

LAW SOCIETY SUBMISSION



MEDIATION BILL 2017

DEPARTMENT OF JUSTICE AND EQUALITY

APRIL 2017

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

- 1.1. The Law Society of Ireland (the Society) welcomes the publication of the Mediation Bill which, once enacted, is likely to have a transformative effect on how civil law disputes are processed and resolved in the State, together with a significant impact on practising solicitors in their conduct of civil proceedings on behalf of their clients.
- 1.2. On 25 April 2012, the Society made a preliminary submission (the Preliminary Submission) to the Joint Oireachtas Committee on Justice, Defence and Equality on the General Scheme of the Mediation Bill, 2012 (the General Scheme) and looked forward to publication of the Bill in due course and to making such further detailed submissions as appropriate following due consideration of the Bill.
- 1.3. This submission is made following due consideration of the 2017 Bill, consultation with our members, and in the public interest.

2. Executive Summary & recommendations

- 2.1. Save in respect of mediation of family and other civil disputes involving vulnerable people, the Society believes that there is no public policy or public interest reason to depart from the Law Reform Commission's Recommendation in respect of mediators' reporting obligations to a court. The Society recommends that the legislation should apply to all mediations and recommends the deletion of section 17 of the Bill.
- 2.2. As mediation is a process that is an alternative to judicial proceedings that allows parties to compromise or settle their dispute, mediation attracts a distinct form of privilege. The Society recommends that this privilege should be confirmed in the Bill.
- 2.3. Regarding the proposal in section 6(6), the Society believes that a mediator's statement of general reasons for withdrawing must be subject also to the confidentiality of mediation.
- 2.4. Regarding the proposals in section 7, the Society believes that the parties in mediation should be free to include terms in the agreement to mediate that they and the mediator consider appropriate for their circumstances. It is recommended that the section be amended to reflect this.
- 2.5. The absence of a compulsory system of registration of mediators undermines the entire Bill. It is in the public interest that a transparent system of registration of mediators, the imposition of minimum standards to be registered and ongoing continuing educational requirements are introduced prior to the further progression of the Bill. The proposed council does not meet any of the requirements and an 'opt in' code of conduct as proposed fails to protect the members of the public who wish to engage in a professional manner to resolve their dispute with a mediator. The Society wishes the Mediation Bill to succeed but it will fail to do so unless there is immediate and prior statutory regulation of mediators. An example of the type of statutory body is present in the Health and Social Care Professionals Act 2005 with suitable modifications. The regulatory body should not be a cost to the exchequer but funded by registered members.
- 2.6. If the Bill is permitted to proceed without an adequate system of qualification, regulation and registration of mediators then the public will be under the misconception that all mediators are equally qualified, there is some statutory basis for mediation [and hence mediators] although there is no protection of the public interest in this Bill, no accountability for mediators.
- 2.7. Regarding the proposals in section 21, the Society believes that a court, in considering any application for costs, should be required to have regard to an unreasonable refusal or failure of the applicant to consider using mediation, whether the applicant has been invited by a court or by another party in the proceedings.

2.8. The Society has identified issues regarding the applicability of the Bill to Family Law proceedings as follows:

2.8.1. The requirement to give information to parties involved in multiple proceedings arising from the same relationship breakdown.

2.8.2. The Society has identified issues regarding the enforceability of mediated agreements in Family Law disputes.

2.8.3. The Bill appears to provide for an unnecessary procedural step in Family Law proceedings that unnecessarily may add additional time and expense to court users.

2.8.4. The Society has identified issues regarding how reporting obligations in Family Law proceedings are provided for.

2.8.5. The Society remains concerned as to how information on mediation is to be provided to parties in Family Law proceedings, including those who litigate in person.

