

Draft General Scheme of Mediation Bill 2012

Arrangement of sections

Head

1. Short title and commencement
2. Interpretation
3. Scope and application
4. Duty on solicitor to provide information and advice on mediation
5. Duty of barrister in relation to mediation
6. Mediation conditions
7. Role of mediator
8. Duty on mediator to provide information on training etc.
9. Codes of practice
10. Confidentiality of mediation communications
11. Enforceability of mediation agreements
12. Court support for mediation alternative
13. Submission of mediator's report to court
14. Effect of mediation on limitation and prescription periods
15. Staying of court proceedings arising from mediation clause
16. Fees and costs
17. Factors to be considered in awarding costs
18. Involvement of child or dependents in family law mediation
19. Liability for civil damages
20. Amendment of Civil Liability and Courts Act 2004

Head 1 – Short title and commencement

Provide that:

1. (1) This Act may be cited as the Mediation Act 2012.

(2) This Act comes into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Explanatory note

This is a standard provision.

Head 2 – Interpretation

Provide that:

2. In this Act —

“civil proceedings” include commercial proceedings, proceedings in relation to boundary disputes between adjoining landowners and proceedings before a tribunal other than a Tribunal of Enquiry.;

“commercial proceedings” include a claim under section 205 of the Companies Act 1963;

“dispute” subject to Head 3, means any civil or commercial dispute that could give rise or has given rise to civil proceedings;

“family law dispute” means a dispute that could give rise to family law proceedings in court;

“mediator” means a person who assists parties to reach a voluntary agreement to resolve their dispute whilst acting at all times in accordance with the principles of impartiality, integrity, fairness and confidentiality, with respect for all parties involved in the mediation.

“mediation” means a facilitative and confidential process in which a mediator assists parties to a dispute to attempt by themselves, on a voluntary basis, to reach a mutually acceptable and voluntary agreement to resolve their dispute.;

¹

“mediation communications” include —

¹ A number of alternative definitions for “mediation” are available including:

1. EU Mediation Directive - DIRECTIVE 2008/52/EC

‘Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.

2. Folberg and Taylor - Mediation: A Comprehensive Guide to Resolving Conflict without Litigation

“Mediation means a process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.)

- (a) statements that are made orally or in writing or other recorded activity by a mediator, party or non-party participant, and
- (b) communications to initiate a mediation process and other communications arising out of or in connection with a mediation process;

“Minister” means the Minister for Justice and Equality;

‘non-party participant’ means a person, other than a party or mediator, who participates in a mediation.

“party” includes an individual and a legal person and, without prejudice to the generality of that definition, includes the State, a Government Department, a local authority, any other body established by or under an enactment (including a company), and an unincorporated body (including a partnership or club).

Explanatory note

“**civil proceedings**”: while the term “civil proceedings” is normally understood in this jurisdiction to include proceedings relating to commercial disputes, EU instruments such as the Mediation Directive refer to mediation in “civil and commercial matters”; Statutory Instrument 209 of 2011 which transposes the Directive also makes reference to “civil or commercial” proceedings. The definition makes specific reference to boundary disputes between adjoining landowners, a frequent source of potential litigation and to proceedings before any tribunal which is not a Tribunal of Enquiry.

“**commercial proceedings**”: as recommended by the LRC, commercial proceedings has been defined to include reference to shareholder disputes (minority shareholder oppression under the Companies Act 1963).

“**dispute**”: the definition of “dispute” is intended to implement the recommendation in paragraph 2.51 of the LRC Report, which is based on the general definition of “civil and commercial matters” in the 2000 EU “Brussels I” Regulation No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and (in respect of mandatory statutory requirements) the text in the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI No.27 of 1995).

The definition is subject to the provisions of Head 3 which implements the recommendation in the LRC Report that the definition of dispute be subject to a number of exclusions: firstly, where employment disputes are being dealt with through the alternative dispute processes of the Labour Relations Commission or the Labour Court; secondly, the Bill is not intended to replace any mediation or other dispute-resolution process which is already provided for under any other enactment; thirdly, in relation to tax or customs matters. In addition, mediation cannot be used to avoid any mandatory

constitutional or statutory requirements. These three exceptions have been grouped at Head 3.

“family law proceedings”: The LRC Bill included a definition of “family law proceedings” that made reference to the definition included in the draft Courts (Consolidation and Reform) Bill 2010 contained in the Commission’s Report on Consolidation and Reform of the Courts Acts (LRC 97-2010). This definition has not been retained in the General Scheme; the reference to family law proceedings will have its ordinary, and well-understood, meaning.

“mediator”: The LRC Bill does not include a definition of mediator. However, it is considered that such a definition would be helpful. It is based on a similar definition in the Code of Practice for the Mediators Institute of Ireland.

“mediation”: this implements paragraph 2.37 of the LRC Report to the effect that mediation is a facilitative and confidential process in which the parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute with the assistance of an independent third party, called a mediator. This takes account of section 6(e) of the LRC Bill which provides that “a mediator or conciliator shall be neutral and impartial...”. As indicated in the footnote a number of other definitions of “mediation” are possible.

“mediation communications”: the definition of “mediation communications”, which is connected with the specific form of confidentiality for mediation set out in section 7 of the LRC Bill, implements the recommendations in paragraphs 3.46 and 3.47 of the LRC Report.

“non-party participant”: the definition of “non-party participant” implements the recommendation in paragraph 3.54 of the LRC Report: see also Head 5(5)] on the involvement of a non-party participant in a mediation process.

“party”: the definition implements the recommendation in paragraph 2.16 of the LRC Report that, to avoid any doubt, the Bill applies to disputes involving individuals and also legal persons, whether the State, a Government Department, a local authority, any other body established by or under an enactment (such as a company) and an unincorporated body (including a partnership or club).

Head 3 – Scope and application

Provide that:

3. (1) This Act shall not apply to—

(a) an arbitration within the meaning of the Arbitration Act 2010,

(b) an employment-related dispute referred that falls under the functions currently exercised by the Employment Appeals Tribunal, the Labour Relations Commission, the Labour Court, the National Employment Rights Authority and the Equality Authority and their successors;

(c) any dispute relating to the payment of any tax or customs charge;

(2) Nothing in this Act shall be construed as replacing any mediation or other dispute-resolution process which is provided for in any enactment or otherwise.

