DRAFT MEDIATION AND CONCILIATION BILL 2010

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DRAFT MEDIATION AND CONCILIATION BILL 2010

BILL

Entitled

AN ACT TO FACILITATE THE SETTLEMENT OF CIVIL AND COMMERCIAL DISPUTES BY MEDIATION AND CONCILIATION; TO SET OUT THE PRINCIPLES APPLICABLE TO MEDIATION AND CONCILIATION IN GENERAL; TO SET OUT SPECIFIC ARRANGEMENTS FOR MEDIATION AND CONCILIATION CONNECTED WITH CIVIL PROCEEDINGS IN COURT; TO SET OUT SPECIFIC ARRANGEMENTS FOR MEDIATION AND CONCILIATION IN CONNECTION WITH PARTICULAR DISPUTES; TO GIVE EFFECT TO DIRECTIVE NO. 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 MAY 2008 [1] ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS; TO PROVIDE FOR A STATUTORY CODE OF CONDUCT FOR MEDIATORS AND CONCILIATORS AND FOR TRAINING ISSUES; AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

PRELIMINARY

Short title and commencement

1.—(1) This Act may be cited as the Mediation and Conciliation Act 2010.

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

Explanatory note
This is a standard section setting out the short title and commencement arrangements.

Interpretation and non-application to arbitration

2.— (1) In this Act —

"Code of Conduct for Mediators and Conciliators" has the meaning assigned by *section 36*;

[1] O.J. No. L.136, 24/5/2008, p.3

"conciliation" has the meaning assigned by *section 4(2)*;

"cross-border dispute" has the meaning assigned by *section 30*;

"Directive on Cross-Border Mediation in the European Union" means Directive No. 2008/52/EC of the European Parliament and of the Council of 21 May 2008[2] on Certain Aspects of Mediation in Civil and Commercial Matters;

"dispute" has the meaning assigned by *section 4(4)*;

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

"family law proceedings" means proceedings under a "family law enactment," "civil partnership law proceedings" or "cohabitancy proceedings," each within the meaning of *section 5* of the *Courts (Consolidation and Reform) Bill 2010*;[3]

"mediation" has the meaning assigned by *section 4(1)*;

"mediation or conciliation communications" include —

(*a*) statements and proposals that are made orally, through conduct, or in writing or other recorded activity by a mediator, conciliator, party or non-party participant, and

(*b*) communications to initiate mediation or conciliation and other non-session communications arising out of or in connection with a mediation or conciliation;

"Minister" means the Minister for Justice and Law Reform;

"non-party participant," in the context of a mediation or conciliation, includes a qualified legal practitioner, an expert witness, a potential party or friend of a party or potential party,

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

(2) Subject to *section 35*, this Act does not apply to arbitration within the meaning of the Arbitration Act 2010.

Explanatory note
Subsection (1) sets out a number of definitions for the purposes of the Bill.

"Code of Conduct for Mediators and Conciliators": this definition refers to the statutory Code of Conduct for Mediators and Conciliators to be made under *section 36* of the Bill, which implements the recommendation in paragraph 11.07.

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2 O.J. No. L.136, 24/5/2008, p.3

3 The reference to *section 5* of the *Courts (Consolidation and Reform) Bill 2010* is to the section in the draft *Courts (Consolidation and Reform) Bill 2010* in the Commission's *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

"Conciliation": the definition of conciliation (see *section 4(2)*) implements the recommendation in paragraph 2.44.

"Cross-border dispute": the definition of "cross-border dispute" (see *section 30*) implements the recommendation in paragraph 2.57 and refers to the disputes dealt with in the 2008 EU Directive on Certain Aspects of Mediation, 2008/52/EC, which *Part 5* of the Bill proposes to implement.

"Dispute": the definition of dispute (see *section 4(4)*) implements the recommendation in paragraph 2.51, which is based on the general definition of "civil and commercial matters" in the 2000 EU "Brussels I" Regulation No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and (in respect of mandatory statutory requirements) the text in the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (SI No.27 of 1995).

"Family law proceedings": the definition of "family law proceedings" for the purposes of *Part 5, Chapter 1* of the Bill refers to the definition in *section 5* of the draft *Courts (Consolidation and Reform) Bill 2010* in the Commission's *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

"Mediation": the definition of mediation (see *section 4(1)*) implements the recommendation in paragraph 2.37.

"Mediation or conciliation communications": the definition of mediation or conciliation communications, which is connected with the specific form of confidentiality privilege for mediation and conciliation set out in *section 7*, implements the recommendations in paragraphs 3.46 and 3.47.

"Non-party participant": the definition of non-party participant implements the recommendation in paragraph 3.54: see also *section 5(3)* on the involvement of a non-party participant in a mediation or conciliation.

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

Subsection (2) implements the recommendation in paragraph 2.16 that, to avoid any doubt, the Bill does not, in general, apply to or affect arbitration within the meaning of the *Arbitration Act 2010*. This is subject to the provisions in *section 35* of the Bill, which involve the implementation of Article 8 of the 2008 EU Directive on Certain Aspects of Mediation, 2008/52/EC.

PART 2

MEDIATION AND CONCILIATION: GENERAL

Purpose of Part 2

3.— This Part sets out—

(*a*) the general scope of mediation and conciliation,

(*b*) the role of the parties, mediators, conciliators and non-party participants,

(*c*) the general principles that apply in mediation and conciliation,

(*d*) the nature and scope of the specific confidentiality privilege that applies in mediation and conciliation,

(*e*) the main elements of the mediation and conciliation process,

(*f*) the financial cost of mediation and conciliation,

(*g*) the enforceability of mediation and conciliation agreements in general (subject to the specific provisions in *Part 3*) and

(*h*) the effect of mediation and conciliation on statutory limitation periods concerning civil proceedings in court.

Explanatory note

This section describes the general purposes of *Part 2* of the Bill. Purpose clauses have been used from time to time, for example, in the *Education Act 1998.* They have also been used in the draft *Courts (Consolidation and Reform) Bill 2010* in the Commission's *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010).

Mediation and conciliation: role of parties and general scope

4.— (1) For the purposes of this Act, "mediation" means a facilitative and confidential structured process in which the parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute with the assistance of an independent third party, called a mediator.

(2) For the purposes of this Act, "conciliation" means a facilitative and confidential structured process in which an independent third party, called a conciliator, actively assists the parties in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.

(3) The process of mediation and of conciliation may be used by the parties either —

(*a*) on their own initiative, that is, independently of any civil proceedings in court, or

(*b*) arising from an initiative occurring after the initiation of civil proceedings in court, whether that initiative arises from the parties or from the court.

(4) "Dispute" means any civil or commercial dispute that could give rise to civil liability, but—

(*a*) this Act does not apply to any mediation, conciliation or other dispute resolution process engaged in under the statutory remit of the Labour Relations Commission or the Labour Court (notwithstanding which, this Act does apply to any dispute arising within an employment context that has not been referred to the dispute resolution processes of the Labour Relations Commission or the Labour Court), and

(*b*) without prejudice to *subparagraph (a)*, and subject to *Part 4*, this Act is not to be interpreted as replacing any mediation, conciliation or other dispute resolution process which is provided for in accordance with any other enactment (but this Act may, with any necessary modification, be adapted for any such process under any other enactment), and

(*c*) without prejudice to *section 17*, this Act is not to be interpreted as permitting any mediation or conciliation process to negate or avoid any rights or obligations in respect of which the parties are not free to decide themselves under the relevant applicable law, including —

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

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

Explanatory note

Subsection (1) implements the recommendation in paragraph 2.37 that mediation should be defined as a facilitative and confidential structured process in which the parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute with the assistance of an independent third party, called a mediator.

