputants of their own age group to find solutions to a range of disputes and is often promoted in school settings for resolving disputes between peers.

2.40 Facilitation and fact-finding are similar concepts to mediation and involve a neutral and independent third party assisting the parties in identifying problems and positions but they do not impose or recommend any solutions to the parties.

2.41 The Commission views mediation as a facilitative, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement. The participation of the parties in the process is voluntary and the mediator plays no advisory or evaluative role in the outcome of the process, but may advise on or determine the process.

G Advisory ADR Processes

³⁶ See Irving and Benjamin *Therapeutic Family Mediation: Helping Families Resolve Conflict* (Sage Publications, 2002); Erickson <http://heinonline.org/HOL/LuceneSearch?specialcollection=&term=s=creator%3A%22Erickson,%20Beth%20M.%22&yearlo=&yearhi=&subject=ANY&journal=ALL&sortby=relevance&collection=journals&searchtype=advanced&submit=Search> “Therapeutic Mediation: A Saner Way of Disputing” (1997) 14. J. Am. Matrimonial Law 223; and Paquin and Harvey “Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection” (2001) 3 Fla Coastal L J 167.

³⁷ See Alfini “Evaluative versus Facilitative Mediation: A Discussion” (1996) 24 Fla St U L Rev 919; Levin “Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion” (2000) 16 Ohio St J Disp Resol 267; and Stark “Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator” (1997) 38 S Tex L Rev 769.

³⁸ See the Northside Community Law Centre website for more information on their community mediation service at www.nclc.ie. See Chapter 9, below.

2.42 Advisory processes include for example, conciliation and collaborative lawyering. They are also called evaluative processes, because they involve a neutral and independent third party, actively assisting the parties in reaching a mutually acceptable agreement.³⁹ The third party may evaluate the positions of the parties, advise the parties as to the facts of the dispute and recommend options for the resolution of the dispute.

(1) Conciliation

2.43 Conciliation is the process which is used by the Labour Relations Commission to settle industrial disputes.⁴⁰ It is also extensively used in the construction industry and is a feature of the New Public Sector (GCCC) Contracts.⁴¹

2.44 Conciliation is a process similar to mediation but the neutral third party takes a more interventionist role in bringing the two parties together. In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement. This interpretation of conciliation mirrors the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law. Article 6 (4) of the Model law states that “The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.”⁴²

(2) Collaborative Lawyering

2.45 Collaborative lawyering is a problem-solving method of dispute resolution, used primarily for the resolution of family disputes, where the parties and their lawyers agree, through a contractual commitment, to resolve the issues without litigation. Typically, each spouse retains a solicitor to help them

³⁹ In collaborative lawyering, the Commission notes that there is no neutral and independent third party present during the process. However, the solicitors in the process play an advisory role in assisting the clients in reaching a mutually acceptable negotiated agreement.

⁴⁰ See Chapter 4, below.

⁴¹ See Chapter 7, below.

⁴² UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at www.uncitral.org. See also Dobbins “UNCITRAL Model Law on International Commercial Conciliation: From a Topic of Possible Discussion to Approval by the General Assembly” (2002) 3 Pepp Disp Resol L J 529.

to negotiate an outcome that they consider, following independent advice, to be fair and acceptable.⁴³ Lawyers represent the parties for settlement purposes only and should the process end, both solicitors are disqualified from any further involvement in the case. The aim is to find a fair and equitable agreement for the couple. The success and effectiveness of the system depends on the honesty, cooperation and integrity of the participants.⁴⁴

2.46 If a client wishes to proceed through the collaborative law process, both sides must sign a legally-binding agreement to disclose all documents and information that relate to the issues. Negotiation sessions take place during four-way meetings, with the solicitors and clients all meeting together. Both the clients and the solicitors must agree to work together honestly and in good faith. Neither party may go to court, or even threaten to do so, when they are working within the collaborative law process.⁴⁵

H Determinative ADR Processes

2.47 Determinative processes involve a neutral and independent third party hearing both sides of the dispute and making a determination, which is potentially enforceable, for its resolution. This category of ADR includes the processes of arbitration, adjudication, and expert determination.

(1) Arbitration

2.48 Arbitration is a long-established procedure in which a dispute is submitted, by agreement of the parties, to one or more impartial and independent arbitrators who make a binding and enforceable decision on the dispute. It is a sophisticated method of dispute resolution in Ireland and is the preferred method of dispute resolution in a number of sectors in Ireland, including the construction and insurance industries.

2.49 Ireland has separate legal regimes for international and domestic arbitration. Domestic arbitrations are governed by the *Arbitration Act 1954* as amended by the *Arbitration Act 1980*. The *Arbitration (International Commercial) Act 1998* introduced the UNCITRAL Model Law as the procedural framework for international arbitrations.

⁴³ Horgan "Let's Work Together" (June 2005) *Law Society Gazette* at 24.

⁴⁴ Walls "Collaborative law a new and better way" *Sunday Business Post* 25 March, 2007.

⁴⁵ Horgan "Let's Work Together" (June 2005) *Law Society Gazette* at 25. See chapter 7 for more information on the collaborative law process. See Chapter 5 below for further information on collaborative lawyering.

2.50 The arbitrator is usually selected from a panel of available arbitrators or may have already been agreed upon in the arbitration clause. Once the matter has been submitted to the arbitrator, the arbitrator will contact all parties. A schedule will be set, which includes when all documents must be exchanged, when all witnesses must be disclosed, when arbitration briefs are to be submitted, and where and when the hearing will be conducted. A preliminary meeting will be held at arbitrator's request. This may be a joint session with all parties present or may be conducted by telephone conference. At the arbitration hearing, each of the respective parties is allowed to present evidence. After review of the evidence, the arbitrator will make an "arbitrator's award." After the arbitrator's award has been issued, the prevailing party often has the ability to have it issued as an enforceable court order.⁴⁶

2.51 The Chartered Institute of Arbitrators, Irish Branch, which is a non-statutory body, currently administers the training and promotion of arbitration on the island of Ireland. The Institute refers to a number of advantages which it states arbitration enjoys over litigation:

- Flexibility: The arbitrator is typically chosen by the parties or nominated by a trusted third party.
- Specialist Knowledge: The arbitrator will usually have specialist knowledge of the field of activity.
- Efficiency: The parties can decide on the location, language and to a great extent, the timing of the hearing to facilitate the parties and their witnesses.
- Informality: The process is less formal than court.
- Certainty: The arbitral award is binding and enforceable.
- Finality: The arbitral award is final and cannot be appealed.
- Speed: Expedition results in cost savings.
- Privacy: Arbitral awards are private and do not become binding precedents.⁴⁷

2.52 There are now many variants of arbitration developing in other jurisdictions. These include

- Baseball arbitration - In this arbitral process, each party submits a proposed monetary award to the arbitrator. At the conclusion of the hearing, the arbitrator is required to select one of the proposed awards,

⁴⁶ See Stewart *Arbitration: commentary and sources* (FirstLaw 2003).

⁴⁷ See the Chartered Institute of Arbitrators, Irish Branch website www.arbitration.ie.

without modification. This approach, sometimes called “Last Offer Arbitration”, severely limits the arbitrator’s discretion.⁴⁸

- Bounded arbitration: In this process the parties agree privately without informing the arbitrator that the arbitrator’s final award will be adjusted to a bounded range.⁴⁹
- Incentive arbitration: In this form of arbitration, the parties agree to a penalty if one of them rejects the arbitrator’s decision, resorts to litigation, or fails to improve his position by some specified percentage. Penalties may include payment of attorneys’ fees incurred in the litigation,⁵⁰ and
- High-low arbitration: This is an arbitration in which the parties agree in advance to the parameters within which the arbitrator may render his or her award.⁵¹

(2) Hybrid Models including combinations of mediation and arbitration: Med-Arb and Arb-Med

2.53 Hybrid models, which involve a combination of mediation and arbitration, have also developed. These hybrid processes are known as med-arb and arb-med. Both models allow the parties to select a single third party to serve as both mediator and arbitrator.

2.54 Med-arb is a process in which the parties first attempt to settle the dispute through mediation. If mediation does not yield a settlement, the mediator switches roles from mediator to arbitrator, and imposes a binding decision on the disputing parties. Med- arb is commonly used in labour disputes in the United States and is considered suitable for patent disputes also.⁵²

⁴⁸ See The International Institute for Conflict Prevention & Resolution “ADR Glossary” 2005 at www.cpradr.org; and Carey “Baseball” arbitration” (2004) 11(6) CLP 138.

⁴⁹ See The International Institute for Conflict Prevention & Resolution “ADR Glossary” 2005 at www.cpradr.org.

⁵⁰ *Ibid.*

⁵¹ See Arbitration Defined 2003 JAMS. Available at www.jamsadr.com.

⁵² See *IDA Ltd v University of Southampton* [2006] EWCA Civ 145.; Elliot “Med/Arb: Fraught with Danger or Ripe with Opportunity” (1996) 34 Alta L Rev 163; and Landry “Med-Arb: Mediation with a Bite and an Effective ADR Model” (1996) 63 Def Counsel J 263.

2.55 Arb-med is a process where the parties first present their case to arbitration. At the end of the hearings, the arbitrator writes up a decision and seals it without disclosing its contents to the parties. Then, for a fixed period the parties mediate the dispute. If the parties reach agreement before the deadline for the end of the mediation, the parties never learn about the contents of the arbitrator's decision. If they do not reach agreement by the specified deadline, the arbitrator's decision becomes final and binding on the parties.⁵³ The arb-med procedure has been used in South African union management relations in the auto and steel industries and, to a limited extent, in the United States.

2.56 These hybrid models have been met with some criticism. It has been suggested that the parties are likely to be inhibited in their discussions with the mediator if they know that the mediator might be called upon to act as arbitrator in the same dispute,⁵⁴ and a third party who mediates and then assumes the role of arbitrator may be biased by what has been conveyed to him or her informally and confidentially in the mediation process.⁵⁵

2.57 The Commission views mediation and arbitration as two very distinct ADR processes. The Commission recognises that many disputes which are not settled by mediation may then be arbitrated.

(3) Adjudication

2.58 Adjudication is a process similar to expert determination and involves a neutral and independent third party, an adjudicator, who uses his or her own knowledge and investigations, whilst also weighing the evidence presented by the parties, in order to reach a legally binding decision.

2.59 Adjudication is used in this jurisdiction by the Private Residential Tenancies Board (PRTB) to resolve disputes between landlords and tenants. A PRTB adjudicator is appointed to the case and examines the evidence of the parties and investigates the dispute fully. The Adjudicator will decide how the dispute is to be resolved. The hearing is confidential. An adjudication decision that is not appealed will become a binding determination order of the PRTB in resolution of the dispute.⁵⁶ Adjudication is also used by the Financial Service

⁵³ Zack "Quest for Finality in Airline Disputes: A Case for Arb-Med" (Jan 2004) 58 *The Dispute Resolution Journal* at 34-38.

⁵⁴ Limbury "*Med-Arb, Arb-Med, Neg-Arb and ODR*". A paper presented to the New South Wales Chapter of The Institute of Arbitrators and Mediators Australia (Sydney, August 3rd 2005).

⁵⁵ *Ibid.*

⁵⁶ For further discussion on the PRTB see Chapter 9.

Ombudsman's to resolve complaints that have not been settled by mediation.⁵⁷ The process is most commonly associated with the resolution of disputes in the building and construction industry in the UK.

(4) Expert Determination

2.60 Expert determination is a process in which the parties to a dispute appoint a neutral and independent third party to make a final and binding determination on a dispute which relates to that expert's particular area of specialisation. The parties therefore agree in advance to be bound by the decision of the expert determination.

2.61 Expert determinations can be particularly useful in disputes involving technical issues. For example, Bord Gáis Eireann's dispute resolution procedures provide that a dispute relating exclusively to technical issues which is not resolved by mediation within 30 days may be referred to "determination by an Expert."⁵⁸

2.62 Expert determinations are often conducted purely on written submissions. It has been suggested that this makes the process short and cost effective compared to litigation. It can also be used in conjunction with other dispute resolution systems such as mediation, where a technical issue needs to be resolved quickly and with the correct expertise. Common examples of expert determination include the use of a surveyor in a rent review, or an accountant to provide a valuation under a share purchase agreement.⁵⁹

2.63 Whilst the expert determination process can resemble arbitration there are several notable differences between the two processes.⁶⁰ There are currently no statutory provisions applicable to expert determinations. In terms of enforcement, an expert's determination will not be enforceable domestically without separate court action.⁶¹ Consequently, whilst expert determination may

⁵⁷ See www.financialombudsman.ie.

⁵⁸ Bord Gáis Eireann "Approved Dispute Resolution Legal Drafting" Section 6.3.2. Available at www.bordgais.ie.

⁵⁹ Carey "Expert determination – Some Practical Issues" (2004) 2 *Journal of Civil Practice and Procedure* 1 at 9.

⁶⁰ For a summary on the differences between arbitration and expert determination see Dowling-Hussey "The Irish Law of Arbitration: An Overview Part1" (2007) 25 *ILT* 137.

⁶¹ Carey "Expert determination – Some Practical Issues" (2004) 2 *Journal of Civil Practice and Procedure* 1 at 14. See also Carey "Expert Determination—An Alternative Basis For Challenge" (2004) 22 *ILT* 25 and Kendall *Expert Determination* (3rd ed Sweet and Maxwell, 2001).

resolve the dispute in a quickly, enforcing the determination may necessitate arbitration or litigation in any event.⁶²

I Collective ADR

2.64 Collective ADR can be used successfully as a method of dealing with multi-party scenarios without resorting to litigation. An example of collective ADR was the Alder Hay mediation case.⁶³ Similarly, “test cases” such as those used in the Social Welfare Equality Claims of the 1980s can be used as a means of assisting the administrative resolution of similarly situated parties.⁶⁴ In 2002 a single complaint by a visually impaired man to the Office of the Ombudsman resulted in almost 700 similarly situated people receiving an increased social welfare allowance.⁶⁵

2.65 Collective ADR processes can also prevent the creation and escalation of disputes through regulation. Examples of regulators include the Environmental Protection Agency,⁶⁶ the Health and Safety Authority,⁶⁷ Financial Regulator,⁶⁸ the Commission for Energy Regulation,⁶⁹ the Commission for Aviation Regulation,⁷⁰ and the Commission for Communications Regulation.⁷¹ As noted in the Law Reform Commission’s *Report on Multi-Party Litigation* “the impact of effective regulatory mechanisms will often work to prevent the wrong

⁶² In *O’Mahony v Patrick Connor Builders Ltd.* [2005] IEHC 248 Clarke J held that where parties agreed to be bound by the report of an expert, such report could not be challenged on the ground that mistakes had been made in its preparation, unless it could be shown that the expert had departed from the instructions given to him in a material respect or had acted in bad faith.

⁶³ See Chapter 1, above.

⁶⁴ See Law Reform Commission *Report on Multi-Party Litigation* (LRC 76-2005).

⁶⁵ *Annual Report of the Ombudsman 2002* Chapter 4. (Office of the Ombudsman, 2003) Available at www.ombudsman.gov.ie.

⁶⁶ *Environmental Protection Act 1992*. See www.epa.ie.

⁶⁷ *Safety Health and Welfare Act 2005*. See www.hsa.ie.

⁶⁸ See Financial Regulator website at www.ifsra.ie.

⁶⁹ See the Commission for Energy Regulation at www.cer.ie.

⁷⁰ See the Commission for Aviation Regulation at www.aviationreg.ie.

⁷¹ See the Commission for Communications Regulation at www.comreg.ie.

arising in the first place and thus head off the need for any form of multi-party litigation from the outset.⁷²

2.66 In addition to the collective ADR processes represented by regulators another collective ADR process is offered by ombudsman schemes.

(1) Ombudsman Schemes

2.67 An Ombudsman can either be appointed by statute or through a non-statutory sectoral scheme. Ombudsmen have wide powers of investigation and their recommendations need not be limited to the form of orders commonly associated with litigation. There are a number of Ombudsmen operating in the State.

(a) Office of the Ombudsman

2.68 The Office of the Ombudsman which was created by the *Ombudsman Act 1980*, investigates complaints against Government Departments and Offices and other public bodies such as local authorities, the Health Service Executive and An Post. The Office of the Ombudsman has dealt with over 68,000 complaints since its inception. In 2007, 2,578 valid complaints were received by the Ombudsman which was an increase of 14.8% on the intake for 2006. In addition 9,334 enquiries were dealt with during 2006.⁷³

2.69 Most complaints are finalised following an informal examination but, if it is not possible to resolve the complaint informally, the Ombudsman may decide to undertake a formal investigation of the matter. If, at the end of this process, the complaint is found to be justified the Ombudsman will make recommendations to resolve it.

2.70 The Ombudsman has extensive powers. They can demand any information, document or file from a public body complained of and can require any official to give information about a complaint. In most instances the Ombudsman's recommendations are complied with but if the public body concerned fails to act on the Ombudsman's recommendations he or she may present a special report to the Houses of the Oireachtas on the matter.

2.71 Typical examples of matters dealt with by the Ombudsman include: entitlement to old age and retirement pensions; disputes about income tax credits; entitlement to higher education grants; entitlement to agricultural

⁷² Law Reform Commission *Report on Multi-Party Litigation* (LRC 76-2005) at 7.

⁷³ *Annual Report of the Ombudsman 2007* at 5 (Office of the Ombudsman, 2008). Available at www.ombudsman.gov.ie.

livestock grants; entitlement to local authority housing; and disputes about the medical card scheme.⁷⁴

Ombudsman Case Study

The complainant's car was ticketed for being parked on a yellow box in a Castlebar Town Council car park. The complainant acknowledged that she may not have been parked in a designated parking space but maintained that, on the day in question, it was snowing and that when she arrived at the car park the ground was covered with snow and there was no way of knowing the exact location of the designated parking spaces. She appealed the matter to the Council but her appeal was rejected. The Traffic Warden who had issued the ticket maintained that, at the time of the offence, there was no snow on the ground and that there is an onus on drivers to be aware of parking signs etc. The Ombudsman considered that while the complainant was not parked correctly, having regard to the circumstances which existed on the day, inflexibility in the application of the relevant regulations would give rise to inequity in this case. The Ombudsman requested that the Council review its position and having considered the situation in detail the Council decided to cancel the fine and issued a refund to the complainant.⁷⁵

2.72 This mediated result indicates the broad extent of the Ombudsman's statutory role.

(b) *Financial Services Ombudsman*

2.73 Voluntary ombudsman schemes for the credit institutions and the insurance sector were in place in Ireland since the early 1990s. These schemes constituted recognition by the sectors that a complaints resolution process outside of the courts was necessary and appropriate. While the voluntary schemes worked well it was felt in the late 1990s that a statutory Ombudsman scheme for all providers of financial services with enhanced statutory powers was necessary.⁷⁶ This was enacted in the *Central Bank and Financial Services Authority of Ireland Act 2004*.

2.74 The Financial Services Ombudsman deals independently with unresolved complaints from consumers about their individual dealings with all financial service providers. The service is currently free to eligible consumers who include all natural persons, limited companies with a turnover of €3 million

⁷⁴ See www.ombudsman.gov.ie.

⁷⁵ *Ibid.*

⁷⁶ Address by Joe Meade, Financial Services Ombudsman, on 14 June 2005 to the Institute of Bankers in Ireland and the Irish Bankers Federation seminar on complaints handling. Available at www.financialombudsman.ie.

or less (SMEs), and unincorporated bodies, including clubs, charities, trusts and partnerships.

2.75 The principal function of the Financial Services Ombudsman is to deal with complaints by mediation and, where necessary, by investigation and adjudication.⁷⁷ Participation in the mediation by the parties to a complaint is voluntary, and a party may withdraw at any time. The Financial Services Ombudsman may abandon an attempt to resolve a complaint by mediation on forming the view that the attempt is not likely to succeed.⁷⁸ Evidence of anything said or admitted during a mediation, or an attempted mediation, of a complaint, and any document prepared for the purposes of the mediation, are not admissible in any subsequent investigation without the consent of the person who made the admission, or in any proceedings before a court or a tribunal.⁷⁹

2.76 The Financial Services Ombudsman can direct a financial service provider to do one or more of the following: rectify or change the conduct complained of or its consequences; provide reasons or explanation for that conduct; change that practice; pay compensation up to a maximum of €250,000 or €26,000 annuity; or take any other lawful action.⁸⁰

2.77 The Financial Services Ombudsman has extensive legal powers to require the financial services provider to provide information including the power to require employees to provide information under oath. If necessary the Ombudsman can enter premises of providers and demand the production of documents.⁸¹ In the case of non compliance, the Financial Services Ombudsman can seek a Circuit Court Order. Any person who obstructs the Financial Services Ombudsman commits an offence and is liable on summary conviction to a fine of up to €2,000, imprisonment for up to 3 months or both.⁸²

⁷⁷ Section 57BK (1) of the *Central Bank Act, 1942*, as inserted by section 16 of the *Central Bank and Financial Services Authority of Ireland Act 2004*.

⁷⁸ Section 57CA (2) of the *Central Bank Act, 1942*, as inserted by section 16 of the *Central Bank and Financial Services Authority of Ireland Act 2004*.

⁷⁹ Section 57CA (3) of the *Central Bank Act, 1942*, as inserted by section 16 of the *Central Bank and Financial Services Authority of Ireland Act 2004*.

⁸⁰ Section 57CI (4) of the *Central Bank Act, 1942*, as inserted by section 16 of the *Central Bank and Financial Services Authority of Ireland Act 2004*.

⁸¹ Section 57CF (1) of the *Central Bank Act, 1942*, as inserted by section 16 of the *Central Bank and Financial Services Authority of Ireland Act 2004*.

⁸² Section 57CH of the *Central Bank Act, 1942*, as inserted by section 16 of the *Central Bank and Financial Services Authority of Ireland Act 2004*.

2.78 In 2007, 4,374 complaints (2,445 involving insurance sector and 1,929 involving credit institutions) were received by the Ombudsman. This was an increase of 15% over 2006.⁸³ In 2005, the highest compensation awarded by the Ombudsman was €56,000 against a credit institution and €32,000 against an insurance sector provider.⁸⁴ By contrast, €116,000 was awarded in five instances in 2007 and over €200,000 was awarded to a professional rugby player.⁸⁵

Financial Services Ombudsman Case Study

The complainant had booked a holiday. After the booking she was diagnosed with a serious illness and as a result was not able to travel. The complainant then claimed her cancellation costs of €4,000 from the insurance company with whom she had arranged travel insurance.

The company informed her that as holiday would have lasted 61 days, it would not be covered by the insurance policy. The insurance policy stated that: "The duration of a trip must not exceed 60 days". The complainant claimed that her holiday was for 59 nights and, with the varying schedule of flights, her trip would not have exceeded the time frame of 60 days.

The Financial Services Ombudsman noted that the insurance policy did not specifically provide a definition in its policy document as to what constituted a "day" for the purpose of cover and he referred to a dictionary definition of a "day" - "A period of 24 hours as a unit of time usually from midnight to midnight". Using this definition, and taking the times of departure and arrival to be exact, he found that the complainant's intended trip would have only been for 59 full days. He directed the company to pay the complainant her cancellation costs.⁸⁶

2.79 This determination used interpretive techniques familiar to lawyers. The difference in this case is that the adjudicative process was free to the consumer.⁸⁷

⁸³ *Annual Report of Financial Ombudsman 2007* at 16 (Government Publications 2008).

⁸⁴ *Annual Report of Financial Ombudsman 2005* (Government Publications 2006).

⁸⁵ *Annual Report of Financial Ombudsman 2007* at 20 (Government Publications 2008).

⁸⁶ Available at www.financialombudsman.ie.

⁸⁷ See Chapter 8 below for information on FIN-NET and the Financial Services Ombudsman.

(c) Office of the Pensions Ombudsman

2.80 The Pensions Ombudsman was established by Part 11 of the *Pensions Act 1990* (inserted by the *Pensions (Amendment) Act 2002*) to investigate and decide complaints and disputes involving occupational pension schemes and Personal Retirement Savings Accounts (PRSAs).

2.81 Complaints are usually made against those responsible for the management of occupational pension schemes and PRSAs. A complaint may be against those who are (or have been) trustees, managers, employers, former employers and administrators (including PRSA providers). The Pensions Ombudsman also investigates disputes of fact or law concerning pension schemes, between members and others entitled to benefit from the schemes, and trustees or managers or employers.⁸⁸

2.82 The *Pension Ombudsman Regulations 2003*⁸⁹ require that all occupational pension scheme trustees and PRSA providers put in place internal procedures for dealing with complaints and disputes that come under the jurisdiction of the Pensions Ombudsman. The outcome of an internal dispute resolution procedure is not binding on any party to a dispute. The right to complain to the Pensions Ombudsman remains available if the individual is dissatisfied at the end of the internal dispute resolution procedure.⁹⁰ The Pensions Ombudsman has discretion to waive the requirement for internal disputes resolution in appropriate circumstances.

2.83 When the Pensions Ombudsman nears the end of an investigation, he may, but will not always, give a "preliminary view" to all parties to the complaint or dispute. This will list the facts as found during the investigation and the Pension Ombudsman's view on how he is likely to rule on the matter. This can be said to be similar to the process of early neutral evaluation. At that stage the parties will have a chance to provide any further information or evidence that they feel is important to the case.

2.84 The Pensions Ombudsman will then make a final ruling. Financial compensation may be awarded in a case where the Pensions Ombudsman decides that a complainant has been at a financial loss due to the poor administration of a pensions scheme or a PRSA. The Pension Ombudsman's ruling is final, subject to a right of appeal to the High Court. The Pensions

⁸⁸ See Office of the Pensions Ombudsman at www.pensionsombudsman.ie.

⁸⁹ SI No. 397 of 2003.

⁹⁰ *Disputes Resolution Procedures - Guidance notes for Trustees and Administrators* (Office of the Pensions Ombudsman, 2003) at 3. Available at www.pensionsombudsman.ie

Ombudsman may make a ruling even if the complaint is withdrawn during the investigation.

2.85 The Pensions Ombudsman, under section 137 of the *Pensions (Amendment) Act 1990*, has the statutory power to formally require any person who, in the opinion of the Pensions Ombudsman, is in possession of information, or has a document in his power or control, that is relevant to the investigation to furnish that information to the Pensions Ombudsman for the purposes of the investigation. If it appears to the Pensions Ombudsman that a person has failed to furnish this information, the Pensions Ombudsman may apply to the Circuit Court for an order requiring that person to comply with the requirement. In May and April 2008, the Pensions Ombudsman initiated separate legal actions to secure court orders against builders who had failed to produce the requested documents. The Pensions Ombudsman has stated that

“Anybody who fails to comply with a request for information from my Office should be fully alive to the fact that I will not hesitate to instigate a criminal action for non compliance and civil action to enforce the request.”⁹¹

2.86 In 2006, of a total of 730 complaints made or on hand, 117 were resolved by mediation.⁹² The average time taken to arrive at a satisfactory resolution through mediation was 33 weeks, compared with an average of 64 weeks where a final determination was made.⁹³ This indicates the benefits in terms of time efficiency in a mediated resolution as opposed to one which requires a final adjudicated decision. In 2007, the Pensions Ombudsman succeeded in closing 584 cases which was an increase of 90% on 2006. The construction industry was instructed by the Pensions Ombudsman to repay over €1.6 million in arrears in pension and death benefit in 2007.⁹⁴

Cases Received	2004	2005	2006	2007
Total	297	389	439	515

⁹¹ “*Pensions Ombudsman Loses Patience – Civil and Criminal Prosecutions Initiated for Non-Compliance with Requests for Documentation*”, Press Release May 2008. Available at www.pensionsombudsman.ie.

⁹² *Annual Report of the Pensions Ombudsman 2006* (Office of the Pensions Ombudsman, 2007) at 9.

⁹³ *Ibid.*

⁹⁴ *Pensions Ombudsman Reports Significant Increase in Case Activity in 2007* Press Release, March 2008. Available at www.pensionsombudsman.ie.

(d) Ombudsman for Children

2.87 The Ombudsman for Children is a free, independent and impartial complaints handling service which was established under the *Ombudsman for Children Act 2002*. The Ombudsman may examine complaints made by children (or adults on their behalf) against public organisations, schools or hospitals. In accordance with the 1989 *Convention on the Rights of the Child* the Ombudsman also promotes the rights of children in the Convention and assists the development of government policy on children.

2.88 By December 2007, 1,710 complaints had been received by the Ombudsman for Children, representing a 43% increase from 2006.⁹⁵

Ombudsman for Children Case Study

A mother made a complaint that her local authority had failed to provide adequate housing for her son who had been diagnosed with a progressive disabling disease. The mother refused a house offered by the local authority on foot of medical advice that the accommodation would not meet her son's specific and changing needs. The local authority contended that the house was developed for her son in consultation with his occupational therapist. Since 2000, the local authority had refused to review the child's case despite several medical representations outlining the deterioration in the boy's condition.

Following an investigation, the Office of the Ombudsman for Children found that there was no evidence that the house had been adapted for the boy's specific needs and, therefore, did not constitute a reasonable offer and that no review of the case took place for a period of almost 4 years. On this basis, the Office made a number of recommendations including that the child's case be reviewed to find a suitable housing solution for him; that the local authority administrative processes be reviewed; and that the local authority adopt a more integrated and responsive approach to children. The local authority recognised the findings and recommendations as fair and accurate and agreed to work on implementing them.⁹⁶

(e) Ombudsman for the Defence Forces

2.89 The Ombudsman for the Defence Forces was established by the *Ombudsman (Defence Forces) Act 2004*. The Ombudsman for the Defence Forces investigates complaints by members and former members of the

⁹⁵ *Annual Report of the Ombudsman for Children Office 2007* at 20. Available at www.oco.ie.

⁹⁶ *Annual Report of the Ombudsman for Children's Office 2005–2006* at 17. Available at www.oco.ie.

Defence Forces where these have not been adequately addressed by the internal military complaints process.

2.90 Serving members of the Permanent Defence Forces and the Reserve Defence Forces must, first, make a complaint through the internal Defence Force structures under section 114 of the *Defence Act 1954*. If, 28 days after making that complaint, there is no resolution of the dispute a serving member of the Defence Forces is entitled to bring their complaint to the Ombudsman. Former members of the Permanent Defence Forces and former members of the Reserve Defence Forces can make a complaint directly to the Defence Ombudsman. Serving and former members of the Defence Forces have to make a complaint either within 12 months of the action happening or within 12 months of becoming aware of the action.⁹⁷

2.91 The Ombudsman for the Defence Forces has wide powers to investigate any action that may have been taken without proper authority, taken on irrelevant grounds, the result of negligence or carelessness, based on wrong or incomplete information, improperly discriminatory or contrary to fair or sound administration.⁹⁸

2.92 If the investigation finds that the person who made the complaint was adversely affected by the action, the Ombudsman for the Defence Forces will make recommendations to the Minister for Defence. The recommendations may set out measures that should be taken to rectify the situation. If the Ombudsman for the Defence Forces believes that the response of the Minister for Defence to their recommendations is unsatisfactory then he or she may issue a special report on the case. That special report will be included in the Office's Annual Report. The recommendations made by the Ombudsman for the Defence Forces to the Minister for Defence, and the Minister's response, will be provided to the person who made the complaint.⁹⁹

2.93 In 2007, the Ombudsman received 168 complaints which represented a 121% increase on 2006. 76 cases were referred to the Office, a 192% increase on 2006. 29 final reports issued, with 20 cases upheld.¹⁰⁰

⁹⁷ See the Ombudsman for the Defence Forces website at www.odf.ie.

⁹⁸ Section 4(2) of the 2004 Act.

⁹⁹ Section 7 of the 2004 Act.

¹⁰⁰ *Annual Report of the Ombudsman for the Defence Forces 2007*. (Ombudsman for the Defence Forces, 2008). Available at <http://www.odf.ie/publications/ODFAnnualReport2007EN.pdf>.

(f) Garda Síochána Ombudsman Commission

2.94 The Garda Síochána Ombudsman Commission was established under the *Garda Síochána Act 2005*. The Ombudsman Commission is empowered to: investigate complaints against members of the Garda Síochána; investigate any matter, even where no complaint has been made, where it appears that a Garda may have committed an offence or behaved in a way that would justify disciplinary proceedings; and investigate any practice, policy or procedure of the Garda Síochána with a view to reducing the incidence of related complaints.

2.95 Any member of the public who is directly affected by or who witnesses conduct by a member of the Garda Síochána that is alleged to constitute misbehaviour can complain to the Garda Ombudsman. Generally complaints are to be made within 6 months of the incident in question. The Garda Ombudsman may extend this time limit if it considers that there are good reasons for doing so. If a complaint is admissible the Garda Ombudsman may then refer less serious complaints for resolution through mediation or informal resolution process.

2.96 Section 90 of the *Garda Síochána Act 2005* provides that mediation or other informal resolution may take place with the consent of both the complainant and the Garda member who is the subject of the complaint.¹⁰¹ The process involved is confidential and anything said may not be used in any civil or criminal proceedings.¹⁰²

2.97 The mediation process functions under the auspices of a Mediation Unit managed by Garda Ombudsman Case Officers and is undertaken by accredited mediators. These may be Garda Ombudsman staff or independent mediators appointed from an approved panel.¹⁰³

2.98 If mediation succeeds no further action need be taken in respect of the complaint. Both parties will record the successful resolution in writing and a copy of this will be kept by the Garda Ombudsman. The Garda Commissioner will be advised of the resolution and any record of the complaint held by the Garda Síochána will be expunged. If mediation does not succeed due to the failure of the complainant to provide reasonable assistance for the purpose of

¹⁰¹ Section 90(3) of the 2005 Act.

¹⁰² Section 90(5) of the 2005 Act.

¹⁰³ *Guidelines on Informal Resolution & Mediation* (Garda Síochána Ombudsman Commission, April 2007) at 8. These guidelines were issued under section 90(1) of the 2005 Act.

conducting the mediation process, the Garda Ombudsman retains the discretion to either close the case or to have it investigated pursuant to section 92 of the 2005 Act.

(g) Press Ombudsman

2.99 The Office of the Press Ombudsman is part of a new system of independent regulation for the print media in Ireland connected with a 2007 Code of Practice agreed by the Press Council, a representative body of the industry. The aim of the Ombudsman is to provide the public with a quick, fair and free method of resolving any complaints about newspapers and periodicals that breach the Code of Practice.

2.100 The Ombudsman's Office will, in the first instance, attempt to resolve the matter by making direct contact with the editor of the publication concerned. It will outline the complaint to the publication and seek to resolve the matter by a process of conciliation. If conciliation is not possible, the Ombudsman will examine the case and make a decision and may also refer significant or complex cases to the Press Council. The *Defamation Bill 2006* when enacted will give statutory backing to the Press Ombudsman.¹⁰⁴

(h) Legal Services Ombudsman

2.101 The Legal Services Ombudsman is to be established under the *Legal Services Ombudsman Bill 2008*.¹⁰⁵ Members of the public will be able to appeal to the Legal Services Ombudsman if they are dissatisfied with the outcome of complaints to the disciplinary bodies of the Law Society of Ireland (which deals with complaints concerning solicitors) or the Bar Council of Ireland (which deals with complaints concerning barristers).

2.102 The 2008 Bill states that the functions of the Legal Services Ombudsman are to receive and investigate complaints about the handling by the Law Society and Bar Council of complaints made to them by clients of barristers and solicitors, to ensure that such complaints are dealt with fairly, effectively and efficiently by the two professional bodies, to assess the adequacy of their admissions policies and to promote public awareness of the complaints procedures of the two bodies.¹⁰⁶

2.103 Sections 21 and 22 of the 2008 Bill provide for the making and investigation of complaints. A complaint may be made to the Ombudsman concerning the handling by the Bar Council or the Law Society of a complaint

¹⁰⁴ Bill Number 43 of 2006.

¹⁰⁵ Bill Number 20 of 2008.

¹⁰⁶ Section 9 of 2008 Bill.

against a barrister or solicitor. A complaint may also be made to the Ombudsman about a decision of the Law Society to make or refuse to make a payment from the Law Society's Compensation Fund which deals with money taken in a fraudulent manner by solicitors. Complaints to the Legal Services Ombudsman must be made within 6 months of the determination of the related complaint by the relevant body.

2.104 Individuals or the professional bodies may ask the High Court to stop an investigation, and the High Court can also be asked to decide on instances where the Ombudsman might refuse to discuss specific cases before committees of the Oireachtas.¹⁰⁷

(i) The European Ombudsman

2.105 The Office of European Ombudsman, which is an office of the European Union, investigates complaints about maladministration in the activities of EU institutions and bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. The European Ombudsman has defined "maladministration" by reference to a failure to respect human rights, the rule of law and principles of good administration. The Ombudsman usually conducts inquiries on the basis of complaints but can also launch inquiries on his own initiative.¹⁰⁸

2.106 The European Ombudsman may simply need to inform the institution concerned about a complaint in order for it to resolve the problem. If the case is not resolved satisfactorily during the course of his inquiries, the Ombudsman will try, if possible, to find a friendly solution which puts right the case of maladministration and satisfies the complainant. If the attempt at conciliation fails, the European Ombudsman can make recommendations to solve the case. If the institution does not accept the recommendations, he can make a special report to the European Parliament

2.107 If an inquiry leads to a finding of maladministration, the European Ombudsman tries to achieve a friendly solution whenever possible. In some cases, a friendly solution can be achieved if the institution or body concerned offers compensation to the complainant. Any such offer is made ex gratia, that is, without admission of legal liability and without creating a legal precedent.

2.108 In 2007, the European Ombudsman received 3,211 new complaints, compared to 3,830 in 2006. In almost 70% of cases, the Ombudsman was able to help the complainant by opening an inquiry into the case, transferring it to a

¹⁰⁷ Coulter "Ombudsman will oversee complaints against lawyers" *The Irish Times* March 25th 2008 at 1.

¹⁰⁸ *The European Ombudsman Annual Report 2007* (European Communities, 2008) at 1. Available at www.ombudsman.europa.eu.

competent body, or giving advice on where to turn for a prompt and effective solution to the problem. The main e-mail account of the Ombudsman was used to reply to a total of 7,273 e-mails requesting information in 2007. Of these, 3,127 were mass mailings submitted by citizens and concerned complaints already received by the European Ombudsman, while 4,146 constituted individual requests for information. In total, therefore, the European Ombudsman handled 10,484 complaints and information requests from citizens in 2007.¹⁰⁹

2.109 The main types of maladministration alleged were lack of transparency, including refusal of information (28% of cases), unfairness or abuse of power (18%), unsatisfactory procedures (13%), avoidable delay (9%), discrimination (8%), negligence (8%), legal error (4%), and failure to ensure fulfilment of obligations, that is, failure by the European Commission to carry out its role as "guardian of the EC Treaty" (3%).¹¹⁰

European Ombudsman Case Study¹¹¹

The Ombudsman received a complaint alleging that the European Commission had wrongly failed to take action against Ireland for possible infringement of the EC Habitats Directive. The complainant also complained about the Commission's decision not to take further action on arguments relating to possible infringement of the Waste Directive. The Ombudsman found that the Commission had provided a reasonable explanation of its strategic role in relation to the implementation of these Directives. He also noted that the Commission had given the complainant relevant useful advice in this case.

2.110 As can be seen from the case study above, it is important to note that the Ombudsman process can lead to a decision in favour of the party about whom a complaint is made.

J Judicial ADR Processes.

2.111 Judicial ADR processes are dispute resolution processes which often occur after litigation has been initiated and during the lead up to the commencement of a trial and are aimed at reaching a settlement on some or all issues. These processes may involve the assistance of a judge of the Court or a Court official in overseeing the process.

¹⁰⁹ *The European Ombudsman Annual Report 2007* (European Communities, 2008) at 2. Available at www.ombudsman.europa.eu.

¹¹⁰ *Ibid.* at 9.

¹¹¹ *Ibid.*

2.112 Judicial ADR processes are well developed in Canada and the United States and include early neutral evaluation, mini-trial, Court settlement conferences and small claims procedures. The small claims procedure is also now well-established in Ireland, operating through the District Court.

(1) Small Claims Court

2.113 The small claims procedure is an alternative method of commencing and dealing with certain civil proceedings. It is currently regulated under the *District Court (Small Claims Procedure) Rules 1997 and 1999*. It provides a fast and inexpensive alternative dispute resolution process for consumers without having to use a solicitor.¹¹²

2.114 This process allows parties to a dispute to resolve the issues between them by mediation through a District Court clerk, who for this purpose is called the Small Claims Registrar. These court officials settle many cases through mediation without having to list the case for court. The small claims procedure operates an online dispute resolution procedure where claims can be filed online. The current maximum jurisdiction of the small claims procedure is €2,000. As noted by the Consumer Strategy Group, “The disproportionate costs and time involved in legal action have been alleviated to some degree by the introduction of the Small Claims Court, whose procedures are simpler and whose costs are low.”¹¹³

(2) Early Neutral Evaluation

2.115 Early neutral evaluation is a process in which parties to a dispute appoint a neutral and independent third person, usually a judge or somebody legally qualified, who provides an unbiased evaluation of the facts, evidence or legal merits of a dispute and provides guidance as to the likely outcome should the case be heard in court. The evaluation is without prejudice and is non-binding.¹¹⁴

2.116 The purpose of early neutral evaluation is to reduce the costs of litigation by facilitating communications between the parties while at the same time providing them, early in the process with a realistic analysis of their case.¹¹⁵

¹¹² See Chapter 8, below at 8.55.

¹¹³ See *Make Consumers Count - A new Direction for Irish Consumers* (Consumer Strategy Group, Forfas, April 2005).

¹¹⁴ See Kakalik *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND Corporation, 1996).

¹¹⁵ Conner “Primer for Participants in Early Neutral Evaluation” (1999) 70 *Oklahoma Bar Journal* 38.

It is often described as a means of providing the parties with a 'reality-check' of the strengths and weaknesses of their case. Early neutral evaluation often occurs early in the litigation process, traditionally in the pre-trial period prior to the commencement of discovery (the exchange of detailed documents between the parties).

2.117 The evaluator holds an informal meeting of clients and their legal representatives where each side presents the evidence and arguments supporting its case. The evaluator identifies areas of agreement and clarifies and focuses the issues. The evaluator generally writes an evaluation in private that may include an assessment of the relative strengths and weaknesses of each party's case and the reasoning that supports this assessment. This evaluation is provided to the parties either privately or jointly.

2.118 Early neutral evaluation is often appropriate when the dispute involves technical or factual issues that lend themselves to expert evaluation. It is also used when the parties disagree significantly about the value of their cases. In Australia, early neutral evaluation is increasingly used in family law disputes where a husband and wife are in conflict over issues arising out of their marital breakdown. The evaluator, who is often a family law specialist, will provide to both parties an early neutral evaluation of the likely result if the matter were to be litigated in the Family Court. This process is also used in certain US state courts, and is offered by the English Commercial Court judges and the Technology and Construction Court.¹¹⁶

2.119 Case appraisal is a similar process to early neutral evaluation in which a neutral and independent third party investigates the dispute and provides advice on possible and desirable outcomes for the resolution of the disputes.

(3) Mini Trial

2.120 The mini trial is a flexible voluntary process that involves a blend of mediation, adjudication and negotiation procedures. It can be described as a highly structured settlement process.

2.121 A procedural agreement is usually drawn up between the parties, outlining their obligations, their right to terminate the process, the confidentiality of the process, and the effect on any litigation. Before the mini trial there is an exchange of documents, without prejudice to any litigation if the mini-trial is unsuccessful. The parties select a neutral adviser, often a retired judge or expert in the matter of the dispute, to preside over the mini-trial. The adviser's role is that of a facilitator in the proceedings, as in mediation. However, if

¹¹⁶ For a more detailed discussion on the role of early neutral evaluation in the English Courts see Chapter 7, below 7.43.

settlement is not reached, the advisor may be asked what the likely trial outcome would be and so acts then as an arbitrator in a non-binding arbitration. At the mini-trial, lawyers for each side make summary presentations, generally in the range of one to six hours. Witnesses, experts or key documents generally may be used. Once an agreement is reached, it is enforceable as a contract between the parties.¹¹⁷

2.122 The judicial mini-trial, used in Canada and the United States, is a voluntary process similar to early neutral evaluation. The primary difference is that a judge serves as the evaluator. In the process, the parties' legal representatives present brief argument to a judge, who will not be the judge if the case goes to trial. The judge hears both sides and then meets with the parties and their legal representatives in an attempt to resolve the dispute. In doing so, the judge may point out the strengths and weaknesses of each party's case.

(4) Court Settlement Process

2.123 Court settlement process is a process similar to the judicial mini-trial and was introduced into the England and Wales Technology and Construction Court in 2006 as a pilot scheme. It is a confidential, voluntary and non-binding dispute resolution process in which a settlement judge (who is a judge of the Technology and Construction Court) assists the parties in reaching an amicable settlement at a court settlement conference.¹¹⁸

2.124 Unless the parties otherwise agree, during the court settlement conference the settlement judge may communicate with the parties together or with any party separately, including private meetings at which the settlement judge may express views on the disputes. Each party must cooperate with the settlement judge. A party may request a private meeting with the settlement judge at any time during the court settlement conference. The parties shall give full assistance to enable the court settlement conference to proceed and be concluded within the time stipulated by the settlement judge. If an agreement is reached, it becomes binding on the parties once they sign the agreement. If no settlement is reached, the case continues, but with a different judge. The settlement judge cannot be called as a witness in any future proceedings

¹¹⁷ See Alberta Law Reform Institute *Research Paper on Dispute Resolution: A Directory of Methods, Projects and Resources* No. 19 July 1990 at 26; Alberta Law Reform Institute *Discussion Paper on Civil Litigation: The Judicial Mini-Trial* (1993); and Henderson "Avoiding Litigation with the Mini-Trial: The Corporate Bottom Line As Dispute Resolution" (1995) S C L Rev 237.

¹¹⁸ For more information on the court settlement process see www.hmcourts-service.gov.uk/docs/tcc_court_settlement_process.pdf.

connected with the claim. After the process, the parties have the option of asking the settlement judge for an "assessment", giving his views on the dispute, including prospects of success and likely outcome. This will be entirely confidential and the parties will not be able to use or refer to it in any subsequent proceedings.¹¹⁹

2.125 Judicial settlement conferences are either permitted or required by statute in many United States courts as a procedural step before trial.¹²⁰ Federal judges are expressly authorised under Rule 16 of the *Federal Rules of Civil Procedure 2007* to use settlement procedures to resolve the case or controversy before the court. Local court rules often provide for mandatory settlement conferences during the pre-trial proceedings. The judge handling the case may conduct informal settlement discussions with the parties but, in recent years, a practice has developed of assigning a judge or magistrate to conduct the settlement conference. This judge will not be the judge to try the case if settlement is unsuccessful. This separates the roles of adjudicator and mediator. Once again, the settlement judge has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. The parties may agree to a binding settlement. If no settlement is reached, the case remains on the litigation track.

K Conclusion

2.126 The Commission considers that ADR processes should become an integral part of the civil justice system. Therefore it is important that ADR processes and terminology are clearly defined and understood in order to increase confidence and trust in their suitability and potential for resolving disputes.

2.127 *The Commission provisionally recommends that the more commonly used ADR terms, in particular mediation and conciliation, should be clearly and consistently defined in legislative form.*

2.128 *The Commission provisionally recommends that when provision for mediation is made in legislative form, it should be defined as a facilitative, consensual and confidential process, in which parties to the dispute select a*

¹¹⁹ See also the presentation of Gough "The New TCC Guide ADR, Adjudication, Arbitration and the new TCC mediation initiative" (May 2006). Available at http://www.39essex.co.uk/documents/KGO_TCC_Guide_ADR_May_2006.pdf.

¹²⁰ See Parness "Improving Judicial Settlement Conferences" (2006) 39 U C Davis L Rev 1891; and Hogan "Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation" (1991) 27 Willamette L Rev 429.

neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement.

2.129 *The Commission provisionally recommends that when provision for conciliation is made in legislative form, it should be defined as an advisory, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement.*

CHAPTER 3 GENERAL PRINCIPLES AND OBJECTIVES OF ADR

A Introduction

3.01 ADR systems and schemes are usually established in an attempt to fulfil policy goals and objectives, which are in turn drawn from a set of main principles.¹ In Ireland, ADR processes such as mediation and conciliation already form part of many statutory codes, ranging from industrial relations to commercial litigation. These codes do not currently contain a set of basic principles which explain the operation of these ADR processes. The Commission agrees with the view that such principles are essential foundations to enable the full development and operation of ADR processes in the context of civil and commercial matters.²

3.02 In this chapter the Commission examines several of the main objectives and principles of ADR in particular in connection with mediation and conciliation. Part B explores the voluntary nature of ADR. Part C examines the principle of confidentiality. Part D considers the principles of self-determination and party empowerment. Part E discusses the objective of ensuring efficiency in ADR through the speedy and economical resolution of disputes. Part F sets out the principle of flexibility. Part G describes the principles of neutrality and impartiality in guaranteeing that the ADR processes are fair for all parties involved. Part H discusses the important objective of delivering an ADR system that delivers a quality process to consumers. In Part I, the Commission summarises the objectives and principles which are contained in the *Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters*.

¹ Alexander *Global Trends in Mediation* (2nd ed Kluwer Law 2006) at 8.

² Recital 3 of the Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters states that "...the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice."

B Voluntary Nature of ADR Processes

(1) An Overview

3.03 The Commission considers that if mediation and conciliation are to become integral processes in the civil justice system, they must be approached on a voluntary basis. Voluntariness is exercised at each moment a party chooses to remain at the table, and is best validated by the approach that any party may withdraw from the process at any time they choose. Without this essential principle of voluntariness other underlying principles of ADR, notably, party empowerment, flexibility, and confidentiality cannot ensue.

3.04 The principle of voluntariness is, and has always been, fundamental to ADR processes. It has been included in various pieces of Irish legislation providing for mediation. For example, section 55(3) of the *Health and Social Care Professionals Act 2005* states that “No attempt may be made to resolve a complaint by mediation or other informal means without the consent of the complainant and the registrant against whom the complaint was made.”³

3.05 From the outset, parties must be free to voluntarily choose the form of dispute resolution they wish to pursue. They must not be forced into mediation, for example, simply because they cannot afford another option.⁴ As in many other settings, parties to a dispute should be educated on the full spectrum of ADR processes which are available to them to resolve their dispute.⁵

3.06 As ADR develops in this jurisdiction, a question has arisen as to whether a more compulsory element should be introduced into ADR processes. One reason for this is that experience suggests that there will always be a difficulty for disputants ‘taking the first step’ towards ADR as this may be perceived as a sign of weakness.⁶

3.07 In relation to mediation, those in favour of compulsion argue that mediation has a good success rate; that it could be compulsory subject to an opt-out, such as a court concluding that it is not appropriate in a particular case,

³ See also section 90(3) of the *Garda Síochána Act 2005*.

⁴ *Response to Policy Consultation Paper on Alternative Dispute Resolution by Advice Services Alliance* (Scottish Consumer Council, August 2003) at 7. Available at www.scotconsumer.org.uk.

⁵ Aylmer “Commercial Mediation in Ireland-An Opportunity for Progress?” 20th February 2007. Online article available at www.efc.ie.

⁶ *Ibid.*

and that nothing is lost by attempting it.⁷ Furthermore, it is asserted that if a more compulsory form of mediation was introduced, such a step would ensure that greater numbers of litigants were compelled to experience ADR processes, thus, arguably speeding up the process of public and practitioner education about ADR.⁸

3.08 The contrasting view is that compulsion conflicts with the essence of mediation as a consensual process. Compelling parties into a process against their wishes would only increase costs and delays and it has been suggested that the rates of settlement in court-ordered mediation are much the same as when mediation is entirely voluntary.⁹

3.09 The Commission considers that there is an important distinction to be noted between mandatory *attendance* at an information session about ADR processes or at a mediation session and mandatory *participation* in an ADR process.

(2) Forms of Referral to Mediation or Conciliation

3.10 As with many aspects of ADR, the issue of “voluntary” or “compulsory” is not really an “either, or” choice but rather a matter of a gradual spectrum which depends on the form of referral. Four variations of referral can be distinguished:

1. The parties themselves propose the idea for mediation or conciliation as an option;
2. The court encourages the parties to consider mediation or conciliation;
3. The court encourages the parties to consider mediation or conciliation and warns of the possible imposition of cost sanctions for an unreasonable refusal to consider ADR;

⁷ Cornes “Commercial Mediation: the Impact of the Courts” (2007) 73 *Arbitration* 12-19.

⁸ Genn “*Solving Civil Justice Problems What might be best?*” Paper presented at Scottish Consumer Council Seminar on Civil Justice, January 19th 2005. Available at www.scotconsumer.org.uk.

⁹ Cornes “Commercial Mediation: the Impact of the Courts” (2007) 73 *Arbitration* 12-19.

3.16 If an element of compulsion is to be introduced into mediation or conciliation, a possible option would be that parties could initiate the process and compel the other party to attend either an ADR information session or a mediation/conciliation session. A model for this can be found in British Columbia's Notice to Mediate initiative.

"The theory behind the notice to mediate approach is that cases partially self-select, so that they are more likely to be ripe for mediation. It is also a simple, inexpensive program that does not result in a sudden boost in demand for mediators."¹²

(a) British Columbia's Notice to Mediate

3.17 In 1998 the British Columbia Attorney-General introduced the mandatory Notice to Mediate. The Notice to Mediate is a process by which one party to an action may compel all other parties in the action to mediate the matter(s) in dispute. "Rather than a court encouraging or mandating participation in mediation, a party who is presumably intimately familiar with the dispute and who has assessed the timing and appropriateness of mediation, compels the participation of the other parties in mediation."¹³

3.18 The Notice to Mediate process was first introduced as a dispute resolution option for motor vehicle actions and came into force in April 1998.¹⁴ From 1998 to 2002, the process was used in more than 6,000 actions. In approximately 74% of the actions mediated under the Notice, all issues were resolved.¹⁵ An additional 10% of actions settled after delivery of a Notice, but before the mediation session.¹⁶

3.19 The party who wishes to initiate mediation delivers a Notice to Mediate to all other parties to the action. Within 10 days after the Notice to Mediate has been delivered to all parties, the parties must jointly agree upon and appoint a mediator. The mediation must occur within 60 days of the

¹² Goldschmid "Discussion Paper : Major Themes of Civil Justice Reform" Prepared for the Civil Justice Reform Working Group January, 2006. Available at http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_paper_01_18_06.pdf.

¹³ Zutter "Incorporating ADR in Canadian Civil Litigation" (2001) 13 *Bond Law Review* 2.

¹⁴ BC Reg 127/98.

¹⁵ "Dispute Resolution Office Bulletin" (Ministry of Attorney General of British Columbia, June 2002). Available at www.ag.gov.bc.ca/dro.

¹⁶ *Ibid.*

mediator's appointment, unless all parties agree in writing to a later date. If the parties themselves are unable to agree upon a mediator within 10 days, any party may apply to a roster organisation designated by the Attorney General to appoint the mediator. The British Columbia Mediator Roster Society maintains a list of trained and experienced mediators who have agreed to subscribe to a code of mediation conduct.¹⁷ A mediation is considered concluded when:

- all issues are resolved, or
- the mediator determines that the process will not be productive and so advises the participants, or
- the first mediation session is completed and there is no agreement to continue.¹⁸

3.20 Similar schemes were introduced in 1999 and 2000, for residential construction disputes¹⁹ and all civil, non-family, Supreme Court of British Columbia actions,²⁰ respectively.

3.21 In 2007, a similar scheme was introduced on a pilot basis in family disputes.²¹ This enables any party in a family dispute to require the other parties to attend a single mediation session, no earlier than 90 days after the filing of the first Statement of Defence in the proceeding, and no later than 90 days before the trial date. Once the Notice to Mediate is issued, the party being served with the notice must participate in mediation unless:

- all parties have already had a mediation session on the issues in dispute;
- one party has a family restraining order or peace bond against another party;
- the mediator advises that mediation is not appropriate or would not be productive;

¹⁷ "Dispute Resolution Office Bulletin" (Ministry of Attorney General of British Columbia, June 2002). Available at www.ag.gov.bc.ca/dro.

¹⁸ Focus Consultants "An Evaluation of the Notice to Mediate Regulation in the Insurance (Motor Vehicle) Act" (Ministry of Attorney General Office June 1999) at 1. See <http://www.ag.gov.bc.ca/dro/publications/reports/motor-vehicles.pdf>.

¹⁹ Notice to Mediate (Residential Construction) 1999 BC Reg 152/99.

²⁰ Notice to Mediate (General) Regulation 2001 BC Reg 4/2001.

²¹ Notice to Mediate (Family) Regulation 2007 BC Reg 296/2007.

- the court orders that one party is exempt from participating in the mediation process, because it would be impractical or unfair to require that party to attend; or
- the parties agree in writing that one party does not have to participate in mediation, and the mediator confirms that in writing.²²

3.22 Mediations held under a Notice to Mediate have the following characteristics: privacy; voluntary settlement; no decision-making authority invested in the mediator; no requirement to negotiate in good faith; no requirement to use a specified mediation model; the delivery of a Statement of Facts and Issues at least seven days before the mediation session; and the delivery of a Fee Declaration setting out the fees for the mediation and the agreement of the participants as to how the mediator's fees will be apportioned.²³

3.23 If a party refuses to attend a mediation, any party may file a Declaration of Default with the court. In this situation the court may exercise its discretion from a number of powers, including staying the action until the mediation occurs and making an order of costs against the defaulting party.²⁴

(b) Summary

3.24 The Commission considers that parties should be encouraged to propose mediation to the other side but should not have the power to compel an unwilling party to mediation. The Commission also considers that the Court plays a fundamental role in encouraging parties to attempt mediation in appropriate cases and to limit the option of referring the dispute to mediation to the parties themselves would overlook the important position of the Court to encourage the uptake of ADR.

²² See the Nanaimo Family Justice Services Centre website at www.nanaimo.familyjustice.bc.ca.

²³ See Zutter "Incorporating ADR in Canadian Civil Litigation" (2001) 13 Bond L Rev 2.

²⁴ A similar scheme operates in the Construction and Arbitration List of the High Court of Hong Kong whereby one party may compelled other parties to mediation by issuing a "Mediation Notice". For more information on the scheme see Tay "Pilot Scheme for Voluntary Mediation - High Court of Hong Kong" (31 January 2007). Online article available at <http://www.rics.org/Practiceareas/Management/Disputes/etay001.html>.

(4) Court-Annexed ADR Schemes

3.25 Several degrees of compulsion or encouragement to use ADR, notably mediation, can be established in schemes of court-annexed ADR. These include:

- entirely voluntary, with the court limiting its role to encouragement and the provision of information and facilities;
- made mandatory by a statutory or court rule for all cases in a defined class.

(a) *ADR is entirely voluntary, with the court limiting its role to encouragement and the provision of information and facilities.*

3.26 In this version of court-annexed ADR, mediation or conciliation is encouraged by the Courts. However, parties are free to accept or reject the Court's recommendation to consider or attempt ADR without any threat of a sanction, such as refusing costs to a party.

3.27 It can be argued that this version of court-annexed ADR mirrors current arrangements in Ireland. This is because cost sanctions have yet to be imposed for an unreasonable refusal to consider or attempt ADR. The Irish Courts are increasingly encouraging parties to a dispute to consider ADR where they think it is appropriate.²⁵ For example, in *Charlton v Kenny* a dispute over land ownership between neighbours, Harding Clark J encouraged both sides to explore the possibility of mediation.²⁶ The parties agreed to suspend legal proceedings and to engage in a mediated intervention in an effort to resolve their dispute. The parties successfully mediated the dispute after a 10-hour mediation process and arrived at a mutually acceptable agreement.

3.28 However, there is currently no voluntary mediation or conciliation pilot operating in conjunction with any Court or the Courts Service. Parties may attempt mediation with private mediators. Furthermore, no information sessions about ADR are offered to or are available for disputants. The following sections explore some voluntary mediation and conciliation schemes which have been established in other jurisdictions.

²⁵ See Chapter 11, below.

²⁶ 2006 No. 4266P. See Chapter 9, below.

(i) Small Claims Mediation Pilot Schemes in England and Wales

3.29 In 2006, the UK Department of Constitutional Affairs (DCA)²⁷ published research reports into three small claims mediation pilot schemes at Exeter, Manchester and Reading County Courts (the equivalent of the Circuit Court in Ireland). Each pilot scheme used a slightly different model:

- In Exeter, solicitors who were also qualified as mediators offered free 30 minute mediation appointments to litigants referred by District Judges.²⁸
- In Manchester, a full time salaried mediation officer was available in court to give information and advice about mediation, and to provide free one hour face-to-face mediations to small claims parties. After the start of the pilot period he began to offer telephone mediation as well, which proved very popular.²⁹
- The Reading pilot focused on giving advice and information about the small claims process to unrepresented litigants, with a 'by-product' of facilitating some settlement negotiations. The scheme has since been discontinued.

3.30 The DCA concluded that the service offered at the Manchester pilot had achieved a higher rate of settlement relative to the other court-based mediation services (86%) and that parties who used the mediation service expressed high levels of satisfaction with the service and the mediation officer (93%).³⁰ The research also highlighted that the mediator had independently developed telephone mediations to address the needs of parties who were

²⁷ Now the Ministry of Justice.

²⁸ See Prince *Court-based Mediation: A preliminary analysis of the small claims mediation scheme at Exeter County Court* (Civil Justice Council, March 2004); Enterkin and Sefton *An evaluation of the Exeter small claims mediation scheme* (Department of Constitutional Affairs Research Series, December 2006); Prince and Belcher *An Evaluation of the Effectiveness of Court-based Mediation Processes in Non-Family Civil Proceedings at Exeter and Guildford County Courts* (Department of Constitutional Affairs Research Series, December 2006); Prince "Institutionalising mediation? An evaluation of the Exeter Court small claims mediation pilot" (2007) 5 *Web Journal of Current Legal Issues*, available at <http://webjcli.ncl.ac.uk/2007/issue5/prince5.html>.

²⁹ See Doyle *Evaluation of the Small Claims Mediation Service at Manchester County Court* (Department of Constitutional Affairs, December 2006), available at <http://www.dca.gov.uk>.

³⁰ *Ibid.*

based a considerable distance away from the Manchester area. The use of telephone mediation to deal with cases without the need for a judicial hearing significantly increased the take up by parties wishing to use the service. In 2007, it was reported that telephone mediations accounted for over 70% of all mediation dealt with by the mediator.³¹

3.31 There were several ways for court users to gain access to the small claims mediation service: self-referral, judicial referral, and external referral, through for example, citizens advice bureaux.³²

3.32 Under the pilot scheme, a leaflet explaining the small claims mediation procedure was sent or given to all claimants issuing claims at the County Court. It contained a tear-off reply slip allowing a party to state whether they were interested in using the small claims mediation. This was also sent to both parties when they were sent an allocation questionnaire. If one or both parties completed the slip, it was attached to the issue documents and, after allocation to the small claims track, the case was referred to the mediation officer. In such cases the District Judge issued one of the following judicial directions:

SC7 – “Upon all the parties having indicated they wish to engage in mediation, it is directed that the case be referred to the Court Mediator for the mediation to be arranged.”

SC8 – “Note for Court Staff. Some but not all parties have indicated they wish to engage in mediation. Please notify the Court Mediator of the case.”

3.33 If neither party completed the slip, the District Judge could refer the case to mediation at the allocation stage by issuing the following judicial direction:

SC9 – “The judge has considered your case is suitable for mediation and you are therefore invited to use the free Small Claims Mediation Service. The Court Mediator will be notified of your case.”³³

³¹ Rustidge *Small Claims Mediation Service at Manchester County Court and roll out to all HMCS areas in England and Wales and 2007 / 2008*. Paper presented to the European Commission for the Efficacy of Justice (26th June 2007). Available at <http://www.coe.int/>.

³² Doyle *Evaluation of the Small Claims Mediation Service at Manchester County Court* (Department of Constitutional Affairs, December 2006) at 22. Available at <http://www.dca.gov.uk>.

³³ *Ibid.* at 23.

3.34 If a case was referred to mediation and one or both parties declined, the mediation officer placed a note on the court file indicating to the judge that mediation had been offered but had not taken place. No further information was provided to the judge.³⁴

3.35 The success of the Manchester pilot scheme led to its introduction across England and Wales during 2008.³⁵

(ii) Edinburgh Sheriff Court

3.36 The majority of litigation in Scotland is conducted in the Sheriff Court. An in-court advice service was introduced at Edinburgh Sheriff Court in 1997, and a mediation service was formally linked with it in 1998. The in-court advice service provides advice to unrepresented litigants involved in small claims, summary cause, housing and debt cases. Since 2008, the Service is available up to a threshold of £5,000.

3.37 Where the in-court adviser identifies a case, at any stage of the court process, which may be suitable for mediation, that client is referred to the mediation service. In many cases the adviser is able to refer them to the mediation service before the court process even begins.³⁶ The mediation project offered arms-length negotiation, as well as face-to-face mediation; both procedures were used by approximately equal numbers of clients.³⁷

3.38 The mediation pilot was examined in a 2002 report.³⁸ Data was collected from the project's client records; in addition, interviews were held with project workers, sheriffs and sheriff court employees, solicitors, representatives of advice agencies and mediation clients.

3.39 In the 9 month period that was examined, 151 cases were referred to the mediation project. Of these, 99 were referred by the in-court advice project, 18 were referred by the mediation coordinator, 15 were referred by the Citizens

³⁴ *Ibid.*

³⁵ Doyle *Evaluation of the Small Claims Mediation Service at Manchester County Court* (Department of Constitutional Affairs, December 2006) at 22. Available at <http://www.dca.gov.uk>

³⁶ *Response to Policy Consultation Paper on Alternative Dispute Resolution by Advice Services Alliance* (Scottish Consumer Council August 2003) at 6. Available at <http://www.scotconsumer.org.uk/>

³⁷ Samuel *Supporting Court Users: The In-Court Advice and Mediation Projects in Edinburgh Sheriff Court, Research Phase 2* (Edinburgh: The Stationery Office, 2002). Available at <http://www.scotland.gov.uk/cru/kd01/purple/scu2.pdf>.

³⁸ *Ibid.*

Advice Bureaux and 5 were referred by the Court Sheriff. The majority of cases (16 out of 23) involved small claims litigants.³⁹ More than half of parties referred agreed to take up mediation, but in only half of these cases did the second party agree to mediate. Of the 151 cases referred during the research period a settlement was successfully negotiated by the mediation coordinator in 21 cases, and a mediated settlement was reached in 20 cases out of the 22 that went to mediation.⁴⁰

3.40 Turning to the procedure used in the ongoing mediation service, a mediation co-ordinator attends the relevant weekly Court hearing at which a Sheriff may recommend mediation to litigants. It is not compulsory for the parties to accept the recommendation, but the majority do. The Sheriff Clerk (a court officer) then assigns dates for the mediation and for the next Court hearing. These have been provided in advance by the co-ordinator. The mediation co-ordinator then takes over the management of the case. If a settlement agreement is reached at mediation, the mediation co-ordinator arranges for any further Court proceedings to be dismissed in the absence of the parties.⁴¹

3.41 From September 2006 to August 2007, 98 cases were referred to the mediation service. Of those, 18 did not proceed to mediation. Reasons for this include one party withdrawing from the process or the case being settled prior to the mediation. Of the 68 cases that went through the mediation process, 53 cases (78%) were resolved. Mediations lasted an average of 1.8 hours. The average time from referral by a Sheriff to a mediation meeting was 21 days. The average time from referral to closing of the mediation file was 19.6 days.⁴²

3.42 The Scottish Executive is the sole funder of the mediation service. In the financial year 2006/2007 it provided £25,571 for the service.⁴³ This allows for a part-time Mediation Co-ordinator (20 hours per week) but not for payment of mediators. The Service is financially viable only because of the willingness of volunteer mediators. The Scottish Courts Service provides two purpose-built

³⁹ Samuel *Supporting Court Users: The In-Court Advice and Mediation Projects in Edinburgh Sheriff Court, Research Phase 2* (Edinburgh: The Stationery Office, 2002). Available at <http://www.scotland.gov.uk/cru/kd01/purple/scu2.pdf>.

⁴⁰ *Ibid.*

⁴¹ See Mantle "Overview of the Sheriff Court Mediation Scheme in Edinburgh" (2007). Online article available at <http://www.mediationworld.net/ukscotland/schemes/full/13.html>

⁴² *Ibid.*

⁴³ *Ibid.*

mediation rooms and the Mediation Co-ordinator works out of the Citizens Advice Bureau office in the court building.⁴⁴

3.43 Following on from the success of the Edinburgh Sheriff Court in-court advice service, further in-court advice services were established in Aberdeen, Airdrie, Dundee, Hamilton and Kilmarnock in 2002 and 2003.⁴⁵

(iii) The Netherlands

3.44 The Dutch civil justice system has a long-standing tradition of informal resolution of civil disputes. More recently, the Netherlands has developed a mediation project on a pilot basis, slowly expanding to incorporate a larger number of courts. In court-annexed mediation in the Netherlands, mediation sessions are coordinated by a non-judge coordinator. Parties choose a mediator from the court's register and mediations proceed at a specified date. As mediation in the Netherlands is entirely voluntary, judges do not refer cases to mediation, but are able to explain to parties the extent of their options and the advantages of pursuing ADR.⁴⁶

3.45 In 2000, the Netherlands introduced a project entitled *Court-connected Mediation in the Netherlands*. Its aim was to examine whether a permanent system of referral to mediation was justified within the judicial infrastructure and how this could be organised most effectively. The project was carried out in five district courts (Amsterdam, Arnhem, Assen, Utrecht and Zwolle) and one court of appeal.

3.46 Various methods of referral were prepared and tested in the project:

- Oral referral by the judge at the hearing;
- Written referral on a selective or non-selective basis:
 - Selective : cases were chosen on the basis of file selection and parties were sent a customised letter offering them mediation
 - Non-selective : parties were approached on the basis of a random sample and asked by letter to consider mediation,

⁴⁴ See Mantle "Overview of the Sheriff Court Mediation Scheme in Edinburgh" (2007). Online article available at <http://www.mediationworld.net/ukscotland/schemes/full/13.html>.