(3) Nothing in this Act shall be construed as permitting a mediation process to negate any rights or avoid any obligations of the parties in respect of which the parties themselves are not free to decide under any enactment or instrument.

Explanatory note

Subhead 1

Subhead (1)(a) implements the recommendation in paragraph 2.16 of the LRC Report that the Act should not, in general, apply to or affect arbitration within the meaning of the Arbitration Act 2010. Subhead (1)(b) implements paragraph 2.48, i.e. that the Act should not apply to any dispute arising within an employment context referred to statutory dispute-resolution processes such as those provided by the Labour Relations Commission, the Labour Court or other statutory employment bodies. Subhead (1)(c) provides that the Act should not apply to any dispute arising from tax or customs legislation.

Subhead (2)

This implements the recommendation in paragraph 2.52 of the LRC Report that the Act is not intended to be interpreted as replacing any mediation or other dispute-resolution process which is already provided under any other enactment or under any other agreed dispute resolution process. As noted in the LRC Report, a number of existing statutes already provide for forms of mediation or dispute-resolution outside court proceedings. These include dispute-resolution processes concerning equality matters under the Employment Equality Acts 1998 to 2008 and the Equal Status Acts 2000 to 2008; landlord and tenant disputes under the Residential Tenancies Act 2004; assessment of needs under the Disability Act 2005; and resolution of certain complaints by mediation under the Medical Practitioners Act 2007. In addition, the Multi-Unit Developments Act 2011 contains provisions for a mediation conference to settle disputes. The inclusion of

the term “or otherwise” is necessary to cover, for example, situations where an internal dispute resolution mechanism is part of an employment contract.

Subhead (3)

This subhead provides, in line with the LRC Report, that a mediation process cannot be used to avoid any mandatory constitutional or statutory requirements. The rationale behind the provision stems from the EC Mediation Directive of 2008 which states that the Directive should apply to processes whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should not, however, apply to rights and obligations on which the parties themselves are not free to decide under the relevant applicable law.

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

Provide that:

4. (1) A solicitor advising or acting for a client shall, prior to commencing civil proceedings on behalf of the client,—
- (a) advise the client to consider using mediation as an alternative means of resolving the dispute,
 - (b) provide the client with—
 - (i) information concerning mediation services,
 - (ii) names and addresses of persons or organisations qualified to provide mediation services,
 - (iii) insofar as is possible, an estimate of the client’s legal costs in the event of court proceedings,
 - (iv) where practicable—
 - (I) an estimate of the costs of other parties for which the client may be liable if unsuccessful in court proceedings,
 - (II) an estimate of the likely duration of such proceedings (from commencement to conclusion), and
 - (c) inform the client of the provisions of subhead (2) and Heads 11 and 12.
- (2)(a) A person commencing civil proceedings shall, when making application to the court, include a written statement signed by the person and his or her solicitor in the person’s presence, confirming that—
- (i) mediation has been considered as an alternative means of settling the dispute, and
 - (ii) the solicitor has complied with the requirements of subhead (1).
- (b) Where a person referred to in paragraph (a) does not include the required statement, the court may adjourn the proceedings for such time as it deems necessary for the person to provide the statement.

Explanatory note

This Head is based on sections 14 and 15 of the LRC Bill and implements the key recommendation in paragraph 4.45 that a solicitor acting for any person must, prior to initiating civil proceedings, advise the person to consider mediation where such processes are appropriate for resolving the dispute.

Subhead (1)

Paragraph (a) requires the solicitor to advise his or her client to consider using mediation as a means of resolving of the dispute. Paragraph (b) is based on section 5(1)(b) of the Judicial Separation and Family Law Reform Act 1989 together with paragraphs 4.42 to 4.44 of the LRC Report which outlines information required to be given in various jurisdictions assist the party in determining whether mediation is worth investigating.

Paragraph (c) requires the solicitor to inform the party of the provisions of subhead (2) and Heads 11 and 12. This is intended to ensure that the party is aware that the court can—

- require the party to confirm that mediation was considered as an alternative means of settling the dispute (subhead (2)),
- enforce a mediation agreement (Head 11), and
- invite, at the request of a party or of its own motion, the parties to engage in mediation or direct their attendance at an information session (Head 12).

Subhead (2)

This is based on section 15 of the LRC Bill and implements paragraphs 4.50 and 4.51 that parties involved in civil proceedings must sign a Mediation Certificate which confirms that they have considered mediation as alternative processes for settling the dispute. Subhead (2) requires a “statement” rather than a “mediation certificate”.

Section 14(2) of the LRC Bill included a requirement for the solicitor to sign the Mediation Certificate confirming that he or she advised the person concerning mediation as processes for settling the dispute. The Head requires the party to confirm that his or her solicitor has complied with the requirements of subhead (1).

Head 5 Duty of barrister in relation to mediation

Provide that:

5. A barrister when advising or acting on behalf of a client in respect of any dispute shall, prior to the commencement of civil proceedings, advise the client of the possible use of mediation as an alternative to litigation to resolve the dispute and shall certify in writing that such advice was so furnished.

Explanatory Note

This provision will require all barristers representing a client before the initiation of litigation to advise their client to consider the usefulness and appropriateness of using mediation in an effort to resolve the dispute and to certify that he has done so. The obligation will apply in any situation where a barrister is employed, whether through a solicitor or by direct access. The intention is to make mediation a factor to be considered at all stages of a legal case.

Direct access to barristers is relatively rare at present but it should be noted that the Legal Services Regulation Bill 2011 makes provision for the establishment in the State of legal partnerships and multi-disciplinary practices. It also provides for a public consultation process as to how these partnerships and practices should operate. In addition, it makes provision for direct access to barristers in relation to non-contentious matters.