Subsection (2) implements the recommendation in paragraph 2.44 that conciliation should be defined as a facilitative and confidential structured process in which an independent third party, called a conciliator, actively assists the parties in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.

Subsection (3) implements the recommendation in paragraph 2.51 that mediation and conciliation may be used by parties either on their own initiative, that is, independently of any civil proceedings in court, or, alternatively, arising from an initiative occurring after the initiation of civil proceedings (whether the initiative arises from the parties or the court).

Subsection (4) implements the recommendations in paragraphs 2.51, 2.52 and 2.53 that the legislation should, in general, apply to civil and commercial disputes. This term is not confined to the scope of "civil and commercial matters" within the meaning of the 2000 EU "Brussels I" Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which determines the scope of "cross border disputes" under the 2008 EC Directive on Mediation, which *Part 5* of the Bill proposes to implement. Nonetheless, the scope of the term "civil and commercial matters" in this section is subject to three provisos. The first proviso relates to where employment disputes are being dealt with through the mediation or conciliation processes of the Labour Relations Commission or the Labour Court (any other employment-related dispute may, however, use the processes in this Bill). The second proviso is that the Bill (with the exception of *Part 4*, which contains additional provisions for family law and personal injuries disputes) is not intended to be interpreted as replacing any mediation, conciliation or other dispute resolution process which is already provided for in accordance with any other enactment. A number of existing statutory provisions already provide

for varying forms of mediation or dispute resolution outside the scope of civil proceedings in court. These include dispute resolution processes concerning: equality matters under the *Employment Equality Acts 1998 to 2008* and the *Equal Status Acts 2000 to 2008*; landlord and tenant disputes under the *Residential Tenancies Act 2004*; assessment of needs under the *Disability Act 2005*; and resolution of certain complaints by mediation under the *Medical Practitioners Act 2007*. The section provides that, in such instances, this Bill may, with any necessary modification, be adapted for any such process under any such other enactment. The third proviso is that mediation or conciliation cannot be used to avoid any mandatory constitutional or statutory requirements. This part of the section takes account of the provisions in *section 17* of the Bill on the enforceability of mediation and conciliation agreements, and has also adapted the comparable text used in the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (SI No.27 of 1995).

General role of mediator, conciliator and non-party participant

5.— (1) A mediator and, as the case may be, a conciliator shall comply with the Code of Conduct for Mediators and Conciliators published under *section 36*.

(2) A mediator may not, at any stage in the mediation process, make a proposal to the parties to resolve the dispute.

(3) A conciliator may, at any stage in the conciliation process, make a proposal to the parties to resolve the dispute, but he or she is not empowered to impose such a proposal on the parties.

(4) The parties may agree that a non-party participant be allowed to participate in a mediation or conciliation.

Explanatory note

Subsection (1) implements the recommendation in paragraph 11.15 that a mediator and, as the case may be, a conciliator must comply with the Code of Conduct for Mediators and Conciliators published by the Minister for Justice and Law Reform under *section 36* of the Bill.

Subsection (2) implements the recommendation in paragraph 2.38 that a mediator, by contrast with a conciliator (see *subsection (3)*, below), may not, at any stage in the mediation process, make a proposal to the parties to resolve the dispute.

Subsection (3) implements the recommendation in paragraph 2.45 that a conciliator, by contrast with a mediator may, at any stage in the conciliation process, make a proposal to the parties to resolve the dispute but that he or she is not empowered to impose such a proposal on the parties.

Subsection (4) implements the recommendation in paragraph 3.53 to provide for the involvement in a mediation or conciliation of a "non-party participant," defined (in *section 2* of the Bill) to include a qualified lawyer, expert, potential party or friend of a party or potential party.

General principles that apply to mediation and conciliation

6.— The following principles shall apply to a mediation and to a conciliation under this Act—

(*a*) participation in mediation and conciliation is voluntary, and any party involved in mediation or conciliation, and the mediator or conciliator, may withdraw from the process at any time and without explanation,

(*b*) the specific form of confidentiality privilege set out in *section 7* shall apply to communications made during mediation and conciliation,

(*c*) the parties involved in a mediation or conciliation shall be informed, in accordance with *section 8*, of their right to determine the outcome of the mediation or conciliation,

(*d*) where a dispute has been submitted to mediation or conciliation, the parties, and the mediator and, as the case may be, the conciliator, shall seek to complete the process in the shortest time practicable, relative to the nature of the dispute, and

(*e*) a mediator or conciliator shall be neutral and impartial, including by complying with *section 8(4)*.

Explanatory note

This section implements the recommendation in paragraph 3.04 that the legislation on mediation and conciliation should set out the key principles underlying mediation and conciliation.

Paragraph (a) implements the recommendation in paragraph 3.12 that participation in mediation and conciliation is voluntary, and any party involved in mediation or conciliation, and the mediator or conciliator, may withdraw from the process at any time and without explanation.

Paragraph (b) implements the recommendation in paragraph 3.42 that a specific form of confidentiality privilege (defined in *section 7* of the Bill) shall apply to communications made during mediation and conciliation.

Paragraph (c) implements the recommendation in paragraph 3.89 concerning the right to self-determination, the details concerning which are set out in *section 8(1)*.

Paragraph (d) implements the recommendation in paragraph 3.108 where a dispute has been submitted to mediation or conciliation, the parties, and the mediator and, as the case may be, the conciliator, must seek to complete the process in the shortest time practicable, relative to the nature of the dispute.

Paragraph (e) implements the recommendation in paragraph 3.141 concerning the neutrality and impartiality of a mediator or conciliator: see also the duty to disclose any conflict of interest in *section 8(4)*.

Confidentiality privilege for mediation and conciliation

7.— (1) A party involved in mediation or conciliation may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication.

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

(3) A non-party participant may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication of the non-party participant.

(4) The confidentiality privilege referred to in *subsections (1) to (3)* may be waived during any subsequent civil litigation (and, or alternatively, any recommenced civil proceedings out of which the mediation or conciliation arose) if—

(*a*) in the case of the privilege of a party in *subsection (1)*, it is expressly waived by all parties to the mediation or conciliation,

(*b*) in the case of the privilege of a mediator or conciliator in *subsection (2)*, it is expressly waived by the mediator or conciliator, and

(*c*) in the case of the privilege of a non-party participant in *subsection (3)*, it is expressly waived by the non-party participant.

(5) The confidentiality privilege referred to in *subsections (1) to (3)* does not apply where disclosure of the content of any agreement resulting from mediation or conciliation is necessary in order to implement or enforce that agreement.

(6) The confidentiality privilege referred to in *subsections (1) to (3)* does not apply where disclosure is necessary to prevent physical or psychological injury or ill-health to a party.

(7) The confidentiality privilege referred to in *subsections (1) to (3)* does not apply where disclosure is required by law.

(8) The confidentiality privilege referred to in *subsections (1) to (3)* does not apply where the mediation or conciliation communication is used to attempt to commit a crime, or to commit a crime, or to conceal a crime.

(9) The confidentiality privilege referred to in *subsections (1) to (3)* does not apply to a mediation or conciliation which is sought or offered to prove or disprove a civil claim concerning the negligence or misconduct of a mediator or conciliator based on conduct occurring during a mediation or conciliation, or a complaint to a professional body concerning such negligence or misconduct.

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

Explanatory note

This section implements the Commission's specific recommendations that follow from the general recommendation in paragraph 3.42 (implemented in *section 6(b)* of the Bill) that a specific form of confidentiality privilege shall apply to communications made during mediation and conciliation.

Subsection (1) implements the recommendation in paragraph 3.52 that a party involved in mediation or conciliation may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication.