⁴⁵ *Scottish Civil Courts Review: A Consultation Paper* (Scottish Civil Courts Review, November 2007) at 13. Available at <http://www.scotcourts.gov.uk/>.

⁴⁶ De La Campa & Rozdeiczner *Alternative Dispute Resolution Manual: Implementing Commercial Mediation* (The World Bank Group, November 2006). Available at http://rru.worldbank.org/Documents/Toolkits/adr/adr_appendices.pdf.

including a simple self test in which they could assess the advantages and disadvantages of mediation in their specific case compared with litigation;

- Self-referral: besides referral by a member of the judiciary, it was also possible for the parties themselves to opt for mediation on their own initiative.

3.47 In 2003, the Dutch Ministry of Justice published a report on the project. The survey findings confirm that a permanent system of referral to mediation within the judicial infrastructure was warranted.⁴⁷

3.48 The research found that referral by means of a written invitation at an early stage of the proceedings was more efficient than referral at the hearing. This was because those who responded to a written proposal opted voluntarily for mediation entirely of their own choice and were more committed to the process.⁴⁸ In addition, the dispute was still reasonably undeveloped and the positions of the parties were therefore less entrenched.⁴⁹ A specific case-related invitation with a self-assessment test (person-oriented, with questions about personal motives) was found to have the best chance of success, with acceptance rates of between 10% and 40%.⁵⁰

3.49 In a separate study it was found that mediation could be successfully used at any point in the life of a case. This indicated that there is no point at which referral seems to yield significantly higher settlement rates. Similarly, the study reported that no single case or group of cases settled more easily than others through mediation.⁵¹

3.50 Since the conclusion of the evaluation, steps have been taken towards the full implementation of a referral facility in all courts in the Netherlands. Each court now has one or more mediation officers. The mediation

⁴⁷ See Combrink-Kuiters, Niemeijer, Voert, *Ruimte voor Mediation (Space for Mediation)*, Justice Research and Documentation Center (Ministry for Justice 2003).

⁴⁸ See Niemeijer *Court- Based Mediation in the Netherlands Research, Evaluation, and Future Expectations* .Paper presented at the annual meeting of the The Law and Society Association, Renaissance Hotel, Chicago, Illinois, May 27, 2004.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ De La Campa & Rozdeiczner *Alternative Dispute Resolution Manual: Implementing Commercial Mediation* (The World Bank Group, November 2006) . Available at http://rru.worldbank.org/Documents/Toolkits/adr/adr_appendices.pdf.

officer acts as adviser for all internal and external parties involved in mediation. In addition, he or she plays an important role in monitoring the quality of mediation. The mediation officer is therefore the liaison officer for the judge in referring cases. The mediation officer also liaises with the mediators. The duties of a mediation officer in referrals can be summarised as follows: providing information to those concerned, submitting a list of mediators from which the parties may choose, arranging the first appointment, monitoring the progress of the mediation and ensuring that the financial and administrative aspects are arranged.

3.51 In all Dutch courts judges have been provided with training to select cases for referral to mediation. They learn how to investigate whether the parties have a so-called success-predicting motivation that is likely to lead to an effective and success-promising choice for mediation.⁵²

3.52 In 2005, a Dutch judge cited a 61% settlement rate for court-annexed mediation. She stated that almost 1,000 cases had been referred to mediation, of which 89% had completed the terms of the mediated settlement within three months. She stated that a typical case required an average of 6.3 hours of mediation. She also suggested that 50% of civil cases could be settled via mediation, reducing case backlogs and increasing the settlement capacity of judges.⁵³

(iv) Slovenia

3.53 In 2001, the District Court in Ljubljana, which is the biggest court in the Republic of Slovenia, launched a pilot programme for the reduction of court backlogs. The programme introduced court-annexed mediation in civil cases and a Department for Alternative Dispute Resolution (DADR) was established. In 2002, a mediation programme was established for family law cases and since 2003 a programme for commercial mediations is available. All the programmes are voluntary and both parties must consent to mediation. The pilot programmes have since become permanent features of the court system.

⁵² See Niemeijer *Court- Based Mediation in the Netherlands Research, Evaluation, and Future Expectations*. Paper presented at the annual meeting of the Law and Society Association, Chicago, Illinois, May 27, 2004 at 2. Available at http://english.justitie.nl/images/Court%20Based%20Mediation%20in%20the%20Netherlands-Pel%20and%20Niemeijer%E2%80%A6_tcm75-114368_tcm35-17280.pdf.

⁵³ Judge Reiling *ADR in the Netherlands—Private and Court-Annexed Mediation* Paper presented on the conference organized by the Institute for the Study and Development of Legal Systems (ISDLS, 2005). Available at http://rru.worldbank.org/Documents/Toolkits/adr/adr_appendices.pdf.

3.54 The main objectives of the court-annexed mediation programme were to:

- to offer parties additional dispute resolution mechanisms and thus increase access to justice;
- to offer the possibility of faster and cheaper dispute resolution;
- to allow the parties a greater influence on the procedure and the contents of the dispute resolution.⁵⁴

3.55 The DADR sends parties a brochure with information on the programmes which are available along with a consent form. Where parties consent to participate in mediation, DADR selects a mediator from the list of mediators and appoints him or her to mediate the case. The DADR then summons the parties, and the Court guarantees that, in civil disputes, the first mediation session will be held within 3 months, in commercial disputes in 2 months, and in family cases within 14 days of the receipt of all consents. Mediation sessions are held in the court premises, and they involve 2 sessions which last for 1.5 hours each.⁵⁵ Cases resolved in mediation account for 5 to 6% of the total amount of litigation.⁵⁶ In 2007, the District Court carried out between 30 to 50 mediation sessions a week.

3.56 The mediators who participate in the mediation programmes include Supreme, Higher and District Court judges as well as the Deputy Human Rights Ombudsman. All carry out the mediations free of charge in addition to their regular work. Retired judges and members of the legal profession also mediate on a contract basis. To be included on the Court's list of mediators, each person must undergo specialised training in the field of ADR.⁵⁷

⁵⁴ Marinko *The Crystal Scales of Justice – The European Prize for Good Practice in Civil Justice Organisation and Procedure – Slovenian Entry* (European Commission, 2005) at 4. Available at http://ec.europa.eu/civiljustice/docs/ecjd_2005/news_jejc_finalist_slovenia.pdf.

⁵⁵ *Ibid.* at 5.

⁵⁶ *Ibid.* at 6.

⁵⁷ Zalar *Court-Annexed Programmes of Alternative Dispute Resolution* Presentation given by the Vice – President of the Slovenian Association of Judges In Slovenia, April 2007. Available at <http://www.gemme.eu/spip.php?rubrique309>.

(b) ADR is made mandatory by a statutory or court rule for all cases in a defined class

3.57 In situations where mediation is mandated, for example, by a court or a statute, the principle of voluntariness remains because even where participation in the process is required, continued participation is not. Parties are free to withdraw from the process at any time they choose.

(i) Ontario Mandatory Mediation Program (OMMP)

3.58 At about the same time as the Woolf Review was initiated in England and Wales, in the early 1990's the government of Ontario commissioned a Civil Justice Review which sought to enhance access to justice for litigants by attempting to stem the increasing costs in the system, in addition to helping to end the huge backlog in cases going before the courts.⁵⁸ In 1995, the First Report of the Civil Justice Review in Ontario set out the following 'benchmarks' for a civil justice system: fairness, affordability, accessibility, timeliness, accountability, efficiency and cost-effectiveness together with a streamlined process and administration.⁵⁹ It likewise proposed that the concept of court-connected mediation be accepted "in principle".⁶⁰ These mirror the Woolf Report principles.

3.59 The Ontario Civil Justice Review proposals were implemented by the 1999 Rules of Civil Procedure made under the *Courts of Justice Act 1990*.⁶¹ The Rules included the Civil Justice Review Committee recommendation "that there be mandatory referral of all non-family cases to a three-hour mediation session, to be held following the delivery of the first statement of defence, with a provision for 'opting out' only upon leave of a Judge or Case Management Master"⁶² who may grant an exemption order at their discretion.

3.60 The 1999 Rules of Civil Procedure introduced on a test basis a common set of rules and procedures mandating mediation for case-managed, civil, non-family actions in the Ontario Superior Court of Justice in Ottawa and

⁵⁸ Prince *Mandatory Mediation: The Ontario Experience* (2007) 26 C.J.Q. 2007 79.

⁵⁹ Civil Justice Review, Supplemental and Final Report, (The Queen's Printer, Toronto, 1996) at 1.1.

⁶⁰ *Ibid.*, at 13.5.

⁶¹ *Courts of Justice Act RSO 1990 c.43*. available at <http://www.canlii.org/on/laws/sta/c-43/> .

⁶² Civil Justice Review, Supplemental and Final Report , (The Queen's Printer, Toronto, 1996) at 5.2 (5). Rule 24.1 establishes that parties could only opt-out for reasons which had to be agreed with the Judge or Case Management Master.

Toronto. Under the OMMP, cases are referred to a mediation session early in the litigation process to give parties an opportunity to discuss the issues in dispute.⁶³ Of the cases referred in Toronto, there was a settlement rate of approximately 40%, with a further 17% resulting in partial settlement.⁶⁴

3.61 In 2001, Ontario established a pilot project for Toronto and the Ottawa regions to require early mandatory mediation in 100% of case managed civil actions. This change led to approximately 18,000 extra cases initiated per year in Toronto being placed under case management and also subject to mandatory mediation.⁶⁵ Members of the legal profession and the judiciary raised numerous concerns as to the evident rising costs associated with the introduction of a new procedural step requiring disputants to attempt mediation at an early stage in the litigation.⁶⁶

3.62 As a result, in 2004 a practice direction⁶⁷ which outlined radical changes to the case management system directed that the 100% rule would no longer apply but that “mediation will continue to be mandatory. Parties are expected to conduct mediation at the earliest stage in the proceeding at which it is likely to be effective, and in any event, no later than 90 days after the action is set down for trial by any party.” The explanation provided for abolishing early mandatory mediations in Toronto provided by the practice note is as follows:

“The bench and bar are concerned about serious delays in the civil justice system in Toronto. Waiting times to obtain dates for both interlocutory motions and trials are unacceptably long and growing. Concern has also been expressed about rising costs occasioned by the increasing number of formal steps and appearances which must be undertaken (particularly at the early stages) and the decreasing

⁶³ The relevant rule requires both parties and their lawyers to attend at least one mediation session which as noted above, must occur within 90 of the delivery of the defence delivered.

⁶⁴ *Ontario mandatory mediation pilot a success, The Lawyers Weekly*, March 10, 2000.

⁶⁵ *Report of the Case Management Implementation Review Committee*, (Ontario Superior Court of Justice, 2004).

⁶⁶ Short “Recent Mediation Matters in Ontario” (2004) 2 *Canadian Arbitration and Mediation Journal* 13 at 18.

⁶⁷ (2004) 71 O.R. (3d) 97 which reserves early mandatory mediation for wrongful dismissal and simplified procedures cases, issued by Regional Senior Chief Justice Warren Winkler of the Toronto Superior Court.

ability of counsel and parties to determine on a case-by-case basis how and when to move their cases along.”

3.63 The practical effect of this change was that not all cases were any longer automatically referred to case management, rather only those which were complex enough to require it. Thus parties were free to determine the timing of the mediation, but were nonetheless expected to conduct it at some point before trial.

(ii) Germany

3.64 The German Federal Parliament has enacted a series of laws which provide for the establishment of both voluntary and mandatory court-related ADR.⁶⁸ Since 2000, all German states may (but do not have to) introduce mandatory court-connected mediation for certain kinds of civil disputes as part of their Civil Procedure Codes. These serve two primary goals, firstly, to promote the practice of mediation as a dispute resolution method among lawyers and disputants and, secondly, to reduce dramatically the case load at magistrate court level.⁶⁹ To qualify for mandatory mediation, the disputes must fall into one of three categories. They must be either be:

- financial disputes before the Magistrates Court up to a value of €750;
- certain neighbourhood disputes; or
- disputes where any alleged defamation has not occurred through the media.

3.65 State parliaments in Germany may introduce legislate to require participation in mediation in these cases as a prerequisite to initiating court proceedings. The so-called “experimentation clause” aims to encourage different models in the different German states with respect to ADR schemes.⁷⁰

⁶⁸ Alexander et al “Mediation in Germany: The Long & Winding Road” in Alexander *Global Trends in Mediation* (2nd ed Kluwer Law 2006) at 233.

⁶⁹ Funken “Management: Court-connected Mediation in Japan and Germany” (2002) *German Law Journal* No. 2 at 233. Online article available at <http://www.germanlawjournal.com/article.php?id=130>

⁷⁰ Alexander et al “Mediation in Germany: The Long & Winding Road” in Alexander *Global Trends in Mediation* (2nd ed Kluwer Law 2006) at 233.

(iii) New South Wales

3.66 The *Civil Procedure Act 2005 (NSW)* permits the Supreme Court at any stage of the proceedings to refer parties to mediation.⁷¹ This power does not depend on the consent of the parties nor is it the intention of the Court that mediation will be ordered in all proceedings.⁷² Initially there was a general acceptance of the view adopted by Barrett J in *Morrow v Chinadotcom Corp.*⁷³ that there was no point in a mediation engaged in by a reluctant party. In a frequently cited passage from *Remuneration Planning Corp Pty Ltd v Fitton*⁷⁴ the NSW Supreme Court held, however,

“since the power was conferred upon the Court, there have been a number of instances in which mediation have succeeded, which have been ordered over opposition, or consented to by the parties...it has become plain that that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered.”

(5) Voluntary Schemes v Compulsory Schemes & the Impact of Costs Sanctions: England & Wales

3.67 In 2007, the Ministry of Justice for England and Wales published a report entitled *Twisting arms: court referred and court linked mediation under judicial pressure.*⁷⁵ This report evaluated two mediation programmes in Central London County: a voluntary mediation scheme which had been operating in the court since 1996 and an experiment in quasi-compulsory mediation which ran in the court between April 2004 and March 2005.

3.68 Since 1998, the voluntary mediation scheme in central London operates on the basis that information about the mediation scheme is sent to both parties once a defence has been received by the court. This again emphasises the importance of educating parties about the alternative processes which are available to them for the resolution of their dispute. The decision as to

⁷¹ Part 4 of the *Civil Procedure Act 2005*. See also Practice Note No. SC Gen 6 Supreme Court – Mediation.

⁷² Part 4 of the *Civil Procedure Act 2005*.

⁷³ [2001] NSWSC 209 (28 March 2001).

⁷⁴ [2001] NSWSC 1208 (14 December 2001).

⁷⁵ See Genn *Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007).

whether to use the scheme is entirely voluntary. If both parties agree to opt for mediation, the court fee is £100 per party: this covers a 3 hour mediation session in mediation rooms on the court premises which is held after the end of normal court business.

3.69 The Automatic Referral to Mediation (ARM) pilot involved early random allocation by the court to mediation of 100 defended cases per month⁷⁶ with an opportunity to opt out.⁷⁷ Thus for the first time England had in effect introduced a quasi-compulsory⁷⁸ form of mediation by which cases were automatically referred to mediation. Following any objection to mediation, the case was to be reviewed by a District Court Judge who had the authority to impose cost sanctions under the Civil Procedure Rules if he or she did not reasonably believe the rejection to be objectively justified. The ARM pilot was inspired by the Ontario mandatory mediation programme. Some of the main findings of the report are summarised below.

(i) Low Uptake in Voluntary Mediation Scheme without a Threat of Costs Sanctions

3.70 Between 1996 and 1998, parties were being offered the opportunity to mediate on a voluntary basis. Post-Woolf Civil Procedure Rules had not yet come into effect so no sanction would be imposed against parties who refused to mediate. The 2007 Report stated that in the immediate period after the end of the successful pilot and the establishment of a permanent VOL mediation scheme at Central London, demand for the scheme showed a modest increase up to about 103 cases in 2000, and then a fall in demand to 68 in 2001.⁷⁹

3.71 However, following the landmark Court of Appeal decisions in *Cowl v Plymouth City Council*⁸⁰ and *Dunnett v Railtrack plc*⁸¹ demand began to rise steeply, so that in 2005 368 cases entered the scheme of which 333 were

⁷⁶ Practice Direction to CPR part 26, s. 2 states cases are to be selected from those that would not normally belong on the small claims track, and do not involve minors, patients or those who are exempt from court fees.

⁷⁷ Practice Direction to CPR part 26, s. 3.1 (2)

⁷⁸ A practice direction was issued to support the quasi-compulsory nature of the scheme supplementing CPR, Part 26.

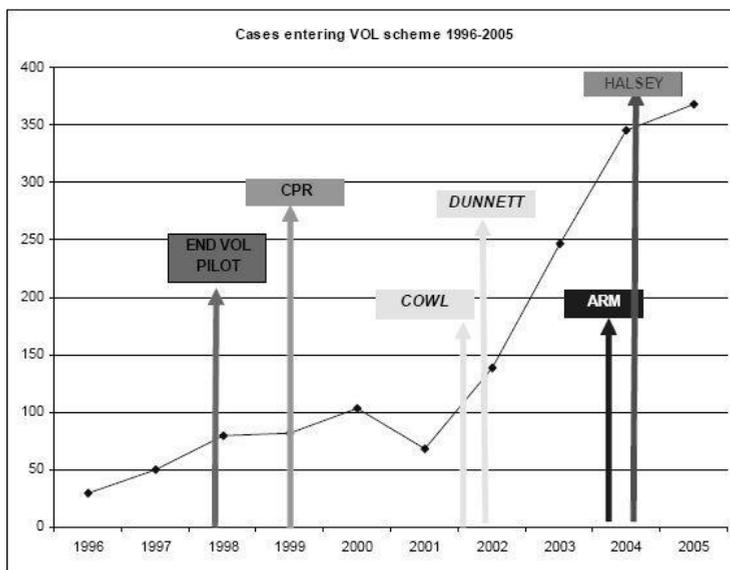
⁷⁹ *Genn Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007) at 150.

⁸⁰ [2001] EWCA Civ 1935; [2002] 1 W.L.R. 803.

⁸¹ [2002] EWCA Civ 303; [2002] 2 All E.R. 850.

actually mediated during the year.⁸² It appears that, faced with the possibility of cost sanctions for an unreasonable refusal to mediate, parties were more inclined to attempt mediation.

3.72 Cases entering the VOL mediation scheme 1996-2005 in relation to key policy milestones.⁸³



3.73 As noted in the 2007 Report,

“It is reasonable to infer that this steep increase in the number of cases entering the scheme can be largely attributed to judicial policy as expressed in the *Dunnett* case. Evidently, the decision had the desired effect in encouraging or frightening litigants and their lawyers into experimenting with the VOL mediation scheme. Demand prior to *Cowl* and *Dunnett* was certainly showing only a modest increase from a low base, and in 2001, the demand was actually beginning to fall.”⁸⁴

⁸² Genn *Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007) at 150.

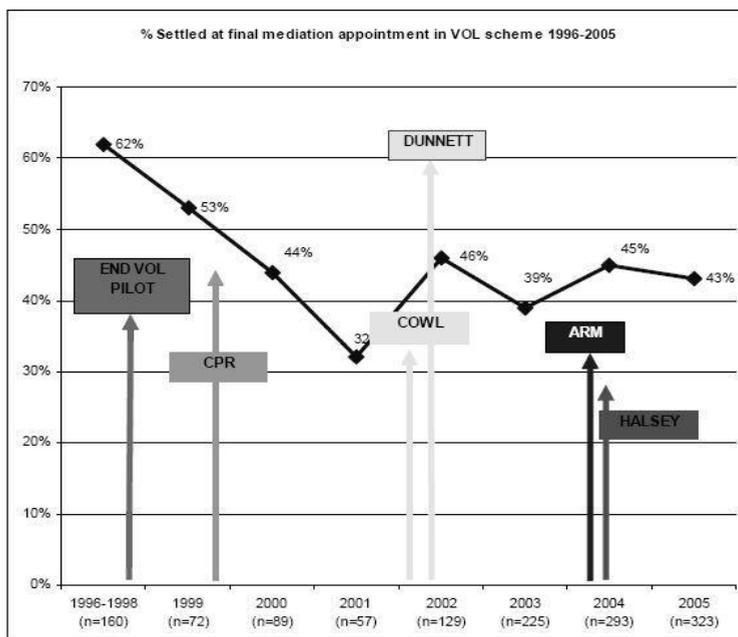
⁸³ Table from Genn *Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007) at 135.

⁸⁴ Genn *Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007) at 134.

(ii) Higher Uptake of Voluntary Mediation with Threat of Cost Sanctions, but Lower Settlement Rates.

3.74 Despite the significant increase in the uptake of the VOL mediation scheme, there has been a relatively steady decline in the success rate, in terms of the number of cases settled at the end of the first or second mediation attempt. In the period 1996–1998, the settlement rate was steady at around 62%, but it fell to 44% in 2000 and to a low of 39% in 2003. In 2004 and 2005, the rate appeared to have recovered to 45% and 43%, respectively, but since 1998, it has not been above 50%.⁸⁵

3.75 Settlement rate 1996-2005 in VOL mediation scheme (Base = 1,348 mediated cases).⁸⁶



3.76 A possible explanation given in the report for the decreasing settlement rate in the VOL scheme is the changed policy environment in which VOL mediations have been taking place. “If judges have been directly pressing parties into mediation, or if parties are unwillingly accepting opponents’ offers to

⁸⁵ *Ibid.* at 151.

⁸⁶ Diagram from Genn *Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007) at 144.

mediate in order to avoid potential costs sanctions, this may be having a depressing effect on the scheme's settlement rate."⁸⁷

3.77 Evidence from evaluations of court-based mediation schemes in Exeter, Guildford and Birmingham support this conclusion. In Birmingham, a purely voluntary scheme enjoyed a 60% settlement rate during the period 1999-2004.⁸⁸ In Guildford, the settlement rate for the voluntary scheme was 53% between 2003 and 2004.⁸⁹ In the same court, some cases were selectively referred to mediation by the judiciary and among those cases, the settlement rate at mediation was as high as 75%. By contrast, in Exeter, where the judiciary exerted considerable pressure to mediate, the settlement rate was about 40% and only 30% for cases that had been judicially referred. The author of the evaluation suggests that the explanation for the lower settlement rate at Exeter, as compared with Guildford, might be an "over-enthusiasm for mediation" which led to cases being referred that were more complex and, therefore, unlikely to settle at time-limited mediations.⁹⁰

3.78 The Commission concurs with the view that a policy of judicial pressure to mediate, accompanied by the threat of sanctions, is capable of propelling cases into mediation in a manner that is not necessarily particularly effective in terms of settlement rates. It is possible that such pressure has drawn in unwilling parties who have participated through fear of costs' penalties rather than a desire to negotiate toward settlement.⁹¹ The rate of settlements is important because unsettled mediations may actually increase costs and lead to delays, something that mediation is intended to reduce.

3.79 It is clear from the findings in the 2007 Report that a genuine willingness to enter the process and motivation to settle is one of the most

⁸⁷ *Ibid.* at 148.

⁸⁸ See Webley, Abrams and Bacquet, *Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme* (Department for Constitutional Affairs, September 2006), available at <http://www.dca.gov.uk/civil/adr/fast-track-mediation-birmingham.pdf>.

⁸⁹ See Prince & Belcher *An Evaluation of the Effectiveness of Court-based Mediation Processes in Non-Family Civil Proceedings at Exeter and Guildford County Courts* (Department for Constitutional Affairs, September 2006), available at <http://www.dca.gov.uk/civil/adr/fast-track-mediation-guildford-exeter.pdf>.

⁹⁰ See Genn *Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007).

⁹¹ *Ibid.* at 151.

important factors in determining outcome.⁹² It is evident to the Commission, therefore, that the voluntary nature of mediation is vital to its success.

(iii) Compulsory Mediation Not Entirely Successful

3.80 The broad figures from the ARM experiment suggest to the Commission that quasi-compulsion in the London context has not been particularly successful. The overall opt-out rate began at around 80% and, although there was some reduction in the number of objections in the last third of the pilot, nonetheless by the end of the pilot only a minority of cases had been mediated.

3.81 During the ARM pilot, 1,232 defended civil cases were randomly referred to mediation, of which 82% were personal injury cases. By the end of the evaluation (10 months after termination of the pilot), only 22% of ARM cases had a mediation appointment booked and 172 cases (14%) of those originally referred to mediation – had been mediated. There was a high rate of objection to automatic referral throughout the pilot scheme. In 81% of cases where the court received a reply, one or both parties had objected to the referral, although after the first few months there was a slight decline in the number of cases in which both parties objected.⁹³

3.82 Of the cases actually mediated under the ARM pilot scheme, the settlement rate over the course of the year followed a broadly downward trend, from a high of 69% among cases referred in May 2004 to a low of just below 38% for cases referred in March 2005. The average over the year was 53% with a handful settling within 14 days of the mediation session. Where neither party objected to mediation the settlement rate was 55%. Where both parties originally objected to mediation, but were then persuaded to go ahead with mediation, the settlement rate was lower at 48%. The majority of cases referred to mediation under the ARM scheme concluded by means of an out-of-court settlement, without ever going to mediation, although among those cases involved in objections hearings, a higher proportion continued to trial.⁹⁴

3.83 The most common reasons for objecting to mediation, given by both defendants and claimants, were that:

- the case would settle anyway;
- that more evidence was needed;

⁹² *Ibid.* at 149.

⁹³ See Genn *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series 1/07, May 2007) at ii.

⁹⁴ *Ibid.* at 197.

- that judgment was necessary;
- that liability was in dispute, or that liability was not in dispute.⁹⁵

3.84 The majority of case management conferences where a District Judge sought to persuade objecting parties to change their minds did not result in mediation bookings and tended to introduce delay into the processing of cases.⁹⁶

3.85 In the Commission's view the evidence from the ARM schemes suggests that facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly efficient than a blanket coercion to mediate.

3.86 It is also worth noting the views of mediators in the UK which were surveyed by Centre for Effective Dispute Resolution (CEDR) in its most recent audit in 2007. CEDR found that mediators strongly (67.5%) favoured the civil justice system taking a more directive approach towards the promotion of mediation, but only 10.3% went so far as to support a fully mandatory system. Lawyers also support change, albeit less strongly - 56% favour a more directive approach (as compared to only 41% in 2005), with 8% favouring a fully mandatory system. However, mediators continued to be opposed to a Mediation Act (60% v 17% with 23% undecided), a strength of feeling which has hardened since 2005 (when only 46% were opposed, 23% in favour, and 31% undecided).⁹⁷

(iv) Willingness of Parties to Negotiate is Crucial to Successful Mediation

3.87 In the 2007 Ministry of Justice Report on the ARMS scheme, mediators thought that key factors contributing to ARM settlement were:

- the willingness of the parties to negotiate and compromise;
- the contribution of legal representatives
- their own skill as mediators; and

⁹⁵ See Genn *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series 1/07, May 2007).

⁹⁶ *Ibid.* at 73.

⁹⁷ The Third Mediation Audit (Centre for Effective Dispute Resolution, November 2007) at 9. Available at www.cedr.co.uk.

- administrative support from the court.⁹⁸

3.88 The significance of the parties' willingness to negotiate and compromise as an explanation both for success and for failure in mediation sits uncomfortably with the evident support shown by some mediation organisations for experimenting with compulsory mediation.⁹⁹

3.89 Interviewees who felt that they had been compelled to attend unsuccessful mediations frequently expressed discontent about the ARM scheme, arguing that bringing unwilling parties to the mediation table was inappropriate and costly. In almost every interview with representatives involved in unsettled mediations, the view was that the mediation had increased the legal costs of the case, on average by around £1,000 to £2,000.¹⁰⁰ Explanations for failure to settle ARM cases at mediation include:

- the parties' unwillingness to compromise having been pressed into mediation;
- lack of understanding by the legal representatives of the mediation process;
- there were also concerns about mediations occurring too early,
- the influence of legal aid and other costs indemnities reducing pressure to settle;
- the constraint of 3-hour mediations; and
- the uncomfortable facilities provided for mediation at the court.¹⁰¹

3.90 The research has, in the Commission's view, shown that if mediation is mandatory, parties will of course use it, especially if they face a penalty when they bring a case to trial without having tried mediation first. Thus, first effect of compulsory mediation is that it receives a higher uptake than voluntary mediation. There second effect is, however, a declining success rate. The Commission agrees with the view that if parties are forced to engage in

⁹⁸ Genn *Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007) at 199.

⁹⁹ *Ibid.* at iv.

¹⁰⁰ *Ibid.* at 79.

¹⁰¹ Genn *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series 1/07, May 2007) at 131.

mediation, that does not in itself provide them with the right mindset to work towards negotiated and mutually satisfactory settlements.¹⁰²

(6) Conclusion

3.91 It is evident to the Commission from the various schemes discussed that voluntary court-annexed schemes are successful for the resolution of disputes, particularly for small claims cases. Many of the schemes have evolved from Court- driven initiatives as opposed to legislative initiatives.

3.92 *The Commission provisionally recommends that, in civil claims generally, courts should be permitted, either on their own motion initiative or at the request of a party to such claims, to make an order requiring the parties to consider resolving their differences by mediation or conciliation.*

3.93 A recurring theme in each of the voluntary schemes is the important role which information and education plays in the successful uptake of the schemes. In Manchester, Edinburgh, the Netherlands, and Slovenia, in-court advice on ADR and the processes which are available to the parties have been the catalyst in the development of the schemes.¹⁰³ The Commission considers that, for ADR to develop as a workable dispute resolution option within the court system in Ireland, it may be appropriate to mandate that parties to a dispute attend an information session on ADR.

3.94 The Commission considers that a court-annexed scheme would make engagement in the mediation process procedurally mandatory in that the Court should have the power to recommend mediation and to impose cost sanctions if the parties unreasonable refuse to consider attempting mediation.¹⁰⁴ Such procedural requirements are consistent with the concept that court-annexed mediation should remain a wholly consensual process.¹⁰⁵

3.95 *The Commission provisionally recommends that the participation of parties in mediation should be voluntary and that the mediator should play no advisory or evaluative role in the outcome of the process, but may advise on or determine the process.*

¹⁰² Zalar *Towards Primary Dispute Resolution System: Global Trends in Civil and Family Mediation – An Overview of best practices in Europe* (2007). Available at <http://cameraarbitrale.odc.mi.it/allegati/utenti/Zalar1.pdf>.

¹⁰³ For further discussion on providing parties with information on ADR see Chapter 5 below.

¹⁰⁴ For further discussion on the issue of cost sanctions see Chapter 11 below.

¹⁰⁵ *The Final Report on Civil Justice Reform* (Civil Justice Reform Judiciary of Hong Kong, 2004) at 438. Available at <http://www.civiljustice.gov.hk/>.

3.96 *The Commission provisionally recommends the participation of parties in conciliation should be voluntary and that the conciliator should not have the authority to impose on the parties a solution to the dispute but may make recommendations to the parties for the settlement of the dispute, which the parties may or may not accept.*

3.97 In the Commission's view voluntary court-annexed schemes would be a positive development in Ireland. As the uptake for purely voluntary mediations is generally low however, judicial encouragement of mediation would be necessary for the successful implementation of such a pilot.

3.98 *The Commission provisionally recommends that a pilot Court-annexed mediation scheme should be established in the District Court based on the principles of the voluntary participation of the litigants.*

C Confidentiality

(1) Protection of Confidentiality: An Overview

3.99 As noted in the EU Green Paper on ADR "Confidentiality appears to be the key to the success of ADR because it helps guarantee the frankness of the parties and the sincerity of the communications exchanged in the course of the procedure."¹⁰⁶ The primary reason for protecting confidentiality in ADR is to enhance trust both in the neutral third party and in the ADR process itself. "The fundamental principle has always been regarded as being that a mediation should be a safe haven, where the parties benefit from the privacy it affords, as it gives them the chance to behave in ways which they would not adopt if they were in any sense 'on the record' in doing so."¹⁰⁷

3.100 Confidentiality operates on two levels. First the process should be confidential as between the participants, preventing third party knowledge of the dispute or any attempt to settle it, and also in terms of all matters disclosed in the process. Secondly, matters discussed between one party and the neutral third party in private sessions should be confidential between them and may not be disclosed to any other party without express consent.¹⁰⁸ During the debates on the *Civil Liability and Courts Act 2004* it was noted that "It is vital in mediation

¹⁰⁶ *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final at 29. Available at <http://eurlex.europa.eu/>.

¹⁰⁷ Allen "Peering behind the veil of mediation confidentiality, a new judicial move in *Malmesbury v Strutt and Parker*" (April 2008). Online article available at www.cedr.co.uk

¹⁰⁸ *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final. Available at <http://eurlex.europa.eu/>.

that the confidentiality of all parties is respected, otherwise people will just be defensive and will stand their ground.”¹⁰⁹

3.101 One of the most common legal mechanisms used to ensure confidentiality in mediation and conciliation is a confidentiality clause in an agreement made prior to entering the process. In addition to contractual protections of confidentiality, the common law has also recognised to some extent the need to protect the confidentiality of mediation and conciliation. Some protection for confidentiality in mediation can also be found in, for example, section 15(5) of the *Civil Liability and Courts Act 2004* which provides that the notes of a chairman of a mediation conference and all communications during a mediation conference or any records or other evidence shall be confidential.¹¹⁰ The Commission now turns to examine the different ways in which confidentiality is currently protected.

(2) Agreement Guaranteeing Confidentiality

3.102 Standard agreements frequently contain confidentiality provisions and have the benefit of eliminating uncertainty about the existence and scope of confidentiality protections.¹¹¹ For example, the Family Mediation Service Mediation Agreement states:

“It has been a precondition of the mediator assisting us that the mediation sessions have been conducted without prejudice and that any information disclosed by either of us in our negotiations with each other is confidential.”¹¹²

3.103 When parties enter into such an agreement they are thus contractually obliged to preserve the confidentiality of the process.

(3) ‘Without Prejudice’ Communications

3.104 Irish law provides for the concept of “without prejudice” negotiations, which means that oral and written statements made on a “without prejudice” basis during negotiations towards the settlement of a dispute are inadmissible in subsequent court proceedings relating to the same subject matter. It is fundamental to the operation of the “without prejudice” rule that communications expressed to be “without prejudice” are made for the purposes of settling the

¹⁰⁹ Seanad Debate Vol 175 No 21 (11th March 2004).

¹¹⁰ See further Chapter 11, below.

¹¹¹ Reichert “Confidentiality in International Mediation” (2004-2005) 59 *Dispute Resolution Journal* 4 at 60.

¹¹² Clause 1.5 of the Family Mediation Service Agreement.

dispute, since the courts will not find the privilege to relate to communications which have a different purpose.¹¹³

3.105 The “without prejudice” rule is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish.¹¹⁴ As Keane J explained in *Greencore Group plc v Murphy*¹¹⁵ it is in the public interest that:

“Parties should be encouraged as far as possible to settle their disputes without recourse to litigation and should not be discouraged by the knowledge that anything that is said in the course of negotiations may be used in the course of proceedings.”¹¹⁶

3.106 Similarly, in the English Court of Appeal decision in *Cutts v Head*,¹¹⁷ Oliver LJ stated that parties who are trying to settle their dispute:

“... should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes ... as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should ... be encouraged fully and frankly to put their cards on the table The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.”

3.107 In the Australian case of *AWA Ltd v Daniels*¹¹⁸ Rolfe J stated that mediation is somewhat analogous to “without prejudice” discussions. Express or implied admissions made in the course of a mediation cannot be disclosed.

3.108 In *Instance v Denny Bros Printing*¹¹⁹ the English Court of Appeal reinforced the “without prejudice” status of mediation negotiations. The Court

¹¹³ See Carey “Without Prejudice Privilege” and “Unambiguous Impropriety” (2004) 22 ILT 122.

¹¹⁴ *Rush & Thompkins v Greater London Council* [1989] AC 1280 at 1299 (per Lord Griffiths).

¹¹⁵ [1995] 3 I.R. 520 at 525.

¹¹⁶ *Ibid.* at 525. Keane J quoting Oliver J in *Cutts v Oliver* [1984] Ch 290.

¹¹⁷ [1984] Ch 290 at 306.

¹¹⁸ Rolfe J, 18 March 1992, unreported.

¹¹⁹ [2001] EWCA Civ 939.

held that communications made in a mediation which did not settle an earlier dispute extended to later litigation connected with the same subject-matter.

(a) Exceptions to ‘Without Prejudice’ Privilege

3.109 There are a number of exceptions to the “without prejudice” privilege at common law. The Commission now turns to the relevant guiding principles in this area.

(i) Unambiguous impropriety

3.110 In *Unilever plc v Proctor & Gamble Co*¹²⁰, Laddie J outlined some circumstances where without prejudice negotiations, which would otherwise be privileged, can be disclosed. The first is where the entitlement to rely on the privilege may be treated as waived. Secondly a court may come to the conclusion that the claim to without prejudice status is not *bona fide*. Laddie J cited with approval the dicta of Hoffmann LJ in *Forster v Friedland*¹²¹ that “whatever the parties may stipulate the rule covers only those communications which are genuinely aimed at a settlement to avoid litigation.” Thirdly, Laddie J stated that there are occasions where, even though the parties treated the negotiations as being without prejudice, the Court refuses to allow the claimed privilege where “the protection afforded by the rule had been unequivocally abused.”

3.111 It was then noted that any further exceptions should not be encouraged, particularly when an important ingredient of the Woolf civil justice reforms were to encourage those who were in dispute to engage in frank discussions before they resorted to litigation.¹²²

(ii) Threats

3.112 In *Venture Investment Placement Ltd v Hall*¹²³ the Court was faced with the question was whether something said during mediation, alleged to amount to threats, could override the confidentiality created by the mediation agreement. The English High Court answered no, and it restrained Mr Hall from referring to or disclosing any part of the discussion that took place during the mediation on the basis that any such threat essentially involved a question of defamation.

¹²⁰ [2000] FSR 344, [2000] 1 WLR 2436, [2001] 1 All ER 783.

¹²¹ 10 November 1992, Court of Appeal of England and Wales, unreported.

¹²² Carey “Without Prejudice Privilege” and “Unambiguous Impropriety” (2004) 22 ILT 122.

¹²³ [2005] EWHC 1227 (Ch).

(iii) To prove the existence of a concluded agreement

3.113 If there is a dispute as to whether or not there has been a settlement, it may be necessary to look to the detail of the mediation or negotiation to determine the terms of that settlement.¹²⁴ In *Brown v Rice & Patel*¹²⁵ the plaintiff asserted that, during a mediation, the defendant had bound herself to leave open defined settlement terms for acceptance until noon the following day, and that he had accepted them before the deadline. The defendants both denied that any such agreement had been duly concluded within the mediation.

3.114 The defendants argued that the court should not hear evidence as to whether there was a concluded agreement because:

- a form of overall mediation privilege exists to prevent such an investigation;
- the only exception to the without prejudice rule applicable to mediations is the unambiguous impropriety rule;
- the fact that the mediation agreement provided that no binding settlement agreement could be reached unless in writing and signed removed the court's power to investigate whether settlement had been reached; and
- contractual mediation confidentiality prevented admissibility.

3.115 Having concluded that the conventional “without prejudice” rule applied to the situation, the court held that communications during the mediation process, which were to be construed as “without prejudice”, could be admitted in evidence in order to determine whether a binding settlement had been concluded.

3.116 The court admitted evidence of offers made at the mediation by each side, including: content of a meeting at the mediation in which the deadline was allegedly set; the mediator's own note about the offers; subsequent e-mail correspondence between the mediator and the parties; and inter-party correspondence about whether or not agreement had been reached. On that evidence, the judge concluded that a settlement offer had been made but it was incomplete as it did not deal with the manner of disposal of the proceedings. The decision in the *Brown* case indicates that it is only in specified and clear circumstances that the court will seek to examine the conduct of the mediation

¹²⁴ *Tomlin v Standard Telephones & Cables* [1969] 3 All ER 201. As discussed in Allen “Does mediation need further privilege? Thoughts on two recent cases” 157 NLJ 1342. Available at www.cedr.co.uk.

¹²⁵ [2007] EWHC 625 (Ch).

and communications made during it. The Court recognised that those exceptions to the without prejudice rule should be "kept within close confines."¹²⁶

(iv) Evidence of Legal Rights.

3.117 Where settlement negotiation communications disclose evidence of legal entitlement,¹²⁷ that information is admissible as evidence both as between the parties¹²⁸ and as between a party and a third party.¹²⁹ This does not extend to evidence of waiver of a right, being restricted to proof of existing rights, so that the veil remained intact in respect of an alleged reaffirmation of liability that was otherwise statute barred.¹³⁰ Evidence of a fact, for instance that someone had written and signed a document, not related to the terms of the settlement are admissible.¹³¹ In *Munt v Beasley*¹³² notes of mediation proceedings were used as evidence to establish that a landlord had, contrary, to the express terms of a lease included the use of a loft as part of the tenancy.

(v) Waiver

3.118 If a party refers to negotiation communications in the course of a trial, this is deemed to be a waiver of the privilege. Assuming the other party has not objected on the grounds of privilege to admissibility, they can rely on anything in the communications which is in their favour.¹³³ Whatever the circumstances, the reference must, however, be intentional. A mere accidental reference or oversight may not be sufficient to pierce the veil of confidentiality. Both parties can expressly consent to waive privilege. Furthermore, once a party waives the privilege the other party is also free to rely on that material in court.¹³⁴

¹²⁶ "Mediation: No such thing as mediation privilege yet" (April 2007) Herbert Smith Litigation E-Bulletin. Available at www.herbertsmith.com

¹²⁷ See *McDowall v Hirschfield Lipson & Rumney* [1992] LAWTEL 1603200.

¹²⁸ See *Bath & N.E.Somerset DC v Nicholson* (2002) 10 EG 156 (CS).

¹²⁹ See *Cnitrow Ltd v Cape plc* [2000] 3 All.E.R. 763 CA.

¹³⁰ See *Bradford & Bingley plc v Mohammed Rashid* [2005] EWCA Civ 1080.

¹³¹ See *Waldridge v Kennison* (1794) 170 ER 306 .

¹³² [2006] EWCA Civ 370.

¹³³ See *Somatra Ltd v Sinclair Roche & Temperley* [2002] EWHC Com 1627.

¹³⁴ *Ibid.*

3.119 In *Chantrey Vellacott v Convergence Group plc*¹³⁵ the claimants sought an order for their costs of a mediation which had failed to settle the dispute. The parties agreed to waive privilege over the “without prejudice” meeting in order to allow the Court to evaluate the details and conduct of the mediation. The claimants were awarded their mediation costs because the defendants had been so plainly intransigent and unrealistic at both mediation and trial.

3.120 In *Hall v Pertemps Group Ltd*¹³⁶ the court was asked to decide whether threats which occurred during a mediation amounted to a waiver of the mediation privilege. The court held that it only amounted to a waiver of the discrete issue as to whether or not threats were made in the mediation or occurred subsequently and were made to a third party and hence were not relevant to the action. Accordingly the privilege that attached to the mediation process continued to apply and nothing that occurred or was said during the mediation was admissible in court.

(vi) Unreasonable Refusal to Mediate and Without Prejudice Communications

3.121 In 1889 the English Court of Appeal held, in *Walker v Wilshire*¹³⁷ that “letters or conversations written or declared to be “without prejudice” cannot be taken into consideration in determining whether there is a good cause for depriving a successful litigant of costs.”

3.122 When arguing for costs in England and Wales, if a party wishes to refer to correspondence on the basis that the other party has acted unreasonably it is necessary to have marked it “without prejudice save as to costs.” This is known as a *Calderbank* offer. In *O'Neill v Ryanair (No 3)*¹³⁸ the High Court recognised the *Calderbank* letter procedure.

3.123 In *Reed Executive plc v Reed Business Information Ltd*¹³⁹ the English Court of Appeal considered whether it could compel the parties to disclose the detail of “without prejudice” negotiations (or documents) in ADR when dealing with the question of costs. The Court offered the *Calderbank* letters approach and held that only correspondence which is either 'open' or marked 'without prejudice save as to costs' could be disclosed to the Court in

¹³⁵ [2007] EWHC 1774 (Ch), [2007] All ER (D) 492 (Jul).

¹³⁶ [2005] EWHC 3110 (Ch).

¹³⁷ [1889] 23 QBD 335

¹³⁸ [1992] 1 IR. 166.

¹³⁹ [2004] EWCA Civ 159.

the absence of a waiver by both parties that “without prejudice” correspondence can also be disclosed.

3.124 Giving the judgment of the Court Jacob LJ also confirmed that the court will not hear evidence as to what happened at the mediation. He added:

"I do not regard such a conclusion as disastrous or damaging from the point of view of encouraging ADR. Far from it. Everyone knows the *Calderbank* rules. It is open to either side to make open or *Calderbank* offers of ADR. These days there is no shame or sign of weakness in so doing. The opposite party can respond to such offers, either openly or in *Calderbank* form. If it does so and gives good reason(s) why it thinks ADR will not serve a useful purpose, then that is one thing. If it fails to do so, then that is a matter the court may consider relevant (not decisive, of course) in exercising its discretion as to costs. The reasonableness or otherwise of going to ADR may be fairly and squarely debated between the parties and, under the *Calderbank* procedure, made available to the Court but only when it comes to consider costs."¹⁴⁰

(b) Summary of Without Prejudice & Mediation

3.125 The Commission acknowledges that the words “without prejudice” cannot bring down a complete veil over mediation communications. In *Ryan v Connolly*¹⁴¹ the Supreme Court recognised that it may be obliged to balance the interest in disclosure against the public interest in encouraging settlements, (or ADR, the Commission would add) in cases where the disclosure is sought not for the purpose of holding an opponent to admissions made in the “without prejudice” offer “but simply to demonstrate why a particular course had been taken”.¹⁴² The Commission considers that the appropriate balance is achieved if the law indicates that a court should be slow, both because of the terms of a mediation agreement and public policy factors, to hold that the without prejudice status of material was lost, except in clear and unequivocal circumstances.

(4) Distinct Mediation Privilege

3.126 The Commission now turns to consider whether mediation should be granted a distinct form of mediation privilege. In *Cook v Carroll*¹⁴³ Gavan Duffy

¹⁴⁰ *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159. at para 35.

¹⁴¹ [2001] 2 IRLM 174.

¹⁴² *Ibid* at 181.

¹⁴³ [1945] IR 515.

J. approved four criteria favoured by Dean Wigmore¹⁴⁴ for the general purpose of conferring privilege on communications arising from the confidential nature of the relationship between the communicants. According to these criteria, privilege may be established where the court is satisfied that:

1. the communication was confidential;
2. confidentiality is essential to the satisfactory maintenance of the relationship;
3. the relationship is one the community deems necessary to foster; and
4. the likely harm caused by mandatory disclosure outweighs the benefit to be gained in the instant case by it.¹⁴⁵

3.127 Examples of categories of privilege include the absolute privileges over confidential communications made by a parishioner to a priest (sacerdotal privilege)¹⁴⁶, or communications with a marriage guidance counsellor.¹⁴⁷

3.128 The Code of Ethics of the Mediators Institute of Ireland notes that “Unless the mediation is specifically given legal privilege under legislation it is not privileged.”¹⁴⁸ It remains to be resolved definitively whether a general privilege attaches to the whole mediation process, including all communications passing within that process. The Commission notes that section 114 of the *Residential Tenancies Act 2004* provides for absolute privilege for mediators only for the purposes of the law on defamation.

3.129 In the English case *Brown v Rice and Patel*,¹⁴⁹ counsel for the defendant argued for the existence of a “mediation privilege”, distinct from the “without prejudice” rule, under which (at least) a mediator could not be required to appear as a witness or produce documents and under which the parties could not waive the mediator’s entitlement not to give evidence in respect of the contents of mediation. It was argued that this should build on a category of privilege in matrimonial cases, protecting confidential communications made with a view to matrimonial conciliation.

¹⁴⁴ Wigmore *Anglo-American System of Evidence* (3rd ed. Vol. viii Boston 1940) at paras 2380-91.

¹⁴⁵ Healy *Irish Laws of Evidence* (Round Hall 2004) at 396.

¹⁴⁶ *Cook v Carroll* [1945] IR 515.

¹⁴⁷ *ER v JR* [1981] 1 IR 125.

¹⁴⁸ Mediators Institute of Ireland Code of Ethics at 4.3.

¹⁴⁹ [2007] EWHC 625 (Ch).

3.130 The Court noted that the possible existence and desirability of a distinct privilege attaching to the entire mediation process was dealt with in *Brown and Marriott ADR Principles and Practice*.¹⁵⁰ As already noted, the Court decided the case under the existing “without prejudice” rule. Accordingly, it was not necessary for the Court to determine the question of whether a distinct ‘mediation privilege’ existed.

3.131 It remains possible and thus a matter of concern that a mediator could be called to give evidence in subsequent litigation between the parties. Parties could attempt to extend confidentiality to the mediator by including a contractual provision to that effect in the mediation agreement.

“A substantial and, to our knowledge, unquestioned line of authority establishes that where a third party [whether official or unofficial, professional or lay] receives information in confidence with a view to conciliation the courts will not compel him to disclose what was said without the parties’ agreement.”¹⁵¹

3.132 In its 2002 Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, the European Commission stated: “As a rule the third party [the mediator] should not be able to be called as a witness...within the framework of the same dispute if ADR has failed.”¹⁵² This approach is being formalised in the United States as mediator privilege. The *Uniform Mediation Act* provides: “A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.”¹⁵³ As noted by the Court in *Brown v Patel* “It may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts but that is not something which arises [in this case].”¹⁵⁴

¹⁵⁰ *Brown and Marriott ADR Principles & Practice* (Sweet & Maxwell, London, 1999), paras 22-079 to 22-097.

¹⁵¹ Per Bingham MR in *Re D [Minors]* [1993] 2 All ER 693.

¹⁵² *Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters* COM/2002/0196 Final at para. 82. Available at <http://eurlex.europa.eu/>.

¹⁵³ Section 4(b)(2). This follows a line of cases, the most notable of which was *NLRB v Macaluso* 618 F. 2d 51 (9th Cir. 1980), which stated that the public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from a given mediator’s testimony.

¹⁵⁴ [2007] EWHC 625 (Ch).

(5) Conclusion

3.133 Confidentiality in mediation refers to the ability of a party to prevent the contents of the mediation from being used as evidence in subsequent legal proceedings. In the Commission's view this is important, not just from a legal standpoint, but from a practical perspective. Candour by the parties can be crucial to a successful mediation. Confidentiality is essential to the mediation process because without it, parties would not be willing to make the kind of concessions and admissions that lead to settlement.¹⁵⁵

3.134 The importance of the legal status of confidentiality in mediation is particularly pronounced because confidentiality is a fundamental expectation of parties in agreeing to a mediation. In any list of the advantages that mediation offers as a dispute-settlement procedure, confidentiality generally features prominently.

3.135 The Commission notes that, to the extent that the matter has been addressed in legislation in Ireland, confidentiality has not been given sufficient recognition. For example, the Rules of the Superior Courts (Commercial Proceedings) 2004 provide that:

“Without prejudice to any enactment or rule of law by virtue of which documents or evidence are privileged from disclosure, to assist him in deciding whether or not to make any order or give any direction,... a Judge may direct the parties, or any of them, to provide information in respect of the proceedings, including... particulars of any mediation, conciliation or arbitration arrangements which may be available to the parties.”¹⁵⁶

3.136 This provision indicates clearly that communications made during the course of a mediation, conciliation or arbitration are not protected and that a judge can request such communications.

3.137 By contrast, section 7 of the *Judicial Separation and Family Law Reform Act 1989*, renders inadmissible in evidence in court any communications (written or oral) between a spouse and a third party who is assisting towards a reconciliation or agreement on the terms of separation, where proceedings under the 1989 Act have been adjourned for that purpose. In its 1994 *Consultation Paper on Family Courts* the Commission stated that:

“It is possible that the courts will extend privilege to statements made in the course of mediation in other contexts. There is a strong public

¹⁵⁵ See Johnson “Confidentiality in Mediation: What can Florida Glean from the Uniform Mediation Act?” (2003) 30 *Florida State University* 487.

¹⁵⁶ Rule 6(2) of the 2004 Rules.

interest in fostering mediation. However, it is doubtful whether such a privilege could be regarded as absolute. There may, for example, be cases where the protection of a child from a serious threat of injury would justify a court in setting aside the privilege.”¹⁵⁷

3.138 In its subsequent 1996 *Report on Family Courts* the Commission recommended that “information arising during the course of mediation should, subject to a number of exceptions, be inadmissible as evidence in any subsequent court proceedings. Statutory provisions to this effect should be enacted.”¹⁵⁸

3.139 *The Commission provisionally recommends that the principle of confidentiality of mediation and conciliation should be placed on a statutory basis and invites submissions as to whether confidentiality in mediation should be subject to a distinct form of privilege.*

D Self-Determination

3.140 ADR processes, such as mediation and conciliation, give disputants full control over the outcome of the process which is not always possible in a public, formal and adversarial justice system. Litigation effectively delegates power and control of the resolution of the dispute to a third party and the parties involved do not retain full control over the dispute. Some litigating parties become relatively passive, disempowered and often disillusioned by the entire process. As noted by the Lord Chief Justice of England and Wales:

“Once you are in the hands of professional litigants they take charge of you, willy-nilly, and you find that you have embarked on a course that has no turning back and the incidents of which you cannot even understand. Mediation is not like that. You can always turn back and you have explained to you precisely what is going on. You are in control of what is happening to you.”¹⁵⁹

3.141 Mediation and conciliation processes are based on the underlying concept of party autonomy which permits the parties to retain virtually all of the

¹⁵⁷ Law Reform Commission *Consultation Paper on the Family Courts* (LRC CP March 1994) at 56.

¹⁵⁸ Law Reform Commission *Report on Family Courts* (LRC 52-1996) at 99.

¹⁵⁹ “*Alternative Dispute Resolution: An English Viewpoint*”. Speech presented by Lord Phillips of Worth Matravers at the International Centre for Alternative Dispute Resolution, India, March 2008. Available at www.judiciary.gov.uk/docs/speeches/lcj_adr_india_290308.pdf.

power over the resolution and outcome of their dispute. This principle is known as self-determination.

(1) An Overview of Self Determination

3.142 The success of any mediation or conciliation is closely connected with the parties' ability to make voluntary, uncoerced, informed decisions.¹⁶⁰ Defined in this way, self-determination is often said to be mediation's "prime directive."¹⁶¹ This may be seen particularly in a family breakdown dispute where self-determination provides parties with fairness and dignity at a time in their life when they are feeling powerless and unacknowledged. In this way, the process respects the disputants as human beings with the capacity to choose.¹⁶²

3.143 Self determination is present where the following processes are offered:

- the parties are at the centre of the process;
- the parties are the principal actors and creators within the process;
- the parties actively and directly participate in the communication and negotiation;
- the parties choose and control the substantive norms to guide their decision-making;
- the parties create the options for settlement; and
- the parties control whether or not to settle.¹⁶³

3.144 The self-determination principles is clearly applied in section 4.6 of the Mediators Institute of Ireland's Code of Ethics:

"The content and outcome of the mediation is the responsibility of the parties. The parties can exercise their self-determination by their

¹⁶⁰ See Cohen "Convening for Enhanced Self-Determination and Access to the Process" (2003) 18 *The Texas Mediator* 2.

¹⁶¹ Bush "Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field" (2002) 3 *Pepp Disp Resol L* 111 at 115.

¹⁶² Morley "Reconciling the value of self-determination with more interventionist models of family law mediations". Online article available at www.janemorley.com.

¹⁶³ Welsh "The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?" (2000) 6 *Harv Negot L Rev* 1 at 8.

choice of Mediator, content of process, participation in or withdrawal from mediation and the outcome.”

3.145 The MII Code also states that “the Mediator must empower the parties to make free and informed choices as to content and outcome. The Mediator is responsible for being in charge of the process.”

(2) Informed Consent

3.146 In the Commission's view, it has been correctly noted that “... the principle of informed consent provides the structural framework through which this value [of self-determination] is measured in mediation.”¹⁶⁴

3.147 It is important that parties are free to make an informed decision about the form of dispute resolution they wish to pursue. This must not, for example, be forced into mediation, simply because they cannot afford any other option.¹⁶⁵ In that respect, parties to a dispute must be informed on the full spectrum of ADR processes available to them. At a minimum, the principle of informed consent requires that parties be educated about the process before they consent to participate in it; that their continued participation in the process should be voluntary; and, that they understand and consent to the outcomes reached in the process.¹⁶⁶

3.148 The Commission notes that section 3.3 of the European Code of Conduct for mediators advises mediators to give all parties adequate opportunity to be involved in the mediation process and to ensure that all agreements are reached through informed consent. Paragraphs 16 and 17 of the European Commission's 2001 Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes states that:

“(16) Before the parties agree to a suggested solution on how to settle the dispute they should be allowed a reasonable amount of time to consider the details and any possible conditions or terms.

¹⁶⁴ Nolan-Haley “Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking” (1999) 74 *Notre Dame L Rev* 775 at 789.

¹⁶⁵ *Response to Policy Consultation Paper on Alternative Dispute Resolution by Advice Services Alliance* (Scottish Consumer Council, August 2003) at 7. Available at www.scotconsumer.org.uk.

¹⁶⁶ See Nolan-Haley “Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking” (1999) 74 *Notre Dame L Rev* 775; and Aylmer “*Commercial Mediation in Ireland - An Opportunity for Progress?*” 20th February 2007. Online article available at www.efc.ie.

(17) In order to ensure that procedures are fair and flexible and that consumers have the opportunity to make a fully informed choice, they must be given clear and understandable information in order that they can reflect on whether to agree to a suggested solution, obtain advice if they wish or to consider other options.¹⁶⁷

3.149 As noted in the European Commission's 2002 Green Paper on ADR

"... the parties' agreement is the essential and, from a certain standpoint, the most sensitive stage of the procedure.' Indeed, care must be taken to ensure that the agreement concluded is genuinely an agreement... It would therefore appear that there is a need for a period of reflection before the signing or a period of retraction after the signing of the agreement."¹⁶⁸

(3) Conclusion

3.150 Self-determination and party autonomy are key features of mediation and conciliation which make them distinct from, and therefore alternative to the litigation process. Empowering parties to determine their own agreement to a dispute enhances access to justice. The Commission emphasises, of course, that there are many cases in which parties to a dispute will, for a multitude of personal and legal reasons, wish to hand over control of the dispute to an arbitrator or a court. However, mediation and conciliation provide an important element of control which should also form an important part of a modern civil justice system.

3.151 The Commission believes that in order for parties to exercise their right to self-determination, they must be fully educated and informed about the ADR processes which are available to them. Those engaged in facilitating ADR must see it as their duty to ensure that parties to a dispute receive all necessary information which, in turn, will result in the parties' personal empowerment.

3.152 *The Commission provisionally recommends that parties to mediation or conciliation should be fully informed about the process by the neutral and independent mediator or conciliator before they consent to participate in it, that their continued participation in the process should be voluntary, and that they understand and consent to the outcomes reached in the process.*

¹⁶⁷ Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).

¹⁶⁸ *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final. Available at <http://eurlex.europa.eu/>.

3.153 *The Commission provisionally recommends that parties should be encouraged to seek independent advice, legal or otherwise, before signing an agreement entered into at conciliation or mediation.*

E Efficiency

3.154 In has been pointed out in Ireland that:

“... where a dispute appears as if it is about to result in litigation, one of the questions at the back of a businessman’s or businesswoman’s mind is whether he or she can afford it...The advantage of mediation is that the parties involved can bring their issues to the mediator relatively inexpensively.”¹⁶⁹

3.155 This echoes previous comments internationally. For example, Lord Woolf in his Review of the English Civil Justice system in the mid 1990’s noted:

“Where there exists an appropriate dispute resolution mechanism which is capable of resolving a dispute more economically and efficiently than court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they had made use of that mechanism.”¹⁷⁰

3.156 In its 1997 Issues Paper on *Alternative Dispute Resolution*, the South African Law Commission noted that the most common general complaint about the justice system is that the cost of civil litigation is prohibitive.¹⁷¹ The South African Law Commission stated that:

“This prevents meaningful access to courts and even those with access are often victims of delay. For most litigants, delay means added expense and for many people justice delayed is justice denied. Delay combined with the cost of litigation has put justice beyond the reach of the ordinary citizen. The incomprehensibility and adversarial nature of the process with a resulting lack of control furthermore leads to a sense of frustration and disempowerment.”¹⁷²

¹⁶⁹ McDowell, Joint Committee on Justice, Equality, Defence and Women’s Rights Parliamentary Debates Vol No 91, 1 June 2005.

¹⁷⁰ Lord Woolf *Access to Justice, Interim Report* (1995) at Chapter 4 para 7(3) at.20.

¹⁷¹ South African Law Commission on *Alternative Dispute Resolution* (Issues Paper No. 8, Project 94, 1997). Available at <http://www.saflii.org/za/other/zalc/ip/8/8-CHAPTER-2.html>

¹⁷² *Ibid.*

(1) Cost Efficiency

3.157 Mediation and conciliation provides an alternative to the costs of litigation. Of course, mediation and conciliation do not come free of charge. The expenses include the third party's fee, the cost of preparatory work undertaken and overheads for the mediation and conciliation itself. The fee and overheads are usually shared between the parties. Each party bears its own costs and expenses. In Commercial Court cases and in personal injury cases respectively, mediation may be suggested or imposed by a Court during the course of proceedings and refusal to participate or do so in good faith may have negative cost consequences.

3.158 According to the English Centre for Effective Dispute Resolution (CEDR) the commercial mediation profession could save British business in excess of £1 billion a year in wasted management time, damaged relationships, lost productivity and legal fees.¹⁷³ Since 1990, CEDR suggests that the mediation profession has contributed savings of £6.3 billion.

3.159 In *Egan v Motor Services (Bath) Ltd*¹⁷⁴ the English Court of Appeal gave a very strong endorsement to the use of mediation at an early stage in a case, particularly where litigation costs were more likely to be disproportionate to the amount in dispute. In *Egan*, the amount in dispute was only £6,000 but the parties between them had spent in the region of £100,000 on the litigation, including the appeal. Ward LJ stated that he regarded the parties as "completely cuckoo" to have engaged in such expensive litigation with so little at stake. In support of mediation, Ward LJ stated:

"The cost of... mediation would be paltry by comparison with the costs that would mount from the moment of the issue of the claim. In so many cases, and this is just another example of one, the best time to mediate is before the litigation begins. It is not a sign of weakness to suggest it. It is the hallmark of commonsense. Mediation is a perfectly proper adjunct to litigation. The skills are now well developed. The results are astonishingly good. Try it more often."

3.160 In the English Ministry of Justice's 2007 review of the voluntary mediation scheme in London, parties who had attended mediation were asked whether they felt that the mediation had made any difference to their costs. Overall, 38% of respondents said that the mediation had saved costs, while

¹⁷³ CEDR UK "*Conflict is costing business £33 billion every year*" (26 May 2006). Online article available at www.cedr.com.

¹⁷⁴ [2007] EWCA Civ 1002.

29% said that costs had been increased.¹⁷⁵ There was a significant difference in perception between those respondents whose cases had settled at mediation and those whose cases did not settle. Almost two-thirds of those whose cases settled felt that they had saved costs and 7% thought that mediation had increased their costs. Among those respondents whose cases had not settled, 45% thought that their costs had increased, 19% thought they had saved costs, and 28% thought that the mediation had made no difference to their cost.¹⁷⁶

3.161 In 2001, the UK Government made a pledge to use ADR to settle disputes involving government departments wherever possible and where the other party agrees to join in the process. In addition, government departments will insert ADR clauses in their standard procurement contracts.¹⁷⁷ In 2005, ADR was used in 336 cases with 241 leading to settlement, saving costs estimated at £120.7m.¹⁷⁸ It is worth noting that in *Royal Bank of Scotland v Secretary of State for Defence*¹⁷⁹ the English High Court refused the Minister of Defence its costs in a successful defence, because it had not used the 2001 ADR pledge.

3.162 The potential for cost savings through mediation appear to have support from a number of reviews carried out internationally. The Singapore Mediation Centre (SMC) indicates that up to April 2006 more than 1,000 cases have been referred to the SMC. Of those mediated, about 75% were settled. The SMC reported that the Singapore the Supreme Court has recorded savings of more than \$18 million and 2,832 court days up to April 2006. The figures provided by the Singapore Supreme Court indicate, for example, that in a High Court case involving two parties, it is not uncommon for parties to save as much as \$80,000 in total.¹⁸⁰

3.163 In a study conducted at the end of 2002, of the 1,044 disputants who mediated at the SMC and provided feedback, 84% reported costs savings, 88% reported time savings and 94% would recommend the process to other persons

¹⁷⁵ Genn *Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007) at 177.

¹⁷⁶ *Ibid.* at 178.

¹⁷⁷ U.K. Office of Government Commerce, 52338-SGP-Dispute Guidance (Office of the Government Commerce, 2002). Available at <http://www.ogc.gov.uk/documents/cp0077.pdf>.

¹⁷⁸ *Annual Report Monitoring the Effectiveness of the Government's Commitment to using ADR 2005/2006* (Department of Constitutional Affairs 2006).

¹⁷⁹ [2003] EWHC 1479 Ch.

¹⁸⁰ See also the Singapore Mediation Centre's website <http://www.mediation.com.sg/>.

in the same conflict situation.¹⁸¹ The responses from 900 lawyers who represented their clients and provided feedback was similar - 84% reported savings in costs, 83% reported savings in time and 97% of the lawyers indicated that they would recommend the process to others in a similar situation. It is to be noted that even parties and lawyers who did not reach a settlement reported time and cost savings.¹⁸²

3.164 In the United States, the Florida State Agency Administrative Dispute Resolution Pilot Project reported that more than \$3 million in potential savings had been realised through the successful mediation of 31 of 36 administrative disputes selected from five state agencies and one environmental control district during 1998-99. Savings over anticipated litigation costs reported by participants ranged from \$2,250 to \$700,000. Another \$2.3 million in potential savings was attributed to litigation costs already incurred in cases later mediated through the project. The study suggested those costs could have been reduced or eliminated if mediation had begun earlier. The project's premise was to "demonstrate through pilot case examples and through training how mediation and facilitation may be integrated into the management and budgeting of administrative litigation."¹⁸³

3.165 In 2007, the English the National Audit Office reported the cost of litigation versus mediation in family breakdowns.¹⁸⁴ In the period October 2004 to March 2006, some 29,000 people who were funded through legal aid attempted to resolve their family dispute through mediation. The average cost of legal aid in non-mediated cases was estimated at £1,682, compared with £752 for mediated cases, representing an additional annual cost of £74 million.

3.166 It is important to note that the potential benefits of mediation and conciliation noted must be balanced against the reality that mediation and conciliation can also be seen as an additional layer on civil litigation where it does not lead to a settlement and that every step along the way drives up the costs of litigation. "There is truth to this assertion in cases where mediation is

¹⁸¹ Onn "Non-court annexed mediation in Singapore". Paper presented at the international Conference and Showcase on Judicial Reforms. (Philippines, November 2005) at 6. Available at [http://jrn21.supremecourt.gov.ph/forum_icsjr/ICSJR_Singapore%20\(L%20Onn\).pdf](http://jrn21.supremecourt.gov.ph/forum_icsjr/ICSJR_Singapore%20(L%20Onn).pdf).

¹⁸² *Ibid.*

¹⁸³ Florida Conflict Resolution Consortium, 2000. See <http://consensus.fsu.edu/>.

¹⁸⁴ *Report on Legal aid and mediation for people involved in family breakdown* National Audit Office, Legal Services Commission March 2007). Available at <http://www.nao.org.uk/>.

undertaken for improper strategic purposes, rather than with the intention of entering into good faith bargaining.”¹⁸⁵

3.167 While the Commission acknowledges that, from the surveys discussed above, mediation and conciliation can in a large number of cases lead to a settlement, for a number of cases the reality is that if the case is not settled using ADR, the final costs will actually be increased. This reality is relevant to the Commission’s previous emphasis on the voluntary nature of ADR.

(2) Time Efficiency

3.168 In addition to the need to consider potential cost effectiveness, another aspect of the efficiency of ADR is the length of time it takes to resolve a dispute. “People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.”¹⁸⁶ Mediation and conciliation may lead to a faster settlement of a dispute than going to court.

3.169 The Commission has already referred to the time savings involved in the English Alder Hay group litigation which was dealt with by CEDR. In Ireland similar cases have arisen. For example, in the Commercial Court (High Court), on Monday 13 November 2006, Kelly J. admitted a claim by Irish folk group *The Dubliners Ltd v EMI Records (Ireland) Ltd.*, into the Commercial List of the High Court. The Group had sued EMI over its promotion and selling of its CD Box Set. The dispute concerned copyright over seven songs featured in the Box Set collection. On the 14th November 2006, the case appeared again before Kelly J. The Dubliners sought injunctions against EMI who proposed that the dispute be referred to mediation. The case was adjourned for hearing to 21 November 2006, unless the parties agreed in the meantime to go to mediation. On the 16th November 2006 the parties informed the Court that the case had been settled following mediation. Kelly J. said that the case had established a record for the Commercial Court in that it had been admitted into the Commercial List, had gone to mediation on the following day and had been settled two days later.

3.170 In England, the Centre for Effective Dispute Resolution has stated that mediators reported that around 75% of their cases settled on the day, with another 13% settling shortly after that giving an aggregate settlement rate of

¹⁸⁵ Speech delivered by the Honourable Warren K. Winkler Chief Justice of Ontario “Access to Justice, Mediation: Panacea or Pariah?” (2007). Available at <http://www.ontariocourts.on.ca/coa/en/ps/speeches/access.htm>.

¹⁸⁶ US Chief Justice Warren Burger: “Our Vicious Legal Spiral” (1977) 22 *Judges Journal* 49.