The Bill requires the Authority to engage in a public consultation process, to be completed within 18 months of the establishment of the Authority, and to provide a report to the Minister on—

- the manner in which legal partnerships and multi-disciplinary practices should be formed and operated,
- the reforms, whether administrative, legislative or to existing professional codes, that are required in order to facilitate such establishment and operation, and
- the implications of barristers being permitted to receive instructions directly from persons in contentious matters and the reforms, whether administrative, legislative or to existing professional codes, that would be necessary to allow this.

Head 6 - Mediation conditions

Provide that:

6. (1) Parties may engage in mediation—
 - (a) on their own initiative prior to or at any stage following the commencement of civil proceedings, or
 - (b) following invitation by a court under Head 12.
- (2) The terms under which mediation takes place, including information concerning—
 - (a) the qualifications of the mediator under Head 8,
 - (b) the code of practice (if any) under Head 9 to which the mediator adheres,
 - (c) the confidentiality of mediation communications under Head 10, and
 - (d) the fees and costs referred to in Head 16,shall be set out in writing by the mediator and agreed and signed by him or her as well as the parties.
- (3)(a) It is for the parties involved in mediation to determine the outcome of a mediation process.
- (b) A party involved in a mediation process may withdraw from it at any time with or without explanation.
- (4) Where a mediator proposes to withdraw from a mediation process, he or she shall give reasons to the parties for his or her withdrawal.
- (5) Where a dispute has been submitted to mediation, the parties and the mediator shall, having regard to the nature of the dispute, seek to complete the mediation process as quickly as possible.
- (6) One or more non-party participants may be present and may assist a party during the mediation process.

Explanatory note

Subhead (1)

This implements the recommendation in paragraph 2.51 of the LRC Report that mediation may be used by parties on their own initiative at any stage prior to or after the commencement of civil proceedings. It also refers to the possibility that the court can, under Head 11, invite the parties to consider mediation.

Subhead (2)

Subhead (2) provides that a statement regarding the terms on which the mediation process takes place, including information relating to:

- the qualifications of the mediator;
- the mediator's adherence to a code of practice published under Head 9;
- confidentiality; and
- fees and costs of the process

shall be furnished to the parties by the mediator. An agreed statement must be signed by the mediator and all parties to the mediation.

Subhead (3)

Subhead 3(a) reinforces the general principle underlined in the LRC Report that the outcome of mediation shall be determined by the parties themselves. Subhead 3(b) implements the recommendation in paragraph 3.12 that participation in mediation is voluntary, and any party involved in mediation may withdraw from the process at any time and without explanation.

Subhead (4)

The LRC also recommended that the mediator should be able to withdraw from the process without explanation. However, subhead (4) requires the mediator to provide reasons where he or she proposes to withdraw from the process. It is undesirable from a policy perspective that a mediator be permitted to withdraw without any explanation.

Subhead (5)

This implements the recommendation in paragraph 3.108 of the LRC Report that, where a dispute has been submitted to mediation, the parties and the mediator, must seek to complete the process in the shortest time practicable, having regard to the nature of the dispute.

Subhead (6)

This implements the recommendation in paragraph 3.53 of the LRC Report to provide for the involvement of a "non-party participant" – defined in Head 2 to include a qualified lawyer, expert, potential party or friend of a party or potential party – in a mediation process.

Head 7 - Role of mediator

Provide that:

7. (1) A mediator shall, before the commencement of a mediation process—

(a) comply with the requirement for a written agreement under Head 6(2),

(b) make such enquiry as is reasonable in the circumstances to determine whether there is any actual or potential conflict of interest which will arise in or during the mediation process,

(c) inform the parties—

(i) that their continued participation in the mediation process is voluntary,

(ii) that they may withdraw from it at any time with or without explanation,

(iii) that it is for the parties themselves to determine the outcome of the mediation process,

(iv) that they may be accompanied during the mediation process by such non-party participants as they deem appropriate,

(v) that the fees and costs referred to in Head 16 shall not be contingent on the outcome of the mediation process,

(vi) of the means by which any agreement between them may be formalised or made enforceable, and

(vii) whether he or she has any actual or potential conflict of interest in relation to the mediation process;

(2) In the course of mediation, a mediator shall—

(a) ensure that at all stages in the mediation process, each party has the capacity to engage in the process,

(b) disclose any actual or potential conflict of interest which arises during the mediation process and in such cases disqualify himself from the process save where all parties to the dispute request the mediator to continue the mediation,

(c) act with impartiality towards the parties and serve all parties equally,

(d) while ensuring that parties have sufficient time to consider issues, and having regard to the nature of the dispute, complete the mediation process as quickly as possible,

(e) ensure that the parties understand and consent to any agreement reached during the mediation process,

(f) ensure that parties are aware of their rights to obtain independent advice, including legal advice, prior to signing any agreement arising from the mediation process,

(g) advise any party not having a legal representative or other professional adviser involved in the mediation process to consider seeking independent advice, whether legal or otherwise, prior to signing any agreement arising from the process.

(3) Subject to subhead (4), a mediator shall not make proposals to the parties to resolve the dispute during a mediation process.

(4) A mediator may, with the agreement of all the parties, make proposals to resolve the dispute but it shall be for the parties to determine whether to accept such proposals.

Explanatory note

Subhead (1)

Subhead (1)(a) requires the mediator to comply with the requirement under Head 6(2) to prepare a written agreement on the terms of the mediation process. Subhead (1)(b) places an obligation on the mediator to establish whether he or she has any existing or potential conflicts of interest in the case. Subhead (1)(c) sets out the information which must be given by the mediator to the parties before the commencement of the process. This includes information concerning the voluntary nature of the process, the manner in which a mediation can be concluded (whether by agreement or not) and that the outcome of the process will be determined by the parties.