Subsection (2) implements the recommendation in paragraph 3.52 that a mediator or conciliator may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication.

Subsection (3) implements the recommendation in paragraph 3.52 that a non-party participant may refuse to disclose, and may prevent any other person from disclosing, a mediation or conciliation communication of the non-party participant.

Subsection (4) implements the recommendation in paragraph 3.56 concerning the waiver in any civil litigation of the specific confidentiality privilege that arises in mediation and conciliation.

Subsection (5) implements the recommendation in paragraph 3.70 that the specific confidentiality privilege that arises in mediation and conciliation does not apply where disclosure of the content of any agreement resulting from mediation or conciliation is necessary in order to implement or enforce that agreement.

Subsection (6) implements the recommendation in paragraph 3.70 that the confidentiality privilege that arises in mediation and conciliation does not apply where it is necessary to prevent physical or psychological injury or ill-health to a person.

Subsection (7) implements the recommendation in paragraph 3.70 that the confidentiality privilege that arises in mediation and conciliation does not apply where disclosure is required by law.

Subsection (8) implements the recommendation in paragraph 3.70 that the confidentiality privilege that arises in mediation and conciliation does not apply where the mediation or conciliation communication is used to attempt to commit a crime, or to commit a crime, or to conceal a crime.

Subsection (9) implements the recommendation in paragraph 3.70 that the confidentiality privilege that arises in mediation and conciliation does not apply to a mediation or conciliation which is sought or offered to prove or disprove a civil claim concerning the negligence or misconduct of a mediator or conciliator based on conduct occurring during a mediation or conciliation, or a complaint to a professional body concerning such negligence or misconduct.

Subsection (10) implements the recommendation in paragraph 3.71 that evidence introduced into or used in a mediation or conciliation that is otherwise admissible or subject to discovery in civil proceedings outside of a mediation or conciliation shall not be or become inadmissible or protected by privilege in such civil proceedings solely because it was introduced into or used in a mediation or conciliation.

Mediation and conciliation process

8.— (1) The parties involved in a mediation or conciliation shall be fully informed by the mediator or conciliator—

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

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

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

(2) The parties may, at any time during a mediation process, request the mediator to take on the role of conciliator, thus converting the process into a conciliation process.

(3) The parties may be encouraged by a mediator or conciliator to seek independent advice, including legal advice, before agreeing to or signing any agreement entered into during conciliation or mediation.

(4) A mediator or conciliator shall disclose to the parties any actual or potential conflict of interest he or she may have.

(5) A mediator or conciliator shall ensure, at all stages in the mediation or conciliation process, that a party has the capacity to engage in the process, by reference —

(*a*) in the case of a natural person, to the test of capacity in the *Scheme of the Mental Capacity Bill 2008*,[4] and

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

Explanatory note

Subsection (1) implements the specific recommendations that follow from the general recommendation in paragraph 3.89 (implemented in *section 6 (c)* of the Bill) concerning self-determination, namely, that the parties involved in a mediation or conciliation must be fully informed by the mediator or conciliator: (a) about the process before they agree to participate in it; (b) that their continued participation in the process is voluntary; and (c) that they understand and consent to any agreed outcomes reached in the process.

Subsection (2) implements the recommendation in paragraph 2.39 that the parties may, at any time during a mediation process, request the mediator to take on the role of conciliator, thus converting the process into a conciliation process.

Subsection (3) implements the recommendation in paragraph 3.95 that the parties may be encouraged by a mediator or conciliator to seek independent advice, including legal advice, before agreeing to or signing any agreement entered into during conciliation or mediation.

Subsection (4) implements the specific recommendation in paragraph 3.147 that follows from the general recommendation in paragraph 3.141 (implemented in *section 6 (e)* of the Bill) concerning the neutrality and impartiality of a mediator or conciliator, namely, the requirement to disclose to the parties any actual or potential conflict of interest of the mediator or conciliator.

Subsection (5) implements the recommendation in paragraph 3.84 that a mediator or conciliator must ensure, at all stages in the mediation or conciliation process, that a party, whether an individual or an undertaking, has the capacity to engage in the process.

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[4] This refers to the *Scheme of the Mental Capacity Bill 2008* published by the Department of Justice and Law Reform in September 2008. The Commission understands that a *Mental Capacity Bill* based on the 2008 Scheme of a Bill will be published by the end of 2010 or in early 2011. The proposed mental capacity legislation would implement the key recommendations in the Commission's *Report on Vulnerable Adults and the Law* (LRC 83-2006).

Financial cost of mediation and conciliation

9.— (1) The financial cost of a mediation or conciliation shall, subject to *subsection (2)* and *section 18*, be borne by the parties, and shall be on the basis of a written agreement to that effect entered into at the beginning of the mediation or conciliation.

(2) (*a*) Subject to *paragraph (b)*, the financial cost of mediation and conciliation shall be reasonable and proportionate to the importance of the issue or issues at stake and to the amount of work carried out by the mediator or conciliator.

(*b*) Nothing in *paragraph (a)* shall be interpreted as preventing a party to civil proceedings in the High Court or Circuit Court from submitting to taxation of costs any bill of costs arising from the proceedings.

Explanatory note

Subsection (1) implements the recommendation in paragraph 3.103 that, in general, the financial cost of a mediation or conciliation is to be borne by the parties on the basis of a written agreement to that effect entered into at the beginning of the mediation or conciliation. This is subject to: (a) *subsection (2)*, which sets out a test that the cost be reasonable and proportionate; and (b) *section 18* of the Bill, which provides for costs orders in limited circumstances where parties involved in civil proceedings accept an invitation from a court to consider mediation or conciliation.

Subsection (2) implements the recommendation in paragraph 3.104 that the financial cost of mediation and conciliation be reasonable and proportionate to the importance of the issue at stake and to the amount of work carried out by the mediator or conciliator. It also provides that this is subject to the entitlement of a party involved in civil proceedings in court to submit a bill of costs to taxation of costs ("taxation of costs" involves a decision by a Taxing Master in the High Court or County Registrar in the Circuit Court as to whether the legal costs were reasonable in the circumstances).

Enforceability of mediation and conciliation agreements: general

10.— (1) The parties alone shall determine, either at the beginning of any mediation or conciliation or when agreement (if any) is reached, the enforceability, or otherwise, of any mediated or conciliated agreement that arises from the mediation or conciliation process.

(2) Subject to *subsection (1)* and *section 17*, a mediated or conciliated agreement is enforceable as a contract at law where it is in writing and signed by all the parties and, as the case may be, by the mediator or conciliator.

Explanatory note

Subsection (1) implements the recommendation in paragraph 4.91 that the parties alone have the power to determine, either at the beginning of any mediation or conciliation or when agreement (if any) is reached, the enforceability, or otherwise, of any mediated or conciliated agreement that arises from the mediation or conciliation process. This emphasises the control of the parties over the mediation or conciliation process.

Subsection (2) implements the recommendation in paragraph 4.95 that a mediated or conciliated agreement is enforceable as a contract at law where it is in writing and signed by all the parties and, as the case may be, by the mediator or conciliator. This enforceability is subject to the general requirement in *subsection (1)* concerning the role of the parties to agree enforceability. It is also subject to those situations, referred to in *section 17*, where the subject matter of the dispute may require a court order. This can arise, for example, in family law disputes where specific aspects of a case may require court approval of any settlement.

Limitation periods

11.— (1) Where the subject-matter of a mediation or conciliation involves a dispute to which any limitation period (within the meaning of the Statutes of Limitations) may apply, the parties to the mediation or conciliation may agree in writing to suspend the running of any relevant limitation period from the commencement of the mediation or conciliation to the termination of the mediation or conciliation, and such agreement in writing shall operate to suspend the running of any relevant limitation period.