3. Mediator report to court – Section 17

- 3.1. Head 13 of the General Scheme proposed similar provisions to those now proposed in section 17 of the Bill. The Society identified some concerns about these proposals in its Preliminary Submission. The Society now wishes to highlight its concerns about the legislative proposals contained in Section 17 of the Bill.
- 3.2. The Society recognises that parties in disagreement, conflict or dispute may decide to refer their issues to mediation at any time and for any reason, including;
 - that they are party to an agreement that provides for mediation or other form of alternative dispute resolution;
 - that they are invited by a court to consider mediation;
 - that they believe mediation is appropriate for them to save time and legal costs;
 - that, as with over 90% of all civil disputes, theirs does not require judicial or other adjudicative determination; or
 - for some other reason.
- 3.3. Section 17 of the Bill distinguishes between mediations that take place following an invitation by a court and those that do not, on the grounds of a mediators obligation to report. The Society sees no basis for such distinction. The Society believes that, save as outlined below, any statutory obligation on mediators to report on their conduct of and participation in civil dispute mediation offends against the principles of voluntariness and confidentiality of mediation, regardless of when or why parties decide to refer their dispute to mediation.
- 3.4. Moreover, the Bill as drafted only applies to mediations entered into after court proceedings have issued. Therefore, parties taking up the opportunity to mediate and reaching agreement without ever issuing proceedings, will not benefit from its protections. This runs contrary to the statement in the Long Title to the Bill and is presumably not the intention of the legislation.
- 3.5. The Society recognises that, for the protection of children and other vulnerable people, certain reporting obligations do arise for mediators in separating couples and other family dispute mediations, including those in which there is a risk of physical or psychological injury, and that it is appropriate that such mediations be distinguished from other civil dispute mediations on grounds of mediators' statutory reporting obligations.
- 3.6. It is a fundamental principle of mediation that it be voluntary, meaning that the parties are not required by law to refer their dispute to mediation and, if they do, that they are entitled to withdraw from the mediation at any time and for any reason. Mediation is a process of self-determination by the parties, both in terms of their participation in a mediation and as to its outcome. These principles are recognised as fundamental in mediation, by the Law Reform Commission and indeed in the provisions of the Bill.

- 3.7. The Society believes, and the experience of practising solicitors strongly suggests, that any obligation on mediators in civil disputes generally to report any aspect of a mediation to a third party, including to a court, particularly on their opinion as to how parties have engaged in mediation where no settlement is reached would, in addition to undermining the fundamental principle of voluntariness, make parties less likely to refer disputes to mediation at all or, where they did, to engage fully in the mediation.
- 3.8. The Society believes, and the experience of practising solicitor-mediators strongly suggests, that mediators generally would be very reluctant to act as a mediator in the State if the reporting obligations envisaged by section 17 are introduced.
- 3.9. Many practising solicitor-mediators believe that statutory court reporting obligations as envisaged by section 17 would adversely affect their willingness to act as a mediator and most parties' willingness to engage openly and frankly with each other and with the mediator in the process. The Society therefore believes that this issue is fundamental to the success of mediation and of the legislation.
- 3.10. Most agreements to mediate provide that the mediator may not be called on by the parties as a witness in any subsequent judicial or other proceedings. The Society believes that any such reporting obligations on mediators would render such contractual provisions void and unenforceable and would thereby undermine the efficacy of mediation.
- 3.11. Regarding the proposal in section 17(1)(a), the Society believes that, regardless of considerations of voluntariness, confidentiality or contract, mediators are unlikely to know or to be able to express any meaningful statement of the reasons why a mediation did not take place following an invitation by a court.
- 3.12. Regarding the proposals in section 17(1)(b)(i)-(iii), the Society believes that, regardless of considerations of voluntariness, confidentiality or contract, such obligations are unnecessary where such information, to the extent that it could be relevant to continuing judicial proceedings, would be readily available to a court from the parties themselves or the legal representatives, without the need for any report from the mediator.
- 3.13. The courts and the Law Reform Commission have, consistent with the principles of voluntariness and self-determination, recognised parties' entitlement not to engage in mediation as an alternative to litigation, provided that they have considered the alternatives and have identified good reasons not to engage in mediation. The Society believes that it is not the role of a mediator to participate in the judicial determination of proceedings that follow upon an inconclusive mediation conducted by a mediator.
- 3.14. The Society notes that since 2004, Order 63A Rules 6(1)(xiii) and 6(2)(d) have allowed judges of the High Court, Commercial List, to adjourn proceedings pending mediation or require parties to provide particulars available to them of any mediation to assist the Court in deciding whether or not to grant such adjournment respectively. The Court has long since ceased making such orders or requesting such particulars on grounds that