Subhead (2)

Subhead (2)(a) provides that the mediator must ensure that all parties have capacity to engage in the mediation process. Subhead (2)(b) provides that the mediator must disclose any potential conflicts of interest which may arise in the course of the process and must withdraw from the mediation except where all the parties request the mediator to continue the process while subhead (2)(c) requires the mediator to act impartially towards the parties. Subhead (2)(d) requires the mediator, while providing adequate time to the parties to consider issues, to complete the process as expeditiously as possible, while subhead (2)(e) requires the mediation to ensure that parties understand and consent to any agreement reached. Subhead (2)(f) provides that the mediator should ensure that parties are aware of their rights to seek independent advice, including legal advice, before agreeing to or signing a settlement of the case. Subhead (2)(g) requires the mediator to advise parties not having a legal representative or other professional adviser to consider seeking legal advice before signing a mediation settlement.

Subhead (3)

This adapts the recommendation in paragraph 2.38 of the LRC Report that a mediator may not, at any stage in the mediation process, make a proposal to the parties to resolve the dispute. As outlined in subhead (4), a mediator may do so with the agreement of the parties.

Subhead (4)

Subhead (4) provides that the mediator may take on the role of conciliator with the agreement of the parties. This is based on section 8(2) of the LRC Bill and implements the recommendation in paragraph 2.39 that the parties may, at any time during a mediation process, request the mediator to take on the role of conciliator, thus converting the process into a conciliation process.

Head 8. – Duty on mediator to provide information on training etc.

Provide that:

8. (1) A mediator shall, prior to the commencement of the mediation process, provide parties to the process with details of his or her training and experience in mediation matters.

(2) A mediator shall, where requested by a party, provide that party with the following:

- (a) details of any specialist qualifications, including training in screening techniques to assess the appropriateness of mediation, which may be relevant to the mediation process;
- (b) details of continuing professional development (if any) undertaken by him or her;
- (c) a copy of the code of practice (if any) under Head 9 to which the mediator adheres.

Explanatory Note:

Subhead (1) provides that the mediator must, before the commencement of the process, provide details of his training and experience in mediation to all parties. This is in line with accepted practice as set out in various codes of practice for mediators. If parties are not satisfied with the level of experience and training it is open to them to seek out another mediator.

Subhead (2) provides that, on request, a mediator must provide a party with information regarding any specialist training they might have which would be relevant to the matter at hand, details of any continuing professional development (CPD) they have undertaken and a copy of any code of practice for mediators that they adhere to. It is based on the recommendations, adapted, in paragraph 11.26 of the LRC Report and the text of section 37 of the LRC Report.

The main difference between the text of the Scheme and section 37 of the LRC Bill is the removal of references to family law proceedings. It is considered that it should be a standard requirement for mediators to be competent to assess the appropriateness of mediation in any case. In addition, a requirement to provide information on CPD has been included.

Head 9 - Code of practice for mediators

Provide that

9. (1) Subject to subhead (3), the Minister may—

- (a) prepare and publish a code of practice, or
- (b) approve of a code of practice drawn up by another body,

for the purpose of setting and maintaining standards for the provision and operation of mediation services.

(2) Without prejudice to the generality of subhead (1), a code of practice may, in particular, include provisions in relation to:

- (a) maintaining the confidentiality of the mediation process;
- (b) appropriate ethical standards;
- (c) qualification requirements, including levels of training and experience;
- (d) procedures for the operation of mediation processes;
- (f) the manner in which fees and costs are to be determined;
- (g) procedures for redress in the event of dissatisfaction with the conduct of the mediation process.

(3) Before publishing or approving of a code of practice under this section, the Minister—

- (a) shall make available in such manner as he or she considers appropriate a draft of the code and allow persons such period as the Minister may determine, being not less than 30 days from the date of making such draft available, within which to make representations in writing to him or her in relation to it, and.
- (b) having considered the representations (if any) received, consent to its publication or approval, with or without modifications.

(4) Where the Minister publishes or approves of a code of practice under this section, he or she shall cause a notice to that effect to be published in Iris Oifigiúil and such notice shall specify the date from which the code shall have effect.

(5) Subject to subsection (6), the Minister may—

- (a) amend or revoke a code of practice published under this Head, or
- (b) withdraw approval of any code of practice approved of under this Head.

(6) Subsection (3) shall, with all necessary modifications, apply to a code of practice that the Minister intends to amend or revoke, or withdraw his or her approval of, under subsection (5) as subsection (3) applies to a code of practice that the Minister proposes to publish or approve of under this section.

(7) Where the Minister amends or revokes, or withdraws his or her approval of, a code of practice published or approved of under this section, the Minister shall cause a notice to that effect to be published in *Iris Oifigiúil* specifying—

(a) the code to which the amendment, revocation or withdrawal of approval, as the case may be, relates and, if applicable, particulars of the amendment,

(b) the date from which the amendment, revocation or withdrawal of approval, as the case may be, shall have effect.

Explanatory Note

Subhead (1) provides that a code of practice designed to set standards in relation to the practice of mediation may be prepared and published by the Minister or, if the code has been drawn up by some other body, be approved of and published by the Minister.

Subhead (2) lists certain aspects of mediation which may be included in any code of practice published under this section.

Subhead (3) provides that the Minister must make any draft code available for consultation and, following the receipt of representations (if any), consent to the publication or approval of the code with or without modifications.

Subhead (4) provides that the Minister shall place a notice in *Iris Oifigiúil* regarding the publication of the code and specifying the date on which the code comes into effect. Subhead (5) provides for the amendment, revocation or withdrawal of a code of practice. Subhead (6) provides that, prior to an amendment, revocation or withdrawal of a code, a consultation process shall be entered into. Subhead (7) provides that the Minister shall insert a notice in *Iris Oifigiúil* where a code has been amended, revoked or withdrawn and the notice shall specify the date on which the amendment, revocation or withdrawal comes into effect.

Head 10 - Mediation communications to be confidential

Provide that:

10. (1) Subject to this Head, mediation communications shall be confidential and shall not be admissible as evidence in any court or other proceedings except where, in the case of a mediation communication of a party, confidentiality is expressly waived by all the parties.

