South African Law Reform Commission

DISCUSSION PAPER168

PROJECT 94
ALTERNATIVE DISPUTE RESOLUTION: A MEDIATION ACT FOR SOUTH AFRICA

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INTRODUCTION

The South African Law Commission, now known as the South African Law Reform Commission, was established by the South African Law Reform Commission Act 19 of 1973.

The members of the South African Law Reform Commission who were appointed by the President on 10 January 2024 are:

Justice Chris Jafta (Chairperson)
Professor Wesahl Domingo (Deputy-Chairperson)
Advocate Jacob Skosana
Dr Sejako Senatle
Dr Keneilwe Radebe
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The Secretary is Mr Tshisamphiri Nelson Matibe. The Commission's offices are at 2007 Lenchen Avenue South, Centurion, Pretoria.

The members of the Advisory Committee are:

Judge President Dunstan Mlambo (Chairperson), until his resignation on 30 May 2023
Mr John Brand, until his resignation on 20 April 2023
Professor Debbie Collier, project leader from 24 February 2024
Professor David Butler
Professor Wesahl Domingo, project leader from June 2022 to 4 October 2023
Advocate Hendrik Kotze
Deputy Judge President Aubrey Ledwaba
Advoate Anthea Platt (project leader), until her resignation from the Commission in February 2022
Advocate Paul Pretorius SC
Judge Cassim Sardiwalla, until September 2023
Justice Zukisa Tshiqi
Barrister Samantha Phumaphi, from 7 October 2024
Advocate Pat Mkhize, from 7 October 2024
Mr Ebrahim Patelia, from 7 October 2024

The Commission acknowledges that Advocate Hendrik Kotze developed Chapter 3 on accreditation and professional practice standards of mediators, and Professor David Butler developed Chapter 6 on international commercial mediation and the Singapore Convention.

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The researcher assigned to this project from 2017 until 30 November 2021 was Ms Ananda Louw. The researcher assigned to this project since 1 April 2023, is Mr Pierre van Wyk, and from 1 March 2025, is Dr Dellene Clark at dclark@justice.gov.za.

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PREFACE

This discussion paper, which reflects information up to November 2024, is prepared to elicit responses from interested parties and to serve as a basis for the deliberations of the South African Law Reform Commission (Commission), considering any responses already received. Accordingly, the views, conclusions, and recommendations in this paper are not to be regarded as the Commission's final views.

The discussion paper (which includes draft legislation is published in full to provide persons and bodies that wish to comment or make suggestions for the reform of this branch of the law with enough background information to enable them to make focused submissions to the Commission. Respondents are requested to respond as comprehensively as possible and are invited to raise additional issues not covered in this paper, should they wish to do so. The Commission assumes that, unless representations are marked confidential, respondents agree that the Commission may quote from or refer to their comments and may attribute comments to the respondent concerned. Respondents should bear in mind that the Commission may in any event be required to release information contained in the representations under the Promotion of Access to Information Act 2 of 2000.

The Commission will consider public responses to the discussion paper and test public opinion about solutions identified by the Commission. Based on such responses, a report containing the Commission's final recommendations will be prepared. The report (with draft legislation) will be submitted to the Minister of Justice and Constitutional Development for consideration for tabling in Parliament.

Respondents are requested to submit written comments, representations, or requests to the Commission by **30 April 2025** at the address appearing on the previous page. Any enquiries should be addressed to the Secretary of the Commission, Mr Nelson Matibe, or the researcher assigned to this project, Mr Pierre van Wyk, at pvanwyk@justice.gov.za and at telephone 012 622 6317, until 28 February 2025. Please contact Dr Dellene Clark from 1 March 2025, at dclark@justice.gov.za and at telephone 012 622 6307, for further enquiries about this investigation.

This document is also available on the Internet at: https://www.justice.gov.za/salrc/dpapers.htm

EXECUTIVE SUMMARY

1. This investigation aims to consider the development of legislation to promote the optimal use of mediation, and to provide citizens with an additional avenue to access to justice. In some quarters there has been a move away from the phrase “alternative dispute resolution” (ADR) to the phrase “dispute resolution” (DR). However, the term ‘ADR’ is embedded in our legal system and it is proposed that we retain the term *alternative* in the acronym ADR to identify the umbrella term of this investigation, namely ADR (see para 1.12).
2. In November 2019, we published our Discussion Paper 148 on *Alternative Dispute Resolution in Family Matters* with a draft Family Dispute Resolution Bill, for general information and comment. During 2024, we developed our report on this investigation. The Commission considered a draft report on family dispute resolution on 13 December 2024 and approved it subject to minor amendments. In 2025, an initial socio-economic assessment system report will be compiled and submitted to the Department of Policy, Monitoring and Evaluation in the Presidency for consideration. Once the Department of Policy, Monitoring and Evaluation is satisfied with the assessment report, it will sign-off the assessment report. The Commission will then submit the Project 100A report to the Minister of Justice and Constitutional Development with the socio-economic assessment report to enable the Minister to consider implementation of recommendations made in that report. The Commission’s discussion paper 168 therefore does not deal with the resolution of family disputes (see para 1.21).
3. In 2018, the advisory committee decided, as a first step, to concentrate on the development of a generic Mediation Bill to identify and develop the primary definitions and core principles pertaining to mediation. Practical considerations will determine how any existing ADR legislation will be integrated into, or linked with, overarching ADR legislation (see para 1.13).
4. Mediation has a long history in South Africa, and its approach to dispute resolution aligns with our African heritage, as well as our recent history. We note the adversarial litigation approach to resolving disputes in South Africa and the calls for resolving disputes by way of meaningful engagement. Legislative recognition and support for mediation is in line with this development (see paras 2.1 & 2.9).
5. Mediation provides an effective, inexpensive, and appropriate mechanism for the timeous or early resolution of disputes compared to litigating a dispute at a high cost in court. Mediation is also a tool that is effectively used to bring disputants to

the point of the early settlement of their disputes (see para 2.10).

6. A general concern which has been raised against the prevailing adversarial civil-justice system in South Africa since the late 1950s is the exorbitant costs involved in litigation. Disputants do not gain unhindered access to courts to pursue their matters. On average it takes three to six years to resolve a civil legal dispute in South Africa, although there is variation depending on the court or tribunal and process for resolution of the dispute. (see paras 2.24 & 2.25).
7. The challenge facing the democratic state is to ensure that the justice system is acceptable and accessible to the larger community. Mediation is one aid to promote access to justice, and in this regard, we consider relevant court cases in South Africa (see para 2.41).
8. Our proposed legislation leaves the approach that a mediator will adopt to facilitate resolving the dispute between the disputants to the discretion of those involved in the mediation. The legislation is therefore not prescriptive about the mediation approach to be adopted (see para 2.57).
9. This paper provides an analysis of the reasons why parties consider using mediation and why parties are cautious in resorting to mediation (see paras 2.58 to 2.75).
10. This paper considers the voluntary nature of mediation and the levels of compulsion introduced internationally. The South African Constitutional Court supports a distinction between coercion to enter mediation and coercion within mediation and held that "… the compulsion lies in participating in the process, not in reaching a settlement …". Mandatory mediation is, therefore, an allowable limitation on the right of disputants to access to courts. The Mediation Bill provides in clause 29 for mandatory mediation, but the court still has the discretion in terms of clause 30 to direct that mediation should not be required, even though mandatory mediation is usually required. Relevant authority on the nature of the court's discretion is considered in the paper (see paras 2.171 to 2.178).
11. We note in Chapter 2 the options of disputants opting in or out of mandatory mediation. The findings in the jurisdictions considered in Chapter 2 (USA, EU, Italy, Greece, India, Tanzania, Namibia, England, and Wales) confirm the utility of providing for mandatory mediation provided the parties have an option of opting out of mandatory mediation once they have participated in an initial mediation session. We therefore provide in clause 29 for disputants to be permitted to opt out of mandatory mediation (see para 2.178).
12. Our preliminary conclusions and proposals on regulating and certifying mediators are set out in five options in Chapter 3 (see also Annexure D to this paper, which

comprehensively sets out the five options. Our preference is option 4):

11.1 The first option would be to require existing professional bodies to also certify and supervise their members for the mediation work that they perform (e.g. the Law Society would supervise the mediation work that attorneys do, the Health Professions Council of South Africa would supervise the mediation work that psychologists do, etc). No additional legislation would be required to establish the accreditation and practice supervision mechanisms, but there are difficulties with this approach, which are considered in the paper (see paras 3.123 to 3.125 & 3.159).

11.2 The second option would be voluntary industry regulation. In such a system there is no legal requirement for mediators to affiliate with any accrediting or supervisory body. However, mediators can voluntarily affiliate with organisations that vouch for their qualifications and offer practice supervision. No additional legislation would be required to establish the accreditation and practice supervision mechanisms, however, the standards for mediation would not be uniformly regulated (see paras 3.126 to 3.129 & 3.159).

11.3 The third option is based on the National Qualifications Framework Act, 67 of 2008 ("NQFA") which allows for certain organisations to be recognised as a professional body, on fulfilment of the criteria for recognition. Such a body will then have statutory embedded powers to represent and/or regulate a recognised community of expert practitioners within the regulatory framework of the NQFA. No additional legislation would be required to establish the accreditation and practice supervision mechanisms. This would rely on the existing NQFA (see paras 3.130 to 3.136 & 3.159).

11.4 In terms of the fourth option, which is our preferred option, the envisaged Mediation Act will create a framework in accordance with which mediation accreditation and practice will be regulated. This option will require substantial legislative provisions to give the Minister of Justice the power to designate a Council, to describe the duties of the Council, and to make provision for how such a Council is to be constituted. This option puts in place a framework for regulating mediators, and the Bill provides in several instances for accredited mediators to be used for specific functions. Chapter 3 of the Bill provides a mechanism that will apply at the commencement of the Act, where the Chief Justice must, after consultation with the Minister of Justice, recognise one or more established organisations to register persons as certified mediators for purposes of litigated civil matters. This is a relatively low level of regulation which recognises that there are established mediation organisations in South Africa that have qualification

standards and codes of conduct and they exercise supervision to evaluate, assess and certify people as mediators. The proposed mechanism enables the Chief Justice, where an organisation performs those functions effectively, to recognise that organisation as one that qualifies for certifying mediators. This mechanism is used in jurisdictions such as the UK and Australia, where it works very effectively, and has been in place for many years. The committee has positioned that as the starting position in the Bill. When the Bill comes into effect that would be the first level of certification to be put in place. Clause 7 also provides for a process, if the Minister of Justice considers that it is necessary to establish a Mediation Council. The committee referenced the existing mechanisms in South Africa under the NQFA for organisations to be established and certified by the SA Qualifications Authority as a professional body. If there is such a professional body in place for mediation at that stage, then clause 7 empowers the Minister of Justice to recognise such a body as the Mediation Council. This would unlock the functions in clauses 8 and 9 to be performed by such a Mediation Council. This relates to generally setting qualification requirements certifying mediators and putting codes of practise in place. When the Mediation Council is recognised by the Minister of Justice, then the supervisory or the accreditation framework for mediators will step up a level and the Mediation Council will then function in terms of clauses 7 to 9. However, there is no obligation on the Minister to take this step. What the advisory committee envisages is that there may come a time, where the arrangements in terms of clause 5, where existing bodies are recognised, may no longer be enough and where an overarching approach to standard setting and to accreditation might be required (see para 3.137).

11.4.1 We propose in clause 5(1) of the Bill that at the commencement of the Mediation Act the Chief Justice must, after consultation with the Minister of Justice, by way of notice in the Government Gazette, recognise one or more organisations to register persons as certified mediators for purposes of litigated civil matters under Chapter 7 of the Bill. The Chief Justice may from time to time under clause 5(2) recognise additional organisations, by way of notice in the Government Gazette, to register persons as certified mediators. Clause 5(4) prescribes the factors which the Chief Justice must consider before recognising any such organisation (see para 3.138).

11.4.2 We further propose that under clause 5(5), the Chief Justice may, when recognising an organisation, stipulate that the organisation is only

recognised to register persons as certified mediators for one or more specified categories of dispute. Under clause 5(7), the Chief Justice may from time to time, after consultation with the body and the Heads of Court, for the reasons provided to the body, withdraw the recognition of any organisation previously made. Under clause 5(8), if a Mediation Council is recognised, only persons registered by that body shall be certified mediators for purposes of this Act and any other Act that requires mediation services to be rendered, provided that such body may continue to recognise persons who were regarded as certified mediators (see paras 3.139 & 3.165).

11.4.3 Under clause 7(1), the Minister of Justice may, after consultation with the Chief Justice and with the relevant supervisory body, and by way of notice in the Government Gazette, recognise a supervisory body for mediation practitioners, provided that the supervisory body is recognised under the NQFA as the Mediation Council. Clause 7(2) sets out the considerations and process for the Minister to withdraw the recognition previously made. Under clause 7(3), where a body is recognised as the Mediation Council, it must perform the functions and exercise the powers of the Mediation Council within the regulatory framework of the NQFA. Clause 7(4) provides for the functioning, composition, and quorum of the Board of the body performing the functions of the Mediation Council. The Mediation Council must, under clause 7(5), take steps to ensure that it is representative of the interests of mediators in general; and the public interest regarding mediation services (para 3.140 & 3.165).

11.4.4 We propose that under clause 8, the functions and powers of the Mediation Council include setting qualification requirements, and levels of training and experience for mediators in general, and mediators in specified categories of disputes; certifying persons as mediators, and as certified mediators in specified categories of disputes; instituting and enforcing disciplinary action against registered persons contravening the provisions of the Act and or the Code of Practice. The functions and powers of the Mediation Council further include advising the Minister on any matter referred to it by the Minister or on any matter it considers necessary to achieve the objects of the Act; compiling and publishing information; the promotion of mediation, by the arranging of mediation awareness and settlement weeks; investigating and encouraging the

establishment of public and private mediation schemes; co-operation with the Justice College for the purposes of providing mediation training to mediation clerks and registrars; and by contributing towards the availability and distribution of mediation information documents, their delivery to courts and disputants; and overseeing their publication on the website of the Council or prescribed websites; and, finally, advising the Minister on the preparation or approval of a scheme for the delivery of mediation information sessions in family dispute law cases as envisaged in the Family Dispute Resolution Bill, developed under the Commission's Project 100A (paras 3.141 & 3.165).

11.4.5 We propose under clause 9(1) that the Mediation Council must, within 90 days of being recognised in terms of section 7(1), publish a code or codes of practice to set standards for the conduct of mediations. The remainder of clause 9 sets out the matters to be regulated and the process of publishing, amending, and revoking a code. Considerations for a code of practice for community mediation are also set out in the paper, drawing on the comparative experience in Nepal, Sri Lanka, Trinidad and Tobago. Considerations for funding of the Mediation Council are also discussed and included in clause 10 (see paras 3.142 & 3.165; and paras 3.143, 3.165 & 7.109).

11.5 The fifth option for regulating and accrediting mediators is that a statutory mediation council be established by legislation at the outset to regulate the mediation industry. If a legislative Council is proposed, comprehensive legislative provisions would be required. In this regard, the South African Geomatics Council was established in 2013 by the Geomatics Profession Act, 19 of 2013 provides a template for enabling legislation as to how a Mediation Council could be established (see paras 3.146 to 3.151 & 3.164).

13. The long title of the Bill is to facilitate the settlement of disputes by mediation; to specify the principles applicable to mediation; to specify arrangements for mediation as an alternative to the institution of civil proceedings or to the continuation of civil proceedings that have been instituted; to provide for codes of practice to which mediators may subscribe; to create and regulate a mediation profession; to provide for recognition of a body as the Mediation Council of South Africa for this Act; to provide for enforcement of international commercial mediation settlement agreements; and to provide for related matters (see paras 4.5 and 4.6).

14. We propose a preamble in the Mediation Bill that references section 34 of the

Constitution; the duty of the State to provide accessible, inexpensive, quality, and expeditious justice to all parties; and set out the objectives of mediation (see para 4.10).

15. We propose several definitions in clause 1 of the Bill. “Accredit’’ means the process of evaluation and recognition by the Council of service providers and training programmes offered by institutions in respect of the mediation profession (see paras 4.12 & 4.13).
16. “Action” means litigation commenced by the issue of summons (see para 4.14).
17. “Agreement to mediate” means an agreement by two or more persons to refer for mediation the whole or part of a dispute which has arisen, or which may arise between them, and may include an agreement entered into between the disputing parties and a mediator before the mediation process commences which sets out the terms under which the mediation will be conducted (see para 4.15).
18. “Application” means litigation commenced by notice of motion (see para 4.16).
19. “Certified mediator” means a person who has been accredited or certified as a mediator, or where applicable as a mediator in specified categories of disputes, in terms of section 8 of the Act (see para 4.17).
20. “Community mediation” means a voluntary and accessible mediation process for resolving conflict and disputes between persons, groups, and organisations, including government entities, within a community, area, or locality, to promote social harmony, empower community members, and prevent the escalation of conflicts (see para 4.18).
21. “Constitution” means the Constitution of the Republic of South Africa, 1996 (see para 4.19).
22. “Costs of mediation” means the fees of a mediator; the travel and other expenses of a mediator; the costs of any expert advice requested by a mediator with the agreement of the parties; the costs of any assistance by a service provider recommending or selecting the appointment of a certified mediator pursuant to sections 12(5) and (6); and the costs of the venue of the mediation (para 4.20).
23. “Council” means the Mediation Council of South Africa recognised in terms of sections 5 and 6 of the Act (see para 4.21).
24. “Court” means any court in the Republic as defined in section 166 of the Constitution (see para 4.22).
25. “Deliver” means to serve a document on the opposite party in litigation and to file with the clerk or registrar of the court (see para 4.23).
26. “Dispute” means the subject of a disagreement between parties, or an aspect thereof, and includes an alleged dispute (see para 4.24).

27. “Family” means a societal group that is or has been related by blood (kinship), adoption, foster care, or the ties of marriage (civil, customary, or religious), civil union, or cohabitation (see para 4.25).
28. “Family law dispute” means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties’ respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary or different one (see para 4.26).
29. “Heads of court” means, under the Superior Courts Act, 2013 (Act No. 10 of 2013), in relation to the Constitutional Court, the Chief Justice; the Supreme Court of Appeal, the President of that Court; any Division of the High Court, the Judge President of that Division; and any court of a status similar to the High Court, the most senior judge of such court. We further propose that “heads of court” means under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), the heads of the administrative regions designated as such by the Minister, after consultation with the Magistrates Commission (see para 4.27).
30. “Legal practitioner” means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 of the Legal Practice Act, 2014 (Act No. 28 of 2014) (see para 4.28).
31. “Litigant” means a party to litigation (see para 4.29).
32. “Litigation” means court proceedings commenced by action or application proceedings (see para 4.30).
33. “Mediation” means a process in which a mediator facilitates and encourages communication and negotiation between the mediation parties and seeks to assist the mediation parties in arriving at a voluntary agreement regarding the dispute (see para 4.4.39).
34. “Mediation communication” means communication as referred to in clause 20(3). We propose this wording to prevent any contradiction with clause 20(3) which deals substantively with mediation communications (see para 4.43).
35. “Mediated settlement agreement” means an agreement referred in section 23 (see para 4.44).
36. “Mediator” means an individual or individuals who conduct the mediation (see para 4.47).
37. ‘‘Minister’’ means the Cabinet member responsible for the administration of justice, or where the context indicates another Cabinet member, that Cabinet member (see

para 4.48).

38. ‘‘NQF’’ means the National Qualifications Framework contemplated in Chapter 2 of the National Qualifications Framework Act, 2008 (Act No. 67 of 2008) (see para 4.49).
39. “Non-party” means a person, other than a mediation party or mediator, who is present at a mediation session or otherwise participates in a mediation process and includes the legal practitioner of each party, and experts in the subject matter of a dispute and witnesses (see para 4.51).
40. “Party” means a person or entity who participates in mediation and whose agreement is necessary to resolve the dispute (see para 4.54).
41. We decided to omit a definition for “person” from the Bill since unintended consequences might arise if this definition were to exclude other persons or entities if it were to list certain categories of individuals and entities (paras 4.56).
42. ‘‘Prescribed’’ means prescribed by regulation by the Minister in terms of the section 51 (see para 4.57).
43. We question the need for the inclusion of a definition for “proceeding” in the Bill in the context of referring a dispute to a mediation process (para 4.58).
44. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form (para 4.59).
45. ‘‘Regulation’’ means any regulation made by the Minister in terms of section 48 (para 4.60).
46. “Republic” means the Republic of South Africa (see para 4.61).
47. “Rules of court” means the rules of court applicable to any court in the Republic (see para 4.62).
48. “Service provider” means a body accredited by the Council or recognised by the Chief Justice and which supplies mediation services to the public and maintains a panel of certified mediators (see para 4.63).
49. “This Act’’ includes any regulation, any rule, and the code of conduct for mediators made in terms of this Act (see para 4.64).
50. The objectives of the proposed legislation in clause 2 are to minimise citizen frustration and delays in justice delivery by providing a standard legal framework for the fair and efficient settlement of disputes through mediation; promote and encourage mediation as an appropriate method of dispute resolution; afford parties the opportunity to resolve their disputes expeditiously and cost-effectively; regulate the mediator profession; regulate the procedure for the referral of disputes to mediation; direct the mediation process; and provide for the enforcement of settlement agreements under the rules of procedure and the conditions laid down

in the Singapore Convention (see para 4.69).

51. Under clause 3(1), the Mediation Bill must be interpreted in a manner that gives effect to the objectives of the Act. Under clause 3(2), whenever a provision in the Bill is in conflict with the provision in other legislation, any reasonable interpretation of a provision that would best promote the objects and scope of both legislation must be preferred over any alternative interpretation of that provision that is in conflict with the purpose and scope of both legislation. Under clause 3(3), whenever a provision of the Bill, excluding the provisions in Chapter 7 and Chapter 8 of the Bill, is in conflict with a provision in special legislation, then the provision in the special legislation shall prevail (see paras 7.70 & 4.71).

52. The default position on the application of the legislation in clause 4(1) is that the legislation will apply to all mediations under the Mediation Bill. This will generally mean where the disputants are required to mediate by law or when they are directed by a court to mediate their dispute (see paras 4.94 & 4.105).

53. Although the Mediation Bill is a general enabling Bill, it also applies in two specific contexts, firstly, court attached or court connected mediation, and secondly, the enforcement of cross-border international commercial mediation settlement agreements. The rest of the Mediation Bill contains the general enabling provisions. We consider that our approach is defensible to provide for these two specific areas in the Bill, and that there is a need for these provisions. We are of the view that excluding these provisions from the Bill would lead to unnecessary delays in the development of this area of the law. We, however, invite comment whether these two specific areas should be separated from the proposed Mediation Bill and the reasons for adopting such an approach (see para 4.95).

54. Parties to a mediation not covered by clause 4(1), may agree in writing that the provisions of sections 11 to 13 of the Bill Act will apply to their mediation: provided that the parties may not exclude the application of sections 12(8) and 12(10) from their mediation. Clause 11 deals with the requirements and consequences of disputants concluding agreements to mediate; clause 12 with the appointment of a mediator and clause 13 with the grounds for the termination of the appointment of a mediator (see paras 4.101 & 4.105).

55. Under clause 4(3) the provisions of clauses 12(8), 12(10) and clauses 14 to 27 of the Bill shall apply to any mediation not otherwise covered by clause 4(1) if the parties enter into a mediation agreement. This is to clarify that only where the parties enter into an agreement, they have a duty to include these provisions. Clauses 14 to 27 deal with the effect of time limits on mediation; the suspension of proceedings that are subject to a mediation agreement; immunity of mediators; the

procedure to be followed at mediation and the role of a mediator; commencement and time limit for completion of mediation; the submission of information at mediation; confidentiality of the mediation process; legal privilege in relation to mediation proceedings; right to legal representation; mediated settlement agreements and their enforcement; termination of mediation; certification of outcome of a mediation; unconditional and without prejudice tenders; and role of experts and non-parties (see paras 4.101 & 4.105).

56. Under clause 4(4) in mediations to which the Bill does not apply, it is nevertheless good practice to implement and comply with the principles set out in Chapters 4 and 5 of the Act (see paras 4.101 & 4.105).

57. Under clause 4(5), subject to clause 4(8), which deals with the Family Dispute Resolution Act (which is presently being developed also by the Commission), the provisions of the Mediation Bill only apply to mediations required by any other law to the extent that the provisions of this Bill are not inconsistent with that other law or with the regulations or procedure authorised or recognised by that other law. This clause clarifies that the provisions of the Mediation Bill are subject to the provisions of any other applicable legislation, e.g. the Labour Relations Act, the Traditional Courts Act, the Companies Act, the Land Court Act, and a large number of other statutes providing for ADR, including mediation (see paras 4.102 & 4.105).

58. The question arises whether the Mediation Bill ought to provide for mediation in public administration matters, such as for example disputes which may arise from the administration of estates by the Master's Office. There may be more disputes which arise in the public administration sphere. We have clarified in this paper that the specific provisions in Chapter 7 relate to mandatory mediation in litigated civil matters. There is in all probability scope to establish mediation processes for the resolution of disputes regarding public administration matters, if these are disputes that are appropriate for resolution by mediation in accordance with the mechanisms established by the Mediation Bill. We therefore invite comment whether there are disputes regarding public administration matters that should explicitly be regulated in accordance with the provisions of the Mediation Bill? (See para 4.103.)

59. Under clause 4(6), Chapter 8 of the Bill applies only to international commercial mediation settlement agreements (see paras 4.104 & 4.105).

60. Under clause 4(7), if any provision of the legislation or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable (see paras

4.104 & 4.105).

61. Under clause 4(8), the provisions of the proposed legislation apply to any mediation conducted in terms of the Family Dispute Resolution Act, 20…, to the extent that such matter has not been dealt with in the Family Dispute Resolution Act; and the applicable provision is capable of operating concurrently with the provisions of the Family Dispute Resolution Act, 20 … (see paras 4.104 & 4.105).

62. We propose in clause 11 that where parties agree to mediate, it must be in writing. Where the parties have not entered into an agreement to mediate, a person may initiate mediation by sending to the person with whom they have a dispute, a written invitation regarding the mediation. If the invitee does not receive an acceptance of the written invitation within 15 days from the day on which the invitation was sent, or within such longer period of time as specified in the invitation, the invitee may elect to treat this as a rejection of the invitation to mediate. Once the written invitation of the person who initiates the mediation is accepted by the other party, the parties must agree to mediate (see paras 5.15 – 5.17).

63. Under clause 12, based on party autonomy the parties may appoint any person to be their mediator in terms of a mediation agreement to assist them in the mediation. However, if it is a statutory mediation or if it is a court ordered or if the parties have contracted into the Act then we consider the mediator must be certified. We consider the appointment of a mediator must deal further with the following aspects: and there should be one mediator, unless otherwise agreed and where there is more than one mediator, the mediators must act jointly in the mediation. The parties must endeavour to appoint a mediator by agreement unless a different appointment procedure has been indicated by court, statute, or contract. Clause 12 has provisions for a service provider to assist the parties with the appointment of a mediation. When a person is approached in connection with a possible appointment as mediator, that person must disclose, as soon as is practical before accepting an appointment, any circumstances that a reasonable individual would consider likely to give rise to justifiable doubts as to their impartiality or independence, including the disclosure of details of any personal, professional, financial or other interest that may influence the outcome of the mediation; from the time of appointment and throughout the mediation, without delay, disclose to the parties any such circumstances as they arise; and at the request of a party, disclose the mediator's qualifications to mediate a dispute. Finally, we consider no appointment of a mediator should be valid except with the written consent of the mediator (see paras 5.23 & 5.24).

64. Clause 13 deals with the termination of the appointment of a mediator, including

by agreement of the parties for any reason (see paras 5.24 to 5.26).

65. We propose in clause 14, that where a dispute is referred to mediation, the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute who has elected to mediate from the date of conclusion of the agreement to mediate referred to in clause 11 to the time of the completion or the termination of the mediation. We further propose that any party to the proceedings who considers that the suspension of the prescribed time limits is being abused may apply to the court for the uplifting of the suspension of the prescribed time limits. Finally, we propose that the suspension of the time limits shall lapse upon the completion or termination of the mediation (see para 5.45).

66. Under clause 15, in court proceedings where there are multiple parties some of whom are agreeable to mediation and some of whom are not, parties who are agreeable to mediation may proceed to mediation notwithstanding any other party's refusal to mediate. In any matter where there are multiple issues, the parties may agree that some issues be referred to mediation and that the issues remaining in dispute may proceed to litigation. Further, if any issue remains in dispute after mediation, the parties may proceed to litigation on such issue in dispute (see para 5.52).

67. We propose in clause 16 that a mediator is not liable for any act or omission in respect of anything done or omitted to be done in the discharge of their functions as a mediator unless the act or omission is shown to have been done in bad faith. A further consideration is whether mediators should also be liable for their acts or omissions done in gross negligence, and we invite comment on whether gross negligence should explicitly be covered under the mediator immunity provision (see paras 5.55 & 5.56).

68. Clause 17 sets out aspects of the role and functions of mediators in facilitating a mediation. A mediator may meet or communicate with the parties together or with each of them separately at any stage of a mediation. A mediator must not act as a representative or adviser of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is related to the mediation. A mediator may assist the parties in reaching a satisfactory resolution of the dispute and suggest options for the settlement of the dispute (see para 5.67).

69. We propose in clause 18, that the date of the commencement of the mediation process is the date that the agreement to mediate was concluded, where the agreement is drawn up in writing after a dispute has arisen, or, in case of reference to mediation by a court, the date the court made its decision known or, in any other

case, on the date when the mediator took the first step to start the mediation process. We further propose that the time limit for completion of the mediation is 30 days from the date of commencement of the mediation unless otherwise agreed, and on expiry of this date the parties may institute or proceed with legal proceedings (see para 5.73).

70. Under clause 19, parties may at any stage of the mediation submit to the mediator and or other parties information concerning the dispute, statements describing the general nature of the dispute, the points at issue, any supporting document or additional information deemed appropriate, a description of the goals, interests, needs, and motivations of the parties, the terms of the proposed settlement, as well as any relevant documents. A mediator may request any party to submit any additional information or document as the mediator deems appropriate (see para 5.76).

71. Clause 20 provides that unless otherwise agreed by the parties, all information relating to the mediation, any mediation communication, and including, if relevant, the settlement agreement, must be kept confidential, except where disclosure is required by law; or the disclosure is required under any other law for implementation or enforcement of a settlement agreement. When a mediator receives information concerning a dispute from a party, the mediator must keep such information confidential, unless the relevant party indicates that the information is not subject to the condition that it should be kept confidential, or expresses its consent to the disclosure of such information to another party to the mediation. Any mediation communication is privileged and is not subject to discovery or admissible in evidence in any proceedings unless required by law or otherwise agreed. What constitutes a “mediation communication” in clause 20(3), is elaborated in the definitions clause (see para 5.96).

72. In respect of privilege, clause 21 provides that any mediation communication is privileged and is not subject to discovery or admissible evidence in any proceedings unless required by law or otherwise agreed. The privilege may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant. Clause 21(3) to (6) sets out the circumstances in which privilege does not apply. If any communication made in the mediation process is subject to an exception, only that part of the communication necessary for the application of the exception may be disclosed or admitted. Disclosure or admission of evidence excluded from privilege does not render the evidence or any other communication made in the mediation process discoverable

or admissible for any other purpose. Privilege does not apply if the parties in a signed document agree in advance, or if a record of proceedings reflects that the parties agree, that all or part of the mediation process is not privileged (see para 5.106).

73. Clause 22 provides that parties to a mediation may be assisted by a legal practitioner or another person of their choice unless otherwise agreed (see para 5.110).

74. We propose in clause 23 that once the parties agree on the terms of a settlement to resolve all or part of the dispute, they must prepare and sign a written settlement agreement. The mediator must provide support to the parties in preparing and accurately recording the settlement agreement. A mediated settlement agreement is binding on the parties and may be made an order of court; may be used as evidence; and may be relied upon for seeking relief. If proceedings have been commenced in court, the settlement agreement may be recorded before the court as a consent judgment or judgment of the court. We further propose in clause 37 that the power of the Chief Justice and heads of court under the Superior Courts Act to make directives include the making of directives for expedited processes for the enforcement of mediated settlement agreements referred to in section 23 (see paras 5.126 to 5.128).

75. Clause 24 provides for the termination of the mediation process (see para 5.134).

76. Clause 25 requires a mediator to provide the parties with a certificate of the outcome of the mediation stating that agreement on all or some of the issues in dispute has been reached between the parties, or that agreement between the parties could not be reached; or, if applicable, setting out the reasons provided by a party why that party opted out of participation or refused to engage in mediation as provided for in clause 29(6). Further, a mediator may not make a report, evaluation, recommendation, finding, or other communication regarding a mediation to a court, arbitrator, or other authority that may make a ruling on the dispute that is the subject of the mediation, and a communication made in violation of this prescript, may not be considered by a court, arbitrator, or other authority (see paras 5.137 & 5.138).

77. We propose in clause 26 that where court proceedings have been instituted in respect of a dispute that is subsequently unsuccessfully submitted to mediation, a party may immediately make an offer, including one rejected during the mediation, as a tender without prejudice save as to costs under the relevant court rules. The fact that a tender has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs. We further

propose that this clause does not prevent any party from making an unconditional tender contemplated by Rule 34 of the Rules of the High Court (see para 5.142).

78. Clause 27 provides that in the mediator's discretion, non-parties whose presence and participation is deemed helpful, either to resolving the dispute or addressing an issue underlying it, may be permitted to attend and participate in the mediation. A mediator may exclude anyone wishing to attend and participate, whose presence and participation the mediator deems would likely be disruptive or counterproductive (see para 5.146).

79. Clause 28 regulates the cost of mediation. We considered whether provision ought to be made that parties be excused from mandatory mediation if the parties satisfy the Court that they cannot afford the costs of mediation; where they fail to agree on the costs, or any dispute arises in relation to the costs of mediation. We note that such provision is made in Italy and South Carolina. We propose that the Legal Aid SA (LASA) mandate ought to be extended by the State and that the LASA budget allocation be augmented to enable LASA to fund indigent disputants to obtain mediation in civil disputes. Consideration ought to be given to certified mediators who are candidate legal practitioners and legal practitioners providing pro bono mediation services to disputants as part of their annual community service under the Legal Practice Act. The Legal Practice Council could assist disputants by establishing pro bono mediation panels and publicising information about these mediation panels. Will it be viable to establish a mediation scheme paid for by the state in South Africa, particularly regarding disputes subject to mandatory mediation like the court-connected mediator scheme at the Namibian High Courts and in family law disputes in Ireland? (see paras 5.193 to 5.197).