88%.¹⁸⁷ This is slightly lower than the aggregate 93% rate reported in the 2005 Audit, although we noted at the time that that figure seemed surprisingly high compared to previously published service providers' rates that are generally in the 80-85% range.¹⁸⁸ According to the UK National Audit Office mediated cases in family disputes are quicker to resolve, taking on average 110 days, compared with 435 days for non-mediated cases.¹⁸⁹ Over 95% of mediations were complete within nine months and all mediations were complete within 12 months.¹⁹⁰ By comparison, the average elapsed time between applying for other legal help for family-related matters (predominantly cases relating to children, domestic violence or financial provision) and the date of the final bill was 435 days, or over 14 months. Only 70% of these cases were complete within 18 months.¹⁹¹

3.171 In the English Ministry of Justice 2007 assessment of the voluntary mediation scheme in London, approximately 25% of the parties involved thought that the mediation had made no difference to the time involved in dealing with their dispute, 33% thought that the time had been increased, and 42% thought that time had been saved.¹⁹² 73% of respondents who had settled their case thought that mediation had saved time, while only 17% of those whose cases did not settle thought that mediation had saved time. When cases did not settle at mediation, 56% thought that mediation had increased time spent on the case.¹⁹³ 42% of the representatives of the parties said that mediation had saved time, 37% thought that mediation had increased time and 20% thought that the mediation had made no difference to the amount of time that they had spent on the case.¹⁹⁴

¹⁸⁷ The Third Mediation Audit (Centre for Effective Dispute Resolution, November 2007) at . Available at www.cedr.co.uk.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Report on Legal aid and mediation for people involved in family breakdown* National Audit Office, Legal Services Commission March 2007)at 8. Available at <http://www.nao.org.uk/>.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² See Genn *Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007).

¹⁹³ Genn *Twisting arms: court referred and court linked mediation under judicial pressure*, (Ministry of Justice Research Series 1/07, May 2007) at 181.

¹⁹⁴ *Ibid.*

3.172 Estimates of time saved as a result of mediation show a very wide range with 28% of those responding estimating savings to be no more than 8 hours and 25% thinking that the saving had been 30 hours or more. 75% of those who thought that they had spent extra time on the case estimated the additional time spent to be no more than 1 day.¹⁹⁵

3.173 In the United States, it has been claimed that the increasing use of ADR has led to a significant decrease in the number of cases reaching trial since the 1960's. Approximately, 11% of all federal cases reached trial in 1962, but less than 2% did in 2002. Over the same period the number of actual cases filed in court has increased by 500%.¹⁹⁶

(3) Conclusion

3.174 In 2005, the then Minister for Justice stated:

“Mediation... is a model of dispute resolution which the Government supports as a means of reducing costs for all parties and as a means of reaching a speedier resolution to difficulties which may arise in the ordinary course of human engagement.”¹⁹⁷

3.175 In this respect, the Commission considers that while neither mediation nor conciliation can be viewed as a simple solution to the inevitable delays and costs involved in litigation, they may provide many parties with an efficient mechanism for the resolution of disputes and access to justice.

3.176 *The Commission provisionally recommends that any bodies responsible for providing ADR processes, in particular mediation and conciliation, should periodically review the procedures involved to ensure that the dispute is being dealt with expeditiously and appropriately.*

F Flexibility

3.177 An important advantage of ADR is its flexibility in achieving consensual and mutually satisfactory resolutions which are not available through traditional adversarial litigation. The Commission has already noted that, in the English Alder Hey case involving over 1,000 claims concerning organ retention, it was possible through ADR for parents to receive an apology

¹⁹⁵ Genn *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series 1/07, May 2007) at 183.

¹⁹⁶ See Galanter “The Vanishing Trial: An examination of Trials and Related Matters in Federal and State Courts” (2004) 1 *Journal of Empirical Legal Studies* 3.

¹⁹⁷ McDowell Joint Committee on Justice, Equality, Defence and Women's Rights Parliamentary Debates Vol No 91 Wednesday, 1 June 2005.

and the promise of a permanent memorial to the children whose organs had been retained by the hospital.¹⁹⁸

(1) Procedural Flexibility

3.178 As noted in the European Commission's 2002 Green Paper on ADR:

“ADRs are flexible, that is, in principle the parties are free to have recourse to ADRs, to decide which organisation or person will be in charge of the proceedings, to determine the procedure that will be followed, to decide whether to take part in the proceedings in person or to be represented and, finally, to decide on the outcome of the proceedings.”¹⁹⁹

3.179 The ability of the parties to select ADR professionals who are qualified to deal with the issues that are specific to their dispute is a principal element of flexibility in ADR. The ADR professional need not be from a legal background but may be an expert in whatever area the dispute is about.

3.180 In addition, ADR offers greater procedural flexibility than litigation. For example, the hearings conducted by a neutral in mediation or conciliation may be held at any place and at any time, subject to agreement. ADR processes also allow parties to apply their own knowledge and creativity in the process, ensuring that their needs are met more closely than the traditional litigation system is able to do. This in turn promotes party empowerment.

(2) Flexibility of Outcome

3.181 Another feature of flexibility which the Commission views positively is the variety of outcomes available in ADR. In facilitative and advisory ADR processes, the agreement may contain a wide range of novel outcomes which would not normally form part of a court agreement and which may provide solutions that better suit each parties' needs.

3.182 The New South Wales Law Reform Commission has also recognised that mediation can provide a greater range of remedies than those available through the courts including:

- an apology;
- an explanation;
- the continuation of an existing professional or business relationship perhaps on new terms; and

¹⁹⁸ See Chapter 1, above.

¹⁹⁹ *Green Paper on alternative dispute resolution in civil and commercial matters* COM/2002/0196 Final. Available at <http://eurlex.europa.eu/>.

- an agreement by one party to do something without any existing legal obligation to do so.²⁰⁰

3.183 A court is more limited in the forms of relief it can make. Courts are reluctant to make any form of order which would require ongoing supervision. ADR processes can provide the types of outcomes already discussed. As noted by the former Minister of Justice, Equality and Law Reform:

“A mediator can think outside the box and can arrive at solutions different from those that can be arrived at by a court. For instance, I have witnessed mediations in which arguments between employers and employees have resulted in a proposal radically different from that which a court would make. Such a proposal might include an extension of the person’s working life. No court could order that a person’s retirement age be postponed but this kind of solution can be made from outside the box by a mediator as a way of getting both sides to realise they have common ground.”²⁰¹

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

G Neutrality & Impartiality

3.185 The principles of neutrality and impartiality are fundamental to the success of ADR. Neutrality in the broadest sense of the term includes issues such as a lack of interest in the outcome of the dispute, a lack of bias towards one of the parties, a lack of prior knowledge of the dispute and/or the parties, the absence of the mediator making a judgment about the parties and their dispute, and the idea that the mediator will be fair and even-handed.²⁰² Impartiality is said to refer to “an even-handedness, objectivity and fairness towards the parties during the process.”²⁰³

3.186 Adopting a neutral stance, it is argued, helps mediators to establish trust credibility, and respect. It is commonly thought that if a mediator is unable to maintain a neutral stance, codes of ethics and standards of practice require

²⁰⁰ New South Wales Law Reform Commission *Report on Community Justice Centres* (Report 106 - 2005) at 1.29. Available at <http://www.lawlink.nsw.gov.au/lrc>.

²⁰¹ McDowell Joint Committee on Justice, Equality, Defence and Women’s Rights Parliamentary Debates Vol No 91 Wednesday, 1 June 2005.

²⁰² Field “Neutrality and Power: Myths and Reality” (2000) 3 *ADR Bulletin* 1 at 16-19.

²⁰³ Boule *Mediation: Principles, Process, Practice* (Butterworths Sydney 1996) at 19.

that he or she withdraw from the case. For example, the Mediators Institute of Ireland Code of Ethics states that “The Mediator must act and be seen to act in an impartial manner throughout the process of mediation. Impartiality means freedom from favouritism, bias or prejudice. The Mediator must not take sides.” Similarly, the European Code of Conduct for Mediators states that “The mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests.”²⁰⁴

3.187 *The Commission provisionally recommends that the requirement of neutrality and impartiality be included in any general statutory formulation that concerns mediation and conciliation.*

H Quality and Transparency of Procedure

3.188 To the extent that mediation resolves a dispute which may otherwise have been decided by litigation in court, the questions of the training quality and accountability of mediators are crucial matters.²⁰⁵ Those who require to use ADR processes are entitled to expect that mediators and conciliators involved in providing those processes are competent, have adequate training and expertise, and that their services will be of a suitable standard. Moreover, those who may be involved in referring cases to an ADR process must be satisfied on this matter. The transparency of the ADR procedure should also be guaranteed.

3.189 To ensure the quality of the ADR process information about the procedure, including the costs involved, should be readily available to the parties in simple terms so that they can access and retain it before submitting a dispute.

3.190 The European Commission 2001 Recommendation on ADR in consumer disputes states that information should be made available on: how the procedure will operate, the types of disputes that can be dealt by it and any restrictions on its operation; the rules governing any preliminary requirements that the parties may have to meet, and other procedural rules, notably those concerning the operation of the procedure and the languages in which the procedure will be conducted; the cost, if any, to be borne by the parties; the timetable applicable to the procedure, particularly with regard to the type of dispute in question; any substantive rules that may be applicable (legal provisions, industry best practice, considerations of equity, codes of conduct); the role of the procedure in bringing about the resolution of a dispute; and the

²⁰⁴ Available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

²⁰⁵ See Chapter 10, below.

status of any agreed solution for resolving the dispute.²⁰⁶ The Commission agrees that this type of information will lead to increased confidence in the process.

3.191 As previously noted, the 2004 Code of Conduct for Mediators has been made available on the European Commission's website in order to promote its use by practitioners. The Code does not have the force of law but in the Commission's view it is appropriate to consider whether the general content of the Code should be given some statutory basis. The Commission does not think it is appropriate at this stage to make any recommendation on this issue.

3.192 *The Commission invites submissions as to whether the European Code of Conduct for Mediators should be given a statutory basis in Ireland, including in the form of a Code of Practice.*

I European Directive and Principles of Mediation

3.193 The Commission has already referred to the 2008 Directive on Certain Aspects on Mediation in Civil and Commercial Matters.²⁰⁷ The objective of the 2008 Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.²⁰⁸

3.194 The 2008 Directive is based on the premise that, in order to promote the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce legislation addressing, in particular, key aspects of civil procedure.²⁰⁹ The Directive states that such legislation should preserve the flexibility of the mediation process and the autonomy of the parties. It should also ensure that mediation is conducted in an effective, impartial and competent way.²¹⁰

²⁰⁶ Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).

²⁰⁷ The Directive is available in the Official Journal of the European Union L 136/3 (May 2008). It is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>.

²⁰⁸ Article 1(1) of the 2008 Directive.

²⁰⁹ Recital 7 of the 2008 Directive.

²¹⁰ Recital 17 of the 2008 Directive.

3.195 The 2008 Directive applies to mediation in cross border civil and commercial disputes only, but it also states that “nothing should prevent Member States from applying such provisions also to internal mediation processes.”²¹¹ The 2008 Directive does not apply to pre-contractual negotiation, to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it is legally binding as to the resolution of the dispute.²¹² This allows Member States to preserve existing arrangements, such as the mediation and conciliation services of the Labour Relations Commission.²¹³

(1) Voluntary Nature of Mediation

3.196 The 2008 Directive defines mediation as:

“...a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.”²¹⁴

3.197 This structured process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.²¹⁵ The 2008 Directive also states that “The mediation provided for in the Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time.”²¹⁶

3.198 Article 5 (1) of the 2008 Directive states that:

“A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.”

3.199 In this respect the 2008 Directive seeks to preserve the autonomy of the parties and to avoid their being compelled to mediate. A court, who is in a

²¹¹ Recital 8 of the 2008 Directive.

²¹² Recital 11 of the 2008 Directive.

²¹³ See Chapter 4, below.

²¹⁴ Article 3 (a) of the 2008 Directive.

²¹⁵ Article 3 (a) of the 2008 Directive.

²¹⁶ Recital 13 of the 2008 Directive.

unique position to evaluate the situation, is given discretion to invite the parties to use mediation or at least to attend an information session thereon, which may prove useful in situations where it appears that the parties, have not considered mediation. The Directive also notes that the courts should be able to draw the parties' attention to the possibility of mediation whenever appropriate.²¹⁷ While the 2008 Directive promotes voluntary referral to mediation it also recognises that national legislation may introduce compulsory mediation or provide for incentives or sanctions in relation to mediation.²¹⁸

(2) Confidentiality

3.200 The principle of confidentiality in the mediation process is a key element of the 2008 Directive.²¹⁹ Article 7 of the 2008 Directive states:

“Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular, when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.²²⁰

3.201 Recital 7 states that nothing prevents Member States from enacting stricter measures to protect the confidentiality of mediation.²²¹

3.202 In the context of confidentiality the Commission notes that the United States *Uniform Mediation Act 2001* (UMA) provides greater detail in relation to confidentiality and mediation and has attempted to clarify the various confidentiality protections afforded by individual states in the United States. No

²¹⁷ Recital 13 of the 2008 Directive.

²¹⁸ Article 5(2) of the 2008 Directive.

²¹⁹ Recital 23 of the 2008 Directive.

²²⁰ Article 7 of the 2008 Directive.

²²¹ Article 7(2) of the 2008 Directive.

confidentiality statute that includes the UMA provision creates an absolute confidentiality privilege. Section 4 (b) of the UMA states that:

- “(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
 - (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
 - (3) A non-party participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the non-party participant.
- (c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.”

3.203 The UMA also provides for exclusions from, waivers of and exceptions to privilege. Exclusions include collective bargaining mediations, grievance mediations under collective bargaining agreements, judicially conducted settlement conferences, school student-to-student mediations and mediations between youths in a juvenile correctional institution.²²² Mediation parties may exclude a particular mediation from privilege protection if they agree to do so, in a signed record, in advance of mediation.²²³ After mediation, a party may waive privilege in a record or orally at a proceeding.²²⁴

3.204 The UMA also provides five separate exceptions to the privilege: public records and meetings, threats and crimes, professional misconduct, child and adult protection and agreements reached in mediation.²²⁵ The UMA includes a broad definition of communication, namely, “statements that are made orally, through conduct, or in writing or other recorded activity.” The protection provided is also similar to the attorney-client privilege protection in that a mediator’s mental impressions and observations and work product are considered communications for purposes of the privilege.²²⁶

²²² See O.R.C. § 2710.02 (B).

²²³ See O.R.C. § 2710.02 (C).

²²⁴ See O.R.C. § 2710.04(A).

²²⁵ See O.R.C. § 2710.05.

²²⁶ § 2(2) Reporter’s Notes.

(3) Self Determination

3.205 Returning to the 2008 Directive it also deals explicitly with the issue of self-determination by stating that “The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time.”²²⁷ This reflects the fundamental principle of self-determination and party-control in mediation.

(4) Efficiency

3.206 The 2008 Directive also acknowledges that “Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties.”²²⁸

3.207 The Commission notes that the European Commission’s 2001 Recommendation of 4 April 2001 states that once a dispute has been submitted it should be dealt with in the shortest possible time commensurate with the nature of the dispute. The 2001 Recommendation also states that the body responsible for the ADR procedure should periodically review its progress to ensure that the parties’ dispute is being dealt with expeditiously and appropriately.

(5) Neutrality & Impartiality of Mediators

3.208 The 2008 Directive does not specifically state that mediators must be neutral and impartial. Nonetheless, one of the introductory recitals to the Directive states that mediators should be made aware of the existence of the European Code of Conduct for Mediators which does set out principles of neutrality and impartiality.²²⁹

3.209 It is notable that the European Commission’s 2001 Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes states that impartiality is a fundamental principle of ADR, in the following terms:

“Impartiality should be guaranteed by ensuring that those responsible for the procedure:

- (a) are appointed for a fixed term and shall not be liable to be relieved from their duties without just cause;
- (b) have no perceived or actual conflict of interest with either party;

²²⁷ Recital 13 of the 2008 Directive.

²²⁸ Recital 6 of the 2008 Directive.

²²⁹ Recital 17 of the 2008 Directive.

(c) provide information about their impartiality and competence to both parties prior to the commencement of the procedure.”

(6) Flexibility

3.210 The mechanisms should aim at preserving the flexibility of the mediation process.²³⁰

(7) Quality & Transparency of Process

3.211 The 2008 Directive obliges Member States to encourage the training of mediators and the development of, and adherence to, voluntary codes of conduct and other effective quality control mechanisms concerning the provision of mediation services.²³¹ These mechanisms may include market-based solutions (that is non-statutory arrangements) provided that they aim to preserve the flexibility of the mediation process and the autonomy of the parties and to ensure that mediation is conducted in an effective, impartial and competent way.

3.212 The 2008 Directive states that Member States should encourage the provision of information to the general public on how to contact mediators and organisations who provide mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.²³² The Directive also states that Member States must encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way manner.²³³

(8) Enforceability of Mediated Agreements

3.213 The enforceability of outcomes is an important feature of dispute resolution processes. A decision of a court is legally binding and is enforceable on the parties to the dispute and enables the final resolution of a dispute. Decisions made using arbitration are binding on disputants, but most ADR processes, by contrast, do not produce legally binding outcomes.²³⁴

3.214 At present, parties who mediate in circumstances where they have not commenced litigation are usually restricted to reducing the terms of any

²³⁰ Recital 17 of the 2008 Directive.

²³¹ Article 4(1) of the 2008 Directive.

²³² Recital 25 of the 2008 Directive.

²³³ Article 4(2) of the 2008 Directive.

²³⁴ See Thompson “Enforcing Rights Generated in Court-Connected Mediation - Tension between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice” (2003) 19 Ohio St J on Disp Resol 509.

settlement and the obligations flowing from it to a written agreement for enforcement, breach of which obliges the injured party to commence legal proceedings. The 2008 EC Directive obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. Article 6 of the 2008 Directive states that

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

3.215 Currently in Ireland, (with some exceptions) no formal means exist by which mediated settlement agreements are enforceable, except those concluded during court proceedings, such as family proceedings, which may be ruled by the court.²³⁵ Although parties will in most cases voluntarily comply with the terms of an agreement reached in mediation, a formally enforceable agreement can be desirable for obligations, such as child maintenance, which require regular payments over a fairly long period. This would enable parties to give an agreement resulting from mediation a status similar to that of a judgment without having to commence judicial proceedings.

3.216 Article 6(2) of the 2008 Directive states that:

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

3.217 *The Commission provisionally recommends that a Court may enforce any agreement reached at mediation or conciliation.*

(9) Limitation Periods

3.218 Article 8 of the 2008 EC Directive addresses the effect of mediation on limitation periods. It states that:

“Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute

²³⁵ Stewart and Moore “Mediation in Ireland— An improving environment” (2005) 12(5) CLP 115.

by the expiry of limitation or prescription periods during the mediation process.”

3.219 As with the rule on confidentiality, it can be argued that this provision also indirectly promotes the use of mediation by ensuring that parties’ access to justice is preserved should mediation not succeed.

3.220 *The Commission invites submissions as to whether the parties in a mediation or conciliation may agree in writing to suspend the running of any limitation period.*

J Conclusion

3.221 The Commission considers that the 2008 Directive serves as an important recognition at a European level of the potential for mediation to improve access to justice. The Commission considers that it would be useful to consider whether the provisions of the Directive should be extended, as the Directive itself envisages, to mediations in civil and commercial matters which do not have a cross-border aspect but which are domestic disputes.

3.222 The Commission notes on this matter that this may also be an issue in which the Department of Enterprise, Trade and Employment may be minded to engage in a public consultation process in the context of the implementation of the EC directive which must occur by 2011. The Commission will ensure that in that event no duplication of work will occur and will ensure there is appropriate liaison with the Department.

3.223 *The Commission invites submissions as to whether the 2008 EC Directive on Certain Aspects on Mediation in Civil and Commercial Matters should be applied to disputes that do not involve a cross-border element, that is domestic disputes.*

CHAPTER 4 EMPLOYMENT DISPUTES & INDUSTRIAL RELATIONS: THE ROLE OF ADR

A Introduction

4.01 Ireland has a comprehensive set of statutory bodies which are responsible for the resolution of employment grievances and disputes outside of the court system. ADR processes such as facilitation, mediation, and conciliation play important roles in the activities of most of these statutory agencies. Their integration into the employment sector, as viable and efficient mechanisms for the resolution of disputes and preservation of relationships, serves to illustrate the potential which ADR provides in this area.

4.02 The Commission does not propose to make any recommendations in this area, and the discussion is for the purposes of indicating the suitability of ADR in a specific context. In Part B the Commission provides an overview of the nature of employment disputes and the appropriateness of ADR in the resolution of such disputes. In Part C the Commission discusses the role of the Labour Relations Commission. In Part D the Commission explores the role of mediation in the resolution of disputes at the Equality Tribunal. In Part E the Commission outlines the functions of the Labour Court. In Part F the Commission examines the role of the Employment Appeals Tribunal. In Part F the Commission explores recent developments in employment law and ADR.

B Employment Disputes: An Overview

4.03 In employment disputes, an important distinction can be made between conflicts of interest and conflicts of rights.

“Conflicts of interests are normally associated with employment relations disputes between employers and employees over aspects of pay and working conditions such as changes to reward systems or proposed changes to the working environment. Conflicts of rights are

more concerned with alleged violations of legally enforceable employment rights.”¹

4.04 Conflict, whether of interests or of rights, is an inevitable part of everyday working life. It has been noted that an important issue is the need to resolve any such dispute quickly.

“When a dispute arises in the workplace, it is in the interests of all parties to resolve it as soon as possible. There is a window of opportunity for early resolution. Delay increases the likelihood of positions becoming entrenched and the dispute leading to formal processes, with significant financial costs to both partiesand a serious impact on employers and employees in terms of lost time, stress and the likely breakdown of the employment relationship.”²

4.05 In Ireland in 2006, 7,350 working days were lost in 10 industrial disputes with approximately 1,200 workers involved.³ Research conducted by the Centre for Effective Dispute Resolution (CEDR) indicates that businesses in the United Kingdom spend approximately £277,000 in time and fees on a typical employment dispute. Of this total figure £72,000 is spent on management time in tackling the dispute. CEDR suggests that if the parties mediated the dispute at the earliest stage possible, costs would be greatly reduced to approximately £9,000.⁴

4.06 In addition to the possible financial savings which can be achieved by mediation and conciliation, more importantly, they can provide a safe and confidential environment for the parties to focus on preserving their relationship. Employment disputes grow out of relationships and the parties to an employment dispute often both wish to have the trust and confidence in their

¹ Teague “New Employment Times and the Changing Dynamics of Conflict Resolution at Work: the Case of Ireland” (2006) 28 Comp. Lab. L. & Pol’y J. 57 at 65.

² Gibbons “*Better Dispute Resolution. A review of employment dispute resolution in Great Britain*” (Department of Trade and Industry, March 2007) at 23. Available at <http://www.berr.gov.uk/files/file38516.pdf>.

³ Chairman of the Labour Relations Commission, speaking at the Joint Committee on Enterprise, Trade and Employment, 5 March 2008. Available at <http://debates.oireachtas.ie>.

⁴ *Businesses spend £277,000 in time and fees on a typical employment dispute* (Centre for Effective Dispute Resolution, December 2006). Available at http://www.cedr.com/index.php?location=/news/archive/20061204_90.htm¶m=releases.

relationship restored and enhanced. Emotions, such as anger, frustration, embarrassment and regret, can cause the parties to become entrenched in their positions if these are not expressed and explored. This is particularly true when disputes enter the adversarial system and the focus is on legal rights as opposed to underlying interests and emotions.⁵ Furthermore, ADR can encourage parties to consider novel remedies such as training, job modification, letters of reference, changes in organisational structure, or letters of apology.

4.07 The statutory bodies responsible for the resolution of employment disputes in this jurisdiction, such as the Labour Relations Commission, also emphasise that employers must ensure that they put in place internal mechanisms for the resolution of any grievances which arise. “It is in the interest of all, the employer and worker, and also the State, to provide an efficient, effective, fair and respected procedure to resolve those disputes.”⁶ The Labour Relations Commission recommends that the parties to an industrial dispute should only resort to the Commission's services when local procedures have been exhausted and when every effort has been made to resolve the issue in dispute within the undertaking concerned.⁷

4.08 The importance for employers of implementing and observing appropriate grievance policies has been highlighted in a number of decisions. In *The Health Board v BC and the Labour Court*⁸ the High Court quoted part of a determination of the Labour Court:

“The adoption of a Code of Practice, the adoption of a policy statement on the prevention of sexual harassment, the existence of guidelines as to how all staff should behave, and the establishment of clear grievance procedures, all constitute the kind of ‘reasonable steps’ which employers should adopt and which will be accepted by the Court as evidence of the employer's bona fides in this type of dispute.”

4.09 ADR processes, specifically mediation and conciliation, by their voluntary and confidential nature, have a significant role to play in the resolution of employment disputes within an organisation. As noted by Stewart:

⁵ See Chapter 1, above at 1.07.

⁶ Stewart “Resolution of Employment Disputes” (2004) 1 IELJ 5 at 136.

⁷ *Labour Relations Commission General Policy*. Available at http://www.lrc.ie/ViewDoc.asp?fn=/documents/aboutus/general_policy.htm&CatID=3&m=a.

⁸ [1994] E.L.R. 27.

“There is no reason why employers should not insert mediation or general ADR clauses into employment contracts with a view to settling disputes with their employees. Although an employee cannot be forced to mediate where a statutory remedy is available, for instance, where a dispute over equal pay arises, in some cases the desire to resolve the matter privately and without undue antagonism being created between the parties makes mediation attractive.”⁹

4.10 The benefits of incorporating ADR processes into an organisation’s internal grievance and disciplinary procedures include transparency, flexibility, confidentiality and efficiency. ADR can also offer greater sensitivity to the needs of the particular business and their employees, especially in highly sensitive and personal disputes such as sexual harassment claims. Moreover, voluntary solutions can build greater commitment and self-reliance between the disputants to their relationship.¹⁰ The Commission notes that mediation has also been developed by some employers to resolve personal injuries claims.¹¹

4.11 Where internal ADR mechanisms fail to resolve the dispute, employers and employees have a comprehensive set of statutory bodies which are available to assist them in the resolution of the dispute. In the following sections, the Commission provides an overview of these statutory bodies and the role which ADR processes plays in resolving employment disputes.

C Labour Relations Commission

4.12 The Labour Relations Commission was an agency established by the *Industrial Relations Act 1990*¹² to promote effective resolution of workplace

⁹ Stewart “Resolution of Employment Disputes” (2004) 1 IELJ 5 at 136.

¹⁰ Brown “Dispute Resolution – an International Perspective”. Paper presented at the Labour Relations Commission Symposium *New Perspectives on Workplace Change*, 9TH November 2006, Dublin. Available at www.lrc.ie.

¹¹ See *Health and Safety Review*, May 2002 and September 2003, referring to a mediation scheme by Dublin City Council. Available at www.healthandsafetyreview.ie.

¹² The *Industrial Relations Act 1990 Act* also provided for important changes in law relating to industrial action as well as to the industrial relations mechanisms for dealing with industrial disputes. The Labour Court had been responsible for providing a conciliation service since 1946 and a Rights Commissioner Service since 1969. The 1990 Act changed the role of the Court and re-assigned these services to the Labour Relations Commission in order to make the Labour Court the appellate body.

disputes as well as stable, high quality employment relations.¹³ As noted by Meenan, “One of the main reasons for its establishment was to enhance the appellate function of the Labour Court which has hearing too many matters that could and should have been resolved at a lower level or between the parties themselves.”¹⁴

4.13 The Labour Relations Commission “... has placed itself at the centre of dispute resolution in Irish industrial relations and has consistently evolved to meet the needs of its major clients – Government, employer bodies, trade unions and employees”¹⁵ by providing a comprehensive range of industrial relations services including an advisory advice, conciliation and mediation services and a rights commission service.¹⁶ According to Kieran Mulvey, Chief Executive of the Labour Relations Commission “Ireland is internationally acknowledged as the leading benchmarker on both dispute resolution and employment law by the International Labour Organisation and the European Union.”¹⁷

(1) Conciliation Service

4.14 The Labour Relations Commission describes conciliation as “a voluntary mediation process” and the process can be described as “a facilitated search for agreement between disputing parties.”¹⁸ The aim of conciliation is “to bring about a timely and effective settlement of industrial disputes without resort to strikes or lockouts, and to hasten the termination of work stoppages or

¹³ Teague “New Employment Times and the Changing Dynamics of Conflict Resolution at Work: the Case of Ireland” (2006) 28 Comp. Lab. L. & Pol’y J. 57 at 59.

¹⁴ Meenan *Working Within the Law: a Practical Guide for Employers and Employees* (2nd ed Oak Tree Press 1999) at 511.

¹⁵ *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 2. Available at www.lrc.ie.

¹⁶ The British Advisory, Conciliation and Arbitration Service (Acas) established in 1974, performs similar functions to the Labour Relations Commission. For further information on Acas see www.acas.org.uk.

¹⁷ Chief Executive of the Labour Relations Commission speaking at the Joint Committee on Enterprise, Trade, and Employment, 5 March 2008. Available at <http://debates.oireachtas.ie>.

¹⁸ See the *Conciliation Service Process* (Labour Relations Commission, 2004). Available at www.lrc.ie.

industrial action where these have occurred.”¹⁹ The Conciliation Service remains the primary industrial dispute resolution service in the State in terms of numbers of industrial disputes handled²⁰ and “... for many, it constitutes the identity of the organisation.”²¹

4.15 The Conciliation Service is available free of charge to almost all employees and employers with the exceptions of certain persons employed "by or under the State" such as the Defence Forces, the Gardaí, and teachers who have their own Conciliation and Arbitration Schemes.²² Conciliation is voluntary and non-binding and there are only two possible outcomes, namely, settlement or disagreement.

4.16 The process of conciliation usually begins when one or both disputing parties contact the Commission requesting assistance with their industrial relations dispute. Alternatively, it can be offered by the Commission as a helpful initiative in a 'stand-off' situation where no formal request for conciliation has been made.²³ Arrangements for conciliation meetings are finalised only when both parties confirm their willingness to participate in the process.

4.17 Conciliation involves a series of meetings that usually take place on the same day. The process starts with the Industrial Relations Officer (IRO)²⁴ chairing a joint meeting of the parties representing the employees and the employer. The IRO then meets the parties separately. The first meeting enables the IRO to hear the parties' assessment of the dispute. Subsequent meetings

¹⁹ *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 23. Available at www.lrc.ie.

²⁰ *Ibid.*

²¹ Chairman of the Labour Relations Commission speaking at the Joint Committee on Enterprise, Trade and Employment, 5 March 2008. Available at <http://debates.oireachtas.ie>.

²² Section 23 of the 1990 Act. The *Civil Service Regulation (Amendment) 2005* provides civil servants the right of access to the Employment Appeals Tribunal and the Rights Commissioner Service of the Labour Relations Commission.

²³ For example, in 2008 the Labour Relations Commission, on its own initiative invited two nursing unions and health service employers to exploratory talks aimed at finding a basis a dispute. See www.dohc.ie/press/releases/2008/20080508.html.

²⁴ The Labour Relations Commission assigns a mediator, known as an Industrial Relations Officer (IRO), who acts as an independent, impartial chairperson in discussions and negotiations between the negotiating teams that represent the employer and the employees.

explore the possibilities for a settlement. The IRO must treat as confidential all information received during the course of conciliation.²⁵ They will not disclose this information to any other party unless expressly permitted to do so.²⁶

4.18 The Commission never imposes an outcome on the parties. Writing in 1947, the then Chairman of the Labour Court identified the role of a conciliator as that of “an experienced neutral who has no power but to act as a friendly chairman and go between.”²⁷ His description of the role, which mirrors that of a mediator, is no longer applicable to the modern advisory role as “the conciliator is now expected to be a vigorous and pro-active agent in identifying options for the resolution of disputes.”²⁸

4.19 The IRO may make proposals for settlement to the parties where they fail to reach a mutually acceptable agreement between themselves but does not impose a proposal on the parties. The IRO may also adjourn the proceedings to allow the parties consider their positions. The parties retain control over the outcome of the conciliation at all times as they may choose to accept or reject any proposals recommended by the IRO. Where the process ends in continuing disagreement, the parties have the option of referring the dispute to the Labour Court for recommendation.

Case Example: Conciliation Service

A union made a claim for a member wage increase from a company. The claim was rejected as it was in breach of the National Wage Agreement. The company proposed a gain-sharing arrangement with the union on the basis of certain changes in working practices. However, local discussion on the proposal broke down. There was disagreement on the amount of savings the company would make from the new arrangements. The Conciliation Service of the LRC was approached and a mediator was appointed. The mediator or IRO took part in the discussions between the union and company in an impartial and independent way. First the IRO listened to both parties' assessment of the situation. Then individual meetings were held. Once the IRO understood both positions, separate and joint discussions were held.

²⁵ See Section 26(6) of the 1990 Act.

²⁶ See the *Conciliation Service Process* (Labour Relations Commission, January 2004). Available at www.lrc.ie.

²⁷ Speech delivered by R. Morished “The Industrial Relations Act, 1946: An Outline of the Act, with some comparisons with other countries” (March, 1947). Available at http://www.tara.tcd.ie/bitstream/2262/5601/1/jssisiVolXVII671_690.pdf.

²⁸ *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 24. Available at www.lrc.ie.

With the objective help of the IRO a mutually acceptable agreement regarding new work practices was reached. These new practices were put in place and a satisfactory gain sharing agreement was established.²⁹

4.20 In 2006, the Conciliation Service Division chaired 1,959 conciliation conferences and secured a settlement in 81% of all cases referred to it.³⁰ Where no resolution of a dispute is possible at conciliation, the Service endeavours to secure the agreement of the parties to proceed to the Labour Court for investigation and recommendation.³¹

4.21 In 2007, the Labour Relations Commission carried out a client survey to determine satisfaction levels in relation to the conciliation service.³² The clients interviewed for the survey came from the private and public sectors, Government Departments, the Labour Court, representative bodies - such as trade unions and employer organisations - as well as selected individuals with key experience of restructuring in Irish based enterprises.

4.22 Among the most favourable responses, clients referred to its 'huge success rate' and they viewed conciliation as a 'well established and robust process'. The skills of the conciliation officers were commented upon favourably, such as their ability to 'bang heads', forcing parties 'to face realities', and their 'capability to suggest solutions'. They were seen as impartial 'in the main'; they allow the parties to have a handle on the outcomes; and provided a 'rapid response when needed.'³³

4.23 As to negative responses some clients indicated that access and process can be slow, and that there was at times an 'insufficient appreciation' of sectoral conditions.³⁴ The survey also demonstrated that the extent of the Commission's services and expertise may not be fully understood by clients and

²⁹ "A Brief History of Industrial Relations in Ireland" (2004) Business 2000 8th ed., *The Irish Times* at 2.

³⁰ *Statistics from the Conciliation Service Division*. (Labour Relations Commission, 2008). Available at <http://www.lrc.ie/viewdoc.asp?Docid=606&Catid=19&StartDate=1+January+2008&m=s>.

³¹ *Ibid.*

³² *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 13. Available at www.lrc.ie.

³³ *Ibid.* at 14.

³⁴ *Ibid.*

potential clients.³⁵ In its *Strategic Objectives 2008 – 2010*, the Labour Relations Commission has recognised that a “client’s experience of conciliation can be enhanced through a deeper understanding, by the client, of the dynamics of the conciliation process.”³⁶ The Division plans to provide clients with a guide explaining the means employed by the Service on the day of a conference and their expectations of clients in approaching the conciliation process.

(2) Advisory Services Division

4.24 The Labour Relations Commission is statutorily charged with the promotion of good employment relations practice across all Irish workplaces.³⁷

“Key to this objective has been the delivery by the Advisory Services Division of innovative developments through its interventions over the past decade particularly in the area of the facilitation of dispute resolution/avoidance/structures in private enterprises and public service organisations.”³⁸

4.25 The Division assists employers and employees to build and maintain positive working relationships and works with them to develop and implement on-going effective problem-solving mechanisms. This assistance is confidential to the parties and free of charge.

Advisory Service Case Study: Ballygowan/ ATGWU

As a result of a dispute in 2000 the Advisory Service was invited by Ballygowan and ATGWU to carry out a review, to identify industrial relations problems, and make appropriate recommendations to both parties. The review, which was completed in 2001 recommended improvements in the following areas: on-site relationships; communications; HR function in Ballygowan; role of supervisors; and training. Following a progress review in December 2002 the Advisory Service initiated a facilitation process which commenced in January 2003 and focused on establishing more harmonious relationships in Ballygowan and dealing with outstanding industrial relations issues. The facilitation process concluded successfully in December 2003. A key element in the facilitation process was monitoring and review by the Advisory Service. The final review of progress achieved since the Advisory

³⁵ *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 22. Available at www.lrc.ie.

³⁶ *Ibid.*

³⁷ Section 25 (1)(b) of the *Industrial Relations Act 1990*.

³⁸ *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 28. Available at www.lrc.ie.

Service became involved with the parties took place in March 2004. The Advisory Service conducted the survey in the Ballygowan premises on the morning of 30th March 2004 using its Re-Solve technology. Overall the findings were extremely positive and demonstrated the considerable transition which had taken place while cautioning that continuing further vigilance and effort are required if improvements are to continue. Survey findings included that: 73% of all participants believe Ballygowan is a better place to work now than in 2000; 63% of all participants believe communications are better now in Ballygowan; 69% of all participants believe management/union relations are better; 57% of all participants believe personnel issues are dealt with more effectively; 67% of all participants believe training and development is better; 74% of all participants believe that the Advisory Service contributed to the improvement; and 65% of all participants believe that the facilitation process contributed to the improvement.

4.26 The Advisory Service delivers a broad range of services including: industrial relations audits,³⁹ joint working parties,⁴⁰ preventive services and advice,⁴¹ and frequent users initiative.⁴²

4.27 Under the *Industrial Relations Act 1990* the Labour Relations Commission also has responsibility to prepare and draw up Codes of Practice on industrial relations matters.⁴³ They are drafted by the Advisory Service and

³⁹ In conducting an industrial relations audit, the Advisory Service will audit all of the organisation's industrial relations practices. It will also survey all the distinct groups in the organisation. A survey gathers information, by interview or questionnaire, on the differing views of industrial relations across the organisation. Typically an audit is presented as a confidential report with findings and recommendations. The Division provides further support in terms of monitoring and, where necessary, assisting with the implementation of recommendations.

⁴⁰ The Division chairs joint working sessions of company management and employee representatives working together to agree and implement recommendations or decisions to improve industrial relations in the workplace.

⁴¹ Assistance is often required in situations where parties anticipate future difficulties. The Division assists in such cases by providing preventive mediation. The Division advises on and develops specific disputes and grievance procedures, new work practices, structural change and other measures.

⁴² The Frequent Users Initiative is a consultative process undertaken by the Advisory Service on a regular basis.

⁴³ Section 42 of the 1990 Act.

are written in consultation with employers, trade unions and other interested parties.⁴⁴ The Labour Relations Commission is required to submit the final draft of a Code to the Minister for Enterprise, Trade and Employment who will make an order declaring that the Code can become a Code of Practice under the 1990 Act.⁴⁵ The Labour Relations Commission has developed 10 Codes of Practice under this power.⁴⁶

4.28 These Codes are intended to be a guide for the use of employers, trade unions and others and to highlight and encourage the adoption of good industrial relations practice and are not legally binding. However, courts and industrial relations tribunals and institutions may take them into account and deem them to be relevant as admissible evidence in determining any proceedings before them.⁴⁷ The *Enhanced Code of Practice on Voluntary Dispute Resolution*⁴⁸ provides a recognised framework for the processing of disputes arising in situations where negotiating arrangements are not in place and where collective bargaining fails to take place.

4.29 According to the 2007 client survey, there was limited awareness and limited use by clients of the various codes of practice provided by the Commission. "That said, they are seen as having 'significant status' as they are jointly agreed official documents. They are seen as more important by trade unions than employers, and are useful when serious difficulties arise."⁴⁹

(3) Rights Commissioner Services

4.30 The Office of Rights Commissioner established in 1969 was transferred to the Labour Relations Commission under the *Industrial Relations Act 1990*. Its primary role is to investigate disputes, grievances and claims for

⁴⁴ Section 42(2) of the 1990 Act.

⁴⁵ Section 42(3) of the 1990 Act.

⁴⁶ These include :*Code of Practice On Disputes Procedure Including Procedures In Essential Services* (1992); *Code of Practice, Duties And Responsibilities Of Employee Representatives And The Protection And Facilities To Be Afforded Them By Their Employer* (1993); *Code of Practice On Voluntary Dispute Resolution* (2000); *Code of Practice On Grievance And Disciplinary Procedures* (2000); and *Code of Practice Detailing Procedures For Addressing Bullying In The Workplace* (2002).

⁴⁷ Section 42(4) of the 1990 Act.

⁴⁸ SI No.76 of 2004.

⁴⁹ *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 15. Available at www.lrc.ie

small groups of employees and individuals "...and the aim is provide people with access to justice without undergoing an excessively legalistic process."⁵⁰

4.31 The Labour Relations Commission describes the hearings as formal but not adversarial. It adds that "... they have acquired, gradually, a more encompassing quasi-judicial role in respect of employment rights due to the increasing complexity of employment legislation and its prescriptive content."⁵¹ The Chief Executive of the Labour Relations Commission has commented, however, that "we do not want every rights commissioner hearing to become a court of law. They are not, do not have to be and, as long as we are around, will not become courts of law."⁵²

4.32 Where a party objects to an investigation being carried out by a Rights Commissioner, the objection must be made in writing to the Commissioner within 3 weeks of the notification by post that a dispute has been referred.⁵³ Where such an objection is made, the Rights Commissioner cannot investigate the case. The applicant can instead request the Labour Court or, depending on the relevant legislation, the Employment Appeals Tribunal to hear the case.⁵⁴

4.33 Rights Commissioners issue the findings of their investigations in the form of either decisions or non-binding recommendations, depending on the legislation under which a case is referred.⁵⁵ Where a recommendation is issued, either party has 6 weeks to appeal that decision to the Labour Court.⁵⁶ In all of these cases, where the Rights Commissioner is asked to decide whether a person has established a legal entitlement under the particular legislation it can be appealed to the Employment Appeals Tribunal (EAT).

⁵⁰ Chief Executive of the Labour Relations Commission speaking at the Joint Committee on Enterprise, Trade and Employment, 5 March 2008. Available at <http://debates.oireachtas.ie>.

⁵¹ *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 32-35. Available at www.lrc.ie.

⁵² Chief Executive of the Labour Relations Commission speaking at the Joint Committee on Enterprise, Trade and Employment, 5 March 2008. Available at <http://debates.oireachtas.ie>.

⁵³ Section 13(b) of the *Industrial Relations Act 1969*.

⁵⁴ See www.lrc.ie.

⁵⁵ Section 13 of the 1969 Act.

⁵⁶ Section 13 (9)(a) of the 1969 Act.

Case Example: Rights Commissioner Service

A supermarket checkout operator brought a case of unfair dismissal against her employers. The situation arose when security staff searched staff one night found one employee with a number of grocery items in her possession and that she could produce a receipt for all the items except one packet of cigarettes. The incident was reported to the store manager. A meeting was held between the store manager, the employee and the employee's trade union representative. The employee was suspended with full pay pending a meeting with her full-time union representative. After this meeting she was dismissed on the grounds of gross misconduct. The dispute was brought to the LRC. A Rights Commissioner gave a statement of his findings. He outlined a number of discrepancies in the case against the employee. In considering the evidence and events, the Rights Commissioner decided that something untoward involving the employee did happen. He considered the employee's six-year unblemished record with the employer, and concluded that a punishment less than outright dismissal would be the more correct action to take. The Rights Commissioner recommended the employee be given unpaid suspension time and then reinstated in her job.

4.34 In 2006, there were 7,000 referrals to the Rights Commissioners. These referrals dealt the payment of wages, hours of work, unfair dismissals or more general industrial relations issues that they were unable to reconcile at a workplace level.⁵⁷ In 2007, the number of cases referred to the Rights Commissioners reached 9,000.⁵⁸

4.35 Clients surveyed in 2007 generally saw the Rights Commissioner Service as providing a 'very effective means of settling individual disputes especially around legislation.' The importance of this service has increased 'substantially' in the eyes of clients, and they see the service as having very 'practical knowledge/skills' because of their backgrounds. 'Traditionally', the survey notes, the Rights Commissioners are 'quite informal and user friendly.'⁵⁹

4.36 The most significant criticism of the Service related to the delay in obtaining hearings/recommendations. In an attempt to ease the backlog 14 Rights Commissioners have been put in place in 2008. By 2010, the Service

⁵⁷ Chairman of the Labour Relations Commission speaking at the Joint Committee on Enterprise, Trade and Employment, 5 March 2008. Available at <http://debates.oireachtas.ie>.

⁵⁸ *Ibid.*

⁵⁹ See *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 32-35. Available at www.lrc.ie.

expects that it should take no longer than 4 months from referral, to hearing, to adjudication once the current backlog of cases have been heard.⁶⁰

4.37 The National Social Partnership Agreement *Towards 2016* document envisages that, in the future all employment rights cases will be dealt with by Rights Commissioners at first instance, with an appeal to either the EAT or the Labour Court.⁶¹ An exception will be provided for unfair dismissal cases which will be dealt with by the EAT if the parties so elect (as at present), and in such cases an appeal will lie to the Circuit Court.⁶² Given that the workload of the Rights Commissioners will inevitably continue to grow it has also been recommended that consideration be given to developing a Mediation Service within the Rights Commissioner structure.⁶³

(4) Workplace Mediation Service

4.38 In 2005, the Labour Relations Commission decided to establish a Workplace Mediation Service on a pilot basis “in response to a perceived demand for an informal and confidential dispute resolution service, focusing on disputes involving individuals or small groups of employees.”⁶⁴ The service aims to provide a prompt, confidential and effective remedy to workplace conflicts, disputes and disagreements. “The process of mediation allows the exploration of issues in a very personal way and facilitates constructive engagement on issues where the level of personal emotional investment by the parties is quite high.”⁶⁵ The Workplace Mediation Service operates under the Conciliation

⁶⁰ See *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 32-35. Available at www.lrc.ie.

⁶¹ *Towards 2016: Ten-Year Framework Social Partnership Agreement 2006-2015* (Stationary Office, Department of An Taoiseach, 2006) at 97. Available at http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf.

⁶² See Bruton & O'Mahony “Employment law and reform: What is coming down the tracks?” (2007) 4 IELJ 4 at 121.

⁶³ *Submission on Employment Rights Bodies to the Department of Enterprise, Trade and Employment* (Irish Congress of Trade Unions, 2003) at 6. Available at www.ictu.ie.

⁶⁴ *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 27. Available at www.lrc.ie.

⁶⁵ *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (The Labour Relations Commission, February 2008) at 36. Available at www.lrc.ie.

Services Division. A group of 8 mediators was initially appointed and, in 2006, 4 additional mediators were assigned.

4.39 In 2006, the service was actively engaged in 24 cases, although the number of contacts and enquiries far exceeded this number.⁶⁶ 14 of these cases were in the public sector, the remaining 10 in the private sector. The main issues in cases requiring mediation involved interpersonal workplace relationships, often between managers/supervisors and subordinates. Issues around disciplinary and grievance procedures have also arisen together with workplace bullying.⁶⁷ The majority of cases relate to individuals, although 3 cases concerned group issues generally centred on group dynamics, relationships and reporting arrangements.⁶⁸

4.40 According to the 2007 client survey conducted by the Labour Relations Commission knowledge of the mediation service is not widespread, with usage confined mainly to the public service. The Commission is committed to developing the service and integrating it more fully into its suite of dispute resolution services.⁶⁹ Some concern was expressed in the survey that the service could divert resources and focus from key areas of conciliation. The Labour Relations Commission recognises that it must proceed with the development of the Workplace Mediation Service in a pragmatic manner, aware of the need to ensure that all its commitments under the 1990 Act are met.⁷⁰ In regard to bullying and harassment cases, mediation is seen as a better option than investigation and legal routes.⁷¹

4.41 The 'menu of choices' available at the Labour Relations Commission attests to its well-established role in the resolution of industrial disputes, whether collective or individual. The discussion in this section indicates that, on an ongoing basis, the Labour Relations Commission recognises that its conciliation services can be augmented by the development of further informal mediation processes particularly in the resolution of individual grievances in the workplace.

⁶⁶ *Conciliation Service 2006* (Labour Relations Commission, 2007). Summary available at <http://www.lrc.ie/viewprint.asp?DocID=606&StartDate=1+January+2007>.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Developing Best Practice in Employment Relationships: Strategic Objectives: 2008 – 2010* (Labour Relations Commission, 2008) at 27. Available at www.lrc.ie.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at 15.

D The Equality Tribunal

4.42 The Equality Tribunal was established under the *Employment Equality Act 1998* to ensure proper compliance with the increasingly complex body of equality legislation.⁷² Its core function is to investigate and/or mediate complaints of unlawful discrimination and its services are free of charge. The Tribunal has competence to act under 9 prohibited grounds of discrimination.⁷³ Its remit was extended to cover discrimination outside of employment under the *Equal Status Act 2000*.

(1) Mediation at the Equality Tribunal: An Overview

4.43 Section 78 of the *Employment Equality Act 1998* provides for the establishment of a mediation service, staffed by Equality Mediation Officers. A similar approach to mediation is also found in the *Equal Status Act 2000*.⁷⁴ Neither the 1998 Act nor the 2000 Act define the process of mediation. However, the Equality Tribunal Mediation Guidelines defines it as:

“...an internationally recognised process whereby a neutral and impartial person facilitates the parties in a dispute to explore their area(s) of dispute and, where possible, to assist them in reaching a mutually acceptable agreement / settlement. The mediator empowers the parties to negotiate their own agreement on a clear and informed basis, should each party wish to do so. The process is voluntary and either party may terminate it at any stage.”⁷⁵

4.44 The Commission acknowledges that this reflects the Commission’s definition of mediation.⁷⁶

4.45 The 1998 and 2000 Acts provide that if, at any time after a case has been referred to the Director of the Tribunal it appears to the Director that the case is one which could be resolved by mediation “the Director shall refer the

⁷² Teague *Towards Flexible Workplace Governance: Employment Rights, Dispute Resolution and Social Partnership in the Irish Republic* (The Policy Institute, Trinity College Dublin, 2005) at 59.

⁷³ These are: gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community. The grounds apply in relation to employment, the disposal of goods and property, the provision of services and accommodation, and in certain aspects of education.

⁷⁴ Section 24 of the 2000 Act.

⁷⁵ *Mediation Service: Guide to Procedures* (Equality Tribunal, 2002) at 2. Available at www.equalitytribunal.ie.

⁷⁶ See Chapter 2, above at 2.41.

case for mediation to an equality mediation officer.”⁷⁷ Under the *Employment Equality Act 1998* the Labour Court, on making a similar judgement, may refer a case to the Director for mediation by an equality mediation officer if the Court decides not to attempt to resolve the case itself.⁷⁸ The mediation option is available to the parties at any stage in the investigation process right up to the day of the hearing. It has often happened that a hearing is adjourned to give the parties an opportunity to resolve the case by mediation.⁷⁹

4.46 Mediation at the Equality Tribunal is completely voluntary. In adhering to the consensual nature of mediation, the 1998 and 2000 Acts provide that mediation cannot take place if either party objects.⁸⁰ Mediation has been reported to be more efficient than an investigation before an equality officer, on average 3 times quicker.⁸¹ An investigation is a quasi-judicial process carried out by a Tribunal Equality Officer who will consider submissions from both parties before arranging a joint hearing or hearings of the case to enable him/her to reach a decision in the matter. Investigations are conducted by trained Equality Officers who have extensive powers to enter premises and to obtain information to enable them to conduct an investigation. Decisions are binding and are published.

4.47 The mediation process is informal and does not involve written submissions. Mediation is conducted in private⁸² and agreements are not published, unlike Equality Officer investigations and decisions. The parties are also given a “cooling off” period before being asked to sign an agreement to

⁷⁷ Section 78(1) of the *Employment Equality Act, 1998*. Section 24 (1) of the *Equal Status Act 2000*.

⁷⁸ Section 78(2)(b). of the *Employment Equality Act 1998*

⁷⁹ Gogan *Developments in ADR: The Equality Tribunal's Mediation Service 2 Years On* (Equality Tribunal, 2002) at 8.

⁸⁰ Section 78(3) of the *Employment Equality Act 1998*. Section 24(2) of the *Equal Status Act 2000*.

⁸¹ Gogan *Developments in ADR: The Equality Tribunal's Mediation Service 2 Years On* (Equality Tribunal, 2002) at 1.

⁸² Section 78(4) of the *Employment Equality Act 1998*. Section 24(3) of the *Equal Status Act 2000*.

ensure that both sides can give informed consent on signing.⁸³ Mediators at the Equality Tribunal are accredited by the Mediators Institute of Ireland.⁸⁴

4.48 If the case is resolved through mediation, the mediator writes up the terms of the settlement and the agreement is signed by the complainant and the respondent. The agreement, when signed, is legally binding and enforceable.⁸⁵ If agreement is not reached and it appears to the mediator that the case cannot be resolved by mediation a notice to that effect will be issued by the mediator to both parties.⁸⁶

4.49 If a complainant wishes to apply for an Equality Officer investigation they must make an application to the Director of the Equality Tribunal within 28 days of the non-resolution notice. If the case returns to an Equality Officer for investigation both sides are precluded from using information disclosed by the other side at mediation without consent. In addition the mediator will not pass on any information from mediation to an investigating equality officer.⁸⁷

4.50 In 2006, 70% of the 185 cases referred to mediation were disposed of through the mediation process and did not need to be returned for investigation by an Equality Officer.⁸⁸ In approximately 90% of cases the mediation process was completed after one mediation session – with either agreement being reached or the case being deemed not resolvable. The flexibility of the agreements reached at the mediations proved its success as an appropriate mechanism for the resolution of discrimination claims.

(2) Flexibility of Agreements Reached at Mediation

4.51 It has been noted that mediation in the Equality Tribunal allows the parties to reach a settlement which meets their particular needs.⁸⁹ Some of the

⁸³ Gogan *Developments in ADR: The Equality Tribunal's Mediation Service 2 Years On* (Equality Tribunal, 2002) at 1.

⁸⁴ *Ibid.* at 5. For further information on the Mediators Institute of Ireland see Chapter 10, below.

⁸⁵ Section 78(5) of the *Employment Equality Act 1998*. Section 24(4) of the *Equal Status Act 2000*.

⁸⁶ Section 78(6) of the *Employment Equality Act 1998*. Section 24 5) of the *Equal Status Act 2000*.

⁸⁷ Gogan *Developments in ADR: The Equality Tribunal's Mediation Service 2 Years On* (Equality Tribunal, 2002) at 1-8.

⁸⁸ Equality Tribunal Mediation Review 2006 at 2. See www.equalitytribunal.ie.

⁸⁹ Gogan *Developments in ADR: The Equality Tribunal's Mediation Service 2 Years On* (Equality Tribunal, 2002) at 1.

outcomes of the 65 Employment Equality Mediation Agreements reached in 2006 were:

- an acknowledgement that a job advertisement may have appeared discriminatory in nature;
- an admission that inappropriate procedures were employed in relation to a dismissal and an apology for same given;
- an acknowledgement from both parties that they were willing to accept in good faith the other party's interpretation of the incident that had led to the complaint of discrimination;
- the provision of a positive job reference;
- an agreement by the parties that all copies of papers relating to the complaint would be destroyed as soon as possible after the signing of the agreement;
- an offer by a respondent to make a substantial payment to a charity of the complainants' choice; and
- an offer to an unsuccessful job applicant of tuition in word processing skills in advance of an upcoming word processing examination for a position within that organisation.⁹⁰

4.52 Some of the outcomes of the 19 Equal Status Mediation Agreements reached in 2006 were:

- an agreement by a college to waive any educational fees payable to the college in respect of the complainant's children who may be eligible to attend the college in the future;
- an offer by a Housing Authority to provide a larger property to the mother of a child with a disability;
- an invitation to a complainant and his family to attend a pub/restaurant for a drink or lunch at any time;
- an apology from a hotel to a person with a disability for not seeking clarification of her accommodation needs when her booking was being made;
- an acceptance that a case of mistaken identity may have led to a refusal of service in a pub; and
- an undertaking by a provider of life insurance to review the wording of their application form to ensure that potential clients are aware that HIV

⁹⁰ *Equality Tribunal Mediation Review 2006* at 17. See www.equalitytribunal.ie.

and hepatitis tests may be required in certain circumstances where applicants have lived abroad for more than a period of 6 months.⁹¹

(3) Conclusion

4.53 The process of mediation promoted and used by the Equality Tribunal mirrors the definition of mediation which the Commission provided in Chapter 2. The success of mediation at the Equality Tribunal is evident from the personalised, creative and flexible settlement agreements which have been created by the parties themselves and which would not have been available as remedies if the parties had litigated the claims.

E Labour Court

4.54 The Labour Court was established under the *Industrial Relations Act 1946*.⁹² Despite its title it is not a court of law in the traditional sense but operates as an industrial relations tribunal. The Labour Court itself recommends that a dispute should only be referred to the Court when all other efforts to resolve a dispute have failed. The Labour Court was established to provide a free, comprehensive service for the resolution of disputes about industrial relations, equality, organisation of working time, national minimum wage, part-time work and fixed-term work matters.⁹³

(1) Main Functions of the Labour Court

4.55 In terms of industrial relations disputes, the Labour Court's main functions are to

- Investigate trade disputes under the *Industrial Relations Acts, 1949 to 2004*;
- Investigate, at the request of the Minister for Enterprise, Trade and Employment, trade disputes affecting the public interest, or conduct an enquiry into a trade dispute of special importance and report on its findings;
- Hear appeals from Rights Commissioners' recommendations under the *Industrial Relations Acts*; and

⁹¹ *Equality Tribunal Mediation Review 2006* at 17. See www.equalitytribunal.ie.

⁹² There have been many changes to its structure and functions since then, following amendments to the *Industrial Relations Act* in 1969, 1976, 1990, 2001 and 2004.

⁹³ See www.labourcourt.ie.

- Establish Joint Labour Committees and decide on questions concerning their operation register and vary and interpret employment agreements.

4.56 In terms of equality, the Labour Court's main functions are to:

- Hear appeals of decisions and recommendations under the *Employment Equality Act 1998* and the equality provisions of the *Pensions Act 1990*;
- Hear appeals from non-discrimination notices and substantive notices issued by the Equality Authority.

4.57 In terms of the organisation of working time the Labour Court's main functions are to:

- Approve working time agreements under the *Organisation of Working Time Act 1997*;
- Hear appeals of Rights Commissioners' decisions under the *Organisation of Working Time Act 1997*; and
- Investigate complaints of the non-implementation of Rights Commissioners' decisions under the *Organisation of Working Time Act 1997*.

4.58 In terms of the national minimum wage the Labour Court's main functions are to:

- Hear appeals from Rights Commissioners' decisions under the *National Minimum Wage Act 2000*; and
- Investigate complaints of the non-implementation of Rights Commissioners' decisions under the *National Minimum Wage Act 2000* and hear applications for exemption from the provisions of the *National Minimum Wage Act 2000*.

4.59 In terms of part-time work the Labour Court's main functions are to:

- Approve collective agreements regarding casual part-time employees under the *Protection of Employees (Part-Time Work) Act 2001*;
- Hear appeals from Rights Commissioners' decisions under the *Protection of Employees (Part-Time Work) Act 2001*; and
- Investigate complaints of non-implementation of Rights Commissioners' decisions under the *Protection of Employees (Part-Time Work) Act 2001*.

4.60 In terms of fixed-term work the Labour Court's main functions are to

- Hear appeals from Rights Commissioners' decisions under the *Protection of Employees (Fixed-Term Work) Act 2003*; and
- Investigate complaints of non-implementation of Rights Commissioners' decisions under the *Protection of Employees (Fixed-Term Work) Act 2003*.⁹⁴

4.61 There are a number of referral methods in which a case can be heard in the Labour Court. These include; referral by the Labour Relations Commission at the request of the parties where they have failed to reach an agreement through conciliation; referral directly by the Labour Relations Commission; Ministerial intervention in a dispute resulting in a direct referral; appeal of the decision of a Rights Commissioner; appeal of the decision of the Director of the Equality Tribunal; and direct referral in cases of an advance acceptance of a recommendation where a worker, or workers, in a trade dispute, or a trade union on his/her/their behalf; or if all the parties agree in advance to accept the Labour Court's recommendation (the Court may give priority to the investigation of such disputes), they can bring their case directly to the Labour Court.⁹⁵

4.62 The Labour Court investigates disputes by requiring the parties to a dispute to provide it with written submissions of their positions in relation to the dispute, and, subsequently, by holding hearings which both parties attend. The hearings are usually held in private, unless one of the parties requests a public hearing. After the hearing the Labour Court will issue to the parties its written recommendation as to how the dispute might be resolved.

4.63 In general, recommendations are non binding. Both sides are, however, expected to give favourable consideration to the Court's recommendations. Most recommendations are thus implemented and this voluntary acceptance invests the Labour Court with considerable moral authority. The Court's determinations under the *Employment Equality Act 1998*, *Pensions Act 1990*, *Organisation of Working Time 1997*, *National Minimum Wage Act 2000*, *Industrial Relations (Amendment) Act 2001*, *Protection of Employees (Part- Time Work) 2001* and *Protection of Employees (Fixed-Term Work) 2003 Act* are legally binding.

4.64 In 2007, the Labour Court received 924 referrals, held 819 hearings, issued 549 recommendations (or determinations or decisions or orders) and

⁹⁴ See *Guide to the Labour Court* at 5-8. Available at www.labourcourt.ie.

⁹⁵ See Teague *Towards Flexible Workplace Governance: Employment Rights, Dispute Resolution and Social Partnership in the Irish Republic* (The Policy Institute, Trinity College Dublin, 2005) at 50.

investigated 100 cases which were settled at or after a hearing and made 11 Employment Regulation Orders.⁹⁶

F Employment Appeals Tribunal

4.65 The Employment Appeals Tribunal (EAT) was established under the *Redundancy Payments Act 1967*. Until 1977, it was known as the Redundancy Appeals Tribunal. In 1977, under section 18 of the *Unfair Dismissals Act 1977*, its name was changed to the Employment Appeals Tribunal.

4.66 The Tribunal is an independent body bound to “act judicially” and was established to provide a speedy, fair, inexpensive and informal means for individuals to seek remedies for alleged infringements of their statutory rights. The Tribunal was originally set up to adjudicate in disputes about redundancy between employees and employers and between employees or employers and the Minister for Enterprise, Trade and Employment or a Deciding Officer. The scope of its functions has been greatly expanded over the years. The EAT now deals with cases or claims involving unfair dismissal, constructive dismissal, redundancy, minimum notice of termination of employment, terms of employment, holidays, payment of wages and deductions from wages.⁹⁷ While the Tribunal has no mediation role under its procedures, it does encourage settlement between the parties where it sees that it might be achieved.

4.67 The EAT sits in divisions of three – a legally qualified Chair and a representative from the employer and worker nominees appointed by the Minister. The EAT can, through written Determinations, award compensation or direct a course of action that the employer must follow in order to comply with the particular legislation under which an employee has claimed they were denied their full entitlement.

⁹⁶ *Labour Court Annual Report 2007*(Labour Court, 2008) at 7.

⁹⁷ The Employment Appeals Tribunal adjudicates on employment disputes under the following: *Redundancy Payments Acts 1967 to 2007*, *Minimum Notice and Terms of Employment Acts 1973 to 2001*; *Unfair Dismissals Acts 1977 to 2001*; *Protection of Employees (Employers’ Insolvency) Acts 1984 to 2001*; *Organisation of Working Time Act 1997*; *Payment of Wages Act 1991*; *Terms of Employment (Information) Act 1994 and 2001*; *Maternity Protection Act 1994*; *Adoptive Leave Act 1995*; *Protection of Young Persons (Employment) Act 1996*; *Parental Leave Act 1998*; *Protections for Persons Reporting Child Abuse Act 1998*; *European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003*; *European Communities (Protection of Employment) Regulations 2000*; *Carer’s Leave Act 2001*; and *Competition Act 2002*.

4.68 EAT determinations can be enforced through the Circuit Court if, after the appeal period has expired (usually 6 weeks) the employer has refused to comply. The Circuit Court is empowered, without taking evidence, to issue an order that will either uphold, overturn or vary the determination. Either party to an EAT hearing may also appeal the determination to the High Court on a point of law.

4.69 Cases can be referred directly to the EAT, or on appeal, within 6 weeks of a Rights Commissioner Recommendation. Unfair dismissal cases, either at first instance or on appeal from recommendations of Rights Commissioners, account for 36% of the annual total number of cases disposed of by the Tribunal, and account for approximately 95% of the annual workload of the Tribunal in terms of time spent at hearings.⁹⁸

4.70 In 2006, the total number of claims referred to the Tribunal either directly, or on appeal from recommendations and decisions of the Rights' Commissioner Service was 3,480 and the Tribunal disposed of 3,169 claims and appeals. Adjudicating on unfair dismissal cases continues to account for approximately 95% of the Tribunal's workload in terms of the time spent at hearings. The number of unfair dismissal cases referred to the Tribunal in 2006 and the number disposed of was 1171.⁹⁹ In 2006, the annual average waiting period to have a claim heard was 27 weeks in Dublin, and 44 weeks in provincial areas at year's end.¹⁰⁰ The Tribunal awarded total compensation of €2,627,003 in 221 cases in 2006. The average compensation awarded by the Tribunal was €11,886.89.

4.71 In 2007, the EAT Procedures Revision Working Group was established with the aim of improving the EAT's procedures. The Report of the Working Group discusses to what extent the Tribunal provides a process that is fair, speedy, inexpensive and informal. The Report also discusses the extent to which EAT procedures should be changed.¹⁰¹ The Report of the Group suggested that proceedings at the EAT have "moved very substantially from the

⁹⁸ *Employment Appeals Tribunal Procedures Revision Group: Report to the Minister for Labour Affairs* (May 2007) at 2. Available at <http://www.entemp.ie/publications/employment/2007/EATProceduresrevisiongroup.pdf>.

⁹⁹ *Employment Appeals Tribunal Annual Report 2006* at 2.

¹⁰⁰ *Ibid.* at 6.

¹⁰¹ *Employment Appeals Tribunal Procedures Revision Group: Report to the Minister for Labour Affairs* (May 2007) at 2. Available at <http://www.entemp.ie/publications/employment/2007/EATProceduresrevisiongroup.pdf>.

more informal inquisitorial model to a more long drawn out, over legalistic, adversarial, costly and, especially from the perspective of employees and unions, intimidating environment.”¹⁰²

4.72 The Report of the Working Group recommended:

- An interim process between the exchange of initial documentation and the substantive hearing be established. This preliminary process, which should be held in private, would be chaired by an experienced member of the Tribunal (Vice Chair or Ordinary Member) and its purpose would be to confirm basic factual information, to seek and identify the core issues between the parties, to outline the practice, procedures and approach adopted at substantive tribunal hearings and, in so far as it is the wish of the parties, to facilitate a resolution by way of settlement between them.
- In accordance with current informal practice in the EAT, the secretary of the hearing would, immediately prior to the Hearing, inform the parties that they may request time from the Tribunal to bilaterally reconcile their differences. A reasonable amount of time may be allowed before the commencement of the hearing to facilitate settlement.
- The hearing would begin with the Chair explaining the process followed by opening statements by or on behalf of both sides. The purpose of these statements would be to identify the core issues of law and fact, to the extent it was not already clear from the preliminary process stage.
- The Tribunal should be given the power to issue consent determinations on application by the parties to a settlement which has been reached. This would give legal force to the terms of the settlement.¹⁰³

¹⁰² *Employment Appeals Tribunal Procedures Revision Group: Report to the Minister for Labour Affairs* (May 2007) at 3. Available at <http://www.entemp.ie/publications/employment/2007/EATProceduresrevisiongroup.pdf>.

¹⁰³ *Ibid.* at 27.

G Other Developments in Ireland

(1) Partnership

(a) Social Partnership

4.73 Social partnership is a process by which issues of social policy can be agreed between the Government and the social partners. The social partners include trade unions, employers, farming organisations and the community and voluntary sector. The most recent social partnership agreement, *Towards 2016*, was agreed in 2006 and covers a 10 year period. All social partnership agreements have included provisions for the orderly processing of grievances and disputes.

(b) National Centre for Partnership and Performance

4.74 The (NCP) operates under the auspices of the Department of the Taoiseach.¹⁰⁴ The Centre facilitates organisational change, based on partnership, in both the private and public sectors. The NCP was established in 2001 and was placed on a statutory footing under the *National Economic and Social Development Office Act 2006* (NESDO). NESDO's other constituent bodies are the National Economic and Social Council (NESC) and the National Economic and Social Forum (NESF).

4.75 Since its establishment in 2001, the NCP has developed a series of practical guidance and learning materials to assist employers and employees in the public and private sectors to understand and appreciate the benefits of a partnership-led approach to implementing change and innovation in the workplace. The NCP provides information, research, advice and guidance materials to Irish public and private-sector organisations interested in exploring or implementing workplace change and innovation through partnership. Partnership in the workplace includes:

- formal collaborative arrangements between management and employees and unions
- participative approaches to work and new work practices
- formal collaborative arrangements between management and employees in non-unionised organisations
- informal arrangements to work together
- direct and indirect employee involvement

¹⁰⁴ See www.ncpp.ie.

- high performance/ high commitment workplaces.¹⁰⁵

(2) National Employment Rights Authority

4.76 The National Employment Rights Authority (NERA) was established on a non-statutory basis in 2007 under the Social Partnership Agreement *Towards 2016*.¹⁰⁶ Three units dealing with employment rights, which were formerly within the Department of Enterprise, Trade and Employment, have been subsumed into NERA. These are the Employment Rights Information Unit, the Labour Inspectorate, and the Prosecution and Enforcement Unit.

4.77 NERA aims to secure compliance with employment rights legislation and to foster a culture of compliance in Ireland through five main functions: information; inspection; enforcement; prosecution; and the protection of young persons. It will be established on a statutory footing with the enactment of the *Employment Law Compliance Bill 2008*.¹⁰⁷

H Conclusion

4.78 In this Chapter, the Commission has outlined the broad range of ADR processes, notably mediation and conciliation, which are available in the employment area under the diverse range of statutory codes available to this important aspect of Irish social policy. The Commission indicated at the beginning of the Chapter that it did not propose to make any specific recommendations in this area. Indeed, it is clear that, to the extent that the complexities of the issues in this area bring continuous challenges to adapt arrangements to growing demands, the various agencies involved in this area have been proactive in this respect.