(2) Notwithstanding subhead (1), confidentiality shall not apply—

- (a) where disclosure of the content of a mediation communication is necessary in order to implement or enforce a mediation agreement,
- (b) where disclosure is necessary to prevent physical or psychological injury to a party,
- (c) where disclosure is required by law,
- (d) where a mediation communication is used to—
 - (i) attempt to commit a crime,
 - (ii) commit a crime,
 - (iii) conceal a crime, or
 - (iv) threaten a party to the mediation process,
- (e) to a mediation communication which is sought or offered to prove or disprove a civil claim concerning the negligence or misconduct of a mediator occurring during a mediation process, or a complaint to a professional body concerning such negligence or misconduct.

(3) Evidence introduced into or used in a mediation process that is otherwise admissible or subject to discovery in civil proceedings shall not be or become inadmissible or protected by privilege in such proceedings solely because it was introduced into or used in mediation.

Explanatory note

This Head is intended to implement the LRC's recommendations in paragraph 3.42 that a form of confidentiality should apply to communications made during mediation processes.

Subhead (1)

Confidentiality will apply mediation communications except where a communication has been expressly waived by all the parties; the provisions in subhead (2) also override the confidentiality condition in certain circumstances.

Subhead (2)

This broadly implements the recommendation in paragraph 3.70 of the LRC Report and specifies the circumstances where the confidentiality does not apply. These circumstances include:

- where disclosure of the mediation communication is necessary to implement any agreement arising from the mediation;
- where disclosure is necessary to prevent physical or psychological injury to a party,
- where disclosure is required by law,
- where the mediation communication is used in criminal activity;
- where the communication is needed to prove or disprove a civil claim relating to alleged negligence or misconduct of a mediator during the mediation.

Subhead (3)

This implements the recommendation in paragraph 3.71 that evidence introduced into or used in a mediation that is otherwise admissible or subject to discovery in civil proceedings outside mediation shall not be or become inadmissible or protected by privilege in such proceedings solely because it was introduced into or used in a mediation process.

Head 11 - Enforceability of mediation agreements

Provide that:

11. (1) The parties involved in a mediation process shall determine—

- (a) if and when an agreement has been reached between them, and
- (b) whether the agreement is to be enforceable between them.

(2) Notwithstanding subhead (1) and subject to subhead (3), an agreement in writing signed by the parties and by the mediator shall have effect as a contract between the parties except where it is expressly stated to have no legal force until incorporated into a formal legal agreement or contract to be prepared by either party's solicitor and signed by the parties.

(3) Without prejudice to section 8 and 8A (inserted by section 20 of the Status of Children Act 1987) of the Family Law (Maintenance of Spouses and Children) Act 1976, a court may, on the application of the parties to any written agreement reached at the conclusion of a mediation process, enforce its terms where it is satisfied that—

- (a) the agreement adequately protects the rights and entitlements of the parties and their dependents (if any),
- (b) the agreement is based on full and mutual disclosure of assets, and
- (c) a party to the agreement has not been overborne or unduly influenced by any other party or parties in reaching the agreement.

(4) Where an agreement referred to in subhead (2) relates to the guardianship, custody or access to a child, a court in determining any application with regard to the agreement shall be bound by section 3 of the Guardianship of Infants Act 1964.

Explanatory note

This is based on sections 10, 17, 22 and 25 of the LRC Bill.

Subhead (1)

This Head implements the recommendation in paragraph 4.91 that the parties alone have the power to determine whether an agreement has been reached and the manner in which it becomes enforceable.

Subhead (2)

This implements the recommendation in paragraph 4.95 that a mediated agreement is enforceable as a contract at law where it is in writing and signed by all the parties and the mediator. However, this will not apply where it is expressly stated to have no legal

force until incorporated into a formal legal agreement or contract to be prepared by either party's solicitor and signed by the parties. It is also subject to situations referred to in subhead (3), where the subject matter of the dispute may require a court order. This can arise, for example, in family law disputes where specific aspects of a case may require court approval of any settlement.

Subhead (3)

This implements the recommendation in paragraphs 4.100 (and 6.47 in the case of an agreement in a family law dispute) that a court may, on the application of the parties to any written agreement reached at mediation, enforce the agreement. Under paragraphs (a) to (c), the court must be satisfied that the agreement adequately protects the rights or entitlements of the parties and their dependents (if any), that the agreement is based on full and mutual disclosure of assets, and that one party has not been unduly influenced or coerced another party in reaching the agreement.

The LRC text included an additional provision at sections 17(2) and 25(2): “(and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland, including Article 41.3.2°)”. This was intended to cover, for example, any agreement connected with a divorce (which is subject to the requirements of Article 41.3.2° of the Constitution and the Family Law (Divorce) Act 1996) or connected with the sale of goods (which is subject to the Sale of Goods and Supply of Services Acts 1893 and 1980 and Regulations such as the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI No.27 of 1995)). It has been omitted from the General Scheme as it appears to be covered by the requirement on the court to “adequately protect” the “rights or entitlements of the parties and their dependents”.

Subhead (4)

Subhead (4) relates specifically to section 3 of the Guardianship of Infants Act 1964 which provides that in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.

Head 12 - Court inviting parties to consider mediation

Provide that:

12. (1) A court may—
 - (a) on the application of a party involved in civil proceedings, or
 - (b) of its own motion where it considers it appropriate having regard to all the circumstances of the case—
 - (i) invite the parties to use mediation to settle the dispute,
 - (ii) for this purpose direct the parties to attend an information session on the use and operation of mediation, and
 - (iii) draw the attention of the parties to the possibility of staying court proceedings under Head 15 to facilitate such mediation.
- (2) Where the court invites the parties to use mediation or directs the parties to attend an information session on their use and the parties decide to enter a mediation process, the court—
 - (a) shall adjourn the proceedings,
 - (b) may make an order extending the time for compliance by a party with any provision of the relevant rules of court or of any order of the court in the proceedings,
 - (c) may make such other orders or give such directions as the court considers necessary to facilitate the effective use of mediation
- (3) The provisions of this Act shall apply to any mediation arising from an invitation or direction under subhead (1).
- (4) An application by a party under subhead (1) shall be made by motion to the court on notice to the opposing party not later than 28 days before the date on which the proceedings are first listed for hearing and shall, unless the court otherwise orders, be grounded upon an affidavit sworn by or on behalf of the party.
- (5) In deciding whether it is appropriate to make an invitation under subhead (1), the court shall consider, in particular, whether mediation has a reasonable prospect of success and whether it is likely to assist the parties in resolving their dispute or an issue in the dispute.