(2) For the purposes of suspending the running of limitation periods, a mediation or conciliation commences on the day on which the parties agree in writing to suspend the running of any limitation periods.

(3) For the purposes of suspending the running of limitation periods, the termination of a mediation or conciliation occurs —

(*a*) by the conclusion of an agreement by the parties, on the date of that agreement, or

(*b*) by a declaration of the mediator or, as the case may be, the conciliator in writing, after consultation with the parties, to the effect that further efforts at mediation or conciliation are no longer justified, on the date on the declaration, or

(*c*) by a declaration of a party or parties in writing addressed to the mediator or conciliator to the effect that the mediation or conciliation is terminated, on the date of the declaration.

Explanatory note
Subsection (1) implements the recommendation in paragraph 4.81 that where the subject-matter of a mediation or conciliation involves a dispute to which any limitation period (within the meaning of the *Statute of Limitations 1957*, as most recently amended by the *Statute of Limitations (Amendment) Act 2000*) may apply, the parties to the mediation or conciliation may agree in writing to suspend the running of any relevant limitation period from the beginning of the mediation or conciliation to the termination of the mediation or conciliation, and such agreement in writing will operate to suspend the running of any relevant limitation period. This follows the general approach in Article 8 of the 2008 EU Directive 2008/52/EC on Mediation in Cross-Border Civil and Commercial Matters.

Subsection (2) implements the recommendation in paragraph 4.82 that for the purposes of suspending the running of limitation periods, a mediation or conciliation commences on the day on which the parties agree in writing to suspend the running of any limitation periods.

Subsection (3) implements the recommendation in paragraph 4.83 that for the purposes of suspending the running of limitation periods, the termination of a mediation or conciliation occurs: (a) by the conclusion of an agreement by the parties, on the date of that agreement, or (b)

by a declaration of the mediator or, as the case may be, the conciliator in writing, after consultation with the parties, to the effect that further efforts at mediation or conciliation are no longer justified, on the date on the declaration, or (c) by a declaration of a party or parties in writing addressed to the mediator or conciliator to the effect that the mediation or conciliation is terminated, on the date of the declaration.

PART 3

MEDIATION AND CONCILIATION: CIVIL PROCEEDINGS IN COURT

Purpose of Part 3

12.— This Part sets out—

(*a*) the role of the courts in staying (that is, bringing to an end) court proceedings where the parties have agreed to submit a dispute to mediation or conciliation by a mediation or conciliation clause,

(*b*) the provisions required for any mediation or conciliation process that may become connected with civil proceedings in court, including where the process may arise after civil proceedings have been initiated,

(*c*) the duty of a solicitor to advise a client concerning mediation or conciliation,

(*d*) the obligation of litigants to confirm that they considered mediation or conciliation,

(*e*) the role of the court in inviting parties to consider mediation or conciliation,

(*f*) the role of the court in the enforceability of mediation and conciliation agreements,

(*g*) the limited circumstances in which an award of costs may be made concerning mediation and conciliation connected to civil proceedings and

(*h*) the content of a report to a court by a mediator or conciliator.

Explanatory note

This section describes the general purposes of *Part 3* of the Bill.

Staying court proceedings arising from mediation or conciliation clause

13.— (1) In this section, "mediation or conciliation clause" means a contract clause, in writing, entered into by the parties in which they agree to submit to mediation or conciliation (or both) any dispute which has arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) If any party to a mediation or conciliation clause commences any proceedings in any court against any other party to such clause in respect of any matter agreed to be referred to mediation or conciliation, any party to the proceedings may at any time after proceedings have been commenced apply to the court to stay the proceedings.

(3) The court, unless it is satisfied that the mediation or conciliation clause is inoperative, is incapable of being performed or is void (which may include that the clause purports to deal with a matter which is excluded or not otherwise permitted by virtue of *section 4(4)*), or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

(4) It is a matter for the court, having regard to the circumstances of each individual case, to determine the severability of a mediation or conciliation clause.

(5) In this section—

(*a*) a mediation or conciliation clause may be in the form of a mediation or conciliation clause within a written contract or in the form of a separate written agreement, and

(*b*) the requirement of writing is met by an electronic communication if the information contained in it is accessible so as to be useable for subsequent reference.

(6) In this section, "electronic communication" means any communication that the parties make by means of data messages; and "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, messages communicated over the internet, electronic data interchange (EDI), electronic mail (email), telegram, telex or telecopy.

Explanatory note

This section implements the recommendations in paragraphs 4.18, 4.19 and 4.20 that a court must, in general, stay (that is, bring to an end) any proceedings where the parties have agreed, in writing, to submit to mediation or conciliation (or both) any dispute which has arisen or which may arise between them, using a mediation clause or conciliation clause. This mandatory requirement, which mirrors a court's powers under the *Arbitration Act 2010*, is subject to certain conditions. The section also implements the recommendation in paragraph 4.24 that it remains a matter for the court, having regard to the circumstances of each individual case, to determine the severability of mediation and conciliation clauses. The definition of "writing" in the section includes electronic communication, such as over the internet or by email.

Duty of solicitor to advise client concerning mediation or conciliation

14.— A solicitor, if any, acting for any person shall, prior to initiating any civil or commercial proceedings (which, without prejudice to the generality of the scope of such proceedings, shall include a claim under section 205 of the *Companies Act 1963* or a dispute concerning the boundary between two adjoining lands), advise the person to consider mediation and conciliation where such process or processes are appropriate for the resolution of the dispute.

Explanatory note

This section implements the recommendation in paragraph 4.45 that a solicitor acting for any person must, prior to initiating any civil or commercial proceedings, advise the person to consider mediation and conciliation where such process or processes are appropriate for the resolution of the dispute. The general scope of the term "civil and commercial proceedings" is sufficiently wide to encompass claims under section 205 of the *Companies Act 1963* and boundary disputes. Nonetheless, these have been included in this section to reflect the specific recommendations in paragraph 8.27 (claims under section 205 of the *Companies Act 1963*) and paragraph 10.21 (boundary disputes).

Confirmation that mediation or conciliation considered by litigants in civil proceedings

15.— (1) Where any person commences any civil or commercial proceedings, he or she shall, when the first document commencing the proceedings is filed with the court, sign a certificate, referred to in this section as a "Mediation and Conciliation Certificate," stating that mediation or conciliation (or both) has (or have) been considered as processes for settling the dispute.

(2) Where any person becomes a party to any civil or commercial proceedings, he or she shall, when the first document relevant to that party in connection with the proceedings is filed with the court, sign a Mediation and Conciliation Certificate stating that mediation or conciliation (or both) has (or have) been considered as processes for settling the dispute.

(3) A solicitor, if any, acting for any person who commences any civil or commercial proceedings shall, when the first document commencing the proceedings is filed with the court (and at the same time as the person), sign the Mediation and Conciliation Certificate, stating that the solicitor has advised the person to consider mediation and conciliation, where appropriate, for the resolution of the dispute.

Explanatory note

This section implements the recommendations in paragraph 4.50 and 4.51 that parties involved in civil proceedings must sign a Mediation and Conciliation Certificate, which confirms that they have considered mediation or conciliation (or both) as processes for settling the dispute. The section also provides that, where a solicitor acts for any person commencing civil or commercial proceedings, he or she must also sign (at the same time) the Mediation and Conciliation Certificate confirming that the solicitor advised the person concerning mediation and conciliation as processes for settling the dispute

Court inviting parties to consider mediation or conciliation

16.— (1) A court may, either on the application of any party involved in civil proceedings or of its own motion, and where the court considers it appropriate having regard to all the circumstances of the case, invite the parties to consider using mediation or conciliation to attempt to settle the proceedings.