mediation is more likely to achieve a resolution where no such order is made or requirement imposed.

- 3.15. The Law Reform Commission in its 2010 Report [LRC 98-2010] concluded that mediators' reports, if any, should be narrowly restricted and might have some role in assisting a court in determining a successful litigant's costs application after litigation subsequent to an inconclusive mediation but not otherwise. The Commission concluded at paragraph 4.125 of the Report that;

“The Commission considers that the content of mediators’ or conciliators’ reports to the Court should be narrowly restricted. Confidentiality during a mediation session is essential to protect the integrity of the process. For the mediation or conciliation to be effective, a mediator or conciliator must have the trust of all participants, both in joint sessions and in private caucuses. Requiring mediators or conciliators to report on the conduct of the parties to the court imperils the confidentiality of the process.”

and recommended at para. 4.127 that;

“The Commission recommends that the content of a report to the court, if any, by a mediator or conciliator should be limited to a neutral summary of the outcome of the mediation or conciliation.”

- 3.16. The Society believes that there is no public policy or public interest reason to depart from the Law Reform Commission's Recommendation in this regard. On the contrary, the Society believes, and the experience of practising solicitors strongly suggests, that any such general reporting obligations on mediators would be counter-productive.

Law Society Recommendation: The Bill should apply to all mediations, not just those entered into after judicial proceedings have issued.

Law Society Recommendation: Section 17 should be deleted from the Bill in its entirety.

4. Confidentiality – Section 10

- 4.1. The Society notes that the Law Reform Commission proposed a definition of mediation 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.”

- 4.2. The Bill proposes that mediation be defined as *“a facilitative voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute.”* The Society believes that, as confidentiality is a fundamental principle of mediation, it should be included within the statutory definition.

- 4.3. The Society notes the conclusions drawn by the Law Reform Commission in its 2010 Report [LRC 98-2010]. The Commission concluded that confidentiality in mediation should be the subject of a distinct form of privilege. Paragraph 3.42 of the Report provided that;

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

- 4.4. The courts and the Common Law have long treated communications between parties in judicial proceedings made and intended to compromise or settle the proceedings as protected by ‘without prejudice’ privilege. Such communications cannot be disclosed or relied upon by either party in subsequent proceedings.

- 4.5. The Society believes, that as mediation is a process that is an alternative to judicial proceedings that allows parties to compromise or settle their dispute, mediation attracts a distinct form of privilege that should be confirmed in the Bill.

- 4.6. The Society believes, that in the alternative, the legislation should acknowledge that mediation communications are protected by ‘without prejudice’ privilege.

Law Society Recommendation: Mediation should be defined as follows:

“a facilitative, voluntary, confidential process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute.”

Law Society Recommendation: Section 10 should provide that the confidentiality of mediation is protected by mediation privilege.

Typographical error: The word *“inadmissible”* in the first line of section 10(3) should read *“admissible”*.

5. Mediation in general – Section 6

- 5.1. Head 6 of the General Scheme proposed similar provisions to those now proposed in section 6 of the Bill. The Society identified some concerns about these proposals in the Preliminary Submission.
- 5.2. Regarding the proposal in section 6(6), the Society believes that a mediator's statement of general reasons for withdrawing must be subject also to the confidentiality of mediation.