(6) The power conferred by subhead (1) is without prejudice to any other discretionary power which the court may exercise at any time during the course of proceedings with a view to facilitating settlement of a dispute.

Explanatory note

This Head is based on section 16 of the LRC Bill and also draws on S.I. No. 502 of 2010 which amended the Rules of the Superior Courts to make provision for mediation and conciliation to be considered by the parties.

Subhead (1)

This implements the recommendation in paragraph 4.62 that a court may, either on the application of any party involved in proceedings or of its own motion, and where the court considers it appropriate having regard to the circumstances of the case, invite the parties to consider using mediation to settle the proceedings.

It also draws from S.I. No. 502 of 2010 which introduced a new Order 56A into the Rules of the Superior Courts. A key change in Order 56A is that the court can “direct” rather than “invite” the parties to attend an information session. This underscores the proposition that the parties can be directed to attend an information session on ADR but ADR processes, being voluntary, cannot be imposed on the parties.

Subhead (2)

This implements the recommendation in paragraph 4.63 that where the parties decide, on the basis of the court’s invitation, to use mediation, the court must adjourn the proceedings and may make an order extending the time for compliance by any party with any provisions of the relevant Rules of Court or of any order of the court in the proceedings, and may make such orders or give such directions as the court considers will facilitate the effective use of mediation.

Subhead (3)

This implements the recommendation in paragraph 4.63 that where the parties decide, on the basis of the court’s invitation, to use mediation, the provisions of the General Scheme will apply.

Subhead (4)

This implements the recommendation in paragraph 4.64 of the LRC Report. The wording is based on Rule 3 of Order 56A and requires the application to be made not later than 28 days before the date on which the proceedings are first listed for hearing, to be on motion to the court on notice to the other party or parties and, unless the court directs otherwise, be grounded in an affidavit.

Subhead (5)

This implements the recommendation in paragraph 4.71 that, in deciding whether it is appropriate to invite the parties to engage in mediation under subhead (1), the court must consider, in particular, whether mediation has a reasonable prospect of success and whether it is likely to assist the parties in resolving their dispute or issues in the dispute.

Subhead (6)

This confirms that the power conferred by subhead (1) is without prejudice to any other power of the court concerning its role in advising parties of the benefit of any form of process to settle their dispute. This includes existing statutory powers of the courts in:

- family law proceedings under the Family Law Act 1995 or the Family Law (Divorce) Act 1996;
- commercial cases in the High Court's Commercial Court List under the Rules of the Superior Courts 1986 (SI No.16 of 1986) (as amended by the Rules of the Superior Courts (Commercial Proceedings) Rules 2004 (SI No.2 of 2004)); or
- personal injuries actions under the Civil Liability and Courts Act 2004.

This also includes the use of the court's inherent powers to regulate its own proceedings of encouraging parties to settle civil proceedings. As the LRC notes in the Report, the courts often use their existing inherent powers to encourage resolution of disputes and this can take the form simply of adjourning the proceedings at an opportune point with a suggestion that the parties might consider resolving the dispute, or aspects of it, during the adjournment.

Head 13 - Mediator report to court

Provide that:

13. (1) Where, following a court intervention under Head 12, the parties engage in a mediation process, the mediator shall prepare and submit a report on the outcome of the process to the court without comment or recommendation.

(2) Without prejudice to Head 10, the report under subhead (1) shall set out—

- (a) a statement as to whether or not an agreement has been reached between the parties, and
- (b) where an agreement has been reached, a statement of the terms of the agreement signed by the parties.

(3) A copy of a report prepared under subhead (1) shall be given to the parties at least 7 days prior to its submission to the court, except where otherwise agreed or directed by the court.

Explanatory note

Section 19 of the LRC Bill provided that the content of a report to the court, if any, by a mediator or conciliator shall be limited to a neutral summary of the outcome of the mediation or conciliation and this was intended to reinforce the general confidentiality privilege of a mediator provided for under Head 10. The requirement to inform the courts on these lines does not impinge on the overall confidentiality of the mediation process. The words “Without prejudice to Head 10,” in subhead (2) are intended to put this beyond doubt.

Head 14 - Effect of mediation on limitation and prescription periods

Provide that:

14. (1) In reckoning a period of time for the purposes of a limitation period specified by the Statute of Limitations 1957 or the Statute of Limitations (Amendment) Act 1991, the period beginning on the day on which the dispute is referred to a mediation process and ending on the day which is 30 days after the mediation process ends shall be disregarded.

(2) The mediator shall inform the parties in writing of the date on which a mediation process ends.

Explanatory note

This Head is based on section 11 of the LRC Bill.

Subhead (1)

This is based on section 50 of the Personal Injuries Assessment Act 2003 and makes provision for disregarding the Statutes of Limitations where a dispute has been referred to mediation. This approach is taken in S.I. 209 of 2011 giving effect to the Mediation Directive. It differs from the approach in the LRC draft Bill which allows the parties to agree to suspend the running of any relevant limitation period from the beginning of the mediation to the termination of the mediation, and such agreement in writing would operate to suspend the running of any relevant limitation period.

Subhead (2)

This requires the mediator to inform the parties of the date on which the mediation concludes and is in line with Article 8 of the 2008 EU Directive 2008/52/EC on Mediation in Cross-Border Civil and Commercial Matters.

Head 15 - Staying court proceedings to facilitate mediation process

Provide that:

15. (1) In this Head, “mediation clause” means a clause in writing entered into by the parties in which they agree to submit to mediation a dispute which has arisen, or which may arise, between them in respect of a defined legal relationship, whether contractual or not.

(2) Where—

(a) parties have entered into a mediation clause, and

(b) a party commences court proceedings in respect of a matter covered by it,

a party to the proceedings may at any time after an appearance has been entered and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.