¹⁰⁵ *Achieving High Performance: Partnership Works - The International Evidence* (Research Series No. 1, National Centre for Partnership and Performance, 2003) at 10. Available at <http://www.ncpp.ie/dynamic/docs/Partnership%20Works.pdf>. See also *Working to our Advantage A National Workplace Strategy: Report of the Forum on the Workplace of the Future* (National Centre for Partnership and Performance, 2005). Available at <http://www.ncpp.ie/dynamic/docs/NationalWorkplaceStrategy.pdf>.

¹⁰⁶ *Towards 2016: Ten-Year Framework Social Partnership Agreement 2006-2015* (Stationary Office, Department of An Taoiseach, 2006). Available at http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Towards2016PartnershipAgreement.pdf.

¹⁰⁷ Bill No. 18 of 2008.

CHAPTER 5 FAMILY DISPUTES & ADR

A Introduction

5.01 In this chapter the Commission examines the role of ADR in resolving family law disputes. In Part B the Commission discusses the need for information meetings for separating or divorcing couples. In Part C the Commission explores the initiative of parenting plans. In Part D the Commission examines the provision for counselling in family law disputes. In Part E the Commission discusses mediation and family disputes. In Part F the Commission discusses the development of collaborative lawyering. In Part G the Commission examines a pilot case conferencing procedure for family disputes. In Part H the Commission provides a summary of ADR developments in England and Wales, with a specific focus on Government initiatives in the area of family mediation. In Part I the Commission discusses the appropriateness of mediation for resolving family probate disputes.

B Information Meetings

(1) *The Commission Report on Family Courts 1996*

5.02 In its *Report on Family Courts*¹ the Commission made a number of recommendations in relation to providing information to those who have begun, or are considering the institution of, family law proceedings.² The Commission recommended that a Family Court Information Centre be established at various regional courts, with responsibility for providing objectively presented information relating to available alternatives to litigation, the implications of separation, court processes and case management information and information on available support services. The Commission recommended that any legal information received should be information only, and not advice.³

¹ Law Reform Commission *Report on Family Courts* (LRC 52-1996).

² *Ibid.* at 55-59.

³ See Recommendation 22 in the Law Reform Commission's *Report on Family Courts* (LRC 52-1996) at 132.

5.03 The Commission also recommended that where proceedings for judicial separation have been instituted, the parties should be required within two weeks to attend the proposed Family Court Information Centre, if they had not already done so, to receive information as appropriate concerning the various family support services available, including welfare service and to receive information and advice concerning the availability and purpose of mediation.⁴ This information would be given by an official with appropriate knowledge and counselling skills who would act under the auspices of the court. The Commission recommended that this information should be augmented by an appropriate video, and by the provision of a full information pack and that there should be emphasis throughout on the need to give priority to the interests of any dependent children and on the importance of avoiding any damage or distress to them.⁵

5.04 In relation to other family law proceedings before the Court, including custody, access, maintenance and barring and safety order applications, the Commission recommended that the opportunity should be presented to the parties to attend the proposed Family Court Information Centre to receive similar free information and advice.⁶ This should not be compulsory, but the court would be obliged to consider at the beginning of the hearing whether to adjourn proceedings, if appropriate, to require the parties to attend the proposed Information Centre to receive the relevant information and advice. The Court should not, however, adjourn proceedings for this purpose unless satisfied that no additional risks would be involved in respect of any family members whose safety or welfare was in issue.⁷

5.05 The Commission also recommended that the parties should not be required to attend the session together, that attendance at information sessions should be free of charge and that attendance should be certified by the proposed Information Centre.⁸ Where the appropriate certificate of attendance or waiver has not been obtained, the Court would have the right, at its discretion, to adjourn the case until the parties had attended the proposed Information Centre. Where one or both of the parties still refused to attend, the

⁴ See Recommendation 23 of the Law Reform Commission's *Report on the Family Courts* (LRC 52-1996) at 132.

⁵ *Ibid.*

⁶ See recommendation 24 of the Law Reform Commission's *Report on the Family Courts* (LRC 52-1996) at 132.

⁷ *Ibid.*

⁸ See Recommendations 25-28 of the Law Reform Commission's *Report on the Family Courts* (LRC 52-1996) at 133.

court would proceed with the hearing, but written information would be sent to the parties.⁹ These recommendations have not been implemented.

(2) 2007 Courts Service Report on Family Law Reporting Pilot Project

5.06 The 2007 Report prepared for the Courts Service of Ireland reiterated a number of the recommendations in the Commission's 1996 Report. It also recommended that each proposed regional family courts should have an information office providing information on all options available for the resolution of family law disputes, mediation facilities, an office of the Legal Aid Board, and family support and child assessment services.¹⁰ It also recommended that the Courts Service should commission or prepare comprehensive information booklets on the various options available for the resolution of family law disputes, including the option of ADR, and the reliefs available in the District Court and Circuit Court and how to apply for them.¹¹

(3) Models in Other Jurisdictions

(a) Canada

5.07 Parenting After Separation (PAS) is a free three-hour information session for separating parents sponsored by the Ministry of the Attorney General in British Columbia.¹² The purpose of the sessions is to help parents make informed choices about separation and conflict, taking into account the best interests of their children. Information is presented in lectures, videos, handouts and interaction with participants in three key areas: the impact of separation on children and adults, and how parents can best help their children through this difficult time; the full range of dispute resolution options available in the justice system, including mediation and the court process; how the child support guidelines work; and how to find out more about them. Both the person making an application to court and the other parent must attend a PAS session before their first court appearance if:

- an original order for child custody, access, guardianship or child support is sought, or

⁹ *Ibid.*

¹⁰ Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service, October 2007) Recommendation 2 at 61.

¹¹ *Ibid.* Recommendation 8 at 62.

¹² See <http://www.ag.gov.bc.ca/family-justice/help/pas/index.htm>. See also Kruk "Promoting Co-operative Parenting After Separation: A Therapeutic/interventionist Model of Family Mediation" (1993) 15 *Journal of Family Therapy* 235.

- a variation of an existing order for child custody, access, guardianship or child support is sought.

5.08 Parents can apply to the court for an exemption from attending a PAS session when they are applying for a restraining order or if they feel their personal safety, or the safety of their children, is at risk as a result of urgent and exceptional circumstances.

(b) United States

5.09 Structured educational programmes for separating and divorcing parents have been developed and widely implemented in the United States and exist in either a mandatory or a voluntary format.¹³ Research on parent education programmes in the United States, and parental response to these programmes, suggests that well-designed divorce education programs should be mandatory and early in the divorce process for all parents disputing custody or access issues as they bring children's needs and voices sharply into focus for parents in a completely nonadversarial manner, and at relatively low cost.¹⁴

5.10 In a 2008 survey, it was found that parent education programmes operate in 46 states throughout the United States. 27 programs make attendance mandatory by statute. 15 states require all parents to attend, while 14 states leave it within the discretion of the court. There are two states which provide parent education programmes but do not make them mandatory.¹⁵

5.11 By way of example, in 1995 the St Louis Family Court in Missouri introduced a court mediation-education programme. Couples filing for divorce are required to attend one or two hour long programmes. The first programme, entitled "Parenting", addresses the needs of children during the divorce. The second mandatory session is entitled "Orientation to the Family Court" and

¹³ See Kelly "The United States experience", keynote address at the Proceedings of the International Forum on Family Relationships in Transition Legislative, Practical and Policy Responses, December 2005. Available at <http://www.aifs.gov.au/>.

¹⁴ Kelly "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice" (2002) 10 Va J Soc Pol'y & L 129 at 133-136.

¹⁵ Pollet and Lombreglia "A Nationwide Survey of Mandatory Parent Education" (2008) 46(2) *Family Court Review* 375-394. See also Stone, Clark and McKenry "Qualitative Evaluation of a Parent Education Program for Divorcing Parents" (2000) 34 *Journal of Divorce and Remarriage* 25; and Gray et al "Making it Work: An Evaluation of Court-mandated Parenting Workshops for Divorcing Parents" (1997) 35 *Family and Conciliation Courts Review* 280.

focuses on how mediation can speed up the process and the court's role in a divorce. The goals of the programme are: to reduce the time taken to complete a divorce; to enable couples with the help of a court-appointed mediator to work out a divorce agreement themselves to reduce the number of contested divorces going to trial; to reduce extended conflict and stress; and to reduce the cost for the couples involved.¹⁶

5.12 Research has indicated that voluntary participation in these education programmes is quite low, and so the trend has been to make them mandatory for all parents who seek the assistance of the courts for disputes about their children, or at the very least to provide courts with the authority to order the classes.¹⁷

5.13 For these reasons the Commission reiterates the recommendations expressed in its 1996 *Report on Family Courts*, that information meetings be required in family disputes.

5.14 *The Commission reiterates its previous recommendations set out in the Commission's 1996 Report on Family Courts (LRC 52-1996) in relation to information in family law disputes.*

C Parenting Plans

5.15 When parents separate, children often experience distress, and their adjustment post-separation may be adversely affected when the relationship with one of their parents is severed.¹⁸ Arguments in favour of the use of parenting plans are based on the premise that the process of developing a parenting plan will encourage joint parental responsibility and prevent future

¹⁶ See Blaney "Family Mediation: A Comparative Overview" (1999) 2 IJFL 2.

¹⁷ See Kelly "The United States experience", keynote address at the Proceedings of the International Forum on Family Relationships in Transition Legislative, Practical and Policy Responses, December 2005. Available at <http://www.aifs.gov.au/>.

¹⁸ See Lamb and Kelly "Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children: A Rejoinder to Solomon and Biringen" (2001) 39 *Family Court Review* 365–371; Catania "Learning from the Process of Decision: The Parenting Plan" (2001) *BYU L Rev* 857; Kelly "Developing Beneficial Parenting Plan Models for Children following Separation and Divorce" (2004) *J Am Acad Matrimonial Law* 237; and Ellis "Washington State Parenting Act in the Courts: Reconciling Discretion and Justice in Parenting Plan Disputes" (1994) 69 *Wash L Rev* 679.

disputes arising by ensuring that potentially contentious issues have been identified and dealt with in as positive a way as possible.¹⁹

5.16 The Family Mediation Service which forms part of the Family Support Agency²⁰ describes a parenting plan as:

“...a carefully devised schedule which lays out how to share time with the children, how to manage responsibilities, and how to make decisions about the children. School arrangements, child care, holidays, and pocket money can all be part of a parenting plan. It is a plan that is individual to each family and takes into account everyone’s needs and interests.”²¹

5.17 The Family Mediation Service suggests that parenting plans provide continuity for children in their relationship with each parent and provide a structure so that everyone is clear about future living arrangements. Furthermore, clearly agreed plans help to reduce conflict.²² The Commission notes that in some jurisdictions completion of parenting plans and parenting education programmes are mandatory.

(a) Voluntary Parenting Plans: England & Wales

5.18 Parenting plans were introduced in England and Wales in the context of information meetings to encourage parents to focus on the needs of their children and to plan for their future in practical everyday ways. Parents are provided with a booklet in which they can enter arrangements for their children under nine broad headings including living arrangements, schooling, health, special days and staying in contact with the wider family.²³

¹⁹ *Letter of Advice to the Attorney-General on Parenting Plans Part 2* (Family Law Council of Australia and the National Alternative Dispute Resolution Advisory Council of Australia, March 2000 Available at <http://www.ag.gov.au/agd/www/Flchome.nsf/Page/23060A7517DA516ECA256B43007E4AB7?OpenDocument>).

²⁰ See paragraphs 5.50 to 5.55, below.

²¹ *What is a Parenting Plan?* Family Mediation Service. Available at <http://www.fsa.ie/familymediation/parentingplan.html>.

²² *Ibid.*

²³ Stark, Laing and Richards “Developing and Using a Parenting Plan” in *Information Meetings and Associated Provisions within the Family Law Act 1996: Final Evaluation Report* (Research conducted by the Centre for Family Studies at the University of Newcastle upon Tyne, Lord Chancellor’s Department, 2001) at 577.

5.19 In the evaluation of the information meetings and parenting plan pilots it was found that very few parents (13%) actually completed the plan, but a larger group found it useful in a variety of ways.²⁴ Parents used it as an agenda for discussions with their partner, children and others, and as a reminder of the issues that they needed to settle.

5.20 The British Government proposes to further develop these plans to provide templates which parents can use to enable them to reach the best possible arrangements for their child. They also illustrate to parents how the courts are likely to approach their case if considering an application. Mediators and solicitors will also be able to use this additional information as a guide when advising their clients.²⁵

(b) Statutory Parenting Plans: Australia

5.21 Parenting plans were given legislative recognition in the *Family Law Act 1975* as amended by the *Family Law Reform Act 1995*. Parents of a child were encouraged to agree about matters concerning the child rather than seeking an order from a court and, in reaching their agreement, to regard the best interests of the child as the paramount consideration.²⁶

5.22 A parenting plan was defined in the changes introduced in 1995 as an agreement in writing, made between the parents of a child, dealing with one or more of the following: the person or persons with whom a child is to live; contact between a child and another person or persons; maintenance of a child; and any other aspect of parental responsibility for a child.²⁷ Those matters, apart from maintenance of a child, are called "child welfare provisions."

5.23 The child welfare provisions of a registered parenting plan took effect as if they were orders for residence, contact or specific issues. In other words,

²⁴ Stark, Laing and Richards "Developing and Using a Parenting Plan" in *Information Meetings and Associated Provisions within the Family Law Act 1996: Final Evaluation Report* (Research conducted by the Centre for Family Studies at the University of Newcastle upon Tyne, Lord Chancellor's Department, 2001) at 577-582.

²⁵ *Parental Separation: Children's Needs and Parents' Responsibilities: Report of the Responses to Consultation and Agenda for Action* (Consultation Paper, CM 6273, 2004). Presented to the Parliament by: the Secretary of State for Constitutional Affairs, the Secretary of State for Education, and the Secretary of State for Trade and Industry.

²⁶ Section 63B of the of the *Family Law Act 1975* , as amended by the *Family Law Reform Act 1995*.

²⁷ Section 63C of the 1975 Act as amended by the 1995 Act.

the provisions of the plan became legally enforceable once the parenting plan was registered and were enforceable as if they were court orders. An unregistered parenting plan had no such effect.

5.24 A parenting plan became registered in a court after scrutiny by that court. To be registered, an application was made to the court accompanied by a copy of the plan together with either a certificate of independent legal advice or a certificate that the plan was developed after consultation with a child and family counsellor. The court may have registered the plan if it considered it appropriate to do so having regard to the best interests of the child to which the plan relates. A parenting plan may have been set aside where: it has been obtained by fraud, duress or undue influence; the parties wish it to be set aside; or it is in the child's best interests for it to be set aside.²⁸

5.25 Statistics kept by the Family Court of Australia indicate that there was limited use of the registration provisions introduced by the 1995 Act. For example, in 1998-99 there were a total of 395 applications to register parenting plans in the Family Court of Australia. In the same period, 320 plans were registered and there were 5 revocations of previously registered parenting plans. By contrast, there were 15,553 consent orders sought during 1998-99.²⁹ It has been suggested that a major reason for the diminishing use of parenting plans was that lawyers and the court were not encouraging parents to register their parenting plans because of: the costs involved; the complexities associated with amending registered parenting plans (revocation by further agreement); and an appreciation that the registration of parenting plans is contrary to the intention that they should be a flexible alternative to court adjudication.³⁰

5.26 Arising from this, further changes were made by the *Family Law Amendment (Shared Responsibility) Act 2006*. As a result a plan is not legally enforceable but parents can have their parenting plans made into 'consent orders'. Consent orders are orders made by the court, with the agreement of both parents, and have the same legal force as other court orders.

5.27 The 2006 Act amended the obligations of advisers (that is, legal practitioners, family counsellors, family dispute resolution practitioners and

²⁸ Section 63H of the 1975 Act, as amended by the 1995 Act.

²⁹ *Letter of Advice to the Attorney-General on Parenting Plans Part 3* (Family Law Council of Australia and the National Alternative Dispute Resolution Advisory Council of Australia, March 2000). Available at <http://www.ag.gov.au/agd/www/Flchome.nsf/Page/23060A7517DA516ECA256B43007E4AB7?OpenDocument>.

³⁰ *Ibid.*

family consultants) under the 1975 Act when giving advice to people in relation to parenting plans. Two different types of information must be provided under this section, depending on whether an adviser is advising people generally about arrangements for children after separation or providing specific advice in connection with the making of a parenting plan. Advisers assisting or advising people about parental responsibility following the breakdown of a relationship must inform the people they are advising:

- that they could consider entering into a parenting plan, and
- about the services that are available to provide assistance to develop a plan.

5.28 When advising people about the making of a parenting plan, an adviser must inform them, that where it is in the best interests of the child and reasonably practicable, they could consider as an option an arrangement where they equally share the time spent with the child and that if an equal time arrangement is not appropriate, they could consider whether an arrangement where the child spends substantial and significant time with each person would be in the best interests of the child and reasonably practicable. This ensures that the focus is not just only on the amount of time that each parent spends with the child but also on the type of time that is spent.

(c) Parenting Agreements: New Zealand

5.29 The New Zealand *Care of Children Act 2004* encourages parents and guardians to agree on their own arrangements for the care of their children. When an agreement is not working in practice the 2004 Act also encourages parents and guardians to sort out their differences themselves. The Family Court arranges free counselling, if necessary, to help them come to a new agreement. Only as a last resort will the Court become involved and settle the disagreement by making a parenting order. As under the Australian 1975 Act (as amended in 2006) a parenting agreement cannot be enforced like a Court order or a commercial contract can. However, parents and guardians can apply to the Family Court to have a parenting agreement made into a Court order. The terms of the agreement can then be enforced like any other Court order.

5.30 *The Commission invites submissions as to whether separating and divorcing parents should be encouraged to develop parenting plans.*

D Counselling

5.31 In its 1994 *Consultation Paper on Family Courts* the Commission defined counselling as

“professional assistance to parties with respect to their psychological and emotional problems. Counselling may be directed towards the individual or it may address the parties' relationship.”³¹

5.32 In the 1996 *Report on Family Courts*, the Commission recommended that solicitors should be under a duty of care to advise clients to engage in counselling. On foot of this recommendation, section 20 of the *Children Act 1997* places a duty on solicitors to advise their clients to consider engaging in counselling to assist them in reaching an agreement about the custody of the child, the right of access to the child or any other question affecting the welfare of the child. The solicitor must also give to their client the name and address of persons qualified to give counselling on the matter.

(1) New Zealand

5.33 The New Zealand Family Court was established in 1981 under the *Family Proceedings Act 1980*. Family ADR processes in New Zealand have developed quite differently to those in Australia.³² The first level of dispute resolution is counselling at the court or privately. If this does not resolve the matter, a mediation conference is held, the aim of which “is to demonstrate to a couple that settlement of the dispute is their responsibility.”³³ If the mediation conference fails to bring resolution to the dispute, then the final step is adjudication.

5.34 The *Family Proceedings Act 1980* also established the post of Counselling Co-ordinator, whose duty is to facilitate the proper functioning of the Family Court and of counselling and related services, such as mediation.³⁴ The 1980 Act provides that the Co-ordinator is an officer of the court. Counselling is available on request by one of the spouses³⁵ or by “mandatory

³¹ Law Reform Commission *Consultation Paper on Family Courts* (March 1994) at 33.

³² See Law Commission of New Zealand *Report on Dispute Resolution in the Family Court* (NZLC Report No. 82, 2003).

³³ Wilson “Alternative Dispute Resolution” (1993) 7 *Auckland University Law Review* 2 362 at 363.

³⁴ Section 8 of the 1980 Act.

³⁵ Section 9 of the 1980 Act.

referral” after an application for a separation order.³⁶ Discretionary counselling is available when the court considers, at any stage of the proceedings, that such counselling may promote reconciliation or conciliation.³⁷ The 1980 Act provides that a court may direct referral to conciliation counselling in an application relating to custody of a child. Counselling can be dispensed with if the court considers that violence has been used or threatened against a spouse or child, or if delay or other reasonable cause exists.³⁸ Referral to conciliation counselling may also come from legal advisers who have a statutory duty to encourage conciliation.³⁹

5.35 One of the Family Court Judges in New Zealand, Cartwright J, has stated that the Counselling Co-ordinator has played a pivotal role in the Family Court and has been critical to its success.⁴⁰ Cartwright J noted that “in all parts of New Zealand where there is a counselling co-ordinator attached to the Family Court the level of judicial work in Court has dropped markedly.” The Co-ordinator had humanised the “otherwise bureaucratic face of the Court”. The lawyers had also taken advantage of the service by referring clients to the Co-ordinator for appropriate referral to a counsellor or other agency.⁴¹

5.36 In its 2003 *Report on Dispute Resolution in the Family Court*⁴² the Law Commission of New Zealand recommended that counselling should be available to all couples regardless of sexual orientation. The Law Commission also recommended that there should be discretion to offer counselling to people who are parents of the same child, but who have never lived together. It also recommended that people other than the separating parents should be able to attend counselling, if, in the view of the Family Court Co-ordinator (or on the recommendation of the counsellor and parties) it is thought this might help resolve the dispute and that children should have access to counselling services.⁴³

³⁶ Section 10 of the 1980 Act.

³⁷ Section 19 of the 1980 Act.

³⁸ Section 10(3) of the 1980 Act.

³⁹ Section 8 of the 1980 Act.

⁴⁰ Cartwright J “The New Zealand Family Court in operation: legislation,” *Commonwealth Law Bulletin* (Jan 1986) at 239-40.

⁴¹ *Ibid.*

⁴² Law Commission of New Zealand *Report on Dispute Resolution in the Family Court* (NZLC Report No. 82, 2003).

⁴³ *Ibid.* at 219.

E Mediation

(1) Family Mediation: An Overview

5.37 The 2007 Report prepared for the Courts Service *Family Law Reporting Pilot Project* suggests that the unplanned development of the family law system in Ireland has led to a situation where, “...lists are overcrowded; cases, including urgent cases involving matters on the welfare of children, are adjourned for weeks or months at a time. Practices and procedures can vary from district to district and circuit to circuit, compounding a general lack of information about how the family law system works.”⁴⁴ In responding to the Report, the then Minister for Justice stated “We have to examine whether there could be some procedure short of the courts that could be used to resolve differences. A full court hearing in a family law case is a bit like a tribunal of inquiry for a politician.”⁴⁵ Mediation is one of the methods by which family law disputes can be resolved and the need to use it for the resolution of family law disputes has been widely acknowledged.

5.38 In 1985, the Joint Committee on Marriage Breakdown described the essential features of mediation as follows:⁴⁶

- that it accepted that the marriage had broken down and was therefore totally different from reconciliation;
- that it conveyed the idea that the parties should be responsible for resolving their own disputes; and
- that it was designed to deal with specific problems caused by breakdown and provided a basis for continued interaction and co-operation between the spouses.

5.39 As noted by the Family Mediation Service, issues which can be addressed and resolved by family mediation include:

- The family home – where will each person live and where will the children live?

⁴⁴ Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service, October 2007) at 58.

⁴⁵ “Lenihan to urge more family mediation” *The Irish Times* 13th October 2007. In 2007, 4,081 applications for divorce and 1,689 applications for judicial separation were received by the Circuit Court. 5,210 applications for custody and access were dealt with by the District Courts. A further 4,448 maintenance applications were dealt with in the District Courts. (*Courts Service Annual Report 2007* at 28).

⁴⁶ *Report of the Joint Committee on Marriage Breakdown* (March 1985), Chapter 8.

- Parenting – how will the children spend time with each of their parents and how will the parents communicate about their children?
- Financial support – will support be paid for one spouse and the children and how much will each person have to live on?
- Pensions – what entitlements are there and how will they be distributed?
- Assets – how will the couple divide their assets?
- Debts – how will they manage debts and other outgoings?
- Contents of the family home – how will the contents be allocated?⁴⁷

5.40 Proponents of family mediation argue that the traditional adversarial litigation system is unable to adapt to the needs unique to family breakdown. Where human relationships are strained, the adversarial approach may actually increase rather than reduce conflict.⁴⁸ “The basic nature of the adversarial system pits parents against each other, encourages polarised and positional thinking, and discourages parental communication, cooperation, and more mature thinking about children’s needs at a critical time of change and upheaval.”⁴⁹

5.41 In its *Consultation Paper on Family Courts*,⁵⁰ the Commission acknowledged a number of advantages and disadvantages for mediation. The Commission noted that the advantages that have been put forward for mediation as an alternative to the adversarial process include:

- Adversarial court hearings may exacerbate the friction and hostility inherent in most marital disputes, while the emphasis in mediation is rather on fostering co-operation and establishing workable arrangements for the future;

⁴⁷ *Family Support Agency Annual Report 2006* at 23. Available at <http://www.fsa.ie/publications/FSA%20Annual%20Report%202006%20Eng%20Version.pdf>.

⁴⁸ Alberta Law Reform Institute *Research Paper on Court-Connected Family Mediation Programs in Canada* (No. 20 1994) at 1.

⁴⁹ Kelly “Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice” (2002) 10 Va J Soc Pol’y & L 129 at 131.

⁵⁰ Law Reform Commission *Consultation Paper on Family Courts* (March 1994) at 32.

- Mediation offers the parties an opportunity to take control over their future arrangements, instead of leaving it in the hands of professionals;
- The costs of mediation may be less than the costs of a full hearing and disputes can be resolved more quickly than through the court process;
- Arrangements reached through agreement are more likely to be adhered to than solutions imposed by a court. This is especially so in arrangements relating to child custody and access; and
- Mediation is private. Mediation usually limits outside intervention (with the exception of legal advisers) to one professional.⁵¹

5.42 In terms of disadvantages, the Commission noted that:

- The process of mediation with its emphasis on the voluntary agreement of the parties tends to mask social and economic imbalance between the parties. The economically dependent spouse, usually the wife, is generally in a weaker contracting position than her partner;
- Mediation designates agreement between the parties as its aim, and it operates without the protection of legal norms and principles;
- Mediation removes control from the parties, even where its intention is to give them greater control. This criticism is associated in particular with schemes where the mediator actively encourages a particular form of settlement rather than letting the parties define their own terms;
- Instead of deregulating proceedings, mediation [this is more akin to the Commission's definition of conciliation⁵²] actually extends regulation, in particular under in-court schemes where experience shows that the professionals may tend to dominate and the proceedings become more adjudicative than conciliatory in nature. Mediation may also extend regulation in that simpler, alternative means of settlement might have been used if mediation were not available, such as settlement through solicitors; and
- The cost of mediation may be significant, and it is not established that it is in all cases less than the cost of court proceedings.⁵³

⁵¹ Law Reform Commission *Consultation Paper on Family Courts* (March 1994) at 32.

⁵² See Chapter 2, above at 2.129.

⁵³ Law Reform Commission *Consultation Paper on Family Courts* (March 1994) at 32.

5.43 The Commission acknowledges that mediation has advantages, but also some disadvantages. For this reason in its 1996 *Report on Family Courts* the Commission concluded that mediation services are not intended to replace the court system, but rather to divert appropriate cases from it. Some cases will and should be resolved in court and may not be appropriately resolved by mediation. Such cases, as previously noted by the Commission, include those where there is serious violence against one of the spouses, or where there are allegations of child sexual or physical abuse.⁵⁴ With these exceptions in mind, the Commission remains of the view that where appropriate, mediation should be considered by parties to a family dispute before litigation.

5.44 *The Commission provisionally recommends that, where appropriate, mediation should be considered by parties to a family dispute before litigation.*

(2) Legislative Development of Family Mediation in Ireland

5.45 The *Judicial Separation and Family Law Reform Act 1989* introduced the first statutory duty on solicitors to advise their clients in judicial separation proceedings to discuss reconciliation, mediation and making a separation agreement. The 1989 Act also required solicitors to give their clients the names and addresses of persons qualified to help effect a reconciliation between spouses who have become estranged, and the names and addresses of “persons and organisations qualified to provide a mediation service.”⁵⁵

5.46 Where a solicitor acting for an applicant or respondent fails to certify that he has advised his client as to these possibilities, the court has the power to adjourn the proceedings for such period as it deems reasonable to allow the solicitor to discuss these matters with his client.⁵⁶

5.47 The *Family Law (Divorce) Act 1996* imposes a similar duty on solicitors in divorce applications. Section 9 of the 1996 Act provides for the non-admissibility as evidence of communications relating to reconciliation, separation or divorce.⁵⁷

5.48 Similarly, section 20 of the *Guardianship of Infants Act 1964*,⁵⁸ as inserted by the *Children Act 1997*, requires the solicitor acting for an applicant

⁵⁴ Law Reform Commission *Report on Family Courts* (LRC 52-1996) paragraph 9.23.

⁵⁵ Section 5(1) of the 1989 Act.

⁵⁶ Section 7 of the 1989 Act.

⁵⁷ See Conneely “The Family Law (Divorce) Act 1996: Some Observations” (1997) 15 *ILT* 78.

⁵⁸ Section 11 of the 1997 Act.

for guardianship to discuss the possibility of using mediation to effect an agreement about custody, access or any question affecting the welfare of the child and to give to the applicant the names and addresses of persons qualified to provide an appropriate mediation service.⁵⁹

5.49 It has been suggested that the legislation appears to have little impact on the use of mediation by those whose relationships have broken down and that “some judges express scepticism as to whether the option of mediation is seriously discussed by many solicitors with their clients.”⁶⁰

(3) Family Mediation Service

5.50 The Family Mediation Service was established by the Department of Family and Social Affairs in 1986 as a pilot service and was placed on a statutory footing as part of the Family Support Agency (established under the *Family Support Agency Act 2001*). It operates a nationwide mediation service of four regional full time centres (Dublin, Cork, Galway and Limerick) and 12 part-time offices.

5.51 It is a confidential service that enables couples who have decided to separate, or who have already separated, to negotiate their own separation agreement. This is done with the help of a trained mediator, without resorting to adjudication through the courts.⁶¹ Unlike schemes in the United States and Australia, it is not directly affiliated to the court.

5.52 From 1986-1996, an average of 250 couples a year used the Family Mediation Service. The number using the Service has increased dramatically in more recent years. In 2006, the Service assisted 1,553 couples. Of these 875 were assisted to completion, a further 319 did not proceed after the intake session and the remaining couples were carried forward to 2007 and are continuing mediation.⁶²

5.53 The 875 couples who sought assistance from the Family Mediation Service in 2006 need to be seen in the context of 20,900 family law applications to the District Court, 5,835 applications to the Circuit Court and 90 applications, to the High Court, giving a total of 26,825 court applications in the area of family

⁵⁹ Blaney “Family Mediation: A Comparative Overview” (1999) 2 IJFL 2.

⁶⁰ Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service, October 2007) at 40.

⁶¹ See <http://www.fsa.ie/familymediation/index.html>.

⁶² Family Support Agency *Annual Report 2006* at 24. Available at <http://www.fsa.ie/publications/FSA%20Annual%20Report%202006%20Eng%20Version.pdf>.

law in 2006.⁶³ This indicates that the number of people who use the Family Mediation Service is low.

5.54 In the 2007 Report *Family Law Reporting Pilot Project* several reasons were proposed as to why there is a low uptake of mediation in family disputes in Ireland. These include:

- There is no obligation on a couple to undergo any mediation before having recourse to the courts;
- Some legal practitioners express concerns about the quality of mediation available in certain areas, and fear that their client's rights may not be upheld during the process, especially where there is an imbalance in power and resources between the parties;
- A client opting for mediation can be a client lost to a solicitor, which may have a bearing on the extent to which solicitors encourage their clients to seek a mediated settlement;
- Research carried out on behalf of the Family Mediation Service also found that both the public and the legal professions lacked information about the service and what it can do, which contributes to it not being used more.⁶⁴

5.55 The 2007 Report recommended that the Family Mediation Service should be expanded and that all family mediators should be subject to a national system of accreditation. The 2007 Report also recommended that the service should be linked more closely to the courts and linked in to collaborative law where appropriate.⁶⁵

(4) Issues in Family Mediation

(a) Voice of the Children in Family Mediation

5.56 A question arises in family mediation as to whether a child should actively participate in the mediation process to make his or her voice heard in

⁶³ Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service, October 2007) at 40.

⁶⁴ *Ibid.*

⁶⁵ Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service, October 2007) Recommendation 9 at 62. See Chapter 10 below for the Commission's discussion on training and accreditation for family mediators.

order for parents and mediators to make sure the child's best interests are met.⁶⁶

5.57 Articles 9 and 12 of the 1989 *UN Convention on the Rights of the Child* ratified by the State in 1992, declares the child's right to express an opinion and to have that opinion taken into account in any matters or procedures affecting them. Article 9 states:

"The right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

5.58 While Article 12 states:

"The rights of a child who has the capacity to form his or her own views to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

5.59 The 2003 Brussels II EC Regulation⁶⁷ concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility also recognises the right of the child to be heard, in accordance with his or her age and maturity, on matters relating to parental responsibility over the child.⁶⁸

5.60 It has been suggested that allowing the child to participate actively in a mediation process acknowledges the worth of the child and reduces a child's distress, especially because "research evidence shows that the parents' views of what children think can differ considerably from what the children themselves think."⁶⁹ Yet certain mediators feel that the involvement of children places an

⁶⁶ See Schoffer "Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation" (2005) 43 *Family Court Review* at 324; Neale and Smart *Good to Talk: Conversations with Children after Divorce* (Nuffield Foundation, London, 2000); Pedro-Carroll et al "Assisting Children Through Transition: Helping Parents Protect Their Children from the Toxic Effects of Ongoing Conflict in the Aftermath of Divorce" (2001) 39 *Family Court Review* 377; and, Harold and Murch "Children of Separated and Divorced Parents: Theory, Research and Future Directions" (2004) 7IJFL 3 16.

⁶⁷ Council Regulation (EC) No 2201/2003 of 27 November 2003.

⁶⁸ *Ibid.* Article 4.

⁶⁹ See Conneely "Researching the Irish Family Mediation Service: Children in Mediation" (2000) 4 IJFL 16; and Emery "Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation - Comments on Kelly's Resolving Child Custody Disputes" (2002) 10 Va J Soc Pol'y & L 164.

unfair burden on them and the mediator may be forced to abandon their neutral and impartial role and adopt the position of child advocate. Furthermore, research has shown that children's views often change over time and mediators have argued that the right of parents to determine their own decisions about their children is not necessarily at odds with the welfare of the children.⁷⁰

5.61 In Ireland, the voice of child will only be heard in a mediation where both parents give consent to the mediator to consult the child directly and the child agrees to partake.⁷¹ The Family Mediation Service *Code of Ethics and Professional Conduct* sets out several provisions which address the welfare of children in mediation proceedings. These include the following:

“Mediators have a special concern for the welfare of all the children of the family. They must encourage clients to focus upon the needs of the children as well as upon their own needs and must assist the clients to explore the situation;

Mediators must encourage the clients to consider their children’s own wishes and feelings. Where appropriate, they may discuss with the clients whether and to what extent it is proper to involve the children themselves in the mediation process in order to consult them about their wishes and feelings.

If, in a particular case, the mediator and clients agree that it is appropriate, to consult any child directly in mediation, the mediator should be trained for that purpose, must obtain the child’s consent and must provide appropriate facilities.

Where a mediator has a reasonable concern that a child may be at risk, the mediator will assist the clients themselves to report concerns to the appropriate agency and inform clients that a notification from the Service will be sent to Community Care. The mediator must inform clients who are unwilling or unable to take responsibility for reporting that a referral will be made by FMS in accordance with the procedures set out in FMS Child Protection Policy.”⁷²

5.62 In Australia, the *Family Law Act 1975*, as amended by the *Family Law Reform Act 1995* put a greater emphasis on the child’s best interests in the process of dispute resolution. An Australian study found that only 4% of

⁷⁰ *Ibid.*

⁷¹ See Lloyd “The Family Mediation Service: Recent Developments” [2001] 3 IJFL 23.

⁷² *Family Mediation Service Code of Ethics and Professional Conduct* (2002). Sections 5.16-5.19.

mediators had ever consulted school age children. Following this, a four month pilot project was launched into child consultation. The results of this study reported that over 80% of parents whose children were consulted as part of the mediation process felt that they had benefited 'a great deal' from it.⁷³

5.63 In 2006, a research report in New Zealand examined the efficacy of a mediation model which involves working with children who are actually included with their parents in parts of the mediation process at the time of separation.⁷⁴ The research involved interviewing 17 families at different stages of parental separation following attendance at a mediation process, and children had attended parts of this mediation with their parents. The families were selected from Family Court referrals. The 26 children involved ranged in age from 6 to 18 years. Findings indicated a high level of satisfaction with this process from both children and parents. Parents registered a heightened awareness of the effects of conflict on their children, recognition of a child's need for parental co-operation and an enhanced ability to make agreements about co-parenting with their former partner. Children in the study felt that their strong need for a voice and for information from within the familial context was satisfied by this involvement. They reported a decrease in anxiety about the emotional and practical issues facing them as their family life was rearranged. Parents also commented on how much less anxious their children were.⁷⁵ When asked how the process had helped, children stressed the emotional results of a mediated meeting with their parents. The fact that parents had improved communication and listened to the child minimised the likelihood of triangulation and allowed the child to relate positively to both parents.⁷⁶ In a follow-up study one month after the original sessions, contentment with the process remained high. Several parents commented that, if their situation deteriorated, they felt it would be productive to return to the mediation process.⁷⁷

⁷³ See McIntosh "*Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study*" (2000)18 *Mediation Quarterly* 2; and *Legal Aid and Mediation for People involved in Family Breakdown* (National Audit Office, Legal Services Commission, March 2007) at 26.

⁷⁴ Goldson *Hello, I'm a Voice, Let me Talk: Child-Inclusive Mediation in Family Separation* (Families Commission, Innovative Practice Report No 1/06, December 2006). Available at <http://www.nzfamilies.org.nz/download/innovativepractice-goldson.pdf>.

⁷⁵ *Ibid.* at 5.

⁷⁶ *Ibid.* at 12.

⁷⁷ *Ibid.* at 16.

5.64 According to the American Model Standards for Family and Divorce Mediation “Except in extraordinary circumstances, the children should not participate in the process without the consent of both parents and the children’s court appointed representative.”⁷⁸ The use of the phrase “extraordinary circumstances” in the Model Standards sets a deliberately high barrier, and does not force a parent to involve a child if that parent is opposed to it and a child’s participation is a matter for parents to decide after proper consultation and discussion.⁷⁹

5.65 The Commission agrees that this achieves the correct balance between giving a voice to the views of children and at the same time ensuring appropriate levels of control over whether this should become part of mediation.

5.66 *The Commission invites submissions as to whether children should participate in mediation proceedings affecting them.*

(b) Screening in Mediations

5.67 Screening mechanisms help determine whether mediation is appropriate. The Commission has already reiterated its previously expressed view that mediation is inappropriate for resolving family disputes where domestic violence is alleged, where there are allegations of child sexual or physical abuse, where one of the parties suffers from alcohol or drug dependency, or where power imbalances exist between the parties.⁸⁰

5.68 In relation to the issue of domestic violence the Family Mediation Service *Code of Ethics and Professional Conduct* states that:

“One of the purposes of screening at the intake session is to check out if violence is, or has been present or whether it is alleged that any client has been or is likely to be violent towards another. Where violence is alleged or suspected mediators must discuss whether any client wishes to take part in mediation and provide information about available support services. Where mediation does take place,

⁷⁸ Available at <http://www.afccnet.org/pdfs/modelstandards.pdf>.

⁷⁹ See Schoffer “Bringing Children to the Mediation Table: Defining a Child’s Best Interest in Divorce Mediation” (2005) 43 *Family Court Review* at 326.

⁸⁰ See paragraph 5.43 above. See also Conneely “Researching the Irish Family Mediation Service: Women in Mediation” (2002) 5(2) *IJFL* 10; Gerencser “Family Mediation: Screening for Domestic Abuse” (1995) 23 *Fla St U L Rev* 43; Zylstra “Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators” (2001) *J Disp Resol* 253; Mack “Alternative Dispute Resolution and Access to Justice for Women” (1995) 17 *Adel LR* 123.

mediators must uphold throughout the principles of voluntariness of participation, fairness and safety... In addition, steps must be taken to ensure the safety of all clients on arrival and departure.”⁸¹

5.69 The Commission fully supports the policy of the Family Mediation Service that “the mediator is continually assessing for domestic abuse in the course of mediation and a number of cases will terminate as a result of this.”⁸²

(c) Enforcement & Review of Mediated Settlement Agreement

5.70 Another issue is whether a court should review all mediated settlements in relation to custody and access arrangements for children. In its 1996 *Report on Family Courts* the Commission recommended that:

“Mediated agreements should normally be reviewed by the parties' respective legal advisers. The parties should be encouraged to seek independent legal advice before and, as necessary, during the mediation process. Where a party wishes to receive legal advice and is waiting for an appointment to consult a Legal Aid Board solicitor, mediation should be suspended until such advice becomes available. Provisions to this effect should be included in a Code of Practice.”⁸³

5.71 The Commission also recommended that there should be no extension of the courts' powers to review agreed arrangements concerning custody of or access to children.⁸⁴ The Commission recommended that instead there should exist a more general power in the courts to review and, if necessary, vary, on the application of either party, the terms of agreements concerning maintenance and property on the following grounds:

- (a) that facts have come to light since the agreement was entered into which, had either party been aware of them at the time, could reasonably be expected to have effected a material change in the terms of the agreement, or
- (b) that the economic circumstances of the parties have altered since the agreement in a manner which could not reasonably have been anticipated by the parties at the time of the agreement, and which makes it unreasonable to

⁸¹ *Family Mediation Service Code of Ethics and Professional Conduct* (2002). Sections 5.20.

⁸² Lloyd “The Family Mediation Service: Recent Developments” [2001] 3 IJFL.

⁸³ Law Reform Commission *Report on Family Courts* (LRC 52-1996). Recommendation 48 at 137.

⁸⁴ *Ibid.* Recommendation 49 at 137.

insist on the application of the original terms of the agreement.⁸⁵

5.72 In these circumstances, the Commission recommended that the court should have the power to confirm, cancel or vary any terms in the agreement, but should not disturb transactions which have already been concluded under the provisions of the original agreement.⁸⁶ The Commission also recommended that in every case where an application is made to a court to have an agreement, that affects the parties' financial or property relationships recorded or made a rule of court, there should be an obligation on the court not to grant the application unless it is satisfied that the agreement is a fair and reasonable one which in all the circumstances adequately protects the interests of the parties and of any dependent children.⁸⁷

5.73 The 2007 Report for the Courts Service *Family Law Reporting Pilot Project* recommended that:

“Cases that ended in a mediated or negotiated settlement should be separately listed and ruled. Consideration should be given to establishing a court of limited jurisdiction, presided over by the county registrar, who could rule such consents”⁸⁸

5.74 *The Commission reiterates its previous recommendations set out in the Commission's 1996 Report on Family Courts (LRC 52-1996) in relation to enforcement and review of mediated agreements.*

(5) Mediation Schemes in Other Jurisdictions

(a) England & Wales

5.75 In *Al-Khatib v Masry*⁸⁹ Thorpe LJ stated that mediation should be considered at each level of court proceedings, even at Court of Appeal level, because

“... there was no family case, however conflicted, that was not potentially open to successful mediation, even if mediation had not been attempted or had failed during the trial process.”

⁸⁵ Law Reform Commission *Report on Family Courts* (LRC 52-1996). Recommendation 50 at 137.

⁸⁶ *Ibid.* Recommendation 51 at 137.

⁸⁷ *Ibid.* Recommendation 52 at 137.

⁸⁸ Coulter *Family Law Reporting Pilot Project: Report to the Board of the Courts Service* (Courts Service, October 2007) at 61.

⁸⁹ [2004] EWCA Civ 1353.

5.76 There are approximately 150,000 divorces per year in England and Wales and approximately 50,000 applications concerning children. Furthermore, 3 in every 5 marriages are estimated to end in divorce, 1 in 4 children under 16 will experience their parents divorce and over 150,000 children are affected by divorce every year.⁹⁰ With 15,000 publicly funded mediations plus approximately 5,000 private mediations, this indicates a mediation population of around 20,000. Thus it would appear that there are 10% of the divorcing and separating population who use mediation.⁹¹

5.77 For many years, there was little official support and funding for family mediation in England and Wales. However stemming from the recommendations of the Law Commission's 1990 Report *Family Law: The Ground for Divorce*⁹² family mediation was allotted a central role in the reform of divorce introduced by the *Family Law Act 1996*. The 1996 Act aimed to contribute to a situation where divorce could be carried out:

- with minimum distress to the parties and to the children affected;
- with questions dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances; and
- without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end.⁹³

5.78 The 1996 Act introduced a requirement that those seeking public funding for court proceedings must first be referred by their lawyer to a State-registered family mediator, to receive information about mediation and to regard it as an alternative to contested court proceedings. At this preliminary meeting, which the applicant may attend separately or with the other party, as preferred,

⁹⁰ *Divorcing or Separating?* National Family Mediation (2006). Available at <http://www.nfm.org.uk/leaflets/NFM%20Leaflet%20v5.pdf>.

⁹¹ Sayers "Family Mediation in England and Wales". Presentation to The Committee on Legal Affairs Presidency of the Council of the European Union "*Mediation: Pushing the Boundaries*", October 2007. See also *Information Meetings and Associated Provisions within the Family Law Act 1996: Summary of the Final Evaluation Report* (Lord Chancellor's Department, London, 2001).

⁹² Law Commission of England and Wales *Report on Family Law: The Ground for Divorce* (Law Com. No. 192, 1990).

⁹³ Section 1(c) of the 1996 Act.

the mediator explains the help that can be offered through mediation and makes an assessment with the client of the suitability of the dispute for mediation.⁹⁴

5.79 Although mediation was seen as a better alternative to adversarial proceedings, the *Family Law Act 1996* did not make mediation compulsory, the principle that participation in mediation should be voluntary was maintained. Although there was a criticism that the requirement that one party attend an information meeting cannot actually lead to mediation unless the other party is also willing, experience has shown that the opportunity to receive information from a mediator at an early stage results in mediation being accepted by both parties in a significant proportion of cases.⁹⁵

5.80 Parties are not free to choose any mediator to conduct the mediation. Only quality assured mediators meeting the criteria of the Legal Services Commission can conduct publicly funded family mediation. The process until October 2007 had been that, when a client approached a solicitor for legal services in connection with a legal dispute arising out of a family relationship, the solicitor might have wanted to assess whether the client is eligible for publicly funded legal services. For clients who were eligible for publicly funded legal services this led to a compulsory referral to a mediation organisation. Once the referral had been received a mediation organisation would contact the clients to the dispute to ascertain whether they were willing to attend an information/intake meeting.⁹⁶

5.81 If the clients attended for an information/intake meeting, they would be given information about the mediation process, the suitability of their case for mediation would be ascertained (including a domestic violence check) and an assessment of their eligibility for publicly funded mediation undertaken. Appropriate cases would then progress to mediation. Since October 2007 the 'compulsory' point at which the solicitor has to refer to mediation has been changed, to immediately before the issuing of proceedings.⁹⁷

⁹⁴ Section 29 of the 1996 Act. A number of other States including Queensland, Victoria and New South Wales have also developed mediation and conferencing schemes in which family law clients must participate as a condition of a grant of State-funded legal aid.

⁹⁵ See Cretney, Masson and Bailey-Harris *Principles of Family Law* (Sweet and Maxwell 2003) at 303.

⁹⁶ Sayers "Family Mediation in England and Wales". Presentation to The Committee on Legal Affairs Presidency of the Council of the European Union "*Mediation: Pushing the Boundaries*", October 2007.

⁹⁷ *Ibid.*

5.82 At the pre-mediation information meeting the mediator must:

- engage with each party/both parties and, if they choose to come together, understand their issues and explain the mediation process carefully;
- assess their eligibility for legally aided mediation according to income and other factors;
- assess whether mediation is suitable. Cases involving a history of domestic violence and continuing risk are not normally suitable for mediation, whereas situations involving perhaps a single incident and low risk may be suitable, especially if both parties want to come to mediation;
- provide information on other services, if mediation is not suitable; and
- confirm both parties' willingness to take part in mediation, having understood the principles and benefits.⁹⁸

5.83 In October 2007, the English Legal Service Commission introduced a new family mediation fee structure. This fee scheme encourages the use of mediation, where it is appropriate, and it rewards mediators who are successful in reaching an agreement.⁹⁹

5.84 As previously noted by the Commission, the National Audit Office published a report on mediation and family breakdowns.¹⁰⁰ In the period from October 2004 to March 2006, 29,000 people who were funded through legal aid attempted to resolve their family dispute through mediation. The average cost of legal aid in non-mediated cases was estimated at £1,682, compared with £752 for mediated cases, representing an additional annual cost to the taxpayer of some £74 million. Mediated cases were reported to be quicker to resolve, taking on average 110 days, compared with 435 days for non-mediated cases.¹⁰¹ Over 95% of mediations were complete within 9 months and all mediations were complete within 12 months. By contrast, the average elapsed time between applying for other legal help for family-related matters and the date of the final

⁹⁸ Parkinson "Family Mediation in England and Wales" (2005), online article available at www.rln.lt/download.php/fileid/227.

⁹⁹ See Family Mediation Fee Scheme of the Legal Services Commission at http://www.legalservices.gov.uk/civil/remuneration/family_mediation_fee_scheme.asp.

¹⁰⁰ *Legal aid and mediation for people involved in family breakdown* (National Audit Office, HC 256 Session, 2007).

¹⁰¹ *Ibid.*

bill was 435 days, or over 14 months. Only 70% of these cases were complete within 18 months.¹⁰²

5.85 It is notable that, while publicly-funded clients are given the opportunity to find out about mediation and assess whether their case is suitable for mediation, private clients are not given this same opportunity. Non-legally-aided parties are invited but not required to attend such meetings. Section 13 of the British *Family Law Act 1996*, empowers a court to compel a party (legally aided or not) to attend a meeting with a mediator to hear about mediation and its benefits. This provision has not been brought into force.

(b) United States

5.86 In a study conducted in 2001, it was noted that 38 states in the United States had legislation that regulate family mediation.¹⁰³ The mediation process in the legislative schemes was generally confidential; with some exceptions, notably in relation to reporting child abuse and neglect. Domestic violence has been raised as the greatest barrier to fair and successful mediation and hence, in most systems where mediation is mandated, there are exemptions where this has been alleged. Most agreements reached through mediation were not binding until approved by the court. If no agreement was reached, generally, it was found that the cases go to trial.¹⁰⁴

5.87 In relation to mandatory mediation, many policy makers in the United States believe that mediation should be mandatory for parents who have custody or access disputes, because of its demonstrated effectiveness in achieving settlement, conflict reduction and more positive co-parental relationships. It was also pointed out that such mandatory mediation statutes send a clear public policy message that where possible, the first level of intervention for family law disputes should be in non-adversarial processes, before proceeding to more conflict-escalating adversarial interventions.¹⁰⁵

¹⁰² *Legal aid and mediation for people involved in family breakdown* (National Audit Office, HC 256 Session, 2007) at 8.

¹⁰³ See Tondo et al "Mediation Trends: A Survey of the States" (2001) 39 *Fam Ct Rev* 431.

¹⁰⁴ *Ibid.* at 433

¹⁰⁵ See Kelly "The United States experience", keynote address at the Proceedings of the International Forum on Family Relationships in Transition Legislative, Practical and Policy Responses, December 2005. Available at <http://www.aifs.gov.au/>; and Kelly 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002) 10 *Va. J. Soc. Pol'y & L.* 129 at 137.

5.88 Custody mediation is an early intervention for disputing parents, who are required to schedule a mediation appointment within several weeks of filing a motion or petition.¹⁰⁶ By 2001, mediation had become mandatory in 13 states in the United States.¹⁰⁷ It is important to note that these mandatory mediations only require an attempt to mediate parental differences on custody and contact, not settlement.¹⁰⁸

5.89 In California, mediation has been compulsory since 1981. The mediation statute states that the purposes of the mediation proceedings are:

- (a) To reduce acrimony that may exist between the parties;
- (b) To develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child; and
- (c) To effect a settlement of the issue of visitation rights of all parties that is in the best interests of the child.¹⁰⁹

5.90 A study in 2004 indicated that in 34 of California's 58 counties, mediators were authorized to make recommendations to the court for custody and visitation arrangements when parents were at an impasse, whereas in the remaining counties mediation was confidential.¹¹⁰ Thus, in "recommending" counties, mediation incorporates an evaluative component and is more in line with the Commission's view of conciliation.

(c) Australia

5.91 Australia has a long tradition of promoting ADR for family disputes. The Federal government issued a "Justice" statement in May 1995 in which it committed itself to making dispute resolution services more widely available.

¹⁰⁶ See Folberg "Mediation of Child Custody Disputes" (1985) 19 Colum J L & Soc Probs 413; Garner "Child Custody Mediation: A Proposed Alternative to Litigation" (1989) J Disp Resol 139; and Barlow "Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion" (2004) 52 Clev St L Rev 499.

¹⁰⁷ Including Delaware, Florida, Hawaii, Idaho, Maine, Nevada, North Carolina, South Dakota, and Utah.

¹⁰⁸ See Goldberg "Family Mediation is Alive and Well in the United States of America: A Survey of Recent Trends and Developments" (1996) J S Afr L 358.

¹⁰⁹ Cal. Fam. Code Section 3161.

¹¹⁰ Kelly "Family Mediation Research: Is There Empirical Support for the Field?" (2004) 22 *Conflict Resolution Quarterly* 1 at 5. See also Kandel "Development Appropriateness as Law in California Child Custody Mediation: Towards a Jurisprudence of Persuasion" (1995) 35 J Legal Pluralism L 75.

Funding was allocated to 24 family mediation services throughout Australia over a four-year programme. Funding was also allocated to expand community based family mediation services. A National Alternative Dispute Resolution Advisory Council (NADRAC) was established in November 1995 to develop a comprehensive policy framework for the expansion of alternative dispute resolution.¹¹¹

5.92 In 1992, a pilot mediation project (the Family Court Mediation Service) was established in Melbourne to provide comprehensive mediation services in addition to the existing conciliation services. The service was “comprehensive” in that any issue in dispute could be made the subject of mediation. Referrals under the project were voluntary. In 1994, the success of the pilot project was assessed in a report issued by the Family Court of Australia Research and Evaluation Unit.¹¹²

5.93 The evaluation report found that a critical factor which persuaded parties to resort to mediation was a desire to avoid court proceedings and their associated costs. 68% cent chose mediation to avoid court costs and the adversarial nature of litigation, though 75% were prepared to go to court if mediation did not settle the matter.¹¹³ Of the 82% of cases that achieved some measure of settlement in mediation, 71% settled all matters in dispute and 11% settled one major matter. 87% of clients reported satisfaction that the decision reached at the mediation was a fair one. 79% felt that each party had an equal influence over the agreement, while 78% said that the mediated agreement was close to the legal information they were given before the process began. Follow-up interviews some eight months after agreement confirmed that 86% of agreements were still in place. Of the 14% that were not, most were re-negotiated through a lawyer, with only one case requiring court intervention. In contrast, 42% of clients who failed to reach a mediated agreement needed a court hearing. It should be noted that 51% of the referrals were from a solicitor or legal aid, 24% were from the family court staff, and 13% from other agencies, which included legal advice centres. 65% of female clients and 54% of male clients had consulted or retained a lawyer at the time they attended mediation. The evaluation report found that mediation was most successful when carried out before proceedings have issued.¹¹⁴

¹¹¹ See www.nadrac.gov.au.

¹¹² Bordow and Gibson, *Evaluation of the Family Court Mediation Service* (Family Court of Australia Research and Evaluation Unit, Research Report No 12, 1994).

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

(i) Phasing in Mandatory Mediation

5.94 In 2006 the Australian Government instituted a major transformation of the family law system. It included the phasing in of mandatory mediation for separating couples through significant amendments to the *Family Law Act 1975* by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. The 2006 Act places increased emphasis on using mediation to resolve family law disputes.

(ii) Family Dispute Resolution

5.95 Section 10F of the *Family Law Act 1975* as amended by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, defines a family dispute resolution as a process (other than a judicial process):

- (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- (b) in which the practitioner is independent of all of the parties involved in the process.

5.96 It is clear, therefore, that this includes mediation and conciliation. The family dispute resolution practitioner must be accredited under the accreditation rules set out in Act.¹¹⁵ Parents are able to attend family dispute resolution services at a range of services including Family Relationship Centres, or at any other community, private or government-funded service (such as legal aid commissions, community justice centres or community legal centres) that have accredited family dispute resolution practitioners.

5.97 From July 2007, parents must attend family dispute resolution and make a genuine effort to resolve the dispute before applying for a Parenting Order through the Family Court of Australia or Federal Magistrates Court. The courts must not hear an application for a Parenting Order unless the applicant files a certificate from a family dispute resolution practitioner.¹¹⁶ This requirement does not apply where there is family violence or abuse or the risk of family violence or abuse.

5.98 A family dispute practitioner may give those attending dispute resolution one of the following certificates:

- A certificate stating that the party did not attend dispute resolution as a result of the refusal or failure of other parties to the proceedings to attend;

¹¹⁵ Section 10G(1) of the 1975 Act as amended by the 2006 Act.

¹¹⁶ Section 60I(8) of the 1975 Act as amended by the 2006 Act.

- A certificate stating that the person did not attend dispute resolution because the practitioner considered that it would not be appropriate to conduct the proposed dispute resolution;
- A certificate stating that the person attended with the other parties to the proceedings and all attendees made a genuine effort to resolve the dispute;
- A certificate stating that the person attended with the other parties to the proceedings but that the person, or other parties, did not make a genuine effort to resolve the dispute.

5.99 A family dispute resolution practitioner is required to keep communications confidential – except in certain circumstances, such as where the party gives consent, or to prevent a serious threat to someone’s life or health or to prevent the commission of a crime. A family dispute resolution practitioner must also report child abuse.

5.100 It is expected that from July 2008 all applications to the court in children’s matters, including subsequent interim applications in an ongoing matter, will be subject to the compulsory primary dispute resolution requirement. Exceptions are where the parties are consenting to the orders sought, there is risk of abuse or violence if the application is delayed, in circumstances of urgency, where one or both parties is incapable of participating in primary dispute resolution processes, if the application relates to a contravention or where the application deals with an issue in relation to which an order has been made in the previous 12 months.

(iii) Family Consultants

5.101 A court may order one or more parties to the proceedings to attend an appointment (or a series of appointments) with a family consultant. The court may make this order on its own initiative or on the application of a party to the proceedings or a lawyer independently representing a child’s interests.¹¹⁷

5.102 The functions of family consultants are to provide services in relation to proceedings including:

- (a) assisting and advising people involved in the proceedings;
- (b) assisting and advising courts, and giving evidence, in relation to the proceedings;
- (c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings;

¹¹⁷ Section 11 F (3) of the 1975 Act as amended by the 2006 Act.

(d) reporting to the court

(e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings¹¹⁸

5.103 Communications with family consultants are not confidential.¹¹⁹

(iv) Family Relationship Centres

5.104 To assist the family dispute resolution process the Australian Government committed itself to establish 65 Family Relationship Centres (FRCs) across Australia. The FRCs are not established by the 2006 Act, but they form the centrepiece of implementing the Federal Government's new family law system. This new network will underpin a fresh approach to the family law system, putting the emphasis on reaching agreement at a much earlier stage in the separation process, rather than waiting until conflict becomes entrenched and relationships severely deteriorate.

5.105 FRCs attempt to assist separated parents to make a genuine effort in resolving their children's disputes before commencing litigation. Through the centres, separating parents will have free access to information, advice and up to three hours of dispute resolution sessions with a parenting advisor to help resolve disputes and reach agreement on parenting plans. It is envisaged that FRCs will be recognised as single entry points into the process of mediation and other processes resolving family disputes.¹²⁰

5.106 The centres will also assist couples to access pre-marriage education and help families who are experiencing relationship difficulties with information and access to family skills training and support. An important aim of the centres will be to assist fathers in maintaining a substantial role in their children's lives immediately following a relationship breakdown.

(d) Canada

5.107 In Canada, mediation has been connected with the formal legal process for 30 years. The first court-connected family mediation service in Canada was launched in 1972 with the establishment of the Edmonton Family Court Conciliation Project. Since then, mediation services offering various

¹¹⁸ Section 11A of the 1975 Act as amended by the 2006 Act.

¹¹⁹ Section 11C of the 1975 Act as amended by the 2006 Act.

¹²⁰ Nicholls "The New Family Dispute Resolution System: Reform Under the *Family Law Amendment (Shared Parental Responsibility) Act 2006*" (2007) 3(1) *Bond University Student Law Review* at 6.

programmes have been introduced in all 10 Canadian provinces.¹²¹ Court-connected family mediation programmes have centred on private law disputes which result from divorce or spousal separation. Most of the services have been dedicated to the child-related issues of custody, access and child support but some have expanded into other areas. Mediation services in New Brunswick, Ontario, Quebec and Saskatchewan also encompass at least some issues relating to property division between spouses, and financial arrangements.¹²²

5.108 In several Canadian jurisdictions, the role of mediation in assisting to resolve family law matters is recognised in legislation. Federally, the *Divorce Act 1985* that every lawyer who acts in a divorce case has the duty to inform the spouse of mediation facilities that might be able to assist the spouses in negotiating the matters that may be the subject of a support order or a custody order.¹²³ In Ontario,¹²⁴ Newfoundland,¹²⁵ and the Yukon¹²⁶ legislation expressly authorises the court to appoint a mediator to deal with any matter that the court specifies. In each of these jurisdictions, the order appointing the mediator must be made at the request of the parties who also select the mediator. Saskatchewan legislation is similar except that the order may be made on the application of either party and the court may choose the mediator provided that the person appointed has consented to be named.¹²⁷ In 1993, Quebec amended the *Code of Civil Procedure* to permit the court to adjourn a contested family matter and refer the parties to mediation where the parties consent.¹²⁸

¹²¹ Alberta Law Reform Institute *Research Paper on Court-Connected Family Mediation Programs in Canada* at 4. (Alberta Law Reform Institute Research Paper No. 20, 1994).

¹²² *Ibid.*

¹²³ R.S.C. 1985 (2nd Supp.), c.3, s.9(2).

¹²⁴ *Children's Law Reform Act*, R.S.O. 1990, c.C.12, s.31; *Family Law Act*, R.S.O. 1990, c.F.3, s.3.

¹²⁵ *Children's Law Act*, R.S.Nfld. 1990, c.C-13, s.37,41; *Family Law Act*, R.S.Nfld. 1990, c.F-2, s.4.

¹²⁶ *Children's Act*, R.S.Y. 1986, c.22, s.42.

¹²⁷ *Children's Law Act*, S.S. 1990, c.C-8.1, s.10; *Family Maintenance Act*, S.S. 1990, c.F-6.1, s.13.

¹²⁸ Bill 14 (1993, c.1), 34th Leg. 2nd Sess., amending the *Code of Civil Procedure*, R.S.Q. 1977, c.C-25, arts.815,827.

(i) Child Protection Mediation Programme

5.109 The Child Protection Mediation Programme was established in 1997 under the *Child Family and Community Service Act 1996*. Section 22 of the 1996 Act states:

“If a director and any person are unable to resolve an issue relating to the child or a plan of care, the director and the person may agree to mediation or other alternative dispute resolution mechanisms as a means of resolving the issue.”

5.110 Parents and the director can choose to use mediation when there is a disagreement regarding the care of a child. It can be used to resolve a number of issues, including: what services the family will receive and participate in as part of the plan of care; the length of time the child will be in the director’s care; the amount and form of access the parent or others have with the child; the specific terms of a supervision or access order; or other matters relating to the care or welfare of a child. Section 23 of the 1996 Act provides that if the proceedings are adjourned for mediation, any time limit applicable to the proceeding is suspended. Once the parties agree to try mediation, they must select a mediator from the Child Protection Mediation Roster.¹²⁹

(ii) Family Mediation Practicum Project, British Columbia

5.111 The Family Mediation Practicum Project has been operating in New Westminster, British Columbia since January 2004 and provides free mediation services for family disputes about custody, access, guardianship, child support, and simple property matters. One of the objectives of the project is to expand the number of qualified family mediators in British Columbia. In the project, one mediator is guided by a senior, highly trained mediator (or mentor), who assists the mediator to prepare for and conduct each session. An evaluation of the Project in 2005 found that the project had successfully achieved all of its objectives. Exceptionally high satisfaction ratings were reported by clients who participated in mediation by mediators and by project mentors.¹³⁰

(iii) Québec

5.112 Since 1997, couples in Quebec with children may obtain the services of a professional mediator during the negotiation and settlement of their

¹²⁹ See http://www.mediator-roster.bc.ca/select_cp.cfm.

¹³⁰ See <http://www.ag.gov.bc.ca/dro/family-mediation/PracticumProgram.pdf>.

application for separation, divorce, dissolution of the civil union, child custody, or spousal or child support, or the review of an existing decision.¹³¹

5.113 The spouses must attend an information session if they disagree on one or more of the following issues: child custody; access rights; the amount of spousal or child support; other rights resulting from the marriage or civil union. Before the case is heard by the court, the spouses are required to attend an information session on mediation. This session may take place either before or after an application is submitted to the court. The spouses may then choose to continue on with the mediation process or to go before the court. A spouse required to attend an information session who fails to attend without a valid reason may be ordered to pay all costs relating to the application that is submitted to the court.

5.114 At a certain point during the examination of a contested application, the court may decide it is appropriate to order the spouses to undertake mediation. Spouses may choose their own mediator. However, to obtain mediation free of charge, they must choose a mediator whose fee corresponds to the rate prescribed by law. If the mediator charges a different fee, the spouses must pay all the mediation costs. In the case of a couple with children, the Service de médiation familiale will pay the mediator's fee for six sessions (including the information session if applicable). However, if the mediation concerns the review of an existing court judgment, the Service will pay for only three sessions (including the information session if applicable).

(e) New Zealand:

(i) Judicial Mediation conference

5.115 Judicial mediation conferences are available in New Zealand for parties under the *Family Proceedings Act 1980* where a party has applied for a separation or maintenance order, or for a custody or access order. Mediation conferences may also be convened under section 170 of the *Children, Young Persons, and their Families Act 1989*.

5.116 Judicial mediation conferences usually take place once parties have attended counselling if issues remain outstanding.¹³² Mediation conferences are chaired by a Family Court Judge. Parties may request a judge-led mediation, or the court can direct them. The mediation conference is often preceded by the preparation of specialist reports. These reports are available to the Chairman (who is a Family Court Judge), the lawyers, and usually the parties. If this does

¹³¹ See <http://www.justice.gouv.qc.ca/English/publications/generale/mediation-a.htm#anchor145822>.

¹³² See paragraph 5.33, above.

not resolve the matter, a hearing date may be set. Even then, cases are sometimes resolved at a pre-trial conference. In care and protection cases, the child can request a mediation conference. If a child requests a mediation conference, the Court must arrange one.¹³³ Family Court judges held approximately 3000 mediation conferences in 2000.¹³⁴

5.117 In response to the New Zealand's Law Reform Commission Report on *Dispute Resolution in the Family Court* recommendation that non-judge-led mediation be introduced into the Family Court as part of a new conciliation service, the Government established a family mediation pilot. Family mediation was piloted in North Shore, Hamilton, Porirua and Christchurch Family Courts between March 2005 and June 2006.¹³⁵

5.118 The four pilot courts adopted different practices with respect to referral. In Christchurch, referral to family mediation was the 'default' option, and the referral was discontinued if it was subsequently determined to be not appropriate. This court completed the most mediations. In the other pilot courts the practice tended to be that cases were identified as appropriate for family mediation by the Family Court Coordinator (FCC) using the guidelines provided, or were referred by judges, or were recommended for family mediation by counsel or counsellors.¹³⁶

5.119 A study was undertaken to enable the Ministry of Justice in 2007 to identify any implementation issues, assess the costs of the pilot, and assess the experiences of the various participants, including their satisfaction with the process. It considered matters such as referrals and attendance, immediate outcomes of mediation and returns to court by the parties.¹³⁷

5.120 From March 2005 to June 2006, 540 Family Court cases were offered family mediation and of these, 380 (70%) were referred to mediators. Of the 380 cases referred to mediation, 354 (93%) entered pre-mediation, and 321 (84%) completed pre-mediation. Of those who completed pre-mediation, 284 cases (88%) proceeded to mediation, and 37 (12%) did not. The main reasons

¹³³ See paragraph 5.63, above.

¹³⁴ See Law Commission of New Zealand *Report on Dispute Resolution in the Family Court* (NZLC Report No. 82, 2003) at 69.

¹³⁵ Barwick and Gray *Family Mediation - Evaluation of the Pilot: Report for the Ministry of Justice* (Ministry of Justice, 2007). Available at <http://www.justice.govt.nz/pubs/reports/2007/family-mediation-evaluation-of-pilot/ex-summary.html>.

¹³⁶ *Ibid.* at 11.

¹³⁷ *Ibid.*

for cases not proceeding to mediation at this point were that the parties settled matters before the mediation took place or one party was reluctant to proceed.¹³⁸

5.121 Data supplied by the Ministry of Justice based on an analysis of direct costs to the end of April 2006 showed that the average cost of a mediation was \$777.16 and in 7% of cases the cost of mediation exceeded \$800. In 56% of cases a lawyer for the child was appointed for the mediation (in addition many cases referred to mediation had a lawyer for the child appointed already and the average cost of lawyer for child appointed for the mediation was \$943.48.¹³⁹ The length of mediations ranged from 1.5 hours to 7.5 hours. According to mediator case reports, 33% mediations were completed within three hours and 50% took between three and four hours.¹⁴⁰

5.122 Of the 257 completed mediations, agreement was reached on all matters being mediated in 59%, and agreement was reached on some matters in a further 30%. The most common reason for achieving only partial agreement was that the level of trust between the parties was so low that one or both required evidence that the other party was prepared to make agreements work, before they were prepared to make concessions on all disputed issues.¹⁴¹ Consent orders were sought in 68% of cases in which all or some agreement was reached. In only 13 mediations (5%) was no agreement reached. In most cases, mediators believed that this was because one party was unwilling to compromise or to put the children's needs ahead of their own.¹⁴²

5.123 Given the mediation pilots success, a *Family Courts Matters Bill 2008* was introduced as the legislative vehicle allowing for the Courts to direct attendance at mediation and to implement the pilots on a permanent basis.¹⁴³ The 2008 Bill does not propose to change the existing judicial mediation process under the *Family Proceedings Act 1980*. This would see the options of either judicial or non-judicial mediation working side by side.