Law Society Recommendation: Section 6(6) should provide as follows:

“Subject to subsections (7) and (8) and subject always to the confidentiality of mediation, the mediator may withdraw from the mediation at any time during the mediation by notice in writing given to the parties stating the mediator's general reasons for the withdrawal.”

6. Agreement to mediate – Section 7

- 6.1. Regarding the proposals in section 7, the Society believes that the parties in mediation should be free to include terms in the agreement to mediate that they and the mediator consider appropriate for their circumstances.
- 6.2. The Agreement to mediate should contain certain basic information relating to the mediator:
 - i. their name, professional address and contact details
 - ii. their qualifications and years in practice as a mediator
 - iii. membership of any professional bodies
 - iv. any code of conduct by which they claim to be bound which must be annexed to the Agreement
 - v. a clause setting out how the parties could make a complaint in the event that either one is not satisfied with the professional or other behavior of the mediator.
- 6.3. In addition, in family law matters, the Agreement should contain the following:
 - i. A clause stating that any agreement reached in the context of a Judicial Separation or Divorce or Section 3 of the Guardianship of Infants Act 1964 may not be binding even though the parties intend it to be so and will be subject to the discretion of the appropriate Court. The 1964 Act is referred to in section 11(4) of the Bill but there is no reference to the 1995(judicial separation) or 1996 (Divorce) Family Law Acts
 - ii. Details of the child protection policies of the mediator and any protocols adopted by the mediator in relation to hearing the voice of the child.

Law Society Recommendation: Section 7 should provide as follows:

“(g) Any other term as may be appropriate for the parties and the mediator.”

7. Code of Practice & minimum requirements in relation to council contained in the schedule – Section 9

- 7.1. The Society is disappointed that proportionate and appropriate regulation of mediators has not been given a statutory basis in the Bill. The proposals in the Bill simply refer to:
- i. code which will not be binding on mediators, and
 - ii. register only of those mediators who wish to accept the code.
- 7.2. The opt in system of regulation for mediators is out of step with the statutory regulation of all other professionals in this jurisdiction and is contrary to the public interest.
- 7.3. The Bill must make provision for a mandatory minimum qualification prior to practicing as a mediator, together with an independent system of complaints handling and disciplinary process for mediators
- 7.4. The proposed council does not appear to have any regulatory role and is simply an opt in system which permits those who do not wish to opt in to operate as they wish which it is submitted is not in the public interest.
- 7.5. If there is to be a transformative change as anticipated then mediators must be part of an independent, open and transparent system of regulation like all other professionals and this system needs to be put on a statutory basis prior to the implementation of the Mediation Bill as the public interest demands it.
- 7.6. It is unacceptable to permit those mediators who have completed a short course to be placed on the same level as already professionally qualified mediators with hundreds of hours of training or to compare those who submit themselves to significant ongoing continuing education to those who do not refresh and update their mediation skills and education.
- 7.7. It is submitted that the only qualification a mediator appears to require under the Bill is contained in the Section 2 definition of mediator as ‘a person appointed under an agreement to mediate to assist the parties to the agreement to reach a mutually acceptable agreement to resolve the dispute the subject of the agreement.’
- 7.8. In the public interest, mediators should be subject to a system of statutory regulation to be set out clearly and which provides for the following:
- i. A minimum qualification for entry
 - ii. A minimum CPD requirements
 - iii. A binding code of conduct
 - iv. A clear definition of misconduct
 - v. A transparent system of complaints handling and disciplinary procedures, and
 - vi. the location of a register of practicing mediators

- 7.9. There are ample statutory examples of suitable regulation which could be adapted for mediators such as the Health and Social Care Workers Act 2005 with suitable modifications. Any such regulation and registration board should be funded by the registered mediators and in the public interest it must be mandatory to be registered in order to practice as a mediator.