(2) Where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the Court shall adjourn the proceedings and may make an order extending the time for compliance by any party with any provisions of the relevant Rules of Court or of any order of the Court in the proceedings, and may make such other orders or give such directions as the Court considers will facilitate the effective use of mediation or conciliation.

(3) Where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the provisions of *Part 2* apply to the mediation or conciliation.

(4) Where a party involved in civil proceedings wishes to apply to the court under this section, the application shall be made not later than 28 days before the date on which the proceedings are first listed for hearing, shall be on motion to the Court on notice to the other party or parties.

(5) In deciding whether it is appropriate having regard to all the circumstances of the case to invite the parties to consider using mediation or conciliation to attempt to settle the proceedings under this section, the court shall consider in particular whether mediation or conciliation has a reasonable prospect of success and whether it is likely to assist the parties in resolving their dispute or issues in the dispute.

(6) The power conferred by *subsection (1)* is without prejudice to any other power (whether contained in an enactment, Rules of Court or otherwise) which the court may, in its discretion, exercise at any time during the course of proceedings in connection with inviting or facilitating parties to settle a dispute.

Explanatory note

Subsection (1) implements the recommendation in paragraph 4.62 that a court may, either on the application of any party involved in civil proceedings or of its own motion, and where the court considers it appropriate having regard to all the circumstances of the case, invite the parties to consider using mediation or conciliation to attempt to settle the proceedings.

Subsection (2) implements the recommendation in paragraph 4.63 that where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the Court must adjourn the proceedings and may make an order extending the time for compliance by any party with any provisions of the relevant Rules of Court or of any order of the Court in the proceedings, and may make such orders or give such directions as the Court considers will facilitate the effective use of mediation or conciliation.

Subsection (3) implements the recommendation in paragraph 4.63 that where the parties decide, on the basis of the court's invitation, to use mediation or conciliation, the provisions of *Part 2* of the Bill apply to the mediation or conciliation.

Subsection (4) implements the recommendation in paragraph 4.64 that where a party involved in civil proceedings wishes to apply to the court under this section, the application must be made not later than 28 days before the date on which the proceedings are first listed for hearing, is to be on motion to the Court on notice to the other party or parties.

Subsection (5) implements the recommendation in paragraph 4.71 that, in deciding whether it is appropriate having regard to all the circumstances of the case to invite the parties to consider using mediation or conciliation to attempt to settle the proceedings under this section, the court shall consider in particular whether mediation or conciliation has a reasonable prospect of success and whether it is likely to assist the parties in resolving their dispute or issues in the dispute.

Subsection (6) confirms, to avoid any doubt, that the power conferred by *subsection (1)* is without prejudice to any other power of the court concerning its role in advising parties of the benefit of any form of process to settle their dispute. This includes existing statutory powers of the courts in: family law proceedings under, for example, the *Family Law Act 1995* or the *Family Law (Divorce) Act 1996*; large commercial cases in the High Court's Commercial Court List under the *Rules of the Superior Courts 1986* (SI No.16 of 1986) (as amended by the *Rules of*

the Superior Courts (Commercial Proceedings) Rules 2004 (SI No.2 of 2004)); or personal injuries actions under the *Civil Liability and Courts Act 2004*. This also includes the use of the court's inherent powers to regulate its own proceedings of encouraging parties to settle civil proceedings. As the Commission notes in the Report, the courts often use their existing inherent powers to encourage resolution of disputes, and this can take the form simply of adjourning the proceedings at an opportune point, with a suggestion that the parties might consider resolving the dispute, or aspects of it, during the adjournment.

Enforceability of mediation and conciliation agreements: role of court

17.—(1) A court may (subject to *subsection (2)*), on the application of the parties to any written agreement reached at mediation or conciliation, including an agreement made in accordance with *section 10*, enforce the terms of that agreement where it is satisfied that it is appropriate to do so.

(2) Where an application under *subsection (1)* concerns any written agreement reached at mediation or conciliation that affects the rights or entitlements (including financial or property rights or entitlements) of the parties, or, where relevant, any dependent of the parties, the court may, in its discretion, enforce the terms of that agreement where it is satisfied that the agreement adequately protects those rights or entitlements having regard to all the circumstances (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland).

Explanatory note
Subsection (1) implements the recommendation in paragraph 4.100 that a court may, on the application of the parties to any written agreement reached at mediation or conciliation, including an agreement made in accordance with *section 10* of the Bill, enforce the terms of that agreement where it considers it to be appropriate to do so.

Subsection (2) implements the recommendation in paragraph 4.101 that the general rule in *subsection (1)* is subject to certain limits. These limits are required to ensure that account is taken of existing statutory or constitutional requirements. Thus, where an application is made to a court to enforce any written agreement reached at mediation or conciliation that affects the rights or entitlements (including financial or property rights or entitlements) of the parties, or, where relevant, any dependent of the parties, the court may, in its discretion, enforce the terms of that agreement where it is satisfied that the agreement adequately protects those rights or entitlements having regard to all the circumstances (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland). This includes, for example, any agreement connected with a divorce (which is subject to the requirements of Article 41.3.2º of the Constitution and the *Family Law (Divorce) Act 1996*) or connected with the sale of goods (which is subject to, for example, the *Sale of Goods and Supply of Services Acts 1893 and 1980* and Regulations such as the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (SI No.27 of 1995)).

Award of costs of mediation and conciliation where connected to proceedings

18. —(1) Where a court has invited parties to consider using mediation or conciliation in accordance with *section 16*, the court, in awarding costs in the proceedings connected with that invitation (or, as the case may be, any appeal in those proceedings) may, where it considers it

just, have regard to any unreasonable refusal of any party to consider using mediation or conciliation where such a process had, in the Court's opinion, a reasonable prospect of success.

(2) Where a court has invited parties to consider using mediation or conciliation in accordance with *section 16*, the court may, in the absence of an agreement by the parties as to financial cost made in accordance with *section 10*, make such order for costs incurred by either party in connection with the mediation or conciliation process as it considers just, including an order that both parties bear the costs equally.

(3) *Subsection (1)* does not apply to family law proceedings, except where the Court otherwise determines.

Explanatory note
Subsection (1) implements the recommendation in paragraph 4.115 that, where a court has invited parties to consider using mediation or conciliation under *section 16*, the court, in awarding costs in the proceedings connected with that invitation (or, as the case may be, any appeal in those proceedings) may, where it considers it just, have regard to any unreasonable refusal of any party to consider using mediation or conciliation where such a process had, in the Court's opinion, a reasonable prospect of success.

Subsection (2) implements the recommendation in paragraph 4.123 that, where a court has invited parties to consider using mediation or conciliation under *section 16* of the Bill, the court may, in the absence of an agreement by the parties as to financial cost made in accordance with *section 10*, make such order for costs incurred by either party in connection with the mediation or conciliation process as it considers just, including an order that both parties bear the costs equally. The discretion to order that both parties bear the costs equally emphasises that the court is free to depart from the standard rule in civil proceedings that "costs follow the event," that is, that the losing party pays their own legal costs and those of the successful party.

Subsection (3) implements the recommendation in paragraph 4.116 that, in family law proceedings, unreasonable refusal of any party to consider using mediation or conciliation should not give rise to costs sanctions, except where the Court otherwise determines.

Content of report to court by mediator or conciliator

19. — The content of a report to the court, if any, by a mediator or conciliator shall be limited to a neutral summary of the outcome of the mediation or conciliation.

Explanatory note
This section implements the recommendation in paragraph 4.127 that the content of a report to the court, if any, by a mediator or conciliator is to be limited to a neutral summary of the outcome of the mediation or conciliation. This reinforces the general confidentiality privilege of a mediator or conciliator provided for under *section 7* of the Bill.