80. Unless the proposed legislation contains elements of compulsion, it is likely that we will not see the desired uptake of mediation in our civil justice system. We propose in clause 29 that whenever an appearance to defend is entered in action proceedings or a notice of intention to oppose is delivered in application proceedings, the parties to any dispute, must enter into an agreement to mediate. The court may, in accordance with relevant screening guidelines to be adopted by the Chief Justice and the Heads of Court, at any stage of litigation, in any civil matter, refer a dispute between the parties to a certified mediator to facilitate mediation of the dispute in terms of this legislation, and may do so either with or without the consent of the parties to the proceedings. In cases to which mandatory mediation apply, parties should inform the court whether they have participated in mediation and whether they have reached an outcome. Unless that party files with the court a certificate of outcome furnished to that party by a certified mediator, the

court will not hear a dispute. The discretionary powers which a court may exercise during proceedings with a view to facilitating the resolution of a dispute, are not limited by any other powers conferred in terms of the legislation. The court may impose an appropriate cost order against a party who unreasonably refuses to engage in mediation. The mediation must be performed by a certified mediator appointed by the parties or where the parties are indigent, by a certified mediator appointed by the Court. A party may after attending one session of mediation with a certified mediator, opt out of further mediation, and may provide to the mediator the reasons in writing for opting out of mediation or refusing to engage in mediation (see paras 5.209 to 5.211).

81. We note the examples in Italy, Greece, India, Tanzania and Namibia which provide for categories of mandatory mediation. In May 2024 mandatory mediation also commenced in small money claim disputes in England and Wales. We consider it is appropriate to follow the examples of mandatory mediation in Italy, Greece, India, Tanzania and Namibia. We propose in clause 30 that unless a court directs otherwise, mediation is mandatory in the following disputes: insurance and subrogated insurance disputes; medical negligence disputes; professional negligence disputes; defended loan default disputes; construction contract disputes; personal injury claims arising from motor vehicle accident disputes; and defamation disputes. We further propose that the Chief Justice may request the Minister to delineate, by regulation, any additional categories of disputes that, in the opinion of the Chief Justice, should be subject to mandatory mediation. Finally, this clause does not detract from the power of the court under clause 30(1) to exempt parties in certain circumstances from mandatory mediation (see paras 5.217 to 5.218).

82. We invite comments on the adoption of guidelines in the Mediation Bill to guide courts in deciding to refer a matter to mediation, and the adequacy of the guidelines or exemptions based on the *Churchill* case, whether home-grown guidelines or exemptions should be developed for adoption in South Africa, or would such an approach stifle legal development in this area of the law. We further invite comment on our proposal that the Chief Justice and the Heads of Court make, as practice directives, screening guidelines to empower courts, at any stage of litigation, in any civil matter, to refer a dispute between the parties to a certified mediator to facilitate mediation of the dispute (see paras 5.219 to 5.223).

83. Clause 31 provides that in certain circumstances parties may be exempted from mandatory mediation, namely if they intend to file a consent order and both parties consent to the order that is being requested; or a court determines that participation

is not in the best interests of the parties, including, but not limited to urgency or potential hardship. We invite comment on the adequacy of this proposal considering the request for comment set out in the preceding paragraph (see para 5.224).

84. We are of the view that the envisaged legislation should include a provision like Rule 41A of the High Court and should impose on the parties a duty to disclose why they resorted to mediation or not. We propose in clause 32 that in every new action or application proceeding in any category of dispute not subject to mandatory mediation, the plaintiff or applicant must, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation in terms of the Act. The parties in every action or application proceeding, may at any stage before judgment, agree to refer the dispute to mediation. Where the trial or the hearing of the opposed application has commenced and the parties wish for the trial or the hearing to be adjourned as a result of the referral to mediation, the parties must obtain the leave of the court on such order as to costs as the court may deem appropriate (see para 5.228).

85. We propose in clause 33 that nothing in the proposed legislation prevents a court from exercising its powers to apply judicial case management in any civil matter. Furthermore, during a mediation process, a court may at any time issue an urgent order to protect the health, safety, welfare, or interest of a party to the dispute (see para 5.232).

86. There is a general need for the development of information and education documents to inform and educate disputants about mediation. In clause 34 we propose measures to ensure that disputants are informed about the benefits of mediation (see paras 5.234).

87. We propose in clause 35 that a legal practitioner must, prior to issuing or defending proceedings on behalf of a client provide to and discuss with the client the information and education document, and disclose, in writing, an estimate of the costs of proceeding with litigation without mediating. We further propose that if a legal practitioner is acting on behalf of a client who intends to institute or defend proceedings, the originating document by which proceedings are instituted or defended must be accompanied by a sworn declaration made by the legal practitioner evidencing that they have performed the obligations imposed on them in relation to the client and the proceedings to which the declaration relates. Finally, the court may consider compliance by the legal practitioner about the required declaration when making a costs order. Is there a need to qualify this clause to

exclude its application to an ex parte urgent application in a matter not already subjected to mediation? We request comment on legal practitioners complying with clause 35 in urgent applications (see paras 5.244 to 5.246).

88. We are of the view that the duties of magistrates' court and High Court clerks and registrars regarding mediation ought to be included in the Bill as set out in clause 36. The clerk or registrar must assist unrepresented parties, if the parties agree to mediation, to conclude a written agreement to mediate, and upon conclusion of an agreement to mediate, forward to the mediator a copy of the agreement to mediate; in action proceedings, copies of the summons and plea; and in application proceedings, copies of the founding, answering and replying affidavits. We note that the DOJCD's Brigitte Mabandla Justice College provides mediation training to court clerks and registrars. The proposed legal training requirement for magistrates' court and High Court clerks and registrars to receive training on mediation should therefore not impose an additional training burden on the State (see paras 5.249 & 5.250).

89. We propose in clause 37 that the Chief Justice, and Heads of Court, under the Superior Courts Act, should issue practice directives for the following matters, including mediation under the Act: screening guidelines for referring matters to mandatory mediation; expedited processes for the enforcement of mediated settlement agreements referred to in section 23; the promotion of mediation in small claims disputes; and the integration of mediation into case management. We propose that the Chief Justice and the Heads of Court must consult with the Legal Practice Council, the Mediation Council and members of any relevant professional bodies before issuing any practice directive in this regard. We further propose that the Rules Board for Courts of Law to make rules for mediation in the superior courts and the magistrates' courts under the Act, in consultation with the Chief Justice (see paras 5.251 to 5.252).

90. Clause 46 provides for the Minister to make regulations about any matter the legislation requires or permits to be prescribed; and any matter that may be necessary for the application of the legislation. We further propose that the legislation clarifies that the power of the Minister does not extend to making practice directives which are in the jurisdiction of the Chief Justice and the heads of Court under clause 37 (see paras 5.253 to 5.255).

91. Clause 47 provides that the short title of the statute should be the Mediation Act; and that the legislation will come into operation on a date fixed by the President by proclamation in the Gazette and include the possibility for different parts of the Act to commence at different times (see paras 5.256 to 5.257).

92. In 2018, UNCITRAL approved the text of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention), which was developed concurrently with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Model Law of 2018). The Singapore Convention was adopted by the UN General Assembly by consensus and a signing ceremony was held in Singapore on 6-7 August 2019. On that occasion, 46 countries signed the Convention, including China, India, Nigeria and the United States of America. South Africa was not a signatory at the time. Several countries have since signed the Convention including Australia, the United Kingdom, Ghana, Rwanda and three further countries from Africa. The Convention now has 14 ratifications, including Singapore, Japan, and Saudi Arabia, with Nigeria being the only party from Africa that has ratified the Convention. The Singapore Convention provides a uniform framework for enforcement of cross-border mediation settlement agreements, and greater certainty to parties on enforceability. It is not clear whether South Africa intends to sign the Convention, however states do have the option to adopt and modify provisions of the Model Law or the Convention, with the option of later signing or acceding to the Convention (see para 6.2).
93. We examine in Chapter 7 of this paper the desirability of generic legislation for South Africa to promote the use of mediation for the settlement of disputes. One of the issues that we have to address is a recommended response by South Africa to the UNCITRAL Model Law as a whole. We recommend a provisional response on this issue, without dealing with the content of the original Model Law of 2002 in any detail. We propose legislation which could give effect to South Africa's accession to the Singapore Convention on Mediation, or alternatively to incorporate provisions of the Model Law of 2018, if South Africa does not intend to sign or accede to the Singapore Convention. In view of the close similarity between the text of the Singapore Convention on Mediation and Section 3 of the Model Law of 2018 addition, the draft legislation proposed to give effect to accession to the Convention is similar to that which would be required to include Section 3 of the Model Law in the Committee's proposed generic legislation on mediation. The former option requires the addition of two definitions, one extra clause, and one further minor addition to the Mediation Bill. The reasons for preferring the former option appear from Chapter 7 of the paper (see para 6.3).
94. The Model Law on Mediation of 2018, Sections 1 and 2, have no provisions dealing with the powers of the court in the context of the mediation process. As a result, the need for harmonisation of national mediation laws relating to cross-border

disputes is correspondingly less. It has been said that the Model Law on Mediation "has a tendency to regulate details internal to the mediation process that do not actually require regulation." It is submitted that this criticism is misplaced. Section 2 of the Model Law, which deals with the process for an international commercial mediation, has only one mandatory provision. The rest of the provisions are merely default or contract-out provisions, which only apply where the parties have not agreed to their own process. However, this does not mean that the default provisions of the Model Law on Mediation are necessarily appropriate for a generic mediation statute for South Africa. It is suggested that the Model Law, along with other generic national mediation legislation, can be consulted for guidance on the drafting of specific provisions in the proposed South African statute, without it being necessary to base the generic South African legislation closely on the provisions of the Model Law on Mediation (see paras 6.7 & 6.8).

95. We are of the view that South Africa should give serious and urgent consideration to ratifying or acceding to the Singapore Convention. Chapter 8 of the Draft Bill has been worded accordingly, and as an alternative, we propose adopting provisions of the Model Law. In the available literature on the Singapore Convention we are not aware of any reason being suggested as to why a nation intent on promoting foreign trade should not join the Convention. In an African context, the initiative has been seized by Nigeria through first signing and then joining the Convention and including the necessary provision for it to have effect in domestic law by means of appropriate provisions in its new Arbitration and Mediation Act of 2023. African commentators have urged the adoption of the Convention by other African states. In Asia the government of India signed the Convention and has since been criticised for failing to ratify the Convention and to make provision for such ratification in domestic law in its new generic Mediation Act. The Commission requests respondents to the discussion paper who hold different views on South Africa joining the Singapore Convention or even on adopting Section 3 of the Model Law on Mediation to motivate their reasons in their responses so that the Commission can take these views into account when drafting its report (see para 6.11).

96. We suggest that it is unnecessary for South Africa to adopt either of the two reservations permitted in article 8 of the Singapore Convention. In terms of the first, the Convention would not apply to a settlement agreement, as defined, to which the state or other public body ("government agency") is a party. In terms of the second, the Convention will only apply to a settlement agreement if the parties to that agreement so agree. In a South African context legislation furthermore

provides for mediation as the primary vehicle for resolving investment disputes between the state and foreign investors, to the exclusion of arbitration. The second reservation would mean that parties would have to "contract in" to the Convention before it would apply to their settlement agreement, which would reduce the efficacy of the Convention. Nigeria found it unnecessary to make either reservation (see para 6.12).

97. We propose that South Africa should not make either of the permitted reservations before joining the Singapore Convention. By adopting the Convention rather than Section 3 of the 2018 Model Law, South Africa sends out a stronger message of support to the global and African communities of South Africa's support for the use of mediation to resolve cross-border commercial disputes. It also encourages other states to ratify or accede to the Convention, for the benefit of South African commercial entities wishing to enforce or rely on settlement agreements achieved through mediation in states which are parties to the Convention (see para 6.13).
98. Chapter 8 of the proposed legislation is based on the Singapore Convention and article 3 of the Model Law (see para 6.21).
99. Clause 38 of the Bill contains relevant definitions for Chapter 8, including "international" and "settlement agreement" which are taken from articles 1(1) and 2(1) of the Convention and article 16 of the Model Law on Mediation. The definitions of "court" and "UNCITRAL" are taken from the International Arbitration Act 15 of 2017. The definition of court excludes a magistrate's court. Where a settlement is reached under the mediation provisions of the Magistrates' Courts Rules, even if the matter concerns a cross-border commercial dispute, the settlement agreement would be enforceable in South Africa as provided by the Rules. The definitions of "Convention" and "mediation" have been added, the latter being taken from article 2(3) of the Convention (see para 6.22).
100. Clauses 41 to 44 of the draft legislation are based on the corresponding provisions of articles 17-20 of the Model Law on Mediation, which are virtually identical to articles 3-6 of the Convention (see para 6.23).
101. The International Arbitration Act allows reference to be made to reports of UNCITRAL and its secretariat for purposes of interpreting Schedule 1 of that Act. A similar provision is included in clause 39 (see para 6.24).
102. Clauses 40(2) and (3) deal with the exceptions where the draft legislation does not apply, based on articles 1(2) and (3) / 16(2) and (3) of the instruments (see para 6.25).
103. Clause 45 gives effect to article 7 of the Singapore Convention (see para 6.26).
104. We propose that community mediation within communities and local government

level should be promoted by the proposed legislation; however, we did not attempt to exhaustively regulate community mediation in the proposed legislation, and further discussions with community mediators and local authorities should be undertaken. We, therefore, request our stakeholders who are active in the community mediation field in South Africa to engage with the Commission on the regulation and funding of community mediation and on promoting mediation in resolving community disputes (see paras 7.105 & 7.107).

105. A further question is whether funding could be allocated at local government level to support and grow existing community mediation programmes in our community like the Sri Lankan model we note in this paper (see para 7.108).

106. We note the codes of conduct or code of ethics adopted in Nepal, Sri Lanka, and Trinidad and Tobago, which apply to community mediators (see Annexures A to C to this paper). A further question is whether stakeholders agree with our view that the envisaged Mediation Council be tasked with the adoption of a code of conduct for community mediators and if so, what issues should it address (para 7.109).

DRAFT MEDIATION BILL

A Bill to facilitate the settlement of disputes by mediation; to specify the principles applicable to mediation; to specify arrangements for mediation as an alternative to the institution of civil proceedings or to the continuation of civil proceedings that have been instituted; to provide for codes of practice to which mediators may subscribe; to create and regulate a mediation profession; to provide for recognition of a body as the Mediation Council of South Africa for the purposes of this Act; to provide for enforcement of international commercial mediation settlement agreements; and to provide for related matters.

PREAMBLE

RECOGNISING THAT –

everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or independent and impartial tribunal or forum as provided in section 34 of the Constitution;

the State is required to ensure accessible, inexpensive, quality and expeditious justice for all,

AND BEARING IN MIND THAT –

the broad objectives of mediation are –

- to promote access to justice;
- to facilitate an expeditious and cost-effective resolution of a dispute between litigants;
- to assist litigants to determine at an early stage of the litigation whether proceeding with a trial or an opposed application is in their best interest or not;
- to allow litigants to return to litigation should the attempt at mediation not be successful;
- to preserve the relationships between litigants which may become strained or destroyed by the adversarial nature of the litigation;
- to promote restorative justice;
- to protect and respect the inherent right to dignity of a person as provided in section 10 of the Constitution; and
- to protect the right of a person to privacy as provided in section 14 of the Constitution;

AND NOTING

that it has been identified that in the light of the core constitutional values of ubuntu – botho, trial courts and disputants should be encouraged towards searching for processes which enhance the possibilities of resolving disputes between parties;

AND IN ORDER TO –

- enhance access to justice by promoting and encouraging mediation as a method of alternative dispute resolution in order to supplement litigation in the resolution of disputes;

BE IT THEREFORE ENACTED BY the Parliament of the Republic of South Africa, as follows: —

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CHAPTER 1
DEFINITIONS AND PURPOSE

1. Definitions

''accredit'' means the process of evaluation and recognition by the Council of service providers and training programmes offered by institutions in respect of the mediation profession;

"action" means litigation commenced by the issue of summons;

"agreement to mediate" means an agreement by two or more persons to refer for mediation the whole or part of a dispute which has arisen, or which may arise

between them, and may include an agreement entered into between the disputing parties and a mediator before the mediation process commences which sets out the terms under which the mediation will be conducted;

"application" means litigation commenced by notice of motion;

"certified mediator" means a person who has been certified as a mediator, or where applicable as a mediator in specified categories of disputes, in terms of section 8 of the Act;

"community mediation" means a voluntary and accessible mediation process for resolving conflict and disputes between persons, groups, and organisations, including government entities, within a community, area or locality, to promote social harmony, empower community members, and prevent the escalation of conflicts;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"costs of mediation" means –

(a) the fees of a mediator;
(b) the travel and other expenses of a mediator;
(c) the costs of any expert advice requested by a mediator with the agreement of the parties;
(d) the costs of any assistance by a service provider recommending or selecting the appointment of a certified mediator pursuant to sections 12(5) and (6); and
(e) the costs of the venue of the mediation;

"Council" means the Mediation Council of South Africa established in terms of sections 5 and 6 of this Act;

"court" means any court in the Republic as defined in section 166 of the Constitution;

"deliver" means to serve a document on the opposite party in litigation and to file with the clerk or registrar of the court;

"dispute" means the subject of a disagreement between parties, or an aspect thereof, and includes an alleged dispute;

"Director-General" means the Director-General of the Department of Justice and Constitutional Development;

"family" means a societal group that is or has been related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation;

"family law dispute" means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties' respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary or different one;

"heads of court" means –

(a) under the Superior Courts Act, 2013 (Act No. 10 of 2013), in relation to—

(i) the Constitutional Court, means the Chief Justice;

(ii) the Supreme Court of Appeal, means the President of that Court;

(iii) any Division of the High Court, means the Judge President of that Division; and

(iv) any court of a status similar to the High Court, the most senior judge of such court;

(a) under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), the heads of the administrative regions designated as such by the Minister, after consultation with the Magistrates Commission.

"legal practitioner" means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 of the Legal Practice Act, 2014 (Act No. 28 of 2014);

"litigant" means a party to litigation;

"litigation" means court proceedings commenced by action or application proceedings;

"mediation" means a process in which a mediator facilitates and encourages communication and negotiation between the mediation parties, and seeks to assist the mediation parties in arriving at a voluntary agreement regarding the dispute;

"mediation communication" means an oral or written statement referred to in section 20(3);

"mediated settlement agreement" means an agreement, by some or all of the parties to the mediation settling the whole, or part of, the dispute to which the mediation relates;

"mediator" means an individual or individuals who conduct the mediation;

''Minister'' means the Cabinet member responsible for the administration of justice, or where the context indicates another Cabinet member, that Cabinet member;

"National Qualifications Framework Act" means the National Qualifications Framework Act, 2008 (Act No. 67 of 2008);

''NQF'' means the National Qualifications Framework contemplated in Chapter 2 of the National Qualifications Framework Act;

"non-party" means a person, other than a mediation party or mediator, who is present at a mediation session or otherwise participates in a mediation process and includes the legal practitioner of each party, experts in the subject matter of a dispute and witnesses;

"party" means a person or entity who participates in mediation and whose agreement is necessary to resolve the dispute;

''prescribed'' means prescribed by regulation by the Minister in terms of section 48;

"record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

''regulation'' means any regulation made by the Minister in terms of section 46.

"Republic" means the Republic of South Africa;

"rules of court" means the rules of court applicable to any court in the Republic;

"service provider" means a body accredited by the Council or recognised by the Chief Justice which supplies mediation services to the public and maintains a roster of certified mediators;

''this Act'' includes any regulation and any rule made in terms of this Act.

Objectives of this Act

2. (1) The objectives of this Act are to –

(*a*) minimise citizen frustration and delays in justice delivery by providing a standard legal framework for the fair and efficient settlement of disputes through mediation;

(*b*) promote and encourage mediation as an appropriate method of dispute resolution;

(*c*) afford parties the opportunity to resolve their disputes expeditiously and cost effectively;

(*d*) regulate the mediator profession;

(*e*) regulate the procedure for the referral of disputes to mediation;

(*f*) direct the mediation process; and

(*g*) provide for the enforcement of settlement agreements under the rules of procedure and the conditions laid down in the Singapore Convention.

CHAPTER 2
INTERPRETATION AND APPLICATION PROVISIONS

Interpretation

3(1) This Act must be interpreted in a manner that gives effect to the objectives of the Act.

(2) Whenever a provision in this Act is in conflict with the provision in other legislation, any reasonable interpretation of a provision that would best promote the objects and scope of both legislation must be preferred over any alternative interpretation of that provision that is in conflict with the purpose and scope of both legislation.

(3) Whenever a provision of this legislation, excluding the provisions in Chapter 7 and Chapter 8, conflicts with a provision in special legislation, then the provision in the special legislation shall prevail.

Application

4.(1) This Act applies to a mediation in which the mediation parties are required to mediate a matter in accordance with the provisions of this Act.

(2) Parties to a mediation not covered by subsection (1) may agree in writing that the provisions of sections 11 to 13 of this Act will apply to their mediation, but they may not exclude the application of sections 12(8) and 12(10) from their mediation.

(3) The provisions of section 12(8), 12(10) and sections 14 to 27 of this Act shall apply to any mediation not covered by subsection (1) if the parties enter into a mediation agreement.

(4) In a mediation to which this Act does not apply, it would be good practice to implement and comply with the principles set out in Chapters 4 and 5 of this Act.

(5) Subject to subsection (8), the provisions of this Act only apply to mediations required by any other law to the extent that the provisions of this Act are not inconsistent with that other law or with the regulations or procedure authorised or recognised by that other law.

(6) Chapter 8 of this Act applies only to international commercial mediation settlement agreements.

(7) If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

(8) The provisions of this Act apply to any mediation conducted in terms of the Family Dispute Resolution Act, 20…, to the extent that –

(a) such matter has not been dealt with in the Family Dispute Resolution Act; and

(b) the applicable provision of this Act is capable of operating concurrently with the provisions of the Family Dispute Resolution Act, 20…

CHAPTER 3
CERTIFICATION OF MEDIATORS AND PROVISION FOR MEDIATION COUNCIL

Arrangements for the certification of mediators

5.(1) At the commencement of this Act the Chief Justice must, after consultation with the Minister and the Heads of Court, without delay and by way of notice in the Government Gazette, recognize one or more organisations to register persons as certified mediators for purposes of Chapter 7 of the Act.

(2) The Chief Justice may from time to time recognize additional organisations, by way of notice in the Government Gazette, to register persons as certified mediators.

(3) When the Chief Justice has recognised an organisation in accordance with subsections (1) or (2), the persons certified as mediators by that organisation are certified mediators, and where applicable certified mediators for specific categories of disputes, for purposes of this Act and any other Act that requires mediation services to be rendered.

(4) Prior to recognising any organisation in terms of subsections (1) or (2), the Chief Justice must have regard to the following–

(*a*) qualification and certification standards used by the organisation, including any such standards that may be applicable to mediation in specific categories of dispute;

(*b*) manner in which the organisation requires persons to be assessed for certification against these standards;

(*c*) codes of conduct that the organisation requires certified mediators to comply with, as well as the complaints and disciplinary processes that apply to mediators certified by the organisation; and

(*d*) manner in which the mediator standards, the codes of practice, the complaints and disciplinary processes, and the register of mediators certified by the organisation, are published.

(5) The Chief Justice may when recognising an organisation in terms of subsections (1) or (2) stipulate that the organisation is only recognised to register persons as certified mediators for one or more specified categories of dispute.

(6) Subject to subsection (4), the decisions in accordance with subsections (1), (2) and (5) are at the discretion of the Chief Justice, provided that the Chief Justice may consult with any relevant stakeholders prior to making any such decision.

(7) The Chief Justice may from time to time, after consultation with the body and the Heads of Court, for the reasons provided to the body, withdraw the recognition of any organisation previously made in accordance with subsections (1), (2) or (5).

(8) In the event that a supervisory body for the mediation profession is recognised as the Mediation Council in terms of section 7, only persons registered by that body shall be certified mediators for purposes of this Act and any other Act that requires mediation services to be rendered, provided that such body may at its discretion and after

consultation with the Chief Justice, continue to recognise persons who were regarded as certified mediators in accordance with this section.

Provision for a Mediation Council

6.(1) Provision is hereby made for recognition of an entity to be known as the Mediation Council.

(2) No person, other than a professional body recognised under section 7 may be known, or describe itself, as the Mediation Council or any variant of that name.

Appointment of Mediation Council

7.(1) The Minister may, after consultation with the Chief Justice and with the relevant supervisory body, and by way of notice in the Government Gazette, recognize a supervisory body for a community of mediation expert practitioners, provided that the supervisory body is recognised as a professional body in terms of sections 28, 29, 30 and 31 of the National Qualifications Framework Act, as the Mediation Council for purposes of this Act.

(2) The Minister may from time to time, after consultation with the supervisory body, for the reasons provided to the body, also if the Mediation Council loses its NQFA status as a professional body, withdraw the recognition previously made in accordance with subsection (1).

(3) Where a body is recognised as the Mediation Council, it must perform the functions and exercise the powers of the Mediation Council as set out in sections 8 and 9 of this Act within the regulatory framework of the National Qualifications Framework Act.

(4) The functioning, composition and quorum of the Board of the body performing the functions of the Mediation Council referred to in subsection (1), must be determined by that body subject to the regulatory framework of the National Qualifications Framework Act.

(5) Subject to the provisions of the National Qualifications Framework Act, the Mediation Council must take steps to ensure that it is representative of –

(*a*) the interests of mediators in general; and

(*b*) the public interest with regard to mediation services.

Functions and powers of the Mediation Council

8. Subject to the provisions of the NQF Act, the functions and powers of the Mediation Council as referred to in section 6 include —

(*a*) setting qualification requirements, including levels of training and experience for mediators in general, and for mediators in specified categories of

disputes, and establishing mechanisms for the evaluation and accreditation of training programmes offered by institutions in respect of the mediation profession;

(*b*) regulating the mediation profession so as to promote and protect the interests of the public in relation to mediation work, as long as it is not inconsistent with any other applicable law;

(*c*) certifying persons as mediators, and where applicable as certified mediators in specified categories of disputes, for purposes of this Act and any other Act that requires mediation services to be rendered, and establishing mechanisms for mediators to apply for certification, as well as mechanisms for the evaluation and accreditation of service providers for the purposes of this Act;

(*d*) instituting and enforcing disciplinary action against registered persons contravening the provisions of this Act and or the Code of Practice referred to in this Act;

(*e*) promoting a high standard of education and training in the mediation sector;

(*f*) publication of a code of practice contemplated by section 9 to set standards for the conduct of mediations;

(*g*) advising the Minister on any regulations contemplated by section 46 and any matter referred to it by the Minister or on any matter it considers necessary to achieve the objects of this Act;

(*h*) annually compiling and publishing information about accredited service providers and the mediation profession;

(*i*) the promotion of mediation, by–

(i) the arranging of mediation awareness and settlement weeks;

(ii) investigating and encouraging the establishment of public and private mediation schemes;

(iii) co-operation with the Justice College for the purposes of providing mediation training to mediation clerks and registrars; and

(iv) by contributing towards the availability and distribution of mediation information documents, referred to in section 34, their delivery to courts and disputants; and overseeing their publication on the website of the Council or prescribed websites;

(*j*) advising the Minister on the preparation or approval of a scheme for the delivery of mediation information sessions in family dispute law cases in terms of the Family Dispute Resolution Act, 20 …

Codes of practice

9.(1) The Mediation Council must, within 90 days from the date of being recognised in terms of section 7(1) and having had regard to the matters specified in subsections (2) and (3), as well as the relevant provisions of this Act, publish a code or codes of practice to set standards for the conduct of mediations.

(2) A code or codes of practice of the Mediation Council must have due regard to the different requirements that may be applicable to the practice of mediation in various specialised areas of mediation.

(3) A code of practice referred to in subsection (1) must include provisions in relation to all of the following:

(*a*) continuing professional development training requirements for mediators;

(*b*) procedures to be followed by mediators in the conduct of a mediation;

(*c*) procedures to be followed by mediators in the conduct of a mediation requiring consultation, by a mediator, with a child;

(*d*) ethical standards to be observed by mediators before, during and after a mediation;

(*e*) procedures to be followed by a party for redress in the event of dissatisfaction with the conduct of a mediator;

(*f*) determination of the fees and costs of a mediation; and

(*g*) any other matters relevant to the conduct of mediation.

(4) Before publishing a code of practice under this section, the body referred to in subsection (1) must—

(*a*) publish a notice in the Government Gazette and on the Council's website—

(i) indicating that it proposes to publish or approve a code under this section;

(ii) indicating where a draft of the code is available for inspection free of charge and for purchase for a period specified in the notice (being not less than 30 days from the date of the publication of the notice in the Government Gazette and on the Council's website); and

(iii) stating that submissions in relation to the draft code may be made in writing to the Mediation Council before a date specified in the notice (which must be not less than 30 days after the end of the period referred to in subparagraph (ii));

(iv) indicating that as long as the code remains in force, copies of it are available –

(*aa*) on the Council's website;

(*bb*) for inspection by members of the public free of charge at the Council's offices; and

(*cc*) for purchase or copying by members of the public at a reasonable price at the Council's offices, and

(*b*) have regard to any submissions received pursuant to paragraph (a)(iii).

(5) When the Mediation Council approves a code of practice under this section, it must cause a notice of the approval to be published in the Government Gazette and the notice must specify the date from which the code must come into operation.

(6) Subject to subsection (4), the Mediation Council may amend or revoke a code of practice prepared or approved under this section.

(7) The requirements of subsections (3) and (4) must, with all necessary modifications, apply to a code of practice that the Mediation Council intends to amend or revoke.

(8) In this section "code of practice" includes part of a code of practice.

(9) When persons are regarded as certified mediators under the provisions of section 7(1) or (2), they shall be required to comply with the codes of practice of the organisation or organisations that certified them as mediators and be subject to the complaints and disciplinary processes of these organisations.

Funding of the Mediation Council

10. Expenditure incidental to the exercise of the powers or the performance of the functions of the Council in terms of this Act or any other law must be defrayed from the funds of the Council and may include fees calculated in accordance with such rules as it must make for that purpose.

CHAPTER 4
RECOURSE TO MEDIATION

Agreement to mediate

11.(1) An agreement to mediate must be in writing.

(2) Where the parties have not entered into an agreement to mediate as contemplated in subsection (1), a person may initiate mediation by sending to the person with whom they have a dispute, a written invitation regarding the mediation which must briefly specify the matters in dispute.

(3) Upon receipt of a written invitation sent by the person initiating the mediation under subsection (2), the person with whom they have a dispute may, in writing, accept the written invitation, where there is a prior agreement to mediate contemplated in subsection (1).

(4) If a party that invited another party to mediate does not receive an acceptance of the written invitation within 15 days from the day on which the invitation was sent, or

within such longer period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.

(5) Once the written invitation of the person who initiates the mediation is accepted by the other party, the parties must enter into an agreement to mediate, if they have not entered into an agreement to mediate as contemplated in subsection (1).

Appointment of mediator

12.(1) The parties must appoint a certified mediator to assist them in the mediation, provided that in a mediation other than mediation required by law or court ordered, the parties may agree to appoint any mediator to assist them.

(2) There should be one mediator, unless otherwise agreed.

(3) Where there is more than one mediator, the mediators must act jointly in the mediation.

(4) The parties must endeavour to appoint a mediator by agreement, unless a different appointment procedure has been indicated by a court, statute or contract.

(5) The parties may seek the assistance of a service provider for appointing a certified mediator by –

(*a*) requesting a service provider to recommend suitable candidates; or

(*b*) agreeing that the selection must be made directly by the service provider, in which case the parties must subsequently appoint the selected mediator.

(6) In recommending or selecting individuals to act as mediator, the service provider must have regard to:

(*a*) The professional expertise and qualifications of the prospective mediator, including expertise in the subject matter in dispute, experience as a mediator and ability to conduct the mediation;

(*b*) Any relevant certification of a prospective mediator, awarded by the Council, or in the absence of a Council, any relevant certification by an organisation recognised by the Chief Justice;

(*c*) The availability of the mediator;

(*d*) Such considerations as are likely to secure the appointment of an independent and impartial mediator; and

(*e*) the complexity of the subject matter in dispute, and any diversity between the parties.

(7) When a person is approached in connection with a possible appointment as mediator, that person must –

(*a*) disclose, as soon as is practical before accepting an appointment, any circumstances that a reasonable individual would consider likely to give rise to justifiable doubts as to their impartiality or independence, including the disclosure of details of any personal, professional, financial or other interest that may influence the outcome of the mediation;

(*b*) from the time of appointment and throughout the mediation, without delay, disclose to the parties any such circumstances as they arise; and

(*c*) at the request of a party, disclose the mediator's qualifications to mediate a dispute.

(8) Prior to accepting the appointment, the prospective mediator must ensure their availability to conduct the mediation diligently and efficiently.

(9) No appointment of the mediator is valid except with the written consent of the mediator.

Termination of appointment of mediator

13.(1) If a mediator appointed under this Part—

(*a*) is found to not possess the relevant qualifications, special knowledge or experience in mediation as required under section 12(6)(a);

(*b*) is found to no longer satisfy the requirement of an institution in relation to a mediator as required under section 12(6)(b);

(*c*) is found to have financial or personal interest in the dispute;

(*d*) is found to have obtained his appointment by way of fraud or any other improper means; or

(*e*) is unable to serve as a mediator for the mediation,

the parties may terminate the appointment of the mediator and appoint another mediator for the mediation or request the designated service provider to appoint another mediator.

(2) Notwithstanding subsection (1), the parties may agree to terminate the appointment of a mediator, or agree to replace a mediator at any time, for any reason.

Effect of mediation on time limits

14.(1) Where a dispute is referred to mediation—

(*a*) the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute

who have elected to mediate from the date of signature of the agreement referred to in section 11 to the time of completion or termination of the mediation;

(*b*) any party to the proceedings who considers that the suspension of the prescribed time limits referred to in paragraph (a) is being abused, may apply to the court for the uplifting of the suspension of the prescribed time limits; and

(*c*) the suspension of the time limits referred to in paragraph (a) shall lapse upon the completion or termination of the mediation referred to in sections 18 and 24.

Suspension of court proceedings which are subject of a mediation agreement

15.(1) In court proceedings where there are multiple parties some of whom are agreeable to mediation and some of whom are not, parties who are agreeable to mediation may proceed to mediation notwithstanding any other party's refusal to mediate.