(3) The court shall make an order staying such proceedings if it is satisfied that—

(a) there is not sufficient reason why the matter in respect of which the proceedings have been commenced should not be dealt with in accordance with the mediation clause, and

(b) the applicant party was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for proper implementation of the mediation clause.

(4) In determining whether subhead (3)(a) applies, the court shall have regard to whether—

(a) the mediation clause is inoperable, otherwise incapable of being performed or void (including on the ground that the clause purports to deal with a matter to which this Act does not apply or is not otherwise permitted under Head 3), or

(b) the dispute between the parties concerns a matter which is subject to the mediation clause.

(5) It is a matter for the court to determine the severability of a mediation clause having regard to the circumstances of the case.

(6) A mediation clause may form part of a written contract between the parties or be in the form of a separate written agreement between them.

Explanatory note

This Head is based on section 13 of the LRC Bill and implements the recommendations in paragraphs 4.18, 4.19 and 4.20 of the LRC Report that a court must, in general, stay any proceedings where the parties have agreed in writing to submit to mediation any dispute which has arisen or which may arise between them, using a mediation clause. This mandatory requirement, which mirrors a court's powers under section 5 of the Arbitration Act 2010, is subject to certain conditions.

Subheads (2) to (4) are based on section 136 of the Pensions (Amendment) Act 2002 and are more easily understandable than those at section 13(2) and (3) of the LRC Bill.

Subhead (1)

This is based on sections 13(1) and (6) of the LRC Bill and contains a definition of "mediation clause".

Subhead (2)

This provision means that a party who has entered into a mediation clause may apply to the court to stay any proceedings subsequently commenced in respect of any of the matters which are the subject of the clause. The LRC Bill provides that the application to the court to stay the proceedings can be made at "any time after the proceedings have been commenced". However the Head provides that such application can only be made "at any time after an appearance has been entered, and before delivering any pleadings or taking any other steps in the proceedings". This type of limitation is considered necessary as the LRC wording could allow for an application at the time when the court has considered submissions from the parties and is about to deliver its verdict.

Subhead (3)

Under this subhead, the court must stay any proceedings where it is satisfied that there is no sufficient reason why the matter in respect of which the proceedings have been commenced should not be dealt with in accordance with the mediation clause and the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper implementation of the mediation clause.

Subhead (4)

This is based on section 13(3) of the LRC Bill and sets out the matters that the court must take into account in determining whether there is no sufficient reason why the matter in respect of which the proceedings have been commenced should not be dealt with in accordance with the mediation clause.

Subhead (5)

This implements the recommendation in paragraph 4.24 that it remains a matter for the court, having regard to the circumstances of each individual case, to determine the severability of mediation clauses.

Subhead (6)

This is based on section 13(5) of the LRC Bill and provides that a mediation clause may form part of a written contract between the parties or be in the form of a separate written agreement between them.

Head 16 - Fees and costs

Provide that:

16. (1) Unless otherwise agreed or ordered by the Court –

(a) the parties to the mediation shall pay the mediator and share equally the fees and costs of the mediation,

(b) the fees and costs of the mediation shall be identified in advance of mediation, and unless otherwise agreed to, be furnished by the parties to the mediator or held on account by an agreed third party until the conclusion of the mediation and thereafter paid to the mediator,

(c) a mediator who withdraws from a case shall return any unearned fee or unspent costs to the parties.

(2) The fees and costs associated with mediation—

(a) shall be reasonable and proportionate to the importance and complexity of issues at stake and to the amount of work carried out by the mediator, and

(b) shall not be contingent on the outcome of the process.

(3) Before the agreement referred to in Head 6(2) is signed by the parties, the mediator shall explain to the parties the basis on which fees and costs referred to in subhead (1) will be charged and borne by the parties.

(4) Nothing in this Head shall be interpreted as preventing a party to civil proceedings from submitting to taxation of costs any bill of costs arising from the proceedings.

Explanatory note

This Head reflects the LRC's view in paragraph 3.101 regarding information on costs for mediation.

Subhead (1)

Subhead (1) provides general guidance in relation to the payment of fees and costs associated with the mediation. It states that, unless otherwise agreed between the parties or ordered by the courts, the fees and costs shall be shared equally by the parties, shall be paid in advance and, in the event that the mediator withdraws from the case any unearned fee or unspent cost shall be returned to the parties.

Subhead (2)

Paragraph (a) implements the recommendation in paragraph 3.104 of the LRC Report that the financial cost of mediation be reasonable and proportionate to the importance and complexity of the issue at stake and to the amount of work carried out by the mediator. Paragraph (b) is not in the LRC Bill but is referred to in paragraph 3.102 of the LRC Report: “in most codes of practice it is stressed that the fees charged by a mediator should not be contingent on the outcome of the mediation”.

Subhead (3)

This is a requirement on the mediator to explain the basis for charging the fees and costs and is linked to the written agreement referred to in Head 6(2). It gives effect to paragraph 3.103 that, in general, the financial cost of mediation is to be borne by the parties on the basis of a written agreement to that effect entered into at the beginning of the mediation process.

Subhead (4)

This is based on section 9(2)(b) of the LRC Bill and preserves the entitlement of a party involved in civil proceedings in court to submit a bill of costs to taxation of costs. Inclusion of such a provision is questionable since it relates to court proceedings and not the mediation.

Head 17 - Factors to be considered by court in awarding costs²

Provide that:

17 (1) In awarding costs in respect of proceedings referred to in Head 12, a court may, where it considers it just, have regard to—

(a) any unreasonable refusal of a party to consider using mediation where such a process had, in the opinion of the court, a reasonable prospect of success, and

(b) any unjustified refusal of a party to attend an information session following a direction under Head 12(1).

(2) In considering whether a refusal referred to in subhead (1)(a) is unreasonable, or refusal to attend an information session referred to in subhead (1)(b) is unjustified, the court shall have regard to such matters as it considers appropriate, including—

(a) whether the costs of mediation would have been disproportionately high, and

(b) whether any delay in setting up and attending mediation would have been prejudicial to a party.