¹³⁸ Barwick and Gray *Family Mediation - Evaluation of the Pilot: Report for the Ministry of Justice* (Ministry of Justice, 2007) at 12. Available at <http://www.justice.govt.nz/pubs/reports/2007/family-mediation-evaluation-of-pilot/ex-summary.html>.

¹³⁹ *Ibid.* at 14.

¹⁴⁰ *Ibid.* at 15.

¹⁴¹ *Ibid.* at 17.

¹⁴² *Ibid.*

¹⁴³ 2008 No 143-2.

(f) Hong Kong

5.124 Divorce is a growing problem in Hong Kong. The number of divorce cases has increased sharply over the past two decades. In 1981, 2,811 divorce petitions were filed. The figure rose to 6,767 in 1990 and to 13,737 in 2001.¹⁴⁴

5.125 In 1997, the Chief Justice of Hong Kong appointed a Working Group to consider a pilot scheme for the introduction of mediation into family law litigation in Hong Kong. In its report completed in 1999, the Working Group recommended that a three-year pilot scheme be run to test the effectiveness of mediation in resolving matrimonial disputes in Hong Kong.¹⁴⁵ Other recommendations of the Working Group included:

- Litigants should be given the choice of mediators from a list of those qualified, including mediators from the Social Welfare Department, non-government organisations and those from private practice;
- A certain number of mediation sessions should be provided free of charge under the pilot scheme to encourage litigants to try the service;
- A post of full-time Mediation Co-ordinator, with the support of a full-time secretary and a clerk, should be created;
- The Mediation Co-ordinator's Office should be accommodated in the Family Court to give a clear indication to legal practitioners and litigants of the court's full support for mediation; and
- As lawyers were expected to be the chief agents for referral to mediation, it was recommended that lawyers should be obliged to advise their clients of the availability of mediation services and to give information leaflets on mediation prepared by the Co-ordinator to their clients. As proof of this, it was recommended that lawyers should be required to file with the court a "Certificate as to Mediation" form. It was recommended that the Certificate should be introduced by way of a Practice Direction issued by the Chief Justice.¹⁴⁶

¹⁴⁴ *Evaluation Study on The Pilot Scheme on Family Mediation: Final Report* (A Consultancy Study Commissioned by the Judiciary Of the Hong Kong Special Administration Region, January 2004) at 1. Available at http://www.judiciary.gov.hk/en/publications/hkpu_finalreport.pdf.

¹⁴⁵ See *Report of the Working Group to Consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong* (1999).

¹⁴⁶ Law Reform Commission of Hong Kong *Report The Family Dispute Resolution Process* (LRC HK March 2003) at 18.

5.126 In June 1999, the Mediation Coordinator's Office (MCO) was set up to implement a pilot scheme funded and monitored by the Judiciary and the pilot was launched in 2000.¹⁴⁷

5.127 In accordance with the recommendations of the Working Party on the Pilot Scheme, a consultancy study was commissioned part-way through the scheme to evaluate a number of aspects of the service provided. The main findings were:

- Between May 2000 and November 2001, 1,670 people attended 294 information sessions through the service. 87% of the attendees went through initial assessment in the Mediation Co-ordinator's Office (MCO), which resulted in 547 cases being referred out for mediation service.
- Approximately 60% of the cases had completed initial assessment for suitability for mediation, and had been referred to mediators by the MCO, within a month.
- About 75% of the cases took less than 3 months for the mediators to complete.
- Of the 458 cases completed between May 2000 and November 2001, 71.4% reached full agreement and another 8.5% reached partial agreement. On average, it took 10.18 hours to reach a full agreement, 14.35 hours to reach a partial agreement and 6.3 hours to reach no agreement between the parties using the mediation service.
- Almost 80% of the respondents indicated that they were "satisfied" or "very much satisfied" with the mediation service they received.
- More than 60% of the respondents agreed that they were able to discuss disputed issues with their spouses through mediation in a peaceful and reasonable manner.¹⁴⁸

5.128 The study concluded that there was considerable evidence that family mediation was a viable option for family dispute resolution in Hong Kong. The study therefore recommended that the Administration should consider continuing to fund the scheme for family mediation service on a long-term

¹⁴⁷ *Evaluation Study on The Pilot Scheme on Family Mediation: Final Report (A Consultancy Study Commissioned by the Judiciary Of the Hong Kong Special Administration Region, January 2004)* at 1. Available at http://www.judiciary.gov.hk/en/publications/hkpu_finalreport.pdf.

¹⁴⁸ *Ibid.*

basis.¹⁴⁹ It was also recommended that applicants for legal aid in matrimonial cases should be required to attend information sessions at the Mediation Co-ordinator's Office.

5.129 The study found that provision of a totally free mediation service might not be in the best interests of the users, and that some fee-charging was acceptable and might increase the motivation of service users to make better use of the service. It was therefore recommended that, if family mediation were to be offered on a long-term basis, a fee-charging mechanism could be introduced for users able to afford the service.¹⁵⁰

F Collaborative Lawyering

5.130 Collaborative lawyering is an emerging method of dispute resolution for separating or divorcing couples, where the parties and their lawyers agree to resolve the issues without litigation.¹⁵¹

5.131 The Commission considers collaborative lawyering to be an advisory ADR process.¹⁵² Like mediation, collaborative law helps parties resolve their dispute themselves rather than having a ruling imposed upon them by a court or arbitrator. The lawyers' role is to guide and advise the parties towards a reasonable resolution. While legal advice is an integral part of the process, all the decisions are made by the husband and wife.¹⁵³

5.132 The essence of the process is that the best interest of the spouses and their families is served by trying to resolve these disputes in a non-confrontational way. This is achieved by way of informal discussions with each party, ensuring their direct influence on the outcome. The ultimate aim is to avoid the use of court in family law cases.¹⁵⁴

¹⁴⁹ *Ibid.*

¹⁵⁰ *Evaluation Study on The Pilot Scheme on Family Mediation: Final Report (A Consultancy Study Commissioned by the Judiciary Of the Hong Kong Special Administration Region, January 2004)*. Available at http://www.judiciary.gov.hk/en/publications/hkpu_finalreport.pdf.

¹⁵¹ Walls "Collaborative law a new and better way" *Sunday Business Post* 25 March, 2007.

¹⁵² See Chapter 2, above at paragraph 2.42.

¹⁵³ Walls "Collaborative law a new and better way" *Sunday Business Post* 25 March, 2007.

¹⁵⁴ *Ibid.* See also Bryan "Collaborative divorce: meaningful reform or another quick fix?" (1999) 5(4) *Psychology, Public Policy, and Law* 1001; Gamache 202

5.133 The Legal Aid Board, which promotes and trains solicitors in the collaborative law process, suggests that collaborative law provides the following advantages to clients:

- Provided everyone enters the process in good faith, the process is faster and less acrimonious than court proceedings;
- Clients can set their own agenda according to what matters most to them and their family;
- Clients have a greater degree of control over the process, including the pace at which negotiations take place;
- The process is likely to be far less stressful than court proceedings, which are widely regarded as being one of the most stressful events that a person can encounter. With collaborative law there should be no surprises and each party should know what to expect; and
- If the process is successful there will be an agreement between the couple which will be a more effective basis than a court imposed solution, for maintaining an ongoing relationship for the benefit particularly of any children.¹⁵⁵

5.134 In relation to cost, it has been suggested that in 2006 the average cost for each party undergoing the collaborative law process is approximately €6,000 plus VAT. By contrast, an average case that proceeds to the Circuit Court, even if settled, costs each party about €12,000.¹⁵⁶ It is important to note, however, that collaborative law process may not always work. One party may opt for it in the belief that it is cheaper, rather than because they have a strong commitment to the process and finding a mutually acceptable solution. Where the process is terminated without an agreement being finalised, the parties may have to initiate litigation with an additional set of legal costs.¹⁵⁷

“Collaborative practice: a new opportunity to address children’s best interests in divorce” (2005) 65 *Louisiana Law Review* 1455; Lande and Gregg “Fitting the forum to the family fuss: choosing mediation, collaborative law, or cooperative law for negotiating divorce cases” (2004) 42(2) *Family Court Review* 280; and Schwab “Collaborative Lawyering: A Closer Look at an Emerging Practice” (2003) 4 *Pepp Disp Resol L J* 351.

¹⁵⁵ *Information Leaflet on Collaborative Lawyering* Legal Aid Board. See www.legalaid.ie.

¹⁵⁶ Coulter “A New Era in Family Law” *The Irish Times* 17 May, 2006.

¹⁵⁷ *Ibid.*

5.135 An Association of Collaborative Practitioners (ACP) has been established in Ireland.¹⁵⁸ The aims of the ACP are stated to be:

- To promote collaborative law as a mechanism for settling disputes;
- To support practitioners by providing documentation and ethical guidelines for the practice of collaboration; and
- To provide training and peer review structures for collaborative practitioners.¹⁵⁹

5.136 By 2007, 140-150 lawyers had been trained in collaborative lawyering in Ireland.¹⁶⁰ One of the first collaborative law cases in Ireland was dealt with in the High Court in 2008. The parties involved were business people who married in 1987, had three children and separated in 2003. They signed a deed of separation which involved a 50/50 split but they never implemented it and their finances remained interwoven. To resolve their financial arrangements in the context of divorce proceedings the couple engaged in the collaborative law process and entered into a participation agreement and successfully resolved all their issues.¹⁶¹

(1) The Collaborative Process

5.137 Both the clients and the solicitors must agree to work together respectfully, honestly and in good faith and both sides must sign a legally-binding agreement to disclose all documents and information that relate to the issues, early, fully, and voluntarily. Neither party may go to court, or even threaten to do so, when they are working within the collaborative law process.¹⁶² Should the process end, both solicitors engaged for a collaborative law representation may never go to court for the clients who retained them in a representative capacity or as witnesses to such litigation.

¹⁵⁸ See www.acp.ie .

¹⁵⁹ See Annable "Beyond the Thunderdome - The Search for a New Paradigm of Modern Dispute Resolution: The Advent of Collaborative Lawyering and Its Conformity with the Model Rules of Professional Conduct" (2004) 29 J Legal Prof 157.

¹⁶⁰ Walls "Collaborative law a new and better way" *Sunday Business Post* 25 March, 2007.

¹⁶¹ *Family Law Matters* Volume 2 No 1 (Courts Service, Spring 2008) at 22. Available at www.courts.ie.

¹⁶² See Horgan "Let's work together" (2005) 99 *Law Society Gazette* 5.

5.138 The Commission considers that there are a number of duties which should be imposed on solicitors involved in the collaborative process. These include

- A duty to screen clients. The Commission considers collaborative lawyering to be inappropriate for resolving family disputes where domestic violence is alleged, where there are allegations of child sexual or physical abuse, where one of the parties suffers from alcohol or drug dependency, or where power imbalances exist between the parties; and
- A duty to withdraw from further representation if the collaborative law process is terminated.

5.139 The parties and solicitors engage in ‘4-way’ meetings to resolve the issues. Once issues are agreed, the lawyers then complete the paperwork, for example, the deed of separation or the terms of consent to be approved by the court in the context of a judicial separation or a divorce. If the process needs to be postponed for any reason, there is the possibility of seeking outside assistance by way of further professionals such as counsellors, accountants, auctioneers or arbitrators and the process can be suspended to facilitate such intervention. In a collaborative law separation or divorce it is only when all of the issues have been agreed that the case is ruled in court as a consent matter.¹⁶³

5.140 The process requires that the participants focus on the interests of both clients, gather sufficient information to insure that decisions are made with full knowledge, create a full range of options, and then choose flexible options that best meet the needs of the parties. The structure creates a problem-solving atmosphere with a focus on interest-based negotiation and party empowerment.¹⁶⁴

5.141 Proponents of collaborative law suggest this approach reduces legal costs, expedites resolution, leads to better, more integrative solutions and enhances personal and commercial relationships.¹⁶⁵

(2) Participation Agreement

5.142 The cornerstone of collaborative lawyering is the “participation agreement.” Prior to a party choosing the process, the lawyer and client review the participation agreement and can be likened to a mediation agreement which

¹⁶³ *Ibid.*

¹⁶⁴ See Slovin “The Basics of Collaborative Family Law- A Divorce Paradigm Shift” (2005) 18 *The American Journal of Family Law* 2.

¹⁶⁵ Horgan “Let’s work together” (2005) 99 *Law Society Gazette* 5.

sets out certain fundamental provisions. The core provision mandates that both solicitors are precluded from representing their respective clients in the event the case reaches impasse or in the event either party chooses to withdraw from the process.

5.143 The parties also contract to provide complete, honest and open disclosure of all relevant information. The standard is that there must be full disclosure, whether the information has been requested or not. There is an affirmative duty to disclose and failure to do so will result in a termination of the process. Confidentiality of communications is central to the collaborative law process. Typically, in order to promote productive negotiations participation agreements also provide that communications during the process are confidential. The participation agreement may also include a provision that the parties may choose to jointly retain an expert, such as a business valuation specialist as a neutral, and that the expert cannot be called to testify absent both parties specific waiver of the neutral expert provision.¹⁶⁶

5.144 There are no statutory guidelines in Ireland in relation to what should be included in a participation agreement. It has been suggested that at a minimum the participation agreement must:

- Be in writing;
- Describe in reasonable detail the dispute that is the subject of the process;
- Describe the process of collaborative lawyering; and
- Be signed by both the parties and the solicitors engaging in the process

5.145 The following core provisions have also been suggested to be included:

- A Party has the right to unilaterally terminate the process at any time and for any cause or reason or no cause or reason by written notice.
- Solicitors for all parties must withdraw from further representation if the process is terminated.
- Any solicitor associated in the practice of law with the solicitor who represented a party in the process is disqualified from representing any party in any proceeding or matter substantially related to the dispute;

¹⁶⁶ See Slovin "The Basics of Collaborative Family Law- A Divorce Paradigm Shift" (2005) 18 *The American Journal of Family Law* 2.

- Parties will make timely, full, candid and informal disclosure of information reasonably related to the dispute and have an obligation to promptly update information previously provided in which there has been a material change;
- Parties will jointly retain neutral experts who are disqualified from testifying as witnesses in any proceeding substantially related to the dispute; and
- Collaborative Law communications are confidential.¹⁶⁷

(3) Developments in Other Jurisdictions

5.146 The International Academy of Collaborative Professionals (IACP) is an international body promoting the practice of collaborative law internationally. It has 2,458 members drawn from 9 countries and sets out training standards for those involved in collaborative law.¹⁶⁸ Whilst the highest concentration of collaborative lawyers is in family law, the collaborative process is also used in other areas of law. For example, in Massachusetts it is used in resolving commercial disputes. Similarly, Texas is considering extending the practice of collaborative law into other areas of civil law.¹⁶⁹

(a) United States of America

5.147 The practice of collaborative family law was developed in 1990 by a US attorney Stu Webb. As an alternative to litigation, Webb developed a dispute resolution model that had settlement as its focus. If settlement could not be reached Webb would withdraw. Within two years he had handled almost 100 cases on a collaborative basis.¹⁷⁰

¹⁶⁷ These provisions are based on the articles of the draft Uniform Collaborative Law Act 2007 by the National Conference on Commissioners on Uniform Law in the United States. See http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm#_Toc176230887

¹⁶⁸ As of 2007, IACP members include lawyers from the USA (2,304 members), Canada (91 members), England (25 members), Ireland (6 members), Scotland (6 members), Australia (21 members), New Zealand (1 member), Austria (3 members) and Switzerland (1 member). See www.collaborativepractice.com and *Minimum standards for a collaborative basic training*, www.collaborativepractice.com/articles/IACP_Training_Standards.pdf.

¹⁶⁹ Pirrie “Collaborative divorce” (2006) 156 *New Law Journal* 898 at 899.

¹⁷⁰ Schwab “Collaborative lawyering: a closer look at an emerging practice” (2004) 4 *Pepperdine Dispute Resolution Law Journal* 351 at 355.

5.148 Collaborative law is now widespread in the United States. Associations that represent the interests of collaborative practitioners have been formed in more than half of the States. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is developing a *Uniform Collaborative Law Act* which is modelled on the *Uniform Mediation Act*. The first draft of the Act was released in October 2007.

5.149 In 2001, Texas became the first US State to enact legislative provisions recognising the use of collaborative law in family disputes.¹⁷¹ The statute defines collaborative law as

“a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.”

5.150 Legislative change was necessary in Texas because, once a family dispute is filed with the court, judicial time limits begin to run. In other words, before the amendments were made, parties who filed a family dispute in court and then decided to attempt collaboration could be prevented from proceeding to trial because certain time limits had passed. The effect of the amendments to the Texas Family Code is to stay court time limits that may otherwise apply, until the collaborative process is concluded. and it allows for a stay of up 180 days.¹⁷²

5.151 Collaborative law services have been available in California since 1993.¹⁷³ In 2000, Hitchens J, the residing family law judge of the San Francisco Superior Court established the Collaborative Law Department of the Superior Court. In her view, collaborative law “empowers people to resolve their own disputes, and to do it in a more creative and more lasting manner than has ever

¹⁷¹ Section 6.603 of the Texas Family Code 2001.

¹⁷² Texas Family Code 2001 sections 6.603 and 153.0072. See also Collaborative Law Council Inc, *Protocols of practice for collaborative lawyers*, Texas, 2005 at www.collaborativelaw.us/articles/TCLC_Protocols.pdf.

¹⁷³ Schwab “Collaborative lawyering: a closer look at an emerging practice” (2004) 4 *Pepperdine Dispute Resolution Law Journal* 351 at 355.

been achieved by a court order.”¹⁷⁴ After consulting with collaborative lawyers in San Francisco, Hitchens J felt that that the best way for the Superior Court to demonstrate its support for collaborative law was to establish a department within the court to encourage and support the process.¹⁷⁵

5.152 All collaborative law cases in San Francisco are now assigned to the department, a process which serves three main purposes. First, collaborative lawyers can go to the department to file routine documents such as collaborative contracts. Second, the department is staffed by judges who are well informed about the collaborative process and can assist lawyers and their clients to resolve difficult issues without having to join the queue of ordinary cases needing the court’s attention. Third, the department plays an enforcement role with respect to the collaborative contracts by encouraging the parties to abide by the terms of their contract and handling any applications arising from an alleged breach of the contract.¹⁷⁶

5.153 In 2000, the Family Law Section of the North Carolina Bar Association established a Collaborative Law Committee. Legislative provisions recognising collaborative law as a means of resolving family law matters were enacted in North Carolina in 2003. The relevant legislation is expressed in similar terms to the Texas Family Code. The principal difference is it is more detailed than its Texan counterpart.¹⁷⁷ Parties engaging in the collaborative process and their legal representatives must sign a collaborative law agreement which provides for the withdrawal of the legal representatives if the dispute cannot be resolved collaboratively and the parties decide to litigate. Provided that the agreement is validly executed, all legal time limits will then be suspended for the duration of the collaboration.¹⁷⁸ This allows cases to proceed

¹⁷⁴ Judge Donna Hitchens, quoted in Tesler “Donna J Hitchens: family law judge for the twenty-first century” (2000) 2 *The Collaborative Quarterly* 1 at 3.

¹⁷⁵ *Ibid.* at 2–3.

¹⁷⁶ See Da Costa “Divorce with dignity” (2005) 35 *Family Law Journal* 478 at 481.

¹⁷⁷ Article 4 sets out in some detail the legal requirements for parties seeking to resolve a divorce dispute on a collaborative basis, as well as a list of definitions relating to collaborative law.

¹⁷⁸ Sections 50–76, Article 4, Chapter 50, *North Carolina General Statute* (2004). If the collaborative process is successful, parties are ‘entitled to an entry of judgment or order to give legal effect to the terms of a collaborative law settlement agreement’. If the parties are unable to reach an agreement, they may immediately resume or commence a civil action provided that the collaborative agreement does not stipulate that alternative means of dispute resolution be attempted first.

on a collaborative basis and at a pace that suits the parties involved. It describes collaborative law as

“A procedure in which a husband and wife who are separated and are seeking a divorce, or are contemplating separation and divorce, and their attorneys agree to use their best efforts and make a good faith attempt to resolve their disputes arising from the marital relationship on an agreed basis. The procedure shall include an agreement by the parties to attempt to resolve their disputes without having to resort to judicial intervention, except to have the court approve the settlement agreement and sign the orders required by law to effectuate the agreement of the parties as the court deems appropriate. The procedure shall also include an agreement where the parties' attorneys agree not to serve as litigation counsel, except to ask the court to approve the settlement agreement.”

5.154 Under the statute, a collaborative law agreement must be in writing, signed by all the parties to the agreement and their attorneys, and must include provisions for the withdrawal of all attorneys involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute.¹⁷⁹ It also provides that all statements, communications, and work product made or arising from a collaborative law procedure are confidential and are inadmissible in any court proceeding. “Work product” includes any written or verbal communications or analysis of any third-party experts used in the collaborative law procedure.¹⁸⁰

(b) Australia

5.155 In 2006, the Family Law Council prepared a report for the Attorney-General on Collaborative Practice in Family Law. The report recommended that:

- A working group be established to develop national guidelines for collaborative practice in family law;
- The Law Council of Australia should consider developing and disseminating information about collaborative practice and lists of collaborative practitioners to Family Relationship Centres and community-based service providers of family dispute resolution;
- The *Family Law Act 1975* should be amended to provide for courts exercising family law jurisdiction to have jurisdiction in relation to enforcement of collaborative contracts concerning family law disputes; and

¹⁷⁹ Sections 50-72 Article 4, Chapter 50, *North Carolina General Statute* (2004).

¹⁸⁰ Sections 50-77 Article 4, Chapter 50, *North Carolina General Statute* (2004).

- The *Family Law Act 1975* should be amended to provide confidentiality of communications in the collaborative process.¹⁸¹

(4) Conclusion

5.156 The Commission acknowledges that, although collaborative law is an emerging ADR process, it has a capacity to provide another method to assist in the resolution of family disputes in certain circumstances. Given that it is a relatively new process in Ireland, the Commission emphasises the need to ensure that those engaged in the process are trained in the collaborative process. This involves learning not only the collaborative model, but also the new skills needed to work with clients and the lawyer representing the other spouse to try and get the best result for both spouses and the family. Another issue stemming from collaborative lawyering is the ethical and professional problems which may arise and whether the parties' best interests are fully served by the solicitors.¹⁸² In this context the Commission would welcome submissions as to whether a statutory Code of Practice or Guidelines for collaborative lawyering should be introduced.

5.157 *The Commission invites submissions as to whether a statutory Code of Practice or Guidelines for collaborative lawyering should be introduced.*

G Case Conferencing in Family Law Disputes

5.158 A pilot case conferencing initiative to assist with the resolution of family law cases commenced in Limerick Circuit Court in October 2006. The case conference is, by agreement, a meeting held by the County Registrar with the solicitors for both parties which takes place after court proceedings have been issued. The purpose is to narrow the issues for trial or to facilitate settlement of some or all of the issues between the parties.¹⁸³

5.159 The County Registrar can make certain court orders, for example on the time for filing of documents, inspections of property, interim maintenance and access orders, and orders for discovery. Cases which have gone through the case conferencing procedure and are either settled or where some issues remain to be dealt with by the court are then fast tracked to a judge for hearing

¹⁸¹ *Family Law Council Collaborative Proactive in Family Law: A report to the Attorney-General* (Family Law Council, 2006) at 2-4.

¹⁸² Walls "Collaborative law a new and better way" *Sunday Business Post* 25 March, 2007. See also Fairman "Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads " (2002) 18 Ohio St J Dis Resol 505.

¹⁸³ *Courts Service Annual Report 2006* at 51.

or to make any necessary orders.¹⁸⁴ After each case conference, an order is prepared and put on the file with a copy sent to each party. This is very important for the parties, both to confirm what was agreed and to indicate what action is to be taken with regard to any orders made, and also to ensure the confidentiality of the whole hearing.¹⁸⁵

5.160 An example of a case conference which was resolved at Limerick Circuit Court involved a case where there were two sets of proceedings involving a husband and his former and current wife. The former wife had reared a family and the parties had been divorced in England. The current wife sought permanent barring orders and financial reliefs. At the case conference, it transpired that the former wife was seeking the transfer from the husband into her own name of the family home and the site adjoining it. The current wife had no dispute with the former wife and relinquished any claim over these assets. By consent, property adjustment orders were made to that effect.¹⁸⁶

5.161 The Commission understands that the Circuit Court Rules Committee has agreed a draft set of Family Law Case Progression Rules with the aim of ensuring that proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise costs. The new rules will assign functions to the County Registrar currently dealt with by the Court in order to relieve Circuit Court judges of a large pre-trial applications caseload. It is also anticipated that the case progression hearing would facilitate parties in reaching agreement on issues in dispute.¹⁸⁷

5.162 *The Commission provisionally recommends the extension to all Circuit Courts of case conferencing in family disputes by County Registrars.*

H Government Initiatives in England and Wales

5.163 In a 2004 Green paper entitled *Parental Separation: Children's Needs and Parents' Responsibilities*¹⁸⁸ the UK Government, in conjunction with

¹⁸⁴ *Courts Service Annual Report 2006* at 51.

¹⁸⁵ Information on the case conferencing procedure was provided to the Commission by Patrick Meghen, Limerick County Registrar.

¹⁸⁶ Case study provided to the Commission by Patrick Meghen, Limerick County Registrar.

¹⁸⁷ Information on the case conferencing procedure was provided to the Commission by Patrick Meghen, Limerick County Registrar.

¹⁸⁸ *Parental Separation: Children's Needs and Parents' Responsibilities: Report of the Responses to Consultation and Agenda for Action* (Consultation Paper, CM 6273, 2004). Presented to the Parliament by: the Secretary of State for

senior judiciary and rule committees in England and Wales, proposed to review relevant rules and Practice Directions in order to give the strongest possible encouragement to parties to agree to mediation or other forms of dispute resolution and to fund this mediation through legal aid. The respondents to the Green Paper agreed on the importance of mediation but, while some of them considered that mediation would not be effective if it is not made compulsory, others considered that mediation would not work if parents were forced to attend.

5.164 In 2005, the Government stated that it did not plan to make mediation compulsory, but would strongly promote its use; that it would work with the senior judiciary to find the best way to encourage parties to attend mediation and that it would look at other ways of involving children in mediation and developing new models of child-focused mediation.¹⁸⁹

(1) Family Mediation Helpline

5.165 The Family Mediation Helpline began operating in 2006. Trained operators provide information about family mediation, determine whether mediation is suitable for particular cases and examines the likelihood of eligibility of parties for public funding. There has been a gradual increase in the number of calls made to the Family Mediation Helpline in 2007. In a 12 month period, approximately 3,500 calls were made, and over 30% of calls have been referred to mediation services.¹⁹⁰

(2) Mediation Week

5.166 Mediation week is an awareness campaign centred in civil and family courts throughout England and Wales. First held in October 2005 and repeated in 2006, it involves local mediators working with court staff and Legal Services Commission representatives on a number of initiatives aimed at raising the profile and understanding of mediation amongst the judiciary, court staff, legal professionals, advice agencies and the general public.

Constitutional Affairs, the Secretary of State for Education, and the Secretary of State for Trade and Industry.

¹⁸⁹ *Report of the Responses to Consultation and Agenda for Action, Parental Separation: Children's Needs and Parent's Responsibilities - Next Steps*, (Cm 6452, January 2005).
<http://www.dfes.gov.uk/childrensneeds/docs/ParentalSeparation.pdf>.

¹⁹⁰ See Walsh "Family Mediation Helpline" (2007) 37 Fam Law 1038.

(3) Public Awareness Campaign

5.167 In terms of public awareness, the HMCS produced a series of userfriendly guides to mediation, various web-based materials were developed, and a number of interviews for local radio and advice on improving existing information were carried out. Articles were placed in the press and information was distributed in supermarkets and advice was provided to mediators on self-promotion.¹⁹¹ This was intended to increase the number of cases being mediated and increase the national awareness of mediation.

I Mediating Family Probate Disputes

5.168 The Commission turns to examine a particular aspect of family proceedings, namely, probate (wills) disputes. It is clear and unfortunate that grief associated with the death of a loved one creates tensions, and legal proceedings may follow from misdirected anger over the death. Death may cause dormant family disputes to resurface and a dispute supposedly over property may in fact be a dispute over family relationships.

5.169 Disputes may arise because family members have different views of a fair distribution of a deceased love one's property. For example, one of the deceased's children may regard equal distribution among all the children as fair, while another child may believe that he or she should have received more because of care given to an older or incapacitated parent. A dispute may arise between children of one marriage and the surviving spouse of a later marriage. The deceased person's children may view the property as theirs, while a surviving spouse may feel a right to a sizable portion of the property.

5.170 In addition, disputes over wills have the capacity to descend into fights for control of the family silver or other less (financially) valued items. Solicitors frequently find themselves working on difficult probate disputes, while at the same time trying to maintain a good ongoing working relationship with the family. Unfortunately, neither is easy when emotions are running high, and the administration of an estate can often take much longer than it should.¹⁹²

5.171 Where probate (will) disputes are litigated, the applicants will often base their claim on section 117(1) of the *Succession Act 1965* which states that the Court will determine whether testator has failed in his or her "moral duty to make proper provision for the child" in accordance with his means, whether by

¹⁹¹ Sayers "Family Mediation in England and Wales". Presentation to The Committee on Legal Affairs Presidency of the Council of the European Union "*Mediation: Pushing the Boundaries*", October 2007.

¹⁹² Fielding "Mediating Probate Disputes" (2006) 156 NLJ 1605.

the will or otherwise.¹⁹³ In making an order under section 117, a Court must, in accordance with section 117(2):

“consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.”

5.172 An order made under section 117 cannot, however, affect the legal right share of the spouse of the deceased, or, if the spouse is a parent of the child, any gift that has been left to the spouse of the deceased, or any share on intestacy to which he or she would be entitled (this might arise where, for example, a testamentary gift and/or the residuary gift fails and falls to be distributed on intestacy). This is why most section 117 claims are brought in respect of the last will of the second parent to die.¹⁹⁴

5.173 The Commission considers that there are good grounds for suggesting that applications under section 117 of the *Succession Act 1965* should be brought before a judge very early in the proceedings so that the availability of mediation is made known to the parties. For that reason the Commission has provisionally concluded that a Court should adjourn proceedings when appropriate to allow parties to a dispute arising under section 117 of the *Succession Act 1965* to consider mediation.

5.174 *The Commission provisionally recommends that a Court should adjourn proceedings when appropriate to allow parties to a dispute arising under section 117 of the Succession Act 1965 to consider mediation.*

J Conclusion

5.175 The Commission concurs with the comments of the President of Ireland that:

“The old adversarial model of a day in court with a winner and a loser was never designed effectively to address the profound human needs and vulnerabilities at the heart of family relationships and indeed even the most redeemed family law model has stark

¹⁹³ See Brady *Succession Law in Ireland* (2nd ed Butterworths, 1995).

¹⁹⁴ See Hourican “Section 117 Claims: Practice and Procedure and Matters to Bear in Mind” (2001) 6(3) CPLJ 62.

limitations to the difficulties and problems it can realistically address and help resolve.”¹⁹⁵

5.176 The Commission considers that, where possible mediation (and other ADR processes such as collaborative lawyering) should form part of an overall suite of processes that aim to resolve what are complex human and legal problems in family law disputes. The Commission reiterates that this is not an “either or” issue but a question of a suitable mix of approaches that are tailored to the particular circumstances of those involved in family disputes in the wide sense discussed in this Chapter.

¹⁹⁵ Remarks by President McAleese at the opening of the second European Collaborative Law Conference, Cork, 2 May 2008. Available at www.president.ie

CHAPTER 6 MEDICAL ISSUES & ADR

A Introduction

6.01 In this chapter the Commission examines how ADR could assist in the resolution of medical disputes. In Part B the Commission explores the potential of ADR in providing alternative non-monetary redress, including an apology, medical negligence claims. In Part C the Commission discusses the provision for mediation under the *Medical Practitioners Act 2007*. In Part D the Commission examines developments in England and Wales in relation to the promotion of ADR in medical negligence claims. In Part E the Commission discusses various schemes in the United States which have been implemented for the early and effective resolution of medical negligence claims.

B Civil Claims: Medical Negligence

6.02 It has been estimated that up to 1,500 deaths are caused annually by medical errors in Ireland.¹ Medical negligence litigation has long been criticised “... as complex, costly, and gruelling for all concerned, yet the number of medical negligence claims being brought in this country has risen sharply in recent years.”²

6.03 Lord Woolf in his *Final Report on Access to Justice*, identified the following problems associated with medical negligence claims in England and Wales:

- (a) The disproportion between costs and damages in medical negligence is particularly excessive, especially in lower value cases.
- (b) The delay in resolving claims is more often unacceptable.
- (c) Unmeritorious cases are often pursued, and clear-cut claims defended, for too long.

¹ See Clancy “Risk Management in the Irish Health Service – where do we go from here?” (2003) 9 *Medico-Legal Journal of Ireland* 88.

² Moloney “Dealing with Medical Negligence Claims: a review of options for reform” (1999) 5 *Medico-Legal Journal of Ireland* 2 at 79.

(d) The success rate is lower than in other personal injury litigation.

(e) The suspicion between the parties is more intense and the lack of co-operation frequently greater than in many other areas of litigation.³

6.04 In Ireland, until the establishment of a Clinical Indemnity Scheme (CIS) under the auspices of the States Claims Agency (SCA),⁴ various insurance and indemnity arrangements had meant that each defendant to a claim - hospital, health board, consultant, hospital doctor, or nurse - was represented by a separate legal team. The SCA has noted that "This led to an unnecessarily adversarial approach to the resolution of claims, to duplication of effort, considerably lengthened the time taken to process a claim and added significantly to claims' costs."⁵

6.05 The Clinical Indemnity Scheme (CIS) was established in 2002, in order to rationalise pre-existing medical indemnity arrangements by transferring responsibility for managing clinical negligence claims and associated risks to the State, via the Health Service Executive (HSE), hospitals and other health agencies. Under the scheme, which is managed by the SCA, the State assumes full responsibility for the indemnification and management of all clinical negligence claims, including those which are birth-related.⁶

(1) Role for ADR in Resolution of Medical Negligence Disputes: Alternative Dispute Remedies

6.06 Most legal actions in Ireland brought by patients against medical professionals are based on the tort of negligence. The action's principal objective is to provide compensation to the patient.

6.07 Research has indicated, however, that patients often want a wider range of remedies than litigation is designed to provide. As noted by Lord Woolf in his 1996 Report *Access to Justice*, "Some victims want an explanation or apology rather than financial compensation, but are forced into protracted litigation because there is no other way of resolving the issues."⁷ Mediation can

³ Lord Woolf, *Access to Justice Final Report* (1996) at Chapter 15(2).

⁴ The States Claims Agency was established in 2001 as a unit within the National Treasury Management Agency (NTMA), pursuant to the *National Treasury Management Agency (Amendment) Act 2000*. The SCA was established in response to the need to manage mass claims such as the Army deafness claims on the 1990's. See *Report on Multi-Party Litigation* (LRC 76-2005), para 1.13.

⁵ See www.stateclaims.ie.

⁶ See <http://www.stateclaims.ie/ClinicalIndemnityScheme/introduction.html>.

⁷ Lord Woolf, *Access to Justice, Interim Report* (1995) at paragraph 14.

provide parties to a medical dispute the opportunity to fashion their own remedies to meet their individual needs.

6.08 *Devlin v The National Maternity Hospital*⁸ is an example of a case which might have benefited from mediation. In this case the Supreme Court decided the plaintiff was not entitled to damages from the defendant hospital for nervous shock over the retention in 1988 of some of the organs of his stillborn daughter. Delivering the main judgment, Denham J stressed that its decision in the proceedings was “a decision of law” and “should not be read as an endorsement” of the abandoned practice of the hospital in the 1980s which was “rooted in times long past” and was based on policies that were paternalistic and inappropriate.⁹ The Supreme Court noted that grief or sorrow was not a basis to recover damages and upheld the High Court’s decision that the plaintiff had not proved any legally recognisable injury or loss to himself as a result of the organ retention.¹⁰

6.09 The *Devlin* case deals with circumstances and policies that mirror those which arose at the Alder Hey Children’s Hospitals in Liverpool where the hospital retained the organs of deceased children without the knowledge or consent of their parents. The mediation of this dispute by the Centre for Effective Dispute Resolution resulted in the families receiving an apology from the hospital, in addition to compensation and a memorial for their children.¹¹ Arguably, if the parties in *Devlin* had mediated that dispute, the plaintiffs might have been afforded redress which was not available to them through litigation.¹²

(a) The Office of the Ombudsman

6.10 The following example of an investigation completed by the Ombudsman provides a comparable example of the flexible remedies available for complainants outside of the court system.¹³

⁸ [2007] IESC 50.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See Chapter 1, above at 1.16.

¹² On the organ retention controversy see also *Report of Dr. Deirdre Madden on Post Mortem Practice and Procedures* (Department of Health and Children, 2005), available at www.dohc.ie.

¹³ This case study is taken from *Complaints against the Public Health Service A Report by the Ombudsman to the Health Service Executive* (Office of the Ombudsman, March 2006) at Chapter 6 ‘Complaints and Complaint Handling’. Available at <http://ombudsman.gov.ie/en/Publications/InvestigationReports>.

Case Study: Medical Complaint to Ombudsman

Family members had sought explanations from nursing and medical staff in a general hospital as to the cause of their father's pain and discomfort after his admission. The family stated that the treating doctor refused to give them information on their father's condition and proposed treatment. Their father was subsequently transferred to another hospital, where he died shortly after his admission as a result of a ruptured aneurysm.

They family complained to the Ombudsman that they were not informed of the nature and severity of their father's condition and of the proposed treatment to alleviate it. The investigation concluded that the family's concerns had not been adequately addressed and the Ombudsman upheld their complaint. The outcome of the Ombudsman's recommendations included; the delivery of a personal apology to the family; the establishment of a new management structure that would include Consultant medical staff and so incorporate the role of the Consultant medical staff into the complaints procedure; the establishment of a new programme of nurse education in relation to best practice in the maintenance of nursing notes; the establishment of a chart review and audit of nursing documentation to determine effectiveness of the programme and generally to monitor documentation; and the development of a new complaints procedure and an administrative protocol relating to the respective roles and relationship of junior and senior medical staff.

6.11 The Ombudsman commented as follows on this case:

"It is very important to note that the family in this case did not pursue their complaint in a vindictive way or with a view to litigation. In essence, all they were seeking were clear answers to their questions about their late father's treatment, appropriate apologies for the shortcomings they perceived and assurances that lessons would be learned for the benefit of future patients and their relatives."¹⁴

6.12 The Ombudsman provides, in this respect, an important and free alternative for complainants who do not wish to litigate health care grievances.

¹⁴ *Complaints against the Public Health Service A Report by the Ombudsman to the Health Service Executive* (Office of the Ombudsman, March 2006) at Chapter 6 'Complaints and Complaint Handling'. Available at <http://ombudsman.gov.ie/en/Publications/InvestigationReports>.

(2) Flexibility & Creativity of Mediation Agreements in Medical Disputes

6.13 One of the advantages of mediation is that parties can fashion their own remedies. This provides scope for creating imaginative and non-legalistic outcomes which meet the needs of the parties. In England and Wales a number of such outcomes have emerged from mediations of medical disputes. These include:

- “A fast-track IVF was agreed for woman who lost her child as a result of a ruptured Caesarean scar, where her ability to conceive was said to have been compromised;
- An offer of future employment for the wife, soon to be a widow of a cancer patient, who used to work for the hospital that had failed to spot his lesion; involvement in the reviewing of departmental protocols and paperwork and risk analyses;
- Participation in discussions over changes in procedure and departmental risk assessments.”¹⁵

(3) The Power of an Apology

6.14 Society places a great value on apologies as a way of redressing wrongs. “Apology leads to healing because through apologetic discourse there is a restoration of moral balance – more specifically, a restoration of an equality of regard.”¹⁶ It can be “...one of the most effective means of averting or solving legal disputes”,¹⁷ yet “it is an act very much outside the traditional adversarial legal framework”.¹⁸ As noted by the former Ombudsman:

“If an apology is not provided, or is delayed, the complainant is less likely to be satisfied: all too often a failure or unwillingness to say ‘sorry’ at an early stage is the reason for complaints proceeding further through the system than is really necessary or appropriate. Apologies can be given without an admission of blame or liability in relation to the substance of the complaint. At the same time,

¹⁵ Allen “A New Way to Settle Old Disputes: Mediation and Healthcare” (2005) 73 *Medico-Legal Journal* 3 at 93-110.

¹⁶ Taft “Apology Subverted: The Commodification of Apology” (2000) 109 *Yale Law Journal* 1135 at 1137.

¹⁷ Tanick and Ayling “Alternative Dispute Resolution by Apology: Settlement by Saying I’m Sorry” *Hennepin Lawyer* (1996) at 22.

¹⁸ Cohen “Legislating Apology: The Pros and Cons” (2002) 70 *U. Cin. L. Rev.* 819 at 872.

apologies should not be used simply to brush complainants off. An apology, however gracious, without answers or follow-up action and information, is not going to be sufficient response to the most serious complaints.”¹⁹

6.15 This was also emphasised by Peart J in *O'Connor v Lenihan*,²⁰ another organ retention case, in which he stated:

“I feel that this case has not in fact been about the recovery of damages. I have little doubt that no award of damages would be even half as useful in easing [the plaintiffs’] feelings of anger and distress as a forthright and sincere and appropriately tendered apology for the anger, hurt and distress caused, however unintentionally at the time, by the retention of their babies’ organs, and perhaps an acknowledgement to the plaintiffs that the failure to explain that organs and tissue might be retained was not these days an acceptable way of dealing with such a situation. But the problem is that our legal system is not conducive to such steps being taken by defendants exposed to a claim for damages once fault might be seen to be acknowledged by such an apology, and are inhibited from taking a step which perhaps in other circumstances they would wish to take in order to assist those who have suffered distress and hurt.”

6.16 As Peart J noted, it has been suggested that doctors, health authorities, insurers and lawyers have been very reluctant to offer an apology to the patient or their family for fear that it would be taken as an admission of liability. To remove this fear various jurisdictions have introduced statutory provisions for apologies.

6.17 Massachusetts was one of the first States to introduce a statute creating a ‘safe harbour’ for apologies. Its relevant provision states that:

“Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relation to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in civil action.”²¹

¹⁹ Address by Kevin Murphy, Ombudsman “Handling Complaints in the Health Services” at Eastern Regional Health Authority Regional Conference (March 2002). Available at <http://www.ombudsman.irlgov.ie/ga/raidi/Name,2181.ga.htm>.

²⁰ 2000 No. 13001P.

²¹ Mass. Gen. Laws Ann. Ch 233 S23D (West Supp. 1998).

6.18 The statute defines “benevolent gestures” as “actions which convey a sense of compassion or commiseration emanating from humane impulses.”²² By the end of 2005, apology-immunity statutes had been passed in 19 states in the United States.²³ Empirical evidence is now emerging that supports the view that apologies can reduce litigation and promote the early resolution of disputes.²⁴

6.19 All Australian states have also introduced statutory protection for apologies in the context of medical claims.²⁵ Similarly, in British Columbia the *Apologies Act 2006*²⁶ was enacted to “make the civil justice system more accessible, affordable and effective” and to “promote the early and effective resolution of disputes by removing concerns about the legal impact of an apology.”²⁷

6.20 Similarly, in England and Wales, section 2 of the *Compensation Act 2006* states that “An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.” As a result,

“the new statute enables an apology to be given, and remedial and rehabilitation treatment to be given, without prejudice to any legal claim which the patient may bring in the future, so that with any luck his sense of grievance may be assuaged, his health improved despite his injury, and litigation either becomes unnecessary or is settled at an early stage.”²⁸

6.21 *The Commission provisionally recommends that a statutory provision be considered which would allow medical practitioners to make an apology and*

²² Mass. Gen. Laws Ann. Ch 233 S23D (West Supp. 1998).

²³ Berlin “Will Saying “I’m Sorry” Prevent a Malpractice Lawsuit?” (2006) 187 *American Journal of Roentgenology* (2006) 10-15. Available at <http://www.ajronline.org/cgi/content/full/187/1/10#REF21>.

²⁴ *Discussion Paper on Apology Legislation* (British Columbia Ministry of the Attorney General, 2006) at 2. Available at www.ag.gov.bc.ca.

²⁵ See *Civil Law (Wrongs) Act, 2002* (A.C.T.) ss 12-14; *Civil Liability Act, 2002* (N.S.W.) ss.67-69; *Civil Liability Act, 2002* (Tas.), ss.6-7; *Civil Liability Act 2002* (W.A.) SS5AF-H.

²⁶ S.B.C. 2006,c.19

²⁷ British Columbia, Legislative Assembly, Hansard, Vol. 8, No. 7 (29 March 2006) at 3456. (Hon. W. Oppal).

²⁸ Samuels “The Compensation Act 2006: Helpful or Unhelpful for Doctors?” (2006) 74 *MLJ* 171.

explanation without these being construed as an admission of liability in a medical negligence claim.

C Professional Conduct

(1) Medical Practitioners Act 2007

6.22 The *Medical Practitioners Act 2007* substantially expanded the grounds upon which a complaint may be brought for professional misconduct.²⁹ Previously the Irish Medical Council (IMC) could hear complaints based on alleged professional misconduct and fitness to practice by reason of physical or mental disability. The 2007 Act provides for a number of additional grounds including:

- Poor professional performance;
- Failure to comply with an undertaking;
- A criminal conviction in the State or elsewhere; and
- Failure to comply with a condition of registration or contravention of a provision in the 2007 Act.³⁰

6.23 The 2007 Act also establishes a Preliminary Proceedings Committee (PPC). The PPC will filter complaints that are made against medical practitioners, and, if it is deemed necessary, the committee will refer the complaint to the Fitness to Practice Committee for hearing, if the PPC is of the view that there is a *prima facie* case to warrant further action.³¹

6.24 The 2007 Act also introduces a new power to resolve conflicts by mediation.³² As noted by Minister for Health during the Oireachtas debate on the 2007 Act:

“Many complaints are received by the Medical Council and other regulatory bodies which can be resolved in a much more satisfactory manner through mediation or discussion ...We are introducing the concept of mediation in order to ensure that the Fitness to Practise Committee is the process that is used for serious issues only and that it is not used for what could be termed minor matters that can be dealt with through dialogue, discussion or mediation... Under no

²⁹ SI No.2 of 2007.

³⁰ Section 57 of the 2007 Act.

³¹ Section 59 of the 2007 Act.

³² Section 62 of the 2007 Act.

circumstances could one facilitate serious issues being resolved through mediation. That would be neither in the patient's interests nor the interests of the profession."³³

6.25 Under s.62(1) of the 2007 Act the Council may prepare guidelines for resolving complaints by mediation. No attempt to resolve the complaint through mediation can be made without the consent of both the complainant and the registered medical practitioner concerned.³⁴ Where the practitioner consents to mediation, it is not construed as an admission of any allegation.³⁵ Any communications made during the course of the mediation are confidential and cannot be used in any disciplinary, civil or criminal proceedings.³⁶ The resolution of a complaint by mediation cannot include the payment of any financial compensation.³⁷

6.26 In addition, the Health Service Executive has also incorporated mediation as a process for resolving complaints. The HSE's *Policy and Procedure Manual for the Management of Complaints of the Health Service Executive* states that "As part of the investigation process and where deemed appropriate by the Complaints Officer, mediation should be considered as a means of achieving resolution where both parties agree to the process."³⁸

D Developments in England & Wales

6.27 In *Burne v 'A'*³⁹ the parties in a medical negligence claim were advised by the English Court of Appeal to enter into mediation with a view to ending the "anxious and distressing case." Sedley LJ observed that the case "calls out for alternative dispute resolution." He added that "both parties need to take stock of their position and to enter into mediation in the light of it. No further

³³ Select Committee on Health and Children, Committee Debate 21 March 2007 on the *Medical Practitioners Bill 2007*.

³⁴ Section 62 (3) of the Act.

³⁵ Section 62(4) of the Act.

³⁶ Section 62 (5) of the Act.

³⁷ Section 62 (6) of the Act.

³⁸ See *"Your Service, Your Say' The Policy and Procedures for the Management of Consumer Feedback to include Comments, Compliments and Complaints in the Health Service Executive"* (HSE Consumer Affairs, February 2008). Available at www.hse.ie.

³⁹ [2006] EWCA Civ 24.

step should be taken in the remitted action until this has been done."⁴⁰ Ward LJ added:

"On the issue before us there are powerful arguments either way and I express no view whatsoever as to the eventual outcome. I do, however, feel very strongly that this is a case which must be referred to alternative dispute resolution before it is restored for the re-trial. Both parties should take stock of the strengths but also the weaknesses of their respective cases which are now plain for all to see and I hope mediation will bring a swift conclusion to a tragic event."⁴¹

6.28 Outside of judicial encouragement for mediating such disputes, a number of ADR initiatives have been introduced by the National Health Service (NHS) and a pre-action protocol for the resolution of to clinical disputes has been introduced under the Civil Procedure Rules 1998.

(1) National Health Service (NHS)

(i) Mediation Pilot

6.29 The NHS medical negligence mediation pilot scheme was launched in 1995 in response to criticisms of how negligence claims were managed and concerns about their increasing incidence. It was anticipated that up to 40 cases would be mediated over a 2 year period. As the referrals were low, the scheme was extended by an additional year. By the end of the third year, only 12 cases had been mediated.⁴²

6.30 A report was conducted to evaluate the pilot.⁴³ The 12 mediated cases were fully evaluated: five obstetric, one gynaecology, three surgery, two oncology, one each in radiology, neurology, bacteriology and orthopaedics. The settlement range was between £5,000 to £80,000. A number of other additional remedies were granted to claimants. These included apologies, extensive explanations of medical decisions, new treatment plans and, in one case, information about the place of burial of a foetus. The mediations all took a day to conclude.⁴⁴ Comparing traditionally managed cases with a similar profile to

⁴⁰ [2006] EWCA Civ 24. at para. 35.

⁴¹ *Ibid.* at para. 65.

⁴² Ward "Mediation: An Invaluable Component of Any ADR Forum within the Irish Healthcare System" 7 (2001)*Medico-Legal Journal of Ireland* 2 at 64.

⁴³ See Mulcahy et al. *Mediating medical negligence claims: an option for the future?* (Stationary Office, 2000).

⁴⁴ *Ibid.*

the 12 mediated cases, the report suggests that mediation increased the costs of the settlement process. Additional costs included the fees of the mediators, accommodation, and the loss to the NHS of having doctors present. The report did not take into account the savings in the cost of possible prolonged litigation.⁴⁵

(ii) NHS Complaints Procedure & Litigation Authority

6.31 The NHS Complaints Procedure is designed to provide patients with an explanation of what happened and an apology if appropriate. It is not designed to provide compensation for cases of negligence. However, patients might choose to use the procedure if their only, or main, goal is to obtain an explanation, or to obtain more information to help them decide what other action might be appropriate.⁴⁶

6.32 The NHS Litigation Authority⁴⁷ has also “instructed its panel of law firms to consider the appropriateness of mediation in every case and to monitor the outcomes of mediation.”⁴⁸ It is hoped that, with mediation, the cost of NHS compensation, costs and legal fees, amounting to £4 billion in 2001, will be reduced by at least 5%.⁴⁹

(2) Pre-Action Protocol for the Resolution of Clinical Disputes

6.33 After the completion of the NHS mediation pilot, a clinical negligence pre-action protocol was developed under the Civil Procedure Rules, 1998 to provide a code of good practice to be followed in clinical negligence litigation.⁵⁰ The protocol lists a range of alternative mechanisms for resolving clinical negligence disputes, including mediation, early neutral evaluation, expert determination and arbitration. The aims of the protocol are to encourage greater openness between the parties; encourage parties to find the most

⁴⁵ Ward “Mediation: An Invaluable Component of Any ADR Forum within the Irish Healthcare System” (2001) 7 *Medico-Legal Journal of Ireland* 2 at 64.

⁴⁶ Pre- Action Protocol for the Resolution of Clinical Disputes. Available at http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_rcd.htm.

⁴⁷ See <http://www.nhsla.com/>.

⁴⁸ Nestic “Mediation on the Rise in the United Kingdom?” (2001) 13 *Bond Law Review* 2.

⁴⁹ *Ibid.*

⁵⁰ *Pre-Action Protocol for the Resolution of Clinical Disputes*. (The Stationery Office, Department of Constitutional Affairs, 1998) Available at http://www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_rcd.htm.

appropriate way of resolving the particular dispute; reduce delay and costs; and reduce the need for litigation.⁵¹ As noted in the Pre-Action Protocol:

“It is clearly in the interests of patients, healthcare professionals and providers that patients’ concerns, complaints and claims arising from their treatment are resolved as quickly, efficiently and professionally as possible. A climate of mistrust and lack of openness can seriously damage the patient/clinician relationship, unnecessarily prolong disputes (especially litigation), and reduce the resources available for treating patients. It may also cause additional work for, and lower the morale of, healthcare professionals.”⁵²

6.34 The Protocol adds that:

“The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.”⁵³

6.35 The Protocol suggests that parties should consider negotiation, mediation and early neutral evaluation. Emphasising the voluntary nature of these processes, it also states that “it is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR.”⁵⁴

E Developments in the United States

(1) *Medical Mediation Panels: Wisconsin*

6.36 In Wisconsin, Medical Mediation Panels were introduced in 1986 to provide an objective assessment of the strengths and weaknesses of a medical malpractice claim. All medical malpractice claims must go through this process

⁵¹ Section 1.6 of the Protocol.

⁵² Section 1.2 of the Protocol.

⁵³ Section 5.1 the Protocol.

⁵⁴ Section 5.4 the Protocol.

before they can proceed to court.⁵⁵ Each panel consists of a lawyer, a health care provider, and a layperson. The early neutral evaluation they provide aims to identify claims without merit as early as possible and to expedite the resolution of those claims that do have merit.

6.37 The intention behind the Medical Mediation Panels was to provide "an informal, inexpensive and expedient means for resolving medical malpractice disputes without litigation."⁵⁶ Although referred to in the relevant legislation as "mediation", the work of the panels is more accurately described as early neutral evaluation.⁵⁷

(2) Pre-litigation Screening Panel: Maine

6.38 Before a medical malpractice claim can be filed in Maine, a complaint must be filed with a pre-litigation screening panel⁵⁸. Like the Wisconsin Medical Mediation Panels, the screening panels are meant to serve a twofold function of encouraging both the early resolution of claims and the withdrawal of unsubstantiated claims. But the pre-trial screening process can be bypassed if all parties agree. Alternatively, all parties may agree in writing to submit the claim to a binding decision of the panel. The parties can also use a combined method where certain issues are heard by the panel and others by the court. The panel does not have the power to decide dispositive legal issues.

6.39 The Maine scheme is similar to the one proposed by the Irish Hospital Consultants Association in 1993:

“Under the IHCA's proposal a three-person team - two physicians and one Senior Counsel - would assess cases. There would have been certain regulations in regard to the make up of the panel. That panel would have decided whether compensation was appropriate and, if so, how much. Written into it would have been that the decision of the panel would have to be confirmed by the High Court.”⁵⁹

⁵⁵ Wis. Stat. § 655.42(1); See also Doran “A Healthy Alternative” (2001) 95 *Law Society Gazette* 2 at 16, for a general discussion on mediation and medical negligence in the United States.

⁵⁶ Wis. Stat. § 655.42(1)

⁵⁷ See Chapter 2, above at 2.115.

⁵⁸ Maine Rev. Stats. Title 24, § 2851 and 2853.

⁵⁹ Joint Committee of Health and Children, Medical Litigation Presentations, 14 October 2004. Available at <http://debates.oireachtas.ie/DDebate.aspx?F=HEJ20041014.xml&Ex=All&Page=3>

6.40 This scheme has not been implemented.

F Summary

6.41 The Commission does not consider that mediation is suitable in every medical dispute, but the examples from litigation in Ireland, notably the organ retention cases, *Devlin* and *O'Connor*, indicate the merits of mediation in suitable cases. Mediation may be especially suitable where parties wish to seek redress that is not available through the Courts, for example, where an apology is sought.

“Our culture is increasingly blame-orientated, and litigation only feeds this tendency. Mediation, on the other hand, provides a safe forum for a doctor, who may still be obliged to continue to care for an aggrieved patient, to give them what they often need – an explanation, assurance of changed practices, and an apology if appropriate – without the latter being rewarded by inclusion in the Writ as an admission of liability.”⁶⁰

6.42 Furthermore, mediation can offer the parties an opportunity to express the emotional aspects of the dispute - the stress, trauma, grief which is often experienced by claimants in a medical negligence claim. Acknowledgement of such emotions by the other side may allow the claimants to ‘move on’ from dispute with the knowledge that their voices have been heard and that their feelings have been respected and appreciated by the other party, therefore proving them with a therapeutic sense of closure. Mediation may also be especially suitable for the resolution of multiple claims, such as in the Alder Hey mediation case.

6.43 *The Commission invites submissions as to whether a pre-action procedure providing for mediation in a medical negligence claims should be considered.*

⁶⁰ McVeagh “*Mediation in Clinical Negligence Cases and NHS Complaints – A Way Forward?*” (June 2006). Online article available at www.restorativejustice.org.uk/Health_Sector/MEDIATIONarticleforMediationJournalJun06.pdf.

CHAPTER 7 COMMERCIAL DISPUTES & ADR

A Introduction

7.01 In this chapter the Commission discusses the ability of ADR to resolve commercial disputes. In Part B the Commission provides a general overview of the nature of commercial disputes and the capacity of ADR to provide suitable dispute resolution methods. In Part C the Commission examines the development of commercial ADR in Ireland, with a particular emphasis on the role of the Commercial Court in encouraging the uptake of mediation and also the provision for conciliation under the Government Public Works Contracts. In Part D the Commission summaries the domestic and international institutions and schemes which have been established to resolve disputes of a commercial nature.

B Commercial Dispute Resolution: An Overview

7.02 Most commercial disputes have at least three dimensions; legal, commercial, and emotional.¹ It is a well-established advantage that ADR processes, such as mediation and conciliation, provide an opportunity for parties in a commercial dispute to consider and resolve all dimensions of the dispute in a private and confidential environment which also preserves good business relations. By contrast, litigated commercial disputes are “concerned essentially with the loss of, or entitlement to money or monies worth, between individuals or corporations who have sought to protect their personal wealth or investments by invoking their legal rights.”² Litigation has the advantage of finality but may hamper the continuation of a business relationship.

¹ Runesson and Guy *Mediating Corporate Governance Conflicts and Disputes* (The International Finance Corporation, World Bank Group, 2007) at 28. Available at www.ifc.org.

² Aylmer “*Commercial Mediation in Ireland - An Opportunity for Progress?*” (February 2007), online article available www.efc.ie.

7.03 Commercial disputes can lead to huge direct financial costs for a company, but they can also result in enormous indirect costs including; loss of reputation, loss of key staff and loss of long-term business relationships.³

7.04 In the United Kingdom, the Centre for Effective Dispute Resolution (CEDR) has estimated that disputes may cost business £33 billion every year.⁴ The cost of business disputes is calculated in terms of the amounts paid in damages incurred by business as a consequence of those disputes and associated legal fees. The cost of this consequential damage (£27bn) has been estimated to far outweigh the legal fees (£6bn).⁵ In addition to the economic cost, 8 out of 10 disputes have a significant impact on the efficient running of a business. CEDR has estimated that a dispute valued at £1 million will consume an average of over 3 years of managers' time trying to resolve the dispute.⁶

7.05 The English firm of solicitors Field Fisher Waterhouse conducted research into how companies handle the process of dispute resolution and specifically the role of psychological and emotional aspects of dispute resolution.⁷ The respondents were 75 UK companies which had been involved in commercial disputes in the previous 3 years. Almost half of the respondents (47%) stated that a personal dislike of the other side had led their company into costly litigation. 88% said unrealistic expectations regularly acted as a barrier to the resolution of a dispute, while an overwhelming 97% majority said the business community often underestimated the time and cost required to litigate a case. 53% of the company executives and in-house lawyers surveyed said the adversarial stance taken by their external lawyers had contributed to the escalation of a commercial dispute. The rise in popularity of ADR was evident, with every respondent pointing to the growing importance of ADR as a means of avoiding lengthy disputes.⁸

7.06 Businesses can now incorporate a broad range of ADR processes into the management of their business to prevent and handle commercial

³ See *JAMS Guide to Dispute Resolution Clauses for Commercial Contracts* (2006). Available at www.jamsadr.com.

⁴ CEDR UK “*Conflict is costing business £33 billion every year*” (26 May 2006). Online article available at www.cedr.com.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Stewart “Pride Comes Before a Claim – The Psychology of Dispute Resolution” *Company’s Secretary Review* (January 2008). Available at <http://www.ffw.com/publications/all/articles/psychology-dispute-resolution.aspx>.

⁸ *Ibid.*

disputes that arise. These include, but are not limited to, ADR clauses partnering, joint problem solving, mediation, conciliation, early neutral evaluation, online dispute resolution, and arbitration.

7.07 In a study conducted by the English firm of solicitors Herbert Smith LLP in 2007, 21 general counsel and in-house disputes lawyers were interviewed about their dispute management systems in organisations across a range of industry sectors, including the Royal Bank of Scotland, Merrill Lynch, and GE.⁹ Mediation was overwhelmingly the most frequently used ADR process. 55% of the organisations had used mediation at least 4-8 times in the previous 12 months and some organisations reported far higher numbers than that.¹⁰

7.08 In the United States, approximately 800 companies, including Time Warner, UPS, General Electric, and Coca-Cola have pledged to explore ADR before litigation whenever a dispute arises with a company that has made a similar pledge.¹¹ It is evident from this that commercial mediation is a phenomenon of global significance, and is rapidly becoming an attribute of global commerce.¹²

7.09 Commercial disputes often centre on very sensitive commercial details which parties would prefer not to have disclosed in public. The confidentiality afforded by mediation is therefore highly attractive. When commercial disputes arise, the most favourable outcome for those involved is to have the dispute resolved quickly and to maintain a working business relationship with the other party.

“...Mediation is about mending fences and finding a constructive approach to conflict resolution that brings to the surface issues of mutual concern; reviews the various angles of the issue at stake; and, allows the conflict to be used as a learning tool and as a basis

⁹ “*The Inside Track – How Blue-Chips are using ADR*” Survey & Report conducted by Herbert Smith LLP November 2007. Available at www.herbertsmith.com.

¹⁰ *Ibid.*

¹¹ Runesson and Guy *Mediating Corporate Governance Conflicts and Disputes* (The International Finance Corporation, World Bank Group, 2007) at 13. Available at www.ifc.org.

¹² Response of the International Institute for Conflict Prevention and Resolution (“CPR Institute”) to questions posed by Arlene McCarthy MEP concerning what became the Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters at 3 (November 2005). Available at http://www.europarl.europa.eu/comparl/juri/consultations/cpr_en.pdf.

for improved relations among the parties. Mediation enables parties to resume, or sometimes to begin, negotiations.”¹³

7.10 The benefits of commercial mediation can be seen in the following mediation which was conducted by the Centre for Effective Dispute Resolution.¹⁴

CEDR Solve Case Study: Commercial Mediation

Two companies were in a business relationship, one manufacturing a particular food product and the other distributing it. The manufacturer had a dominant position in the market for the product. Several years into the relationship the manufacturer revised its distribution terms, which the distributor claimed was an abuse of the manufacturer's dominant position through excessive and discriminating prices and the operation of an exclusive direct distribution system. The distributor claimed that this amounted to a breach of Article 82 of the EC Treaty (EU competition rules) and that it affected their trading, causing losses in terms of reduced profits on the product and a reduction of market share. Claiming damages as a result of the manufacturer's abuse of a dominant market position, the distributor commenced litigation. The manufacturer claimed that there was no evidence of abuse, and that even if the allegations of abuse were true, there was no direct link with the distributor's alleged losses.

Although court proceedings were underway, the parties specialised in a niche market and wanted to continue to work together in the future, but on fair terms, so they requested the proceedings to be stayed to allow them to attempt mediation. They approached CEDR Solve believing that mediation would enable a mutually beneficial agreement to be reached and maintain their working relationship, in contrast to the uncertainty of litigation and the damage it would cause to their relationship. The mediator was able to facilitate a settlement, which was reached at the end of a long two-day mediation session. All claims and counterclaims were settled and a protocol was also agreed to enable the parties to start working together again after several years of disagreement.

¹³ Runesson and Guy *Mediating Corporate Governance Conflicts and Disputes* (The International Finance Corporation, World Bank Group, 2007) at 24. Available at www.ifc.org.

¹⁴ “Case study: Abuse of market dominance claim mediated to maintain working relationship” *CEDR Solve*. Available at http://www.cedr.com/CEDR_Solve/casestudies/results.php?param=4.

C Commercial ADR in Ireland

7.11 Ireland has experienced an unprecedented economic expansion in recent years and it was to be expected that commercial disputes would also increase.¹⁵ Irish businesses, as in most other developed western economies, have traditionally chosen litigation or arbitration as the means of resolving the majority of commercial disputes. It has been suggested that, litigation in particular, has been favoured because it provides a clear and final resolution, even where this comes with significant financial and consequential costs, such as damaged business relationships and reputations.

7.12 Indeed, while litigation may inevitably also bring with it considerable media coverage as in *Fyffes v DCC*¹⁶ this may be, as the Commission as already discussed an inevitable aspect of public dispute resolution where no other options are open. Nonetheless, in many situations a less public venue for dispute resolution may be appropriate.

7.13 While commercial disputes are inevitable, the way they are handled can have a profound impact on the profitability and viability of business.¹⁷ “Full-blown disputes are always bad news for a company. They can lead to poor performance, scare investors, produce waste, divert resources, cause share values to decline, and, in some cases, paralyze a company.”¹⁸ One of the most effective mechanisms for reducing and resolving commercial conflict is to incorporate ADR clauses into commercial contracts and corporate governing policies.

(1) ADR Clauses in Commercial Contracts

7.14 The Commission concurs with the view that the optimal time for businesses to implement strategies to avoid adverse effects of a dispute is

¹⁵ Morgan “Commercial Dispute Resolution in Ireland — A Comparative Analysis” (2002) 9 *Commercial Law Practitioner* (9) 200. See also Reichert “Commercial Mediation” (2003) 8 *Bar Review* 4 at 167; Aylmer “The Civil Procedure Rules and commercial mediation – a case for Ireland” (2004) 11 *Commercial Law Practitioner* 14; Williams “Tough Talking” (2003) 97 *Law Society Gazette* 6 at 27.

¹⁶ [2007] IESC 36 Supreme Court, 27 July 2007. See Dowling “*Fyffe’s v DCC* – Analysis and Implications” (2006) 13 CLP 2.

¹⁷ Alexander *Global Trends in Mediation* (Kluwer Law International 2006) at 49.

¹⁸ Runesson and Guy *Mediating Corporate Governance Conflicts and Disputes* (The International Finance Corporation, World Bank Group, 2007) at 13. Available at www.ifc.org.

before any dispute arises.¹⁹ Consistent with standard business planning strategies many organisations incorporate dispute avoidance and management into their corporate strategies. In other words, it is good corporate governance to establish a framework to prevent and solve emerging disputes that may affect a company's reputation and performance.²⁰

7.15 The Commission is aware that ADR clauses are now regularly included in commercial contracts, supplementing more traditional clauses that referred to arbitration only as the appropriate mechanism for resolving disputes. The clause usually stipulates that the parties will refer any dispute that arises out of the contract to a particular method of ADR.²¹ By inserting ADR clauses, businesses establish procedures that will govern the resolution of any disputes that may arise in the course of the contractual relationship, and, as a result, avoid any delay in the resolution of the dispute.

“Mediation provisions in contracts put the dispute resolution framework in place at the relationship's beginning, not when a conflict arises. The parties to a contracted mediation become used to the process. Their minds actually become attuned to meeting, discussing, and identifying disputes and then resolving them because of an identity of interest – the preservation of the relationship to achieve agreed goals.”²²

7.16 In such a clause, ADR is voluntary in the sense that the parties consented to the inclusion of the clause in the agreement, and thus the process, at the outset of their relationship.

7.17 In *Re Via NetWorks Ltd*²³ the Supreme Court indicated that, in a suitable case, it would be willing to uphold an ADR clause, although the case itself involved an arbitration clause. The clause in question stated that:

¹⁹ *JAMS Guide to Dispute Resolution Clauses for Commercial Contracts* (2006). Available at www.jamsadr.com.

²⁰ Runesson and Guy *Mediating Corporate Governance Conflicts and Disputes* (The International Finance Corporation, World Bank Group, 2007) at 44. Available at www.ifc.org.

²¹ See Chapter 2, above at paragraph 2.32 for examples of single and multi-tiered ADR clauses.

²² Runesson and Guy *Mediating Corporate Governance Conflicts and Disputes* (The International Finance Corporation, World Bank Group, 2007) at 6. Available at www.ifc.org.

²³ [2002] 2 IR 47(Supreme Court, 23 April 2002).

“... all disputes... shall be resolved exclusively and finally by binding arbitration among the parties. It is specifically understood and agreed that any dispute may be submitted to arbitration regardless of whether such dispute would otherwise be considered justiciable or ripe for resolution by a court.”