(2) In any matter where there are multiple issues, the parties may agree that some issues be referred to mediation and that the issues remaining in dispute may proceed to litigation.

(3) If any issue remains in dispute after mediation, the parties may proceed to litigation on such issue in dispute.

Immunity of mediator

16. A mediator is not liable for any act or omission in respect of anything done or omitted to be done in the discharge of their functions as a mediator unless the act or omission is shown to have been done in bad faith.

CHAPTER 5
MEDIATION PROCESS

Procedure to be followed at the mediation and role of mediator

17.(1) A mediator may determine the manner in which the mediation is to be conducted after consultation with the parties, taking into account –

(a) the circumstances of the case;
(b) any wishes that the parties may express; and
(c) the need for a speedy settlement of the dispute.

(2) A mediation must be conducted in private unless otherwise agreed by the parties.

(3) Notwithstanding subsection (2)—

(*a*) a non-party of any party's choice may participate in a mediation to assist the party,

subject to the consent of the mediator; provided the consent of the mediator does not apply in regard to legal representation contemplated in section 22; and

(*b*) a non-party of a mediator's choice may participate in a mediation to assist the mediator during the mediation, subject to the consent of the parties.

(4) In order to facilitate the conduct of the mediation, the -

(*a*) parties and the mediator may convene a meeting at an early stage to agree on the organisation of the mediation; and

(*b*) parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution/agency or person.

(5) A mediator may act independently and impartially and seek to maintain fair treatment of the parties and, in so doing, must take into account the circumstances of the case.

(6) At any stage of a mediation a mediator may meet or communicate with the parties together or with each of them separately.

(7) A mediator must not act as a representative or an adviser of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is related to the mediation.

(8) A mediator may assist the parties to reach a satisfactory resolution of the dispute and suggest options for the settlement of the dispute.

Commencement and time limit for completion of mediation

18.(1) The date of commencement of the mediation process is the date that the agreement to mediate was concluded, where the agreement is drawn up in writing after a dispute has arisen, or, in case of reference to mediation by a court, the date the court made its decision known or, in any other case, on the date when the mediator took the first step to start the mediation process.

(2) The time limit for completion of the mediation is 30 days from the date of commencement of the mediation unless otherwise agreed, and on expiry of this date the parties may institute or proceed with legal proceedings even if the mediation has not been completed.

Submission of information at mediation

19. At any stage of the mediation, -

(a) the parties may submit to the other parties and or the mediator information concerning the dispute, such as statements describing the general nature of the dispute, the points at issue, any supporting document or additional information deemed appropriate, a description of the goals, interests, needs

and motivations of the parties, and the proposed terms of settlement as well as any relevant documents; and

(b) a mediator may request any party to submit any additional information or document as the mediator deems appropriate.

Confidentiality of mediation process

20.(1) Unless otherwise agreed by the parties, all information relating to the mediation, any mediation communication, and, including, if relevant, the settlement agreement, must be kept confidential by those involved in the mediation, including a non-party, except where -

(*a*) disclosure is required by law; or

(*b*) the disclosure is required under this or any other law for the purposes of implementation or enforcement of a settlement agreement.

(2) When a mediator receives information concerning a dispute from a party, the mediator must keep such information confidential, unless the relevant party indicates that the information is not subject to the condition that it should be kept confidential, or expresses their consent to the disclosure of such information to another party to the mediation, or unless a court otherwise directs.

(3) Mediation communication includes, but is not limited to –

(*a*) views expressed, or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(*b*) statements or admissions made by a party in the course of the mediation;

(*c*) proposals made by the mediator or the parties;

(*d*) the fact that a party had indicated their willingness to accept a proposal (or parts thereof) for settlement made by the mediator or the parties; and

(*e*) a document prepared primarily for purposes of the mediation.

Legal privilege in relation to mediation proceedings

21.(1) Any mediation communication as referred to in section 20(3), is privileged and is not subject to discovery or admissible in evidence in any proceedings unless required by law or otherwise agreed.

(2) A privilege in terms of this section may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant.

(3) A person who makes a disclosure or representation about any mediation communication which prejudices another person in legal proceedings may not claim privilege in terms of this section, but this limitation on privilege applies only to the extent

that it is necessary for the person prejudiced to respond to the disclosure or representation.

(4) There is no privilege in terms of this section for any communication made in the mediation process that is—

(*a*) available to the public in terms of any law or made during a session of the mediation process that is open to, or is required by law to be open, to the public;

(*b*) a threat or statement of intention to inflict bodily harm or commit a crime of violence;

(*c*) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;

(*d*) part of an agreement resulting from the mediation process, reflected in a document signed by all parties to the agreement; or

(*e*) not subject to the privilege in accordance with the terms of an agreement to mediate between the parties and the mediator.

(5) Privileges in terms of this section do not apply to the extent that a communication is—

(*a)* sought or presented to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to the mediation process; or

(*b)* sought or presented to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the child protection services agency or adult protection services agency is a party to or otherwise participates in the process.

(6) There is no privilege in terms of this section if a presiding officer or tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the importance of protecting confidentiality, and the communication made in the mediation process is sought or presented in—

(*a*) court proceedings involving an offence; or

(*b*) proceedings seeking rescission of a contract arising out of the mediation process or in which a defense to avoid liability under the contract is raised.

(7) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (4) or subsection (6)(*b*).

(8) If a mediation communication is not privileged under subsection 6(a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted; provided that admission of evidence under subsection

6(a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

(9) If any communication made in the mediation process is subject to an exception in terms of subsection (5) or (6), only that part of the communication necessary for the application of the exception may be disclosed or admitted.

(10) Disclosure or admission of evidence excluded from privilege in terms of subsection (5) or (6) does not render the evidence or any other any communication made in the mediation process discoverable or admissible for any other purpose.

(11) The privileges under this section do not apply if the parties in a signed document agree in advance, or if a record of proceedings reflects that the parties agree, that all or part of the mediation process is not privileged.

Right to assistance by legal practitioner or another person

22. A party may be assisted by a legal practitioner or another person of their choice at the mediation, unless the parties agree otherwise.

Mediated settlement agreements and their enforcement

23.(1) Once the parties agree on the terms of a settlement to resolve all or part of the dispute, they must prepare and sign a written settlement agreement.

(2) The mediator must provide support to the parties in preparing and accurately recording the settlement agreement.

(3) A mediated settlement agreement is binding on the parties.

(4) By signing the mediated settlement agreement, the parties agree that the settlement agreement –

(*a*) may be made an order of court;

(*b*) may be used as evidence that it results from mediation; and

(*c*) may be relied upon for seeking relief under the applicable legal framework.

(5) If proceedings have been commenced in court, the mediated settlement agreement may be recorded before the court as a consent judgment or judgment of the court.

Termination of mediation process

24. The mediation terminates -

(*a*) by the signing of the mediated settlement agreement by the parties, on the date of such signature;

(*b*) by a declaration of the parties to the mediator to the effect that the mediation is terminated, and the reason for the termination, on the date of the declaration;

(*c*) by a declaration of a party to the other party and the mediator, if appointed, to the effect that they no longer wish to pursue mediation, on the date of the declaration, unless the parties are prohibited from unilaterally terminating the mediation before the expiration of a defined period;

(*d*) by a declaration of a mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified or that the agreed mediation fees have not been paid, on the date of the declaration;

(*e*) at the expiration of any mandatory period determined in law or by agreement; or

(*f*) by the death of any party or incapacity of any party.

Certification of outcome

25.(1) A mediator must provide the parties with a certificate of outcome —

(*a*) stating that an agreement on all or some of the issues in dispute has been reached between the parties; or

(*b*) stating that an agreement between the parties could not be reached;

(*c*) if required by section 29(7), setting out the reasons provided by a party why that party opted out of participation or refused to engage in mediation.

(2) Except as required in subsection (1) a mediator may not make a report, evaluation, recommendation, finding, or other communication regarding a mediation to a court, arbitrator, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(3) A communication made in violation of subsection (2) may not be considered by a court, arbitrator, or other authority.

Unconditional and without prejudice tender

26.(1) Where court proceedings have been instituted in respect of a dispute that is subsequently unsuccessfully submitted to mediation, a party may immediately make an offer, including one rejected during the mediation, as a tender without prejudice save as to costs under the relevant court rules.

(2) In the case of all other disputes submitted unsuccessfully to mediation, a party may immediately make an offer, including one rejected during the mediation, as a tender without prejudice save as to costs by sending it to the other party.

(3) No offer in terms of this section made without prejudice must be disclosed to the court at any time before judgment has been given and no reference to such offer must appear on any file in the office of the registrar containing the papers in the said case.

(4) The fact that a tender referred to in subsection (1) or (2) has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.

(5) If the court has given judgment on the question of costs in ignorance of the tender, a party may immediately request that the question of costs shall be considered afresh in the light of the tender: Provided that nothing in this subsection must affect the court's discretion as to an award of costs.

(6) The provisions of this section apply with the changes required by the context to a tender made under subsection (2) in the context of a dispute that has been subjected to arbitration.

(7) This section does not prevent any party from making an unconditional tender contemplated by Rule 34 of the rules of the High Court.

Role of experts and non-parties

27.(1) In the mediator's discretion, non-parties whose presence and participation is deemed helpful, either to resolving the dispute or addressing an issue underlying it, may be permitted to attend and participate in the mediation, unless and until the mediator determines that their presence is no longer helpful.

(2) A mediator may, after consultation with the parties, give any directions that they consider appropriate in relation to expert evidence in a proceeding.

(3) A mediator may exclude anyone wishing to attend and participate, whose presence and participation the mediator deems would likely be disruptive or counterproductive.

CHAPTER 6
FUNDING AND FEES

Cost of mediation

28.(1) The parties participating in the mediation process must pay the costs of the mediation in full, unless the services of the mediator are provided free of charge or when a sliding scale, as prescribed, applies owing to the indigence of a party or the parties.

(2) The method for fixing the costs of the mediation must be agreed upon by the parties and the mediator prior to the mediation commencing or as early as possible during the mediation.

(3) Unless otherwise agreed by the parties and the mediator -

(*a*) the fees of the mediator are paid to the mediator prior to the commencement of the mediation;

(*b*) the costs of the mediation are borne equally by the parties;

(*c*) in case of multiparty mediation, the costs referred to in subsection (1) are shared pro rata; and

(*d*) all other expenses incurred by a party are borne by that party.

(4) If the Court is satisfied by one or both of the parties, in the event of the parties failing to agree or any dispute arising in relation to costs, that they cannot afford mediation, the court may determine that –

(*a*) the parties be excused from mandatory mediation subject to the court having without success –

(i) explored with parties the possibility of the non-indigent party carrying the mediation costs; and

(ii) referred them to a service provider that provides pro-bono mediation; and

(*b*) the mediation costs will be such as determined by the court, unless the court decides otherwise.

CHAPTER 7

MEDIATION IN LITIGATED CIVIL MATTERS

Mandatory mediation

29.(1) Whenever an appearance to defend is entered in action proceedings or a notice of intention to oppose is delivered in application proceedings, the parties to any dispute set out in section 30(1), or delineated in terms of section 30(2), must, in order to attempt the resolution of the dispute –

(*a*) submit themselves to mediation in terms of this Act; and

(*b*) enter into an agreement to mediate in terms of section 11(6) and (7).

(2) The court may, in accordance with relevant screening guidelines contemplated in section 37(1)(*b*), at any stage of litigation, in any civil matter, refer a dispute between the parties to a certified mediator to facilitate mediation of the dispute in terms of this Act, and may do so either with or without the consent of the parties to the proceedings.

(3) A court exercising jurisdiction under this Act must not enrol a dispute unless a party whose dispute is one to which mandatory mediation applies, files with the court a certificate of outcome furnished to that party by a certified mediator in terms of section 25.

(4) The discretionary powers which a court may exercise during proceedings with a view to facilitating the resolution of a dispute, are not prejudiced by any other powers conferred in terms of this Act.

(5) In addition to subsection (3), the court may impose an appropriate cost order against a party who unreasonably refuses to engage in mediation.

(6) The mediation must be performed –

(*a*) by a certified mediator appointed by the parties in terms of section 12; or

(*b*) where the parties are indigent, by a certified mediator appointed by the Court.

(7) Notwithstanding the provisions of this section, a party may after attending one session of mediation with a certified mediator, opt out of further mediation contemplated in this section, and may provide to the mediator the reasons in writing for opting out of mediation or refusing to engage in mediation.

Categories of disputes subject to mandatory mediation

30.(1) Unless a court directs otherwise, mediation is mandatory in the following disputes –

(*a*) insurance disputes and subrogated insurance claims;

(*b*) medical negligence disputes;

(*c*) professional negligence claims;

(*d*) defended loan default disputes;

(*e*) construction contract disputes;

(*f*) personal injury claims arising from motor vehicle accident disputes; and

(*g*) defamation disputes.

(2) The Chief Justice may submit a request to the Minister to delineate, by regulation, any additional categories of disputes that, in the opinion of the Chief Justice, must be subject to mandatory mediation.

(3) Any regulation envisaged under this section must be made after consultation with the Cabinet Minister under whose control the matters within which the categories of disputes fall, resides.

(4) This section does not detract from the power of the court under section 33(1).

Parties may in certain circumstances be exempted from mandatory mediation

31. The parties are not compelled to submit to mediation in terms of section 30 if—

(*a*) they intend to file a consent order and both parties consent to the order that is being requested; or

(*b*) a court determines that participation is not in the best interests of the parties, including, but not limited to urgency or potential hardship.

Notice by parties agreeing to or opposing mediation

32.(1) In every new action or application proceeding in any category of dispute not referred to in section 30, the plaintiff or applicant must, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation in terms of this Act.

(2) A defendant or respondent in every action or application proceeding must, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiffs or applicant's legal practitioners, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation in terms of this Act.

(3) Notwithstanding the provisions of subsections (1) and (2) the parties in every action or application proceeding may at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or the hearing of the opposed application has commenced and the parties wish for the trial or the hearing to be adjourned as a result of the referral to mediation, the parties must obtain the leave of the court on such order as to costs as the court may deem appropriate.

General powers of court

33.(1) Nothing in this Act will prevent a court from exercising its powers to apply judicial case management in any civil matter.

(2) During a mediation process, a court may at any time issue an urgent order to protect the health, safety, welfare or interest of a party to the dispute.

Information and education document

34.(1) The Chief Justice must, for the purposes of ensuring that information concerning mediation is available to parties in proceedings in terms of sections 29, 32 or 33 –

(*a*) prepare and publish an information and education document for delivery to parties; or

(*b*) approve an information and education document for delivery to parties prepared by a person other than the Chief Justice.

(2) An information and education document referred to in subsection (1) must address the–

(*a*) benefits of mediation over court-based resolutions in respect of relevant disputes;

(*b*) nature and operation of mediation, including mandatory mediation, in respect of disputes;

(*c*) role of the mediator in a mediation;

(*d*) types of mediation settlements available in a mediation;

(*e*) costs of mediation; and

(*f*) availability of legal advice at any time during the mediation.

(3) The Chief Justice may amend or revoke an information and education document prepared or approved under sub-section (1) after consultation with the Mediation Council and members of any relevant professional bodies.

Role of legal practitioners

35.(1) A legal practitioner must, prior to issuing or defending proceedings on behalf of a client in terms of either section 29 or 32—

(*a*) provide to and discuss with the client the information and education document referred to in section 34;

(*b*) provide the client with information in respect of mediation services;

(c) discuss with the client and provide in writing an assessment of the risks involved in litigating the case; and

(*d*) disclose, in writing, an estimate of the costs of proceeding with litigation without mediating.

(2) If the legal practitioner concerned is acting on behalf of a client who intends to institute or defend proceedings, the originating document by which proceedings are instituted or defended must be accompanied by a sworn declaration made by the legal practitioner evidencing (if such be the case) that the legal practitioner has performed the obligations imposed on them under subsection (1) in relation to the client and the proceedings to which the declaration relates.

(3) If the originating document referred to in subsection (2) is not accompanied by a sworn declaration made in accordance with that subsection, the court concerned may adjourn the proceedings for such period as it considers reasonable in the circumstances to enable the legal practitioner concerned to comply with subsection (1) and provide the court with such declaration or, if the legal practitioner has already complied with subsection (1), provide the court with such declaration.

(4) A Court may consider compliance by the legal practitioner concerned with this section when making a costs order.

Functions and duties of clerks and registrars

36.(1) A clerk or registrar of the court, who has completed a course approved by the Director-General, must –

(*a*) provide to and discuss with unrepresented parties the information and education document referred to in section 34; and

(*b*) explain the liability of the parties, as applicable, for the fees of a mediator.

(2) A clerk or registrar of a court must assist unrepresented parties ─

(*a*) by keeping a list of certified pro bono mediators in accordance with the different levels of certification;

(*b*) by informing the parties that they may be assisted by certified mediators of their choice, at their own cost;

(*c*) if the parties agree to mediation, to conclude a written agreement to mediate, which must be signed by the parties; and

(*d*) upon conclusion of an agreement to mediate, forward to the mediator─

(i) a copy of the agreement to mediate;

(ii) in action proceedings, copies of the summons and plea; and

(iii) in application proceedings, copies of the founding, answering and replying affidavits.

(3) In the event of the unrepresented parties not being able to resolve their dispute or conclude a settlement agreement where the dispute has been referred to mediation, the clerk or registrar of the court must upon receipt of a certificate of outcome from a mediator, file the certificate of outcome to enable the dispute to proceed as a defended action or opposed application.

Chief Justice and Heads of Court may make Directives and Rules Board Rules

37.(1) The Chief Justice, and the Heads of Court under the Superiors Courts Act, may issue practice directives, providing for the following matters, including –

(*a*) mediation under this Act;

(*b*) screening guidelines for referring matters to mandatory mediation;

(*c*) expedited processes for the enforcement of mediated settlement agreements referred to in section 23;

(*d*) the promotion of mediation in small claims disputes; and

(*e*) the integration of mediation into case management.

(2) The Chief Justice and the Heads of Court must consult with the Legal Practice Council, the Mediation Council and members of any relevant professional bodies before issuing any practice directive in terms of sub-section (1).

(3) The Rules Board for Courts of Law established under the Rules Board for Courts of Law Act, 1985 (Act No, 107 of 1985) may make Rules for mediation in the superior courts and the magistrates' courts under this Act in consultation with the Chief Justice.

INTERNATIONAL MEDIATION

CHAPTER 8

INTERNATIONAL COMMERCIAL MEDIATION SETTLEMENT AGREEMENTS

Definitions

38.(1) In this Chapter, unless the context otherwise indicates –

"court" means any Division of the High Court referred to in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013), or any local seat thereof having jurisdiction;

"Convention" means the United Nations Convention on International Settlement Agreements Resulting from Mediation of 2018, the text of which is set out in Schedule 1.

"international" in the context of a settlement agreement means that at the time of the conclusion of the settlement agreement -

(*a*) at least two parties to the settlement agreement have their places of business in different states; or

(*b*) the state in which the parties to the settlement agreement have their places of business is different from either the state -

(i) in which a substantial part of the obligations under the settlement agreement is to be performed; or

(ii) with which the subject matter of the settlement agreement is most closely connected;

"**mediation**" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

"settlement agreement" means an international agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute; and

"UNCITRAL'' means the United Nations Commission on International Trade Law.

(2)(*a*) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(*b*) If a party does not have a place of business, reference is to be made to the party's habitual residence.

(3) A settlement agreement is in writing if its content is recorded in any form, which requirement is met by an electronic communication, if the information contained therein is accessible so as to be useable for subsequent reference.

Interpretation of this Chapter

39. The material to which a court may refer in interpreting this Chapter includes relevant reports of UNCITRAL and its secretariat.

Application of this Chapter

40.(1) Subject to the provisions of this section, this chapter applies to settlement agreements as defined in section 38(1).

(2) This chapter does not apply to settlement agreements -

(*a*) concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(*b*) relating to family, inheritance or employment law.

(3) This chapter does not apply to -

(*a*) settlement agreements that -

(i) have been approved by a court or concluded in the course of proceedings before a court; and

(ii) are enforceable as a judgment in the State of that court; or

(*b*) settlement agreements that have been recorded and are enforceable as an arbitral award.

General principles

41.(1) A settlement agreement must be enforced in accordance with the rules of procedure of the Republic, and under the conditions laid down in the Convention subject to this Chapter.

(2) If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of the Republic, and under the conditions laid down in this chapter, in order to prove that the matter has already been resolved.

Requirements for reliance on settlement agreements

42.(1) A party relying on a settlement agreement under this Chapter must supply to the court-

(*a*) the settlement agreement signed by the parties;

(*b*) evidence that the settlement agreement resulted from mediation, such as -

(i) the mediator's signature on the settlement agreement;

(ii) a document signed by the mediator indicating that the mediation was carried out;

(iv) an attestation by the institution that administered the mediation; or

(iv) in the absence of (i), (ii) or (iii), any other evidence acceptable to the court.

(2) The requirement that a settlement agreement must be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if -

(*a*) a method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(*b*) the method used is either –

(i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) proven in fact to have fulfilled the functions described in subsection (2)(a), by itself or together with further evidence.

(3) If the settlement agreement is not in an official language of the Republic, the court may request a translation thereof into such language.

(4) The court may require any necessary document in order to verify that the requirements of this Chapter have been complied with.

(5) When considering the request for relief, the court must act expeditiously.

Grounds for refusing to grant relief

43.(1) A court may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the court proof that –

(*a*) a party to the settlement agreement was under some incapacity;

(*b*) the settlement agreement sought to be relied upon –

(i) is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereof, under the law deemed applicable by the court;

(ii) is not binding, or is not final, according to its terms; or

(iii) has been subsequently modified;

(c) the obligations in the settlement agreement –

(i) have been performed; or

(ii) are not clear or comprehensible;

(*d*) granting relief would be contrary to the terms of the settlement agreement;

(*e*) there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(*f*) there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

(2) The court may also refuse to grant relief if it finds that -

(*a*) granting relief would be contrary to the Constitution; or

(*b*) the subject matter of the dispute is not capable of settlement by mediation under the law of the Republic.

Parallel applications or claims

44. If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under section 43, the court from which such relief is sought may, if it considers it proper, adjourn its decision and may also, on the request of a party, order the other party to provide suitable security.

Saving for other laws or treaties

45. The provisions of this Chapter do not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Republic.

CHAPTER 9
GENERAL PROVISIONS

Regulations

46.(1) The Minister may make regulations concerning—

(*a*) any matter this Act requires or permits to be prescribed;

(*b*) any matter that may be necessary for the application of this Act; but

(*c*) excluding matters contemplated in section 37.

(2) Before making any regulations, the Minister must consult such persons who can provide relevant information as they consider appropriate.

Short title and commencement

47.(1) This Act is called the Mediation Act, 20 ... and will come into operation on a date fixed by the President by proclamation in the Gazette.

(2) Different dates of commencement may be determined in respect of –

(*a*) different provisions of this Act; and

(*b*) different categories of disputes.

A SCHEDULE 1 SINGAPORE CONVENTION: United Nations Convention on International Settlement Agreements Resulting from Mediation

Resolution adopted by the General Assembly on 20 December 2018

[on the report of the Sixth Committee (A/73/496)]

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[1] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[2] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[3]

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

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1 Resolution 57/18, annex.

2 Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), para. 106; see also Yearbook of the United Nations Commission on International Trade Law, vol. XI: 1980, part three, annex II.

3 3 Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,[4]

Taking note with satisfaction of the draft convention approved by the Commission,[5]

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

62nd plenary meeting
20 December 2018

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social

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4 4 Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17), para. 49.

5 *5 Ibid., annex I.*

and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2.This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3.This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

1.For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2.A settlement agreement is “in writing” if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

3.“Mediation” means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator’s signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties’ or mediator’s intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph

(a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

*(*ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10. Depositary

The Secretary- General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Party to the Convention”, “Parties to the Convention”, a “State” or “States” in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it

may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

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CHAPTER 1: INTRODUCTION

A History and methodology of project 94

1 Background

1.1 On 29 August 1994, the Minister of Justice approved the inclusion of an investigation into domestic and international arbitration in the then SA Law Commission's (Commission) programme of law reform. A topic close to the heart of the then Minister of Justice, Dr A.M. Omar, was how community structures, whether indigenous, urban, township or religious, may play a proper role in ensuring that our population, particularly the poorest of the poor, gain improved access to justice. It was then decided that the investigation into the viability of community courts and other community justice structures should be one of the components of Project 94. On 8 July 1996, at the request of the Minister, the project was broadened to include an investigation into alternative dispute resolution (ADR)[1] to provide a framework within which ADR could be discussed in an orderly fashion. The Minister stressed the urgency of the project, as formalised methods of ADR could relieve the overburdened court system. The Minister appointed a project committee with effect from 16 September 1996. Work commenced on the ADR investigation on 26 October 1996.

1.2 The Commission's Project 94 therefore then consisted of three sub-investigations, namely International Arbitration; Domestic Arbitration; and ADR.

2 International arbitration

1.3 The Commission submitted its report on "Arbitration: An International Arbitration Act for South Africa" to the then Minister of Justice for consideration in July 1998.[2] The International Arbitration Bill was approved by Cabinet on 13 April 2016 and introduced in Parliament on 21 April 2017. The Bill was passed by the National Assembly on 24

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1 SALRC (Oct 1999) *Discussion Paper 89 Community dispute resolution structures* 1.1.1 – 1.1.2; see also Chapter 7 below for a discussion of community mediation.

2 SALRC (1998) *Report on International Arbitration Act for SA*.

October 2017 and by the NCOP on 22 November 2017. The President assented to the Bill, which became the International Arbitration Act 15 of 2017 on 19 December 2017.[3]

3 Domestic arbitration

1.4 Calls for the amendment of the Arbitration Act 42 of 1965 resulted in the then Minister of Justice on 29 August 1994 approving the inclusion of an investigation entitled "Arbitration" in the Commission's programme.[4] In May 2001, the Commission submitted its Domestic Arbitration report on the review of the Arbitration Act 42 of 1965, to the then Minister of Justice and Constitutional Development for his consideration.[5] Although calls have been made in the past to promote the proposed legislation, the Bill is yet to be promoted.[6] In 2010, the Department of Justice and Constitutional Development (DOJCD)[7] indicated its intention to promote the Domestic Arbitration Bill. In 2012 Ms Ananda Louw[8] and Prof David Butler updated the draft Domestic Arbitration Bill and submitted it to the DOJCD on 12 November 2012. The Bill was discussed at a meeting held on 23 November 2012. The Commission and the DOJCD jointly hosted an expert meeting on 12 August 2013 to consider updates to the draft International Arbitration Bill and the Domestic Arbitration Bill. Thirty delegates attended the meeting. Written and oral submissions were then collated. Finalisation of the Bill received attention when the investigation was removed from the Commission's programme on 7 December 2013, and the investigation was transferred to the DOJCD. The Commission submitted the updated Arbitration Bill to the DOJCD in 2014.

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3 Leon (July 2016) Herbert Smith Freehills; Herbert Smith Freehills (2020) "Attaining Maturity: SA's transition to international arbitration".

4 Butler (1994) *CILSA*; Baker (Oct 2014) Norton Rose Fulbright.

5 SALRC (2001) *Report on Domestic Arbitration.*

6 Gauntlett (Aug 2007) *Advocate* 28 - 32*;* Rantsane (2020) *PER / PELJ*; Burger (Jun 2023) *Ciarb*.

7 The Justice portfolio became Justice and Constitutional Development in April 1999, when the Constitutional Development component was transferred from the portfolio of the Ministry of Provincial Affairs to that of the Justice portfolio.

8 She was the Commission's staff member responsible for the ADR investigation until her retirement on 30 November 2021.

4 Alternative Dispute Resolution

1.5 The investigation into arbitration was widened on 8 July 1996 at the request of the Minister of Justice to include an investigation into ADR.[9] The SALRC published its Issue Paper 8 on ADR early in 1997.[10] On 18 October 1997, the Commission decided to divide the ADR investigation into three parts and to develop three discussion papers on ADR and civil law; family mediation; and community courts. In 2011, the Commission discontinued its community courts investigation. The family mediation investigations now form part of *Project 100A – Custody of and access to minor children*.

1.6 Project 94 was dormant for several years, due to changed policy considerations in the DOJCD after the term of Mr Dullah Omar as Minister of Justice ended. Project 94 was, however, reprioritised at the end of 2011 as a result of the Civil Justice Reform Project (CJRP). In 2010, Cabinet endorsed the CJRP, an initiative of the then Minister of Justice to undertake a comprehensive review of the civil justice system in concurrence with the Chief Justice and the Heads of Court to enhance access to justice. This development changed the tone of the discussion on all aspects of ADR. It also identified the following problematic aspects of the civil justice system:[11] access to courts, particularly by persons in rural communities; family law disputes, including divorce and matrimonial disputes, which are protracted by the fragmented court system; and the optimal use of ADR to enhance access to justice.

1.7 One of the objectives of the CJRP was to consider reviewing aspects of the civil

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9 Omar (Oct 1996) *Consultus 126 – 127.*

10 The following areas of investigation were identified and discussed:

- The question whether non-adjudicative dispute resolution may be a less expensive and less conflicting way of resolving disputes and problems.
- An investigation of the existing court structures and services in order to find a specific model of family mediation suitable to South African circumstances.
- The further implementation of community courts in the new dispensation and the proper role of the state in this regard.
- The role of ADR in the criminal sphere was also addressed. The proposed juvenile justice and victim-offender mediation programmes were noted as examples of the increasing importance afforded to ADR in criminal matters. These issues were, however, not dealt with in detail as they are already being addressed in other investigations of the Commission. (See the SALRC's *25th Annual Report of 1997* p 77 under the item Project 94.)

11 It was envisaged that the SALRC would form part of the research team to investigate these issues.

justice system, including the integration of ADR mechanisms and a mandatory referral system. One aspect was the establishment of a court-based mediation framework. The Rules Board for the Courts of Law developed court-connected mediation Rules for the Magistrates' Courts in 2014 which the Ministerial Advisory Committee on mediation implemented. The 2014 Rules were replaced with effect from May 2023, with Rules for the magistrates' courts which mirror the mediation rules of the High Courts.[12]

1.8 In June 2014, the Commission created its Project 94 the aim of which was to develop legislation to accommodate court-connected mediation as a form of ADR. In 2015, the Commission decided that the ambit of Project 94 did not warrant two subprojects.

1.9 The Secretariat informed the then Minister on 31 July 2015 of the overlap of the ADR investigations. On 10 September 2015, the Minister approved the combined project, called "ADR".

B Approval of the investigation and appointment of the Advisory Committee

1.10 The then Minister on 4 April 2017 appointed an Advisory Committee with Judge President Dunstan Mlambo as chairperson, and with the following members: Mr John Brand, Prof David Butler, Adv Hendrik Kotze, Adv Anthea Platt SC, Adv Paul Pretorius SC, Judge Cassim Sardiwalla, and Justice Zukisa Tshiqi. On 25 April 2018, the then Minister appointed Deputy Judge President Aubrey Ledwaba also to the Committee. Mr John Brand resigned from the committee on 20 April 2023, Judge President Mlambo resigned on 30 May 2023 and Justice Tshiqi on 27 October 2023, which resignation the latter withdrew in June 2024.

1.11 On 28 August 2023, the advisory committee identified a need for the appointment of additional experts. On 30 September 2023, the Commission considered candidates for possible appointment by the Minister. In November 2023 a memorandum was

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12 Tonkin Clacey (July 2023) "Mediation now an option in Magistrate Court matters".

promoted to the DOJCD recommending the appointment of additional members by the Minister. In December 2023, the Minister requested additional information. Further submissions were made to the Ministry in 2024, resulting in the Minister appointing three additional advisory committee members, namely Barrister Samantha Phumaphi, Adv Pat Mkhize and Mr Ebrahim Patelia on 7 October 2024.

C Scope of the investigation and approval of the discussion paper

1.12 This investigation aims to consider the development of legislation to promote the optimal use of ADR, including mediation, to provide citizens with an additional avenue to access to justice. In some quarters there has been a move away from the phrase "alternative dispute resolution" (ADR) to the phrase "dispute resolution" (DR). A view is that there is a need to refer to appropriate, amicable, assisted or additional dispute resolution.[13] It is said that alternative dispute resolution became integrated into mainstream dispute resolution.[14] In 2022, in England and Wales, the acronym ADR was replaced by the phrase Negotiated Dispute Resolution ('NDR').[15] However, the term 'ADR' is embedded in our legal system. We propose that we retain the term "alternative" in the acronym ADR to identify the umbrella term of this investigation, namely ADR.[16]

1.13 In 2018, the advisory committee decided, to concentrate on the development of a generic Mediation Bill to identify and develop the basic definitions and principles

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13 Carroll (2002) *University of Western Australian Law Review.*

14 Alexander (2010) *Rabel Journal of Comparative and International Private Law* 732. Vos (2021) "Speech: Relationship between Formal and Informal Justice" concluded about mediation and ADR:

> 47.… mediation is not an end in itself. ADR is not alternative. Dispute resolution needs to become an integrated process in which the parties feel that there is a continuing drive to help them find the best way to reach a satisfactory solution.

15 Jones (2022) "Dispute Resolution no Longer Alternative" comments that '[t]his change in nomenclature, introduced in the 11th Edition of the Commercial Court Guide, reflects the drive to place dispute resolution at the heart of the litigation process. The message is clear: engaging in dispute resolution should be a standard part of the litigation process".

16 Alexander (2010) *Rabel Journal of Comparative and International Private Law* 733 says: "In the final analysis it seems that ADR is more than an acronym; it has become a term of art in its own right. In years to come people may no longer know, or care, what the letters ADR represent but they will know what ADR means".

pertaining to mediation, which could then also serve as a basis for the Commission's investigation into family dispute resolution (Project 100A).

1.14 The advisory committee decided further in 2018 that Project 94 will focus on:

- the desirability of just, quick and cost-effective resolution of disputes using mediation and other forms of dispute resolution in appropriate contexts;
- the proper role for legislation, contract and other legal frameworks in promoting models for consensual or mandatory, statutory and court-annexed ADR;
- the need for precise definitions in order to ensure legal certainty;
- issues of referral powers (including timing of referrals), prescription, confidentiality and status and enforcement of agreements reached;
- proper protections required for the parties, mediators, and others involved in dispute resolution through training and the implementation of appropriate standards;
- the right to information and legal assistance;
- termination of mediation;
- ADR in criminal cases (restorative justice);
- International ADR;
- Community dispute resolution;
- a review, where necessary, of the existing statutory provisions that provide for mediation and other forms of ADR with a view to updating those provisions or incorporating them in ADR specific legislation where necessary;
- consideration of the place of family dispute resolution as an integral part of ADR in South Africa; and
- any related matters the SALRC considers appropriate.