(c) the overall circumstances relating to the proceedings and the conduct of the parties.

(3) Notwithstanding subhead (1), this Head shall not apply to family law proceedings which are heard in circumstances:

(a) where a party reasonably feared for his or her safety,

(b) where a party reasonably feared for the safety of a dependent child,

(c) where a party lacked resources for his or her own support,

(d) where a party lacked resources for the support of a dependent child

(e) where a party reasonably feared the loss of the family home, or that the family home would be rendered uninhabitable or the dissipation or disposal of assets to which proper claim could be made, or

(f) where a delay of court proceedings could otherwise be detrimental to the welfare of a child.

² S.I. No. 502 of 2010 amended Order 99 of the Rules of the Superior Courts to allow the Supreme Court or the High Court, in determining costs, to take into account a person's refusal or failure without good reason to participate in any ADR process.

Explanatory note

Subhead (1)

Paragraph (a) implements the recommendation in paragraph 4.115 of the LRC Report that, where a court has invited parties to consider using mediation under Head 12, the court, in awarding costs in the proceedings may, where it considers it just, have regard to any unreasonable refusal of any party to consider using mediation where such a process had, in the court's opinion, a reasonable prospect of success. Paragraph (b) is not proposed in the LRC Report but is considered a useful addition. It allows the court to have regard to any unjustified failure of a party to attend an information session following a direction under Head 12(1). It is reasonable that such a party should be at risk of additional costs if he or she fails to comply with the direction of the court to attend the information session.

This subhead is subject to subhead (3) which provides that it does not apply to certain family law proceedings.

Subhead (2)

This is based on paragraph 4.111 of the LRC Report. Without prejudice to the generality of matters which the court may take into account, it specifies three factors which may be taken into account.

Subhead (3)

This subhead outlines the circumstances where the provisions of subhead (1) do not apply in family law proceedings.

Head 18 - Involvement of child in mediation in family law dispute

Provide that:

18 (1) If in a family law dispute a mediator considers it appropriate to involve the child of a party directly in the mediation process, the mediator shall—

- (a) obtain the agreement of the parties,
- (b) obtain the consent of the child, and
- (c) provide or ensure the provision of appropriate facilities for involvement of the child in the process.

(2) In a family law dispute, a mediator may, having obtained the agreement of the parties, allow a suitably qualified adult to participate as a non-party participant on behalf of a child.

(3) In this Head, a “suitably qualified adult” means a person who —

- (a) has been appointed guardian *ad litem* for the child,
- (b) is over the age of 18 years and who is responsible for the care and welfare of the child, or
- (c) has been appointed by the Health Service Executive under the Child Care Acts 1991 to 2007 to care for the child.

Explanatory note

This is based on section 23 of the LRC Bill. As drafted by the LRC, this provision gives a very broad power to the mediator to involve a child in the mediation process. It allows the mediator to obtain the consent of the child for this purpose. This gives rise to issues concerning the age of the child from whom consent is being sought and the capacity of that child to give consent. Legal advice will be required as to whether the Head should set out specific safeguards in relation to the child or dependent and the process for obtaining consent. The reasoning of the LRC is contained in paragraphs 6.48 to 6.55 of their Report.

Subhead (1)

This is intended to implement the recommendation in paragraph 6.54 of the LRC Report that if a mediator in a family law dispute considers that it is appropriate to involve any child directly in the mediation, the mediator must obtain the consent of the child and must provide, or ensure the provision of, appropriate facilities for this purpose.

The text of the LRC Bill has been modified to include, at paragraph (a) a provision requiring the agreement of the parties to the involvement of the child in the mediation. This is consistent with the proposition that the process is voluntary and a party may withdraw at any time. In these circumstances, it is not enough for the mediator to

“consult” with the parties in relation to the proposal to involve the child but must obtain their agreement.

Subhead (2)

This is intended to implement the recommendation in paragraph 6.55 that a mediator (having consulted the parties) may allow a suitably qualified adult (which may include a person who has been appointed as a guardian *ad litem*) to participate as a non-party participant on behalf of a child. The text of the LRC Bill has been modified to require the agreement of the parties to the involvement of the “suitably-qualified adult” in the mediation. This reinforces the voluntary nature of mediation.

Subhead (3)

This defines what is meant by “suitably qualified adult”. It refers to a guardian *ad litem*, who will have been appointed by the court; a person over 18 years of age who is responsible for the care and welfare of the child, e.g. a relative who has been looking after the child; or a person appointed by the HSE under the Child Care Acts.

Head 19: Liability for civil damages

Provide that:

19. A mediator acting in accordance with the provisions of this Bill, shall not be liable for civil damages for any statement, decision or omission made in the process of mediation unless the act or omission is made –

- (a) in bad faith with malicious purpose, or
- (b) in a manner exhibiting wilful or wanton disregard of human rights or for an individual's safety, or
- (c) in the case of a dispute relating to a child or children without due regard to the welfare and safety of a child or children.

Explanatory Note

This head provides that, save in certain stated circumstances, a mediator providing mediation according to the provisions of this Bill shall not be liable for civil damages. The consideration is that the mediator will be performing a quasi-judicial function under the Bill and therefore should have protection from civil liability.

It should also be noted that, under Head 9(3), evidence introduced into or used in a mediation that is otherwise admissible or subject to discovery in civil proceedings outside mediation shall not be or become inadmissible or protected by privilege in such proceedings solely because it was introduced into or used in a mediation process

Head 20 - Amendment of Civil Liability and Courts Act 2004

Provide that:

20. The Civil Liability and Courts Act 2004 is amended at section 15(1) by inserting “or upon its own initiative” after “party to a personal injuries action”.

Explanatory note

This Head is based on section 27 of the LRC Bill.

Section 15 of the Civil Liability and Courts Act 2004 provides that a court may, on the request of any party to a personal injuries action, direct that the parties to the action meet to discuss and attempt to settle the action at a mediation conference. It implements the recommendation in paragraph 7.32 that section 15 of the 2004 Act be amended to provide that a mediation conference may also be ordered by the court on the court’s own initiative.