PART 4

MEDIATION AND CONCILIATION: SPECIFIC INSTANCES

Purpose of Part 4

20.— This Part sets out—

(*a*) the provisions that apply to mediation and conciliation in specific instances, that is, family disputes, medical and personal injuries disputes,

(*b*) in the case of family disputes, attendance at information sessions, the use of parenting plans, the specific duties of a mediator and conciliator, the enforceability of mediation and conciliation agreements and the involvement of children and dependents, and

(*c*) in the case of medical and personal injuries disputes, the effect of an apology, attendance at a mediation conference and early neutral evaluation.

Explanatory note

This section describes the general purposes of *Part 4* of the Bill.

CHAPTER 1

Family Law Disputes and Proceedings

Duty of mediator and conciliator in family law dispute as to independent advice

21. — Without prejudice to *section 5*, a mediator or conciliator in a mediation or conciliation process involving a family law dispute shall advise any party who does not have a legal representative or other professional adviser involved in the process to consider seeking independent advice, whether legal or otherwise.

Explanatory note
This section implements the recommendation in paragraph 6.42 that, without prejudice to the general duties of a mediator or conciliator in *section 5* of the Bill, a mediator or conciliator in a family law dispute must advise any party who does not have a legal representative or other professional adviser to consider seeking independent advice, whether legal or otherwise.

Parenting plan

22. —(1) Without prejudice to *section 17*, parents or guardians involved in a family law dispute may (whether as part of a mediation or conciliation process or otherwise) prepare and agree a parenting plan, which provides for parenting and guardianship arrangements for any child of theirs, by reference to the best interests of each child.

(2) A parenting plan prepared and agreed under this section is not, in itself, enforceable as a contract but may, with the agreement and consent of the parties, be made subject to a court order, on such terms as the court considers appropriate.

Explanatory note
Subsection (1) implements the recommendation in paragraph 6.26 that parents or guardians involved in a family law dispute may (whether as part of a mediation or conciliation process or otherwise) prepare and agree a parenting plan, which provides for parenting and guardianship arrangements for any child of theirs, by reference to the best interests of each child. The Commission, in its *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009), has provisionally recommended that the term "parental responsibility" should replace the term "guardianship of infants." The Commission intends to publish its Report on this area by the end of 2010.

Subsection (2) implements the recommendation in paragraph 6.27 that a parenting plan is not, in itself, enforceable as a contract but may, with the agreement and consent of the parties, be made subject to a court order, on such terms as the court considers appropriate.

Involvement of child or dependent in mediation or conciliation process in family law dispute

23. — (1) If a mediator or, as the case may be, a conciliator, in a mediation or conciliation process involving a family law dispute (having consulted the parties) considers that it is appropriate to involve any child or dependent directly in the process, the mediator or conciliator shall obtain the consent of the child or dependent and shall provide, or ensure there are provided, appropriate facilities for this purpose.

(2) The mediator or, as the case may be, a conciliator, in a mediation or conciliation process involving a family law dispute (having consulted the parties) may allow a suitably qualified adult (which may include any person who has been appointed as a guardian *ad litem*) to participate as a non-party participant on behalf of any child or dependent.

Explanatory note
This section implements the recommendation in paragraph 6.54 that if a mediator or conciliator in a family law dispute considers (having consulted the parties) that it is appropriate to involve any child or dependent directly in the mediation or conciliation process, the mediator or conciliator must obtain the consent of the child or dependent and must provide, or ensure there are provided, appropriate facilities for this purpose. It also implements the recommendation in paragraph 6.55 that a mediator or conciliator (having consulted the parties) may allow a suitably qualified adult (which may include any person who has been appointed as a guardian *ad litem*) to participate as a non-party participant on behalf of any child or dependent.

Information session concerning family dispute resolution processes

24. —(1) Each party in family law proceedings, and in proceedings under section 117 of the Succession Act 1965, shall, subject to *subsection (3)*, attend an information session on family law dispute resolution processes, including mediation and conciliation.

(2) Attendance at an information session may take place either before or after an application is made to a court to commence family law proceedings, but, in any event, not later than 28 days before the date on which the proceedings are first listed for hearing.

(3) A party in family law proceedings shall not be required to attend an information session where —

(*a*) the proceedings involve an application for a safety order, a barring order or a protection order under the Domestic Violence Act 1996, or

(*b*) he or she satisfies the court that his or her personal safety, or the safety of his or her children or dependents, is or are at risk.

(4) The person providing the information session shall provide each party who is to attend the information session with one of the following certificates —

(*a*) a certificate stating that the person attended the information session or

(*b*) a certificate stating that the person did not attend the information session.

(5) Where a party has not attended an information session and the circumstances do not fall within *subsection (3)*, a court may in its discretion adjourn family law proceedings until the party has attended an information session.

Explanatory note

Subsection (1) implements the recommendation in paragraph 6.17 that each party in family law proceedings must, subject to the exceptions in *subsection (3)*, attend an information session on family dispute resolution processes, including mediation and conciliation. It also implements the recommendation in paragraph 6.89 that each party in proceedings under section 117 of the *Succession Act 1965* (which concerns claims that a deceased parent did not make adequate provision for a child in a will or during the parent's lifetime) must also attend an information session on family dispute resolution processes.

Subsection (2) implements the recommendation in paragraph 6.18 that attendance at an information session may take place either before or after an application is made to a court to commence family law proceedings, but, in any event, not later than 28 days before the date on which the proceedings are first listed for hearing. This time limit mirrors that in *section 16(4)* of the Bill.

Subsection (3) implements the recommendation in paragraph 6.19 that a party in family law proceedings need not attend an information session where: (a) the proceedings involve an application for a safety order, a barring order or a protection order under the *Domestic Violence Act 1996* or (b) he or she satisfies the court that his or her personal safety, or the safety of his or her children or dependents, is or are at risk.

Subsection (4) implements the recommendation in paragraph 6.20 that the person providing the information session must provide each party who is to attend the information session with one or other of the following two certificates: (a) a certificate stating that the person attended the information session, or (b) a certificate stating that the person did not attend the information session.

Subsection (5) implements the recommendation in paragraph 6.21 that where a party has not attended an information session and the circumstances do not fall within *subsection (3)*, a court

may in its discretion adjourn family law proceedings case until the party has attended an information session.

Enforceability of mediation and conciliation agreements in family law dispute: role of court

25. — (1) Without prejudice to the generality of *section 17*, and subject to *subsection (2)*, a court may, in its discretion, enforce the terms of an agreement reached through a mediation or conciliation process involving a family law dispute.

(2) A court may enforce the terms of an agreement under *subsection (1)* where it is satisfied that the agreement adequately protects the rights or entitlements of the parties and their dependents, if any, that the agreement is based on full and mutual disclosure of assets, and that one party has not been overborne by the other in reaching the agreement (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland, including Article 41.3.2º).

Explanatory note
This section implements the recommendation in paragraph 6.47 that, without prejudice to the generality of *section 17* of the Bill, a court may, in its discretion, enforce the terms of an agreement reached through a mediation or conciliation process involving a family law dispute. The court must be satisfied that the agreement adequately protects the rights or entitlements of the parties and their dependents, if any, that the agreement is based on full and mutual disclosure of assets, and that one party has not been overborne by the other in reaching the agreement (and that it complies, where relevant, with any statutory requirement or provision of the Constitution of Ireland, including Article 41.3.2º).

CHAPTER 2

Personal Injuries Disputes and Proceedings

Effect of apology in personal injuries proceedings

26. — (1) An apology (including an apology made by a health care practitioner in respect of any care or treatment) made by or on behalf of a person who may become or who is a party in a personal injuries action, whether before or after any such action has been initiated in court, in respect of a matter to which any such action may relate or relates—

(*a*) does not constitute an express or implied admission of civil liability by that party, and

(*b*) is not relevant to the determination of civil liability in the action.