1.15 The advisory committee hosted an expert meeting on 30 October 2017, with 40 ADR experts to identify issues for consideration. Research on this investigation then commenced.

1.16 In November 2019, we published our Discussion Paper 148 on *Alternative Dispute Resolution in Family Matters* with a draft Family Dispute Resolution Bill, for general information and comment.[17] During October 2019 to March 2020, eight workshops on the paper and Bill were held country wide.

1.17 The advisory committee approved on 15 August 2019 a framework for a draft Mediation Bill and discussion paper. Two papers on accreditation, training and

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17 SALRC *Discussion Paper 148 ADR in family matters*; PMG (SALRC) Discussion Paper 148 on ADR: call for comments.

professional oversight of mediators; and international mediation under the Singapore Convention, were considered. The committee consulted with stakeholders in two workshops on 8 October 2019. The drafting of a generic Mediation Act commenced in April 2020. The advisory committee on 3 November 2020 confirmed the scope of the Mediation Bill. At advisory committee meetings on 14 January, 21 January and 12 February 2021, the committee considered drafts of the Mediation Bill.

1.18 Professor Domingo and the researcher met with representatives of the National Prosecuting Authority on 25 August 2022 to discuss mediation in criminal matters. In September 2023, Adv Batohi, National Director of Public Prosecutions, requested the Commission to expedite the development of alternative dispute resolution legislation, including adult diversion, informal mediation and corporate non-trial resolution. The Secretary of the Commission decided in September 2022 that the latter aspects would be dealt with in our investigation into the review of criminal justice, project 151.[18]

1.19 The working committee considered a draft discussion paper on 30 August 2024 and recommended it for submission to the Commission. The Commission resolved in September 2024, that amendments needed to be effected to the paper. The working committee considered a further version of the Mediation Bill and a covering note on 25 October 2024. The Commission considered a draft discussion paper at its meeting on 13 December 2024. The Commission approved the release of the discussion paper for general comment, subject to two minor amendments which the advisory committee effected in January 2025.

D Inter-relationship of this investigation with the Commission's family dispute resolution investigation

1.20 Project 94 is conducted in tandem with Project 100A, which is the sector-specific consideration of family dispute resolution (FDR). The proposals developed in Project

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[18] RSA Presidency (Oct 2022) *Response by President Cyril Ramaphosa to recommendations of Zondo Commission of Inquiry* 2.1.35 "The South African Law Reform Commission (SALRC) is considering deferred prosecution agreements as part of its review of the criminal justice system".

100A inform the contextual FDR discussions. The aim of Project 94 is to consider the development of legislation to promote the optimal use of ADR, including mediation. This is the aim of the Project 100A investigation as well but with specific reference to family dispute resolution (especially so far as children are concerned).

1.21 Project 100A therefore deals with those aspects of ADR that either are not covered by the generic Mediation Act of Project 94, or that would, in the family law context, need to deviate from the general principles of the generic mediation statute. In November 2019, we published our Discussion Paper 148 on Alternative Dispute Resolution in family Matters with a draft Family Dispute Resolution Bill, for general information and comment. During 2024, a report was developed in our project 100A. The Commission considered a draft report on family dispute resolution on 13 December 2024 and approved it subject to minor amendments which were subsequently effected. In 2025, an initial socio-economic assessment system report will be compiled and submitted to the Department of Policy, Monitoring and Evaluation in the Presidency for consideration. Once the Department of Policy, Monitoring and Evaluation is satisfied with the assessment report, it will sign-off the assessment report. The Commission will then submit the Project 100A report to the Minister of Justice and Constitutional Development with the socio-economic assessment report to enable the Minister to consider the implementation of the report recommendations. The Commission's discussion paper 168 therefore does not deal with the resolution of family disputes.

CHAPTER 2: NOTABLE PRINCIPLES OF MEDIATION

A Dispute resolution and ubuntu

2.1 Mediation has a long history in South Africa, and its approach to dispute resolution aligns with our African heritage, as well as our recent history.[1] We note below the adversarial litigation approach to resolving disputes and the calls for resolving disputes by way of meaningful engagement. The Interim Constitution introduced an approach of reconciliation as opposed to retribution and vengeance and identified a need for an Ubuntu approach.[2]

2.2 In 1995, Justice Mokgoro explained the concept of ubuntu in *S v Makwanyane*[3] as follows:[4]

> 307. Generally, ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. … Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa ubuntu has become a notion with particular resonance in the building of a democracy. It is part of our "rainbow" heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of humanity and menswaardigheid are also highly priced. … (Footnote omitted)

2.3 The Constitutional Court gave further content to the concept of ubuntu in *Port*

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1 See Brand, Steadman & Todd *Commercial Mediation – a user's guide* Chapter 1 for an overview.

2 *S v Makwanyane* par 130. See also Mokgoro (1998) *PELJ/PER* 21.

3 *S v Makwanyane*. Bohler-Müller (2007) *Obiter* notes critical views which were raised against approaches to ubuntu. She concludes as follows at 599: "A lot can go wrong when we 'defend ideals' such as ubuntu. It is a risky business and the traps are numerous, but if we dare to risk failure, if we dare to ask what good we are without others, if we dare to imagine a revitalised philosophy of ubuntu, if we dare to do it differently, we may have stories worth telling future generations of South Africans. Stories of hope." See also Kamga (2018) *African Human Rights Law Journal* 625 – 649 for trends in the ubuntu jurisprudence of our courts.

4 Himonga, Taylor and Pope (2013) *PEJ/PER* 370 – 428 also analysed and commented on judicial views of Ubuntu.

Elizabeth Municipality v Various Occupiers:

> [37] The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

2.4 Central to mediation is meaningful engagement between disputants to resolve their disputes. The Constitutional Court noted in *Port Elizabeth Municipality v Various Occupiers*[5] that unless appropriate discussions took place between the municipality and the occupiers it would not be fair and reasonable to order the eviction of the occupiers. Important is the fact that the Chief Justice also invited the parties to provide an argument on the legality and suitability of the court ordering it to mediate. None of the parties unconditionally agreed to mediate the dispute.[6] One of the reasons for deciding against ordering mediation was that some of the benefits of mediation were no longer attainable, no savings were possible in respect of the forensic costs, much delay was already caused in the matter and the litigation caused much hostility between the disputants. The Court held "[w]herever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents".

2.5 Meaningful engagement of disputing parties was also an issue in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg.* It involved 400 occupiers of two buildings in the inner city of Johannesburg. The Court noted that engagement entails a two-way process of the parties talking to each other to attain specific goals such as the consequences of the eviction; the city being able to allay the dismal conditions of the occupiers; the city provisionally restoring the buildings to proportionate safety and healthiness; the city being liable to the occupiers; and the extent to which the city would or should comply with these liabilities.[7]

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5 Par [43]. Himonga, Taylor & Pope (2013) PEJ / PER 422 note that this decision constitutes the dawn of the Constitutional Court highlighting the relationship between ubuntu and restorative justice although without referring to restorative justice.

6 Par [44].

7 The Court explained meaningful engagement as follows:

[15] Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If

2.6 In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* the Constitutional Court gave further prominence to the concept of meaningful engagement. At the heart of this matter was the eviction application and relocation of about 4 000 households, involving 20 000 persons, who started occupying land over a period of 15 years. Justice Jacoob held that reasonable engagement took place between the parties and that although individual engagement with each family would have been the optimal option, rationality nevertheless required reality and functionality.[8] Deputy Chief Justice Moseneke noted that no formal notice was given to the residents before the eviction application was lodged. The government did not give the residents "the courtesy and the respect of meaningful engagement" as required by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act prior to an eviction order.[9]

2.7 In 2012, the temporary accommodation the city offered in terms of a tender did not constitute meaningful engagement between the parties[10] in *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality.* The city adopted a top-down approach whereby it would determine who and when would return to Schubart Park and the duration of their stay. The city saw the applicants merely as "obnoxious social nuisances, who contributed to crime, lawlessness and other social ills". [11]

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this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.

See also the 2023 matter of *Ryckloff-Beleggings (EDMS) Beperk v Occupiers of ERF 791 of the Farm Randjesfontein* on meaningful engagement:

[50] In line with the principles set out in Olivia Road, "meaningful engagement" requires all parties to "talk and listen to each other, and try to understand each other's perspectives, so that they can achieve a particular goal". To this effect it is crucial that a meaningful engagement process is "well structured, coordinated, consistent and comprehensive and not be misleading", and must "enable individuals or communities to be treated as partners in the decision-making process

8 Par [116].

9 Par [166].

10 Par [50].

11 See also *JB Marks Local Municipality v Illegal Trespassers Erf 2148, Promosa, Potchefstroom.*

2.8 In 2006, the Constitutional Court noted the role of ubuntu in the context of defamation to resolve disputes generally in South Africa:[12]

> … In the light of the core constitutional values of *ubuntu – botho*, trial courts should feel encouraged pro-actively to explore mechanisms for shifting the emphasis from near-exclusive attention to quantum, towards searching for processes which enhance the possibilities of resolving the dispute between the parties, and achieving a measure of dignified reconciliation. The problem is that if the vision of the law remains as tunnelled as it is today, parties will be discouraged from seeking to repair their relationship through direct and honourable engagement with each other. Apology will continue to be seen primarily as a tactical means of reducing damages rather as a principled modality for clearing the air and restoring a measure of mutual respect.

2.9 Our Courts are therefore giving substance to our history of dispute resolution through the expansion of the Ubuntu principle, as well as the Constitutional principles of right relations and problem-solving in good faith.[13] Legislative recognition and support for mediation is in line with this development.

B Mediation is in the public interest because it provides an effective and appropriate mechanism for the timeous resolution of disputes

2.10 We call in this investigation on the promotion of mediation for the early resolution of disputes. The essential reason why mediation is in the public interest is because mediation provides an effective, inexpensive and appropriate mechanism for the timeous

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12 Justice Sachs in 2006 par [118] in *Dikoko v Mokhatla*. See also Justice Mokgoro's remarks par [69].

13 Cornell & Van Marle (2005) *AHRLJ* 206 also analysed and commented on Ubuntu as follows: "… If we ever try to bring ubuntu into speech, we might attempt to define it as this integral connection between freedom as empowerment, which is always enhanced and indeed only made possible through engagement with other people. Each one of us is responsible for making up our togetherness, which in turn yields a process in which each person can come into their own. …" See also Du Plessis (2019) *PER / PELJ* 19 who concludes that "… ubuntu entails a further duty to promote the social and economic well-being of the parties as well as of the greater community. Hence, in contrast to good faith, ubuntu is concerned with the promotion of substantive equality in private dealings."

or early resolution of disputes[14] compared to litigating a dispute at a high cost in court.[15] Mediation is also a tool that is effectively used to bring disputants to the point of the early settlement of their disputes. Therefore, only those matters which are not settled, then require the scarce and expensive resources of the courts and can consume those resources.

2.11 Our Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.[16] The International Covenant on Civil and Political Rights requires that State Parties to the Covenant ensure that any person whose rights or freedoms under the Covenant are infringed enjoy effective remedies against infringements, and to have access to remedies provided by judicial, administrative or legislative authorities.[17] The African Charter on Human Rights further recognises that every individual has the right to have their case adjudicated including to an appeal against infringements of their fundamental rights recognised and guaranteed by conventions, laws, and customs.[18]

2.12 The origins of the South African civil procedure is the procedural law which applied in England and which was imported in the Cape Colony during the English occupation.[19] Our civil procedure is characterized by the confrontational adversarial system of

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14 Brand (2020) Conflict Dynamics; Hesse (2023 IOL); Muller & Swanepoel (2023) *Speculum Juris* 62 – 63 and 66; Movshovic & Kezile (2024) *Bbrief*. See also the Irish Supreme Court case of *Tracey t/a Engineering Design & Management v Burton & others* [2016] IESC 16 (25 April 2016):

> 45. … Court time is not solely the concern of litigants, or their legal representatives. There is a strong public interest aspect to these issues. … The public have a right to a court system which operates effectively and expeditiously in the public interest, while ensuring that justice is administered as the Constitution requires.

15 *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza* par [1]; see also the discussion in this Chapter under C below under the heading *Mediation is in the public interest by promoting access to justice given the costs and risks of the current systems of conflict resolution*.

16 Section 34.

17 Article 2(3).

18 Article 7(1)1 of the African Charter on Human and Peoples' Rights of 1981.

19 Khan (1989) *SALJ* 613; Erasmus HJ (1987) *TSAR* 1; De Vos W Le Roux 2000 *Stellenbosch Law Review* 344.

litigation.[20] The traditional adversarial system accords to a judge a passive role, especially during the pre-trial phase of a civil case.[21] The parties to a legal dispute, through their legal practitioners, play an active role during both the pre-trial and trial stages.[22] The parties are in control of preparing their cases for trial and presenting their evidence and arguments to the presiding officer.[23]

2.13 The role of presiding officers in civil litigation in South Africa was explained in 1927 as follows:[24]

> … the duty of the magistrate, or any other judicial officer, is to listen to the case which is put before him. He must take into full account all evidence which is properly before him and all argument which is based on that evidence. No authority has been put before us which requires a judicial officer to take any hand in the

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20 Van Loggerenberg (2016) *Brics Law Journal* 126. SALRC *Discussion Paper 148 ADR in family matters* para 2.1.1. Maclons (2014) *Mandatory court based mediation* 20 – 21.

21 SALRC *Discussion Paper 148 ADR in family matters* para 2.4.2. Hurter (2016) *CILSA* 449; See for a discussion of the negative effects of the adversarial system of litigation in family matters De Jong (2010) *TSAR* 516; see also Erasmus HJ (2015) *TSAR* 260 and *Mkhize v S* [2014] ZAKZPHC 31 (13 May 2014) para [3] for the discussion of the role of a judicial officer:

> 211. The role of the judge has been summed up by [Lord Denning in *Jones v National Coal Board* [1957] 2 QB 55 @ 64] in the following terms:
>
> The judge's part . . . is to harken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure, to see that the advocates behave themselves seemly and keep to the rules laid down by law, to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. ... Such are our standards.

22 Explained by the Supreme Court of Canada in Imperial *Oil v Jacques*, 2014 SCC 66 (CanLII), [2014] 3 SCR 287 as follows:

> [25] Although the power of judges to intervene in the conduct of civil proceedings has become increasingly broad, judges generally do not play an active part in the search for truth … In an accusatory and adversarial system, the delicate task of bringing the truth to light falls first and foremost to the parties.
>
> [26] The pre-trial "exploratory" stage, which is a key time for this search in court for the truth, facilitates the disclosure of evidence that might enable the parties to establish the truth of the facts they allege. … This stage enables each of the parties [translation] "to be better informed of the facts of the case and, more specifically, of the opposite party's evidence" …

23 Erasmus HJ (1979) *THRHR* 11; Baxter (1979) *SALJ* 532 who discusses *Director of Hospital Services v Mistry* [1979] 1 All SA 292 (A) 300(1) where the court held: … the applicant in this matter could not extend the issue in dispute between the parties by making fresh allegations in the replying affidavits filed on 8 June 1977 or by making such allegations from the bar". See also Cavallini "Iura Novit Curia not applied yet in English Law".

24 *Naran Dhana v Hull* 1927 TPD 603 at 607 – 608 referred to by Baxter (1979) *SALJ* 532.

> proceedings – to indicate to one party that he ought to do a certain thing, or that he ought not to do a certain thing. … It is presumed that parties appearing before a judicial officer – more particularly when those parties are represented professionally – know how to conduct their cases, and that it is not the duty of a magistrate to conduct the proceedings before him. …

2.14 In 2023, the Labour Court noted in *SARS v CCMA and Others*[25] section 138 of the Labour Relations Act. Under this section, a commissioner may conduct the arbitration in a manner that they consider appropriate to determine the dispute fairly and quickly. A commissioner must deal with the substantial merits of the dispute with the minimum of legal formalities, although this provision does not ban all formality. The Court cautioned that a commissioner ought not to sacrifice fairness on the altar of informality. The Labour Court noted the role of commissioners in arbitration proceedings as follows:[26]

> [17] … commissioners are not expected to merely sit back and allow the parties to present their cases and not guide them to the real issues that are to be determined. There will be instances where intervention on the part of the commissioner would be necessary, whether an adversarial or inquisitorial has been adopted. However, commissioners must guard against an intervention that is likely to suggest bias or a perception of bias in favour of a particular party to the dispute. ...

2.15 In common law countries the adversarial civil procedure applies, the parties exercise active control over their litigation, termed in the continental systems, the *Verhandlungsmaxime* or *Dispositionsmaxime*.[27] In civil law countries, traditionally an inquisitorial litigation procedure applies. The judicial officer exercises active control over the litigation, termed the *Untersuchungsmaxime, Inquisitionsmaxime, Amtsermittlungsgrundsatz* or *Offizialmaxime*.[28] These models no longer apply in their former traditional forms anymore. Elements of the adversarial system have also been adopted in the civil law countries.[29]

2.16 In 1996, the Woolf Report identified deficiencies in the then existing English civil procedure, that it was too pricey, the pace of bringing litigation to finality too moderate

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25 Par [11].

26 *Satani v Department of Education, Western Cape.*

27 Erasmus HJ (1979) THRHR 11; Bürgi *Grundsätze des Zivilverfahrens*; Juracademy *Verfahrensgrundsätze des Zivilprozesses im Überblick*.

28 Bürgi Nägeli (2008) *Grundsätze des Zivilverfahrens.*

29 ALRC (1997) *Issues Paper 20* paras 2.24.

and the relative positions of litigants too unequal.[30] The outcome of litigation was too unpredictable and mystifying to many litigants. Most importantly, the system was highly disconnected as no one was assigned complete control over the administration of civil justice. The process was further too adversarial. The litigants are taking charge of their litigation, instead of the courts. Litigants frequently disobeyed the rules of court which the courts failed to administer.

2.17 Lord Woolf commented, among others, as follows in 1996 on the then prevailing adversarial civil process in England and Wales: [31]

> 3. By tradition the conduct of civil litigation in England and Wales, as in other common law jurisdictions, is adversarial. Within a framework of substantive and procedural law established by the state for the resolution of civil disputes, the main responsibility for the initiation and conduct of proceedings rests with the parties to each individual case, and it is normally the plaintiff who sets the pace. The role of the judge is to adjudicate on issues selected by the parties when they choose to present them to the court.
> 4. Without effective judicial control, the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is seen as a battle field where no rules apply. In this environment, the questions of expense, delay, compromise and fairness will usually have only a low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable.

2.18 Several South African Commissions of Inquiry have considered the adversarial nature of our civil proceedings. In 1983, the Hoexter Commission of Inquiry listed five factors which impede access to justice, namely excessive costs of litigation; delays in the administration of justice; the limited availability of legal aid; the geographical distribution of courts; and a lack of legal guidance for litigants.[32] The Hoexter report noted that it was generally accepted that the cumbersome rules of our adversarial system of litigation aim to effect achievable absolute justice in all litigation.[33] The report pointed out that a disadvantage of the adversarial process was that it is slow and expensive but that for jurists it was justified by the result of utmost justice it provides to litigants. The Hoexter

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30 Woolf (1996) Final Report overview.

31 Woolf (1997) *American Journal of Comparative Law* 710; Fabricius (Nov 1996) *Consultus* 108.

32 Hoexter *Commission of Inquiry (1983) Structure and functioning courts* para 6.1.2.

33 Para 6.3.2.1.

report questioned whether the adversarial system of litigation was practical and economical for the common litigant in the then fast changing circumstances.[34] The 1987, the Vivier Commission of Inquiry also considered the adversarial process used in civil litigation.[35] It noted the 1983 Hoexter Inquiry which did not recommend the substitution of the adversarial system in the high courts or magistrate's courts with an inquisitorial procedure. The Vivier Commission recommended that rather than introducing a foreign inquisitorial process, the then process ought to be improved as was happening at that stage.

2.19 The Hoexter Commission of Inquiry of 1997 made, among others, the following findings about judicial case management and court-annexed alternative dispute resolution.[36]

> 10.1.2 The progress of defended actions thorough the High Court in South Africa is too sluggish and too expensive because of unnecessary delays. The delays supervene because the court supinely allows the parties to dictate the pace of litigation.
>
> 10.1.3 The High Court manages to keep head above water only because 90% of all defended actions are settled. The bulk of these settlements, however, are reached either at or very shortly before the trail. Heavy legal costs for the parties and congestion for the court registry are the consequences for the tardy settlement of cases which, by timely recourse to ADR, could and should have been settled much earlier.
>
> 10.1.4 Radical reform is essential to improve this grave situation. Case management and court-annexed ADR are urgently required for the High Court in South Africa. Case management involves control of the pace and manner of litigation by the court and the parties.
>
> 10.1.5 Case management involves early court intervention in the definition of issues and a monitored supervision of defended cases from entry date to judgment. It also entails early and sustained encouragement to the parties to explore the possibility of settlement.
>
> 10.1.6 The case management model best suited to South Africa's specific needs and limited resources is the basic model involving a routine court control which requires the parties to report to the court at a number of strategically fixed intervals or events ["milestones"]. The intervals must be just long enough to allow proper preparation by the parties for the next event; and just short enough to require prompt action by the

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34 Para 6.3.2.2.

35 *Commission of Inquiry into the handling of litigation in terms of the Motor Vehicles Accident Act, 1986 (Act 84 of 1986)* RP 38/1987 by Mr Justice W Vivier para 9.2 page 46.

36 *Hoexter Commission of Inquiry* (1997) *Rationalisation Supreme Court* para 9.1.3. The report listed 14 findings.

parties. Once deadlines are set there must be strict compliance with them.

10.1.7 The form of court-annexed ADR best suited to South Africa's specific needs and limited resources is mediation. Judges and those members of the court's personnel involved in case management should attend training courses in mediation. The Judges themselves, however, should not participate in mediation sessions.

10.1.8 Successful implementation of case management requires, on the part of both of the judiciary and practitioners, a fundamental readjustment of the traditional but outmoded approach to litigation. It demands a joint and dedicated undertaking by the Bench and the practising professions. …

2.20 On 1 July 2019, the amended judicial case flow management rules commenced for use in proceedings in the High Courts of South Africa.[37] We noted in our 2021 *Report on Legal Fees* that in terms of the new Rule 37A of the Uniform Rules for High Courts, a judicial case management system must apply at any stage after a notice of intention to defend is filed, to such categories of defended actions as the Judge President of any Division may determine in a Practice Note or Directive, as well as to any other proceedings determined by the Judge President, of own accord, or upon request of a party.[38] In cases where Rule 37A Judicial Case Management does not apply, a pre-trial conference contemplated in Rule 37 of the Uniform Rules will be applicable.[39] Furthermore, Rule 30A now provides that in the event of non-compliance with the rules or any order or direction made in the judicial case management process referred to in rule 37A, any other party may notify the defaulting party to comply within 10 days of delivery of such notice to comply, failing which the other party may apply for an order that the claim or defence be struck out.

2.21 We noted further in our 2021 *Report on Legal Fees* that case management requires judicial officers to ensure that trials are not unduly prolonged by the conduct of the parties through the use of voluminous affidavits and heads of arguments, by the introduction of vexatious and unmeritorious claims, by excessive adversarial stances taken by legal

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37 Amendment Case Management Rules June 2019. See for a historical overview of judicial case management in South Africa, Abader (Aug 2012) *Investigation judicial case management SA civil court system* 101 – 108. For further views about judicial case management see Erasmus (1996) 105 – 107; *Consultus*; Griesel (May 1998) *Consultus* 47 – 48; Griesel (Aug 2001) *De Rebus*; Flemming (Aug 2001) *De Rebus*.

38 Par 2.132.

39 Par 2.133.

practitioners, and by tactical interlocutory applications that may not have substantial value.[40] We explained that the object of case management is to change the attitude of lawyers, to "moving attorneys away from technical points taking and becoming less adversarial".[41] Litigation is about the client, not the lawyers. Every case must be resolved within a reasonable time, and all the trimmings – such as trivial and tactical interlocutory applications that clog the motion roll and generate unnecessary wasted costs – should be eradicated from the system. In comment, a respondent pointed out to the Commission that part of the difficulty with case management is that almost every division of the High Court applies its own practice directives and that the unification of the case management process would go a long way towards promoting efficiency and clarity.[42]

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2.22 A 2023 case confirmed that the traditional passive role ascribed to a presiding judicial officer no longer applies to civil litigation in South Africa. Parties and their legal representatives are obliged to adhere to the rules of court, to accelerate cases towards their conclusion and the 2019 case management rules confirm that courts have the authority to take charge of the progress being made in cases.[43] The Constitutional Court noted the differences between mediation and the adversarial adjudicatory process as follows:[44]

> [42] Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can be better used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.

2.23 Questions have been raised in other jurisdictions about the efficacy of trying to establish the disadvantages and advantages of the adversarial system compared to civil law inquisitorial systems. In 1999 the Australian Law Reform Commission addressed the

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40 Par 2.127.

41 Par 2.128.

42 Par 2.139.

43 *Hlatshwayo v Road Accident Fund* par [2].

44 *Port Elizabeth Municipality v Various Occupiers*.

debate which was conducted about the common law adversarial system and its relative disadvantages and advantages:[45]

> 1.112. In DP 62 the Commission concluded that an adversarial–non adversarial construct was too elusive a basis on which to analyse problems or to formulate change to the system. Such debate assumes that transplants from different political and cultural systems will function in similar ways when rooted in our legal system, that such change can be engineered, and that it will improve the system rather than introducing a new host of problems.
> 1.113. The Law Council, and the Law Reform Commission of Western Australia in its review of the civil and criminal justice systems in that State, agreed with the Commission's caution about such an approach.
>
> 1.114. In DP 62 the Commission also noted that calls for overthrow of the adversarial system generally oversimplify the problems and solutions in our civil justice system. Such calls assume that the problems associated with, say, costs, delay or unfairness in the system, are attributable to the 'adversarial character' of the system and that these problems can be 'cured' by extensive borrowing from the civil code systems. …
>
> 1.121. The Commission noted in DP 62 that there is limited utility in simply listing and comparing the advantages and disadvantages of the present 'adversarial' system of conducting civil administrative review and civil law proceedings in federal jurisdiction. …
>
> 1.126. Notwithstanding the supposed variation between the adversarial and non adversarial models, there is a significant degree of convergence in the way both common law and civil code countries now approach civil disputes. … (Footnotes omitted.)

2.24 A general concern which has been raised against the prevailing adversarial civil justice system in South Africa since the late 1950s[46] is the exorbitant costs involved in litigation.[47] Disputants do not gain unhindered access to courts to pursue their matters. Should disputants turn to the courts then they generally face lengthy delays to resolve

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45 ALRC *Report 89* 1999 para 1.111 and further.

46 The Van Winsen Committee of Inquiry into the formulation of uniform rules for the Supreme Court and the cost of litigation in the Supreme Court 1959 and by the Hoexter Commission of Inquiry in 1983.

47 *SALRC Discussion Paper 148 ADR in family matters* para 2.4.9; Bodenstein (2005) *Obiter* 304 to 320; Ramotsho (Nov 2018) *De Rebus*; Radebe (July 2017) *News 24*; SAHRC (Feb 2019) "High Court ruling recognises access to justice as a fundamental human right"; Greenbaum (2020) *De Jure* 248 to 266; Ramotsho (July 2022) *De Rebus*; Zweni (July 2017) *Challenges accessing legal representation*; Klaaren (Sept 2019) *South African Journal on Human Rights* 274 – 287; McQuoid-Mason (2013) *Oñati Socio-Legal Series;* Jeffery (April 2019) *Consultus*; Holness "Access to Justice in SA".

their disputes.[48] Delayed justice leads to increased costs which disputants must incur and which they generally are unable to settle. Disputants ultimately do not attain the justice they sought by resorting to litigation.

2.25 Disputants who resolve their legal disputes in the formal court system must put up with considerable periods lapsing before their matters are resolved. On average it takes three to six years to resolve a legal dispute in South Africa,[49] for finalising a civil matter in the high court, between 18 months and three years, and six months to resolve a civil dispute in the magistrates' courts.[50] On average the waiting period for semi-urgent company law disputes to be litigated in court is about three months and the case might go on trial after three to four years.[51] A matter brought to the Companies Tribunal for alternate dispute resolution, however, is on average resolved within 25 working days and a matter adjudicated by the Tribunal is resolved within 80 working days.

2.26 In July 2024, the media noted the huge workload of particularly the Gauteng High Courts of Pretoria where too few judges are tasked with disposing of many cases.[52] The Office of the Chief Justice confirmed that there were too few judges to handle the caseload. The consequence of this situation is that civil matters are presently set down for trial in January 2029.

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48 Harpur (Dec 2009) *Advocate* 38 – 40; Chalmers-Mmolai (2022) South African Litigation Centre; Ngoepe & Makhubela (Nov 2015) *Records Management Journal;* Strydom & Pillay (13 Aug 2020) *Lawtons Africa*; Singh (May 2020) *Daily Maverick*; Iruoma (2005) *Eradicating delay in the administration of justice in African Courts* 8.

49 Hundermark (2018) "Access to justice and legal costs" 14.

50 Mcquoid-Mason notes the extreme example where the matter dragged on for 15 years in the case of *Christa Sanford (born Steinbrecher) Plaintiff and Patricia L Haley NO Executrix (in her capacity as Executrix in Estate late Arthur Carol Sanford)*, Mcquoid-Mason (2013) Oñati Socio-Legal Series at 593, referred to by Iruoma (2005) *Eradicating delay in the administration of justice in African Courts* at 25. In *Cassimjee v Minister of Finance* the plaintiff did not actively pursue the matter for more than 20 years. The Supreme Court of Appeal held in 2012 at par [10]: "An inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action". See also Moosajee & Mangalparsad (2022) *Mondaq* about this case.

51 Companies Tribunal SA "ADR potential application to insolvency".

52 Venter (July 2024) *Star Early Edition.* See also Louis (July 2024) "Court backlogs are a threat to justice – mediation is part of the answer" Daily Maverick; Judges Matter (Aug 2024 "Judges Matter makes submission on Moseneke Committees rationalisation process"; Webber Wentzel (June 2024) "Johannesburg High Court Backlog: ADR as a solution" *Polity.*

2.27 The Pretoria Attorneys Association highlighted that if disputes proceed only to trail after a 54 months period the civil justice system malfunctions and denies the right of disputants to access to the courts. This Association listed the consequences of the dire consequences disputants and their dependents face if they have to wait 54 months before a civil trial commences such as the risk that key witnesses may die during this period and available evidence may become irretrievable; injured disputants in medical negligence and personal injury matters will not obtain the medical treatment they require until their case will be finalised; injured disputants might not survive the waiting period or their dependents depending on the financial backing of the injured will be deprived of their assistance; expert reports which injured parties will file ahead of the allocated trial date, will become outdated two years after having been filed and will require their updating resulting in duplication of expert report costs.

2.28 Judge President Dunstan Mlambo was quoted as saying: "The leadership of the division has in the past pronounced itself publicly regarding the insufficient number of judges available to the court to deal with the increased volume of matters before the court." Judge President Mlambo noted according to the media that the present challenges the division faced were worsened by the hesitation litigants demonstrated to resolving their disputes by mediation and their preference to rather insist on securing trial dates. Furthermore, he pointed out that of concern to him was that in excess of 85% of matters on the civil trial roll, especially RAF matters, are settled on the date they were set down for trial. Judge President Mlambo noted that if these matters were at an earlier phase submitted to mediation then there would not be long delays for trial dates and the civil court roll would not be congested. The media reported that on Tuesday, 23 July 2024, 42 matters were on the civil court roll with four judges to deal with the 42 matters.

2.29 In February 2014, the then Chief Justice issued norms and standards for how judicial officers ought to perform their judicial functions.[53] One of the stated norms is that all judicial officers shall dispose of their cases efficiently, effectively and expeditiously.[54] It is further required that judicial officers strive to finalise all civil matters, including outstanding judgments, decisions or orders as expeditiously as possible. The norms, however, acknowledge that due to the complexity and magnitude of some cases, these

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53 *Government Gazette* (18 February 2014) "Norms and standards for exercise of judicial functions of all courts"; Rabkin (March 2014) *Business Live.*

54 Norm 5.1(ii).

may take longer to finalise than the stated norms.[55] The norms set a general timeframe for the finalisation of cases, of one year since the issue of summons in the High Court, and within nine months after the issue of summons in the Magistrate's Courts.[56] A Judiciary Report is published annually which reflects, among others, the civil and criminal court performance in the South African courts.[57] Although these reports provide statistics about finalised cases, it has been noted that these reports provide no indication of how long it takes since a case is lodged until it is finalised.[58]

2.30 The Office of the Chief Justice has regularly published reports on the cases which have been outstanding, with particular emphasis on those cases which were outstanding for longer than six months.[59] In 2023 the media drew attention to the Judicial Service Commission calling for the suspension of judges who were not complying with the determined timeframes for handing down outstanding judgments.[60]

2.31 Commentators have noted the dire consequences litigants face, including women and children when they do not receive their maintenance payments, crime victims whose cases are not resolved, and debtors not settling their debts with small enterprises when they have to await their outstanding judgments not being handed down for extraordinarily long periods.[61] Understanding was voiced for the unavoidable factors judges face, including load shedding at the courts, insufficiency of court resources and logistical support,[62] including the limited research support to judges, such as the six researchers allocated to 40 high court judges in Gauteng.[63] Pleas have, however, been

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55 Finalisation of all matters before a judicial officer 5.2.5.

56 See norms and standards 5.2.5(i)(a) and (b).

57 See the Judiciary Annual Report 2021 – 2022.

58 Democratic Governance & Rights Unit UCT (2022) *The State of the Judiciary in Malawi, Namibia & SA* 31.

59 Damons (Oct 2021) *Groundup.*

60 Broughton (April 2023) *Groundup.org*; Broughton (30 April 2023) *Groundup.org*; JudgesMatter (April 2023) "JSC recommends suspension of judges for late judgments"; Mabuza (April 2023) *Timeslive*. See also Rabkin (June 2023) *Sunday Times* who raises questions about the 2022 reserved judgments of the Constitutional Court.