8. Factors to be considered by a court in awarding costs – Section 21

- 8.1. Regarding the proposals in section 21, the Society believes that for the reasons outlined at section 3 of this submission in respect of the proposals in section 17 a court, in considering any application for costs at the conclusion of civil proceedings, should be required, where it considers it just, to have regard to an unreasonable refusal or failure of the applicant to consider using or to participate in mediation, whether the applicant has been invited by a court or by another party in the proceedings, either before or after the proceedings were issued.

Law Society Recommendation: Section 21 should provide as follows:

“In awarding costs, in respect of proceedings referred to in section 16 or otherwise, a court shall, where it considers it just, have regard to—

(a) any unreasonable refusal or failure by a party to the proceedings to consider using mediation, and

(b) any unreasonable refusal or failure by a party to the proceedings to participate in mediation,

following an invitation to do so, under section 16(1) or otherwise.

9. Applicability of the Bill to Family Law disputes

- 9.1. Section 3(1) of the Bill provides that, subject to the exceptions set out therein, the Bill shall apply to any civil proceedings. 'Civil proceedings' is not defined but proceedings under the Domestic Violence Acts 1996 to 2011 and the Child Care Acts 1991 to 2015 are excepted proceedings. This would suggest that family law proceedings as defined in Section 2(1) are included in the scope of the legislation.
- 9.2. In addition, section 3 (f) (i) should be amended to state 'any proceedings in which relief is sought under the Domestic Violence Acts 1996 to 2015'. As in the context of an application for judicial separation or divorce there will in many cases be included in the writ an application under the Domestic Violence Acts, for example in a case where the husband or wife of a violent partner seeks a divorce and also seeks ancillary orders under the Domestic Violence Acts in the context of the divorce.
- 9.3. These Divorce proceedings may not be considered "proceedings under the Domestic Violence Acts 1996-2011;" but would be viewed as proceedings 'under' the Family Law (Divorce) Act 1996 as the principal remedy is a decree of Divorce and one of the ancillary remedies sought is a barring or safety order. Section 15 of the Family Law (Divorce) Act 1996 provides that on granting a decree of divorce or at any time thereafter, the court may make an order under section 2,3,4 or 5 of the Domestic Violence Act 1996. For example the usual order sought for a barring order in the context of an application for Divorce is as follows:
- An Order pursuant to Section 15(1)(d) of the Family Law (Divorce) Act 1996 and Section 3 of the Domestic Violence Acts 1996 for a Barring Order etc
- 9.4. Although the remedy sought is pursuant to both the Divorce and Domestic Violence Acts, it appears that the proceedings would be classed as pursuant to the Divorce Act and not the Domestic Violence Act as the domestic violence relief sought is ancillary to the granting of a decree of divorce. This can be remedied by the proposed amendments above.
- 9.5. The applicability of the Bill in its entirety to family law proceedings raises a number of issues for the Society. Section 14(1) of the Bill provides that a practising solicitor shall, prior to issuing proceedings on behalf of a client, provide that client with specified advice and information. These requirements would appear to be in addition to those contained in Section 5 of the Judicial Separation and Family Law Reform Act 1989 and Section 6 of the Family Law (Divorce) Act 1996. The requirements of the 2017 Bill are not the same as those in the 1989 and 1996 Acts and there is no provision for the certification required by those Acts to satisfy the requirements of Section 14. One of the obvious weaknesses of the Mediation Bill 2017 is that it fails to encourage any other form of Alternative Dispute Resolution prior to the issue of proceedings save Mediation. It is submitted that Mediation should be developed in tandem with other forms of ADR and not on its own. There is no mention of conciliation, collaborative law or lawyer assisted settlements in the Bill.