(2) Evidence of an apology made by or on behalf of a person under *subsection (1)* in respect of a matter to which the action relates is not admissible in any civil proceedings as evidence of civil liability of the person.

(3) In this section, "health care practitioner" includes a registered medical practitioner, dentist or nurse.

Explanatory note
This section implements the recommendations in paragraphs 7.47, 7.48 and 7.49 that an apology made by or on behalf of a person who may become or is a party in a personal injuries action (including an apology made by a doctor, dentist or nurse) in respect of a matter to which the action relates: (a) does not constitute an express or implied admission of civil liability by that party, and (b) is not relevant to the determination of civil liability in the action. This section is based on similar wording in section 24 of the *Defamation Act 2009*.

Mediation conference in personal injuries proceedings
27. — Section 15 of the Civil Liability and Courts Act 2004 is amended in subsection (1) by inserting "or upon its own initiative" after "party to a personal injuries action".

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

Early neutral evaluation in personal injuries claims

28. — (1) Without prejudice to the generality of *section 36(3)*, the Code of Conduct for Mediators and Conciliators shall provide for the use of early neutral evaluation in personal injuries claims, including any claims arising from carrying out medical treatment.

(2) In this Act, "early neutral evaluation" means a process —

(*a*) that occurs at an early stage of civil proceedings in which the parties state the factual and legal circumstances to an independent third party (the "early neutral evaluator") with suitable knowledge of the subject matter of the dispute, and

(*b*) in which the early neutral evaluator provides an evaluation to the parties as to what the likely outcome of the proceedings would be if the claim proceeded to a hearing in court, and

(*c*) in respect of which the parties are free to accept or reject the evaluation but which may assist them to agree a settlement of the dispute once they have heard the evaluation.

Explanatory note

This section implements the recommendation in paragraph 7.25 that the Code of Conduct for Mediators and Conciliators) published by the Minister for Justice and Law Reform under *section 36* of the Bill) must provide for the use of "early neutral evaluation" in personal injuries claims, including any claims arising from carrying out medical treatment. This process would The section defines early neutral evaluation as a process: (a) that occurs at an early stage of civil proceedings in which the parties state the factual and legal circumstances to an independent third

party (the "early neutral evaluator") with suitable knowledge of the subject matter of the dispute; and (b) in which the early neutral evaluator provides an evaluation to the parties as to what the likely outcome of the proceedings would be if the claim proceeded to a hearing in court, and (c) in respect of which the parties are free to accept or reject the evaluation but which may assist them to agree a settlement of the dispute once they have heard the evaluation. In many of the claims involved in this section, notably claims arising from carrying out medical treatment, the State is the defendant, often now represented by the State Claims Agency. In that respect, early neutral evaluation may assist in the risk assessment process for those claims already engaged in by the State Claims Agency.

PART 5

CROSS-BORDER MEDIATION IN THE EUROPEAN UNION

Purpose of Part 5

29. — This Part sets out—

(*a*) the relevant provisions required to give effect to the 2008 Directive on Cross-Border Mediation in the European Union and

(*b*) the scope and application of the general provisions concerning mediation and conciliation in *Parts 2, 3 and 6* of the Bill that apply to Cross-Border Mediation in the European Union.

Explanatory note

This section describes the general purposes of *Part 5* of the Bill, which is to implement the 2008 Directive on Cross-Border Mediation in the European Union, 2008/52/EC, and to ensure that this is integrated into the general framework set out in the Bill.

Meaning of cross-border dispute

30. — (1) In this Part, "cross-border dispute" means any civil or commercial dispute that could give rise to civil liability, but does not include a dispute concerning or arising from —

(*a*) the civil status of natural persons,

(*b*) the legal capacity of natural persons,[5]

(*c*) the guardianship of infants,[6]

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[5] The *Scheme of the Mental Capacity Bill 2008* (in respect of which a *Mental Capacity Bill* may be published by the end of 2010 or in early 2011), which would implement the thrust of the Commission's *Report on Vulnerable Adults and the Law* (LRC 83-2006), includes a test to assess the mental capacity of adults and proposes to establish a statutory framework for adult guardianship.

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

(*e*) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings,

(*f*) any mediation, conciliation or other dispute resolution process engaged in under the statutory remit of the Labour Relations Commission or the Labour Court (notwithstanding which, this Part does apply to any such cross-border dispute arising within an employment context that has not been referred to the dispute resolution processes of the Labour Relations Commission or the Labour Court),

(*g*) customs, revenue or taxation matters,

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

(*i*) social welfare matters, or

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

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

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

(2) Without prejudice to the generality of *subsection (1)*, this Part does not apply to attempts made by a court to settle a dispute in the course of judicial proceedings concerning the dispute in question, including where the court uses its powers referred to in *section 16(6)*.

Explanatory note

This section implements the recommendation in paragraph 2.57 that, while the legislation should apply generally to civil and commercial disputes, with limited exceptions (see *section 4(4)*), the scope of mediation for "cross-border disputes" should be limited to the categories provided for in Article 1 of the 2008 EU Directive on Certain Aspects of Mediation, 2008/52/EC (the 2008 Directive). The definition also reiterates the provision in Article 2 of the 2008 Directive that that the 2008 Directive is not intended to apply where proceedings have been initiated and the court assists the parties to settle the dispute using its inherent powers, or in the exercise of any other specific statutory power to do so (as provided for in *section 16(6)* of the Bill). The definition of the scope of "civil and commercial matters" in this section is based on the definition in the 2000 EU "Brussels I" Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and is narrower than the definition for the purposes of the scope of mediation and conciliation concerning disputes arising in Ireland: see *section 4(4)* of the Bill.

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[6] The Commission, in its *Consultation Paper on Legal Aspects of Family Relationships* (LRC CP 55-2009), has provisionally recommended that the term "parental responsibility" should replace the term "guardianship of infants." The Commission intends to publish its Report on this area by the end of 2010.

Parties in cross-border dispute

31. — (1) In this Part, a cross-border dispute arises where at least one of the parties is domiciled or habitually resident in a Member State of the European Union other than that of any other party on the date on which —

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

(*b*) mediation is considered arising from an order of a court made under *section 31*, or

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

(2) Without prejudice to *subsection (1)*, for the purposes of *section 33* and *section 34* a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in *subsections (1)(a)*, *(b)* or *(c)*.

(3) For the purposes of *subsections (1)* and *(2)*, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Explanatory note

This section implements the provisions of Article 2 of the 2008 Directive and the recommendation in paragraph 2.58.

Application of this Act to cross-border dispute: general

32. — (1) In this Part, mediation has the same meaning as in *section 4(1)*, but is limited to the definition of "cross-border dispute" in *section 30*.

(2) *Part 2*, *Part 3* and *Part 6* apply to cross-border mediation, subject to any necessary modifications.

Explanatory note

This section implements the provisions of Articles 3 and 5 of the 2008 Directive.

Enforceability of agreement resulting from cross-border mediation

33. — (1) Without prejudice to the generality of *section 32*, *section 17* applies to cross-border mediation, subject to any necessary modifications.

(2) Subject to their respective jurisdictional limits, the District Court, the Circuit Court or the High Court are each competent to enforce an agreement resulting from cross-border mediation in accordance with *subsection (1)*.

(3) Nothing in this section affects the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with *subsection (1)*.

Explanatory note

This section implements the provisions of Article 6 of the 2008 Directive.