61 Damons (Apr 2023) *News24.com.*

62 Damons (April 2023) *Groundup.*

63 Damons (July 2023) *Groundup;* Democratic Governance and Rights Unit UCT (2022) *State Judiciary: Malawi, Namibia & SA* 114.

made that judges ought to keep in mind the consequences which deferred judgments have on the South African working population.[64]

2.32 The complexity of the South African legal system and the litigation rules mean that average litigants with no legal training will hardly be able to successfully pursue their claims without the assistance of a legal representative.[65]

2.33 The 2021 Canadian Legal Problems Survey, found that about 18% people living in Canada's provinces had experienced at least one dispute or problem that they considered serious or not easy to fix in the three years preceding the survey. The following access to justice gaps have been identified in Canada:[66]

- Nearly 12 million Canadians will experience at least 1 legal problem in a given 3-year period. Few will have the resources to solve them.
- Members of poor and vulnerable groups are particularly prone to legal problems. They experience more legal problems than higher income earners and more secure groups.
- People's problems multiply; that is, having one kind of legal problem can often lead to other legal, social and health related problems.
- Finally, legal problems have social and economic costs. Unresolved legal problems adversely affect people's lives and the public purse.

2.34 We noted in our 2021 *Report on Legal Fees* that the right to access courts is a fundamental human right embodied in section 34 of the Constitution.[67] We explained that access to justice comprises many aspects, which include access to legal information, advice or mediation services, as well as the use of courts and tribunals and the ability to engage in legal advocacy services. The introduction of the Legal Practice Act 28 of 2014, signals the intention of the Legislature and the Executive that appropriate actions must be taken to address the problem of lack of access to justice for most of the people of South Africa. We noted that legal fees and costs are associated with access to justice at every stage of the legal process. Such expenses constitute a major barrier for those who cannot afford them. Most South African people are unable to access lawyers because of

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64 Damons (April 2023) *Groundup.*

65 Hundermark (2018) "Access to justice and legal costs" 14.

66 Action Committee (Oct 2013) *Roadmap for Change* Executive summary iii and paras 2 & 3.

67 SALRC *Report on legal fees* Executive Summary para 1.

unattainable legal fees. Many South Africans live in rural areas, making travelling to a lawyer's office a financial battle.

2.35 We further noted in our 2021 Report on Legal Fees 2021 that a 2020 study by the Hague Institute for Innovation of Law found that legal needs occur in times of crisis when people are faced with traumatic life events, such as when someone loses a job or their income; is hospitalised after an accident; gets indebted, jailed, or evicted; develops mental health issues or separates from their spouse.[68] To avoid the risk of not being reimbursed for services to be rendered, understandably providers of legal services ask their clients to effect payment upfront. Unfortunately, this increases the pressure on individuals who are already struggling financially.

2.36 The World Justice Project Index annually ranks countries globally for their commitment to the rule of law by applying eight factors, namely constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, criminal justice.[69] Seven sub-factors are applied to measure adherence with civil justice, namely whether: people can access and afford civil justice; civil justice is free of discrimination; civil justice is free of corruption; civil justice is free of improper government influence; civil justice is not subject to unreasonable delay; civil justice is effectively enforced; and alternative dispute resolution mechanisms are accessible, impartial, and effective.

2.37 In 2021, South Africa was scored 0.58 out of 1 for compliance with the rule of law and ranked number 52 globally.[70] South Africa scored 0.61 out of 1 for factor seven, adherence with civil justice, and its factor ranking was 47th.[71] In 2021 South Africa scored regionally 4/33, with a global ranking of 47/139.[72] In 2012 South Africa scored for the civil justice factor seven 0.5 out of 1, it was ranked globally 46/97 and ranked regionally 6/18.[73]

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68 SALRC *Report on legal fees* 1.8.

69 World Justice Report *Rule of Law Index 2021* 15.

70 World Justice Report *Rule of Law Index 2021* 11.

71 World Justice Report *Rule of Law* Index 2021 34.

72 World Justice Report *Rule of Law* Index 2021 152

73 World Justice Report *Rule of Law* Index 2021 34.

2.38 Adequate alternative dispute resolution mechanisms are required to resolve legal disputes. The 2014 court annexed mediation introduced in the magistrates' and regional courts,[74] had the potential to improve the plight of disputants. However, after pilot projects were initially launched, court-annexed mediation services were suspended.[75] Court connected mediation was replaced in June 2023, when mediation Rules for the Magistrates' Courts commenced, and which mirror the High Court mediation Rules.

2.39 One of the access to justice trends identified in 2014 was the emerging role played by actors such as social workers, paralegals and insurers in using mediation to resolve disputes.[76] These roles were in the past reserved for legal practitioners applying adversarial processes. A positive result of mediation is the reduction of costs since fixed fees are applied or an insurance claim settles the costs.

C Mediation is in the public interest by promoting access to justice given the costs and risks of the current systems of conflict resolution

2.40 The Commission further calls in this investigation on the promotion of mediation that is in the public interest and enables access to justice, given the costs and risks of current conflict resolution by litigation.

2.41 The challenge facing the democratic state is to ensure that the justice system is acceptable and accessible to the larger community. Mediation is one aid to promote

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74 See Mediation Centre *DOJCD Court-annexed Mediation Booklet;* See also Masutha (2019) "Members of court-annexed mediation advisory committee":

The committee were to deal with matters pertaining to alternative dispute resolution mechanisms in courts. Their role included –

- liaison with universities and training institutions, including Justice College, for the purpose of designing training programmes for mediators, mediation clerks and any other users of the system;
- assisting the Department in investigating the desirability of legislation on compulsory mediation; and
- advice on any matters pertaining to the implementation and roll-out of the project as well as the use of alternative dispute resolution (ADR) broadly.

75 DOJCD "Court-annexed mediation".

76 Hiil (2014) *Nine Different Ways to Guarantee Access to Justice* 77.

access to justice as we will see in this discussion of court cases in South Africa where mediation was considered.

2.42 Access to justice is valued highly in South Africa and and has been described as one of the sacrosanct constitutional rights of the South African democracy.[77] "Access to justice" does not only entail the right of a disputant accessing a a tribunal as section 34 of the Constitution recognises. Internationally, the concept of access to justice has since the pre-1970s advanced from the limited notion of attaining access to the formal legal and state services to the 1970s wider notion that includes aggrieved parties also attaining social and economic justice also in non-state establishments.[78]

2.43 The modern notion of access to justice has been described as "the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state", that "the system must be equally accessible to all" … and that "it must lead to results that are individually and socially just".[79]

2.44 Three waves of access to justice approaches have since the 1970s been identified.[80] The first wave entailed the supply of legal aid to the poor.[81] Reforms were effected worldwide in attempts to broaden the supply of legal aid to citizens in civil and criminal matters. The supply of legal aid to the indigent has also seen reform in South Africa since its introduction in 1969.[82] Proposals have also been made through the years in South Africa to further broaden the provision of legal aid in South Africa.[83] Research

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77 Radebe (Oct 2012) "Challenges facing access to justice". SALRC Discussion Paper 148 ADR in family matters para 4.1.2 – 4.1.3.

78 SALRC *Discussion Paper 148 ADR in family matters* para 4.1.4; Vettori (2015) *African Human Rights Law Journal* 359.

79 Bryant & Cappelletti (1978) *Maurer Faculty Paper 1142* 182; De Palo (2015) "Mediation as ADR: Directive" 2008 285; Hurter (2011) *CILSA* 410.

80 Bryant & Cappelletti (1978) *Maurer Faculty Paper 1142* 182; Hurter (2011) *CILSA* 410.

81 Bryant & Cappelletti (1978) *Maurer Faculty Paper 1142* 197; Garth, Cappelletti & Trocker (1976) Maurer Faculty 2485 682; Cappelletti (1993) *Modern Law Review* 283 to 284; Hurter (2011) *CILSA* 410.

82 Legal Aid SA (2017) Country Report; Sarkin (2002) *Indicator SA 41 – 49; Cook (1976) De Rebus Procuratoriis 125 – 127.*

83 Jason Brickhill proposed in 2005 that admitted attorneys, law students and graduates could increase the available work force in proving legal aid, see Brickhill (2005) *SAJHR* 294. Bernard and Mildred Bkink suggested in 2009 that more legal aid ought to be provided to family institutions and families, see *Bekink & Bekink (2009) Speculum Juris* 107 – 110; Mcquoid-Mason suggested in 2013 that there was not a oversupply of lawyers in South

has also been conducted on the role paralegals play in resolving disputes and providing access to justice particularly in remote rural areas and suggestions have been made how their role could be further strengthened.[84]

2.45 The second wave of access to justice saw the implementation of reform seeking to provide legal representation in disputes involving widespread or "diffuse" interests mainly in the fields of consumer and environmental protection".[85] This wave therefore no longer aimed at providing legal representation involving individuals but for collective groups of people. These reforms aimed to introduce legal presentation in class, group or citizen actions, public interest litigation and by government institutions such as governmental advocates or public advocates and ombudsmen.

2.46 The third wave of access to justice entailed alternative resolution of disputes or their prevention in a conciliatory, non-combative way, by way of negotiation, mediation or arbitration and the introduction of special courts, often presided over by lay judges.[86]

2.47 The meaning of access to justice is constantly evolving. Hurter concludes, among others, as follows about the evolving nature of "access to justice":[87]

> Reflecting on the evolution of the meaning of the phrase 'access to justice', yields a number of results. One is a reminder of what the initial goals of the movement were; another is to be made aware that the needs of society have changed, have grown in complexity to such an extent that a new approach to ensuring access to justice is needed, and will continue to change in future; but perhaps more important is the fact that much debate on the parameters of such new approach has been stimulated. …

Africa who were able would to provide access to justice but that other constructive ways should be introduced for providing in the increased need for legal representation, Mcquoid-Mason (2013) *Oñati Socio-Legal Series* 561 – 579.

84 Dugard & Drage "Contribution of Community-Based Paralegals .to Access to Justice" 43 – 95 at 93 – 94.

85 Bryant & Cappelletti (1978) *Maurer Faculty Paper 1142* 197 and 209; Garth, Cappelletti & Trocker (1976) Maurer Faculty 2485 682 and 693; Cappelletti (1993) *Modern Law Review* 284 to 287; Hurter (2011) *CILSA* 410 to 411; Trubek & Trubek (1981) "New approach to public interest advocacy" 124 to 125.

86 Bryant & Cappelletti (1978) *Maurer Faculty Paper 1142* 197 and 209; Garth, Cappelletti & Trocker (1976) Maurer Faculty 2485 682 and 693; Cappelletti (1993) *Modern Law Review* 287 to 294; Hurter (2011) *CILSA* 410 to 411.

87 Hurter (2011) *CILSA* 425.

2.48 In our *Discussion Paper 148 ADR in family matters* we noted that to ensure access to justice in a civil justice system several principles[88] should be present. These principles were identified in the 1996 Woolf Report on Access to Justice, namely that the civil justice system should –[89]

(a) be just in the results it delivers;
(b) be fair in the way it treats litigants;
(c) offer appropriate procedures at a reasonable cost;
(d) deal with cases with reasonable speed;
(e) be understandable to those who use it;
(f) be responsive to the needs of those who use it;
(g) provide as much certainty as the nature of particular cases allows; and
(h) be effective: adequately resourced and organised.

2.49 We further noted in our *Discussion Paper 148 ADR in family matters* that recent studies have adequately established the general benefits of mediation.[90] We list below in this Chapter factors why some disputants consider using mediation, namely mediation is a cheaper and faster process than adversarial litigation; mediation is confidential; disputants have autonomy and better control over the process in framing an innovative outcome; high implementation rate of mediation outcomes; preservation of relationships; mediation is an empowering and satisfying process; the litigation route remains a viable option; and mediation is an efficient, convenient and simple process.

2.50 We also noted in our *Discussion Paper 148 ADR in family matters* examples of cases where the courts have referred to the advantages of mediation or referred the parties to mediation.[91] *Van den Berg v Le Roux*[92] dealt with an application for an amendment of the guardianship and custody orders made regarding a child. The main part of the court order instructed the divorced parents that if a dispute were to arise about their guardianship and custody in future then the parents were to contact the clinical psychologist and or the psychologist who had been involved in this case to mediate such

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88 Par 4.1.11.

89 Woolf (1996) *Final Report* see the overview; Fabricius (Nov 1996) *Consultus* 108; Maclons (2014) *Mandatory court based mediation* 13 and 146.

90 Par 2.2.13.

91 Par 2.2.14.

92 *Van den Berg v Le Roux* at 614.

dispute. In the event of an unsuccessful mediation then the two psychologists who had been involved in the case were mandated to nominate a psychologist and or any other capable person who would then have the power to settle such dispute. The parents were not to bring an application about their dispute to a court before the mediation was completed. The parents would further be liable in even shares for defraying the mediation costs unless the mediator ruled differently.

2.51 In *G v G*[93] the Zimbabwean court noted the 10-year study by L.F. Lowenstein,[94] which compared 16 matters which involved adversarial proceedings and 16 matters which were mainly mediated. The court highlighted the finding of the study that both children and their parents experienced elevated levels of satisfaction regarding the outcome in those matters which were mediated.

2.52 In*Townsend-Turner v Morrow*[95] the grandparents applied for defined contact with their grandchild. The court noted that the parties consented to the mediation order it would made. The court advised the parties to the matter to resort to mediation to settle any forthcoming disputes relating to the relationship of the grandparents with their grandchild.

2.53 In *MB v NB,*[96] in addition to the benefits and suitability of mediation, the court emphasised that a positive duty rested on the disputants' attorneys to advise their clients to mediate their dispute before resorting to litigation. The court showed its displeasure with the attorneys' failure to do so by ordering that the fees the attorneys could recover from their own clients be capped.

2.54 In In the 2024 case of *C.J.W v S.J.P* the court noted the case *FS v JJ,*[97] in which the Supreme Court of Appeal supported the finding in *MB v NB*,[98] regarding the efficacy of averting costly and drawn-out matters by resoring to mediating family disputes and that a lawsuit ought not to be resorted to as a matter of course. In *C.J.W v S.J.P* the

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93 *G v G* at 412.

94 Lowenstein (1998) *Contemporary Family Therapy* 505 – 510.

95 *Townsend-Turner v Morrow* at 55.

96 *MB v NB*.

97 *FS v JJ*.

98 2010 (3) SA 220 (GSJ) (25 Aug 2009).

maternal grandfather frustrated the contact of the paternal uncle over a five-year period and disregarded court orders which granted the uncle contact to the two minors. When the maternal family members pulled out of mediation, the applicants were left with no alternative than to apply to court to resolve their dispute.

2.55 We noted above under the discussion of Ubuntu *Port Elizabeth Municipality v Various Occupier*s the benefits which the Constitutional Court noted which mediation holds, among others, the cost savings which would arise arise otherwise from conducting legal proceedings and the mediator assisting disputants to reach a mutually acceptable middle ground in resolving the dispute concerned.

D Approaches to or models of mediation

2.56 We need to consider different mediation practices, approaches or models. Six mediation practices have been identified in the mediation meta-model framework, namely: settlement mediation; facilitative mediation; transformative mediation; expert advisory mediation; wise-counsel mediation; and tradition-based mediation.[99] The four mediation practices which have been identified in commercial mediation disputes are settlement, facilitative, transformative or therapeutic and evaluative mediation.[100] The mediation practices identified in family disputes are: facilitative or non-directive mediation; evaluative or directive mediation; transformative mediation; advocacy or activist mediation; narrative mediation; shuttle mediation; co- or team approach mediation; multi-generational mediation; and multi-family mediation.[101] These different

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99 Alexander (2008) *Conflict Resolution Quarterly* 97 to 123. See further regarding styles or types of mediation Bush & Pope (2002) Pepp. Disp. Resol. L.J. 67 to 96; Brink (2021) *Corporate Mediation Journal* Issue 1; Brink (2021) *Corporate Mediation Journal* Issue 2; Harper (2006) *Journal of Dispute Resolution* 595 – 611; Field (2012) *JCULawRw* 41 – 42; Lohvinenko, Starynskyi, Rudenko & Kordunian (2021) Conflict Resolution Quarterly 51 – 65; Levin (2001) *Ohio State Journal on Dispute Resolution* 267 – 296; Weber (2023) "Pros & cons styles of mediation"; Zumeta (2018) Mediate.com.

100 Feehily (2022) *International Commercial Mediation* Chap 4 83; Boulle & Rycroft (1997) *Mediation: principles, process, practice SA* 26 – 27; Matez (2022) "What type of mediation is right for you".

101 De Jong (2014) Chap 13 "Mediation & dispute resolution" 593. Rooke (2016) *CIAJ.*

mediation approaches used in reaching a solution to a dispute are no more than theoretical classifications and are applied in practice in a flexible and varied way.[102]

2.57 No detailed discussion of the different mediation models is required. Our proposed legislation leaves the approach which a mediator will adopt to facilitate resolving the dispute between disputants to the discretion of those involved in the mediation. The legislation is therefore not prescriptive about the mediation approach to be adopted.[103]

E Reasons why parties consider using mediation and why parties are cautious in resorting to mediation

1 Reasons why parties consider using mediation

(a) Cheaper and faster process than adversarial litigation

2.58 Mediation is less costly than adversarial litigation.[104] Although the mediator's fee structure might be similar to that of the attorney, the mediation costs will be less since much less time is invested by the mediator to resolve the matter, compared to an attorney being involved in the matter with the case slowly grinding through the prescribed court

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102 Alexander (2008) Conflict Resolution Quarterly 117; Feehily (2022) *International Commercial Mediation* Chap 4 83; Boulle & Rycroft (1997) *Mediation: principles, process, practice SA* 26.

103 See also the suggestions made by Jordaan (2023) *Linkedin:*

> … A fixation with mediation models and styles draws our attention away from the fact that mediation is an inherently flexible process, adaptable to fit the requirements of a particular dispute. 'Boxing' mediation styles, especially in the context of civil and commercial disputes, nowadays is probably more a function of the type of mediation training mediators are exposed to than anything else. We need to break out of these silos lest we limit the usefulness of mediation as a tool for bringing resolution – and justice – to the parties before us. …

104 SALRC *ADR Issue Paper 31* par 3.9.13 to 3.9.15 and SALRC *Discussion Paper 148 ADR in family matters* par 4.1.15. Office of the Lord Chief Justice Northern Ireland (Sept 2017) *Review Group's Report on Civil Justice* par 9.9 114. Fotohabadi (Sept 2022) "Advantages & Disadvantages ADR". See also the 2004 case of *Port Elizabeth Municipality v Various Occupiers* where the Constitutional Court noted the advantages of mediation.

processes until a court finally hands down its judgment in the matter.[105] The prospects are that disputants will secure their outcome within hours or a few days when using mediation.[106] Disputants are fortunate in South Africa if a court hands down its judgment within years, particularly if they litigate in the High Courts in Gauteng or the Western Cape where there is a dire shortage of judges which leads to much longer waiting periods for cases to be heard and judgments handed down.[107] Mediation is therefore an efficient process which results in huge savings of time.[108] Views on the resolution of credit disputes in South Africa by ADR in 2012 were equally split on whether the process took too long or was resolved quickly.[109] The view held too was that ADR was a quicker process although it was considered that it was only effective if the parties "are not totally at arms' length". The significance of a mediation outcome within a limited period means disputants do not face litigation fees which they would incur otherwise and which many members of the South African population see as a significant barrier to access to justice and too high in South Africa.[110] Further savings resulting from a harmoniously settled mediation are the saved and continuing relationships which would otherwise deteriorate if the dispute were to remain unresolved.[111] A further saving for disputants settling their dispute by mediation would be preventing the spread of notoriety about the disputants which would result from a widely publicised case once the judgment were to become public knowledge.[112]

(b) Mediation is confidential

2.59 Mediation means that negotiations conducted during mediation remain generally confidential whereas pleadings and the judgment in litigation are accessible to anyone

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105 Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation". See *S v J* par [54].

106 See also *MB v NB* par [50].

107 Benjamin (Aug 2023) *Business Day.*

108 Petzer (Jun 2023) Schoeman Law; Vinayan Singh "Benefits and advantages mediation" Viamediation Centre.

109 Topline Research Solutions (March 2012) *Final Report effectiveness of ADR market SA* National Credit Regulator 28.

110 SALRC *Report on legal fees* para 7.21 & 7.22.

111 Wiese (2016) *ADR in SA* 52; Sturrock (June 2015) *Mediate.com*. See also *Townsend-Turner and another v Morrow* 249, and Lowenstein (1998) *Contemporary Family Therapy* 10 to 11.

112 Wiese (2016) *ADR in SA* 52.

in South Africa, as is the case in other jurisdictions.[113] Mediation generally holds the advantage of privacy and confidentiality meaning that the mediation takes place in private, unless the disputants agree that other parties may sit in at the mediation, and the outcome is confidential unless agreement provides otherwise.[114] Disputants cannot use information disclosed during mediation negotiations in ensuing litigation or arbitration on the same dispute.[115]

(c) Disputants have autonomy and better control over the process in framing an innovative outcome

2.60 In mediation the disputants have autonomy and better control over the outcome of their dispute compared to their dispute being litigated, where the outcome of the dispute is decided by the presiding judicial officer.[116] In mediation, the disputants have a wider range of possibilities to craft their outcome which innovative solutions, including an apology, whereas the options available to a court are confined to making a payment order or performance under an agreement. The enhanced benefit to disputants in mediation lies in them being able to reach an even-handed reciprocal and acceptable settlement of their dispute compared to the decision of the court which might be one-sided. Disputants have further the opportunity to take control over the place, time, location, and duration of the mediation.[117]

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113 SALRC *ADR Issue Paper 31* par 3.9.18. Office of the Lord Chief Justice Northern Ireland (Sept 2017) Review Group's Report on Civil Justice par 9.9 114. Fotohabadi (Sept 2022) "Advantages & Disadvantages ADR" In *City of Cape Town v South African National Roads Authority* the Supreme Court of Appeal held in 2015: "[47] The animating principle therefore has to be that all court records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position – the interests of children, State security or even commercial confidentiality – any departure is an exception and must be justified. …" Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation".

114 Boulle & Rycroft *Mediation: principles, process, practice SA* 39 and 240 to 249; Laubscher (2021) *SA Mercantile Law Journal* 112 to 136*;* Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation"; Vinayan Singh "Benefits and advantages mediation" Viamediation Centre.

115 Wiese (2016) *ADR in SA* 52; Sturrock (June 2015) *Mediate.com*.

116 SALRC *ADR Issue Paper 31* par 3.9.25 and 3.9.30. Wiese (2016) *ADR in SA* 53; Sturrock (June 2015) *Mediate.com*; Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation".

117 Vinayan Singh "Benefits and advantages mediation" Viamediation Centre. In *Townsend-Turner and another v Morrow* 256 the court ordered that the mediators were to mediate the issues of conflict between the parties, which the parties were to themselves identify and that it was in the discretion of the mediators when the mediation sessions were to be held, provided they would commence within two weeks of the granting of the order.

(d) High implementation rate of outcomes

2.61 A high number of disputants tend to give effect to the mediated settlement of the dispute as they buy into reaching an agreement on the way they would resolve their dispute. This means no legal process needs to be instituted at further legal cost to attempt enforcement of the outcome against the other party.

(e) Preservation of relationships

2.62 Mediation provides an opportunity for the disputants to cooperate once they have reached the point of being willing to commence engaging about their respective demands, limits or perspectives to resolve their dispute.[118] Their willingness to start engaging might ultimately lead to the relationship of the disputants being saved[119] once the dispute is resolved.[120]

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118 Wiese (2016) *ADR in SA* 53; Office of the Lord Chief Justice Northern Ireland (Sept 2017) *Review Group's Report on Civil Justice* par 9.9 115; Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation". See also *Phillips and Others v Gunn* [2021] ZAGPPHC 31 where the court noted its concern about the continued co-exstence of the parties. The matter concerned the restoration of peaceful and undisturbed possession and access to a shared residential property. The court noted that the the matter was well-suited for resolution by mediation, see para [5].

119 Fotohabadi (Sept 2022) "Advantages & Disadvantages ADR". See *D.D v I.L and Another* (16939/2024) [2024] ZAWCHC 215 (20 August 2024):

[17] The role of mediation is more suitable to build a relationship in matters such as this, which involves a very young child and where the parties will have to consult and communicate with each other for quite a long time on joint decision making until the minor child reaches the age of majority. However, I am mindful that not all disputes are suitable for mediation. I am mindful that I cannot force parties to mediate. However, the parties are obligated to consider mediation.

[18] In my view, this is a classic case for mediation. It is evident that there was no meaningful mediation prior to the application. Not only will both parties own the process and if correctly managed by a mediator with experience, decisions could be made quicker. It will cost far less than a High Court urgent application and appropriate experts could be engaged as and when needed. Where issues arise requiring joint decision making, a mediator is better suited in instances where there is high volatility between parties and where communication is fractious.

120 Office of the Lord Chief Justice Northern Ireland (Sept 2017) *Review Group's Report on Civil Justice* par 9.9 115. Petzer (Jun 2023) *Schoeman Law;* Wiese (2016) *ADR in SA* 53; Sturrock (June 2015) *Mediate.com*.

(f) An empowering and satisfying process

2.63 Mediators play a supporting but neutral facilitating role to disputants assisting them to overcome a difficult and demanding position.[121] It is further the guiding role of mediators to assist the disputants to identify possible solutions and thereby move them from their respective positions. Hence, possible acceptable outcomes emerge for the disputants to resolve the dispute. Mediation therefore holds the advantage of empowering disputants and leaving them satisfied if they reach an acceptable outcome.[122] By far the majority of respondents indicated that they were satisfied with how their credit disputes through ADR service providers were resolved.[123] Mediation also fosters good client-attorney relationships between the satisfied disputant client and the mediating attorney. [124]

(g) The litigation route remains a viable option

2.64 Disputants who decide to embark upon mediation still retain the option to resort to litigation, should it become apparent that they will not be able to reach an outcome acceptable to those involved.[125]

(h) Efficient, convenient and simple process

2.65 Compared to the court process with its complicated rules of civil procedure, mediation presents an opportunity for disputants to resolve a dispute by the application of an efficient and uncomplicated process.[126]

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121 Office of the Lord Chief Justice Northern Ireland (Sept 2017) *Review Group's Report on Civil Justice* par 9.9 115; Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation".

122 Petzer (Jun 2023) *Schoeman Law; Wiese (2016) ADR in SA 52.*

123 Topline Research Solutions (March 2012) *Final Report effectiveness of ADR market SA* National Credit Regulator 29.

124 Petzer (Jun 2023) *Schoeman Law.*

125 Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation".

126 SALRC *ADR Issue Paper 31* par 3.9.23; Vinayan Singh "Benefits and advantages mediation" Viamediation Centre; Wiese (2016) *ADR in SA* 53; Sturrock (June 2015) *Mediate.com;* Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation".

2 Reasons why parties are cautious about resorting to mediation

(a) Mediation might merely be a step to stall the dispute and a failed mediation adds to the overall cost of resolving a dispute

2.66 A failed mediation adds to the overall cost of resolving a dispute.[127] In England the Court of Appeal noted in 2004 in *Halsey v Milton Keynes General NHS Trust*:

> [10] If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process". If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.

2.67 The financially stronger disputant has an advantage because they are able to prolong the process to exhaust the other party's legal resources or one disputant may simply decide to deceitfully participate with the objective of exhausting the opponent's financial resources.[128] Concern was expressed that mediation could increase the costs for disputants once they resort to litigation after a failed mediation.[129]

(b) Disputants participate voluntarily in mediation.

2.68 Since the disputants participate voluntarily in mediation, it means they participate in mediation of their own volition, and they are able to walk out of the mediation if they wish to do so, unless a court orders the disputants to mediate their dispute.[130] Should

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127 Fotohabadi (Sept 2022) "Advantages & Disadvantages ADR". Office of the Lord Chief Justice Northern Ireland (Sept 2017) *Review Group's Report on Civil Justice* par 9.10 115. SALRC *Discussion Paper 148 ADR in family matters* par 2.2.15.

128 SALRC *Discussion Paper 148 ADR in family matters* par 2.2.15.

129 Dingwall (2010) *Journal of Social Welfare & Family Law* 109.

130 Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation". In *Kalagadi Manganese v IDC SA* the court noted:

… parties may come into a mediation with preconceived ideas which may never be shaken. That, it seems to me, cannot be equated with bad faith: If each party believes that the other cannot be trusted and the mediators cannot overcome that stumbling block then no amount of reassurance or the provision of alternate forms of security for guaranteeing

the disputants not be willing to mediate or they stick to their positions without compromising, the dispute will, remain unresolved. A lot of effort might be invested in a failed mediation when it does not result in a settled outcome. However, it is also argued that even a mediation that is not settled quickly, has the benefit of disputants starting to communicate and then it might be settled in the foreseeable future.[131] This view holds that only a minority of disputants would argue that an unsettled mediation is a lost cause and money down the drain when disputants are unable not reach a settlement.

(c) Mediation does not set a binding legal precedent

2.69 Since mediation is conducted in private and confidentially, settled outcomes are not published and they do not set binding legal precedents.[132] Precedents are, however, regarded as indispensable in all societies to create legal certainty and ensure consistent application of the law.

(d) The information exchanged in mediation remains confidential

2.70 Conducting litigation in public, compared to mediation which takes place behind closed doors, might be beneficial to a disputant if tension caused by media or public attention sways an opponent to settle on more beneficial terms with the other party.[133] The confidentiality of mediation further means that in the case of alleged discriminatory practices, the mediation will not contribute towards the prevention of further discriminatory practices by discriminating parties.[134]

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performance is going to change that, whereas appreciating the downside of not finding an alternate solution may. But again, it is difficult to envisage how running the risk of adverse consequences where there exists a deep-rooted mistrust of any deal that might be brokered can amount to bad faith.

131 Rushton (Sept 2016) *Jams International*.

132 Fotohabadi (Sept 2022) "Advantages & Disadvantages ADR". Rozdeiczer & De la Campa (2006) *The World Bank Group* 13; Vettori (2015) *African Human Rights Law Journal* 360; Office of the Lord Chief Justice Northern Ireland (Sept 2017) *Review Group's Report on Civil Justice* par 9.10 115.

133 Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation".

134 Rozdeiczer & De la Campa (2006) *The World Bank Group* 13.

(e) The outcome of mediation can largely depend on the skills of the mediator.

2.71 A skilled or unskilled mediator may largely influence the outcome of the mediation.[135]

(f) Disputants may be bound to an unfavourable decision

2.72 In mediation disputants reach an agreement on the outcome whereas in a dispute litigated, the judgment by the court has a lawfully binding and enforcing effect.[136] The outcome of mediation could mean that the solution might not be entirely mutually satisfying.

(g) Mediation lacks the constitutional and procedural guarantees guaranteed by the courts

2.73 The beneficial fact that disputants have control over a mediation because they are able to determine how the mediation will be conducted poses the risk that mediation lacks constitutional and procedural guarantees which litigation ensures.[137] A risk also exists that the fact that a confidential mediated settlement does not provide a precedent, means that similar disputes may be referred to mediation which may lead to different unpredictable outcomes.

(h) Formal discovery processes are not part of mediation

2.74 The disputants in mediation rely on the good faith of the other party to disclose information they have at their disposal, and parties in mediation cannot be compelled to disclose information.[138] A view is that litigation, with its discovery rules, might be better suited to resolve a dispute than to attempt to resolve a matter by way of negotiation. However, determining the parameters of when disputants comply with negotiating in good faith and how far confidentiality applies in mediation, are much nuanced matters.[139]

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135 Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation"; Woodward-Smith "Mediation – advantages and disadvantages" Systech International.

136 Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation".

137 Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation".

138 Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation".

139 Quek (2019) *Singapore Academy of Law Journal* 740 – 741 argues as follows:

(i) An unsuccessful mediation attempt can make it more challenging to win if the dispute is litigated

2.75 If disputants unsuccessfully attempt to resolve their dispute by mediation, then the prospects of litigating successful may become remote due to the information which the disputants have disclosed in the mediation. The opponent is now well-informed of the available information and better informed to gauge the prospects of the counter-party successfully litigating the dispute.[140] It may also be that the opponent only agrees to mediation to obtain information they wish to use in subsequent litigation, and they are not really committed to resolving the dispute by mediation.[141]

F Should mediation be mandatory or voluntary

1 Introduction

2.76 An important question in this investigation that needs to be considered is whether mediation should be mandatory or voluntary in nature. Internationally and locally, views differ on this question.[142] We will consider how other jurisdictions introduced or are

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… good faith is consistent with strategic negotiation, and should also be highly encouraged to protect the integrity of the mediation process. To that end, it is recommended that a good faith participation obligation is articulated in appropriate legislation. At the same time, the threshold for the breach of this duty should be a high one so as to facilitate the enforcement of the duty and to prevent the unnecessary lifting of the veil of mediation confidentiality. The informal and private nature of the mediation process, which is placed within a formal justice system, has to be preserved. Yet the need to ensure access to justice also necessitates limited scrutiny of mediation communications. It is not an impossible tension to resolve, but is one that will be more acute with the growing institutionalisation and maturing of mediation in the future.

140 Gaille (2020) "16 Biggest Advantages & Disadvantages Mediation".

141 Office of the Lord Chief Justice Northern Ireland (Sept 2017) *Review Group's Report on Civil Justice* par 9.10 115.

142 SALRC *Discussion paper 148 ADR in family matters* para 4.2.4; SALRC Issue Paper 31 page 188 par. 3.8.41; Smith (1998) *Osgoode Hall Law Journal* 879 – 881*;* Macfarlane & Keet (2005) *Alberta Law Review* 679 – 680; Genn (2010) *Journal of Social Welfare and Family Law* 195 - 205 ; Genn (2010) "Judging Civil Justice"; Hanks (2012) *UNSW Law Journal* 929 – 952; Waye (2016) *Common Law World Review* 214 – 235; Ali (2018) *Cardozo Journal of Conflict Resolution* 269 – 288; Acharya (2023) *Alberta Law Review* 719 – 738; Billingsley & Ahmed (2016) *Common Law World* 186 – 213; Hay (2016) "Matsqui First Nation v Canada (AG)"; Milgo (2021) *UCL Journal of Law and Jurisprudence*; Ruffin (2021) *Queensland Law Society Proctor*; Ruff, Golsong, Belcher & Stewart-Jones (April 2022) *Lawyer Monthly*; Li (Oct 2020) *Kornfeld LLP*; Jones (2022) "Dispute Resolution no Longer Alternative"; De Vos & Broodryk Part 2 (2018) *JSAL/TSAR;* Britz (2018) *Mandatory mediation as dispute resolution mechanism LLM; Maclons (2014) Mandatory court based*

considering introducing levels of compulsion to change the civil justice culture to convince disputants to consider mediation as an option rather than court adjudication to resolve their disputes. We start our discussion on mandatory and voluntary mediation participation by considering participation in mediation under schemes which allow opting in or opting out of mediation to see which lessons we can learn.