7.18 This was, therefore, already an arbitration clause and the Supreme Court ordered that the proceedings should be stayed pursuant to section 5 of the *Arbitration Act 1980*. But the decision is of interest in the ADR context because Keane CJ adopted the following comments of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*:²⁴

“I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts, and if necessary to the arbitrators, that is where the respondents should go.”²⁵

7.19 It is notable that Keane CJ stated that in the *Via Networks* case:

“While, as the passage makes clear, in that case the contract was one which was more characteristic of the high-level world of international commerce than the agreement now under consideration, I have no doubt that the general principle is equally applicable to the agreement in this case.”

7.20 In that respect, the Court in the *Re Via Networks* case suggests that the well-established rule as to staying proceedings on the basis of an arbitration clause which has strong statutory backing in section 5 of the *Arbitration Act, 1980* can be applied in the context of any ADR clause.

7.21 This view is explicitly stated in the English case of *Cable and Wireless plc v IBM plc*.²⁶ In this case, Colman J held that a clause that specifically referred disputes to ADR, but was vague in terms of the precise procedure that should be used, was enforceable. He stated:

“For the courts now to decline to enforce contractual reference to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR [post-Woolf Civil Procedure

²⁴ [1993] AC 334.

²⁵ *Ibid.* at 353.

²⁶ [2002] EWHC 2059 Comm.

Rules of Court] and as reflected in the judgment of the Court of Appeal in *Dunnett v Railtrack plc*.²⁷

7.22 These cases serve to reinforce the increasing weight that the courts give to ADR but of course, this is underpinned in England and Wales by the general statutory reforms to civil procedure under the *Civil Procedure Rules 1998*.

7.23 ADR clauses may, however, be ineffective if they are not properly drafted. In the Australian case *Aiton Australia Pty Ltd v Transfield Pty Ltd*²⁸ Einstein J stated that “The Court will not adjourn or stay proceedings pending alternative dispute resolution procedures being followed, if the procedures are not sufficiently detailed to be meaningfully enforced.”²⁹ In this case the ADR clause was silent about the remuneration to be paid to the mediator and the effect of a declined appointment. The Court added that the minimum requirements applying to a dispute resolution clause, not just to mediation included the following:

- It must be in the form described in *Scott v Avery*.³⁰ That is, it should operate to make completion of the mediation a condition precedent to commencement of court proceedings;
- The process established by the clause must be certain;
- The administrative processes for selecting a mediator and in determining the mediator’s payment should be included in the clause and, in the event that the parties do not reach agreement, a mechanism for a third party to make the selection will be necessary; and
- The clause should also set out in detail the process of mediation to be followed – or incorporate these rules by reference. These rules will also need to state with particularity the mediation model that will be used.³¹

7.24 While the Commission does not necessarily agree that all these elements are required in all cases of ADR clauses (because they may inhibit the flexibility of the mediation process), this case highlights the need for ADR clauses to be properly drafted. Model ADR clauses are widely available which

²⁷ [2002] EWHC 2059 Comm. at paragraph 1.

²⁸ (1999) 153 FLR 236.

²⁹ *Ibid.* at 246.

³⁰ (1856) 5 HLC 811.

³¹ (1999) 153 FLR 236 at 252.

may provide a template for contracting parties. While these standard ADR clauses are a good starting point for drafters, parties should ensure that they incorporate contract-specific matters to reflect their own individual needs.

(2) Commercial Court & ADR

(a) Ireland

7.25 The Commission views the ongoing promotion and encouragement of mediation by the Commercial Court in the High Court as fundamental towards the integration of ADR into our civil justice system.

7.26 The Commercial Court was established in 2004 pursuant to the Rules of the Superior Courts (Commercial Proceedings) 2004.³² Its purpose is to expedite cases of a commercial nature valued at €1 million or more. The 2004 Rules state that the High Court judge exercising the jurisdiction conferred to them:

“... may, of his own motion or on the application of any of the parties, adjourn the matter before it for a period not exceeding 28 days for the purpose of allowing the parties to consider whether or not the proceedings ought to be referred to mediation, conciliation or arbitration.”³³

7.27 The 2004 Rules make clear that the judge does not have the power to direct that the parties *attempt* ADR but is limited to adjourning the proceedings to allow the parties to *consider* whether ADR is appropriate for them. This is consistent to the voluntary nature of ADR.³⁴

7.28 Where the parties decide to attempt ADR, the judge may extend the time for compliance by them with any provision of the rules or order of the court. “This direction will be given for the purpose of facilitating the determination of the proceedings in a manner which is just, expeditious and likely to minimise costs.”³⁵ The 2004 Rules represent the first statutory example in Irish law of the application of ADR in a court setting. This was followed by the Rules of the

³² SI No. 2 of 2004. See generally: Holmes “Two years on – The Commercial Court” 2 (2006) 1 *Journal of Civil Practice and Procedure* 1 at 15; Hayes “The Commercial Court” (2005) 23 *Irish Law Times* 317; Jacobs and Roulston “In the Know” (2004) 98 *Law Society Gazette* 4; Mr. Justice Peter Kelly “The Commercial Court” (2004) 9 *Bar Review* 1; Stauber “Commercial Courts: Twenty-First Century Necessity?” (2007) 1 *Judicial Studies Institute Journal* at 154.

³³ Order 63A, r.6(1)(b)(xiii).

³⁴ See Chapter 3, above at 3.03.

³⁵ Dowling *The Commercial Court* (Thomson Round Hall 2007) at 256.

Superior Courts (Competition Proceedings) 2005³⁶ and section 15 of the *Civil Liability and Courts Act 2004*.

7.29 In the following case study, *Nesselside Builders Ltd. v Carlow County Council*, a potentially expensive civil action was resolved following mediation, which was advised by Kelly J under the 2004 Rules.³⁷

Case Study: Mediation in the Commercial Court

Nesselside Ltd had all but completed a small part of a major road development in County Carlow. It then transpired that the Council did not own a small piece of land linking the Nesselside development to the main development. This small parcel of land was in fact owned by a person called Madden. Nesselside initiated an action requiring the Council to provide access to the land and to initiate a compulsory purchase order for it against the owner. The claim also sought damages for alleged breach of contract, malfeasance in public office and fraudulent misrepresentation. Kelly J advised the parties to consider mediation. The mediation was successful and the case was withdrawn from the Commercial Court list.

7.30 Mediation has also been recommended and attempted in many other cases in the Commercial Court.³⁸ It is important to note that mediation can assist the parties in clarifying the issues and gaining a greater understanding of the nature of the dispute, even if a settlement does not result.

7.31 By actively selecting cases which are believed to be appropriate for resolution by ADR, the Commercial Court has, on its own initiative, increased the awareness and uptake of mediation in such cases. The Commission very much welcomes the introduction of ADR in the Commercial Court, but it is important to note that given the €1 million jurisdictional threshold involved, most commercial disputes will not qualify for inclusion on the Commercial Court's list. In this respect, it has been suggested that ADR must be promoted for the resolution of commercial disputes in small and medium-sized businesses. As certain commentators have noted:

³⁶ SI 130 of 2005.

³⁷ Pender "Roadway dispute is settled" (27Feb. 2008) *The Nationalist*. Available at <http://www.carlownationalist.ie/news/story/?trs=mhmqkfmh&cat=news>.

³⁸ Further examples of cases which were adjourned for mediation and resulted in settlement through mediation include: *Mandraki Associates Ltd v Shell International Petroleum Company Ltd* Record No.2005/4283P, *HSBC Bank Plc v Lillis* Record No.2005/3444P and *C & C (Ireland) Ltd v Societe Anonyme des Eaux Minerales d'Evian*. Record No.2005/3718P. See Dowling *The Commercial Court* (Thomson Round Hall 2007).

“Ensuring the continued growth... of ADR in this jurisdiction will then depend on encouraging small and medium enterprises to include appropriate ADR clauses in agreements... and increasing their awareness of the benefits of mediation in contrast to the damage to commercial and employment relationships which may result from litigation.”³⁹

7.32 The Commission turns to assess developments in the Commercial Court in England and Wales which have placed a greater emphasis on the role of ADR in the resolution of commercial disputes.

(b) England

7.33 The English Commercial Court has issued a series of Practice Directions in recent years providing guidance concerning the procedures of the Court. In 1993 the Court issued a Practice Statement which introduced changes to two questionnaires used by the court. The parties were required to complete and submit these at two stages in the case, first prior to the summons for direction and then another prior to the trial to confirm whether the directions had been carried out. The 1993 Practice Statement added questions about whether the party completing the form had considered the use of ADR and whether ADR had been explored with the other side. In 1995 additional questions were added to all pre-trial check lists in the following form:

- “Have you or your Counsel discussed with your clients the possibility of attempting to resolve this dispute (or particular issues) by Alternative Dispute Resolution?
- Might some form of ADR procedure assist to resolve or narrow the issue in this case?
- Have you or your clients explored with the parties the possibility of resolving this dispute (or particular issues) by ADR?”

7.34 In 1996 the Court issued a second Practice Statement on ADR. This indicated that from that time judges of the Commercial Court would:

- Look at cases or issues in cases to see if they might be appropriate for settlement by ADR;
- Invite the parties to take positive steps to set ADR procedures in motion;
- Adjourn the proceedings to enable ADR to take place;

³⁹ Stewart & Moore “Mediation in Ireland – An improving environment” (2005) 12 (5) CLP 115.

- Provide for the costs of any ADR procedure.

7.35 In identifying cases regarded as appropriate for ADR, judges may suggest the use of ADR, or make an Order directing the parties to attempt ADR. If, following an ADR Order, the parties fail to settle their case they must inform the Court of the steps taken towards ADR and why they failed. It has been said that "... although the Court's practice is non-mandatory, ADR Orders impose substantial pressure on parties."⁴⁰

7.36 The 2006 Commercial Court Guide⁴¹ includes a separate Chapter on ADR and a sample ADR Order printed. In the 2006 Guide, the Court emphasises the 'primary role' of the Commercial Court as a forum for deciding commercial cases, but encourages parties to consider the use of ADR as a possible means of resolving disputes or particular issues. The 2006 Guide states:

"Whilst the Commercial Court remains an entirely appropriate forum for resolving most of the disputes which are entered in the Commercial List, the view of the Commercial Court is that the settlement of disputes by means of ADR:

- (i) significantly helps parties to save costs;
- (ii) saves parties the delay of litigation in reaching finality in their disputes;
- (iii) enables parties to achieve settlement of their disputes while preserving their existing commercial relationships and market reputation;
- (iv) provides parties with a wider range of solutions than those offered by litigation; and

⁴⁰ Genn "Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court & the Court of Appeal" (Department of Constitutional Affairs, Research Report No. 1, 2002) Executive Summary. Available at <http://www.dca.gov.uk/research/2002/1-02es.htm>.

⁴¹ *Admiralty, Commercial and Mercantile Court Guides* (Her Majesty's Courts Service, 2006). Available at <http://www.hmcourtsservice.gov.uk/publications/guidance/admiralcomm/index.htm>.

(v) is likely to make a substantial contribution to the more efficient use of judicial resources.”⁴²

7.37 The 2006 Guide states that Commercial judges will, “in appropriate cases”, invite parties to consider whether their dispute, or issues in it, could be resolved through ADR. Parties wishing to attempt ADR can apply for directions at any stage, including before service of the defence and before the case management conference. The Guide adds that judges may “invite” parties to use ADR if, at the case management conference, it appears to the judge that the case or any of its issues are “particularly appropriate” for an attempt at settlement by means of ADR.⁴³ The judge has the power to adjourn the case to encourage and enable the parties to use ADR, or if deemed appropriate, may make an ADR Order in the terms set out in the Guide.

7.38 The draft ADR Order appended to the 2006 Guide provides for the parties to:

- exchange lists of three neutral individuals available to conduct ADR procedures;
- to endeavour ‘in good faith’ to agree a neutral to conduct the ADR procedure;
- to take serious steps to resolve their dispute by ADR; and
- if the case is not finally settled, the parties are to inform the Court by letter what steps towards ADR have been taken and why such steps have failed.⁴⁴

7.39 A 2002 study entitled *Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal* assessed the impact of ADR Orders on the progress and outcome of 233 cases between 1996 and 2000 explored reactions of practitioners to ADR Orders.⁴⁵

7.40 During the first three years reviewed in the study, the annual number of ADR Orders issued was about 30. ADR was undertaken in a little over half of the cases in which an ADR Order had been made. There was a substantial

⁴² Chapter G (G.1.2). of the *Commercial Court Guide* at 48.

⁴³ Chapter G (G 1.6) of the *Commercial Court Guide*, at 48.

⁴⁴ *Commercial Court Guide*, at 168.

⁴⁵ Genn “Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court & the Court of Appeal” (Department of Constitutional Affairs, Research Report No. 1, 2002). Available at <http://www.dca.gov.uk/research/2002/1-02es.htm>.

increase toward the end of the period, with some 68 Orders being issued in the final six months of the study. This was the result of one or two judges significantly increasing the number of ADR Orders made.⁴⁶

7.41 Of the cases in which ADR was attempted, 52% settled through ADR, 5% proceeded to trial following unsuccessful ADR, 20% settled some time after the conclusion of the ADR procedure, and the case was still live or the outcome unknown in 23% of cases. Among cases in which ADR was not attempted following an ADR Order, about 63% eventually settled. About 20% of these said that the settlement had been as a result of the ADR Order being made. However, the rate of trials among the group of cases not attempting ADR following an ADR Order was 15%. This compares unfavourably with the 5% of cases proceeding to trial following unsuccessful ADR.⁴⁷

7.42 The most common reasons given for not trying ADR following an ADR Order were:

- The case was not appropriate for ADR;
- The parties did not want to try ADR;
- The timing of the Order was wrong (too early or too late); and
- No faith in ADR as a process in general.⁴⁸

7.43 The English Commercial Court also provides for Early Neutral Evaluation (ENE) of commercial disputes. The 2006 Commercial Court Guide states that, in appropriate cases, there is a facility for a without prejudice, nonbinding, ENE by a Commercial Court judge of a dispute, or of particular issues in a case. Following discussion with parties' legal representatives, a judge may offer to provide an evaluation himself, or arrange for another judge to do so, if it is thought that an ENE would help in resolving the dispute. If such an ENE is provided by a judge, that judge will normally take no further part in the case.

7.44 The 2007 *Report and Recommendations of the Commercial Court Long Trials Working Party* recommended that "At appropriate stages those representatives should also be required to sign a statement to the court indicating whether ADR has been considered internally within the client

⁴⁶ Genn "Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court & the Court of Appeal" (Department of Constitutional Affairs, Research Report No. 1, 2002). Available at <http://www.dca.gov.uk/research/2002/1-02es.htm>.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

organisation.⁴⁹ The Report argued that senior representatives of the parties should be required to sign this statement and also whether ADR has been considered with their opposite number. This process should occur automatically at two stages: (i) at the first case management conference, and (ii) after exchange of expert reports, or of witness statements if there are no expert reports. In addition, the judge may of course ask the question at any oral hearing at which he or she considers it appropriate. The proposals and recommendations in the 2007 Report have been put into practice in the Commercial Court for a trial period from February 2008.⁵⁰

7.45 *The Commission invites submissions as to whether mediation and conciliation orders should be introduced in the Commercial Court which would set out the necessary steps which parties must follow when considering mediation and conciliation.*

(3) ADR Clauses in Irish Government Public Works Contracts

7.46 In 2004 the Irish government decided to reform public sector construction procurement in Ireland and commissioned replacement of GDLA⁵¹ and IEI⁵² Standard Forms of Contracts. In 2007, a suite of construction contracts for use on Public Works contracts was published.⁵³

7.47 Public sector construction contributes approximately €8 billion to the Irish construction industry every year.⁵⁴ “Construction projects, as a result of their inherent nature, can be subject to cost and time overruns. With such a

⁴⁹ *Report and Recommendations of the Commercial Court Long Trials Working Party* (Judiciary of England Wales, December 2007 at 58. Available at http://www.judiciary.gov.uk/docs/rep_comm_wrkg_party_long_trials.pdf.

⁵⁰ *Ibid.*

⁵¹ Government Departments and Local Authorities.

⁵² Institution of Engineers of Ireland.

⁵³ See: Public Works Contract for Building Works Designed by the Employer Public Works Contract for Building Works Designed by the Contractor; Public Works Contract for Civil Engineering Works Designed by the Employer; Public Works Contract for Civil Engineering Works Designed by the Contractor; Public Works Contract for Minor Civil Engineering and Building Works designed by the Employer (contracts less than €5m); Short Form of Public Works Contracts for Building and Civil Engineering Works (contracts less than €500,00.00). Available at www.finance.gov.ie.

⁵⁴ Howley and Lang *Public Works Contract for Building Works Designed by the Employer Explained* (Clarus Press, 2008) at i.

large financial outlay and exposure to cost and time overruns, the government require more price and time certainties on public construction projects.”⁵⁵ The introduction of the 2007 Public Works Contracts is aimed at reducing overruns and increasing certainties and are now are mandatory for all publicly funded construction projects.⁵⁶

7.48 The standard contracts and subcontracts of the IEI, RIAI, CIF and SCS provide for the resolution of disputes by conciliation and arbitration. The 2007 Public Sector Contracts follow suit. Clause 13.1 of the 2007 Public Sector Contracts is devoted substantially to the process of conciliation.⁵⁷ The Commission now turns to examine Clause 13.

(a) Voluntary Nature of the Process

7.49 Clause 13.1.1 states that “If a dispute arises under the Contract, either party may, by notice to the other party, refer the dispute for conciliation”. Clause 13.1 doesn’t, therefore, make conciliation mandatory and it is left to the parties to initiate the process if they wish to do so.

(b) Terminology

7.50 Clause 13.1.2 states that:

“Within 10 working days of the referral of a dispute to conciliation, the parties shall jointly appoint a conciliator who is competent to *adjudicate* upon the dispute and independent of the parties.”

7.51 The Commission has already defined conciliation as an advisory as opposed to an adjudicatory process.⁵⁸ While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not in the Commission’s view an adjudicatory or determinative role.⁵⁹ It has

⁵⁵ *Ibid.*

⁵⁶ See also Munnely “Recent developments in construction law: the newly published contracts for publicly funded construction works” (June 2007) 12 *Bar Review* 3 at 118.

⁵⁷ In England and Wales, commercial disputes arising from construction contracts are litigated in the Technology and Construction Court (TCC).

⁵⁸ See Chapter 2, above at paragraph 2.44.

⁵⁹ The use of the word “adjudicate” in clause 13.1 may have been influenced by the English Latham Report which was published in 1999 and which recommended, among other measures, widespread use of adjudication as the method for prompt dispute resolution to be used prior to any arbitration or litigation proceedings. This recommendation was implemented in section 108 of the *Housing Grants Construction and Regeneration Act 1996* which provides that any party to a

been noted in this respect that the use of the word ‘adjudicate’ and not ‘conciliate’ is confusing as the “skills required for a competent conciliator are different from those who is ‘competent to adjudicate.’”⁶⁰ It is clear from the later provisions of clause 13.1 that it may not have been the intention of the drafters to use “adjudicate” in the sense of a decision-making role.

(c) Role of the Conciliator

7.52 In clause 13.1.5 the role of the conciliator is described as advisory in nature and, indeed, it does not expressly permit the conciliator to adjudicate on the dispute. It states that the conciliator shall “consult with the parties in an attempt to resolve the dispute by agreement.” The conciliator may do any of the following or a combination of both:

- meet the parties separately from each other or together and consider documents from one party not sent or shown to the other;
- conduct investigations in the absence of the parties;
- make use of specialist knowledge;
- obtain technical or legal advice;
- establish the procedures to be followed in the conciliation.

7.53 This description of the conciliator’s role confirms the Commission’s view that it is, in fact, consistent with an advisory role. Clause 13.1.6 states that the conciliator “shall not be an arbitrator and the *Arbitration Acts 1954 to 1998* and the law relating to arbitration shall not apply to conciliation.”

7.54 No minimum requirements are laid down in law in respect of the qualifications and qualities required of a conciliator, but the relevant professional bodies apply specific criteria for entry to their lists of approved conciliators. “The IEI criteria, for example, require the conciliator to hold a qualification in construction law and contract administration or equivalent, and to

construction contract subject to the legislation has a right to refer any dispute arising under it for resolution by adjudication. See generally: Nesic “Mediation – On the Rise in the UK?” (2001) 13 *Bond Law Review* 2. Available at <http://www.austlii.edu.au/au/journals/BondLRev/2001/20.html#fnB23>.

⁶⁰ Bunni “The Conciliation Procedures of Engineers Ireland with specific reference to The Conciliation Procedure 2007” paper presented at the Seminar on *New Dispute Resolution Procedures for Public Works and Private Contracts*, 30 April 2008, Dublin at 3.

have attended courses on conciliation, and panellists are required to attend continuing professional development events on a regular basis.”⁶¹

(d) Recommendation of the Conciliator

7.55 Clause 13.1.8 states that where the parties cannot reach an agreement within 42 days after the conciliator is appointed⁶² the conciliator is to provide a written recommendation to both parties. Clause 13.1.8 adds that any such recommendation shall be based on the parties’ rights and obligations under the Contract.

7.56 As previously noted by the Commission, one of the benefits of ADR processes, such as conciliation, is that the focus in resolving the dispute is not solely on the parties legal positions and rights, but rather on their underlying interests and needs. By focusing on the parties’ rights and obligations under the contract, it can be said that clause 13.1.8 is not entirely consistent with some of the advantages which are associated with conciliation, notably flexibility and party-autonomy. The Commission concurs with the view that:

“Whilst it is proper and advisable that the conciliator should first consider and take account of the parties’ rights and obligations under the contract, he/she should do much more than that in order to assist the parties to a settlement that they can live with rather than writing a judicially correct recommendation.”⁶³

7.57 Under clause 13.1.9 if either party is dissatisfied with the conciliator’s recommendation, it may, within 45 days after receiving the conciliator’s recommendation, so notify the other party. Following such notice either party may refer the dispute to arbitration. Clause 13.1.10 states that if neither party gives notice of dissatisfaction within 45 days after receiving the conciliator’s recommendation, “the recommendation shall be conclusive and binding on all the parties, and the parties agree to comply with it.”

⁶¹ Hutchinson “Dispute Resolution” in Keane and Hussey *Construction Projects – Law and Practice* (Thomson Round Hall, 2007) at 8-68.

⁶² Or a longer period proposed by the conciliator and agreed by the parties.

⁶³ Bunni “The Conciliation Procedures of Engineers Ireland with specific reference to The Conciliation Procedure 2007” paper presented at the Seminar on *New Dispute Resolution Procedures for Public Works and Private Contracts*, 30 April 2008, Dublin at 5.

(e) Confidentiality

7.58 The confidentiality of the process is protected in clause 13.1.12 which states that: “The conciliation shall be confidential, and the parties shall respect its confidentiality.”

(f) Conclusion

7.59 In 2008, the *Arbitration Rules for Use With Public Works and Construction Services Contracts* were issued. As yet, there are no equivalent rules in relation to conciliation and the Commission considers that there is a strong case for clearer guidance on conciliation including the need to clarify some of the issues identified in the preceding paragraphs. The Commission is not currently minded to make any recommendations on this issue and invites submissions as to which form the regulation of conciliation should take.

7.60 *The Commission invites submissions as to whether a general statutory framework for mediation and conciliation in commercial disputes should be put in place, which would include small commercial (including consumer) disputes and contracts covered by the Government’s Standard Contracts for Public Works.*

(4) Shareholder Disputes & ADR

7.61 From 2001 to 2006, 20% of the company law-related disputes settled by the International Chamber of Commerce concerned corporate governance-related disputes.⁶⁴ An example of a corporate governance-related dispute includes disputes among shareholders.⁶⁵

7.62 The 2005 *Report of the Legal Costs Working Group* recommended that:

“Mediation...should be encouraged and there may well be strong arguments that applications for example, under section 205 of the Companies Act 1963 (minority oppression) should be brought before a

⁶⁴ Runesson and Guy *Mediating Corporate Governance Conflicts and Disputes* (The International Finance Corporation, World Bank Group, 2007) at 18. Available at www.ifc.org.

⁶⁵ See White and Stewart “Arbitration clauses and shareholders’ remedies” (2002) 9 CLP 246.

judge very early in the proceedings so that the availability of mediation is made known to the parties.”⁶⁶

7.63 It has been stated that: “Shareholder disputes have typically been characterised by a depth of bad feeling and the situation may often be extremely difficult.”⁶⁷ The English Law Commission’s 1997 *Report on Shareholders Remedies* noted that in company and shareholder disputes “there are often grievances between the parties which go beyond the pleaded allegations and for which ADR is suitable.”⁶⁸

7.64 In the same vein the 2001 Final Report of the Company Law Review Steering Group of the UK Department of Trade and Industry, *Modern Company Law For a Competitive Economy* stated that:

“Litigation is often both lengthy, diverting scarce management resources, and expensive, undermining the financial viability of the company and leaving the minority shareholder and/or the company with costs exceeding any award made by the court. Our consultation on this issue has shown that there is significant demand for action to reduce the burden of litigation in shareholder disputes... We recommend that the Government should take two steps. First, it should increase awareness of and accessibility to ADR through publicity and the establishment of referral mechanisms. Second, it should work with arbitration providers in order to establish an arbitration scheme designed specifically for shareholder disputes. We believe that, if these steps are taken, the expense and length of shareholder disputes will be significantly reduced, providing proper remedies for aggrieved minority shareholders while limiting the costs and disruption suffered by companies.”⁶⁹

7.65 The Commission concurs with the views of the Legal Costs Working Group Report and the views of the Law Commission of England and Wales concerning early consideration of mediation in resolving shareholder disputes under section 205 of the *Companies Act 1963*.

⁶⁶ *Report of the Legal Costs Working Group* (Stationary Office, Government Publications, 2005) at 33.

⁶⁷ Carey and Leonowicz “Litigation of Shareholder Disputes Under Woolf- Can Such Changes Yield Advantages for Ireland?” (1999) 6 CLP 12 at 6.

⁶⁸ Law Commission *Report on Shareholder Remedies* (LC246 – 1997) at para. 2.19.

⁶⁹ *Modern Company Law For a Competitive Economy* (Final Report of the Company Law Review Steering Group of the UK Department of Trade and Industry, 2001) at 38.

7.66 *The Commission provisionally recommends that mediation and conciliation may be appropriate for the resolution of shareholder disputes under section 205 of the Companies Act 1963 and should be considered prior to litigation.*

(5) Commercial ADR Schemes & Associations

(a) Small Claims Arbitration Scheme – Bar Council

7.67 The Bar Council of Ireland (the representative body for barristers in Ireland) has developed a Small Claims Arbitration scheme for small businesses that are in a dispute with each other involving a sum of €7,500 or less.⁷⁰ The *Arbitration Act 1954* as amended by the *Arbitration Act 1998* applies to these arbitrations. Under the scheme, the arbitrator is appointed by the Bar Council and must be a qualified barrister. The arbitrator and the Bar Council keep all details of the case confidential unless those involved in the arbitration consent that they may be revealed or the law requires that the details are revealed. The cost of the arbitrator is limited to €750. Speaking at the launch of the scheme in 2005, the then Minister for Enterprise, Trade, and Employment stated:

“This is a new and cost efficient way for small businesses to claim back monies due to them. It provides access to the legal system at a very low cost and allows parties to put their case forward and receive a ruling within a month. Wasted time and money are of great concern to small businesses and I welcome this scheme from the Bar Council which gives a speedy and economical answer to these problems.”⁷¹

(b) Chartered Institute of Arbitrators

7.68 Founded in 1915 the Chartered Institute of Arbitrators is a UK registered charity with an international network.⁷² It has over 11,000 members in more than 100 countries including Ireland. The Institute’s primary objective as set out its Charter is to promote and facilitate the determination of disputes by arbitration and alternative means of dispute resolution.

7.69 The Irish Branch of the Chartered Institute of Arbitrators was established in 1981 and has a permanent secretariat in Dublin. In 2008, the Irish Branch’s membership comprises of over 600 Chartered Arbitrators, Fellows, Members and Associate members.⁷³ The multi-disciplinary

⁷⁰ See www.lawlibrary.ie.

⁷¹ *Launch of Small Claims Arbitration Scheme*” Bar Council of Ireland Press Release 19 October, 2005. Available at www.lawlibrary.ie.

⁷² See www.arbitrators.org.

⁷³ See www.arbitration.ie.

membership includes practitioners in law, information technology, engineering, construction, shipping, finance, insurance, commodities, agriculture, accountancy, medicine and travel. Members of the Branch provide other forms of ADR services including mediation and conciliation services. The Institute defines mediation and conciliation as follows:

“Mediation is a private and structured form of negotiation assisted by a third party that is initially non-binding. If a settlement is reached the mediator can draw up an agreement that can then become a legally binding contract.

Conciliation is similar to mediation, but the conciliator can propose a solution for the parties to consider before agreement is reached.”

7.70 These definitions are entirely consistent with the Commission’s definitions of mediation and conciliation.⁷⁴

7.71 The Irish Branch administers a wide variety of commercial dispute resolution schemes. A scheme is a set procedure under which parties in dispute agree to have their dispute resolved.⁷⁵ The schemes administered by the Irish Branch are:

- Tour Operators Package Holiday Scheme
- Society of the Irish Motor Industry (SIMI) Scheme
- Wildlife Habitat Scheme
- Department of the Environment/NRA/IFA – Land Purchase Scheme

1.04 In its submission on the *Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters* the Irish Branch endorsed the use of compulsory ADR prior to litigation in consumer disputes stating that:

“... the compulsory use of ADR before commencing court proceedings is a way to ensure resolution of any disputes that avoid the well recognised difficulties that can arise from litigation. Confirmation of a third party that such recourse has been availed of and has been unsuccessful appears to be a reasonable requirement before a court would entertain such disputes.”⁷⁶

⁷⁴ See Chapter 2, above at paragraphs 2.128 and 2.129.

⁷⁵ See Chapter 8, below at paragraph 8.24.

⁷⁶ See <http://www.arbitration.ie/Arbitration/ibranch/eusubmissions.html>.

(c) Irish Commercial Mediation Association (ICMA)

7.72 The Irish Commercial Mediation Association (ICMA) was established in 2003 to promote and develop commercial mediation in Ireland.⁷⁷ Mediation is described by ICMA as “a private and confidential dispute resolution process in which a neutral third party, the Mediator, seeks to help the parties to reach a mutually acceptable settlement.”⁷⁸

7.73 There are two types of ICMA memberships. Ordinary membership is open to any person, organisation, body, firm or company with an interest in the provision and development of commercial mediation. Directory of Mediators Membership is open to any person who is qualified to mediate having obtained the relevant qualifications and experience.

(d) Just Sport Ireland

7.74 Just Sport Ireland (JSI) is an independent specialised dispute resolution service for Irish sport offering both a mediation and arbitration facility. It was established by the Federation of Irish Sports in response to the increasing prevalence of sporting litigation.⁷⁹ As noted by Smyth J in *Gould v Sweeney*⁸⁰ courts are not always the appropriate forum for the resolution of such disputes.

“Sports organisations do best to resolve differences under their own governing codes, rather than recourse to the courts of law. Issues of natural justice are important but the substance of matters rather than their form are important in seeking to resolve internal disputes in such organisations and recourse to the courts should be a last resort, and only in the rarest of cases.”⁸¹

7.75 The JSI website states that it aims “to provide a fair, impartial and efficient resolution of sporting disputes thus helping to ensure justice and fairness in sport. Just Sport Ireland will deal with all disputes arising in a

⁷⁷ See www.icma.ie.

⁷⁸ *Ibid.*

⁷⁹ See Anderson “Sports and The Courts –Time for A Sports Disputes Tribunal of Ireland?” (2005) 23 *Irish Law Times* 149.

⁸⁰ Unreported High Court, 23rd January 2007.

⁸¹ *Ibid.* at para. 11.

sporting context save for anti-doping and employment issues.”⁸² It also states that it supports and is founded on the principles of “simplicity, accessibility and enforceability.”⁸³

7.76 A dispute may be referred either to arbitration or mediation by JSI provided one of the following three conditions is met: the rules of the sporting organisation involved in the dispute allow for recourse to JSI; the contract/agreement in dispute contains a clause referring disputes should they arise to JSI; or the parties to the dispute agree in writing to submit the dispute to JSI for arbitration/mediation. The parties need not be represented by legal advisers but may choose to do so.

7.77 Arbitral awards handed down by JSI are final, binding and enforceable in favour of and/or against the parties. The only instance in which an appeal against an arbitral award can be made is where the rules of a sporting organisation make provision for an appeal to the international Court of Arbitration for Sport.⁸⁴

D International Commercial Dispute Resolution in Ireland

7.78 In *Keenan v Shield Insurance Co Ltd*⁸⁵ McCarthy J, delivering a judgment, with the other members of the Supreme Court agreed, stated:

“... the field of international arbitration is an ever expanding one. It ill becomes the courts to show any readiness to interfere in such a process; if policy considerations are appropriate, as I believe they are... then every such consideration points to the desirability of making an arbitration award final in every sense of the term.”

7.79 In recent years, Ireland has co-ordinated its legislative, professional and service resources to put in place an environment for the conduct of international arbitration.⁸⁶ The *Arbitration (International Commercial) Act 1998*

⁸² These issues are dealt with by the Irish Sport Council's Anti-Doping Disciplinary Panel and the Employment Appeals Tribunal respectively. For more information on Just Sport Ireland see www.justsport.ie.

⁸³ *Ibid.*

⁸⁴ See 7.87, below.

⁸⁵ [1988] IR 89.

⁸⁶ See generally: O hOisín “Ireland as a Venue for International Arbitration” (2003) 8 *Bar Review* 3; Byrne “Ireland’s Place in International Commercial Arbitration” (1998) 3 *Bar Review* 9 422; Byrne “Arbitration (International Commercial) Act

has implemented the *UNCITRAL Model Law on International Commercial Arbitration* in full, with some additional measures designed to increase the autonomy of the arbitration process. The State is also a party to the New York Convention on the Enforcement of International Arbitration awards. A purpose-built International Arbitration Centre has been opened in Dublin. The Centre offers facilities for hosting international arbitrations, including translation facilities and video-conferencing.⁸⁷

(1) *International Centre for Dispute Resolution*

7.80 The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA), the world's largest provider of commercial conflict management and dispute resolution services. In 2001, ICDR opened its first European office in Dublin. Speaking at the opening of ICDR, the then Tánaiste stated:

"The AAA chose Dublin as the site because of Ireland's vibrant economy because of the large and increasing number of international corporations currently conducting business here, because of our easy access to other European centres, and because Irish law has long supported the arbitration process."⁸⁸

7.81 ICDR is charged with the exclusive administration of all of the AAA's international matters. The ICDR's international system is premised on its ability to ensure that qualified arbitrators and mediators are appointed, control costs, understand cultural sensitivities, resolve procedural impasses, and properly interpret and apply its International Arbitration and Mediation Rules.⁸⁹

(2) *International Chamber of Commerce*

7.82 The International Chamber of Commerce is one of the world's leading organisations in the field of international commercial dispute resolution and is the world's leading international arbitration institution.

7.83 The ICC has an Irish National Arbitration Committee. The Committee is composed of representative of four constituent bodies: the Law Society of Ireland, the Bar Council of Ireland, the Chartered Institute of Arbitrators (Irish

1998" (1999) 17 *Irish Law Times* 262; Anglade "Developing International Arbitration in Ireland" (1999) 5 *Bar Review* 3 143.

⁸⁷ See www.dublinarbitration.ie.

⁸⁸ "Dublin Chosen for Major International Dispute Resolution Centre Tánaiste Mary Harney officially opens the new Centre" (2001) <http://www.entemp.ie/press/2001/200601a.htm>.

⁸⁹ See <http://www.adr.org/icdr>.

Branch), and Chambers Ireland. Its main purpose in Ireland is to promote international arbitration under ICC rules. When the International Court of Arbitration wishes to appoint an Irish arbitrator, the Irish national committee often has a significant role to play in the selection of that arbitrator, and is invited to nominate appropriate chairs, sole arbitrators, co-arbitrators of Irish nationality under the rules of the ICC International Court of Arbitration. Individual members of the Committee represent the views of the national Arbitration committee at the ICC Commission on Arbitration, and as Member and Alternate to the International Court of Arbitration itself.⁹⁰

7.84 The ICC Court, which was created in 1923, is not a “court” in the ordinary sense. As the ICC arbitration body, the Court ensures the application of the Rules of Arbitration of the ICC. Although its members do not decide the matters submitted to ICC arbitration – this is the task of the arbitrators appointed under the ICC Rules – the Court oversees the ICC arbitration process. The Court’s membership is drawn from 88 countries, including Ireland. The Court is assisted by a Secretariat located at ICC headquarters in Paris.

7.85 Since its creation, the Court has administered over 14,000 international arbitration cases involving parties and arbitrators from 180 countries and territories.⁹¹ In 2007, 599 requests for arbitration were filed with the ICC Court. These concerned 1,611 parties from 126 countries and independent territories and in over 10% of cases at least one of the parties was a State. The amount in dispute in 57.4% of cases exceeded \$1 million.

(3) The Permanent Court of Arbitration

7.86 The Permanent Court of Arbitration (PCA) is an intergovernmental organisation with over 100 States. It was established in 1899 to facilitate arbitration and other forms of dispute resolution. Although initially conceived as an instrument for the settlement of disputes between states, the PCA’s mandate was broadened in 1935 when it administered its first case between a state and a private party setting a precedent for its activity since then of providing services for the resolution of disputes involving various combinations of states, state entities, international organisations and private parties. International commercial arbitration can also be conducted under PCA auspices. The PCA has also developed rules of procedure, which are based on the arbitration rules of UNCITRAL.⁹²

⁹⁰ See www.iccwbo.org.

⁹¹ *ICC International Court of Arbitration* (ICC Publication 810, April 2006). Available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/810_Anglais_05.pdf.

⁹² These include: Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States (adopted in 1992); the Permanent Court of

(4) Court of Arbitration for Sport

7.87 The Court of Arbitration for Sport (CAS), which is based in Lausanne, Switzerland, facilitates the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.⁹³ The CAS was created in 1984 by the International Council of Arbitration for Sport (ICAS). Any disputes directly or indirectly linked to sport may be submitted to CAS. These include disputes of a commercial nature (for example, a sponsorship contract), or of a disciplinary nature following a decision by a sports organisation (for example, a doping case).

E Conclusion

7.88 In this Chapter the Commission has discussed the extent to which ADR, in particular, mediation and conciliation, can contribute to the resolution of commercial disputes. The Commission acknowledges and commends the manner in which the High Court's Commercial List has been operational in a proactive manner to exemplify that mediation and conciliation are not merely "alternatives" to litigation but have become important elements of an integrated approach to the resolution of civil disputes. The Commission also notes that long established methods of arbitration, including international arbitration, have also become integrated into wider ADR context. The Commission reiterates in this respect the need to ensure that ADR processes, in particular mediation and conciliation, should be seen as voluntary and non-binding and should be clearly distinguished from the adjudicative functions properly performed by arbitral processes and Court decisions.

Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State (1993); and the Permanent Court of Arbitration Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment (2002).

⁹³ See www.tas-cas.org.

CHAPTER 8 CONSUMER DISPUTES & ADR

A Introduction

8.01 In this chapter the Commission examines the development of ADR in resolving consumer disputes. In Part B the Commission provides a general overview of consumer disputes. In Part C the Commission examines the main statutory and non-statutory bodies and schemes that provide redress for consumers in Ireland. In Part D the Commission discusses the mechanisms available to resolve cross-border customer disputes. In Part E the Commission explores the area of online dispute resolution for consumer disputes arising from online transactions. In Part F the Commission discusses the Small Claims Procedure which is available through the District Courts for resolving consumer disputes. In Part G the Commission summarises various consumer redress mechanisms which have developed in other jurisdictions.

B Consumer Disputes: An Overview

8.02 Ensuring that consumers have access to fast, effective, and economical redress to disputes is important to society as a whole. As noted in the 2005 *Report of the Consumer Strategy Group*:

“Informed and empowered consumers are a powerful social and economic force. They can improve the overall standard of living in the country and drive innovation in the enterprise sector. Confident, well-informed consumers are not only more willing to spend their money, they are also more likely to favour progressive suppliers that offer more choice, better quality, superior service and innovative products and services at fair prices.”¹

8.03 Consumer redress mechanisms form a spectrum that ranges from two-party consumer and business negotiation, through to various third-party

¹ *Make Consumers Count - A New Direction for Irish Consumers* (Report of the Consumer Strategy Group April, Forfas, 2005) at xiii. Available at www.nca.ie.

processes such as mediation, to litigation.² The most appropriate dispute resolution mechanisms will often depend on the circumstances of the particular complaint, such as:

- (a) The value of the claim;
- (b) The level of legal complexity;
- (c) The incentive of the parties to find a mutually agreeable solution;
- (d) The number of consumers involved;
- (e) Whether there was fraud, negligence, or just misunderstanding;
- (f) The time, money and effort the consumer or businesses want to spend in resolving the dispute;
- (g) Whether any public policy elements are involved; and
- (h) Whether there any cross-border elements are involved.³

8.04 When consumers experience problems with goods or services, their initial responses to such problems may include inaction or voicing the complaint directly to the business. The Commission notes that the majority of consumer dispute resolution takes place at the level of two-party negotiations without the intervention of a third party. However, where efforts to resolve disputes directly with businesses fail, it is important that out of court ADR mechanisms are available.⁴ As the Consumer Strategy Group also noted:

“...what really matters is the gap, if any, between a consumer (or business) deliberately deciding not to take any action and a consumer (or business) wishing to take action but refraining from doing so because of the perceived disadvantages of an ordinary

² Ramsay "Small Claims Courts in Canada: A Socio-Legal Appraisal" in Whelan *Small Claims Courts: A Comparative Study* (Clarendon Press, Oxford, 1990) at 38.

³ *Final Report: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - A Study for the European Commission* (The Study Centre for Consumer Law – Centre for European Economic Law, Belgium, 2007) at 26. Available at ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf.

⁴ *Make Consumers Count - A New Direction for Irish Consumers* (Report of the Consumer Strategy Group April, Forfas, 2005) at 45.

court procedure...mechanisms of ADR that bridge this gap have the unique capability of increasing access to justice.”⁵

8.05 The 2006 Eurobarometer Survey *Consumer Protection in the Internal Market* found that 14% of Europeans had made some form of formal complaint during the preceding 12 months. 54% were satisfied with the way their complaint had been dealt with, while 41% were dissatisfied with the way their complaint was dealt with. 51% of the dissatisfied Europeans, however, took no further action and only 6% brought the matter to an ADR body and 4% to court.⁶

8.06 In Ireland, it can be said that there are a number of non-adversarial avenues of redress for consumer disputes. The first step for the consumer is often to partake in direct negotiation with the business. Many businesses have internal complaints procedures in place which should be exhausted by the consumer. If the consumer remains unsatisfied the next step might be to lodge a formal complaint with an independent complaints body such as the National Consumer Agency.⁷ Many of these bodies have ADR mechanisms in place to resolve the dispute. The consumer may also wish to avail of an online dispute resolution mechanism if the consumer transaction stemmed from an online purchase such as provided by eBay.⁸ In cases, involving cross-border disputes, the European Consumer Centre (ECC) provides ADR mechanisms for redress.⁹ The next stage would be to use the Small Claims Procedure in the District Court if the dispute is within its jurisdiction. Of course, litigation may be required in some instances, and in others, the consumer contract may also include a binding arbitration clause. The Commission turns to discuss each of these stages.

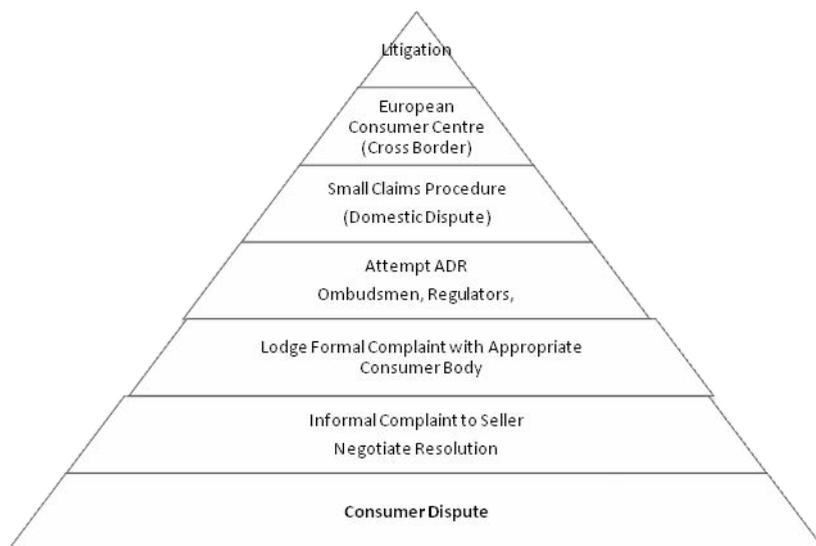
⁵ *Final Report: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - A Study for the European Commission* (The Study Centre for Consumer Law – Centre for European Economic Law, Belgium, January 2007) at 6.

⁶ Special Eurobarometer *Consumer protection in the Internal Market* at 33 (2006,) available at http://ec.europa.eu/public_opinion/archives/ebs/ebs252_en.pdf. See generally: Gwith “Non Litigation-Based Redress for International Consumer Transactions Is Not Cost Effective - A Case for Reform” (2006) 3 *Macquarie J Bus L* 115; and Finkle and Cohen “Consumer Redress through Alternative Dispute Resolution and Small Claims Court: Theory and Practice” (1993) 13 *Windsor Y B Access Jus* 81.

⁷ See below, paragraph 8.14.

⁸ See below, paragraph 8.44.

⁹ See below, paragraphs 8.29 to 8.36.



C ADR Mechanisms for Resolving Domestic Consumer Disputes

(1) Direct Negotiation & Internal Complaints Handling

8.07 Consumers are generally more interested in receiving a swift solution to their problems through direct negotiation rather than asserting their legal rights. For example, redress for a consumer could include delivery, repair, replacement, or refund of a product or service. Given that businesses tend to be ‘repeat players’ in direct negotiations with consumers, it has become common for businesses to set up and operate more formalised complaint handling schemes within their companies to deal with consumer disputes as they arise.¹⁰

8.08 One mechanism for establishing internal redress systems for consumers is incorporating redress procedures into a code of practice. Section 2(1) of the *Consumer Protection Act 2007* defines a code of practice as

“any code, agreement or set of rules or standards that is not imposed by or under an enactment but purports to govern or define commercial practices of one or more traders (whether generally or in respect of a particular trade, business or professional sector or one

¹⁰ *Final Report: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - A Study for the European Commission* (The Study Centre for Consumer Law – Centre for European Economic Law, Belgium, 2007) at 46.

or more commercial practices) who agree, commit or undertake to abide or be bound by such rules or standards.”¹¹

8.09 Section 88 of the 2007 Act provides for codes of practice to be submitted to the National Consumer Agency (NCA) for review and approval. The NCA may approve such a code of practice if satisfied it protects consumer interests. Section 89 of the 2007 Act provides that in any proceedings before a court an approved code of practice is admissible in evidence. Under Section 45 of the 2007 Act a trader who misrepresents that he or she is bound by a code of practice as a means of enticing a consumer to purchase a product or service or who fails to comply with a commitment of such a code commits an offence under the 2007 Act.

8.10 Despite statutory provision for codes of practice, it appears that few Irish businesses actually have a code of practice in place. In compiling its 2005 Report, the Consumer Strategy Group received 64 responses to 2,124 requests for codes of practice from both the public and private sectors.¹² The Commission notes that, in other jurisdictions, best practice codes on complaint handling procedures have been drafted both by public institutions or business or consumer organisations.¹³

8.11 In its 2005 Report, the Consumer Strategy Group recommended in relation to codes of practice:

- Promoting the use of codes of practice by all businesses and encouraging self-regulation schemes;
- Introducing standardised statutory codes of practice across all public sector bodies; and

¹¹ See Slattery “Consumer Protection Bill 2007” (2007) 14(5) CLP 95; and O’Neill “The Consumer Protection Act 2007 – Enforcing the New Rules” (2008) 26 ILT 46.

¹² *Make Consumers Count - A new Direction for Irish Consumers* (Report of the Consumer Strategy Group April, Forfas, 2005) at 67.

¹³ In 1997, the Australian Competition and Consumer Commission (ACCC) issued *Benchmarks for Dispute Avoidance and Resolution* which is aimed at assisting small businesses in dealing with problems involving consumer complaints. In 2002, Industry Canada, acting on behalf of the federal, provincial and territorial ministers responsible for consumer affairs, published *Consumer Complaints Management. A Guide for Canadian Business*. In 2004, the UK Office of Fair Trading issued *Guidance on the Core Criteria for the Consumer Codes Approval Scheme (CCAS)* which provides some important recommendations with respect to complaint handling schemes.

- Establishing private sectoral complaints boards as an alternative means of redress.¹⁴

8.12 The Commission notes that the first element of these recommendations was implemented in section 88 of the 2007 Act and it looks forward to the eventual implementation of the other elements. The Commission also acknowledges that it is often only when internal complaint handling procedures have been exhausted that a consumer will proceed to ADR. For this reason, “internal complaint handling schemes can be categorised as gatekeepers to other ADR schemes (arbitration, mediation or ombudsmen schemes).”¹⁵

8.13 If a consumer is not satisfied after direct negotiation with the business, then the next step is to contact a relevant complaints body. There are a number of consumer complaints bodies in Ireland and abroad that protect consumer rights. Some of these are statutory bodies, others are regulated by industry, while some are voluntary organisations.¹⁶

(a) National Consumer Agency

8.14 The National Consumer Agency (NCA) was established under the *Consumer Protection Act 2007* as the successor to the Office of the Director of Consumer Affairs, on foot of the recommendations in the 2005 *Report of the Consumer Strategy Group*. The 2007 Act also implemented the 2005 EC Directive on Unfair Commercial Practices.¹⁷ The Agency’s primary roles under the 2007 Act are to promote consumer education and awareness, to provide information for consumers on their statutory rights under law, to conduct research and monitor relevant standards (for example, toy safety standards), to act as regulator and to prosecute traders for non-compliance where necessary.

¹⁴ *Make Consumers Count - A New Direction for Irish Consumers* (Report of the Consumer Strategy Group April, Forfas, 2005) at 71.

¹⁵ *Final Report: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - A Study for the European Commission* (The Study Centre for Consumer Law – Centre for European Economic Law, Belgium, 2007) at 47.

¹⁶ The Consumers' Association of Ireland Ltd. (CAI) was set up in 1966 to protect and educate consumers. It is the aim of CAI to represent consumers making sure that their needs as consumers of goods and services are given higher priority. The CAI does not have a role in obtaining redress for consumers. See www.consumerassociation.ie.

¹⁷ Directive 2005/29/EC.

The Commission has already noted that, in carrying out its role, the NCA can give statutory approval and status to an industry code of practice.

(i) The NCA and collective redress mechanisms

8.15 The NCA also has the capacity to develop other important collective standards on its own initiative through engagement with consumer and industry groups. For example, arising from an enormous number of individual complaints received by the NCA from consumers/owners in apartment complexes about the level of professional fees and associated charges being sought by property managing agents (some of which may have arisen from an understanding deficit by consumers and others from poor governance arrangements),¹⁸ the NCA established a Consumer Forum on Apartment Complexes. This Forum developed guidelines for contracts between property managing agents and owners' management companies in apartment complexes, including a contractual template for professional fees and service charges.¹⁹ This initiative resembles that of an Ombudsman who receives individual complaints and then inquires into them in terms of the general procedural problems that need to be addressed. The outcome of the guidelines developed by the NCA Forum is that contractual issues that previously would have given rise to a considerable number of complaints to the NCA and, ultimately, to litigated disputes, may be dealt with in a manner that is satisfactory both to consumers and the service providers with whom they interact.

(ii) The NCA and individual redress

8.16 In addition, the 2007 Act also includes a number of provisions under which the NCA is empowered to seek financial redress on behalf of consumers, whether as individuals or collectively. Thus, under section 70 of the 2007 Act, the NCA may accept written undertakings from traders that they will refrain from certain unfair commercial acts or practices that are prohibited by the 2007 Act. In addition to commitments to cease engaging in prohibited acts or practices and to comply with the 2007 Act, such undertakings may also include commitments to compensate consumers or a class of consumers, including reimbursing any money or returning any other property or thing received from consumers in connection with a consumer transaction. Similarly, under section 78 of the 2007 Act, the NCA may, with the consent of the consumer, apply to court for a "compensation order", requiring a trader convicted of an offence under the 2007 Act to "pay an amount of money the court considers appropriate compensation in respect of any loss or damage to that consumer resulting from

¹⁸ See the Commission's *Report on Multi-Unit Developments* (LRC 90-2008), Introduction, paragraphs 7 and 8.

¹⁹ *Ibid*, Introduction, paragraph 28.

that offence.” These provisions are without prejudice to section 71 of the 2007 Act, which provides that a consumer who has been materially affected by any act or practice of a trader that is prohibited by the Act may apply to court for damages for a breach of the terms of the 2007 Act.

(iii) The NCA and informal redress

8.17 The NCA has also sought informal redress, akin to a mediator, where there may (or may not) not have been a formal breach of the 2007 Act. For example,²⁰ in 2008 an Irish retailer using the well-known British brand name *Habitat* announced that it had ceased trading with immediate effect, leaving a large number of consumers with undelivered goods and others with unredeemed gift vouchers from its two shops. The Irish shops had stocked Habitat merchandise but they operated as a franchise of the English company and had no formal corporate link with it. After the closure of the Irish shops, the NCA wrote to the English company enquiring whether it would honour arrangements entered into and gift vouchers. The letter to the English company noted: “Habitat customers in Ireland would not have been aware of the ownership structure of the Irish operation and would have assumed that they were dealing with a store in the Habitat group. Accordingly, the Agency [NCA] expects that Habitat UK will meet its commitments to Irish customers and ensure that they do not suffer financial loss due to the trading difficulties of the Irish stores.” Within 24 hours, and after considerable media coverage, the British company stated publicly that it would honour any outstanding order and that the Irish gift vouchers could be used in any Habitat store in the United Kingdom. Given that no formal litigation was initiated, it is difficult to state with any certainty whether the English company was required to give the informal undertakings in this case but this provides an example of how the NCA acted as a collective mediator for a large group of consumers.

(b) Ombudsmen and Collective Consumer Redress

8.18 The previous paragraphs have discussed how the NCA can also operate as an Ombudsman-like agency. In addition, as the Commission has previously noted, Ombudsman schemes can provide collective redress to consumers and are used successfully as a method of dealing with multi-party scenarios without resorting to litigation.²¹

²⁰ The case study is based on information at www.nca.ie. (Press releases of 13 May and 14 May 2008).

²¹ See paragraphs 2.64-2.110 above for a detailed discussion of the Ombudsman schemes which have been established in Ireland.2.65

(c) Other Regulators

8.19 The Commission has already described the general regulatory role of the National Consumer Agency (NCA).²² Other examples of regulatory bodies in specific areas having an input on consumers in Ireland include: ComReg (which regulates telecommunications in Ireland);²³ the Commission for Energy Regulation (which regulates the gas and electricity suppliers);²⁴ the Commission for Taxi Regulation;²⁵ the Commission for Aviation Regulation;²⁶ and the Financial Services Regulator.²⁷

8.20 The Financial Regulator's statutory Consumer Protection Code (CPC) 2006 is binding on all regulated financial services providers and intermediaries in relation to their Irish sales. It contains a set of general principles, applicable to sales of all financial services and products, together with more detailed rules applying to specific financial providers and services. In accordance with its powers under the *Central Bank Act 1942* (inserted by the *Central Bank and Financial Services Authority of Ireland Act 2004*) the Financial Regulator may impose administrative sanctions (including penalties of up to €5 million) to regulated entities that breach its provisions. Where a requirement of the CPC conflicts with a requirement of any voluntary code (such as the codes of conduct of the Irish Insurance Federation and Irish Banking Federation) the CPC takes precedence. Paragraphs 46 to 48 of the CPC require regulated entities to have in place written procedures for handling complaints.²⁸ These must include informing the consumer of the right to appeal to the Financial Services Ombudsman or Pensions Ombudsman.

(d) Appeals Bodies

8.21 The Commission has noted that the Financial Services Ombudsman and the Pensions Ombudsman may act as an appeals body for a complaint

²² See paragraphs 8.14 to 8.17 above.

²³ See www.comreg.ie.

²⁴ See www.cer.ie.

²⁵ See www.taxireg.ie.

²⁶ See www.aviationreg.ie.

²⁷ See www.ifsra.ie.

²⁸ See Financial Regulator's Consumer Protection Code at http://www.ifsra.ie/data/pub_files/Code_Doc_rollover-4-2.pdf. For further information on the Consumer Protection Code see Donnelly "The Consumer Protection Code: A New Departure in the Regulation of Irish Financial Services Providers (2006) 13 CLP 11 271.

under the 2006 Financial Regulator's Consumer Protection Code. There are also a number of other statutory appeals bodies in Ireland. These include for example

- Agriculture Appeals Office: this is an independent, statutory appeals body which provides an appeals service to farmers if they are dissatisfied with decisions made by the Department of Agriculture & Food in respect of applications for grant-aid. Decisions of the Agriculture Appeals Office can be appealed to the Office of the Ombudsman;²⁹
- Office of the Appeal Commissioners : the Appeal Commissioners are responsible for hearing appeals by taxpayers against decisions of the Revenue Commissioners concerning taxes and duties;³⁰
- Social Welfare Appeals Office: the Social Welfare Appeals Office operates independently of the Department of Social and Family Affairs and the Social Welfare Services Office. It is headed by the Chief Appeals Officer who is also Director of the Office. If a person disagrees with the decision of the Deciding Officer of the Social Welfare Services concerning their social welfare entitlements, they have the right to appeal to the Social Welfare Appeals Office;³¹
- Health Repayment Scheme Appeals Office: this is an independent office established to provide an appeals service to those who wish to appeal the decision of the Scheme Administrator under the *Health (Repayment Scheme) Act 2006*.³²

(e) Professional Bodies

8.22 Trade associations or professional bodies such as the Register of Electrical Contractors of Ireland,³³ Engineers Ireland,³⁴ Construction Industry Federation,³⁵ and the Irish Medical Organisation³⁶ exist to represent the

²⁹ See www.agriappeals.gov.ie.

³⁰ See www.appealcommissioners.ie.

³¹ See www.socialwelfareappeals.ie.

³² See www.appeal.ie.

³³ See www.reci.ie.

³⁴ See www.iei.ie.

³⁵ See www.cif.ie.

³⁶ See www.imo.ie.

members of their industry. Many such bodies have codes of practice which members of the industry must comply with, and ADR mechanisms available for resolution of consumer disputes which arise within their industry.

8.23 The Advertising Standards Authority for Ireland (ASAI) was established in 1978 by the advertising industry to promote and monitor standards advertising, promotional marketing and direct marketing.³⁷ Its objective is to ensure that all commercial marketing communications are 'legal, decent, honest and truthful'. The ASAI Code of Standards for Advertising, Promotional and Direct Marketing outlines a minimum set of standards and principles for member companies' dealings with their customers and includes procedures for handling customer disputes.³⁸

(i) Industry Arbitration Schemes

8.24 The Commission notes that some industry bodies have established arbitration schemes in conjunction with the Chartered Institute of Arbitrators, Irish branch, for the resolution of consumer complaints.

(l) Society of the Irish Motor Industry

8.25 In 2003, the Society of the Irish Motor Industry (SIMI) established an arbitration scheme in conjunction with the Chartered Institute of Arbitrators, Irish branch.³⁹ The scheme allows for determination of complaints by consumers against SIMI members, many of which are complaints in respect of vehicles purchased from SIMI members. The arbitration clause is contained in pre-printed forms prepared by SIMI for its membership. In addition to arbitration, the customer has the option of going to mediation or alternatively of having the claim assessed by SIMI's own Retail Motor Industry Standards Tribunal whose recommendations are binding on the SIMI member but not on the customer.⁴⁰ The scheme has fixed costs and a 90-day completion period for the arbitration process.

³⁷ See www.asai.ie. The establishment of the ASAI can be seen as a response to the enactment of the *Consumer Information Act 1978* since replaced by the *Consumer Protection Act 2007* which established the National Consumer Agency.

³⁸ This Code is set out in the *ASAI Manual of Advertising Self-Regulation* (6th ed 2007). Available at <http://www.asai.ie/asai%20codebook.pdf>.

³⁹ SIMI has approximately 1700 members within the motor industry and represents distributors, dealers, repairers together with ancillary groupings such as parts wholesalers and retailers. See www.simi.ie.

⁴⁰ See Hamilton "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice" (2005) 51 McGill L J 693.

(II) *Tour Operators Holiday Package Scheme*

8.26 The Tour Operators Holiday Package Scheme was established in 1993 and was negotiated with the Irish Tour Operator's Federation and also the Irish Travel Agents Association. In addition to these bodies the Scheme also operates for a number of private operators who are not members of these organisations. The scheme is based on an arbitration clause incorporated by the Tour Operators within their booking forms.⁴¹

(III) *Schemes in the United Kingdom*

8.27 In the United Kingdom, IDRS Ltd. offers a range of over 100 ADR schemes usually through a group or trade association.⁴² The two most significant schemes are the CISAS scheme and the Arbitration Scheme for the Travel Industry which is operated for ABTA, the Association of British Travel Agents. The CISAS scheme is approved by Ofcom, the independent regulator and competition authority for the UK communications industries and the scheme offers a free and independent consumer adjudication service to consumers of more than 200 fixed line, mobile and internet service providers. The scheme is limited to claims of less than £5,000 for any one customer and must not involve a complicated issue of law. Once the adjudicator's decision is made it becomes binding if the customer accepts it within 6 weeks.⁴³

8.28 Research published in 2004 indicated that provision of ADR in the UK for consumer problems is ad hoc.⁴⁴ Aside from a few active schemes, the 2004 research suggested that consumers with an unresolved complaint over goods and services face very little in the way of a choice between using ADR and going to court. This research concluded that there is a major gap between UK government policy of promoting ADR and the on-the-ground reality of access to effective, affordable ADR for consumers.⁴⁵

⁴¹ See White "A Fair Deal For the Holiday Consumer" (1991) 9 ILT 92.

⁴² A subsidiary of the Chartered Institute of Arbitrators. See www.idrs.ltd.uk.

⁴³ See www.cisas.org.uk and Drahozal and Friel "Consumer Arbitration in the European Union and the United States" (2002) NCJ Int'l L & Com Reg 357.

⁴⁴ See Doyle, Ritters and Brooker *Seeking resolution the availability and usage of consumer-to-business alternative dispute resolution in the United Kingdom* (Department for Business, Enterprise and Regulatory Reform, January 2004).

⁴⁵ *Ibid.* at 74.

D Cross Border Consumer Disputes

(1) European Consumer Centre Dublin

8.29 In October 2001, the European Commission and Member States established the European Extra- Judicial Network (EEJ-Net).⁴⁶ The network aims to help consumers resolve their cross-border disputes through ADR schemes. It operates through clearing houses located in each Member State. In Ireland, the clearing house is the European Consumer Centre (ECC). ECC Ireland gives advice to consumers on their rights and also assists consumers with cross-border disputes by intervening on their behalf with the trader in the other relevant country. ECC Ireland also produces reports and opinion papers, engages in joint projects within the ECC Network, and carries out consumer information campaigns.⁴⁷

8.30 In 2007, ECC Ireland dealt with over 3,500 consumer contacts. The majority of these related to giving advice on cross-border consumer problems, while in almost 500 cases the ECC was required to intervene with the trader on the consumer's behalf. In 2007, ECC Ireland secured €84,000 in refunds and compensation for consumers.⁴⁸

ECC Case Study

An Irish consumer purchased a camcorder online but shortly after receiving the item, he discovered a fault. The consumer was unable to install the relevant software that came with the product that would enable him to download pictures and video to his PC. He returned the product directly to the seller in France for repair and received it back over a month later without any explanation of the fault or details of the repairs carried out. He discovered that the problem still existed, and despite numerous emails and phone calls to the company, he was unable to get a satisfactory reply to his request for a full refund. He contacted the ECC who was able to obtain a full

⁴⁶ See *Working Document on the creation of a European Extra-Judicial Network* (European Commission, 2000), available at http://ec.europa.eu/consumers/policy/developments/acce_just/acce_just07_workdoc_en.pdf.

⁴⁷ See www.eccdublin.ie.

⁴⁸ *European Consumer Centre Ireland Annual Report 2007* (ECC Ireland, 2008) at 3. Available at http://www.eccdublin.ie/publications/reports/annual_reports/Annual_Report_2007.pdf.

refund for the consumer, plus the additional shipping costs he faced in sending it back to the company.⁴⁹

8.31 When ECC Ireland cannot solve a complaint through intervention with the trader, the dispute is assessed and forwarded to a relevant ADR body, where available. In 2007, a total of 96 cases were closed unresolved, despite ECC Ireland's intervention with the relevant trader. In these cases, ECC Ireland sought to refer these cases to an ADR body, but only 20 were referred to ADR and 76 disputes remained unresolved.⁵⁰ According to ECC Ireland:

“This is simply because enough ADR bodies do not exist; no ADR body could be found to which the case could be referred. Of particular concern is that fact that Ireland has no ADR body that deals with air passenger complaints, as most unresolved disputes against Irish traders fall under this category.”⁵¹

8.32 In Ireland, the Department of Enterprise, Trade and Employment is responsible for recommending ADR bodies to the European Commission.⁵² This notification process seeks to ensure common minimum requirements from bodies across the EU which creates a consistent standard of quality. The notification process also means that consumers can have similar expectations from ADR bodies across the Member States.⁵³ Criteria for a successful application include the principles of independence of the organisation, and transparency of the proposed resolution procedure.⁵⁴ ECC Dublin works closely

⁴⁹ *European Consumer Centre Ireland Annual Report 2007* (ECC Ireland, 2008) at 11. Available at http://www.eccdublin.ie/publications/reports/annual_reports/Annual_Report_2007.pdf.

⁵⁰ *Ibid.* at 17.

⁵¹ *Ibid.*

⁵² A notified ADR body is one that complies with one of two European Commission Recommendations (98/257/EC and 2001/310/EC) and is notified to the European Commission by the Department of Enterprise, Trade and Employment. See http://www.entemp.ie/commerce/consumer/nomination.htm#ADR_Ireland.

⁵³ *The development of Alternative Dispute Resolution (ADR) in Ireland: An analysis of complaints, best practice and future recommendations* (ECC Ireland, 2008) at 4. Available at http://www.eccdublin.ie/publications/reports/ecc_reports/ECC_Ireland_ADR_Report_May08.pdf.

⁵⁴ *Ibid.* at 5.

with the Department to nominate suitable ADR bodies. In Ireland, there are currently 5 nominated ADR bodies:

- Advertising Standards Authority of Ireland;
- The Financial Services Ombudsman;
- Scheme for Tour Operators, Chartered Institute of Arbitrators;
- The Direct Selling Association of Ireland; and
- The Office of the Pensions Ombudsman.

8.33 Although ADR Bodies exist in Ireland, ECC Ireland have stated that the cross-border areas that are most problematic for EC consumers do not have ADR.⁵⁵ This means that many cross-border complaints remain unresolved.⁵⁶ Since 2002, ECC Ireland has handled a total of 328 disputes involving Irish and non-Irish companies. 34% of the overall disputes received were against Irish retailers while 17% of these were forwarded to an ADR Body in Ireland. Of these 55 disputes, with one exception, only those that related to car rental could be sent to a relevant ADR body.⁵⁷ ECC Ireland had to inform the remaining EC consumers who had a dispute against an Irish retailer that nothing further could be done to resolve their disputes due to the lack of ADR bodies. ECC Ireland has stated: “This is a cause of grave concern as all of these disputes were valid in terms of the consumer’s legal entitlement to redress.”⁵⁸

8.34 In its 2008 report *The development of Alternative Dispute Resolution (ADR) in Ireland : An analysis of complaints, best practice and future recommendations*⁵⁹ ECC Ireland made the following recommendations in relation to consumer disputes and ADR:

⁵⁵ See also Barnford “Mechanisms for resolving European cross-border consumer queries” (2004) 154 NLJ 7145

⁵⁶ *The development of Alternative Dispute Resolution (ADR) in Ireland: An analysis of complaints, best practice and future recommendations* (ECC Ireland, 2008) at 7. Available at http://www.eccdublin.ie/publications/reports/ecc_reports/ECC_Ireland_ADR_Report_May08.pdf.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *The development of Alternative Dispute Resolution (ADR) in Ireland: An analysis of complaints, best practice and future recommendations* (ECC Ireland, 2008) at 4. Available at

- Develop consumerconnect.ie to include information on existing ADR bodies, and their function in resolving complaints, in addition to the small claims procedure;
- Develop tips on ‘what to look out for before you buy’ and include information on checking whether a business has a complaints procedure or is part of a dispute resolution scheme;
- Develop and publicise specific codes of practice for industry and urge consumers to seek adherence to these codes when choosing a trader;
- Promote the benefits of participation in ADR to businesses and business organisations by demonstrating the costs involved in current lack of systemic redress;
- Take on board the Recommendation on Consumer Dispute Resolution and Redress adopted by the OECD Council on 12 July 2007;
- Target development in key problem sectors – ecommerce and the airline industry by engaging in discussion with those industries regarding dispute resolution choices.
- Consider creation of logo/symbol as a visual stamp of approval for business Codes of Practice in order to encourage best business practice and publicise same. An example of where this has been done successfully is the UK’s Office of Fair Trading and the Direct Selling Association UK;
- Encourage notification of ADR bodies in order to ensure uniformity of standards and build customer assurance; and
- A logo should be designed and awarded to notified ADR bodies so that consumers of their member companies can be more aware that they offer dispute resolution if something goes wrong. Under EU Recommendations 98/257/EC & 2001/301/EC relating to arbitration and mediation, a code of practice for an ADR logo / symbol already exists which can be employed.

8.35 The Commission considers that these recommendations are worthy of further analysis and therefore invites submission as to how they might, for example, be incorporated into a statutory Code of Practice.

8.36 *The Commission invites submissions as to whether the recommendations in the European Consumer Centre’s 2008 Report The development of Alternative Dispute Resolution (ADR) in Ireland : An analysis of*

complaints, best practice and future recommendations should be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes.