Confidentiality of cross-border mediation

34. — Without prejudice to the generality of *section 32*, *section 7* applies to cross-border mediation, subject to any necessary modifications.

Explanatory note

This section implements the provisions of Article 7 of the 2008 Directive.

Effect of cross-border mediation on limitation periods

35. — (1) Without prejudice to the generality of *section 32*, *section 11* applies to cross-border mediation, subject to any necessary modifications and subject to *subsections (2)* and *(3)*.

(2) Parties who choose mediation in an attempt to settle a cross-border dispute shall not subsequently be prevented from initiating arbitration (within the meaning of the Arbitration Act 2010) in relation to that dispute by the expiry of any limitation period during the mediation process.

(3) This section is without prejudice to provisions on limitation or prescription periods in international agreements to which Member States of the European Union are party.

Explanatory note

This section implements the provisions of Article 8 of the 2008 Directive.

PART 6

CODE OF CONDUCT FOR MEDIATORS AND CONCILIATORS AND TRAINING ISSUES

Code of Conduct for Mediators and Conciliators

36. — (1) The Minister shall, as soon as practicable after the coming into force of this Act, publish a Code of Conduct for Mediators and Conciliators, based on the recommendations of a Working Group established by the Minister for this purpose, which shall provide practical guidance for the purposes of giving effect to, and complying with, the provisions of this Act.

(2) Without prejudice to the generality of *subsection (1)*, the Code of Conduct for Mediators and Conciliators shall—

(*a*) be consistent with the role of the parties in mediation and conciliation, and the definition and scope of mediation and conciliation, as set out in *section 4*,

(*b*) be consistent with the general principles concerning mediation and conciliation as set out in *section 5*,

(*c*) have regard to the involvement, where applicable, of a child or dependent in a mediation or conciliation process (in particular in a family law dispute in accordance with *section 23*), and to the requirements of *Children First: National Guidelines for the Protection and Welfare of Children*, published by the Department of Health and Children in 2010 (or any equivalent replacement document),

(*d*) be consistent with the requirements, where applicable, of the Directive on Cross-Border Mediation in the European Union

(*e*) have regard to the European Code of Conduct for Mediators, published by the European Commission in 2004 (or any equivalent replacement document),

(*f*) have regard to the Recommendation establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes,[7] which shall be adapted and applied, to the extent it is appropriate, to all the mediation and conciliation processes under this Act,

(*g*) have regard to the Recommendation on Consumer Dispute Resolution and Redress published by the Organization for Economic Cooperation and Development in 2007 (or any equivalent replacement document),

(*h*) provide for the initial and further training of mediators and conciliators in order to ensure that mediation and conciliation processes are conducted in an effective, impartial and competent way in relation to the parties (including the requirements set out in *section 37*),

(*i*) provide for the relationship between mediation and conciliation and other forms of dispute resolution, including collaborative practice and early neutral evaluation, and the role of such other forms of dispute resolution, and

(*j*) provide for uniform complaints, disciplinary and grievance procedures concerning mediators and conciliators, and the relevant enforcement procedures within professional bodies of which mediators and conciliators are members.

Explanatory note

Subsection (1) implements the recommendation in paragraph 11.07 that the Minister for Justice and Law Reform must, as soon as practicable after the coming into force of this Bill, publish a Code of Conduct for Mediators and Conciliators, based on the recommendations of a Working

[7] Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

Group established by the Minister for this purpose. In respect of cross-border mediation in the European Union, it also implements the provisions of Article 4 of the 2008 Directive. The Code of Conduct will provide practical guidance for the purposes of compliance with the provisions of the Bill.

Subsection (2) implements the recommendations in paragraphs 9.13, 9.22, 11.14, 11.25 and 11.31, and it sets out 10 specific matters which the Code of Conduct must deal with. These are: (a) it must be consistent with the role of the parties in mediation and conciliation, and the definition and scope of mediation and conciliation, as set out in *section 4* of the Bill; (b) it must be consistent with the general principles concerning mediation and conciliation as set out in *section 5*; (c) it must have regard to the involvement, where applicable, of a child or dependent in a mediation or conciliation process (in particular in a family law dispute in accordance with section 23), and to the requirements of *Children First: National Guidelines for the Protection and Welfare of Children*, published by the Office of the Minister for Children and Youth Affairs in the Department of Health and Children in 2010); (d) it must be consistent with the requirements, where applicable, of the 2008 Directive on Cross-Border Mediation in the European Union; (e) it must have regard to the 2004 European Code of Conduct for Mediators, published by the European Commission; (f) it must also have regard to the 2001 European Commission Recommendation establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes; (g) it must also have regard to the 2007 Recommendation on Consumer Dispute Resolution and Redress, published by the Organization for Economic Cooperation and Development (OECD); (h) it must provide for the initial and further training of mediators and conciliators (including in the context of family law disputes) in order to ensure that mediation and conciliation are conducted in an effective, impartial and competent way in relation to the parties; (i) it must provide for the relationship between mediation and conciliation and other forms of dispute resolution, including collaborative practice and early neutral evaluation, and the role of such other forms of dispute resolution; and (j) it must provide for uniform complaints, disciplinary and grievance procedures concerning mediators and conciliators, and the relevant enforcement procedures within professional bodies of which mediators and conciliators are members.

Training of mediators and conciliators in family law disputes

37. — Without prejudice to the generality of *section 36(3)* and the requirements of the Code of Conduct for Mediators and Conciliators (including any requirements arising by virtue of *section 36(2)(f)*), a mediator or conciliator in a mediation or conciliation process involving a family law dispute shall obtain initial and further training in screening techniques to assess the appropriateness, throughout the mediation or conciliation process, of mediation or conciliation.

Explanatory note

This section implements the recommendation in paragraph 11.26 that a mediator or conciliator in a mediation or conciliation process involving a family law dispute must (in addition to any other requirements concerning training) obtain initial and further training in screening techniques to assess the appropriateness, throughout the mediation or conciliation process, of mediation or conciliation in the family law dispute.

Training of collaborative practitioners

38. — (1) Without prejudice to the generality of *section 36(3)* and the requirements of the Code of Conduct for Mediators and Conciliators (including any requirements arising by virtue of *section 36(2)(h)*), every collaborative practitioner who is engaged in collaborative practice shall

obtain initial and further training (including continuing professional development) in collaborative practice.

(2) In this Act, "collaborative practice" means an advisory and confidential structured process (which is neither mediation or conciliation within the meaning of this Act) in which a third party, called a "collaborative practitioner", actively assists and advises the parties in a dispute (including in a family law dispute) in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.

(3) In this Act, "collaborative practitioner" means a suitably qualified professional adviser, and without prejudice to the generality of that requirement, may be a practising solicitor, barrister, accountant or psychologist.

(4) To avoid any doubt, more than one collaborative practitioner may be involved in collaborative practice to assist and advise actively the parties in a dispute (including a family law dispute) in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute.

Explanatory note

This section implements the recommendation in paragraph 6.66 that every collaborative practitioner who is engaged in collaborative practice must obtain initial and further training (including continuing professional development) in collaborative practice.

The section also implements the recommendations in paragraphs 6.63 and 6.64 that the term "collaborative practice," which has developed in Ireland most notably in the context of family law disputes, should be defined in broad terms (this allows this process to be developed outside the family law context, which is the situation in other countries). Collaborative practice is closely connected with mediation and conciliation, but the key difference is that a "collaborative practitioner" may "actively assist and advise" a party in the dispute. By contrast, as provided for in *section 5(1)* of the Bill, a mediator must remain neutral, and neither advise or assist the parties. Under *section 5(2)* of the Bill, a conciliator must remain neutral, although he or she may actively advise and assist the parties to reach a settlement, but may not act as professional adviser to either of them.