2 Opting-in or opt out of mediation legislation

(a) The USA foreclosure mediation programmes

2.77 Should it be left to disputants to opt-in or to opt-out of mediation? The international financial crises of 2007 to 2014 led in the United States of America to millions of homeowners defaulting on their mortgages.[143] Financial institutions therefore resorted to mortgage foreclosures on a historically unprecedented scale. Some of the states in the USA adopted foreclosure mediation as a way to deal with mortgage foreclosure disputes. A view is that research has convincingly demonstrated that the upshot of automatic or opt-out foreclosure mediation programmes is the vastly increased levels of participation by home loan borrowers than if they were to use on-request or opt-in mediation programmes.[144] New York stands out with its participation rates of 70% or more in its automatically scheduled foreclosure mediation, as does the participation in the opt-out mediation programme of in Philadelphia, also at the rate of 70%.[145] The participation rates of homeowners in States in the USA who implemented opt-in foreclosure mediation programmes are at 25% or even less, in stark contrast with the rates of the opt-out programmes.[146]

2.78 On 1 July 2010, foreclosure mediation legislation commenced in Maryland, in the USA.[147] The legislation provided for a homeowning meeting with the mortgage lender

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mediation LLM; Munyati (2020) Mandatory Mediation LLM; Vettori (2015) *African Human Rights Law Journal* 359*.*

143 Fox (2015) *Washburn Law Journal* 89; Coghlan, McCorkell & Hinkley (2018) “Policy Brief” Institute for Research on Labor and Employment 1 – 4.

144 White (2017) Georgia State University Law Review 421.

145 Tutt (2016) *Indiana Journal of Law and Social Equality* 270.

146 White (2017) Georgia State University Law Review 421.

147 Jones (2012) *University of Maryland Law Journal of Race, Religion, Gender and Class* 398.

and an administrative law judge, as a neutral party, with the aim of averting foreclosure. A year later, the mediation programme succeeded in resolving only 317 of the approximately 33 000 foreclosures in Maryland. Maryland was of the USA States which adopted an opt-in approach to mediation, meaning that the homeowner had to request foreclosure mediation so that a mediation meeting could be arranged attended by the homeowner, the mortgage lender and a mediator.[148] The other mediation foreclosure mediation model is where the homeowner decides to opt-out of foreclosure mediation upon receiving a notice from the mortgage lender when the lender automatically arranges an initial foreclosure mediation meeting.[149]

2.79 Milwaukee County, also in the USA, adopted an opt-in foreclosure mediation programme.[150] The lender in Milwaukee County is required to attach to the summons and complaint, served on the homeowner, a notice of mediation and a mediation request form. Notwithstanding the fact that homeowners are informed by their lenders that they may request foreclosure mediation, generally, only 17% to 20% of homeowners actually requested the arrangement of foreclosure mediation.

2.80 The manner in which homeowners become part of the mediation foreclosure programme affects the mediation's effectiveness.[151] The longer it takes to resolve a possible foreclosure, the more the liability of the homeowner increases. It therefore matters to the homeowner to resolve their liability without delay. In 2013 – 2014, an opt-in model was applied in 13 of the USA state-wide mediation programmes.[152] Two state-wide programmes applied an opt-out foreclosure mediation model. There were also limited jurisdictions programmes at city, county, or judicial district level, of which 39 used an opt-in model, and 26 used an opt-out model.

2.81 Six programmes were adopted in Illinois to deal with mortgage foreclosures.[153]

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148 Gormley (2019) *Southern Maryland law.*

149 White (2017) *Georgia State University Law Review 417.*

150 Schneider & Fleury (2011) “Nevada Law Journal 372.

151 Tutt (2016) *Indiana Journal of Law and Social Equality* 270.

152 Tutt (2016) *Indiana Journal of Law and Social Equality* 270; see also Attorney General Massachussets *Final Report of the Foreclosure Impacts Task Force* 15 – 17.

153 Tutt (2016) *Indiana Journal of Law and Social Equality* 270; Shack (2015) *Resolution Systems Institute* 13.

The opt-out programs in the Sixth and 21st Circuits of Illinois resulted in assistance to homeowners in excess of 60%. In the Sixth Circuit, 68% of eligible homeowners participated in the first mediation meeting, with the rate of participation of homeowners in the Sixth Circuit of Illinois nearly matching. Delaware also followed an opt-out state-wide automatic foreclosure mediation program, with a participation rate of 53.66%. In those circuits which followed an opt-in model, on average 7 to 25% of eligible homeowners participated in mediation. Homeowners entered the mediation programme under the opt-out model by following one step only. The lender is required to schedule the mediation session, and the appearance of the homeowner means the entrance of the owner into the programme. The opt-in mediation programmes consist typically of multiple steps to be taken by homeowners to enable their entry into mediation, requiring of them to supply a financial questionnaire to the lender, and taking part both in an informational session and in housing counselling.

2.82 The opt-in foreclosure mediation programme of Maine showed a homeowner participation rate of 30% for foreclosures initiated in 2010. In 2012, this rate accelerated to 43%, only to decline again in 2013, to 36%.[154] A challenge thrown up by opt-in programmes is the way in which lenders deliver mediation notices to homeowners. In 2009, when foreclosure mediation was introduced, lawyers in Hawaii failed in about 50% of forfeiture cases to send the mediation notice and mediation request forms to borrowers, meaning that homeowners were not able to request foreclosure mediation. The initial 2009 opt-in mediation programme in Indiana required of lawyers to deliver mediation notices to homeowners. It resulted in homeowner participation levels of below 5%. Participation of homeowners increased to 50% when they received the mediation notices, indicating a date and time for mediation, from the court. Changes were also effected to the law in 2011 related to borrower notification and submission by the homeowner of loss of mitigation documentation.

(b) 2014 review of the 2008 EU Directive on Mediation

2.83 A 2014 study reviewed the impact of the 2008 EU Directive on Mediation and proposed measures to increase the use of mediation in the European Union.[155] This study noted the successes of the American mediation foreclosure programmes when

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154 Tutt (2016) *Indiana Journal of Law and Social Equality* 270.

155 De Palo, D'Urso, Trevor, Branon, Canessa, Cawyer & Florence (2014) "'Rebooting' the EU Mediation Directive".

applying an opt-out approach instead of an op-in approach. The study noted that Italy adopted an opt-out model of mediation whereby a disputant is at liberty to participate in the initial mediation and then opt-out of the mediation without any adverse consequences when the disputant considers that the mediation does not have prospects for success.[156] The study further noted that countries such as Romania adopted an opt-in model of mediation, where after attending a mandatory initial mediation session, disputants must exercise a choice to initiate a different process to commence mediation.

2.84 The 2014 EU Mediation Directive Rebooting report argued that considerable efficacy lies in the opt-out model which affords disputants the benefit of exposure to a mediation that they will not encounter under the opt-in model. This is the case, considering the report, when disputants attend the initial mediation meeting, which typically occurs under an opt-out model, where the mediator provides information to the disputants about the mediation process. The report also noted the remarkable participation of disputants in the opt-out foreclosure mediation programmes in the USA. Here the opt-out participation rates of homeowners were at 70% compared to the 25% participation rates of homeowners under opt-in programmes.

2.85 The 2014 EU Mediation Directive Rebooting report noted that the respondents surveyed predominantly supported the introduction of mandatory elements into mediation and that disputants be under an obligation to attempt mediating their dispute before being allowed to lodge legal proceedings although only in certain disputes.[157] The responses further suggested that the introduction of a "mitigated" model of mandatory

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156 De Palo, D'Urso, Trevor, Branon, Canessa, Cawyer & Florence (2014) "'Rebooting' the EU Mediation Directive" 8. See also the 2018 comment by De Palo (2018) *Linkedin.com* on opting-out in Italy and Turkey:

> In light of the success of the experiment that started in Turkey in January 2018, with the reform of the Labor Courts Law, people might think it was obvious that the country would go full steam ahead with opt-out mediation. Let's not be so sure. Think of Italy itself, for example, on whose mediation rules the Turkish law is modeled: for some five years, Italy's successful opt-out model has applied to only around 15% of all civil disputes. The remaining 85% of civil litigation is still governed by the voluntary model ("opt-in"), resulting in a very modest number of mediations per year. Surprisingly, legislative attempts at expanding the scope of the opt-out model have so far not come to fruition in Italy. Moreover, opt-in mediation models remain the norm in the EU. The resulting EU Mediation Paradox – the still very low number of mediations in most Member States – is something the EU institutions have heard about for a decade now, not just from me, and that paradox is unlikely to end anytime soon.

157 De Palo, D'Urso, Trevor, Branon, Canessa, Cawyer & Florence (2014) "'Rebooting' the EU Mediation Directive" 164.

mediation may well be more suitable. Respondents supported two mandatory mediation approaches, namely firstly, disputants mandatorily attending of information sessions, and secondly, providing disputants with an option to opt-out of mediation if they do not wish to continue with mediation.

2.86 The 2014 EU Mediation Directive Rebooting report noted that their respondents favourably supported the option of mandatory mediation coupled with disputants being able to opt-out.[158] The report highlighted that those EU member countries who followed the mediation approach of disputants being able to opt-into mediation displayed insubstantial mediation participation statistics, whereas those countries, who adopted an opt-out mediation approach, demonstrated substantial mediation participation statistics. Those countries who adopted an opt-in approach were consequently championing the adoption of more forceful mediation measures. The report noted that evidence was available of the encouraging outcomes produced by mandatory mediation coupled with opt-out approach, such as in Italy with its substantial disputant participation in mandatory mediation.

2.87 The 2014 EU Mediation Directive Rebooting report proposed that two options were possible trajectories for consideration by EU member States.[159] The first option was the introduction by EU legislatures, into their respective legislation, of mandatory mediation in defined categories of disputes, coupled with the option given to disputants to opt-out of mediation.[160] The second option was the adoption by EU Member State, of policies

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158 De Palo, D'Urso, Trevor, Branon, Canessa, Cawyer & Florence (2014) "'Rebooting' the EU Mediation Directive" 165.

159 De Palo, D'Urso, Trevor, Branon, Canessa, Cawyer & Florence (2014) "'Rebooting' the EU Mediation Directive" 165.

160 See also De Palo Giuseppe (2018) "A Ten-Year-Long "EU Mediation Paradox" 5 who commented, among others, as follows on opt-in and opt-out organ donation programmes and opt-in and opt-out mediation models in the EU confirming the 2014 mediation rebooting findings:

> The policy implication of the Johnson and Goldstein study is pretty compelling: the opt-out approach saves many more lives than the opt-in one. The difference shows the power, and very disparate outcomes, that can result between opt-in systems and opt-out systems.
>
> Due to the documented failure of other regulatory models in the EU, and the far better performance of the Italian one, … the Rebooting Study concluded that the European Union should do one of two things to increase the use of mediation. First, mandatory mediation with a readily-available ability to opt out should be introduced, albeit on a temporary trial basis, in the Mediation Directive (which was

promoting mediation confirming the EU theory of a 'Balanced Relationship Target Number" in mediation. Member States would in their policies identify the minimum number of mediations they strive for to be conducted annually.

(c) UK 2023 opt-out mediation evaluation report on online civil money claims

2.88 In March 2023, His Majesty's Courts and Tribunal Services (HMCTS) in the United Kingdom published evaluation findings, including statistics on the opt-out mediation programme implemented in England and Wales.[161] In England and Wales, the HMCTS established an Online Civil Money Claims (OCMC) programme on a digital platform for the issuing and progressing of civil money claims. It was decided to embark upon a test study to determine the changes which an opt-out approach compared to an opt-in approach would have on the OCMC claims in the range of £500 to £10,000. This amount would apply to claims where legal representatives are not involved and exclude the court fees and claims for interest. A modest rise in claims referred to mediation resulted, namely from 17% to 21%, after the approach was adjusted to opt-out from the initial opt-in basis. The average percentage of defendants who agreed to mediation also rose from 27% to 31%. Once a defendant was willing to submit the claim to mediation, the defendant was requested whether they would also consent to participate in mediation, which resulted in a rise from 64% to 69%.[162] The 2023 HMCTS evaluation noted that the additional information made available to both claimants and defendants and the adjustment to an opt-out approach might very well explain the modest elevated

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scheduled for revision in 2016) and in other EU legal instruments on ADR (both those in force and those being proposed).

161 *HMCTS opt out mediation evaluation report* (March 2023), see the executive summary par 2.

162 *HMCTS opt out mediation evaluation report* (March 2023), par 9.1 to 9.13. See also Government response Ministry of Justice UK (July 2023) *Response on Consultation on increase mediation in small claims:*

> 3. The policy design has also been informed by the success of HMCTS' Small Claims Mediation Service – a service that we believe every party in a small claims proceeding should be supported to utilise. As the HMCTS Opt out Mediation Evaluation Report demonstrated, settlement rates within the service are consistently above 50%. Moreover, parties using the service appreciate the swift settlement, consider the resolution fair, and are positive about the skills of the court-employed mediators. Under our plans, this service will be significantly expanded and enhanced, with a full evaluation conducted to inform potential refinements. [Footnote omitted.]

level of participation in mediation.[163]

(d) UK 2023 opt-out mediation evaluation report on online civil money claims

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163 *HMCTS opt out mediation evaluation report* (March 2023), see the executive summary par 2.

164 *HMCTS opt out mediation evaluation report* (March 2023), see the executive summary par 2.

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166 *HMCTS opt out mediation evaluation report* (March 2023), see the executive summary par 2.

3 Voluntary and mandatory mediation in other jurisdictions

(a) England and Wales

2.90 The Court of Appeal of England and Wales' standard on mandatory mediation was laid down in 2004 in *Halsey v Milton Keynes General NHS Trust.* Lord Justice Dyson analysed in this case whether a court could compel parties to participate in mediation. Lord Justice Dyson noted a difference between encouraging disputants to consent to engaging in mediation and even to do so in the most powerful of ways.[167] Lord Dyson considered that compelling genuinely hesitant disputants to mediate would constitute an impermissible constraint to their right to access to court, contrary to article 6 of the European Convention. Should it, however, be within the power of the court to order genuinely hesitant parties to mediate, the court was not able to identify suitable circumstances justifying making such an order. Lord Dyson held further that if a court were to oblige parties who are opposed to mediation to participate in mediation, it would accomplish nothing other than contribute to additional costs to the account of the disputants and hinder the possible value of the ADR system.[168]

2.91 Lord Justice Dyson identified, however, in the *Halsey* case an open-ended list of guidelines to determine whether a party unreasonably refused ADR, namely, the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of the ADR would be disproportionately high; whether any delay in setting up and attending the ADR would have been prejudicial; and whether the ADR had a reasonable prospect of success.[169]

2.92 In 2010, Lord Dyson noted in a speech that his judgment in the *Halsey* case needed to be qualified. He, nonetheless, also said:[170] "… it is one thing to compel parties to consider mediation, it is quite another to frogmarch them to the mediation table, specifically, if the result of a refusal to be frogmarched is to deny them access to the

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167 Par [9].

168 Par [10].

169 Par [16], see also the 2014 case of *PGF II SA v OMFS Co 1 Ltd* of the Court of Appeal par 22.

170 Civil Justice Council (July 2021) Compulsory ADR Report.

courtroom". In 2013 in *Wright v Michael Wright Supplies Ltd & Anor*[171] the Court of Appeal also asked whether the time had not arrived for a judge to reconsider the *Halsey* ruling. The Court of Appeal also reflected in 2013 in *PGF II SA v OMFS Co 1 Ltd* on the reasonableness or not of a refusal to participate in mediation:[172] " … the time has now come for this court firmly to endorse the advice … that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable …"

2.93 On 29 November 2023, the Court of Appeal of England and Wales handed down judgment in *James Churchill v Merthyr Tydfil County Borough Council.*[173] The main issue in this case was whether a court has the power to order parties to court proceedings to engage in a non-court-based dispute resolution process, and, if so, in what circumstances. The respondent in this matter, Mr Churchill delivered a letter of claim to the Council arising from damages caused by the Japanese knotweed which spread from the Council property onto his property. The Council responded to the respondent's claim advising that they would apply for a stay of the proceedings and costs should the respondent institute proceedings. The Council also questioned why the respondent did not apply the Council's non-court dispute resolution complaints procedure. When the claimant instituted court proceedings the Council applied for a stay of the proceedings. The lower court dismissed the stay application on 12 May 2022, relying on the *Halsey* case. It held that the claimant had acted unreasonably in not participating in the Council's complaints procedure, and opposition to the pre-action protocol.

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171 3. …You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable. …

172 Par 34. See also *Bradley & Anor v Heslin & Anor*:

> 24. I think it is no longer enough to leave the parties the opportunity to mediate and to warn of costs consequences if the opportunity is not taken. In boundary and neighbour disputes the opportunities are not being taken and the warnings are not being heeded, and those embroiled in them need saving from themselves. The Court cannot oblige truly unwilling parties to submit their disputes to mediation: but I do not see why, in the notorious case of boundary and neighbour disputes, directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.

173 [2023] EWCA Civ 1416. See also *X (Financial Remedy: Non-Court Dispute Resolution), Re* [2024] EWHC 538 (Fam) (08 March 2024).

2.94 The Court[174] held in *James Churchill v Merthyr Tydfil County Borough Council*[175] that the lower court was not bound by what Dyson LJ had said in the *Halsey* case at paras 9 and 10 since it was said in passing and it was not a required part of the analysis on the costs issues to reach the decision in *Halsey*.[176] The Court[177] considered whether it was empowered to order a stay of legal proceedings or order the parties to participate in a non-court connected dispute resolution process. The Court held that the courts indeed held such a power, provided it was to attain a legitimate objective and that it did not impair the essence of the rights of a claimant to access to a court, and further that the application was proportionate in attaining the legitimate objective.[178] The Court further noted that as a matter of course courts routinely adjourned proceedings so as to provide parties an opportunity to consider a settlement.[179] Therefore, it would be irrational not to allow courts to exercise their power to adjourn proceedings should, for example, a party to the proceedings object to an adjournment.

2.95 What the *Churchill* decision is saying is that an English judge may stay court proceedings, in effect ordering the parties to attempt mediation, but it has the discretion whether it should do so or not. The Court considered the decision of the UK Supreme Court in *UNISON* on impediments to access to courts.[180] The Churchill court's key conclusion on *UNISON* was as follows:[181] "The essential question is whether *UNISON* mandates the conclusion that existing proceedings may not be stayed or delayed to allow such steps to occur without primary legislation allowing it. In my judgment, it does not".

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174 Master of the Rolls, Sir Geoffrey Vos, with Lady Carr of Walton-On-The-Hill, Lady Chief Justice of England and Wales and Lord Justice Birss concurring.

175 Para 21.

176 Para 13.

177 Para 21. See comments by Speers (Nov 2023) Law Society Northern Ireland on this case:

> … It remains to be seen whether Courts will compel parties to take part in mediation. It also will be important to gather information as to the experience of parties who have been obliged to take part in mediation. Will they "go through the motions"? Or will they say we have been required to do this therefore let us make the most of it? …

178 Para [50], see also para [58]. See also the *Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb)* para 126. See also Castro (29 Nov 2023) Law Gazette UK; and Castro (30 Nov 2023) Law Gazette UK.

179 Para [51].

180 See paras 50 and 43 of the *Churchill* judgment which quotes the decision of the UK Supreme Court in *R (UNISON) v Lord Chancellor* [2017] UKSC 51 paras 78 to 80.

181 Para 44.

2.96 The Court noted in *James Churchill v Merthyr Tydfil* the factors which the Bar Council[182] and the complainant[183] invited the Court to consider and also those listed in the *Halsey* case.[184] The Court was not in favour of formulating an extensive list of factors judges would need to apply in exercising their discretion to stay proceedings. The Court noted that judges were experienced enough to determine which process ought to be applied to attain a just and swift resolution of a dispute. The *Churchill* case therefore seems to provide authority for the view that one should not provide a comprehensive test in legislation as to how that discretion should be exercised. The *Churchill* judgment seems to identify helpful factors and to leave it there. In April 2024, the Civil Procedure Rules Committee of England and Wales consulted on proposed changes to the Civil Procedure Rules which aimed to give effect to the *Churchill* case.[185] On 1 October 2024 changes to the Rules commenced.[186] They now clarify the power of a court to order or encourage parties to participate in ADR.[187]

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182 Namely, the form of ADR being considered; whether the parties were legally advised or represented;) whether ADR was likely to be effective or appropriate without such advice or representation; whether it was made clear to the parties that, if they did not settle, they were free to pursue their claim or defence; the urgency of the case and the reasonableness of the delay caused by ADR; whether that delay would vitiate the claim or give rise to or exacerbate any limitation issue; the costs of ADR, both in absolute terms, and relative to the parties' resources and the value of the claim; whether there was any realistic prospect of the claim being resolved through ADR; whether there was a significant imbalance in the parties' levels of resource, bargaining power, or sophistication; the reasons given by a party for not wishing to mediate: for example, if there had already been a recent unsuccessful attempt at ADR; and the reasonableness and proportionality of the sanction, in the event that a party declined ADR in the face of an order of the Court.

183 Namely, there was no neutral third party involved and the claim was dealt with by the manager of the Council's own knotweed department; no legal advice was available to the claimant; there was no settled written procedure by which it operated; it had no statutory backing; it was a process that had no fixed timescale and might take an open ended amount of time; the limitation period was not suspended during the process; there was no provision for the payment of a claimant's costs; and there was no express provision allowing for the payment of compensation in addition to eradicating the knotweed.

184 Para [66].

185 Civil Procedure Rule Committee (2024) *ADR in light of Churchill n Merthyr Tydfil: proposed Rule changes;* O'Neill (2024) *"Proposed rule changes regarding the court's power to compel ADR.*

186 Ewing (2024) "The shift towards ADR in English litigation: what does this mean for parties going forward?".

187 Griffiths (2024) "New amendments to the Civil Procedure Rules and their impact".

2.97 A number of England and Wales reports reflected on the differences between voluntary and mandatory mediation. A 2017 report identified the following arguments which are usually raised in favour of mandatory mediation:[188]

> 8.5.1. ADR is capable of conferring huge benefits on disputants and on the civil justice system. If we really believe that litigation should be the last resort then we should make it the last resort.
>
> 8.5.2. The "voluntary" take up of mediation, in particular, is disappointingly slow and small. The message has been being conveyed for many years now but it is obvious that "doing" rather than "learning" is the way that the mediation message gets through. …
>
> 8.5.3. It is impossible to tell in advance which cases will actually settle and which will not. But those who practise as mediators feel strongly that unless a case is genuinely a pre-selected test case or a claimant is obsessive and will not settle mediation will be effective to settle the majority of cases. …
>
> 8.5.4. If you let the parties waste energy and costs arguing about whether or not to mediate they will do so, generally for tactical/positional reasons.
>
> 8.5.5. The parties are never under an obligation to settle. They would be under an obligation to attend and participate in good faith. They are always free to go back to court burdened by, at most, the costs of the mediation and a small element of delay. …
>
> 8.5.6. There is no convincing evidence that ADR is less successful when compulsory. Experience suggests that parties who are compelled to attend mediations unwillingly (for example by contract terms) often do engage in the process and settle their disputes. … when parties felt they had to mediate or risk a costs sanction there was no sense that settlement rates dropped.
>
> 8.5.7. Sometimes parties were quietly relieved when they felt externally compelled to use an ADR process and did not have to propose it, which they feared might lead an opponent to suspect weaknesses in their case. Compulsion gets rid of the “who blinks first” issue.
>
> 8.5.8. … in England and Wales there are a number of ADR processes that are effectively or actually compulsory. … If compulsory ADR represents a constitutional Rubicon then it does seem to have been crossed a number of times already.

2.98 The 2017 report also noted the following arguments which are usually raised against mandatory mediation:[189]

> 8.6.1. It taints the voluntary ethos which is “the hallmark of mediation’s success”.

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188 ADR & Civil Justice Council (2017) *CJC ADR Working Group Interim Report* 45 – 46.

189 ADR & Civil Justice Council (2017) *CJC ADR Working Group Interim Report* 46 – 47.

8.6.2. It pulls unwilling parties into an unfamiliar process such that not only does the mediation have a reduced chance of succeeding but the whole process of mediation could be brought into disrepute.

8.6.3. The process has to be paid for by the parties or the state. Those costs will in many cases be wasted.

8.6.4. The cost may well be disproportionate given that this measure is typically targeting the low and middle value dispute. Even a fee of £100, the typical costs of a family MIAM [Mediation Information and Assessment Meetings] meeting, will be impossible in many small claims cases – and would be wholly unwelcome even if a free Small Claims Mediation Service was not available.

8.6.5. From the Defendant's point of view compulsion means that any claim however worthless will involve expense and hassle. This creates an artificial nuisance settlement value for spurious claims.

8.6.6. The likely consequence of making mediation mandatory (as at least some overseas experience seems to show) is to produce perfunctory, box-ticking mediations which go nowhere. Because of privilege issues it can be enormously difficult to police a requirement of good faith participation.

8.6.7. Mandating mediation may be a breach of the parties' Article 6 human right of access to the court.

8.6.8. How does the system avoid catching the cases in which there is no real dispute, typically the undefended money claims which make up the majority of claims?

2.99 In July 2021, the Civil Justice Council published its *Compulsory ADR report*. It considered that "introducing further compulsory elements of ADR will be both legal and potentially an extremely positive development".[190] The report considered the use of compulsion in ADR would be justified provided the parties were free to return to a court should they wish to seek adjudicative justice. The report made the following three observations in this regard:

1) Where participation in ADR occasions no expense of time or money by the parties (as with answering questions in an online process as to a party's willingness to compromise) it is very unlikely that the compulsory nature of the system will be controversial – as long as the ADR is otherwise useful and potentially productive.

2) Judicial involvement in ENE [Early Neutral Evaluation], FDR [Financial Dispute Resolution] and DRH [Dispute Resolution Hearings] hearings is proving highly effective and these are of course available free to the parties. Again as long as they seem appropriate for the particular type of case being considered and can

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190 Par 118.

be resourced within the court system, we cannot see that compulsion in an even wider range of cases will be unacceptable.

3) We think that as mediation becomes better regulated, more familiar and continues to be made available in shorter, cheaper formats we see no reason for compulsion not to be considered in this context also. The free or low-cost introductory stage seems the least likely to be controversial.

2.100 In August 2021, the Ministry of Justice called for evidence about dispute resolution in England and Wales.[191] This consultation noted that available evidence suggests that mandatory dispute resolution gateways, such as the mediation information and assessment meeting, function well as part of the court process.[192] Stakeholders were asked whether they agreed with this statement and were invited to provide evidence to support their response. A further question asked was what stakeholders consider would increase the take up of dispute resolution processes.[193] It was asked what impact a greater degree of compulsion would have to ensure that disputants resolve their disputes outside court.

2.101 The responses to the call for evidence on mandatory mediation showed a mixed reaction by stakeholders.[194] The majority of stakeholders who supported compulsion to engage in mediation represented the consumer and public services sector, insurers, and mediators and mediation bodies, specifically in civil cases.[195] The Civil Mediation Council strongly favoured automatic referral to mediation and that provision be made for an opt-out provision. The Council noted the successful application of the 1999 Ontario Mandatory Mediation Program. A need for compulsion was identified by representatives of the legal profession, including the Law Society, specifically the use of early neutral evaluation. Those who supported compulsion mainly regarded directive systematic reform, accompanied by exemptions in suitable circumstances to effect a significant culture change to mediation. Others considered that compulsion would counter the apprehension that taking resort to dispute resolution means weakness.

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191 Ministry of Justice (Aug 2021) *Dispute resolution in England and Wales: call for evidence.*

192 Question 3 at 10.

193 Question 11 at 11.

194 Ministry of Justice UK (March 2022*) Call for Evidence on DR: Summary responses* paras 2.5 – 2.7.

195 Par 2.5.

2.102 A number of questions focussed on the quality of the process and the outcome of dispute resolution.[196] Dissenting views were held mainly by representatives from the legal profession, academia, and the advice sector.[197] These stakeholders were in disagreement with mandatory engagement in dispute resolution due to its possible effect upon the quality of the process and outcome of the dispute resolution. Some considered that compulsion might frustrate the underlying voluntary nature of dispute resolution and therefore compromise its value. Concerns were raised by stakeholders that a mandatory system could have the consequence of disputants merely participating in the process as a "tick-box" activity without their commitment. They considered that access to justice for disputants would be undermined if mandatory dispute resolution caused them to cross further hurdles by incurring further costs and investing time in the process. Stakeholders noted the importance of the stage at which dispute resolution was required as a factor influencing a positive outcome and as some disputants might be dissuaded from engaging in dispute resolution in future. Diffuse concern was raised by stakeholders about whether the impact of increased compulsion to resolve disputes could be adequately dealt with to address the safety of disputants or where notable power imbalances existed, specifically in family disputes, and could possibly result in unjust resolution of disputes. Stakeholders further cautioned against inadvertent consequences resulting from compulsion and that a once-size-fits-all approach might not cater for the inherent distinctiveness of divergent disputes.[198]

2.103 A large number of these stakeholders responded favourably to the question that a greater degree of compulsion should be introduced in mediation.[199] Many stakeholders noted the difference between a mandatory requirement imposed on disputants to learn more about dispute resolution options and a mandatory obligation to engage in dispute resolution. Some stakeholders favoured disputants in family matters being compelled to participate in a mediation information and assessment meeting. It was further proposed

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196 Questions 8 to 15.

197 Par 2.6.

198 Jones (2022) "Dispute Resolution no Longer Alternative" comments as follows on this report:

> There is a great deal of momentum pushing the NDR agenda and we certainly expect to see continued developments in this area. It is indisputable that, used properly, non-litigation methods of dispute resolution can often be enormously effective. But it is equally clear that a one-size-fits-all approach would be hopelessly counterproductive. A nuanced approach is needed.

199 Par 2.7.

that mediation information and assessment meetings ought to be expanded to other disputes with the view to cultivate and fortify the advantages of mediation. There was further diffuse support for the extension and more vigorous application of court pre-action directives to order disputants to apply dispute resolution and to visit defiance of such court directives by disputants with cost sanctions.

2.104 Pre-action protocols were introduced in the UK in 1999 as part of the Woolf reforms to civil procedure rules.[200] Fourteen specific pre-action protocols[201] have been adopted, in addition to the practice direction for the general pre-action protocol. Pre-action protocols aim to explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims.[202] They are approved by the Master of the Rolls and are annexed to the Civil Procedure Rules (CPR).

2.105 The objectives of the practice direction pre-action conduct and protocols are[203] that before commencing proceedings, the court will expect the parties to have exchanged sufficient information to understand each other's position; make decisions about how to proceed; try to settle the issues without proceedings; consider a form of Alternative Dispute Resolution (ADR) to assist with settlement; support the efficient management of those proceedings; and reduce the costs of resolving the dispute. A party may not use a pre-action protocol or the Practice Direction as a tactical device to secure an unfair advantage over another party.[204] Parties must take reasonable and proportionate steps to identify, narrow and resolve the legal, factual or expert issues.

2.106 The practice direction pre-action conduct and protocols further deal with settlement and ADR. Litigation must be a last resort, and parties must consider whether

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200 Civil Justice Council (Nov 2021) "Review of Pre-Action Protocols Interim Report"see Appendix 3 – A Brief History of Pre-Action Protocols" 76.

201 They deal with personal injury; resolution of clinical disputes; construction and engineering; defamation; professional negligence; judicial review; disease and illness; housing disrepair; possession claims by social landlords; possession claims for mortgage arrears; dilapidation of commercial property; low value personal injury road traffic accident claims; low value personal injury employers' and public liability claims; and personal injury claims below the small claims limit in road traffic accidents.

202 Practice Direction Pre-action Protocol para 1.

203 Practice Direction Pre-action Protocol para 3.

204 Practice Direction Pre-action Protocol para 4.

negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.[205] Parties must consider the possibility of reaching a settlement at all times, including after proceedings have been started.[206] If proceedings are issued, the parties may be required by the court to provide evidence that they have considered ADR. The court may determine that the silence of a party in response to an invitation to participate or their refusal to participate in ADR was unreasonable. The court may then order that party to pay additional court costs.[207] If parties fail to comply with a pre-action protocol or the practice direction, the court may release the parties from complying or further complying with such pre-action protocol or practice direction; or stay the proceedings while the parties take measures to comply with the pre-action protocol or the practice Direction; or the court may impose cost sanctions.[208]

2.107 In March 2022, the Department of Education also proposed mandatory mediation in special needs education disputes.[209] A case would need to go to mediation first, and it would be reviewed by the independent local panel prior to an appeal being registered to the appeal tribunal.[210]

2.108 In August 2023, a report was published covering a part of the issues consulted in 2021 about pre-action protocols.[211] The proposed protocol would apply to disputes with a financial value of £500 or less excluding costs and interest. The report noted that the recommendations and guidance were directed towards mandatory pre-action protocols (i.e. pre-action processes that can result in sanctions for non-compliance when

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205 Practice Direction Pre-action Protocol para 8.

206 Practice Direction Pre-action Protocol para 9.

207 Practice Direction Pre-action Protocol para 11.

208 Practice Direction Pre-action Protocol para 15.

209 Boyle (July 2022) "SEND reforms: Mandatory mediation"; Secretary of State for Education (March 2022) *SEND reforms* proposed:

> 31. … In the current system, families must secure a mediation certificate before registering an appeal with the tribunal, but they do not have to go through mediation itself. We propose to change this so that families and local authorities must engage in mediation prior to registering an appeal to the tribunal. The national standards will set clear expectations of how different parties should engage in mediation, including timescales for mediation to take place and ensuring that local authority decision-makers attend meetings. We will make sure there is appropriate support available to parents to help them understand the mediation process and how best to engage with it. (Footnote omitted).

210 Secretary of State for Education (March 2022) *SEND reforms* par 32.

211 Civil Justice Council (Aug 2023) "Review of Pre-Action Protocols".

litigation is formally commenced) regardless of whether parties comply with their protocol obligations through a mandatory portal or other method of communication.[212] Formal oversight of voluntary portals would still be necessary, however, where rule makers deem participation in these portals sufficient to discharge a party's pre-action obligations before commencing court action. The interaction between these voluntary portals and digital court processes would further need to be carefully managed to ensure their inter-operability. It was considered particularly important that any limitations in the technology used in portals do not undermine the functionality of digital court processes.