(2) FIN-NET and the Financial Services Ombudsman

8.37 The Financial Services Ombudsman's Bureau cooperates with FIN-NET which is a financial dispute resolution network of national out-of-court complaint schemes in the European Economic Area countries.⁶⁰ It is responsible for handling disputes between consumers and financial services providers, i.e. banks, insurance companies, investment firms and others with a cross-border element. This network was launched by the European Commission in 2001.⁶¹ It aims to

- provide customers with easy and informed access to out-of-court redress in cross-border disputes;
- to ensure the efficient exchange of information between European schemes so that cross-border complaints can be handled as quickly, efficiently and professionally as possible; and
- to ensure that out-of-court dispute settlement schemes from different European Economic Area countries apply with a common set of minimum guarantees for consumers.⁶²

8.38 The network brings together more than 46 different national schemes that either cover financial services or handle consumer disputes. Members of FIN-NET are linked through a memorandum of understanding which, besides setting out the procedural framework for cross-border cooperation, lays down basic principles for out-of-court dispute settlement.⁶³ The memorandum of understanding includes a declaration of intent from the bodies to apply the quality standards set out in the 1998 European Commission Recommendation

⁶⁰ See www.financialombudsman.ie.

⁶¹ See http://ec.europa.eu/internal_market/fin-net/index_en.htm and http://ec.europa.eu/internal_market/fin-net/docs/adr/ie_ombudsman_en.pdf.

⁶² *FIN-NET Activity Report 2007* (European Commission, May 2008). Available at http://ec.europa.eu/internal_market/fin-net/docs/activity/2007_en.pdf.

⁶³ See *FIN-NET Memorandum of Understanding on a Cross-Border Out of-Court Complaints Network for Financial Services in the European Economic Area* at http://ec.europa.eu/internal_market/fin-net/docs/mou/en.pdf.

on principles applicable to bodies responsible for out-of-court settlement of consumer disputes.⁶⁴ The 1998 recommendation contains 7 principles, namely:

- *independence* of the dispute settlement body to ensure the impartiality of its actions;
- *transparency* of the scheme to ensure that the consumer has all the necessary information about the procedure and that the results obtained can be objectively assessed;
- *adversarial* procedure to ensure that the consumer has the possibility to present all their views and are informed about the arguments of the other party;
- *effectiveness* of the procedure to ensure that the consumer will benefit from the advantages of an alternative dispute settlement, including: access without being obliged to use a legal representative; a procedure that is free of charge or of moderate cost and swift; and an active role of the dispute settlement body enabling it to take into consideration any factors conducive to a settlement of the dispute;
- *legality* to guarantee that the decision taken by the dispute settlement body does not deprive the consumer of the protection afforded by the relevant consumer protection legislation;
- *liberty* to ensure that the decision taken may be binding on the consumer only if they are informed of its binding nature in advance and specifically accept this after the dispute in question has arisen; and
- *representation* to ensure that the consumer has the possibility to be represented in the procedure by a third party if they wish.⁶⁵

8.39 Governments of EC Member States were asked to notify the European Commission of out-of-court dispute settlement bodies in their State

⁶⁴ Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes 98/257/EC (*Official Journal L 115, 17/04/1998*). See <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>.

⁶⁵ Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes 98/257/EC (*Official Journal L 115, 17/04/1998*). See <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>.

that comply with the principles of the Recommendation. FIN-NET only includes schemes that have been notified by their Member States.⁶⁶

8.40 In 2007, FIN-NET handled 1,412 cross-border cases.⁶⁷ Of these, 107 complaints were referred to the Irish Financial Services Ombudsman's Bureau through the FIN-NET scheme.⁶⁸

(3) European Small Claims Procedure

8.41 In 2007, the European Community adopted a Regulation establishing a European Small Claims Procedure (ESCP).⁶⁹ The objective of such a procedure is "to facilitate access to justice"⁷⁰ and "... simplify and speed up litigation concerning small claims in cross-border cases."⁷¹ A claim is considered a small claim where its value does not exceed €2,000 and involves civil and commercial matters.⁷²

8.42 Under the procedure a claimant may initiate a claim by completing a European Small Claims Application form and lodging it with the court with jurisdiction (in Ireland this is the District Court).⁷³ The ESCP will usually be a

⁶⁶ *Fin-Net Settling Cross-Border Financial Disputes Out of Court: Consumer Guide* (European Commission, 2005) at 7.

⁶⁷ *FIN-NET Activity Report 2007* (European Commission, May 2008) at 4. Available at http://ec.europa.eu/internal_market/fin-net/docs/activity/2007_en.pdf.

⁶⁸ *Annual Report 2007 Financial Services Ombudsman* (Financial Services Ombudsman, 2008) at 10. Available at <http://www.financialombudsman.ie/about-us/Financial-Ombudsman-2007-Annual-Report-English.pdf>

⁶⁹ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0001:0022:EN:PDF>.

⁷⁰ Recital 7 of the 2007 Regulation.

⁷¹ Recital 8 of the 2007 Regulation.

⁷² Article 2 of 2007 Regulation states that it does not apply to matters concerning: (a) the status or legal capacity of natural persons; (b) rights in property arising out of a matrimonial relationship, wills and succession; (c) bankruptcy, proceedings relating to the winding up of insolvent companies, judicial arrangements, compositions and analogous proceedings; (d) social security; (e) arbitration; (f) employment law; (g) Tenancies of immovable property; and (h) violations of privacy and of rights relating to personality, including defamation.

⁷³ Article 4 of the 2007 Regulation.

written procedure but the Court may decide to hold an oral hearing if it considers it necessary or if the parties request it.⁷⁴ If one of the parties to the dispute requests an oral hearing this can also be refused by the Court if they feel it is not necessary. The claim form and supporting documents must be submitted to the court in the language/s acceptable to the particular Member State.

8.43 The unsuccessful party will bear the cost of the proceedings, as determined by the court.⁷⁵ The decision of the court can be appealed and information on appealing a decision will be made public by the Commission once available.⁷⁶

E Online Dispute Resolution of Consumer Disputes

8.44 In response to the growth of the online marketplace in particular, methods for allowing the resolution of disputes to themselves take place on the Internet have been developed. Online dispute resolution (ODR) has been identified as a fundamental aspect of consumer protection, as litigation and the common forms of alternative dispute resolution do not meet the needs of customers, predominantly because of distances in transborder cases and disproportionate costs.⁷⁷ The principal types of dispute resolution mechanisms currently offered online are automated negotiation,⁷⁸ assisted negotiation,⁷⁹

⁷⁴ Article 5 of the 2007 Regulation.

⁷⁵ Article 16 of the 2007 Regulation.

⁷⁶ Article 17 of the 2007 Regulation.

⁷⁷ *Final Report: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - A Study for the European Commission* (The Study Centre for Consumer Law – Centre for European Economic Law, Belgium, 2007) at 87.

⁷⁸ Automated negotiation involves the parties entering a “blind bidding” procedure whereby they each, in turn, offer or demand an amount of money. When the amounts of the offer and the demand are sufficiently close, the case is settled for the arithmetic mean of the two figures. Cybersettle is the leading company in this field. See www.cybersettle.com

⁷⁹ Assisted negotiation involves the ODR institution providing the parties with a secure site on which to communicate. As is the case with traditional negotiation, the parties must reach an agreement themselves with no third party having the capacity to decide for them. A good example of an assisted negotiation platform is ECODIR.

online mediation, and online arbitration.⁸⁰ ODR has proved to be an effective tool for resolving small value claims amongst consumers. The most famous example is SquareTrade, which has an exclusive contract with the popular online auction house e-Bay. SquareTrade offers two levels of ODR to e-Bay users: direct negotiation and mediation. By 2007, over 2 million disputes across 120 nations in 5 different languages have been resolved using this platform.⁸¹

(1) Electronic Consumer Dispute Resolution

8.45 The Electronic Consumer Dispute Resolution (ECODIR) project was established in 2001 and stems from a university initiative supported by the European Commission and Irish Department of Enterprise, Trade and Employment.⁸² The aim of the ECODIR Project is to set up a system devoted to the electronic resolution of Internet disputes arising between consumers and businesses. It involves a three step process of negotiation, mediation, and recommendation. A case is only escalated to the next phase where both parties agree, and a resolution can be reached at any stage.

8.46 To initiate a case, the consumer must provide a limited amount of personal information, contact details of the other party, and details of their dispute. They are prompted to provide details of the dispute by a standard form asking whether their dispute relates to products and services, financial issues, commercial practice or privacy. They are then asked to identify a solution from a number of possibilities and to explain the reasons for their choice. They may upload supporting documentation if they wish. Once the consumer has completed the case filing, an email is automatically sent to the second party. This email gives some detail on the ECODIR project and informs the second party that a case has been initiated against it. Should the second party agree to enter negotiations, the negotiation phase is initiated. Participation in ECODIR is

⁸⁰ See generally Lesley "Resolving consumer disputes online: A review of consumer ODR" (2003) 10(8) CLP 207; Schultz "Connect Complaint Processes to Online Resolution Systems" (2003) 10 (11) CLP 307; Solovay and Reed *The Internet and Dispute Resolution: Untangling the Web* (Law Journal Press, 2003); Goodman "The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites" 2003 Duke L & Tech Rev 0004; Katsh and Rifkin *Online Dispute Resolution: Resolving Disputes in Cyberspace* (Jossey-Bass, 2001); and Wahab "Globalisation And ODR: Dynamics Of Change In E-Commerce Dispute Settlement" (2004) 12 *International Journal of Law and IT* 123.

⁸¹ Cortés "Adapting Irish Small Claims Procedure" (2007) 10 *Cork Online Law Review*. Available at <http://www.mercuryfrost.net/colr/index.php>.

⁸² See www.ecodir.org.

therefore entirely voluntary. This is consistent with the Commission's view of alternative dispute resolution procedures.⁸³

8.47 The second party can accept the consumer's proposal, reject it, or make a new proposal, via the ECODIR website. The parties have 18 days to "swap" such proposals in an attempt to reach an agreement. If after 18 days they have not agreed on a solution, ECODIR invites them to participate in the mediation phase. Either party can also request escalation to the mediation phase at any point during the 18 days. For the case to escalate to the mediation phase, the consent of both parties is required. The ECODIR Secretariat will then appoint an independent and qualified mediator from its panel. The mediation phase can last for up to 15 days. If no agreement is reached during the mediation phase, the recommendation phase is automatically initiated. Within four days of the initiation of the recommendation phase, the mediator must make a recommendation and give reasons for it. This will be based on principles of fairness and justice but will not be legally binding unless the parties have agreed to be so bound. Therefore, it can be noted that the process moves from mediation to conciliation.

8.48 From October 2001 to January 2004, ECODIR resolved 115 cases. The majority of cases were cross-border disputes (65%), with a further 29% of domestic cases where the claimant and respondent were from the same country. Almost all of the initial transactions giving rise to disputes involved the Internet to some degree, whether in the form of an online order or simply in an exchange of emails. Most of the disputes were between a commercial party and a consumer (B2C) with the consumer filing the complaint. Since 2004, ECODIR has received a new case every 2 to 3 weeks.⁸⁴

(2) *The Internet Ombudsman*

8.49 In 2007, ECC Ireland was approached by The Internet Ombudsman (TIO) an online dispute resolution organisation, seeking their involvement in their ODR scheme.⁸⁵ ECC agreed to participate in a 6 month pilot project during 2008 involving the referral of unresolved online shopping disputes to the TIO service. For the duration of the pilot only Irish / UK online shopping disputes are to be referred. Consumers can register their complaint about a product or service that they have purchased on the Internet and have it resolved by neutral

⁸³ See Chapter 3, above at 3.03.

⁸⁴ Information supplied to the Commission by Brian Huchinson, ECODIR, University of Dublin.

⁸⁵ www.TheInternetOmbudsman.com is a new service offered by www.TheMediationRoom.com that applies technology to resolve consumer complaints and claims online.

conciliators and adjudicators. This is a two stage process. Firstly the dispute is dealt with through mediation and if this does not succeed, then another neutral. The Internet Ombudsman will consider the joint discussions that have taken place, as well as responses to further questions he or she may raise and then rule on an appropriate and fair outcome. At the conclusion of the pilot phase a short Report is to be drafted and made available on the ECC web site.⁸⁶

8.50 In France, since 1997 IRIS Mediation (Imaginons un Réseau Internet Solidaire) provides mediation services for disputes between internet users. Le médiateur du net, a private body, deals with disputes arising from electronic commerce.⁸⁷ In Austria, the Internetombudsman, another private body, offers online dispute resolution for e-commerce complaints.⁸⁸ In Germany, a similar institute, the Ombudsmann.de, deals with conflicts concerning online shopping transactions. The pre-requisites are that the buyer is a consumer resident in Germany and the retailer is a commercial seller with its place of business in the European Union. Finally, the parties must agree to settle the dispute out of court.⁸⁹ The Arbitration body of the Chamber of Commerce of Milan, Risolvionline, offers online conciliation but is not limited to consumer disputes.⁹⁰

8.51 In its 2002 Report *Building Trust through the Legal Framework*, the Information Society Commission Legal Affairs Group recommended that, as part of a twin-track process, the Department of Justice, Equality and Law Reform should continue to encourage the development of online arbitration systems for both business-to-business (B2B) and for business-to-consumer (B2C) e-commerce. Progress in each area would, it considered, reinforce Ireland's attractiveness as an international centre for dispute resolution. The Report also recommended that the Government should continue to encourage the development of online dispute resolution models.⁹¹

⁸⁶ *The development of Alternative Dispute Resolution (ADR) in Ireland: An analysis of complaints, best practice and future recommendations* (ECC Ireland, 2008) at 10. Available at http://www.eccdublin.ie/publications/reports/ecc_reports/ECC_Ireland_ADR_Report_May08.pdf.

⁸⁷ See www.iris.sgdg.org/mediation.

⁸⁸ See www.isoc.be/safeinternet/bir.htm.

⁸⁹ See www.ombudsmann.de.

⁹⁰ See www.camera-arbitrale.it.

⁹¹ *Building Trust through the Legal Framework* (Report by the Information Society Commission Legal Affairs Group, December 2002) at 24. Available at <http://www.isc.ie/downloads/legal.pdf>.

8.52 Similarly, Forfás recommended in its 2002 report *Legislating for Competitive Advantage in e-Business and Information & Communications Technologies* that the Government should assess the possible role of an online ombudsman in providing a conciliation service between consumers and firms trading over the Internet and in adjudicating any disputes arising. The Report also recommended that if the Irish Courts are to operate as an effective mechanism for the appeal and review of e-ADR, the electronic systems used would have to be integrated or shared. It also stated that mechanisms by which the online ADR and the e-Courts could be integrated, building upon the *27th Interim Report of the Committee on Court Practice and Procedure*.⁹²

8.53 The Commission is also aware of the ongoing work of the Courts Service in its development of an eCourts strategy⁹³ and invites submissions on how the 2002 Reports on online dispute resolution can be further developed.

8.54 *The Commission commends the recommendations on online dispute resolution of consumer disputes made by the Information Society Commission in its 2002 Report Building Trust and by Forfas in its 2002 Report Legislating for Competitive Advantage in e-Business and Information & Communications Technologies and invites submissions as to whether they should be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes.*

F Small Claims Court

8.55 Since its inception as a pilot scheme in 1991 the Small Claims Court, which operates in the District Court, has become an invaluable tool in allowing consumers to assert their consumer rights.⁹⁴ The success of this scheme led to the establishment of the procedure nationwide 1993. The main advantage of the procedure from the consumer perspective is that their only liability in terms of

⁹² *Legislating for Competitive Advantage in e-Business and Information & Communications Technologies* (Forfas, 2002). Available at http://www.forfas.ie/publications/ebus_ict_leg02/021029_ebusiness_ict_leg_72dpi_s.pdf.

⁹³ See *ICT Strategy for the Courts Service 2000-2010*, available at www.courts.ie.

⁹⁴ Now regulated by the *District Court (Small Claims Procedure) Rules 1999* (S.I. No. 191 of 1999) which inserted O53A into the *District Court Rules 1997* (SI no. 93 of 1997). See Bird "Small Claims Procedure in the District Court" (1992) 10 *ILT* 35; and McHugh *Small Claims Court in Ireland: A Consumer's Guide* (FirstLaw, 2003).

cost is the €15 fee which is payable in respect of their claim.⁹⁵ The types of claims which are dealt with by the Small Claims Court include:

- a claim for goods or services bought for private use from someone selling them in the course of a business (consumer claims)
- a claim for minor damage to property (but excluding personal injuries)
- a claim for the non-return of a rent deposit for certain kinds of rented properties, for example, a holiday home or a room / flat in a premises where the owner also lives.

8.56 However the Small Claims Court cannot accept claims relating to debts, personal injuries, goods purchased on hire purchase or breach of leasing agreements.

8.57 Small claims are processed initially by the District Court Clerk, called the Small Claims Registrar. If a claim is disputed by the respondent or the respondent makes a counterclaim, the Registrar may bring the parties together informally in an effort to assist the parties to reach an agreement. If an agreement cannot be reached the Small Claims Registrar may then fix a date, time and location for a hearing of the claim before a judge of the District Court. Both the applicant and the respondent have the right to appeal an order of the District Court to the Circuit Court.

8.58 Applications under the Small Claims procedure increased by almost 25% in 2007, from 2,990 in 2006 to 3,734 in 2007. Applications relating to damage to private property increased by over 90%, from 158 in 2006 to 303 in 2007. Applications relating to holidays accounted for 10% of the total claims. There was a considerable increase in the applications which could not be dealt with under the Small Claims procedure, from 44 in 2006 to 589 in 2007.⁹⁶

8.59 Since 2006, the Small Claims Court operates an online dispute resolution procedure where claims can be filed online. The main advantage of the online initiative is that it makes the procedure more accessible to consumers. The Small Claims Online system allows applicants lodge claims 24/7 over the internet, pay the court fee online and follow the progress of their application as it progresses through the various stages of the process using a unique personal identifier (PIN). If the respondent accepts the claim, or if he does not reply to it within 15 days, the District Court will make an order in the complainant's favour for the amount claimed. This must be paid in a specified period of time by a cheque which will be sent by post to the claimant without the

⁹⁵ *Make Consumers Count - A New Direction for Irish Consumers* (Report of the Consumer Strategy Group April, Forfas, 2005) at 51.

⁹⁶ *Courts Service Annual Report 2007* at 25. See www.courts.ie.

need to attend court.⁹⁷ Of all applications received in 2007, 1,552 or 41.5% were received through the Small Claims Online System.⁹⁸

8.60 It has been suggested that the maximum claim currently possible under the Small Claims Court, €2,000, is relatively low. The 2006 *Report of the Legal Costs Working Group* recommended that consideration should be given to a substantial increase in the jurisdictional limit of the Small Claims Court and that the range of cases dealt with by means of this procedure should be expanded. It recommended that the jurisdictional limit be increased to €3,000.⁹⁹ In its 2008 *Report on Multi-Unit Developments* the Commission also recommended that the Small Claims Court should have its jurisdiction increased to €3,000.¹⁰⁰ The Commission takes the opportunity to reiterate that recommendation in the wider context of this Consultation Paper.

8.61 *The Commission provisionally recommends that the jurisdictional limit of the Small Claims Court be increased to €3,000.*

G Redress Mechanisms in Other Jurisdictions

8.62 Innovative redress mechanisms have been successfully developed in other jurisdictions. The Commission now turns to discuss some of these redress schemes.

(1) Sweden

8.63 In Sweden, the National Board for Consumer Complaints investigates disputes between consumers and traders about goods, services or other utilities intended primarily for private use.¹⁰¹ The Board submits recommendations on how disputes should be resolved, for example that the business operator should repair the defect on a product. The Board's recommendations are not binding, but the majority of companies nonetheless follow them. The process at the Board is purely in writing. Both parties have the right to submit written evidence in the form of, for example, contracts or certificates of inspection. The dispute is

⁹⁷ Cortés “Adapting Irish Small Claims Procedure” (2007) 10 *Cork Online Law Review*. Available at <http://www.mercuryfrost.net/colr/index.php>.

⁹⁸ *Courts Service Annual Report 2007* at 25. See www.courts.ie.

⁹⁹ *Report of the Legal Costs Implementation Advisory Group* (Department of Justice, Equality and Law Reform, 2006). See <http://www.justice.ie/en/JELR/LegalCostsImpGrp.pdf/Files/LegalCostsImpGrp.pdf>.

¹⁰⁰ Law Reform Commission *Report on Multi-Unit Developments* (LRC 90-2008) at 167.

¹⁰¹ See www.arn.se.

usually settled at a meeting with the department under which the matter falls. The parties are not entitled to be present at the meeting.

(2) Denmark

8.64 Similarly in Denmark, the Consumer Complaints Board deals with complaints from private consumers concerning goods, labour or services provided by businesses.¹⁰² A complaint is dealt with on the basis of written documentation, and oral statements may not be made by the parties during meetings of the Board. A complaint may be referred to the Board only if it has already been addressed to the business concerned. The Consumer Complaints Board consists of a chairman and members representing the interests of consumers and trade and industry. The chairman must be a judge and may not have any specific affiliation to consumer or trade and industry organisations. Decisions are not binding or enforceable. When the Board has made a decision, the matter may be brought to court by either party. If the Board's decision is not complied with, the secretariat may bring the matter to court at the request and on behalf of the consumer. As with the Swedish system, decisions are not binding. If a decision is not complied with by a business, the case may be brought before the civil courts. Such cases are subject to special regulations under which the consumer may receive legal aid. Under a special scheme, a decision may also be brought to court by the Danish Consumer Council. An innovation in this area is a list published on the Internet listing businesses that have not complied with Consumer Complaints Board decisions. However, if the business wants the case brought to court, its name may not be published until final judgment is pronounced in the case.

(3) Norway

8.65 In its 2008 Report already referred to, ECC Dublin recommended the redress system for consumers in Norway as a model for best practice in Ireland.¹⁰³ The Norwegian model is a hybrid system which means that a

¹⁰² See <http://www.forbrug.dk/english/complaints-board/about-the-consumer-complaints-board/>. In the Netherlands, the Foundation for Consumer Complaints Boards (Stichting Geschillencommissies voor Consumentenklachten) groups over 41 consumer complaint boards in various economic areas, which are made up of independent arbitrators and technical experts. Decisions of the complaints boards are binding and final. See http://www.ser.nl/~media/Files/Internet/Consumentenvoorwaarden/Engels/Prese ntation_De_Geschillencommissie.ashx.

¹⁰³ See *The development of Alternative Dispute Resolution (ADR) in Ireland: An analysis of complaints, best practice and future recommendations* (ECC Ireland, 2008) Available at

statutory Consumer Dispute Commission with the authority to make legally binding decisions (Forbrukertvistutvalget – the FTU) exists side by side with voluntary, industry specific complaints boards.¹⁰⁴

8.66 The Norwegian Consumer Council gives advice and information to consumers but also mediates on their behalf with the business. The Consumer Council is Norway's largest provider of free legal aid, and deals with approximately 140,000 enquiries from the public annually.¹⁰⁵ If the matter cannot be resolved, it refers the case to either the Consumer Dispute Commission or to a Voluntary Complaint Board. The Consumer Dispute Commission handles complaints by deciding on the dispute once the parties have had the opportunity to state their cases.¹⁰⁶ During both mediation and the remainder of the complaints procedure, the Consumer Dispute Commission takes an impartial and unbiased approach within the framework of the relevant legislation.¹⁰⁷ The Commission's decisions are enforceable. However, both the consumer and the trader have a period of 4 weeks to appeal the Commission's decision through the Norwegian court system. The Commission handles approximately 900 cases a year. In 2007 only 3% of cases were appealed to the District Court.¹⁰⁸

8.67 If the complaint is still unresolved in an informal manner the Consumer Council may forward the case to a ADR voluntary complaint board rather than the Consumer Dispute Commission. The voluntary complaint boards are industry-specific and are set up by agreement between the trade organisations and the Consumer Council and are financed by the businesses. Each complaint board is made up of representatives of the consumer and business and a neutral chairman. Decisions reached by the Boards are advisory and not binding.¹⁰⁹ Therefore, the process can be likened to conciliation.

http://www.eccdublin.ie/publications/reports/ecc_reports/ECC_Ireland_ADR_Report_May08.pdf.

¹⁰⁴ *Ibid.* at 13.

¹⁰⁵ See <http://www.norway.ie/policy/family/consumer/policy.htm>.

¹⁰⁶ See http://forbrukerportalen.no/Emner/engelsk_fransk.

¹⁰⁷ *The development of Alternative Dispute Resolution (ADR) in Ireland: An analysis of complaints, best practice and future recommendations* (ECC Ireland, 2008) at 13. Available at http://www.eccdublin.ie/publications/reports/ecc_reports/ECC_Ireland_ADR_Report_May08.pdf.

¹⁰⁸ *Ibid.* at 14.

¹⁰⁹ *Ibid.*

8.68 When a decision is reached by a voluntary complaint board and the company in question fails to comply with the recommendations, the information is given to the Consumer Council, which uploads this information onto their web site making it available to the public. This method of “naming and shaming” has proved to be an effective incentive for the compliance of companies to the decisions reached by the voluntary complaint boards.¹¹⁰

8.69 ECC Dublin has indicated that the creation of such a body in Ireland could also benefit Irish consumers by bridging the gap for disputes which exceed the Small Claims Court limit yet are not of sufficient ‘value’ to take to the District Court and could also act as a very useful ADR system for the resolution of cross-border consumer disputes.¹¹¹

(4) Queensland: Commercial & Consumer Tribunal

8.70 The Queensland Commercial and Consumer Tribunal is an independent quasi judicial decision-making body which commenced operation in July 2003. The Tribunal operates under the *Commercial and Consumer Tribunal Act 2003*. The Tribunal is a low cost means of resolving commercial disputes. Costs range between \$56 for a party with no financial interest in the dispute, to \$223 for a commercial issue such as a building dispute.¹¹²

8.71 The Tribunal reports that its mediators achieve a high success rate for assisting parties to resolve their dispute at the early stages of the proceedings. Mediators achieved a success rate of 70% in domestic and commercial building disputes referred to mediation, negotiating settlements worth a total of \$5.6m compared with \$2.4m during 2005-06. The Tribunal uses a panel of approximately 45 qualified and experienced mediators who are located throughout Queensland. All mediators appointed by the Tribunal must be accredited and are selected to ensure they have the right mix of mediation skills and subject knowledge. This has contributed significantly to the high

¹¹⁰ *The development of Alternative Dispute Resolution (ADR) in Ireland: An analysis of complaints, best practice and future recommendations* (ECC Ireland, 2008) at 15 Available at http://www.eccdublin.ie/publications/reports/ecc_reports/ECC_Ireland_ADR_Report_May08.pdf.

¹¹¹ *The need to develop ADR in Ireland* (ECC Ireland, 2003) at 14.

¹¹² *Commercial and Consumer Tribunal Annual Report 2006-2007* (Queensland Government 2007). Available at http://www.tribunals.qld.gov.au/Registry/cct_annual_report_06-07%20final.pdf.

success rate of mediated outcomes.¹¹³ Tribunal decisions can be appealed to the District Court on the grounds of an error of law or want of jurisdiction.

¹¹³ *Commercial and Consumer Tribunal Annual Report 2006-2007* (Queensland Government 2007) at 6. Available at http://www.tribunals.qld.gov.au/Registry/cct_annual_report_06-07%20final.pdf.

CHAPTER 9 PROPERTY DISPUTES & ADR

A Introduction

9.01 In this chapter the Commission explores the potential role for ADR in the resolution of specific types of property disputes. In Part B the Commission examines the role for ADR in the resolution of property disputes between neighbours. Part C discusses landlord and tenant disputes and the dispute resolution mechanisms which are available through the Private Residential Tenancies Board. In Part D the Commission considers whether ADR has any role to play in the resolution of planning application disputes.

B Neighbour Disputes & ADR

9.02 One of the most common and acrimonious types of disputes between neighbours is the issue of boundary lines between adjoining properties. Such disputes "can be fought with a passion that seems out of all proportion to the importance of what is involved in practical terms."¹

(1) Nature of Boundary Disputes

9.03 In the early 17th century Sir Edward Coke noted that "the house of every man is to him his Castle and Fortresse, as well for his defence against injury and violence, as for his repose."² This sense of personal space remains a central part of home ownership in the Ireland of the 21st century so that disputes between neighbours are often different from other types of disputes. They are, by their very definition, closer to home and so can be more intrusive in ones personal life.³ Indeed, it is said that "only a marriage separation is more contentious than a neighbour dispute and it is for this reason that the parties often lose sight of objectivity."⁴

¹ Carnwath LJ in *Ali v Lane* EWCA Civ 1532, [2007] 2 EG 126.

² *Semayne's Case* (1604) 77All ER 194.

³ Kaye "Neighbour and Boundary Disputes" (February 2006). Online article available at <http://www.lindermyers.co.uk/article.asp?id=221>.

⁴ Clancy "Mediation as a Methodology to Resolve Boundary Disputes in Ireland". Paper presented at the *Land Registration Perspective on Mediation as a*

9.04 The Irish Courts have repeatedly commented on how neighbour disputes escalate beyond all reasonableness. For example, in 2004, in a claim involving a 30 year old dispute over a plot of land between two separate generations of families, Judge Groarke of the Circuit Court likened it to John Keane's play *The Field*, stating that "Bull McCabe is alive and well and living in Blessington. It is surprising to see quite that level of theatre played out in court like it was today."⁵ In a 2004 Circuit Court claim involving a 19 year dispute over a right a way between two families, Judge Doyle urged the families to "bury the hatchet and see some sense."⁶

9.05 As noted by Ward LJ in the English case of *Alan Wibberley Building Ltd v Insley*:⁷

"To hear those words, 'a boundary dispute', is to fill a judge even of the most stalwart and amiable disposition with deep foreboding since disputes between neighbours tend always to compel...some unreasonable and extravagant display of unneighbourly behaviour which profits no one but the lawyers."

9.06 This case proceeded to the House of Lords, the highest Court in the United Kingdom judicial system, where Lord Hoffman noted that "boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras's army."⁸

9.07 It has been pointed out that these disputes become particularly difficult, not because they involve complex legal problems, but because the "personalities of the parties often lies at the root of the problem."⁹ Very often the boundary dispute is a proxy for an underlying dispute between the neighbours.

methodology to resolve boundary disputes in Ireland Conference (Dublin Institute of Technology, December 2005).

⁵ "Circuit Court Judge Likens Case to The Field", *Wicklow People*, March 18 2004. Available at www.wicklowpeople.ie.

⁶ "Judge advises families to bury the hatchet in dispute over right of way", *Carlow People*, 5 April 2007. Available at www.carlowpeople.ie.

⁷ [1998] 2 All ER 82.

⁸ [1999] 1 WLR 894.

⁹ Powell "Boundary Dispute Resolution in England & Wales – Surveyors and Lawyers Working Together to Resolve Problems" (February 2005) International Federation of Surveyors. Online article available at http://www.fig.net/pub/monthly_articles/february_2005/powell_february_2005.pdf.

It has been noted that a formal legal system approach to the boundary dispute may not resolve the real dispute:

“If the right of way issue is so reduced to the allegation of trespass, met by the counter allegation of prescriptive user, the danger is that we will never reach the real, underlying problem between the parties and therefore never resolve it. Someone will win the case and someone will inevitably lose but the dispute - the actual dispute between the parties - will break out again and again perhaps at some other place and even perhaps in some other generation.”¹⁰

9.08 It is important, therefore, to identify at the outset precisely what the goals and underlying interests are of each of the parties before they become deeply entrenched in their positions and litigation commences.¹¹

(2) Appropriateness of ADR for Resolution of Boundary Disputes

9.09 In the English case *Barker v Johnson*,¹² where a dispute had occurred between neighbours over an easement of drainage, Ward L.J. stated that

“I would urge these parties to seek the help of this court's ADR service in order to explore whether a compromise would not only enable this litigation to be killed off sooner rather than later, but that some sense of compromise might bring a greater sense of happiness and peace in the respective homes of neighbours who continue to live together and should do so with civility rather than continuing acrimony.”¹³

9.10 While it is important to note that parties to a boundary dispute have the same rights of access to the courts as other persons, it is evident that such disputes are ripe for ADR because the cost of litigating a property dispute, both

¹⁰ O'Donnell “Mediation Overview: Pleadings and What They Mean”. Paper presented at the *Dispute Resolution Symposium* organised by Engineers Ireland. (Dublin, April 2007) at 2. Available at www.engineersireland.ie.

¹¹ The Commission notes that sections 41 to 45 of the *Land and Conveyancing Law Reform Bill 2006* (which derives from the *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005)) provide for a process in the District Court for carrying out work between adjoining property. When enacted, these provisions may assist where disputes cannot be resolved through ADR.

¹² [1999] E.W.C.A. (Civil Division) (March 25, 1999).

¹³ [1999] E.W.C.A. (Civil Division) (March 25, 1999).

financially and emotionally, can far out-weigh the value of the claim itself. For example, in the English case *Scammell v Dicker*,¹⁴ the case began in 1989 with the defendant seeking a declaration as to the line of her boundary with the plaintiff's neighbouring farm. The case ended 16 years later in 2005, by which time the plaintiff's litigation was being funded by the Services Indemnity Fund and the defendant was receiving legal aid, having spent her savings on the litigation.¹⁵

9.11 In *Ali v Lane*¹⁶ and *Haycocks v Neville*¹⁷, the Court of Appeal exhorted professional advisers to use their influence to prevent clients from litigating over minor boundary disputes. The Court emphasised that in such cases the professional advisers should regard themselves as under a duty to ensure that their clients are aware of the potentially disastrous consequences of litigation of this kind and of the possibilities of alternative dispute procedures.

(3) Role for Mediation in Neighbour Disputes

(a) Role of the Court in Ireland: A Case Study

9.12 The positive role which can be played by the courts in assisting parties in a boundary dispute to consider mediation is illustrated by the 2008 High Court action *Charlton v Kenny*.¹⁸ This involved a long-standing dispute between two neighbouring couples, which received considerable publicity because one of the plaintiffs is a well known solicitor and one of the defendants is a well known radio and TV presenter.

9.13 The dispute concerned a small strip of land adjacent to the parties' houses. It appeared that the plaintiffs had purchased their house with the adjacent strip of land in 1971. The defendants bought their nearby house some time later. As the claim was ultimately settled after mediation, it is not possible to describe definitively the events which led to the dispute or to ascribe definitive legal significance to them. It appears, however, that from about 1991 the defendants had used and occupied in some way the strip of land which adjoined both houses. At some point, the parties began to dispute ownership of the strip of land and this culminated in the plaintiff initiating a High Court action

¹⁴ [2005] EWCA 405 (Civil Division) (14 April, 2005).

¹⁵ See Smith "Mending Fences" (2007) 104 *Law Society Gazette* 32.

¹⁶ [2006] EWCA Civ 1532; [2007] 02 EG 126.

¹⁷ [2007] EWCA Civ 78; [2007] 12 EG 156.

¹⁸ 2006 No.4266P, High Court, 8 to 11 April 2008 (hearing of action) and 15 April 2008 (settlement after mediation). The accounts given are based on reports in *The Irish Times* and *Irish Independent*, 9 to 12 April 2008 and 16 April 2008.

in 2006 seeking a declaration that they were the owners of the strip of land and an injunction to prevent the defendants from entering onto the land. The defendants put in a full defence to this claim and also filed a counterclaim, which asserted that they had acquired ownership to the strip of land by virtue of adverse possession, commonly known as “squatter’s rights.”

9.14 During the first four days of the hearing of the case in the High Court, their respective counsel had outlined the evidence that both parties were likely to give. This appeared to include the prospect that both parties might give detailed (and possibly conflicting) evidence concerning a number of unhappy encounters and conversations between them about the disputed strip of land. The outline given of this prospective evidence was widely reported in the media. On the fourth day of the hearing, and just before the parties were about to begin their evidence, the trial judge, Clark J, indicated that she wished to say something on her own initiative. Addressing both parties, she stated:

"I have no doubt you are very well thought of in your respective professions throughout the length and breadth of the country. I would urge you to think long and hard before things are said that cannot be taken back," she pleaded...You both live in very attractive houses in a very idyllic setting and you have to go back and live there. It won't be idyllic when the case is over so please think carefully before evidence is given and I am in a position having to say I prefer one party's evidence over the other's."¹⁹

9.15 Clark J added: “If this was a Commercial Court case²⁰ or a family law case,²¹ a judge would be obliged to inquire whether the parties had tried mediation.” The hearing of the case was then adjourned to allow both parties to consider Clark J’s intervention. After just over an hour the parties returned to court to indicate that they had agreed to refer the matter to mediation. It was reported that the mediation involved 10 hours of discussion (facilitated by a senior counsel) in the days immediately after the High Court hearing and that, as a result, the parties reached a settlement in which the defendants agreed to purchase the disputed strip of land. As with all such settlements and mediations, this was agreed on the basis that there had been no final decision on the legal dispute between the parties concerning ownership of the land.

¹⁹ Ms Justice Clark quoted in Black and Healy “Judge Makes Plea for Peace in Kenny Land War”, 12th April 2008, *The Irish Independent*. Available at <http://www.independent.ie/national-news/judge-makes-a-plea-for-peace-in-kenny-land-war-1345782.html>.

²⁰ See Chapter 7, above.

²¹ See Chapter 5, above.

9.16 When the High Court hearing resumed, the parties stated that the case had been settled by mediation and the content of the mediator's report was also read in court. Counsel for both parties expressed their thanks to Clark J for her intervention and indication that mediation be considered.

9.17 The Commission notes that, in *Charlton v Kenny*, Clark J acknowledged the difficulty for litigants that evidence given in court cannot be "taken back" and that a court decision may inevitably involve preferring the evidence of one litigant over another. In this respect, mediation may allow parties (even where their decision to litigate indicates firmly entrenched positions) to "step back" and address the immediate dispute as well as their long term relationship, to which Clark J referred in her intervention. While mediation may not suit all such disputes, the Commission considers that, by analogy with the approach in the Commercial Court and in family disputes (an analogy acknowledged by Clark J in *Charlton v Kenny*), the courts should continue to be proactive in advising parties to consider mediation or conciliation, as appropriate. Using the same analogy, the Commission considers that parties should be advised by their legal representatives to consider mediation or conciliation prior to commencing litigation.

(b) Role for Local Authorities & Community Centres

9.18 In the Department of the Environment's 2001 guidance document on *Good Practice in Housing Management: Guidelines for Local Authorities*,²² mediation is recommended as a means of resolving neighbour disputes in housing estates, including boundary disputes.²³ In this respect, Dublin City Council has recently introduced a neighbourhood mediation service. Staffed by trained mediators employed by the City Council, the service offers local authority residents, involved in disputes with each other, an independent, non-confrontational and strictly confidential mechanism to resolve their disagreements through structured dialogue.²⁴

²² *Managing Partnership: Enabling Tenant Participation in Housing Estate Management*. (The Department of the Environment and Local Government and The City and County Managers Association, October 2001). Available at www.environ.ie.

²³ See Recommendation 27 and 35 of *Managing Partnership: Enabling Tenant Participation in Housing Estate Management*. (The Department of the Environment and Local Government and The City and County Managers Association, October 2001) at 57 and 67 respectively.

²⁴ See also the Royal Institution of Chartered Surveyors (UK) Dispute Resolution Services which has created an innovative form of ADR that is specifically designed to resolve boundary and other neighbour disputes. The Neighbour

9.19 A similar development has also emerged in two Dublin Community Law Centres which have pioneered in Ireland what are known internationally as community justice centres. The Law Reform Commission of New South Wales described the benefits of community justice centres in a 2005 Report as follows:

“Community Justice Centres are said to play a role in the ‘empowerment’ of communities in that they help individuals and communities to develop their own solutions to their own problems without the need for the imposition of an external solution.... At a more pragmatic level it can also be said that CJsCs are well placed to deal with neighbourhood and community disputes and especially provide a valuable outlet for the tensions which sometimes occur in such disputes.”²⁵

9.20 The two community justice centres in Dublin are organised through the Northside Community Law Centre and Ballymun Community Law Centre, both operating in the North Dublin city area. The Commission now turns to discuss both of these centres.

9.21 Northside Community Law Centre is an independent Law Centre. Operating since 1975, the Law Centre was the first Community Law Centre in Ireland. The Centre provides free information, advice and representation to individuals and groups in its community who otherwise would not be able to obtain legal services, and also works to empower the community through education, research and campaigns.²⁶ The Centre also provides a mediation service which is staffed by five trained volunteer mediators who live and work in the area. According to the Centre:

“Community mediation offers constructive processes for resolving differences and conflicts between neighbours, local groups and

Disputes Service has 3 stages. Each stage is designed to resolve a dispute with finality. Information on the service is available at www.rics.org/Services/Disputeresolution.

²⁵ New South Wales Law Reform Commission *Report on Community Justice Centres* (Report No. 106, 2005) at 11. See also New South Wales Law Reform Commission Issues Paper *Community Justice Centres* (No. 23, 2003); New South Wales Law Reform Commission Research Report *Mediation and Community Justice Centres: An Empirical Study* (No. 12, 2004); New South Wales Law Reform Commission Report *Community Justice Centres* (No. 106, 2005); McGillis, *Community Mediation Programs: Developments and Challenges* (US National Institute of Justice, 1997); Faulkes and Claremont, “Community Mediation: Myth and Reality” (1997) 8 *Australian Dispute Resolution Journal* 177.

²⁶ See the Northside Community Law Centre website at www.nclc.ie.

community based organisations. It is an alternative on the one hand to avoidance where disputes fester and on the other hand to prolonged litigation which can be expensive ending up with a win/lose outcome. Above all mediation gives local people in conflict an opportunity to take responsibility for the resolution of their own dispute and to come up with their own solutions. Where this happens, relationships and connections between neighbours get re-built and the sense of community becomes stronger following the resolution of each dispute.”²⁷

9.22 Ballymun Community Law Centre was established in 2002 to tackle unmet legal need in this part of North Dublin city. It provides free legal advice, information and representation to people within the community. Like the Northside Community Law Centre, it provides information, advice, assistance, representation, mediation and education as well as taking a strategic approach to tackling inequality.²⁸ The Centre also provides a mediation service for resolving disputes between neighbours, as well as family disputes. Reflecting on the comments of the New South Wales Law Reform Commission, the Centre notes that “Mediation promotes understanding, builds trust, and strengthens communities. It provides parties in conflict to discuss their concerns with the help of a neutral mediator.”²⁹ The Commission welcomes the continued development of such centres and believes that through community mediation disputes between neighbours can be effectively and efficiently resolved without recourse to litigation.

9.23 *The Commission provisionally recommends the continued development of mediation and conciliation services by community law centres for the resolution of community and neighbour property disputes.*

(4) Conclusion

9.24 Most disputes between neighbours can be amicably resolved by chatting and negotiating over the garden fence. However, there are instances where a dispute will escalate and require a third party intervention to help reach a resolution. In this context, the Commission considers that ADR, and specifically mediation, may resolve boundary disputes more efficiently than litigation. Mediation has the potential to preserve a civilised relationship between neighbours and prevent generations of hostility and unnecessary costly litigation between families. Mediation provides the parties with the

²⁷ Northside Community Mediation Course”, *Northside Community Law Centre Newsletter* (October 2007) Issue 11 at 1-2.

²⁸ See the Ballymun Community Law Centre website at www.bclc.ie.

²⁹ *Ibid.*

opportunity to address any other underlying interests or concerns outside of the boundary issue which may have acting as a catalyst for the escalation of the boundary dispute. If a boundary dispute is litigated, there can only be one winner.

9.25 *The Commission provisionally recommends that property boundary disputes are appropriate for resolution through mediation and conciliation and that parties should be advised by their legal representatives to consider and attempt mediation or conciliation in such disputes prior to the commencement of litigation.*

9.26 *The Commission provisionally recommends that the courts should continue to be pro-active in advising parties in property disputes to consider the adjournment of hearings to allow the parties to consider mediation or conciliation.*

C Landlord & Tenant Disputes

(1) Private Residential Tenancies Board (PRTB)

9.27 The Private Residential Tenancies Board was established by the *Residential Tenancies Act 2004*.³⁰ It has 3 main areas of activity: the operation of a national registration system for all private residential tenancies; the operation of a dispute resolution service; and the provision of information, the carrying out of research and the provision of policy advice regarding the private rented sector.

9.28 The PRTB Dispute Resolution Service replaces the jurisdiction of the Circuit Court in relation to the adjudication of residential landlord and tenant disputes. Disputes can be referred by a wide range of parties including: tenants; sub-tenants; landlords (but only where the tenancy is registered); licensees (in certain circumstances); and certain third parties who may be affected by a landlord's failure to enforce tenants' obligations (for example neighbours).³¹ In 2006, 1,300 disputes between landlords and tenants were referred to the PRTB.³²

³⁰ The 2004 Act implemented the recommendations in the 2000 *Report of the Commission on the Private Rented Residential Sector* (Department of the Environment and Local Government). Available at www.environ.ie.

³¹ Section 76 of the 2004 Act. Examples of the issues the PRTB deal with are: refund or retention of deposits; the charging of rents above market rent; timing of rent reviews; failure to follow the correct procedure to terminate a tenancy; and invalid reasons for terminating a tenancy.

³² *Private Residential Tenancies Board Annual Report 2006* (2007) at 17.

9.29 The PRTB operates a two-stage dispute resolution system. Stage 1 consists of either mediation or adjudication.³³ Stage 2 is a hearing by a Tenancy Tribunal.³⁴

(2) Mediation and Adjudication at the PTRB

9.30 There is no definition of mediation in the *Residential Tenancies Act, 2004*. Section 95 (2) of the 2004 Act states that the ‘mediator’:

“...shall inquire fully into each relevant aspect of the dispute concerned, provide to, and receive from, each party such information as is appropriate and generally make such suggestions to each party and take such other actions as he or she considers appropriate...”

9.31 This description of the mediator’s role highlights that the process is more consistent with the Commission’s definition of conciliation.³⁵ This is evident from the fact that the mediator may “make such suggestions to each party” and so that the third party role is not merely facilitating, but also has an advisory role, which is associated with that of a conciliator.

9.32 Section 101 of the 2004 Act sets out principles which are common to mediators and adjudicators. Both must:

- declare to the parties at the outset of dealing with the matter any potential conflict of interest of which he or she is aware or ought reasonably be aware.³⁶
- act at all times in accordance with the highest standards of the professional body, if any, of which he or she is a member.³⁷
- maintain the confidentiality of the proceedings concerned.³⁸

9.33 Section 101(4) of the 2004 Act states that “the manner in which a mediation or adjudication is conducted shall be at the discretion of the mediator or adjudicator concerned but it shall be the duty of that person to ensure that the mediation or adjudication is conducted without undue formality.” This ensures that the processes are flexible as there are no set procedures for the third party to follow.

³³ Section 95 of the 2004 Act.

³⁴ Section 102 of the 2004 Act.

³⁵ See paragraph 2.129, above.

³⁶ Section 101(1)(a) of the 2004 Act. See also section 112 of the 2004 Act.

³⁷ Section 101(1)(b) of the 2004 Act.

³⁸ Section 101(1)(c) of the 2004 Act.

9.34 Mediation at the PTRB is voluntary in nature and both parties must consent to participate in the process.³⁹ If both parties agree to mediation, a PRTB mediator will be appointed to assist the parties to resolve the dispute. Should either of the parties decide not to use the services of a PRTB mediator or should the PRTB consider that the case is not suitable for mediation, a PRTB adjudicator will be appointed to examine the evidence of the parties and investigate the dispute fully. The adjudicator, who plays a determinative role in the process, will decide how the dispute is to be resolved.⁴⁰ A mediation agreement or adjudication decision that is not appealed will become a binding determination order of the PRTB.⁴¹

(3) Tenancy Tribunals of the PRTB

9.35 A dispute will be referred to a Tenancy Tribunal if any of the parties wishes to appeal the adjudicator's decision within 21 days or in the event that mediation is unsuccessful and any of the parties request a Tribunal hearing.⁴² In certain exceptional cases the PRTB may refer a dispute directly to the Tribunal, for example where there appears to be imminent risk of damage to the dwelling or danger to one of the parties.

9.36 Each Tenancy Tribunal consists of three persons who have relevant professional knowledge and experience.⁴³ The Tenancy Tribunal holds its hearings in public.⁴⁴ Although its procedures are relatively informal basic court rules are applied. Where it considers it appropriate the Tribunal may summon witnesses, require the production of any document and take evidence under oath.⁴⁵ The parties will be allowed participate fully and give their evidence.⁴⁶ The Tribunal's determination of the dispute will be issued to the parties as a determination order of the PRTB and is binding unless appealed, within 21 days, to the High Court on a point of law.⁴⁷

³⁹ Section 93 of the 2004 Act.

⁴⁰ Section 97 of the 2004 Act.

⁴¹ Section 123 of the 2004 Act.

⁴² Section 104 of the 2004 Act.

⁴³ Section 103 of the 2004 Act.

⁴⁴ Section 106 of the 2004 Act.

⁴⁵ Section 105 of the 2004 Act sets out provisions in relation to evidence and the summoning of witnesses.

⁴⁶ Section 104(6) of the 2004 Act.

⁴⁷ Section 123 of the 2004 Act.

9.37 Failure to comply with a determination order of the PRTB is an offence.⁴⁸ The affected party or the PRTB, if notified and satisfied that an order has not been complied with, may apply to the Circuit Court for an Order directing the party concerned to comply.

(4) Conclusion

9.38 The establishment of the PRTB is an acknowledgment by the Oireachtas of the need to provide alternative avenues for dispute resolution outside the Court system. The PRTB affords individuals the opportunity to resolve disputes which might not have been litigated due to the nature or low financial value of the dispute.

D Planning Application Disputes & ADR

(1) Planning Applications & ADR: An Overview

9.39 Under section 37 of the *Planning and Development Act 2000* an applicant for planning permission, and any party who makes a written submission to the planning authority in accordance with the permission regulations, may appeal to An Bord Pleanála within 4 weeks from the date of a decision by a planning authority.⁴⁹ An Bord Pleanála aims to make a decision within 18 weeks. If this is not possible, it will inform all the parties of this. If a development has been granted or refused planning permission, and this decision has been upheld by An Bord Pleanála, an appeal to the High Court can be made for a Judicial Review of the procedures associated with the grant or denial of planning permission.⁵⁰ An application for Judicial Review must be made within 8 weeks from the date the decision is given.

9.40 From 1999 to 2006, the average number of planning applications each year has been approximately 78,000.⁵¹ Of the decisions made, 81.3% were grants of permission and 18.7% were refusals. The appeal rate has fluctuated marginally since 2000 at between 6.5% to 7.4% of decisions made by

⁴⁸ Section 126 of the 2004 Act.

⁴⁹ Section 34 of the 2000 Act.

⁵⁰ Section 50 of the 2000 Act.

⁵¹ *Summary of Annual Planning Statistics 2006* (Department of the Environment, Heritage and Local Government, 2007). Available at <http://www.environ.ie/en/Publications/StatisticsandRegularPublications/PlanningStatistics/filedownload,15333,en.doc>.

planning authorities. In recent years there have been 4,500-5,500 appeals each year. An Bord Pleanála formally decided 3,903 appeals in 2006.⁵²

9.41 There is currently no provision for the use of ADR in the resolution of planning application disputes. It has been noted that:

“It is to be regretted that the Planning Act, a considerable piece of legislation in size and scope, which was enacted to revise and consolidate the law relating to planning and development in Ireland did not take the opportunity to include a form of ADR, like mediation, with a view to streamlining planning applications. The adjudicative, quasi-judicial function of An Bord Pleanála may not be the most beneficial for the planning process in this regard.”⁵³

(2) Role for ADR in the Planning System: International Experiences

(a) England & Wales

9.42 In the English case of *Cowl v Plymouth City Council*⁵⁴ an appeal against a refusal to grant judicial review of a planning decision of Plymouth City Council, Lord Woolf C.J. stated that:

“The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.”

9.43 In a Report in 2000 entitled *Mediation in the Planning System*⁵⁵ the viability of introducing mediation effectively into the English planning process was assessed in order to speed up decision making, reduce the pressure on public funds and the number of disputes which otherwise might result in appeals.

⁵² *Ibid.*

⁵³ Morgan & O'Connor “Resolving property disputes, Universal service – a value for money solution?” (2003) 10(4) CLP 96.

⁵⁴ [2001] E.W.C.A. (Civil Division) 1935 (14 December 2001).

⁵⁵ *Mediation in the Planning System* (Department for Communities and Local Government May 2000). Available at www.communities.gov.uk.

9.44 The Report referred to a pilot mediation scheme for planning disputes which the Planning Inspectorate had made available where the applicant and the local planning authority agreed to mediation.⁵⁶ Mediation was described in this pilot scheme as:

“...the intervention into a dispute by an acceptable impartial neutral person whose role it is to assist the parties in dispute to reach their own mutually acceptable settlement. It is essentially a voluntary procedure, its proceedings are confidential to the participants; any settlement however can be made public with the agreement of all parties.”⁵⁷

9.45 The Report noted that “the most common category where the parties opted for mediation was the ‘householder’ category and, within that, the most common focus of the dispute was design issues.”⁵⁸ The results from the pilot mediation scheme showed that, of 48 mediations, 31 resulted in an agreement, a rate of 65%. The Report concluded that:

“... the use of mediation in the planning process should not be mandatory. In general, mediation can offer financial, social and time-related advantages to resolve planning disputes rather than proceeding by appeal. In addition, it offers an opportunity to ultimately improve the quality of planning proposals rather than solely making a decision on those proposals.”⁵⁹

9.46 In 2003, a follow-up Research Report recommended that a National Planning Mediation Service be established.⁶⁰ The recommendations of this Report have not yet been implemented.

(b) Australia

9.47 In Australia, Victoria’s Civil and Administrative Tribunal (VCAT) was established in 1998 through the amalgamated of 15 boards and tribunals to offer a ‘one stop shop’ dealing with a range of disputes. VCAT has a number of ‘lists’ which specialise in particular types of cases, one of which is the Planning and

⁵⁶ See Morgan and O’Connor “Resolving property disputes, Universal service – a value for money solution?” (2003) 10(4) CLP 96.

⁵⁷ *Ibid.* See *Mediation in the Planning System* (Department for Communities and Local Government May 2000) at 4.3.1. Available at www.communities.gov.uk.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Welbank *Further Research into Mediation in the Planning System* (Department for Communities and Local Government, 2003).

Environment List. The Planning and Environment List hears and determines: applications to review decisions made by Municipal Councils and other authorities under a number of Acts of Parliament; applications for enforcement orders, applications to cancel or amend permits and applications for declarations relating to the use and/or development of land under Victoria's *Planning and Environment Act 1987*.

9.48 The Planning and Environment List offers mediation as an alternative way to settle a dispute. A number of cases are referred to mediation on VCAT's own initiative. Any party may request that their matter be referred to mediation and the mediation service is free of charge.⁶¹

(3) Summary

9.49 The discussion of the role of ADR in planning disputes indicates that it may conceivably have a role in some States. In Ireland, the Commission is aware that informal negotiations between an applicant and a local planning authority often resolve issues or disputes when they have arisen in relation to a planning application. As a result, the Commission is minded to the view that the integration of ADR processes into the planning system may not be necessary. The Commission is accordingly, not at this stage making a provisional recommendation on this issue but invites submissions as to whether there is a role for ADR in the resolution of planning application disputes.

9.50 *The Commission invites submissions on whether ADR, in particular mediation, has a role to play in the resolution of planning application disputes.*

⁶¹ The Land and Environment Court of New South Wales also offers a mediation facility which has been available since 1991. The service is free, voluntary and confidential to parties involved in disputes before the Court.

CHAPTER 10 TRAINING AND ACCREDITATION OF MEDIATORS

A Introduction

10.01 In this chapter the Commission examines the accreditation and regulation of mediators. In Part B the Commission provides a general overview of the importance of providing adequate training and formal accreditation to mediators. The Commission also examines the current structures in Ireland for training and accreditation of mediators. In Part C the Commission provides a summary of training and accreditation schemes in other States. In Part D the Commission considers the issue of education on ADR.

B Accreditation & Regulation of Mediators: An Overview

10.02 There is currently no statutory basis for the general training or accreditation of mediators in Ireland. Rather there is a variety of accreditation bodies that use different standards in training and accrediting mediators. The appointment of mediators may often be based on their professional qualifications, such as engineers, rather than their competence in the mediation process and mediator techniques. However, although practice as a mediator in Ireland does not always, therefore, depend upon being formally trained and accredited, the Commission notes that most mediators voluntarily undergo at least an introductory training course.

10.03 The recent emergence of mediation inevitably raises issues of the accreditation and regulation of those who mediate. Mediators are responsible for overseeing and assisting parties in making legally binding agreements which can have significant implications for themselves, their families, and others in society. This is particularly true of mediated family disputes involving issues such as custody and access to children, division of marital property, and maintenance.¹

¹ See Carey "Credentialing for Mediators – To Be or Not to Be" (1995) 30 USF L Rev 635; Sundermann "The Dilemma of Regulating Mediation" 22 (1985) Hous L Rev 841; Dobbins "Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence" (1994) 7 U Fla J L & Pub Pol'y 95; and Pou "Assuring Excellence, or Merely Reassuring – Policy and Practice in Promoting Mediator Quality" (2004) J Disp Resol 303.

10.04 As previously noted by the Commission, the European Code of Conduct for Mediators has been developed for self regulatory purposes only. Many countries are now considering whether the Code should be introduced as legislation to govern domestic mediations.

10.05 In 1989, the Law Reform Commission of New South Wales published a *Discussion Paper on Alternative Dispute Resolution: Training and Accreditation of Mediators*.² The Commission discussed whether a formal requirement that mediators undergo training and accreditation was necessary. The Commission gave the following reasons as to why formal training and accreditation may not be necessary:

- Mediators are born, not made;
- Mediators derive their authority from the consent of the parties. If the disputants consent to a person acting as a mediator, it is unnecessary that there be an externally imposed requirement that the mediator be trained;
- In the infancy of the practice of mediation, it is too difficult and impractical to determine what the correct training is;
- The need for specific training can be avoided if mediators are chosen by a careful matching of their skills, experience and style with the dispute and disputants; and
- If, according to mediation philosophy, appropriate solutions are likely to be generated by the disputants themselves, it is unnecessary to have mediators with expertise in substantive areas such as family law.³

10.06 By contrast, support for the view that mediators should have training were set out by the following arguments:

- The integrity and credibility of mediation will be promoted by trained practitioners;
- Users have a right to expect competent service, and not one tainted with the 'second class justice' criticism. Training practitioners is the best means of ensuring a quality service;
- Training programs enable mediators to learn the necessary skills and can identify those unlikely to be competent;

² Law Reform Commission of New South Wales *Discussion Paper on Alternative Dispute Resolution: Training and Accreditation of Mediators* (DP 21 -1989). Available at www.lawlink.nsw.gov.au.

³ *Ibid.* at 3.1.

- There is concern that mediators with limited or no training will be unaware of the dangers of the enthusiastic amateur;
- There are some situations where a mediator should be trained in either the substantive matters or the techniques of dealing with people. Mediating in the shadow of a family or dealing with people under severe stress requires specific training to be most effective; and
- Training which addresses substantive ethics and provides a model of ethical behaviour will promote a more ethical service for consumers.⁴

10.07 In its *Report on Training and Accreditation of Mediators*, the Commission of New South Wales concluded:

“...that training for mediators is necessary for competence as a mediator and to enhance the credibility of mediation... The role requires knowledge and skills of a distinct process. Training is the most effective way for a person to acquire expertise. Failure to undergo training in the process increases the risk that a mediator’s behaviour will be incompetent and unethical, and of harm to clients.”⁵

10.08 The Commission fully supports the view of the Law Reform Commission of New South Wales and considers that the training of mediators is necessary to enhance the profile of, and consumer confidence in, the process of mediation, 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.”⁶ Furthermore, if courts continue to encourage and indeed recommend mediation, the judges must have confidence in the quality of the mediators who will undertake the task. If mediation is to become a fully integrated process within the modern civil justice system, the quality and competence of those who oversee the system must be guaranteed through adequate training and formal accreditation.

10.09 *The Commission provisionally recommends that training and accreditation of mediators is essential to ensure the quality of the process and invites submission as to whether this should be included in any statutory framework for mediation.*

⁴ *Ibid.* at 3.2.

⁵ Law Reform Commission of New South Wales *Report on Training and Accreditation of Mediators* (Report 67 – 1991) at 3.6.

⁶ Spurin “Accrediting Mediators” (2004) 4 *ADR News – The Nationwide Academy of Dispute Resolution Newsletter* 1 at 6.

(1) Prescribed Bodies under the Civil Liability and Courts Act 2004

10.10 The Commission notes that, under section 15(4) of the *Civil Liability and Courts Act 2004* the following have been prescribed (by a statutory Order made by the Minister for Justice, Equality and Law Reform) as bodies which can nominate persons to act as the chairperson of mediation conferences.

- Bar Council of Ireland;⁷
- Chartered Institute of Arbitrators (Irish Branch);⁸
- Friarylaw;⁹
- International Centre for Dispute Resolution;¹⁰
- Law Society of Ireland;¹¹
- Mediation Forum – Ireland;¹² and
- Mediators Institute Ireland;¹³

10.11 These prescribed bodies provide a choice for the courts in appointing a chairperson of a mediation conference in personal injuries actions, where the parties themselves do not agree on a chairperson. The list also indicates in general terms the range of bodies currently available to provide mediation services in the State. The Commission now turns to examine some aspects of training and accreditation currently provided in Ireland.

(2) Mediators Institute of Ireland

10.12 The Mediators Institute of Ireland (MII) is the professional association for mediators in Ireland and was established in 1992. The primary object of the MII is “to promote the use of quality mediation as a process of dispute resolution in all areas by ensuring the highest standards of education, training and

⁷ See www.lawlibrary.ie

⁸ See www.arbitration.ie

⁹ See www.friarylaw.ie.

¹⁰ See www.adr.org.

¹¹ See www.lawsociety.ie

¹² See www.mediationforumireland.com.

¹³ See www.themii.ie.

professional practice of mediation and by increasing public awareness of mediation.”¹⁴

10.13 The MII’s Code of Ethics describes mediation as “a process in which an impartial and independent third party facilitates communication and negotiation and promotes voluntary decision making by the parties to a dispute to assist them to reach a mutually acceptable solution.”¹⁵ It defines a mediator as “a trained professional who facilitate the process of mediation whilst acting at all times in accordance with the principles of impartiality, integrity, fairness and confidentiality, with respect for all parties to the dispute and in accordance with the Code of Ethics.”¹⁶ There are four categories of MII membership:¹⁷

- a general member is any person with an interest in mediation. No training required to become a general member;
- an associate member is someone who has satisfactorily completed a 60 hour MII approved course or equivalent course;
- a certified mediator is someone who has satisfactorily completed a 60 hour MII approved or equivalent course and undertaken an MII approved assessment of their mediation skills. The mediator must also select a sector as a ‘home’ sector and sign acceptance of the code of ethics. A certified member is entitled to apply annually for a practising certificate. Certified mediators must also complete 50 hours of Continuing Professional Development over a 2 year cycle. The MII requires all certified mediators to hold current Professional Liability Insurance: and
- a practitioner mediator is an experienced mediator who has successfully completed an advanced assessment. This includes the completion of 100 hours of actual mediation including pre and post mediation (of which there must be at least 6 mediations of which at least 3 led to an agreement) or an MII Approved Practitioner course plus 75 hours actual mediation experience of which where must be at least 3 mediations. They must also attend 3 sharing and learning meetings and present a case at one sharing and learning meeting. The mediator must also attend 6 sessions with a case consultant and maintain a log of mediations. Finally, the mediator must pass an

¹⁴ Article 2 of the *Mediators Institute of Ireland’s Memorandum of Association*. Available at <http://www.themii.ie/documents/MEMO%20&%20ARTS.pdf>.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ See www.themii.ie.

interview assessment or pass a written assessment on 3 mediations. Practitioner members must also complete 50 hours of Continuing Professional Development over a 2 year cycle. The MII requires all practitioner members to hold current professional liability insurance.

10.14 All associate, certified and practitioner members of the MII must agree to be bound by the MII's Code of Ethics and complaints and disciplinary procedures.¹⁸

(3) Family Mediators

10.15 The Family Mediation Service provides a number of places for trainees who wish to specialise in family mediation through the FMS Part II Specialist in service Training Programme. Only those who have successfully completed a Part I Training Course which meets the MII requirements are eligible for FMS Part II Training. The Commission considers that family mediators require specialist knowledge and skills due to the nature and complexity of many family disputes.

C Training & Accreditation Systems in Other Jurisdictions

10.16 The Commission agrees with the view that a national uniform system of mediator accreditation would have the following objectives:

- the improvement of mediator knowledge, skills and ethical standards;
- the promotion of standards and quality in mediation practice;
- the protection of the needs of consumers of mediation services and the provision of accountability where they are not met;
- the conferment of external recognition of mediators for their skills and expertise; and
- the development of consistency and mutual recognition of mediator training, assessment and accreditation.¹⁹

10.17 The Commission turns to examine developments in the systems for the regulation and accreditation of mediation in other States.

¹⁸ For more information on the MII's disciplinary, appeals and complaints procedures see <http://www.themii.ie/governance.jsp>.

¹⁹ *Mediation Accreditation in Australia* Report to The 8th National Mediation Conference, Australia, 3-5 May 2006. Available at <http://www.mediationconference.com.au/html/Accreditation.html>.

(1) The Netherlands

10.18 In the Netherlands, any person may act as a mediator and the title of 'mediator' is not protected by law and it is possible to act as a mediator without being registered, certified or even trained. However, those who wish to be involved in court annexed mediations must be registered or certified with the Netherlands Mediation Institute.

10.19 The Netherlands Mediation Institute (NMI) created in 1995, pioneered and continues to operate a voluntary scheme to certify mediators to defined ISO 17024:2003. ISO 17024:2003 is a general standard from the UN-based International Standards Organisation that sets out the requirements for a body operating a certification scheme for persons and the standards of competence and attributes required of persons being certified. In Ireland, the Irish National Accreditation Board operates to ISO 17024:2003 in its accreditation process for laboratories and other service providers who apply for Irish National Accreditation Board accreditation.

10.20 The NMI is the only body currently arranging for the national certification of mediators to ISO 17024:2003, which it does in collaboration with one of the world's largest certification/verification organisations DNV.²⁰ DNV holds a certificate from the Dutch Raad voor Accreditatie, which like the Irish National Accreditation Board, is a member of the International Accreditation Forum, and DNV Certifications are recognised worldwide under a Multilateral Recognition Agreement.

10.21 All mediators involved in court-annexed mediations in the Netherlands must be either registered with or certified by the NMI and to do this, they must comply with the NMI Quality Assurance System. This comprises a two step process: Step 1: The Principles and Procedures; and Step 2: The Certification of Mediators.

10.22 All NMI mediators must have completed Step 1 to be categorised as NMI-registered mediators. Those who go on to complete Step 2 are deemed to be NMI-certified mediators. Certification must be renewed every 3 years. In addition, an NMI-mediator must comply with the requirement of permanent education, the equivalent of Continuous Professional Development (CPD), by amassing a specified number of points each year in order to remain registered or certified.

10.23 The new two-tier system of accreditation was prompted by the fact that the number of people training to be mediators was increasing at a greater rate than the number of cases going to mediation. The two-tier system ensures that only those mediators who are actually engaged in mediation will attain NMI

²⁰ See www.nmi-mediation.nl.

certification. The fundamentals of mediation such as confidentiality and voluntariness are laid down in the NMI Mediation Rules.

(2) Australia

10.24 There has been considerable debate in Australia during the last 15 years over issues of training and accreditation. This has occurred in the absence of any national mandatory system of mediator accreditation in Australia, and the existence of numerous individual accreditation systems.²¹

10.25 In 2005, a draft National Mediation Accreditation Standards System was published and this became the basis for the introduction of National Mediator Standards and Practices which became effective on 1 January 2008.

10.26 All mediators who wished to be accredited under the National Mediator Standards and Practices must formally apply to a Recognised Mediator Accreditation Body (RMAB). The system is voluntary for those mediators who wish to obtain accreditation to the National Mediator Standards and there is no compulsion for mediators to obtain this accreditation in order to practice.

10.27 RMABs are bodies whose capacities and credentials have been recognised by the Federal Implementation Body as being compliant with the requirements of the system.²² The main function of the RMABs will be to accredit mediators to the NMS. An RMAB must have the following characteristics:

- more than 10 mediator members;
- provision of a range of member services such as an ability to provide access to or refer mediators to ongoing professional development workshops, seminars and other programmes and debriefing, or mentoring programmes;

²¹ See *Report to the Commonwealth Attorney- General: A Framework for ADR Standards*, (National Alternative Dispute Resolution Advisory Council, 2001); *Mediation Accreditation in Australia* Report to the 8th National Mediation Conference, Australia, 3-5 May 2006. Available at <http://www.mediationconference.com.au/html/Accreditation.html>; Sourdin "Australian National Mediator Accreditation System: Report on Project" (2007), available at <http://www.leadr.com.au/documents/Report%20on%20Project.pdf>.

²² An RMAB can be a professional body, a mediation agency or Centre, a Court or Tribunal, or some other entity. See *Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System of 2007* at article 3.5. Available at <http://www.leadr.com.au/documents/Approval%20standards.pdf>.

- a complaints system that either meets minimum standards for industry-based customer dispute resolution or be able to refer a complaint to a Scheme that has been established by Statute;
- sound governance structures, financial viability and appropriate administrative resources;
- sound record-keeping in respect of the approval of practitioners and the approval of any in-house, outsourced or relevant educational courses; and
- the capacity and expertise to assess training and education that may be offered by a range of training providers in respect of the training and education requirements.²³

10.28 RMABs will provide certification to the effect that an individual has satisfied the criteria for accreditation according to the National Mediator Standard. The criteria include:

- a) evidence of good character;
- b) an undertaking to comply with ongoing practice standards and compliance with any legislative and approval requirements;
- c) evidence of relevant insurance, statutory indemnity or employee status;
- d) evidence of membership or a relationship with an appropriate association or organisation that has appropriate and relevant ethical requirements, complaints and disciplinary processes as well as ongoing professional support; and
- e) evidence of mediator competence by reference to education, training and experience.²⁴

10.29 Furthermore, all mediators seeking to be accredited to the NMS must agree to be bound by the National Approval Standards and the National Practice Standards.²⁵ The Approval Standards:

²³ *Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System of 2007* at article 3.5. Available at <http://www.leadr.com.au/documents/Approval%20standards.pdf>.