- 9.6. The Bill will also require the specified information and advice to be provided prior to the issuing of proceedings for other family law matters such as guardianship, custody and maintenance. It is common in family law practice for a number of applications to be made in respect of the same relationship breakdown. If this requirement is to apply to all family law proceedings, solicitors may be required to provide the information on multiple occasions to the same client in relation to the same dispute. On the other hand, many family law litigants are unrepresented and issue proceedings themselves without retaining the services of a solicitor. Litigants in person will not be required under the Bill to receive information in relation to mediation prior to the issue of proceedings.
- 9.7. Section 14(1)(a) requires a solicitor to advise the client to consider mediation as a means of attempting to resolve the dispute. The word ‘advise’ is problematic as it connotes a recommendation that the client attempt mediation. This should be contrasted with the wording of the Family Law (Divorce) Act 1996, 2 section 6(2)(a) which requires a solicitor to ‘*discuss the possibility of engaging in mediation*’ with their client. There may be many family law situations in which a solicitor would not wish to advise a client to attempt mediation. The Bill itself recognises this in excluding proceedings under the Domestic Violence Acts from the requirement. A client may, for example, come to a solicitor as a victim or perpetrator of domestic violence seeking an order for custody, access, maintenance, judicial separation, or divorce. It could be inappropriate for a solicitor in such circumstances to advise that client to consider mediation.
- 9.8. Section 14(1)(d) requires a solicitor to provide a client with information about the advantages of resolving the dispute otherwise than by way of the proposed proceedings. While this may be appropriate in a case of maintenance, child access, or separation where parties can agree all issues in dispute, in many cases there may not be an alternative to litigation. While discrete issues in dispute may be dealt with other than through litigation, agreement will not produce an order for judicial separation, divorce, custody or guardianship. In many family law cases, proceedings are necessary and cannot be substituted with mediation or other form of alternative dispute resolution. In this way family law is very different to ordinary civil disputes where full resolution by agreement is possible.

Law Society Recommendation: Family law proceedings, as defined in the Bill, should be excluded from the application of section 14

Law Society Recommendation: Section 3 (f)(i) should be amended to extend the disapplication of the Bill to ‘any proceedings in which relief is sought under the Domestic Violence Acts 1996 to 2015’.

10. Enforceability of mediated agreements in Family Law disputes

- 10.1. The Bill applies to civil disputes where proceedings have issued and is therefore concerned with providing information before proceedings are commenced and with providing guidance on enforceability of mediated settlements entered into after proceedings have commenced.
- 10.2. As previously identified, the Bill does not appear to have general applicability to mediations that take place prior to the issuing of court proceedings. It is not entirely clear if this was the intention. It appears contradictory to establish a statutory basis for a process intended to direct potential litigants into mediation before litigation is attempted, but to provide a framework for enforcement of mediated agreements only where they are entered into after proceedings have issued.
- 10.3. Section 11 deals with enforceability of mediated settlements, providing that the parties themselves shall determine whether a mediated settlement has been reached between them and that a mediated settlement shall have effect as a contract save where stated to have no legal effect. It is standard practice in family law for mediated agreements to state that they are not legally enforceable until incorporated in to a court order or formal separation agreement. This is necessary because the court retains oversight. This is acknowledged in the Bill in relation to sections 8 and 8A of the Family Law (Maintenance of Spouses and Children) Act 1976 and the provisions of section 3 of the Guardianship of Infants Act 1964. No reference is, however, made to the constitutional requirements for judicial oversight of divorce settlements and the statutory requirements for both Judicial Separation and Divorce. A mediated agreement entered into where proceedings have issued for judicial separation could be enforceable pursuant to s. 11(3) but be inadequate for the purposes of the provisions of the 1989 or 1996 Act.

Law Society Recommendation: Family Law proceedings, as defined in the Bill, should be excluded from the application of Section 11.

11. Applications to adjourn Family Law proceedings

- 11.1. Section 16 allows the court on application of a party involved in proceedings, or of its own motion, to invite the parties to proceedings to consider mediation and to adjourn the proceedings where mediation is commenced. Either party can make an application on motion to the court at least 14 days prior to the date on which the proceedings are first listed for hearing for the purposes of having the court provide information on mediation and issuing an invitation to the parties to consider mediation. This is an unnecessary procedural step. Family law lists are already over-burdened and providing a mechanism for one party to further delay a long-awaited hearing by issuing a motion that will produce little more than advice from the judge seems unhelpful.
- 11.2. Mediation is a voluntary process that requires the consent and active participation of both parties to be effective. In Divorce and Judicial Separation proceedings both parties will already have been advised of the availability of mediation and a request to mediate can easily be made by letter or other communication. The intervention of the court to make a simple request seems superfluous.