2.109 In July 2022, consultation proposals were published for comment in England and Wales proposing the increase of mandatory mediation in small claim disputes.[213] The proposals entailed that the Ministry of Justice would introduce compulsory mediation for small claim disputes valued up to £10,000. These proposals need to be compared to the Civil Justice Council's recommendation made in 2022 for compulsory mediation for claims worth up to £500.[214] Parties would be provided a free hour-long telephone session with a professional mediator provided by HM Courts and Tribunals Service (HMCTS) before their case can proceed to a hearing.[215] The parties would be provided the opportunity to speak separately to the mediator to establish the existence of common ground between them. If a solution were to be brokered by the mediator, both parties would agree over the phone. Their agreement would be made legally binding through a settlement agreement. One of the questions asked was whether any types of small claims should be exempt from the requirement to attend a mandatory mediation appointment, if so, which types and why.[216] A further question was whether parties should be able to apply for individual exemptions from the requirement to attend mediation, assessed on a case-by-case basis by a judge, if so, why and what factors ought to be taken into consideration.[217] It was envisaged that the proposals would result

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212 Civil Justice Council (Aug 2023) "Review of Pre-Action Protocols" Par 1.6.

213 Ministry of Justice UK (July 2022) *Increasing use mediation in civil justice system CP;* Government UK (2022) "Government reveals plans to divert thousands of civil legal disputes away from court."

214 Rose (July 2023) "Compulsory mediation for small claims".

215 Government UK (July 2022) "Press release: Plans to divert thousands of civil legal disputes away from court".

216 Question 1, Ministry of Justice UK (July 2022) *Increasing use mediation in civil justice system CP* 16.

217 Question 2, Ministry of Justice UK (July 2022) *Increasing use mediation in civil justice system CP* 16.

in 20 000 cases being settled without involving the courts, and that 272 000 persons would be able to resolve their small claims disputes using the services of a profession mediator made available free of charge by HM Courts and Tribunals Service.[218] The expectations were further that nearly 7 000 court days would become available to the courts for adjudicating more complicated disputes.

2.110 The Law Society of England and Wales responded in 2023, among others, to the consultation on increasing mediation in small claims as follows:[219]

> If the government does forge ahead with compulsory mediation in small claims, it must:
> - run a pilot with clearly defined parameters, including timeframes and measures of success
> - evaluate data from the pilot thoroughly to guide any further steps
> - consider how the Small Claims Mediation Service will handle such a large volume of disputes effectively
> - provide litigants with clear guidance on what it means to undertake mediation and the legal consequences for those involved
> - consider whether one or both parties would be legally represented (we're concerned about the potential power imbalances)
>
> Also, if the government is to consider making mediation mandatory in other claims, we'd support a compulsory accreditation scheme for civil mediators. However, we stop short of supporting more regulation for our members who are also mediators, unless the evidence shows that it's required.

2.111 In July 2023, the UK Government published its response to this consultation.[220] The response indicated that respondents were generally of the view that no provision ought to be made for any type of claim to be exempted from the proposed mediation requirement.[221] Some respondents considered that in principle but also grounded on their experience, all small claims may be resolved by mediation. Reasons which respondents advanced against introducing exemptions were the likely complexities to originate therefrom and that participation by parties in mediation might be deterred. Respondents highlighted also that cases are already distilled and slotted into the small claims category

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218 Government UK (July 2022) “Press release: Plans to divert thousands of civil legal disputes away from court”.

219 Law Society England and Wales (Sept 2023) “Response: Increasing use of mediation”.

220 Ministry of Justice UK (July 2023) *Response on Consultation on increase mediation in small claims.*

221 Ministry of Justice UK (July 2023) *Response on Consultation on increase mediation in small claims* 19.

owing to their particular characteristics. Respondents stated that it therefore ought to be of paramount importance to the courts to encourage parties in disputes, other than small claims disputes, to mediate their disputes to evade the hassles, expenses and duration of litigation.

2.112 Respondents who favoured the introduction of exemptions identified road accident claims, where legal representatives would be involved, where processes already existed for the resolution of these claims by negotiation and where online portals facilitated the issuing of claims.[222] Further categories identified for exemption were housing and parking claims.[223] A view was that in parking disputes mediation provides a likely advantage to claimants since these claims were generally taken as being sound and that little room for manoeuvring exists other than to bargain with claimants. Some respondents noted in housing and housing disrepair claims the intracity of housing law, a need for preserving the relationships between tenants and landlords, and the disproportionate relationships between landlord and tenants. Although some respondents acknowledged the utility of mediation applying in some guise to some housing disputes, others generally favoured mediation applying to all housing disputes based on the benefits the incorporation of mediation into the court process will hold.

2.113 Few respondents favoured the exemption of disputes when parties have tried in the past to resolve their dispute by mediation or other dispute resolution methods.[224] This view was informed by the need for parties embracing rather than subverting dispute resolution by resorting first to instituting a claim and using the court process. Respondents noted the importance of an integrated strategy for these disputes. A further view was that parties should, as a first step, be referred to ombudspersons or ADR services where such were available.

2.114 The second question asked in the consultation on the increase of mediation in small claims was whether respondents thought that parties should be able to apply for individual exemptions from the requirement to attend mediation, assessed on a case-by-

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222 Ministry of Justice UK (July 2023) *Response on Consultation on increase mediation in small claims 20.*

223 Ministry of Justice UK (July 2023) *Response on Consultation on increase mediation in small claims 21.*

224 Ministry of Justice UK (July 2023) *Response on Consultation on increase mediation in small claims 22.*

case basis by a judge, if so, why and what factors respondents thought should be taken into consideration. A large number of respondents opposed parties being able to apply for individual exemptions whereby they would be able to evade integrated mediation.[225] Respondents further raised intense unease about the costs and time involved in adjudicating exemptions due to the inefficiencies resulting from such a process which would be contrary to the underlying objective of ensuring quick resolution of disputes by the courts. Respondents noted that allowing such an exemption procedure might inspire disputants to circumvent mediation especially when they are ill-informed about the operation of mediation and its advantages. They further noted that the obligation of disputants to participate in a mediation meeting at the Small Claims Mediation Service was uncomplicated. The voluntary participation of disputants to attempt to settle their dispute, therefore posed a negligible risk to them. The duty of mediators to end a mediation once they identified it was improper to carry on was also highlighted. The need was further identified to offer credible arrangements to accommodate the participation of all disputants if no exemption requests would be permitted.

2.115 There was, however, also support that exemptions be provided for disputants against participating in mediation in small claims, under narrow conditions.[226] Views were, however, also divergent on the qualifying conditions for exemption. The conditions respondents identified, included: disputes where justified accommodation for a disputant was unattainable; where a disputant lacked capacity to participate in the mediation or was a vulnerable person; disputes involving disputants with divergent power balances and also where threats of violence and abuse were present; disputes involving legal issues; disputes where the presentation of additional evidence would be imperative; and disputes where a reasonably arguable claim or defence were lacking.

2.116 Matthew Marsh was of the view in September 2023 that the July 2023 government response on mediation in small claim disputes was an indication of a shit of direction in small claims disputes which was likely to be followed in disputes involving larger amounts too.[227] Noting that approximately 5% of claims make it to trial, he wonders

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225 Ministry of Justice UK (July 2023) *Response on Consultation on increase mediation in small claims 23.*

226 Ministry of Justice UK (July 2023) *Response on Consultation on increase mediation in small claims* 24.

227 Marsh (2023) *Threestone Law.*

about the exigencies for extending the existing powers of courts, since most disputes are settled by agreement whereas others are finalised either by being stuck out by the courts or by way of summary judgment. He further noted that the high costs of litigation and the likelihood of being ordered to pay adverse costs were the main incentives why disputants were amenable to settling claims. In Matthew Marsh's view, the integration of mediation into the English civil procedure rules was unavoidable. He considered, however, that the power of courts to order the participation of disputants in mediation, coupled with the court imposing sanctions for the failure of a disputant to so participate, was disputable. He also noted that the introduction of mandatory mediation appeared inescapable. He cautioned that the credibility of mediation would be jeopardised if measures were adopted to abolish confidentiality in mediation to allow courts to determine the participation of disputants in mediation in good faith. He envisaged that disputants would resort to satellite litigation in every dispute should they not settle their dispute as they would then pursue attaining any leverage.

2.117 It was announced on 15 April 2024 that mandatory mediation in designated small money claims below the value of £10,000 would commence in England and Wales in May 2024.[228] The projections of 2022 were now adjusted to about 92 000 small money claim disputes likely to be resolved by mandatory mediation, with a likely 5 000 court sitting days annually freed up to deal with civil matters.

2.118 In 2020 the value of the mediation sector in the United Kingdom was set at approximately £17.5 billion.[229] Projections were further that commerce annually gained savings of about £4.6 billion in respect of damaged relationships, and wasted management time, productivity and legal costs when these disputes were mediated compared to when these disputes were litigated in the courts.[230] A February 2023 civil and commercial mediation audit estimated that the mediation sector would, in 2023, effect commercial savings of about £5.9 billion in damaged relationships, lost productivity, wasted management time, and legal fees when these commercial disputes

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228 Rose (April 2024) *Legal Futures UK.*

229 Ministry of Justice UK (July 2023) Response on Consultation on increase mediation in small claims Foreword; Government UK (Jan 2022) "Benefits of Brexit: How the UK is taking advantage of leaving the EU" 52.

230 Government UK (Jan 2022) "Benefits of Brexit: How the UK is taking advantage of leaving the EU" 52.

were mediated instead of disputants resorting to litigation to resolve these disputes.[231] The 2023 mediation audit also considered the availability of the Civil Mediation Council mediators should mandatory mediation be introduced in respect of disputes in which the value exceeds £ 10 000.[232] Respondents reported their annual availability for conducting civil and commercial mediation, as a median figure of 50 days, with an arithmetic average of 83 days. The projection was therefore that the 649 mediators of the Civil Mediation Council, at the time of the 2023 audit, suggest that their mediation capacity amounted to about 54 000 mediation days annually.

2.119 The 2023 mediation audit further indicated that the outcomes of commercial mediation under the auspices of the Civil Mediation Council persisted at outstanding levels in 2022 compared to previous years.[233] The average rate of settlement in 2022 remained as in 2020 at 72%, whereas the average was 74% in 2018. In 2022 there was a slight decline of cases settled shortly after the mediation day of disputes at an average of 20% on the day of the mediation, compared to the 2020 average of 21%, but in 2022 still markedly better than the 2018 average of 15%. These averages translated to a total settlement rate of 92% in 2022, in 2020 of 93% and 89% in 2018. The average settlement rates of advanced mediators, however, decreased to 85% in 2022, compared to the average rate of 92% in 2020.[234]

2.120 In 2022 Bryan Clark[235] concluded, among others, as follows on mandatory mediation in England and Wales:[236]

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231 CEDR (2023) *Mediation Audit* 17. Mulrooney "Reviewing the 2023 Tenth CEDR Mediation Audit".

232 CEDR (2023) *Mediation Audit* 11.

233 CEDR (2023) Mediation Audit 7.

234 CEDR (2023) *Mediation Audit* 8.

235 Clark (2022) *Amicus Curiae: The Journal of the Society for Advanced Legal Studies* 156.

236 See also the proposal Debbie de Girolamo made in 2016 (De Girolamo (2016) *CJQ*):

> … a better way forward is for government to bite the bullet and develop legislation which better reflects its public policy position regarding ADR and civil justice rather than vacillating through procedures that are not expressly definitive one way or another. An open, transparent system is needed. It is time to be definitive about policy and the manner in which to treat mediation in civil justice. Disputants should know where they stand: they should know what their obligations are when they commence litigation and the penalty for failing to fulfill them. Lord Clarke has opined that the courts already have power to direct parties to mediation. The government needs to channel that power into express legislative provisions to ensure clarity of process.

> There remain many choices to be made with respect to the how and when to compel parties to mediate in different settings. In some areas there may be blanket, 'automatic referral' rules (as in the Ministry of Justice small claims proposals) or discretionary powers for judges to order the parties to mediate. We may also see the further development of pre-filing mandatory requirements to mediate including within online dispute resolution portals (eg the Small Claims Portal for Accidents).
>
> In all of this, as noted in this article, we need to find some way to balance the different policy drivers that might take mediation in different directions. First, care must be taken to stay within the confines of acceptable limitations on litigants' rights to access court as articulated by the European Court of Justice in Rosalba Alassini and Menini. Equally, the priority of efficiency may result in a focus on speed, economy, real or perceived pressure to settle within mediations and perhaps judicial scrutiny of participants' conduct to aid effective enforcement. Such measures, however, can also lead to compromising the qualitative benefits of mediation, providing scant opportunities for proper inter-party dialogue and exploration of interests while also rendering parties at the whim of poor quality mediators with a 'thinning' of their self-determination within the process. 'Justice gaps' that may arise, particularly when participants attend mediation without lawyers, also need to be recognized and addressed if the process is not to avoid characterization as providing second-class justice. (Footnote omitted.)

(b) Canada

2.121 In Canada mandatory mediation schemes exist, including in the province of British Columbia. The mediator must give notice of the pre-mediation conference to all parties.[237] Unless relieved of the obligation to attend, each party who receives such must participate in the pre-mediation conference, and each party to the action must engage in mediation at a mediation session.[238] Such a party may attend a pre-mediation conference by a lawyer, or attend one or both of a pre-mediation conference and a mediation session by a representative, if the party is under legal disability and the representative is that party's litigation guardian; the party is suffering from a mental or physical injury or impairment sufficient to limit the party's effective participation in mediation; or the party is not an individual.[239] Finally, if the party is a resident of a jurisdiction other than British

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> If such a call is too drastic, the government should introduce a pilot scheme where mediation is truly mandatory. In other words, it would not provide the opportunity for litigants to easily withdraw from attending a mediation session. The ARM Pilot was vulnerable to its opt-out provision and the Halsey decision, and as a result, does not provide a good indicator of the value to government policy of such a scheme. …

237 Section 14 of the Notice to Mediate (General) Regulation of British Columbia 2001.

238 Section 15 of the Notice to Mediate (General) Regulation of British Columbia 2001.

239 Section 16 of the Notice to Mediate (General) Regulation of British Columbia 2001.

Columbia and will not be in British Columbia at the time of the pre-mediation conference or the mediation session, they may also be represented at the mediation. The court may direct that the mediation proceeds at the time and on the conditions that the court considers appropriate, or that the mediation be postponed to a later date on the conditions, that the court considers appropriate. The court is further empowered to order that parties are exempt from attending a pre-mediation conference and a mediation session if in the court's opinion, it is materially impracticable or unfair to require that party to attend.[240]

2.122 The British Columbia Supreme Court considered in *Executive Inn Inc v Tann* whether it was fair that a judge ordered the parties to personally attend mediation in Singapore under the British Columbia mandatory mediation scheme. The appellants resided in Singapore and Malaysia. They were part of a significant majority of owners of individual units in the strata or condo hotel in Vancouver, British Columbia.

2.123 Judge Dickson, who made the mediation order in *Executive Inn Inc v Tann*, was satisfied, notwithstanding the negativity and antagonism of the defendants, that the proposed mediation ordered to be conducted in Singapore, held a sensible possibility of advancing this complicated litigation.[241] She further considered that mediation could contribute towards potential savings of significant fees, expenses and judicial resources, to the best interests of all parties, taking also into account the rather developed stage of the litigation and that a skilled mediator would now only become engaged in the matter. She therefore considered that the participation of the defendants in the mandatory mediation mediator would not be materially impracticable or unfair to the defendants. Judge Dickson further consider that the objectives of the mediation regulation include contributing to the prospect of resolving litigation by means of mandatory mediation in a manner that is timely, cost-effective, and fair in the circumstances of the case.[242] She was also of the view that this goal may also be achieved by requiring all parties to personally participate in an out-of-province mediation in Singapore. In her view, the legislation granted a sufficiently broad discretion for the making of such an order.

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240 Section 23 of the Notice to Mediate (General) Regulation of British Columbia 2001.

241 Par [30].

242 Par [38].

2.124 Judge Hall agreed in *Executive Inn Inc v Tann* with the views of Judge Dickson. He noted the realities of international modern business where parties are not necessarily resident at the same judicial forum and the popularity of applying mediation to resolve disputes other than by complete legal proceedings. Judge Hall further acknowledged the sense that mediation augments access to justice and reduces the costs of legal proceedings[243]

2.125 In *Matsqui First Nation v. Canada (Attorney General),* in issue was the claim by the Matsqui people for exercising their domestic salmon fishing right, an aboriginal right under the Canadian Constitution, since the Department of Fisheries (DFI) denied them fishing licenses. The DFI applied for an order that it be exempted from participating in mediation on the ground that its participation would be "materially impracticable or unfair". The court noted how sparsely exemption applications were brought, as it appeared that this was only the second time,[244] since the commencement of the mediation regulations in 2001, that an application seeking exemption from participating in mediation was brought.[245] A ground the DTI proffered, which in their view favoured exemption, was that the matter was a test case which required determination by the court. The DFI further averred that they would require a mandate from the highest level of authority if a settlement were to be reached.[246] Being an election year, no such functionary was available to grant the requisite settlement mandate. Therefore, the DFI argued participation in mediation was impractical for this reason too.

2.126 The court noted in *Matsqui First Nation v. Canada (Attorney General)* the circumstances, under the mediation regulations, which made mandatory mediation inappropriate, were that:[247]

- a legal precedent is needed to govern similar cases in the future;
- an issue of law, public policy, or interpretation needs to be clarified on the record;
- public access or participation in the decisional resolution is desirable;
- people who are not parties to the dispute might be prejudiced by the outcome;

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243 *Executive Inn Inc v Tann* par [15].

244 The first case was *Executive Inn Inc v Tann* of 2008.

245 Par [2].

246 Par [10].

247 Par [14].

- the dispute is over a decision where a statutory decision-maker had no discretion, i.e., no negotiable issue;
- the constitutional validity of an act or law is challenged;
- the case is genuinely frivolous or opportunistic;
- parties acting in bad faith; or
- there is a fear of violence between the parties and the mediation would not be safe.

2.127 The court was not persuaded in *Matsqui First Nation v. Canada (Attorney General)* that mediation was unfair or impractical, with Judge Kent explaining:

> [19] In this case, the Matsqui seek declaratory relief respecting a perceived aboriginal right protected and preserved by the Constitution. This is not the sort of remedy that is readily available in a mediation process. They undoubtedly know this, yet they have initiated the mediation nonetheless. Presumably they believe there is some basis for settling the claim available. It may have little to do with the formal legal relief sought in the litigation. One cannot help but ask what do the parties have to lose by confidentially exchanging and explaining perspectives and interests? If nothing else, perhaps some accommodations and efficiencies may be reached regarding evidence or other trial process that may reduce mutual inconvenience and cost. At best, some sort of creative resolution in principle may emerge, albeit subject to later ratification by superiors if necessary. At worst, the case will simply proceed to trial in a couple months' time with an interim "loss" of one or two days' effort.

2.128 A suggestion was that the British Columbia Supreme Court ought to have granted the application to the DFI to be exempted from engaging in the mandatory mediation, it should have allowed the matter not to be mediated, and should have allowed the court to adjudicate this public interest test case because only a court was able to provide the required certainty.[248]

2.129 The Rules of Civil Procedure in Ontario, adopted under the Courts of Justice Act of 1990, require parties to comply with mandatory mediation rules. The purpose of the mediation Rules is to provide for mandatory mediation in specified actions, to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.[249] The nature of mediation is that a neutral third party facilitates communication among the

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248 Hay (2016) "Matsqui First Nation v Canada (AG)".

249 Rule 24.1.01.

disputants, to assist them in reaching a mutually acceptable resolution.[250] The Rules apply to actions that are commenced in the City of Ottawa; the City of Toronto; and the County of Essex. The Rules do not apply to estates, trusts and substitute decisions; a matter that was the subject of a mediation under the Insurance Act, if the mediation was conducted less than a year before the delivery of the first defence in the action; actions placed on the Commercial List established by practice direction in the Toronto Region; mortgage actions; actions under the Construction Act, except trust claims; and actions under the Bankruptcy and Insolvency Act of Canada. The court may make an order on a party's motion exempting them from this Rule.[251]

(c) Scotland

2.130 In 2019, the Scottish Government considered how mediation could be adopted in Scotland.[252] One of the issues considered in this report was the mandatory referral of disputes to mediation. The suggested approach adopted in the report was to introduce by legislation the obligation on parties to consider mediation. This approach would not compel parties to participate in mediation, neither to reach a settlement. The report noted Quek's five levels of manditoriness, on her suggested a continuum of mandatoriness' in mediation, namely: the categorical or discretionary referral with no sanctions; a requirement to attend a mediation orientation session or a case conference; soft sanctions imposed based on the conduct of the parties; an opt-out scheme whereby parties may seek exemption from mediating; and referral with no exemptions provided for the parties.[253]

2.131 The Scottish approach incorporates elements of the five levels of compulsion. [254] It did not wish to force parties to mediate. They were of the view that their proposed system would not infringe or contravene the rights of disputants to a fair trial under Article 6 of the European Convention on Human Rights. They noted that only the introduction of a feature of compulsion into mediation would result in mediation being embraced and assimilated into the Scottish civil justice system. The Scottish report proposed

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250 Rule 24.1.02.

251 Rule 24.1.05.

252 Scottish Mediation (June 2019) *Report: bringing mediation into mainstream par 130.*

253 Quek (2010) *Cardozo Journal of Conflict Resolution* 488 – 490.

254 Scottish Mediation (June 2019) *Report: bringing mediation into mainstream* 131.

introducing a mandatory referral and initial mediation meeting, with provision for "special cause exemptions".[255] Special cause exemptions was preferred to provide for disputants opting out of mediation.[256] The proposed list of exemption grounds includes: [257]

1. Mediation has already taken place, or a mediator is currently engaged
2. Existence of time-bar (unless provided for in legislation)
3. Contractual clauses stipulate specific DR [Dispute Resolution] method
4. Another preferable DR method exists
5 The case involves a protective order or enforcement order
6. Disputes where there is a risk of domestic abuse, sexual violence or any other gender-based violence.

(d) Australia

2.132 IN 1999, the Chief Justices Council of Australia and New Zealand adopted a formal Declaration of Principles on Court-Annexed Mediation.[258] It provided for court-annexed or referred mediation in New Zealand and Australia: [259]

- Mediation is an integral part of the Court's adjudicative processes and the 'shadow of the court' promotes resolution.
- Mediation enables the parties to discuss their differences in a cooperative environment where they are encouraged but not pressured to settle so that cases that are likely to be resolved early in the process can be removed from that process as soon as possible.
- Consensual mediation is highly desirable but, in appropriate cases, parties

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255 Scottish Mediation (June 2019) *Report: bringing mediation into mainstream 133.*

256 Sturrock (July 2019) *Mediationblog Kluwerarbitration.*

257 Scottish Mediation (June 2019) *Report: bringing mediation into mainstream* 5. The Mitchell (2019) *Mediation (Scotland) Bill Consultation* at 15 proposed the exclusion of the following proceedings, namely –

- under the Abusive Behaviour and Sexual Harm (Scotland) Act, the Domestic Abuse (Scotland) Act and any other domestic abuse and sexual harassment cases;
- civil actions for rape and other sexual offences;
- certain proceedings under the Family Law (Scotland) Act 2006, including declarations of validity or dissolution of marriages;
- proceedings under the Arbitration (Scotland) Act;
- employment disputes governed by statutory dispute-resolution processes;
- matters under tax and customs legislation; and
- judicial review proceedings.

258 Mahony (2000) *VUWLawRw 25*.

259 Spigelman (2001) *Australian Construction Law Newsletter*.

can be referred where they do not consent, at the discretion of the Court.

- The parties should be free to choose, and should pay, their own mediator, provided that when an order is sought for such mediation the mediator is approved by the Court.
- Mediation ought to be available at any time in the litigation process but no referral
  should be made before litigation commences.
- In each case referral to mediation should depend on the nature of the case and be in the discretion of the Court.
- Mediators provided by the Court must be suitably qualified and experienced. They should possess a high level of skill which is regularly assessed and updated.
- Mediators must have appropriate statutory protection and immunity from prosecution.
- Appropriate legislative measures should be taken to protect the confidentiality of
  mediations. Every obligation of confidentiality should extend to mediators themselves.
- Mediators should normally be court officers, such as Registrars or Counsellors rather than Judges, but there may be some circumstances where it is appropriate for a judge to mediate.
- The success of mediation cannot be measured merely by savings in money and time. The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation.

2.133 The overriding objective of the 2011 Australian federal Civil Dispute Resolution Act and Rules is the just, quick and cheap resolution of the real issues involved in civil proceedings.[260] Courts are required to give effect to this objective. Disputants are duty bound to cooperate in the court processes to attain these objectives. Disputants are required to take genuine steps to resolve their dispute before instituting certain[261] civil

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260 Section 26.

261 See sections 15 to 17 which list the excluded proceedings. Excluded proceedings are under section 15 for an order for an order imposing a pecuniary penalty; for an order connected to a criminal offence; decisions of, or a decision subjected to review by: the Administrative Appeals Tribunal; the Australian Competition Tribunal; the Copyright Tribunal of Australia; the Migration Review Tribunal; the Refugee Review Tribunal; the Social Security Appeals Tribunal; the Veterans' Review Board; a body prescribed by regulations; proceedings in the appellate jurisdiction of an eligible court; proceedings arising from the exercise of a power to compel a person to answer questions, produce documents or appear before a person or body under a law of the Commonwealth; proceedings in relation to the exercise of a power to issue a warrant, or the exercise of a power under a warrant; proceedings in which the applicant or the respondent has been declared a vexatious litigant; ex parte proceedings; proceedings to enforce an enforceable undertaking.

proceedings in the federal court of Australia or the federal magistrate court.[262] Genuine steps include a disputant notifying the other disputant of the issues in dispute, and offering to discuss them, with a view to resolving the dispute; a disputant responding appropriately to such a notification; providing relevant information and documents to the other disputant to understand the issues and how the dispute might be resolved; and a disputant considering a process to resolve the dispute, including by alternative dispute resolution.[263] Further where disputants agree to a proposed process, whether they agreed who would facilitate such a process; and whether the disputants attended such a process, and once the proposed process is conducted, but it does not resolve the dispute, whether the disputants considered a different process. Finally, whether the disputants attempted to negotiate on the issues in dispute or authorised a representative to resolve their issues.

2.134 The Australian federal Civil Dispute Resolution Act further requires of the applicant and the respondent to file statements about the genuine steps they took. An applicant who institutes civil proceedings in the federal court must, at the time of filing the application, file a genuine steps statement.[264] It must specify the steps taken to resolve the issues in dispute between the disputants or why no such steps were taken. Such reasons may include the urgency of the proceedings and the fact that taking such steps would have compromised the safety or security of any person or property.

2.135 It is further required of the respondent, after having received the statement filed by the applicant, to also file a genuine steps statement before the hearing date specified in the application.[265] The respondent must specify whether they agree with the genuine steps statement filed by the applicant. Should the respondent disagree with the statement filed by the applicant, the respondent must specify the respects in which, and reasons why, they disagree.

2.136 The Australian federal Civil Dispute Resolution Act further requires of a lawyer representing a disputant, who was required to file a genuine steps statement, to advise that disputant of the requirements for such filing. The lawyer further needs to assist the

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262 See section 3, the objects clause and the definition of eligible court in section 5.

263 Section 4.

264 Section 6.

265 Section 7.

disputant to comply with the requirements of the statement.[266]

2.137 The Australian Civil Dispute Resolution Act further empowers the court, Judge, federal magistrate or other person, when deciding to award costs in a civil proceeding, to determine whether a disputant filed a genuine step statement and took genuine steps to resolve the dispute. The court, Judge, Federal Magistrate or other person may also consider any failure by a lawyer to comply with the duties imposed in regard to the statement to be filed. The lawyer is not allowed to recover costs from the client, should that lawyer be ordered to pay the costs personally if they failed to comply with these obligations,

2.138 Under the New South Wales Civil Procedure Act the court may refer any proceedings for mediation by a mediator if it considers the circumstances appropriate,[267] with or without the consent of the parties to the proceedings concerned.[268] The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court, who may be a listed mediator.[269] Disputants in proceedings which have been referred to mediation are required to participate in the mediation in good faith.[270]

2.139 In 2023 the New South Wales Supreme Court noted in *Aversa v Transport for New South Wales* that there were no explicit criteria for referring a matter to mediation where a disputant objects to such a referral.[271] This discretionary referral depends on the circumstances of the case, and on the justification for probably compelling parties to

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266 Section 8.

267 Section 26.

268 See also Milgo (2021) *UCL Journal of Law and Jurisprudence* 22 to 23 proposing that this provision be used in Englsih legislation to provide the power to courts to compel parties to mediatiate, where appropriate.

269 Listed mediator is defined to mean a mediator appointed in accordance with a practice note with respect to the nomination and appointment of persons to be mediators.

270 Section 23. See *ASIC v Rich* [2005] NSWSC 489:

> 16 … this combination of consumption of time, escalating costs and strain on the Court's resources provides an ample basis for the Court to exercise its power of mandatory mediation. The making of a mediation order may provide the opportunity for the parties to take stock of their positions away from the battleground of the courtroom. An independent mediator should be able to encourage the parties to look at the issues from a different perspective and in a different light, and mediation may provide the occasion for the parties to obtain advice from a broader range of sources than the specifically legal sources used in litigation. …

271 Par 19.

incur additional costs involved in mediation. The court would in all probability be unable to reliably predict a successful mediation outcome even if the general values of mediation has been accepted. Experience has further taught that parties to litigation may drop their fervour and interest in litigation in preference of alternatives which curb liabilities in substitute for an uncertain victory.[272] The court also held the view, although not laying down a general rule, that where the litigation concerned involves ordinary citizens and the state (in this case Transport for New South Wales), then the Court ought to be approving of a court assisted process leading to a mediated outcome of the proceedings.[273] The Court ruled that the plaintiff should confirm to the court registry whether court referred mediation would be feasible for them, and if mediation could not to be arranged, that the plaintiff should apply to the Court to order a private mediation of the dispute, including the conditions of such mediation.[274]

2.140 One of the purposes of the Civil Procedure Act of Victoria is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute in civil proceedings.[275] A court is empowered to refer a civil proceeding to appropriate dispute resolution,[276] at any stage of the proceedings.[277] Under this Act "appropriate dispute resolution" means a process attended, or participated in, by a party to negotiate a settlement of the civil proceeding or resolve or narrow the issues in dispute, including, mediation, whether or not referred to a mediator in accordance with rules of court; early neutral evaluation; judicial resolution conference; settlement conference; reference of a question, a civil proceeding or part of a civil proceeding to a special referee; expert determination; conciliation; or arbitration. This Act applies to the Supreme Court; the County Court; and the Magistrates' Court. A referral order made by made with or without the consent of the parties to the proceedings.[278] However, such an order will not be made for arbitration; a reference to a special referee; an expert determination; or any other type of appropriate dispute resolution that results, directly or indirectly, in a binding outcome. Such an order includes also the referral of proceedings to a judicial resolution

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272 Par 33.

273 Par 34.

274 Par 39.

275 Section 1(c).

276 Section 66(1).

277 Section 66(3).

278 Section 66(2).

conference, also called judicial mediation.

2.141 The Practice notes of the Supreme Court of Victoria lists the circumstances under which proceedings may be referred to judicial mediation. The circumstances are if one or more parties have limited resources; if there is a substantial risk that the costs and time of a trial would be disproportionately high compared to the amount in dispute or the subject matter of the dispute; where the estimated trial length of the trial would engage substantial judicial and other court resources; or aspects of the matter indicate that in the interests of justice, the matter ought to be referred to judicial mediation.[279] However, some proceedings may, as a matter of policy, ordinarily not be appropriate for judicial mediation, such as cases involving the resolution of a matter of public importance which, in the public interest, ought to be heard in open court; and cases in which the commission of a crime or serious misconduct is alleged in a civil proceeding.[280]

(e) Italy

2.142 A general criticism of the Italian civil law system is that it takes much too long to finalise civil disputes.[281] In 2009, 5,8 million civil cases were pending in Italy,[282] with the claim value not exceeding € 3 000 in about 60% of these cases.[283] By 2012, the number of pending civil cases was still about five million.[284] Italy's track record of eight years for disposing of civil cases up to the Supreme Court level compares dismally with the 2013 average of 788 days of high income member countries of the Organisation for Economic Co-operation and Development.[285] The number of pending cases decreased from 3,13 million in 2014 to 2,5 million cases by 2019, although the newly enrolled cases decreased in the period 2014 – 2019 from 3 million to 2,5 million cases.[286] By 2020 the average

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279 Second revision, which commenced on 21 September 2023, par 4.5.

280 Practice Notes, par 4.6.

281 Esposito, Lanau & Pompe (2014) "Judicial System Reform in Italy – A Key to Growth" IMF; Matteuci (2023) *Electronic Journal of Procedural Law* 66; Contini (2023) *Law, Technology and Humans Journal* 153. Fabri (2022) Revue française d'administration publique 1016.

282 Matteuci (2017) *Escola da Magistratura do Estado do Rio de Janeiro* 83.

283 Matteuci (2023) *Electronic Journal of Procedural Law* 69.

284 Esposito, Lanau & Pompe (2014) "Judicial System Reform in Italy – A Key to Growth" IMF 3.

285 Esposito, Lanau & Pompe (2014) "Judicial System Reform in Italy – A Key to Growth" IMF 3.

286 Contini (2023) *Law, Technology and Humans Journal* 159.

duration of finalising civil cases in the first instance courts was 419 days and 891 days in the appeal courts.[287] In 2022 the difference in the average duration of disposing of civil proceedings in Southern Italy was approximately 1,7 years, whilst it was approximately 0,7 years in the North-West of Italy.[288]

2.143 Since 1993, mediation in Italy has been completely voluntary and mandatory at times, for a large number of disputes.[289] Since 2010 a variety of civil and commercial disputes have been subject to mandatory mediation, namely: shared title property, property, division of assets, wills and inheritance, family arrangements and agreements, lease, loans, business rentals, medical and healthcare liability disputes, defamation in the press or by other means of publication, insurance, and banking and financial contracts.[290] In 2020, mandatory mediation was extended to economic disputes related to the Covid 19-pandemic. In July 2023, amendments commenced which extended the categories of mandatory mediation also to the following disputes: joint venture agreements, association agreements, franchising and service agreements, network agreements, supply agreements, personal partnerships, subcontracting and disputes involving relationships of duration. Remco van Rhee commented in 2021 that political bargaining and lobbying appears mainly to be the upshot for the inclusion of these mandatory dispute categories in Italy. [291]

2.144 Four mediation categories exist in Italy. Firstly, voluntary mediation when parties decide voluntarily to resolve any civil or commercial matter they are involved in using mediation.[292] Secondly, judicial mediation, where in judicial proceedings the judge may order the parties to attempt resolving their dispute by mediation. The judge may order

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287 Matteuci (2023) *Electronic Journal of Procedural Law* 66.