²⁴ *Ibid.* at article 3.

²⁵ *Practice Standards for Mediators Seeking Approval under the National Mediator Accreditation System of 2007*. Available at <http://www.leadr.com.au/documents/Practice%20standards.pdf>.

- Specify requirements for mediators seeking to obtain approval under the voluntary national accreditation system;
- Define minimum qualifications and training; and
- Assist in informing participants, prospective participants and others what qualifications and competencies can be expected of mediators.²⁶

10.30 The Approval Standards define mediation as a “... process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to support participants to reach their own decision.”²⁷ This is consistent with the Commission’s definition of mediation.²⁸

10.31 The Practice Standards are intended to govern the relationship between mediators and the participants in the mediation, their professional colleagues, courts and the general public so that all will benefit from high standards of practice in mediation. The Practice Standards also specify practice and competency requirements for mediators and inform participants and others about what they can expect of the mediation process and mediators.²⁹

10.32 The Practice Standards also set out the fundamental guiding principles about mediation that mediators must adhere to. These include: procedural fairness,³⁰ competence,³¹ confidentiality,³² and impartial and ethical practice.³³

²⁶ *Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System of 2007* at article 1.2. Available at <http://www.leadr.com.au/documents/Approval%20standards.pdf>.

²⁷ *Ibid.* at article 2.

²⁸ See paragraph 2.128, above.

²⁹ *Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System of 2007* at article 1.2. Available at <http://www.leadr.com.au/documents/Approval%20standards.pdf>.

³⁰ *Practice Standards for Mediators Seeking Approval under the National Mediator Accreditation System of 2007* at article 9. Available at <http://www.leadr.com.au/documents/Practice%20standards.pdf>.

³¹ *Ibid.* at article 7.

³² *Ibid.* at article 6.

³³ See www.civilmediation.org.

(3) Civil Mediation Council of England & Wales

10.33 The Civil Mediation Council (CMC) is an unincorporated association established in 2003 by mediation providers in England and Wales. Its members include independent mediators, academics, legal professional bodies and government departments.

10.34 The CMC operates a pilot scheme for the accreditation of mediation providers, but individual mediators are not regulated by the CMC. According to Article 24 of the Constitution of the CMC:

“Mediation Providers shall be accredited by the [CMC] Board on behalf of the Council if they satisfy the Board that they have reached the standards required by the Board as determined from time to time; and have paid the annual membership fee for an Accredited Mediation Provider due to the Council”

10.35 Mediation providers who meet the criteria set by the CMC Board are entitled to describe themselves as “Accredited by the Civil Mediation Council”. Accreditation is carried out annually using such systems and methodology as the Board considers appropriate.³⁴

10.36 In 2008 the CMC established a complaints procedure under which either a member, or a client of a member of the CMC, who has exhausted the member’s own complaints process, can refer the matter to the CMC for resolution through mediation.³⁵

(4) Family Mediation Council in England and Wales

10.37 The Family Mediation Council (FMC) was established in 2007 to harmonise standards for family mediation in England and Wales.³⁶ The Council approves family mediation bodies that meet its requirements. Family mediators who are trained and accredited by bodies approved by the council are listed on the UK government-funded Family Mediation Helpline website.³⁷

10.38 To qualify for membership of the Council an organisation must have:

³⁴ Article 26 of the *Civil Mediation Council’s Constitution*, available at <http://www.civilmediation.org/constitution.php>.

³⁵ See Kelbie and Dingle “*Mediation Standards and Quality Accrediting Mediation Provider Organisations - The UK Civil Mediation Council Pilot Scheme*”. Paper presented at the European Mediation Conference September 2007, Austria.

³⁶ See www.familymediationcouncil.org.uk.

³⁷ See www.familymediationhelpline.co.uk. See paragraph 5.165, above.

- a nationally based register of members who are practising family mediators and who have received approved training in order to qualify for practice;
- a professional Code of Practice;
- a system of supervision of its member's professional practice;
- a complaints procedure;
- a system of CPD;
- access to the provision of approved training;
- adequate financial funding that would enable it to meet its share of Council expenses; and
- an equality and diversity policy.³⁸

10.39 The FMC membership organisations, in regulating their individual memberships, must ensure that their family mediators:

- Adhere to the FMC's Code of Practice;
- Have completed FMC recognised family mediator foundation training;
- Undertake FMC accredited continuous professional development;
- Receive FMC recognised supervision;
- Adhere to a clear complaints procedure;
- Hold relevant insurance;
- Undertake additional specialist training where required; and
- Have effective equal opportunities policies.

(5) Canada: Chartered Mediators

10.40 The ADR Institute of Canada was established to develop and promote dispute resolution services in Canada.³⁹ It has obtained recognition under the Canadian *Federal Trade Marks Act 1985* for certain titles including: Chartered Mediator; C.Med., Médiateur Certifié; Médiatrice Certifiée; and Med.C. The Institute is represented throughout Canada by its affiliated Regional Institutes who administer and regulate these titles in their respective regions

³⁸ Article 5 of the Family Mediation Council Constitution. Available at <http://www.familymediationcouncil.org.uk/constitution.htm>.

³⁹ See www.adrcanada.ca.

10.41 The Chartered Mediator designation has been established to recognise a "generalist competence", the goal being to assist the public in finding qualified mediators. In order to ensure that a high set of standards is met by the persons entitled to use this designation, the Institute established general principles, a set of criteria and a protocol to be used in assessing the eligibility of a candidate for the designation and for the granting of the designation. The following process is required to qualify an applicant for designation:

- Satisfactory completion of the educational and practical experience and skills assessment requirements;
- Review and approval by a Regional Institute's Accreditation Review Committee and ratification by the Regional Board of Directors; and
- Review and approval by ADR Canada's National Accreditation Committee and ratification by ADR Canada's Board of Directors.

10.42 Each successful applicant is required to agree to abide by ADR Canada's Code of Ethics and disciplinary policies. ADR Canada also published a Model Code of Conduct for Mediators. Mediation is defined under the Code as "the use of an impartial third Party to assist the parties to resolve a dispute, but does not include an arbitration."⁴⁰ This is consistent with the Commission's definition of mediation.⁴¹

10.43 The main objectives of this Code are stated to be:

- to provide guiding principles for the Mediator's conduct;
- to provide a means of protection for the public; and
- to promote confidence in mediation as a process for resolving disputes.⁴²

10.44 The Code also sets out a framework of general principles which should be adhered to by mediators. These include the principles of self-determination, independence and impartiality, confidentiality, and quality of the process.

⁴⁰ *Model Code of Conduct for Mediators* (ADR Institute of Canada Inc., 2005). Available at http://www.adrcanada.ca/rules/national_code_of_conduct.pdf.

⁴¹ See paragraph 2.128, above.

⁴² *Model Code of Conduct for Mediators* (ADR Institute of Canada Inc., 2005). Available at http://www.adrcanada.ca/rules/national_code_of_conduct.pdf.

(6) Global Quality Mark: International Mediation Institute

10.45 In 2005, three non-profit dispute resolution institutions, the Netherlands Mediation Institute, Singapore Mediation Centre, and the International Centre for Dispute Resolution, recognising the need for mediator competency standards, agreed to form the International Mediation Institute (IMI) and consult worldwide to initiate competency standards which would be applicable everywhere.⁴³

10.46 IMI proposes to launch two different competency certifications:

- The Professional Mediator Competency Certification will provide users of mediation services with the assurance that those they select to mediate will meet high and proven standards of competency; and
- The Intercultural Mediator Competency Certification will additionally demonstrate the capability to mediate across cultural differences. The Intercultural Certification will be available only to mediators who hold the IMI Professional Certification.

10.47 Quality mediation providers will be able to apply to be formally recognised by IMI as a Recognised Educational Establishment (REE). Standards and criteria for this recognition will be set by IMI based on recommendations by its independent Standards Commission. The Independent Standards Commission is responsible for determining the international competency standards, criteria and guidelines for mediators wishing to be IMI Certified. The standards will aim to:

- provide users with reliable data to facilitate their choice of competent mediators;
- address the professional interests of mediators and mediation provider institutions in the area of professional competency;
- reflect outstanding training, independent assessments, ongoing education and experience in practice;
- inspire and encourage the achievement of higher standards throughout the profession; and
- prioritise self-regulation, transparency, simplicity, adaptability and the minimisation of administrative burden and cost.

10.48 Mediators may take an IMI-approved training course with an REE. Successful completion will generate the required IMI training credits. Mediators

⁴³ See www.imimmediation.org.

will then build up IMI education, experience and leadership credits which will entitle them to IMI Certification. To gain an IMI Certification in Professional Mediation Competency, a mediator must secure at least 100 Competency Performance Points from four categories: training, education, experience, and leadership. Once certification is achieved, mediators will be required to maintain a minimum number of competency points every three years in each of the education, experience and leadership streams. Failure to do so will result in de-certification.

10.49 All IMI certified mediators will be required to: adhere to a professional Code of Ethical Conduct, be subject to a disciplinary process and identify that Code and Disciplinary Process in advance to users. For States where there are no existing ethics codes for mediators and no established disciplinary process, IMI will adopt on its website one of the leading international ethics codes and will establish an independent disciplinary process.

10.50 The current draft IMI Code of Ethical Conduct is based on :

- The Model Rule for the Lawyer as a Third Party Neutral of the CPR-Georgetown Commission on Ethics & Standards in ADR (2002)⁴⁴;
- Code of Conduct for Mediators of the UIA Forum of Mediation Centres (2003):
- European Code of Conduct for Mediators of the European Commission (2004).⁴⁵
- Model Standards of Conduct for Mediators (2005) adopted by AAA, ABA and ACR:⁴⁶ and
- Ethical Guidelines for Mediators of the Law Council of Australia (2006).⁴⁷

10.51 For the purposes of this Code mediation is defined as “a process where two or more parties agree to the appointment of a third-party neutral (“mediator”) to help them in a non-binding process to resolve a dispute or to

⁴⁴ Available at <http://www.cpradr.org/pdfs/finalProvider.pdf>.

⁴⁵ Available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf. See paragraph 1.67, above.

⁴⁶ Available at www.acrnet.org/pdfs/ModelStandardsOfConductforMediatorsfinal05.pdf.

⁴⁷ Available at <http://www.lawcouncil.asn.au/policy/1957353025.html>.

conclude the terms of an agreement.” This is also consistent with the Commission’s definition of mediation.⁴⁸

(7) United States

10.52 Some countries enacted legislation to govern the issues of training and accreditation of mediators. Various states in the United States have introduced Court rules which set out basic requirements about training and accreditation of mediators.⁴⁹ For example, the rules of the Tennessee Supreme Court set out the main qualifications which must be met by family mediators:

- good moral character;
- four years of practical work experience in psychiatry, psychology, counselling, social work, education, law or accounting;
- 40 hours of training in family mediation encompassing specified curriculum components including specific domestic violence training;
- 6 additional hours of training in Tennessee family law and court procedure; and
- further training every 2 years together with filing an annual report with the Director of the Alternative Dispute Resolution Commission.⁵⁰

10.53 In the United States, ADR organisations have also developed several national standards for mediation, for example Model Standards of Practice for Family and Divorce Mediation⁵¹ and Model Standards of Conduct for Mediators.⁵²

(8) Austria

10.54 The training and accreditation of mediators is governed by the Civil Law on Mediation Training, which sets out the scope and content of training in this field.⁵³ Mediators in civil law matters must all be registered with the Federal

⁴⁸ See paragraph 2.128, above.

⁴⁹ See Noce “Beaten Path to Mediator Quality Assurance: The Emerging Narrative of Consensus and its Institutional Functions” (2003) 19 Ohio St J on Disp Resol 937.

⁵⁰ Supreme Court Rule 31, s. 13(b)1 — 6.

⁵¹ Available at <http://www.afccnet.org/pdfs/modelstandards.pdf>

⁵² Available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>

⁵³ ZivMediatG 2004, section 16.

Ministry of Justice, which will then enter them on a list of registered mediators. There are a number of requirements for submission to the list, namely that the mediator must: be over 28 years of age; hold a professional qualification;⁵⁴ be trustworthy; and possess the necessary professional indemnity insurance.⁵⁵

10.55 In addition to these criteria, the mediator must also complete a training course at a Ministry of Justice approved facility, which comprises of a minimum of 200 hours theoretical learning.⁵⁶

D Education on ADR

10.56 It is important that those entering the legal profession, and other relevant professions such as engineering, are educated on ADR. Lawyers, in particular, should be capable of advising their clients on all the mechanisms which are available to resolve their dispute. The Commission acknowledges that both the Law Society of Ireland and the Bar Council of Ireland have established Arbitration and Mediation Committees. Courses on dispute resolution are also now becoming available at university level.⁵⁷

10.57 The Australian Law Reform Commission in its 1999 *Report on Managing Justice: A Review of the Federal Civil Justice System* stated that “education plays an essential role in shaping the legal culture...Systematic reform and the maintenance of high standards of performance...require a healthy professional culture, one that values lifelong learning, takes ethical concerns seriously, and embraces a services ideal.”⁵⁸ As noted by Ward LJ in the English case *Burchell v Bullard*:⁵⁹

⁵⁴ Candidates may come from any professional background. However, members of certain professions, such as lawyers, financial trustees, social workers, are able to undergo a reduced training course as a result of their specific professional experience.

⁵⁵ Singer *The EU Mediation Atlas: Practice and Regulation* (LexisNexis 2004) at 6.

⁵⁶ Training programmes in Germany also require 200 hours training.

⁵⁷ See also Moberly “Dispute Resolution in the Law School Curriculum: Opportunities and Challenges” (1998) 50 Fla L Rev 583; and Nelson “Alternative Dispute Resolution: A Supermarket for Law Reform” (1984) 14 N M L Rev 467 at 479,

⁵⁸ The Australian Law Reform Commission *Report on Managing Justice A review of the federal civil justice system* (Report No. 89 -1999) at 8-9. Available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/>.

⁵⁹ [2005] E.W.C.A.Civ 358.

“The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do.”

10.58 In April 2005, a practice advice was jointly issued by the Civil Litigation Committee and ADR Committee of the Law Society of England and Wales.⁶⁰ This relates to the giving of information on mediation and other dispute resolution options to clients before, and during the process of resolving any disputes between the client and third parties. It recommends that solicitors should:

- In appropriate cases, and at appropriate times, explain to clients whether there are ADR techniques that might be used other than litigation, arbitration or other formal processes; what those alternative processes involve, and whether they are suitable in the circumstances; and
- Keep the suitability of mediation and other ADR techniques under review during the case and advise clients accordingly.

10.59 The practices advice also states that solicitors should be aware that failure to provide information and advice at the appropriate stage may have costs or other consequences.⁶¹

10.60 Furthermore, the Judicial Studies Board and the Civil Justice Council in England have embarked on a systematic process of raising awareness and understanding among judges about ADR, with a specific focus on mediation.

10.61 *The Commission provisionally recommends that the relevance of ADR, including mediation and conciliation, should be incorporated into third level programmes in law and other disciplines and the professional programmes conducted by the Law Society of Ireland and the Bar Council of Ireland.*

E Conclusion

10.62 It is clear from this discussion that in all States where mediation is practised, the need for appropriate training and accreditation of mediators is an

⁶⁰ See www.lawsociety.org.uk.

⁶¹ See also Breger “Should an Attorney Be Required to Advise a Client on ADR Options?” (2000) 13 *Georgetown Journal of Legal Ethics* 427.

essential foundation for a fully functioning system of mediation. The issue that remains is the form this regulation should take. The Commission notes that options include:

- i) Self-regulation through professional bodies which would admit to full membership or accredit only those practitioners meeting the levels of training established by the professional body;
- ii) Self-regulation under an overall regulatory body which would be responsible for formal recognition of practitioners and which would make completion of specified training a condition of recognition; or
- iii) A statutory system which would impose minimum mandatory obligations on practising mediators.

10.63 The Commission considers that, at this stage in the development of ADR in Ireland, it is appropriate to allow the development of this emerging discipline in the existing non-statutory bodies, but that a statutory set of principles would enable further development to occur on a firm foundation. The Commission also considers that a form of non-statutory system under the auspices of the Department of Justice, Equality and Law Reform should be developed under which the accreditation of service providers, and of individual practitioners could be structured. Such a non-statutory system would be without prejudice to existing arrangements in particular areas (such as family mediation) and could, in time, provide the basis for a more formal statutory structure at some future point.

10.64 *The Commission invites submissions as to whether the regulation of mediators should continue at present on a non-statutory basis, subject to the principles to be set out in a statutory framework for mediation and conciliation.*

10.65 *The Commission provisionally recommends that all family mediators should receive specialist training in this particular area.*

10.66 *The Commission provisionally recommends that a non-statutory scheme should be established, under the auspices of the Department of Justice, Equality and Law Reform, to provide for the accreditation of organisations, which, in turn, accredit individual practitioners.*

CHAPTER 11 ROLE OF COURT & ADR

A Introduction

11.01 In the chapter the Commission examines the role of the Court in the development of ADR. In Part B the Commission discusses the general role of the Court in encouraging ADR in appropriate cases. In Part C the Commission explores the issue of cost sanctions and mediation. In Part D the Commission discusses the manner in which mediators report to the Courts. In Part E the Commission considers whether mediation costs should be recoverable as legal costs.

B Role of the Court in Encouraging ADR

11.02 As previously noted¹ the Commission acknowledges and commends the manner in which the High Court's Commercial Law List has operated in a proactive manner to exemplify that mediation and conciliation are not merely "alternatives" to litigation but have become important elements of an integrated approach to the resolution of civil disputes. The Commission has also noted the benefits of mediation in land boundary disputes² and the well established use of mediation in family disputes.³

11.03 While encouragement of ADR by the Courts is a welcome development in Ireland, a more difficult question is whether parties who resist judicial encouragement to consider ADR should be compelled to attempt an ADR process and whether this would go against the voluntary nature of processes such as mediation and conciliation. The Commission notes that requiring parties to invest substantial amounts of time and money in mediation under such circumstances may well be inefficient. The Commission also notes that the existing legislative provisions do not present a consistent picture on this matter.

¹ See paragraph 7.25, above.

² See paragraph 9.24, above.

³ See paragraph 5.44, above.

11.04 As the Commission has previously noted, section 15 of the *Civil Liability and Courts Act 2004* provides that mediation in a personal injuries action can only be initiated at the request of one of the parties, thereby creating the situation where a Court might direct that the parties must meet to discuss and attempt to settle the action in a 'mediation conference'. However, should neither party request the holding of a meeting the court cannot compel the parties to consider mediation. One commentator has noted that:

“By choosing an approach whereby the power to initiate mediation rests with one of the parties, irrespective of the views of the other side, the legislature has created a significant power imbalance in the relationship between the parties, which will cause grave difficulties for the mediation process.”⁴

11.05 By contrast, the Rules of the Superior Courts (Commercial Proceedings) 2004 introduced a mechanism by which the Court may, on application to the court or by its own motion, adjourn the proceedings for up to 28 days to facilitate a reference of the dispute to mediation, conciliation or arbitration. The 2004 Rules mirror the approach in the English of the *Civil Procedure Rules 1998* (CPR) in this respect. By contrast with the mediation scheme under the *Civil Liability and Courts Act 2004*, the Court cannot compel the parties to attempt ADR, but is limited to directing them to consider the prospect of mediation. As with the 2004 Act, an unjustified failure to give ADR due consideration may have costs implications. “While there is no compulsion to do so, one would be brave to disregard judicial invitations to the parties to engage in good faith in a mediation conference.”⁵ It is clear from the 2004 Act and the 2004 Rules that there is a thin line between *strongly encouraging* parties to consider ADR and *compelling* parties to attempt ADR and that there is no consistency in how this is achieved. The Commission now turns to examine how other States have dealt with this.

(1) Comparative Review

(a) England and Wales

11.06 In the 1990s Lord Woolf, in his review of the civil courts in England and Wales stopped short of recommending compulsory mediation, on the grounds that it was wrong in principle to deny citizens their entitlement to seek a

⁴ Corbett “Mediations in Actions for Personal Injury: Is it Good to Talk?” in Binchy and Craven, *Civil Liability and Courts Act 2004: Implications for P.I. Litigation* (FirstLaw, 2005) at 103.

⁵ Keane “Cost of Saying No” (2005) *Law Society Gazette* at 28-33.

remedy from the civil courts.⁶ Lord Woolf's view on compulsory mediation has been echoed in various judgments. For example, in *Re H (A Minor)*⁷ Roche LJ expressed the view that compulsory mediation is a contradiction in terms. Nonetheless, Lord Woolf considered that the courts should play an important part in providing information about ADR and encouraging its use in "appropriate cases."

11.07 In England and Wales, the courts have come to recognise that parties sometimes need to be strongly encouraged to embark on ADR. For example, in *IDA Ltd v University of Southampton*⁸ the English Court of Appeal was concerned with costly litigation over who owned a patent. In giving the decision of the Court, Jacob LJ stated:

"Parties to these disputes should realise, that if fully fought, they can be protracted, very, very expensive and emotionally draining. On top of that, very often development or exploitation of the invention under dispute will be stultified by the dead hand of unresolved litigation... This sort of dispute is particularly apt for early mediation."

11.08 Where both parties resist judicial encouragement to ADR, it was suggested by Coleman J in *Cable & Wireless plc v IBM UK Ltd.*⁹ that:

"Occasionally, the circumstances of a dispute may appear to the court so strongly to demand a reference to ADR that, even in the face of objections from both parties, [ADR orders] have been made and have led to settlements much to the surprise of the parties concerned."

11.09 In *Shirayama Shokusan v Danovo Ltd*¹⁰ Blackburn J granted an order for mediation, which had been applied for by the defendant despite the resistance of the claimant. He concluded that the court "does have jurisdiction to direct ADR even though one party may not be willing." He reasoned that the provisions of the Civil Procedure Rules introduced in the wake of the Woolf Reports were, "not confined simply to the case where the parties jointly wish to settle the case or to use alternative dispute resolution procedures."

⁶ See Lord Woolf, *Access to Justice, Interim Report* (1995) and Lord Woolf, *Access to Justice Final Report* (1996).

⁷ [1998] EWCA Civ 98.

⁸ [2006] EWCA Civ 145.

⁹ [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041, [2003] BLR 89.

¹⁰ [2003] EWHC (Ch) 3006.

11.10 The general approach of the English courts to ADR has been decisively laid down in the decision of the Court of Appeal in *Halsey v Milton Keynes General NHS Trust*.¹¹ This was a clinical negligence case. The claimant, a widow, sued a health authority for causing the death of her husband. She failed in her claim, but appealed to Court to refuse to award the health authority its costs because it had repeatedly refused to mediate. The Court declined this request. It held that the health authority was justified in refusing to mediate because it reasonably believed it would win.¹²

11.11 In *Halsey* two important principles concerning the voluntary nature of mediation were established. Firstly, compulsion to engage in mediation would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6 of the European Convention on Human Rights and in Ireland, the Commission might add, the right of access to the courts in Article 40.3 of the Constitution of Ireland. Secondly, the court can decide to deprive successful parties of some or all of their costs on the grounds that they have refused to agree to ADR, but that it must be borne in mind that such an order is an exception to the general rule that costs should follow the event.¹³ The burden of justifying a departure from the general rule is on the unsuccessful party to show that the successful party acted unreasonably in refusing to agree to ADR.

11.12 As to the first principle, Dyson LJ in the Court of Appeal stated that:

“It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their rights of access to the courts.”¹⁴

11.13 The Court went on to state that even if the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, “we find it difficult to conceive of circumstances in which it would be appropriate to exercise it.” If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it and it risked

¹¹ [2004] EWCA (Civ) 576.

¹² See Fielding “Mediation post-Halsey” (2004) 154 NLJ 7145.

¹³ See paragraph 11.54, below.

¹⁴ [2004] EWCA (Civ) 576 at para. 9.

simply adding to the total costs, delaying the date of the hearing, and bringing ADR into disrepute.

11.14 The Court also held that to force parties into mediation would be to impose an unacceptable obstruction on the right of access to the Court and is likely to be a violation of Article 6 of the European Convention on Human Rights. The Court also expressly adopted the view expressed in the "*White Book*" on *Civil Procedure*¹⁵

"The Hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the Court cannot direct that such methods be used but may merely encourage and facilitate".

11.15 Equally, however, the Court also added that "all members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR."

11.16 The Commission notes that the *Halsey* judgement has not escaped criticism. In a speech delivered in 2007, Lightman J stated that both of the principles established in *Halsey* are "unfortunate and mistaken."¹⁶ Firstly, according to Lightman J, the Court of Appeal "... appears to have been unfamiliar with the mediation process and confused an order for mediation with an order for arbitration or some other order that places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most, it merely imposes a short delay to allow an opportunity for settlement."¹⁷ Secondly, he stated that the Court appeared to have been unaware that ordering parties to proceed to mediation regardless of their wishes happens elsewhere in the Commonwealth and the United States¹⁸ and, indeed in Britain in matrimonial property disputes in the Family Division. He added:

"The Court of Appeal refers to the fact that a party compelled to take part in mediation may be less likely to agree a settlement than one who willingly proceeds to mediation. But that is not the point. Such is the impact of mediation that parties who enter it unwillingly often

¹⁵ White Book (Civil Procedure (2003 edn)) vol 1 at 27 para 1.4.11.

¹⁶ Lightman Breaking down the barriers" *The Times* July 31 2007. Available at <http://business.timesonline.co.uk/tol/business/law/article2166092.ece>.

¹⁷ *Ibid.*

¹⁸ See the discussion of case law in New South Wales and the United States, below.

become infected with the conciliatory spirit and settle. Even if only a small percentage of those who have been forced to mediate settle, it is better than never giving the process a chance.”¹⁹

11.17 *Halsey* continues to be the leading authority in England and Wales on the issue of whether a court has jurisdiction to order a party to ADR against their wishes and it has firmly made a distinction between the duty of the court to encourage parties to use mediation and the power to force parties to use mediation against their will.

(b) New South Wales

11.18 The New South Wales *Civil Procedure Act 2005* permits the New South Wales Supreme Court, at any stage of the proceedings, to refer parties to mediation. This power does not depend on the consent of the parties nor is it the intention of the Court that mediation will be ordered in all proceedings. Initially there was a general acceptance of the view adopted by Barrett J. in *Morrow v Chinadotcom Corp*²⁰ that “mediation forced upon one of the parties, rather than voluntarily embraced by all of them, would be unlikely to achieve anything useful.” He noted that the court should think very carefully before compelling what could turn out to be an exercise in futility that would only increase the delay and expense of a final decision by the court. He refused to make an order for mandatory mediation and this decision was upheld on appeal. However, in a later decision *Remuneration Planning Corp Pty Ltd v Fitton*²¹ the New South Wales Supreme Court held that:

“since the power was conferred upon the Court, there have been a number of instances in which mediation have succeeded, which have been ordered over opposition, or consented to by the parties...it has become plain that that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered.”

11.19 In that respect, the New South Wales Supreme Court has recognised that mandatory mediation may be suitable in some cases. In the defamation case *Waterhouse v Perkins*²², the plaintiff did not wish to mediate. Levine J was not persuaded by the plaintiff’s arguments and held that there were a number of

¹⁹ *Ibid.* See also Sautter “Halsey-mediation one year on” (2005) 155 NLJ 7176.

²⁰ [2001] NSWSC 209 (28 March 2001).

²¹ [2001] NSWSC 1208 (14 December 2001).

²² [2001] NSWSC 13.

factors suggesting that mediation would be appropriate. He ordered mandatory mediation for reasons which included:

- the matter had been running for 10 years and was unlikely to be heard for at least another 12 months;
- any trial would be likely to last for at least 6 weeks;
- the party that wished to mediate had offered to bear the costs of the mediator and the venue; and
- the total cost of mediating compared to litigating could not be considered to be a disproportionate diversion of resources.

11.20 Similarly, in *Dickinson v Brown*²³ Bryson J ordered mediation over the objection of all parties. He considered that the cost of the proceedings was “seriously out of scale with the size of the estate and the provision which may be ordered”.

(c) United States

11.21 Courts in the United States are perhaps even more ready to order mediation in the face of resistance from the parties. In its opinion in *Re Atlantic Pipe Corporation*²⁴ the Court of Appeals for the First Circuit said

“In some cases, a court may be warranted in believing that compulsory mediation could yield significant benefits even if one or more parties object. After all, a party may resist mediation simply out of unfamiliarity with the process or out of fear that a willingness to submit would be perceived as a lack of confidence in her legal position. In such an instance, the party’s initial reservations are likely to evaporate as the mediation progresses, and negotiations could well produce a beneficial outcome, at reduced cost and greater speed, than would a trial. While the possibility that parties will fail to reach agreement remains ever present, the boon of settlement can be worth the risk.”

(2) Conclusion

11.22 The Commission considers that if a court were to compel parties to enter into a mediation or conciliation, to which they objected, that would be likely to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. By contrast, the Commission considers that the Courts

²³ [2001] NSWSC 714.

²⁴ 304 F.3d 135 (2002).

have a fundamental role in integrating ADR into the civil justice system by *encouraging* parties to *consider* ADR in appropriate cases. As noted by Sir Clarke MR, the head of the Civil Division of the English Court of Appeal:

“It is of course a cliché that you can take a horse to water but whether it drinks is another thing entirely. That it is a cliché does not render it the less true. But what can perhaps be said is that a horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it. Litigants being like horses we should give them every assistance to settle their disputes in this way. We do them, and the justice system, a disservice if we do not.”²⁵

11.23 The Commission reiterates its previous recommendation that that, in civil claims generally, courts should be permitted, either on their own motion initiative or at the request of a party to such claims, to make an order requiring the parties to consider resolving their differences by mediation or conciliation.²⁶

C Costs Sanctions

11.24 To the Commission’s knowledge costs sanctions for refusing to consider or attempt ADR have yet to be imposed in an Irish Court. At present, there is limited guidance in the Irish system on the issue of costs. Costs are in the discretion of the court but the principal rule is that costs “follow the event”,²⁷ in other words the losing party must pay the successful party’s costs as well as their own.

11.25 Section 15(1) *Civil Liability and Courts Act* provides that, upon application of one of the parties to a personal injury action before the court, a judge may direct both parties to attend a mediation conference for the purpose of settling the case out of court. At the conclusion of an action, if the court is satisfied that a party refused to comply with such a direction, it may order that party to pay the costs of the action, or such part as the court directs, after the making of the direction. Unlike the provisions of the *Civil Liability and Courts Act 2004*, the Rules of the Superior Courts (Commercial Proceedings) 2004 do not

²⁵ Speech by Sir Anthony Clarke, Master of the Rolls, at the Civil Mediation Council’s National Conference in Birmingham on *The Future of Civil Mediation* (8th May, 2008). Available at http://www.judiciary.gov.uk/publications_media/speeches/index.htm.

²⁶ See paragraph 3.92, above.

²⁷ Order 99 Rule 1(4) of the *Rules of the Superior Courts 1986*.

explicitly allow for the possibility of penalising in costs a party who has refused to participate in mediation.

11.26 Before discussing the issues of cost sanctions, the Commission concurs with the following comments of Clarke MR:

“The bane of civil litigation is what I call satellite litigation that is disputes which are not about the underlying merits. I would certainly not like to see a new type of satellite litigation in which complaints about the parties’ approach to mediation are investigated in detail and at great expense.”²⁸

11.27 The Commission agrees with this perspective, satellite litigation stemming from issues arising directly from the parties’ participation in ADR processes should be avoided.

(1) Costs Sanctions: Good Faith Requirement & Genuine Effort to Compromise

11.28 In *Kay-El (Hong Kong) Ltd, v. Musgrave Ltd.*²⁹ a Commercial Court case, Kelly J stated that:

“On foot of the order which I made I was furnished with a report by the mediator who, unfortunately, had to record that although very substantial progress was made in the mediation she was unable to finalise a solution. I should mention that the mediator expressed the view that the parties came to the mediation in good faith and made genuine efforts to reach a compromise. Such being so the lack of success at mediation carries no costs implication for the litigation.”

11.29 It is clear from this passage that costs sanctions will not be imposed on parties in the Commercial Court who come to mediation in “good faith” and make genuine efforts to reach a compromise. It does not, of course, follow that Kelly J considered that the requirement of “good faith” is an essential prerequisite in order to avoid a costs sanction. The Commission would, however, be concerned that information from the mediator is required to confirm an element of good faith as this may conflict with the confidentiality of mediation and may result in a lack of trust in the mediator as he may be perceived as

²⁸ Speech by Sir Anthony Clarke, Master of the Rolls, at the Civil Mediation Council’s National Conference in Birmingham on *The Future of Civil Mediation* (8th May, 2008). Available at http://www.judiciary.gov.uk/publications_media/speeches/index.htm.

²⁹ High Court, 2 December 2005. See Dowling *The Commercial Court* (Thomson Round Hall 2007).

making a judgement, not about the dispute but about the conduct of the parties.³⁰

11.30 An explicit good faith requirement in mediation is found in section 38 of the *Education for Persons with Special Educational Needs Act 2004* which states that:

“A court hearing proceedings... may in making any decision as to the costs of those proceedings, have regard to, if such be the case, that that person did not participate in good faith in such a mediation, and, for the purpose of determining whether that person did not so participate in good faith, the court may have regard to the report... prepared in relation to the mediation.”

11.31 The Commission considers that an explicit requirement of good faith in mediation may threaten the distinction between mediation and litigation; and, in particular, the objective of party empowerment.³¹

11.32 One consequence of a good faith requirement is that mediation participants may feel uncertain about what actions mediators or courts would consider bad faith and which may result in costs sanctions. Most good faith elements depend on an assessment of a person's state of mind which, by definition, is subjective.³² The prospect of adjudicating bad-faith claims by using mediator reports has the potential to distort the mediation process by damaging participants' faith in the confidentiality of mediation communications and the mediators' impartiality.³³

³⁰ See paragraph below on mediator reporting to the Court.

³¹ Boettger “Efficiency Versus Party Empowerment – Against a Good-Faith Requirement in Mandatory Mediation” (2004) 23 Rev. Litig. 1 at 2. See also Biller “Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-Trial Process” (1996) 18 Campbell L Rev 281.

³² Lande “Using Dispute System Design To Promote Good-Faith Participation in Court-Connected Mediation Programs” (2002) 50 UCLA L Rev 69 at 87.

³³ *Ibid.* See Zylstra “Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled” (2001) 17 J Am Acad Matrimonial Law 69.

11.33 In this respect, the Commission notes that the American Bar Association Section of Dispute Resolution has adopted a resolution opposing the use of broad good-faith requirements.³⁴ The resolution states:

“Sanctions should be imposed only for violations of rules specifying objectively-determinable conduct. Such rule-proscribed conduct would include but is not limited to: failure of a party, attorney, or insurance representative to attend a court-mandated mediation for a limited and specified period or to provide written memoranda prior to the mediations. These rules should not be labeled as good faith requirements, however, because of the widespread confusion about the meaning of that term. Rules and statutes that permit courts to sanction a wide range of subjective behavior create a grave risk of undermining core values of mediation and creating unintended problems. Such subjective behaviors include but are not limited to: a failure to engage sufficiently in substantive bargaining; failure to have a representative present at the court-mandated mediation with sufficient settlement authority; or failure to make a reasonable offer.”

11.34 The Commission supports the view expressed there, namely, that objectively verifiable actions – such as complete refusal to consider mediation, could attract some form of sanction. The Commission does not, however, consider it appropriate that subjective matters, such as the state of mind of the parties, should result in any sanction, including costs sanctions.

11.35 By contrast, a judicial recommendation that parties enter into the process in good faith is quite different.³⁵ In that respect, the Commission considers that parties can and should seek a commitment of good faith from each other by including a good faith provision in the mediation agreement. The mediator can remind both parties of their previous commitment throughout the process.

“Encouragement is a means that addresses a person’s state of mind. Encouragement from the court to participate in good faith is more forceful than a simple request because the court shows its trust in the

³⁴ See www.abanet.org/dispute/webpolicy. See also Izumi and La Rue “Prohibiting Good Faith Reports under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent” (2003) J Disp Resol 67.

³⁵ Kovach “Good Faith in Mediation – Requested, Recommended or Required? A New Ethic” (1997) 38 STexLRev 575 at 598.

mediation participants.... With an encouragement neither the mediator nor the court must judge the party's behaviour."³⁶

11.36 *The Commission provisionally recommends a Court should not impose a good faith requirement in mediation or conciliation as this would risk undermining key principles, including the right to self-determination, the voluntary nature of the process, the neutrality of the mediator or conciliator and the confidentiality of the process. The Court should, however, encourage parties to mediate in good faith.*

11.37 Rather than applying any costs sanctions based on the subjective behaviour on the parties during a mediation (which requires the mediator to take on a somewhat adjudicatory role), the Commission considers costs sanctions be based on unreasonable refusal to mediate. The Commission now turns to discuss the relevant English case law on this issue.

(2) *Costs Sanctions in England & Wales - "Unreasonable Refusal to Mediate"*

11.38 Under rule 44.3 of the post-Woolf *Civil Procedure Rules 1998*, the Court has a discretion as to whether costs are payable by one party to another, and the amount of those costs. As with the *Rules of the Superior Court 1986* in Ireland, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the rules also provide that the Court may make a different order. In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including the conduct of all the parties. This includes:

- conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
- whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- the manner in which a party has pursued or defended its case or a particular allegation or issue; and
- whether a successful claimant exaggerated its claim.

11.39 The manner in which a party has conducted its case has been taken by the English Courts to include a refusal to attempt to resolve the dispute before trial by some form of ADR, usually mediation. It has been suggested that this development raises the possibility that an Irish Court might use its costs

³⁶ Boettger "Efficiency Versus Party Empowerment – Against a Good-Faith Requirement in Mandatory Mediation" (2004) 23 Rev. Litig. 1 at 41.

jurisdiction to encourage mediation.³⁷ The Commission now turns to examine English cases which have addressed the issue of ADR and costs sanctions.

11.40 In *Thompson v Commissioner of Police of the Metropolis*³⁸ Lord Woolf MR, the “father” of CPR, noted that:

“We draw the parties’ attention to the arrangements which can now be made by this court [the Court of Appeal] for assistance by way of ADR. We would hope that the guidance we have provided should enable the appeals to be settled without difficulty by the parties themselves, but if they are not we would hope that the parties would seek the assistance of ADR from the court before proceeding with the appeals. If they do not this may be an appropriate matter to be considered when determining the order for costs which should be made.”³⁹

11.41 In *Cowl v Plymouth City Council*⁴⁰ Lord Woolf reiterated the importance of considering ADR:

“The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.”⁴¹

11.42 The *Cowl* case was to an application for judicial review by seven residents in a residential care home owned by Plymouth City Council. The claimants claimed that they had a legitimate expectation that it would be their home for life following assurances to that effect from the Council’s employees.⁴²

³⁷ O’Donnell “Mediation Overview: Pleadings and What They Mean”. Paper presented at the *Dispute Resolution Symposium* organised by Engineers Ireland. (Dublin, April 2007) at 5. Available at www.engineersireland.ie.

³⁸ [1998] QB 498, [1997] 2 All ER 762, [1997] 3 WLR 420.

³⁹ *Ibid.* Lord Woolf MR at para. 14.

⁴⁰ [2001] EWCA Civ 1935.

⁴¹ *Ibid.* at para. 1.

⁴² See James “Litigation Or Mediation? The Implications of The Cowl Decision” (2002) 2.3 *Elder Law & Finance* 77.

Whilst the Court of Appeal did not single out either side for criticism in failing to consider ADR, it expressed its concern that both parties had focused on the past, rather than looking to the future. Lord Woolf CJ commented that:

“Without the need for the vast costs which must have been incurred in this case already being incurred, the parties should have been able to come to a sensible conclusion as to how to dispose of the issues which divided them. If they could not do this without help, then an independent mediator should have been recruited to assist. That would have been a far cheaper course to adopt. Today sufficient should be known about alternative dispute resolution to make the failure to adopt it, in particular when public money is involved, indefensible”

11.43 The important aspect of Lord Woolf’s judgment stems from his strong emphasis that parties and their advisers should consider ADR. In particular, Lord Woolf addressed some comments to legal advisers:

“This case will have served some purpose if it makes clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable.”⁴³

11.44 In *Dunnett v Railtrack plc*⁴⁴ the Court of Appeal decided not to award costs against the unsuccessful claimant because the defendant had refused to consider arbitration or mediation in the face of a recommendation to do so by the court. The case represented “a substantial step in the enforced promotion of ADR by the courts and has raised some concern for practitioners and litigants alike in England and Wales about the costs implications flowing from the failure to partake in some form of ADR.”⁴⁵

11.45 The claimant had made a claim for damages against the defendant after some of her horses had been allowed to escape from her property onto the railway where they were killed. The claimant’s claim was dismissed at trial and she appealed the decision. When the court gave leave to appeal, the judge advised her to explore mediation. The claimant had actually proposed mediation to the defendant before the appeal came on for hearing but the defendant had turned down the proposal. The claimant was unsuccessful again on appeal but the Court of Appeal declined to award costs to the successful respondent.

⁴³ Lord Woolf at para. 27.

⁴⁴ [2002] EWCA Civ 2002.

⁴⁵ Carey “Court Reforms, ADR and Costs Consequences — Lessons for Ireland?” (2002) 20 ILT 246.

11.46 The Court of Appeal interpreted CPR as imposing a duty on both the court and the parties to further the overriding objective of efficiency. Brooke LJ stated that the duty required the respondent to engage in mediation with the appellant, even though it had won the legal argument at first instance and had a realistic expectation that it would win again on appeal. Unless it could justify its refusal to mediate it would be penalised on costs.⁴⁶

11.47 Brooke LJ made a significant statement on the nature of mediation and the role of mediators. He stated that

“Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away.”⁴⁷

11.48 Brooke LJ also emphasised the duty on solicitors to advise clients to consider ADR, stating that “...if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences.”

11.49 Brooke LJ held that, in the particular circumstances of the case, given the refusal of Railtrack to contemplate ADR at a stage before the costs of the appeal started to flow the appropriate order on the appeal was no order as to costs.

11.50 The decision in *Dunnett* did not make mediation mandatory before proceeding to trial, but it was the first example of a successful litigant winning at trial but losing the subsequent costs award because of an unreasonable refusal

⁴⁶ See Dowling Hussey “The rule in *Dunnett v Railtrack* clarified?” (2005) 12(7) CLP 186 .

⁴⁷ Brooke LJ at paragraph 14.

to follow the court's earlier suggestion to mediate the dispute.⁴⁸ As noted by Carey

“The decision in *Dunnett v. Railtrack* clearly indicates that the courts in England and Wales take ADR very seriously. The cost implications flowing from a failure to engage in ADR, especially where proposed by the court, may now be said to go somewhat further than merely encouraging the parties to engage in it... The extent to which costs may be apportioned contrary to conventional practice where ADR has not been utilised add an element of compulsion, and the parties and their lawyers must now very seriously consider availing of it, as is clear from Brooke LJ's decision.”⁴⁹

11.51 The Commission does not necessarily concur with this view that *Dunnett* has crossed the line into compulsion, but accepts that the line is quite thin at this stage.

11.52 In *Hurst v Leeming*,⁵⁰ Lightman J provided substantive guidelines on how and when a party could decline an offer to mediate without being penalised. He stated that *unacceptable* reasons for declining mediation included: the level of costs already incurred in the action; the fact that a claim (as in that case) is for serious allegations of professional negligence and the strength of the case. Lightman J stated that, even if a party has “a watertight case this is no justification for refusing mediation”. *Acceptable* reasons (in this instance) for refusing to mediate included the character of the party proposing mediation.

⁴⁸ A number of cases since *Dunnett* have taken a similar approach. In *Etherton in Malkins Nominees v Society Finance* [2002] EWHC 1221 a 15% deduction in recoverable costs was imposed for a failure by the winning claimant to take part in mediation. In *Neal v Jones Motors* [2002] EWCA Civ 1730 the Court of Appeal reduced the recovery of costs by £5,000 to reflect the impact of refusing to mediate. By contrast in *Boyd v Ministry of Defence* [2003] ADR.L.R. 12/16 the Court held that the case was clearly heading for a full trial in any case and thus refused to impose a costs penalty for refusing to accept the late offer to mediate. See also *Royal Bank of Canada Trust Ltd v Secretary of State for Defence* [2003] EWHC 1479; *Corenso Ltd v The Burnden Group plc* [2003] EWHC 1805; *Leicester Circuits v Coates Brothers plc* [2003] EWCA Civ 333; *Allen v Jones* [2004] EWHC 1189; and *McMillam Williams v Range* [2004] EWCA Civ 294.

⁴⁹ Carey “Court Reforms, ADR and Costs Consequences — Lessons for Ireland?” (2002) 20 ILT 246.

⁵⁰ [2001] EWHC 1051 (Ch).

11.53 Lightman J stated the critical factor as being “whether, objectively viewed, mediation had any real prospect of success...If the court finds that there was a real prospect, the party refusing may be severely penalised.” The decision appears to imply that, while mediation is not mandatory, where there is an unjustified failure to give proper consideration to mediation, particularly when it offers a realistic prospect of success, adverse costs consequences can be expected. Lightman J added that:

“Mediation is not in law compulsory, and the protocol spells that out loud and clear. But alternative dispute resolution is at the heart of today’s civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation...there must be anticipated as a real possibility that adverse consequences may be attracted.”

11.54 The Court of Appeal decision in *Halsey v Milton Keynes NHS Trust*⁵¹ provides comprehensive guidance on the imposition of costs sanctions. The Court affirmed the views expressed in *Dunnett v Railtrack plc*⁵² which modified the observations of Lightman J in *Hurst v Leeming*⁵³ and provided additional general comments about mediation.

11.55 *Halsey* was a clinical negligence case. The claimant sued a health authority for causing the death of her husband. She failed in her claim. However, she asked the court to refuse costs to the defendant NHS Trust because it had repeatedly refused to mediate. Prior to the trial of the action, the plaintiff’s solicitors had made a number of attempts to avoid a Court hearing, offering to limit the plaintiff’s claim to the costs of attending at an inquest, offering in five letters written to the trust to mediate, and then writing a letter to the Secretary of State for Health setting out this history and asking that the letter be taken into account “when the final bill payable by the NHS for legal costs is in the region of €100,000”.

11.56 The defendant consistently refused to negotiate and to mediate. Before the County Court, the plaintiff’s claim was dismissed and, following the usual rule, costs were awarded to the defendant despite the fact that the Defendant had refused to mediate. On appeal, the Court of Appeal upheld the County Court decision on costs as it considered that the defendant was justified in refusing to mediate because it reasonably believed it would win.

⁵¹ [2004] EWCA. Civ. 576.

⁵² [2002] EWCA Civ 2002.

⁵³ [2001] EWHC 1051 (Ch).

11.57 The importance of the *Halsey* decision lies in the fact that the Court clarified the factors which it will take into account in deciding whether a party's refusal to mediate is unreasonable and, as such, the circumstances in which a successful party could be penalised as to costs for unreasonably refusing ADR. The Court listed six factors which may be relevant to the question of whether a party has unreasonably refused ADR. These factors include:

(a) *The Nature of the Dispute*

11.58 As noted by Dyson LJ "Even the most ardent supporters of ADR acknowledge that the subject matter of some disputes renders them intrinsically unsuitable for ADR."⁵⁴ The Commission has previously noted that some disputes are not appropriate for mediation. For example, family disputes where domestic violence is alleged, where there are allegations of child sexual or physical abuse, or where power imbalances exist between the parties. The Court in *Halsey* also provided examples of cases which they considered not to be appropriate such as cases where a party wants the court to resolve a point of law, where it is considered that a binding precedent would be useful or cases where injunctive or other relief is essential to protect the position of a party.⁵⁵

(b) *The Merits of the Case*

11.59 Dyson LJ also noted that a party's reasonable belief that he or she has a strong case is relevant to whether he or she has acted reasonably in refusing ADR. This is because if the position were otherwise there would be considerable scope for a claimant to use the threat of costs sanctions to extract a settlement from the defendant even where the claim is without merit.⁵⁶ Dyson LJ stated that a party who unreasonably believes that his case has watertight is no justification for refusing mediation, but a party who reasonably believes that he or she has a watertight case may well have sufficient justification for a refusal to mediate.

(c) *The extent to which other settlement methods have been attempted*

11.60 Dyson LJ stated that where settlement offers have already been made, but rejected, this is a relevant factor. It may show that one party is making efforts to settle, and that the other party has unrealistic views of the merits of the case. But he also pointed out that mediation often succeeds where previous attempts to settle have failed.

⁵⁴ Dyson LJ at para. 17.

⁵⁵ *Ibid.*

⁵⁶ Dyson LJ at para. 18.

(d) *Whether the costs of mediation would have been disproportionately high*

11.61 Dyson LJ noted that this is an important factor where, on a realistic assessment, the sums at stake in the litigation are comparatively small. He noted that a mediation can sometimes be as expensive as a day in court, especially if the parties have legal representation present during mediation, coupled with the mediator's fees. He added that

“Since the prospects of a successful mediation cannot be predicted with confidence, the possibility of the ultimately successful party being required to incur the costs of an abortive mediation is a relevant factor that may be taken into account in deciding whether the successful party acted unreasonably in refusing to agree to ADR.”⁵⁷

(e) *Whether any delay in setting up and attending mediation would have been prejudicial*

11.62 Dyson LJ considered that if mediation is suggested late in the day, its acceptance may have the effect of delaying the trial of the action. This is a factor which may be relevant in deciding whether a refusal to agree to ADR was unreasonable.

(f) *Whether mediation had a reasonable prospect of success.*

11.63 Dyson LJ accepted that whether the mediation had a reasonable prospect of success could be relevant to the reasonableness of A's refusal to accept B's invitation to agree to it. He stated that, in a situation where B has adopted a position of intransigence, A may reasonably take the view that a mediation has no reasonable prospect of success because B is most unlikely to accept a reasonable compromise. That would be a proper basis for concluding that a mediation would have no reasonable prospect of success, and that for this reason A's refusal to mediate was reasonable. By contrast, Dyson LJ noted that, if A has been unreasonably obstinate, the court might well decide, on that account, that a mediation would have had no reasonable prospect of success. But obviously this would not be a proper reason for concluding that A's refusal to mediate was reasonable. A successful party cannot rely on his own unreasonableness in such circumstances.

11.64 Dyson LJ also stated that the burden should not be on the refusing party to satisfy the court that mediation had no reasonable prospect of success. The fundamental question is whether it has been shown by the unsuccessful

⁵⁷ Dyson LJ at para. 22.

party that the successful party unreasonably refused to agree to mediation.⁵⁸ Lightman J has criticised this aspect of Dyson LJ's judgment arguing that:

“a decision as to the onus of proof of reasonableness or unreasonableness must be guided by three factors: first, that those otherwise deprived of access to justice should be given a chance of achieving it in this way; secondly, the commonsense proposition that the party who refuses to take part in mediation should have to give, explain and justify his decision; thirdly, the explicit duty of the court to encourage the use of mediation and discourage unjustified refusals to do so. All these factors point to imposing the burden of justifying the refusal on the party who refuses to proceed to mediation.”⁵⁹

11.65 The Commission considers that, in general terms, the guidelines set out in *Halsey* are appropriate.⁶⁰ They allow the Court to determine whether to impose cost sanctions without having to explore the subjective intentions of the parties during a mediation. As Dyson LJ noted:

“... parties are entitled in an ADR to adopt whatever position they wish and if, as a result the dispute is not settled, that is not a matter for the court... if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.”⁶¹

⁵⁸ Dyson LJ at para. 28.

⁵⁹ Lightman “Breaking down the barriers” *The Times* July 31 2007, available at <http://business.timesonline.co.uk/tol/business/law/article2166092.ece>.

⁶⁰ The *Halsey* guidelines have largely been followed in later decisions. In *Reed Executive plc v Reed Business Information Ltd.* [2004] EWCA Civ 887 the Court in applying *Halsey* held that there had been a large distance between the positions of the parties and there were novel issues that required a judicial determination, rendering the prospects of mediation poor. In *Wills v Mills Solicitors* [2005] EWCA Civ 591, the defendants had not unreasonably failed to mediate since it would not have been practicable to do so without knowing the full grounds of the claim and the nature of the evidence to be relied upon by the defendant. In *Askey v Wood* [2005] EWCA Civ 574 the Court held that in order for a party to meaningfully engage in mediation, the parameters of a dispute need to be set out clearly. If they are not a party will not be subjected to cost penalties for failing to mediate or failing to settle.

⁶¹ Dyson LJ in *Halsey* at para. 14.

11.66 The Commission considers this is an important passage. It highlights that the subjective intentions of the parties during the mediation should not be reviewed when determining costs.

11.67 The Commission notes in *Carleton Seventh Earl of Malmesbury v Strutt & Parker*⁶² the parties waived the confidentiality protection of the mediation and provided details about the mediation to the Court. In determining the issues of costs, Jack J examined the conduct of the parties during the mediation:

“I consider that the claimants' position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation might have succeeded... For a party who agrees to mediation but then causes the mediation to fail by his reason of unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate. In my view it is something which the court can and should take account of in the costs order in accordance with the principles considered in *Halsey*.”⁶³

11.68 As previously noted, the Commission considers that, even when parties waive a mediation privilege, the conduct of the parties at the mediation should not be examined by the Court when determining costs as it would, in the Commission's view, be detrimental to the development of mediation as a facilitative, non-adjudicatory process.

11.69 The Commission also considers that a danger could arise in which parties will begin to waive the confidentiality of the mediation process so as to use information as leverage to the detriment of the other party during subsequent litigation proceedings. The Commission agrees with the view that where mediation is undertaken for such improper strategic purposes it has the potential to add to the ultimate costs of civil proceedings.⁶⁴

(3) Conclusion

11.70 The Commission's review of developments in other jurisdiction's on costs sanctions indicates the importance of this in the medium term development of ADR in Ireland and the Commission are not minded at this stage to make a recommendation on the issue of costs sanctions and instead

⁶² [2008] EWHC 424.

⁶³ Jack J at para. 72.

⁶⁴ Speech delivered by The Hon. Warren Winkler Chief Justice of Ontario “*Access to Justice, Mediation: Panacea or Pariah?*” (2007). Available at <http://www.ontariocourts.on.ca/coa/en/ps/speeches/access.htm>.

invite submissions on this issue and on the factors that might be applied in determining whether a Court should imposed such sanctions. The Commission considers, however, that whatever final view is taken on this in general, it is important to note that family law cases should not be subject to the threat of cost sanctions for an unreasonable refusal to mediate.

11.71 *The Commission invites submissions as to whether, in general, costs sanctions should be imposed on a party by a Court for an unreasonable refusal to consider mediation or conciliation and whether a Court should apply the following factors in determining that a party has unreasonably refused to consider mediation or conciliation: the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of mediation would have been disproportionately high; whether any delay in setting up and attending mediation would have been prejudicial; and whether mediation had a reasonable prospect of success.*

11.72 *The Commission provisionally recommends that family law cases should not be subject to costs sanctions for unreasonable refusal to consider mediation.*

D Mediator Reporting to the Court

11.73 The issue of a mediator reporting to the court raises a number of questions concerning confidentiality. In some jurisdictions, including Ireland, mediators' reports can be used by the Courts to determine whether costs should be awarded against a party who refused to partake in the mediation process. Under section 16 of the *Civil Liability and Courts Act 2004* which concerns mediation in personal injuries litigation only, states:

A person appointed under section 15(4) to be the chairperson of a mediation conference shall prepare and submit to the court a report, which shall set out -

(a) where the mediation conference did not take place, a statement of the reasons as to why it did not take place, or

(b) where the mediation conference did take place

a statement as to whether or not a settlement has been reached in the personal injuries action concerned, and
where a settlement has been entered into, a statement of the terms of the settlement signed by the parties thereto.

At the conclusion of a personal injuries action, the court may, if satisfied that a party to the action failed to comply with a direction under section 15 (1), make an order directing that party to pay the

costs of the action, or such part of the costs of the action as the court directs, incurred after the giving of the direction under section 15 (1).

11.74 A similar approach is evident in the *Education for Persons with Special Educational Needs Act 2004*. Section 24(4)(c) of the 2004 Act states that a mediator must prepare and furnish to each of the parties a report in relation to the mediation. Any subsequent court hearing proceedings may, in making any decision as to the costs of those proceedings, have regard to the fact that that a person did not participate in good faith in a mediation, and, for the purpose of determining whether that person did not so participate in good faith, the court may have regard to the mediator's report.

11.75 The Commission considers that the content of mediators' reports to the Court should be narrowly restricted. Confidentiality during a mediation session is essential to protect the integrity of the process. For the mediation to be effective, a mediator must have the trust of all participants, both in joint sessions and in private caucuses. Requiring mediators to report on the conduct of the parties to the court imperils the confidentiality of the mediation process.

11.76 Some jurisdictions have placed an obligation on a mediator to make a neutral summary of the outcome of the mediation and make it available to the court if requested. For example, in California a mediator has to complete a Statement of Agreement or Non-Agreement. This identifies the mediator, the date or dates on which the mediation occurred, the total number of hours spent in the mediation and whether it ended in settlement. If the mediation did not take place, the mediator can either tick a box stating that a party who was ordered to appear at the mediation did not appear, or a box marked "other reason", without disclosing any confidential information.

11.77 The Commission considers that this is an appropriate type of mediator report and that this would also allow the Court to have sufficient information on which to determine whether, in objective terms the parties entered into the mediation in good faith.

11.78 *The Commission provisionally recommends that the content of a mediator's or conciliator's report to the court should be restricted to a neutral summary of the outcome of the mediation or conciliation.*

E Recovery of Mediation Costs

11.79 The Commission notes that the costs of preparing and participating in a mediation may be substantial for parties, especially if they have separate legal costs incurred stemming from the mediation such as paying for legal representative at the mediation. The standard agreement to which parties agree before they mediate usually provides that the mediator's fee will be split equally or otherwise, that each party will bear its own costs. Sir Anthony Clarke, Master

of the Rolls in England and Wales, has suggested that as some may complain about the costs of mediation, it would be possible to have a general principle that the costs of a mediation will ordinarily be treated as costs in the case. In that respect he suggests that, the person with the strong case will then be protected against the costs of a failed mediation if the action subsequently succeeds.”⁶⁵

11.80 In *National Westminster Bank v Feeney*⁶⁶ the English High Court confirmed that costs arising from a mediation fall within the definition of recoverable costs of litigation. However, this is only so if it is not contrary to any provision relating to costs contained in the mediation agreement or in the subsequent settlement agreement.

11.81 In *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd*⁶⁷ the issue of recovering the pre-litigation costs including costs incurred from mediation was also examined by the English Technology and Construction Court. The normal form of mediation agreement was entered into in this case but that mediation had happened 2½ years before proceedings were issued. Coulson J drew a distinction between pre-action mediations (as in *Lobster Group*) and mediations that take place after litigation has started (as in *Feeney*):

“... unlike the costs incurred in a pre-action protocol [under the CPR], I do not believe that the costs of a separate pre-action mediation can ordinarily be described as ‘costs of and incidental to the proceedings’. On the contrary, it seems to me clear that they are not. They are the costs incurred in pursuing a valid method of alternative dispute resolution ... Both the course of the mediation itself and the reasons for its unsuccessful outcome are privileged matters known only to the parties. As a matter of general principle, therefore, I do not believe that the costs incurred in respect of such a procedure are recoverable ...”

11.82 Coulson J went on to concede, however, that it was much easier to see why the cost of post-litigation mediations might be recoverable: there was

⁶⁵ Speech by Sir Anthony Clarke, Master of the Rolls, at the Civil Mediation Council's National Conference in Birmingham on *The Future of Civil Mediation* (8th May, 2008). Available at http://www.judiciary.gov.uk/publications_media/speeches/index.htm.

⁶⁶ [2006] EWHC 90066 (Costs).

⁶⁷ [2008] EWHC 413 (TCC); [2008] 1 BCLC 722.

greater proximity to the proceedings and, on that basis, a mediation could well be regarded as 'negotiations with a view to settlement' and so, recoverable.⁶⁸

11.83 The Commission notes that this issue has not been examined in Ireland and would welcome submissions on this matter.

11.84 *The Commission invites submissions as to whether mediation or conciliation costs should be recoverable costs of any subsequent litigation.*

⁶⁸ Carle "United Kingdom: The Costs Of Mediation – Who Picks Up The Tab At The End Of The Day?" (March 2008), online article available at <http://www.mondaq.com/article.asp?articleid=58414>.

CHAPTER 12 SUMMARY OF PROVISIONAL RECOMMENDATIONS

12.01 The Commission's provisional recommendations in this Consultation Paper may be summarised as follows:

12.02 The Commission concurs with the view that ADR provides a suitable means of resolving disputes in appropriate circumstances and provisionally recommends that the key principles underlying ADR, in particular mediation and conciliation, should be set out in statutory form. [Paragraph 1.74]

12.03 The Commission defines ADR as a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes. [Paragraph 2.12]

12.04 The Commission provisionally recommends that the more commonly used ADR terms, in particular mediation and conciliation, should be clearly and consistently defined in legislative form. [Paragraph 2.127]

12.05 The Commission provisionally recommends that when provision for mediation is made in legislative form, it should be defined as a facilitative, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement. [Paragraph 2.128]

12.06 The Commission provisionally recommends that when provision for conciliation is made in legislative form, it should be defined as an advisory, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement. [Paragraph 2.129]

12.07 The Commission provisionally recommends that, in civil claims generally, courts should be permitted, either on their own motion initiative or at the request of a party to such claims, to make an order requiring the parties to consider resolving their differences by mediation or conciliation. [Paragraph 3.92]

12.08 The Commission provisionally recommends that the participation of parties in mediation should be voluntary and that the mediator should play no advisory or evaluative role in the outcome of the process, but may advise on or determine the process. [Paragraph 3.95]

12.09 The Commission provisionally recommends the participation of parties in conciliation should be voluntary and that the conciliator should not have the authority to impose on the parties a solution to the dispute but may make recommendations to the parties for the settlement of the dispute, which the parties may or may not accept. [Paragraph 3.96]

12.10 The Commission provisionally recommends that a pilot Court-annexed mediation scheme should be established in the District Court based on the principles of the voluntary participation of the litigants. [Paragraph 3.98]

12.11 The Commission provisionally recommends that the principle of confidentiality of mediation and conciliation should be placed on a statutory basis and invites submissions as to whether confidentiality in mediation should be subject to a distinct form of privilege. [Paragraph 3.139]

12.12 The Commission provisionally recommends that parties to mediation or conciliation should be fully informed about the process by the neutral and independent mediator or conciliator before they consent to participate in it, that their continued participation in the process should be voluntary, and that they understand and consent to the outcomes reached in the process. [Paragraph 3.152]

12.13 The Commission provisionally recommends that parties should be encouraged to seek independent advice, legal or otherwise, before signing an agreement entered into at conciliation or mediation. [Paragraph 3.153]

12.14 The Commission provisionally recommends that any bodies responsible for providing ADR processes, in particular mediation and conciliation, should periodically review the procedures involved to ensure that the dispute is being dealt with expeditiously and appropriately. [Paragraph 3.176]

12.15 The Commission provisionally recommends that ADR mechanisms should aim at preserving the flexibility of the process. [Paragraph 3.184]

12.16 The Commission provisionally recommends that the requirement of neutrality and impartiality be included in any general statutory formulation that concerns mediation and conciliation. [Paragraph 3.187]

12.17 The Commission invites submissions as to whether the European Code of Conduct for Mediators should be given a statutory basis in Ireland, including in the form of a Code of Practice. [Paragraph 3.192]

12.18 The Commission provisionally recommends that a Court may enforce any agreement reached at mediation or conciliation.[Paragraph 3.217]

12.19 The Commission invites submissions as to whether the parties in a mediation or conciliation may agree in writing to suspend the running of any limitation period. [Paragraph 3.220]

12.20 The Commission invites submissions as to whether the 2008 EC Directive on Certain Aspects of Mediation in Civil and Commercial Matters should be applied to disputes that do not involve a cross-border element, that is domestic disputes. [Paragraph 3.223]

12.21 The Commission reiterates its previous recommendations set out in the Commission's 1996 Report on Family Courts (LRC 52-1996) in relation to information in family law disputes. [Paragraph 5.14]

12.22 The Commission invites submissions as to whether separating and divorcing parents should be encouraged to develop parenting plans. [Paragraph 5.30]

12.23 The Commission provisionally recommends that, where appropriate, mediation should be considered by parties to a family dispute before litigation. [Paragraph 5.44]

12.24 The Commission invites submissions as to whether children should participate in mediation proceedings affecting them. [Paragraph 5.66]

12.25 The Commission reiterates its previous recommendations set out in the Commission's 1996 Report on Family Courts (LRC 52-1996) in relation to enforcement and review of mediated agreements. [Paragraph 5.74]

12.26 The Commission invites submissions as to whether a statutory Code of Practice or Guidelines for collaborative lawyering should be introduced. [Paragraph 5.157]

12.27 The Commission provisionally recommends the extension to all Circuit Courts of case conferencing in family disputes by County Registrars. [Paragraph 5.162]

12.28 The Commission provisionally recommends that a Court should adjourn proceedings when appropriate to allow parties to a dispute arising under section 117 of the Succession Act 1965 to consider mediation. [Paragraph 5.174]

12.29 The Commission provisionally recommends that a statutory provision be considered which would allow medical practitioners to make an apology and explanation without these being construed as an admission of liability in a medical negligence claim. [Paragraph 6.21]

12.30 The Commission invites submissions as to whether a pre-action procedure providing for mediation in a medical negligence claims should be considered. [Paragraph 6.43]

12.31 The Commission invites submissions as to whether mediation and conciliation orders should be introduced in the Commercial Court which would set out the necessary steps that parties must follow when considering mediation and conciliation. [Paragraph 7.45]

12.32 The Commission invites submissions as to whether a general statutory framework for mediation and conciliation in commercial disputes should be put in place, which would include small commercial (including consumer) disputes and contracts covered by the Government's Standard Contracts for Public Works. [Paragraph 7.60]

12.33 The Commission provisionally recommends that mediation and conciliation may be appropriate for the resolution of shareholder disputes under section 205 of the Companies Act 1963 and should be considered prior to litigation. [Paragraph 7.66]

12.34 The Commission invites submissions as to whether the recommendations in the European Consumer Centre's 2008 Report The development of Alternative Dispute Resolution (ADR) in Ireland : An analysis of complaints, best practice and future recommendations should be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes.[Paragraph 8.36]

12.35 The Commission commends the recommendations on online dispute resolution of consumer disputes made by the Information Society Commission in its 2002 Report Building Trust and by Forfas in its 2002 Report Legislating for Competitive Advantage in e-Business and Information & Communications Technologies and invites submissions as to whether they should be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes. [Paragraph 8.54]

12.36 The Commission provisionally recommends that the jurisdictional limit of the Small Claims Court be increased to €3,000. [Paragraph 8.61]

12.37 The Commission provisionally recommends the continued development of mediation and conciliation services by community law centres for the resolution of community and neighbour property disputes. [Paragraph 9.23]

12.38 The Commission provisionally recommends that property boundary disputes are appropriate for resolution through mediation and conciliation and that parties should be advised by their legal representatives to consider and

attempt mediation or conciliation in such disputes prior to the commencement of litigation. [Paragraph 9.25]

12.39 The Commission provisionally recommends that the courts should continue to be pro-active in advising parties in property disputes to consider the adjournment of hearings to allow the parties to consider mediation or conciliation. [Paragraph 9.26]

12.40 The Commission invites submissions on whether ADR, in particular mediation, has a role to play in the resolution of planning application disputes. [Paragraph 9.50]

12.41 The Commission provisionally recommends that training and accreditation of mediators is essential to ensure the quality of the process and invites submission as to whether this should be included in any statutory framework for mediation. [Paragraph 10.09]

12.42 The Commission provisionally recommends that the relevance of ADR, including mediation and conciliation, should be incorporated into third level programmes in law and other disciplines and the professional programmes conducted by the Law Society of Ireland and the Bar Council of Ireland. [Paragraph 10.61]

12.43 The Commission invites submissions as to whether the regulation of mediators should continue at present on a non-statutory basis, subject to the principles to be set out in a statutory framework for mediation and conciliation. [Paragraph 10.64]

12.44 The Commission provisionally recommends that all family mediators should receive specialist training in this particular area. [Paragraph 10.65]

12.45 The Commission provisionally recommends that a non-statutory scheme should be established, under the auspices of the Department of Justice, Equality and Law Reform, to provide for the accreditation of organisations, which, in turn, accredit individual ADR practitioners. [Paragraph 10.66]

12.46 The Commission provisionally recommends a Court should not impose a good faith requirement in mediation or conciliation as this would risk undermining key principles, including the right to self-determination, the voluntary nature of the process, the neutrality of the mediator or conciliator and the confidentiality of the process. The Court should, however, encourage parties to mediate in good faith. [Paragraph 11.36]

12.47 The Commission invites submissions as to whether, in general, costs sanctions should be imposed on a party by a Court for an unreasonable refusal to consider mediation or conciliation and whether a Court should apply the following factors in determining that a party has unreasonably refused to

consider mediation or conciliation: the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of mediation would have been disproportionately high; whether any delay in setting up and attending mediation would have been prejudicial; and whether mediation had a reasonable prospect of success. [Paragraph 11.71]

12.48 The Commission provisionally recommends that family law cases should not be subject to costs sanctions for unreasonable refusal to consider mediation. [Paragraph 11.72]

12.49 The Commission provisionally recommends that the content of a mediator's or conciliator's reports to the court should be restricted to a neutral summary of the outcome of the mediation or conciliation. [Paragraph 11.78]

12.50 The Commission invites submissions as to whether mediation or conciliation costs should be recoverable costs of any subsequent litigation. [Paragraph 11.84]



The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide to legislative changes.

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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975