Law Society Recommendation: Family Law proceedings, as defined by the Bill, should be excluded from the application of Section 16.

12. The voluntary nature of mediation in Family Law disputes

- 12.1. The concerns expressed above regarding Section 16 are exacerbated by the requirement for any mediator appointed following such an invitation to make a report to the court. Where no agreement is reached, the mediator must advise the court whether the parties fully engaged in the mediation. No consequences are identified for failure to fully engage but the court may make an adverse finding in relation to costs under s. 21 where a party unreasonably refuses to consider or attend mediation following an invitation pursuant to s. 16.
- 12.2. In combination, sections 16 and 21 run completely contrary to the statement in section 6(2) that '*participation in mediation shall be voluntary at all times*' and the definition of mediation in section 2(1) as '*a facilitative voluntary process in which parties to a dispute, with the assistance of mediator, attempt to reach a mutually acceptable agreement to resolve the dispute.*' A party cannot unreasonably refuse to participate in a voluntary activity. If a reasonableness test is used, then participation is no longer voluntary – it is compulsory without reasonable excuse.
- 12.3. Specifically in relation to Judicial Separation and Divorce proceedings, sections 16 and 21 are unnecessary. Similar and more appropriate provisions are already contained in existing legislation. In relation to other family law proceedings, the provision for an application on motion is cumbersome and could potentially exacerbate already significant delays in the family law courts.

Law Society Recommendation: Family Law proceedings, as defined by the Bill, should be excluded from the application of Section 21.

13. Information sessions in Family Law proceedings

- 13.1. Section 23 provides that the Minister may develop a scheme for delivery of 'mediation information sessions' to parties to relevant proceedings. A list of the information to be communicated at these sessions is set out in s. 23(2). A 'relevant dispute' is defined in section 23(8) as a dispute subject to family law proceedings or proceedings under certain provisions of the Succession Act 1965. Family law proceedings are proceedings before a court of competent jurisdiction under the enactments listed in section 2(1).
- 13.2. The Bill therefore envisages that these mediation information sessions will be delivered after proceedings have issued. For parties with legal representation, information in relation to mediation will have already been provided by their solicitor prior to the issue of proceedings. For those who have issued Judicial Separation or Divorce proceedings, information will have been provided twice, once pursuant to the 1989 or 1996 Act, and again pursuant to section 14 of the Bill. At least for this cohort, information sessions would seem totally unnecessary.
- 13.3. It is difficult to see what the Bill intends in relation to the purpose and timing of these information sessions. The Bill refers to a scheme to ensure '*that information sessions concerning mediation are available at reasonable cost and in suitable locations.*' This suggests information sessions being available, but not mandatory, and being paid for by the parties themselves. It may be that the intention is to provide a statutory framework for pilot schemes operated within the Courts Service at District Court level but this needs to be clarified.

14. Conclusion

- 14.1. The Society welcomes publication of the Bill, which follows on from the publication of the General Scheme and which will enact many of the key recommendations made by the Law Reform Commission.
- 14.2. The Society believes that the Bill, once enacted, is likely to have a transformative effect on how civil law disputes are processed and resolved in the State and will therefore represent an historic and positive enhancement of our civil justice system in the public interest. However until such time as the independent regulation of mediators has been properly addressed this benefit will not reach potential litigants.
- 14.3. The Society has however identified some fundamental issues around key principles of mediation, together with other mostly drafting issues, which when resolved will help to ensure the success of this very important legislative initiative.
- 14.4. The Society remains available to assist further as may be required to ensure the early passage of the Bill.

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