288 Leogrande (2024) "Duration of Civil Proceedings in the Italian Regions".

289 Matteuci (2017*) Escola da Magistratura do Estado do Rio de Janeiro* footnote 2 on 81; Mellersh (2 June 2017) *International Mediation Institute;* Bruni "2022 Mediation Italy" Lexology GTDT – Mediation.

290 Matteucci (2023) *Electronic Journal of Procedural Law* 77 & 78; Balestra (2023) *Lex IBC;* Milan Chamber of Arbitration (2023) Annual Report 2 & 3; Anwaltskanzlei Cariglino "Pflichtmediation in Italien"; Fontana & Imperiale (2023) *Mediate.com;* Matalon (2023) C*onsulegis.com.*

291 Van Rhee (2021) *Access to Justice in Eastern Europe* 14.

292 Bruni "2022 Mediation Italy" Lexology GTDT – Mediation 6; Bruni Bruni Alessandro "The new law on mandatory attempt of mediation in Italy"; Mellersh (22 June 2017) *International Mediation Institute.*

mediation at any stage of the proceedings, but prior to the last hearing, with the parties being allowed 15 days to select their mediator. Thirdly, where parties agree by way of an agreement that they will resolve their disputes by mediation. Fourthly, mandatory mediation, where Italian law prescribes as an essential requirement that the parties will mandatorily participate in an initial mediation meeting before they are allowed to institute judicial proceedings.

2.145 From 1993 to 2003, mediation was completely voluntary in Italy, its outcome was not enforceable, it was not linked to judicial proceedings, representation by lawyers was not mandatory, mediators were not regulated and the costs of the mediation had to be settled once the mediation commenced.[293] This did not change in the period from 2003 to March 2011, apart from mediators in company disputes since 2011 being required to be accredited. This position changed in the period from March 2011 to October 2012. Mediation became mandatory for certain civil and commercial disputes, with mediation still voluntary in other disputes, mediation was enforceable, and mediation was linked to judicial proceedings. The position remained the same with no provision for mandatory presentation of parties by lawyers and costs still had to be paid at the commencement of the mediation. For an interim period from October 2012 to September 2013, mediation became voluntary again. The mediation outcome was now enforceable, and it was now linked to judicial proceedings. Legal representation was once again not mandatory, and the mediation costs still had to be paid at the commencement of the mediation. In September 2013 mediation became mandatory again with a mandatory initial mediation session for a reduced number of civil and commercial disputes, the mediation outcome was enforceable, mediation was linked to judicial proceedings and legal representation of the parties became mandatory.[294] However, from 1 July 2023, the mandatory initial mediation meeting was abolished. From this date, the parties to the dispute, their lawyers, and the mediator attempt to negotiate a mediated settlement agreement straightaway.

2.146 The intention of the Italian legislature was that disputants to only the listed categories of disputes would be required to participate in the initial mediation sessions

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293 Matteuci (2017*) Escola da Magistratura do Estado do Rio de Janeiro* footnote 2 81; Mellersh (22 June 2017) *International Mediation Institute;* Bruni "2022 Mediation Italy" Lexology GTDT – Mediation.

294 Matteuci (22 June 2017*) Escola da Magistratura do Estado do Rio de Janeiro* footnote 2 81.

for a limited period of four years.[295] The mandatory initial mediation meeting ultimately applied for mandatory mediation in the identified categories from 2013 to 2023.[296] The purpose of this initial meeting was that that the mediator would provide information to the parties and their lawyers about mediation, and how mediation would proceed. The parties and their lawyers would be provided an opportunity to initiate the mediation, to address the mediator and to commence with the mediation. The aim of the initial meeting was largely to allow the parties to ascertain the expediency of resorting to mediation to resolve their dispute. Reform introduced in 2022, which commenced on 1 July 2023, abolished this initial meeting.[297] Those involved in a dispute may now since 1 July 2023 straightaway commence an attempt to resolve their dispute by mediation. The initial first session quintessentially produced two possible results, either the disputants agreed to resort to mediation or they would opt-out of mediation and continued with litigation.[298] Where disputants opted to continue with mediation, they were not allowed to proceed to litigation unless a period of 90 days lapsed.[299] Where disputants did not participate in the prescribed mediation session, but proceed straightaway to litigation, the judge is empowered to postpone the litigation until satisfied that the disputants complied with this obligation.[300]

2.147 Statistics published by the Italian Ministry of Justice for the period 2011 to 2021[301] indicate that incoming mediation requests started off in 2011 at 60 810, increased to 154 879 in 2012, flattened to 41 604 in 2013, when the mediation legislation was declared unconstitutional (since it was not introduced by way of primary legislation), then dramatically increased again to 196 247 mediation requests in 2015. Finally, in 2021, there were 166 511 mediation requests. In 2021, 127 889 mediations were pending, there were 166 511 new incoming mediation requests, 152 919 mediations were

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295 Mellersh (22 June 2017) *International Mediation Institute.*

296 Bruni "2022 Mediation Italy" Lexology GTDT – Mediation 9; Fontana & Imperiale (2023) *Mediate.com*.

297 Bruni "2022 Mediation Italy" Lexology GTDT – Mediation 9.

298 Maiorana (2019) "Mediation in Italy, how does it differ?"

299 Maiorana (2019) "Mediation in Italy, how does it differ?"

300 Maiorana (2019) "Mediation in Italy, how does it differ?"

301 Ministry of Justice Italy *Mediation Legislative Decree 28/2010 Statistics 1 Jan – 31 Dec 2022* 2.

resolved, and 141 480 disputes were still pending.[302]

2.148 The participation of parties in mediation in Italy started at 27% in 2011 – 2012; increased to 32,4% in 2013; increased to 40,5% in 2014; to 44,9% in 2015; and to 50% in 2021.[303] The success rate when parties participated only in the first mediation meeting was 22,6% in 2015; was 23,7% in 2016; in 2020 it was 28,7%; and in 2021 was 27,3%. However, the success rate of mediation, once parties participated in more than only the first mediation information meeting, was 43,5% in 2015; was 43,6% in 2016; was 46,7% in 2020; and in 2021 was 45,7%. Crucial in this context is to consider, however, that the 2020 statistics published by the Italian Ministry of Justice reflected that disputes subject to mandatory mediation only accounted for 8,5% of litigation in Italy.[304]

2.149 Noteworthy is further the Italian statistics for the period 2011 to 2021 of cases resolved by mediation by the four mediation categories, namely judicially referred, mandatory and mediation provided for in advance by agreement and by voluntary agreement mediation.[305] In 2011 of the 200 cases judicially referred to mediation, with 1,7% of cases resolved. In 2012, 4 965 cases were judicially referred, with 3,3% of cases resolved. The judicially referred cases drastically increased to 19 128 in 2016, with 11% resolved; in 2017, to 20 835 cases referred, with 14,3% cases resolved; in 2018, to 21 508 cases referred, and 14,8 % cases resolved; and declined in 2019, to 20 365 cases referred, with 14,5% cases resolved by mediation.

2.150 In 2011 in Italy 31 288 mandatory mediation disputes were referred to the initial mediation meeting, with 77,9% resolved; in 2012, 129 531 disputes were referred with 84,9% disputes resolved; in 2016, 138 127 disputes were referred, with 76,6% disputes resolved; in 2017, 118 963 disputes were referred, with 76,5% resolved; in 2018, 106 336 disputes were referred with 73,4% of disputes resolved; and in 2019, 103 014 disputes were referred, with 73,5% disputes resolved.

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302 Ministry of Justice Italy *Mediation Legislative Decree 28/2010 Statistics 1 Jan – 31 Dec 2022* 5.

303 Ministry of Justice Italy *Mediation Legislative Decree 28/2010 Statistics 1 Jan – 31 Dec 2022* 7.

304 Antich & Francese Dec 2020 “The Italian model of mediation: an update”.

305 Ministry of Justice Italy Mediation Legislative Decree 28/2010 Statistics 1 Jan – 31 Dec 2022 11.

2.151 In Italy in 2011, 200 disputes were subject to resolution by contract or agreement, with 0,5% resolved by mediation; in 2012, 458 disputes were subject to mediation by contract or agreement with 0,3% resolved by mediation. By 2016, 935 disputes were subject to resolution by mediation by contract or agreement, with 0,5% resolved; by 2017, 761 disputes were subject to resolution by mediation by contract or agreement mediation, with 0,5% resolved; by 2018, 818 disputes were subject to resolution by mediation by contract or agreement with 0,6% disputes resolved; and by 2019, 684 disputes were subject to resolution by mediation by contract or agreement with 0,5% resolved by mediation. By 2011, there were 7 937 voluntary mediations with 19,9% resolved; by 2012, there were 17 677 voluntary mediations with 11,6% resolved; in 2016, there were 15 284 voluntary mediations with 8,8% resolved; in 2017, there were 14 898 voluntary mediations with 9,6% resolved; in 2018, there were 16 273 voluntary mediations with 11,2 resolved; and in 2019, there were 16 074 voluntary mediations with 73,5% resolved.

2.152 Leonardo D'Urso is of the view that the Italian approach to mediation means that the mandatory initial mediation session closes the void which exists between mandatory and voluntary mediation.[306] He considers that the Italian mediation statics confirmed that the mandatory initial mediation sessions whereby disputants voluntarily agree to resolve their dispute by mediation is the only effective approach whereby increase mediations in Italy were to be increased in the following two or three years. He suggested that the mandatory first mediation meeting was effective, provided that the following conditions are met:

i the disputants need to participate in person, since the prospects of the dispute advancing to a full-on mediation becomes otherwise extremely slim
ii an experienced and well-trained mediator ought to conduct a mediation
iii the mediation session ought to be held very shortly after the mediation is requested and minimal mediation fees ought to be payable in order not to create an obstacle to access to justice
iv the parties ought to be provided an opportunity to opt-out[307] of the mediation easily without incurring sanctions or the opportunity to continue voluntarily in a full-on mediation
v the disputant who do not participate in the mediation and proceeds to litigation should be visited with significant sanctions.

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306 D'Urso "Italy's required initial mediation session: bridging the gap between mandatory and voluntary mediation".

307 Opt-in and opt-out approaches are considered in detail below in Chapter 4, under the heading application of the legislation.

(f) Greece

2.153 The World Bank noted that Greece held the record in the European Union for the slowest pace of disposing of civil cases, namely 1 711 days, or 4,68 years.[308] Progress has, however, been made on the pace of legal proceedings in Greece. In 2019, the World Bank found that the norm in Greece for resolving and enforcing commercial disputes in the first instance courts was three years, whereas the norm to finalise commercial cases in the European Union was 15 months sooner.[309] The World Bank further reported that in specific Greek cities, such as Larissa, cases were finalised after 1,5 years, whereas in Athens cases were finalised after almost four years after they were initiated.[310] In 2023, the European Commission found that in 2021, the time period for resolving civil cases in the first instance level courts in Greece continued to escalate, on average to 728 days, whereas in 2019 this period was on average 637 days.[311]

2.154 In 2010, Greece introduced its first mediation legislation to comply with the 2008 European Directive on mediation.[312] In 2018, Greece replaced this legislation. Voluntary mediation commenced in 2018. Mandatory mediation was suspended until 2019. The 2018 legislation was then amended in 2019. The Greek legislature decided to introduce elements of mandatory mediation into the Greek civil procedure in 2018. Mandatory mediation would apply to a limited number of disputes, such as incorporeal asset disputes, for example resulting from damage to common property in shared property developments; medical negligence disputes; family disputes, excluding divorce proceedings or paternity disputes; motor vehicle accident damage disputes, excluding claims for injury or death benefits; neighbourhood disputes; stock exchange, financial and banking disputes; and disputes about infringement of intellectual property and trademarks.

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308 Delevegos (2022) *Ekathimerini.com*; Mandrou (2023) *Ekathimerini.com.*

309 World Bank (2019) *Doing Business in the European Union 2020: Greece, Ireland and Italy* 29.

310 World Bank (2019) *Doing Business in the European Union 2020: Greece, Ireland and Italy* 31.

311 European Commission (2023) Commission Staff Working Document 2023 Country Report – Greece 61.

312 Koumpli (2020) *Mediation Blog Kluwer Arbitration;* Tsiptse (2020) *Im Campus;* Ampoulidou (2019) *Drakopoulos Law;* Anastopoulos (2019) *Litigation Newsletter* Polis Partners; Karampelis & Prokopis (2019) *Lambadarios Law;* Kriketou & Vrachasotakis (2019) *Kyriakides Georgopoulos Law Firm*.

2.155 Lawyers and the judiciary vehemently opposed mandatory mediation in Greece, arguing that effective implementation of mediation would only be possible if effect were to be given to the principle of voluntary participation of disputants in mediation; mandatory mediation undermines the rights of disputants to justice and constitutes a threat of privatising justice; mandatory mediation diverts justice from the judiciary and legal representatives; and that mandatory mediation infringes article 20(1) of the Greek Constitution[313] which provides that "every person shall be entitled to receive legal protection by the courts and may plead before them his views concerning his rights or interests, as specified by law."[314]

2.156 Proponents of mandatory mediation in Greece counter the concerns raised against mandatory mediation, arguing that mandatory mediation only requires disputants to participate in mediation to resolve their disputes by way of mediation. Disputants may end their participation in mediation at any stage in the inexpensive and quick initial mediation session where after they are at liberty to proceed to litigation.[315] Disputants are required to participate in the initial mediation session in an attempt to resolve their dispute before they are allowed to lodge their dispute in court.[316] If disputants fail to attend the initial mediation session and proceed to litigation, a court will rule that the claim is inadmissible. Courts are further empowered to fine disputants between € 100 to € 500 should they fail to attend the required initial mediation session. The court will consider the conduct of the party and the grounds for their absence in the initial mediation session when contemplating imposing a fine.[317]

2.157 Under the 2019 legislation, disputants are required to participate in an initial mandatory mediation session in the following disputes before they are allowed to litigate them in court, namely: certain family law disputes, to the exclusion of disputes such as divorce proceedings, annulment of a marriage, determining the existence of a marriage,

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313 Tsiptse (2020) Im Campus.

314 See *Philis v. Greece* (Application no. 12750/87; 13780/88; 14003/88) para 40.

315 Tsiptse (2020) Im Campus.

316 Koumpli (2020) *Mediation Blog Kluwer Arbitration;* Tsiptse (2020) *Im Campus;* Tsagas (2023) *Linkedin.com.*

317 Koumpli (2020) *Mediation Blog Kluwer Arbitration.*

and parent-children relationships, such as parenthood. [318] Mandatory mediation further applies in respect of all civil and commercial disputes within the jurisdiction of Single-Member Courts of Greece with a claim value exceeding € 30 000; all civil and commercial disputes within the jurisdiction of Multi-Member Courts of Greece; and disputes governed by mediation agreements containing an unequivocal mediation clause. Small claim disputes are excluded from mandatory mediation. Disputes involving claims with a value below € 30 000 within the jurisdiction of the Magistrate Courts and the Single Member Courts are also excluded from mandatory mediation. Further excluded disputes are those between a natural or legal person and the Greek State, local and regional authorities or legal entities of public interest.[319]

2.158 Voluntary mediation applies under the 2019 Greek mediation legislation to the following disputes: when disputants agree to resolve their dispute by mediation; when disputants entered into an agreement that they would resolve their disputes by mediation; and when a judicial authority of another EU Member-State rules that mediation proceedings be initiated, provided such initiation is not in contravention of Greek public policy.[320]

(g) Mandatory mediation India

2.159 Since 2018, under section 12A of the 2015 Commercial Courts Act, a plaintiff is required to institute mediation and attempt settlement of their commercial dispute before

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318 Karampelis & Prokopis (2019) *Lambadarios Law;* Anastopoulos (2019) *Litigation Newsletter* Polis Partners.

319 Public interest entities are defined in Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts as follows:

"public-interest entities" means:

(a) entities governed by the law of a Member State whose transferable securities are admitted to trading on a regulated market of any Member State within the meaning of point 14 of Article 4(1) of Directive 2004/39/EC;

(b) credit institutions as defined in point 1 of Article 3(1) of Directive 2013/36/EU of the European Parliament and of the Council, other than those referred to in Article 2 of that Directive;

(c) insurance undertakings within the meaning of Article 2(1) of Directive 91/674/EEC; or

(d) entities designated by Member States as public-interest entities, for instance undertakings that are of significant public relevance because of the nature of their business, their size or the number of their employees.

320 Karampelis & Prokopis (2019) *Lambadarios Law*.

instituting litigation, unless the plaintiff claims urgent interim relief. When the Act commenced, the threshold for the jurisdiction of the commercial courts which applied to a commercial dispute was 10 million Rupees, which equates in November 2024 to R 2,085 million. In 2018, the threshold was reduced to 300 000 Rupees, which equates to R 62 155.[321] The Commercial Courts Act lists 21 commercial disputes and empowers the Central Government to determine additional disputes.[322] Under section 3(3) of the Act the State Government is empowered, with the concurrence of the Chief Justice of the High Court, to appoint one or more persons with experience in dealing with commercial disputes as a Judge, at the Commercial Court at the level of District Judge or below the level of a District Judge.

2.160 In August 2022, the Supreme Court of India provided legal certainty in the case of *Patil Automation Private Ltd vs Rakheja Engineers Private Ltd* regarding the mandatory nature of mediation under section 12A of the Commercial Courts Act.[323] However, the comment has highlighted that legal certainty is required on the meaning of urgent interim relief under section 12A and that disputants are able to evade compliance

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321 Kamran Mohammad & Ashish Kabra (May 2018) "Amendments to the Commercial Courts".

322 Transactions with merchants, bankers, financiers and traders; export or import of merchandise or services; admiralty and maritime law; aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing; carriage of goods; construction and infrastructure contracts, including tenders; agreements relating to immovable property used exclusively in trade or commerce; franchising agreements; distribution and licensing agreements; management and consultancy agreements; joint venture agreements; shareholders agreements; subscription and investment agreements pertaining to the services industry including outsourcing services and financial services; mercantile agency and mercantile usage; partnership agreements; technology development agreements; intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits; agreements for sale of goods or provision of services; exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum; insurance and re-insurance; and agency contracts.

323 The Supreme Court held at par 72 as follows:

> …The object of the Act and the Amending Act of 2018, unerringly point to at least partly foisting compulsory mediation on a plaintiff who does not contemplate urgent interim relief. The provision has been contemplated only with reference to plaintiffs who do not contemplate urgent interim relief. … The object is clear. It is an undeniable reality that Courts in India are reeling under an extraordinary docket explosion. Mediation, as an Alternative Dispute Mechanism, has been identified as a workable solution in commercial matters. In other words, the cases under the Act lend themselves to be resolved through mediation. Nobody has an absolute right to file a civil suit. A civil suit can be barred absolutely or the bar may operate unless certain conditions are fulfilled. …

See also Sarkar & Patil (Sept 2022) "*Automation v. Rakheja Engineers*: An End to Pre-Institution Mediation conundrum".

with mandatory pre-litigation mediation in commercial disputes until the Supreme Court finally settles this issue.[324] Critical comments questioned the justification advanced by the Parliamentary Standing Committee in its July 2022 report on the Mediation Bill of 2021, that mandatory mediation would result in disputants facing delays in settling their disputes, whereas mandatory mediation was, since 2018, a reality in commercial disputes under the Commercial Courts Act.[325] Comment to the Standing Committee identified the limited number of mediators in India which meant that mandatory mediation in the wide ranging disputes under the Mediation Bill would require large numbers of skilled mediators.[326] It was further suggested to the Standing Committee that mandatory mediation ought to be implemented progressively with respect of specified types disputes to ultimately apply to an extensive spread of disputes.[327]

(h) Mandatory mediation in Tanzania

2.161 Under the Civil Procedure Code of Tanzania, disputants have a duty to resolve their civil disputes by ADR. Under Rule 24 of the Code, a court will refer every civil action for negotiation, conciliation, mediation or arbitration or a similar alternative dispute resolution procedure, before the civil action can proceed to trial. Disputes to which this requirement does not apply, include election disputes, human rights infringements, applications subject to the interpretation of the Tanzanian Constitution, and judicial review applications.[328] Under Rule 26 of the Civil Procedure Code, disputants are obliged to endeavour towards reducing costs and delays in resolving their dispute and to facilitate an early and fair resolution of their dispute. Under Rule 22, a judge or a magistrate to whom a case has been assigned must, within 21 days after the conclusion of the

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324 See Singh & Jain (Oct 2022) "Compulsory Pre-Litigation Mediation for Commercial Suits – A Boon or a Bane?" who commented as follows:

> … the apparent lack of conclusiveness on what can be considered "urgent" interim relief – is a question that remains open to debate. In the absence of absolute clarity on the foregoing aspects, the courts may subject applications … on the basis of non-compliance with Section 12A of the CCA to a case-by-case enquiry.

325 Chatterjee & Choudhry (March 2024) "The Mediation Act 2023 – will the ADR wave pick up momentum".

326 Parliamentary Standing Committee on Law and Justice Rajya Sabha July 2022 *Report on the Mediation Bill, 2021 (Vol I Report)* para 3.68.

327 Parliamentary Standing Committee on Law and Justice Rajya Sabha July 2022 *Report on the Mediation Bill, 2021 (Vol I Report)* para 3.73.

328 Hamisi (Nov 2022) *IJIRAS* 6.

pleadings, preside over a first pretrial settlement and schedule a conference, to be attended by the disputants and their legal representatives. The purpose of the scheduling conference is to determine after consultation with the parties and their legal representatives which one of the four speed track categories will apply to the dispute, for resolving the dispute by negotiation, conciliation, mediation, arbitration or any other dispute resolution procedure other than a trial. The judge or magistrate makes a scheduling order and determines on which dates which steps are to be taken in the matter, including the use of alternative dispute resolution procedures. The first speed track category is reserved for a matter which the judge or magistrate considers to be a fast matter, and which seems capable or that the interests of justice require to be concluded within 10 months from the date of the first pretrial conference. The second speed track category is reserved for cases which the judge or magistrate considers to be a normal dispute seemingly capable or which the interests of justice require to be concluded within 12 months from the date when mediation or arbitration or other similar alternative dispute resolution procedure fails. The third speed track category is reserved for a matter which the judge or magistrate considers to be a complex dispute capable of or which the interests of justice require to be concluded within a period not exceeding fourteen months from the date when negotiation, conciliation, mediation or arbitration or another similar alternative dispute resolution procedure fails. The fourth category speed track matter is reserved for a dispute which the judge or magistrate considers to be a special dispute, not falling in any of the other three categories, but which needs to be concluded within 24 months from the date when negotiation, conciliation, mediation or arbitration or any other similar alternative dispute resolution procedure fails. Under Rule 23, once a judge or magistrate has made a scheduling conference order, that judge or magistrate will not allow a departure from or amendment of such scheduling order unless the court is satisfied that such departure or amendment is necessary in the interests of justice and the party in favour of whom such departure or amendment is made, bears the costs of the departure or amendment, or unless the court directs otherwise.

2.162 Once a mediation session is scheduled, the failure by a disputant to attend the scheduled mediation session attracts consequences. Under Rule 29, where it is not practicable to proceed with a scheduled mediation session because a party failed without good cause to attend the mediation session within the time set for the commencement of the session, then the mediator remits the file to the trial judge or magistrate. The trial judge or magistrate may dismiss the matter, if the non-complying party is a plaintiff, or may strike out the defence, if the non-complying party is a defendant, or may order a party to pay costs, or may make any other order it deems just. The Civil Procedure Code

further provides a procedure for the restoration of a matter dismissed for failure of a party to appear at the scheduled mediation session. Under Rule 30, any party aggrieved by an order made under Rule 29, is required, within seven days from the date of the order, to file in court an application for the restoration of a matter or a written statement of defence. The court must hear and determine the application within 14 days from the date of the lodging of the application. Should the applicant show good cause, the court sets aside orders made under rule 29 and restores the matter or the defence and remits the case to the mediator to issue a notice for mediation.

2.163 Views are that mediation under the Civil Procedure Code has resulted in limited success in Tanzania.[329] Strategies have been proposed in Tanzania for ensuring increased uptake levels of mediation such as the Tanzanian government intensifying its support for mediation to encourage disputants to resolve their disputes; increased awareness raising campaigns which will expose Tanzanians to mediation; and education of the judiciary, mediators and legal representatives plays a crucial role in creating a flourishing mediation culture in the Tanzanian society.[330] A lack of Tanzanian mediation policies was also identified as a shortcoming which has impeded the success of mediation. [331] The Tanzanian Judiciary has responded to these calls by the adoption of Court-Connected Mediation Rules on 1 July 2024.[332] According to the preamble the guidelines were adopted to assist disputants and mediators in the effective, proper and expeditious conduct of mediation proceedings and for related purposes. The guidelines deal with definitions; the application of the guidelines; the manner of conducting a mediation; the selection of a mediator; the mediator being notified of their selection; the mediator accepting selection; transmission of the pleadings to the mediator; disclosure by a mediator of lack of impartiality; withdrawal and replacement of a mediator; mediation procedures to be adopted by the mediator; the obligations of the mediator; confidentiality; stages of mediation; the duty of a mediator to submit a certificate of non-attendance by parties or the mediation outcome report; and forms used in mediation. A code of Conduct was further published in 2021 under Regulation 3 of the Code of Conduct for Reconciliators, Negotiators, Mediators and Arbitrators, Regulations 2021. The main objectives of the Code are to provide guiding principles for the conduct of reconciliators,

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329 Lukumay (Jan – June 2016) *LSTLR* 14.

330 Lukumay (Jan – June 2016) *LSTLR* 59; Hamisi (Nov 2022) *IJIRAS* 14.

331 Lukumay (Jan – June 2016) *LSTLR* 60; Hamisi (Nov 2022) *IJIRAS* 14.

332 *Court Annexed Mediation Guidelines, 2024* Judiciary of Tanzania 1 July 2024

negotiators, mediators and arbitrators; ensure efficient and quality delivery of service by accredited persons to the public and the adherence to professionalism in the course of provision of professional service; promote public confidence in reconciliation, negotiation, mediation and arbitration as a means of resolving disputes; and provide protection for members of the public who use the services of accredited reconciliators, negotiators, mediators and arbitrators in Tanzania.

(i) Mandatory mediation in Namibia

2.164 Section 39 of the High Court Act of Namibia was amended in 2013 to further regulate legal proceedings and to provide for the first time for mandatory ADR in certain matters. Section 39(1)(d) now empowers the Judge-President, with the approval of the President of Namibia, to make rules to regulate compulsory alternative dispute resolution in certain matters. The Judge President may prescribe a judge ordering the disputant to refer their dispute to a prescribed ADR procedure. Only once such ADR is unsuccessful and a certificate to that effect is issued, then a disputant or the disputants may set the matter down for hearing or trial. Since 2014, the High Court Rules of Namibia provides for the referral of a matter to ADR and sets out the obligations of disputants in respect of a matter referred to ADR. Under the rules, the managing judge may, at any time in terms of practice directions issued by the Judge-President, of their own initiative or at the request of a disputant refer any part of the proceeding or any issue to an ADR process or in an attempt to resolve that part of the proceeding or issue by way of ADR.[333] Once the managing judge has heard the disputants, the judge may give directions as to what, where, and how is to be resolved during the ADR, and if the disputants do not agree, by whom. The judge will also determine when the ADR will take place and the period within which the conciliator or a mediator will submit its report to the court. Disputants may not proceed with further proceedings until the managing judge has received the ADR procedure report from the conciliator or mediator and the judge has made an order based on the ADR report.[334] If disputants do not settle their dispute by using an ADR procedure, the conciliator or mediator report must only state that the ADR settlement procedure has failed, without stating the reason for such failure, unless it is necessary to inform the court for the possible imposition of costs sanctions.[335] The managing judge is not bound

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333 Rule 38(1).

334 Rule 38(3).

335 Rule 38(4).

to follow the recommendation or conclusion of the conciliator or mediator but may make any order the judge may deem appropriate.[336] Under the ADR Rules of the High Court of Namibia, unless a managing judge directs otherwise, mediation is compulsory in the following cases, namely insurance claims; medical negligence; professional negligence against legal practitioners; building contract claims; divorce, custody of, and access to minor children; spousal and child maintenance; loan default claims; motor vehicle accident claims; and defamation.[337]

2.165 The 2023 annual performance report of the Namibian courts reflects the mediation statistics of mediations conducted in the Namibian High Courts over the period 2016 to 2023 as follows, indicating the annual success rate of mediation, the annual number of court days saved by disputes having been mediated instead of litigated in court, and the annual litigation costs savings:[338]

Year	Mediations finalized	Successful mediations	Success rate	No of court days saved	Litigation Expenses saved
2016	802	420	52%	1 680	N$ 42,000,000
2017	644	406	63%	1 624	N$ 40,600,000
2018	626	418	67%	1 672	N$ 41,800,000
2019	876	517	59%	2 068	N$ 51,000,000
2020	927	621	67%	2 636	N$ 62,100,000
2021	808	401	50%	1 684	N$ 42,000,000
2022	677	332	40%	1 328	N$ 33,200,000
2023	**611**	**316**	**51.7%**	**948**	**N$ 23,700,000**

(j) Discussion

2.166 On 9 March 2020, Rule 41A of the Uniform Rules of the High Court commenced. Its peremptory provisions require disputants to indicate by notice whether such a party

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336 Rule 38(5).

337 Rule 19(5) of the High Court Practice Directions: Rules of High Court of Namibia, 2014.

338 *Statistics performance of the Supreme Court, High Court and Magistrates' Courts of the Republic of Namibia period 2022/2023* released 2024 5. In 2014, when mediation commenced, 208 of the 370 disputes were successfully mediated, at a rate of 56%, 832 court days were saved, which resulted in litigation savings of N$ 20,800,000.00. In 2015, 653 dispytes were successfully mediated of 1072 disputes referred to mediation, ata a success rate of 61%; 2 612 court days were saved, and N$ 65,300,000.00 litigation costs were saved. See *Statistics performance of the Supreme Court, High Court and Magistrates' Courts of the Republic of Namibia period 2020/2021* released 2022.

agrees to or opposes the referral of their dispute to mediation prior to a summons being issued or an application being launched.[339] A defendant or respondent must also state whether they consent or oppose the matter to be referred for mediation prior to the filing of a plea or opposing papers. Failure to comply with the rule may lead to the court making a cost order against that party or the parties.[340]

2.167 The Court explained Rule 41A in *Hlatshwayo v Road Accident Fund* as follows:\

> [205] Rule 41A has a pause button to save costs. That is, once parties agree to go for mediation, the process of exchange of pleadings, is paused. I mention rule 41A for the following reasons: It is ignored and not properly utilised by the parties. Instead, in litigation and very often, the parties just simply and without much ado complete a form stating that the litigation is not capable of being mediated. The engagement and the peremptory provisions imposed on the case management judge, to explore settlement on all or some of the issues identified in rule 37A and rule 37(6) and enquiring whether the parties have considered voluntary mediation as provided for in rule 37A(11), in my view, is meant also to ensure that rule 41A is not made academic. …

2.168 Disputants participate voluntarily in mediation.[341] The court noted the voluntary nature of the mediation process in *Kalagadi Manganese v IDC SA as follow*s: "Mediation has been said … to be premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the

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339 Joubert (May 2020) "Mediation Rule 41A High Court" 12 May 2020 Lexis Nexis SA. *DIY Superstores (Pty) Ltd v* Kruger para [11]; *Sibanda v Firstrand Bank Limited* para [22]. The Court held about Rule 41A in *Koetsioe v Minister of Defence and Military Veterans* in April 2021 as follows:

> 6.2 The fairly recently introduced Rule 41A of the Uniform Rules of this Court obliges a party "in every … application …" to indicate by notice whether such a party agrees to or opposes referral of the dispute to mediation. In the past year, many disputes in this division have successfully been referred to mediation, mostly by judges especially trained in alternate dispute resolution. The rule not only requires a notice but clearly contemplated that a party must have considered the issue earnestly prior to exercising its election. This is clear from the requirement that a party must state its reasons for its belief that a dispute is or is not capable of being mediated.

340 See *Van der Merwe and Others v Superplant Hire (Pty) Ltd:*

> [35] While I hold the view that the both parties would have benefited from the process of mediation as envisioned by Rule 41A to resolve their disputes, it remains of paramount importance for parties not to disregard the rule and its requirements. Had this been done, the costs of this application could have been avoided.

341 Spruyt (2017) LLD 72 – 73; Welsh (2011) "Mandatory Mediation" 108 and 110; Nolan-Haley (2007-2008) *Dispute Resolution Magazine 4*.

parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved."[342]

2.169 A view expressed in 1998 was that parties should willingly participate in mediation and that mediation should not be mandatory.[343] It is the question of the willingness of the parties to mediate which should be explored:[344]

> If mediation is forced upon unwilling parties, the likely consequence will be the failure and disrepute of the process. Considering its usefulness, this would be an unfortunate consequence. The remedy would appear to be to encourage parties to willingly participate. In order to do this, however, one would need to know why parties are unwilling. … (Footnote omitted)

2.170 The following critical view was expressed in 2023 against mandatory mediation:[345]

> On the basis that the rule of law depends on an adjudicative system that centralizes legal rights, I have argued against mandatory mediation. In a society that functions through the rule of law, the ability to choose an adjudicative remedy in the instance of a legal breach must be understood as a procedural right that accompanies substantive rights. Mandating mediation hinders that choice, and that results in an affront to the dignity and autonomy of all legal subjects. Yet mediation must be understood as a valid and important element of civil justice precisely on the basis of those same normative values. Available and well-structured mediation programs would provide a valuable choice to litigants — the ability to choose a process that enables self-determined, autonomous, dialogical dispute resolution. So, a civil justice system operates at its best when dependable adjudication is invariably available and accessible, and so is trustworthy mediation. …

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342 Par 26.

343 Smith (1998) *Osgoode Hall Law Journal* 847 to 885; SALRC (2019) *Discussion Paper 148 family dispute resolution* para 4.2.23.

344 Smith (1998) *Osgoode Hall Law Journal* 879.

345 Acharya (2023) *Alberta Law Review* 738.

4 Conclusion on a mandatory mediation legislative scheme compelling parties to engage in mediation

2.171 The South African Constitutional Court[346] supports a distinction between coercion to enter mediation and coercion within mediation, and held that "… compulsion lies in participating in the process, not in reaching a settlement …"

2.172 We support the view the Court of Appeal of England and Wales expressed in November 2023 in the *Churchill* case that a discretion to stay proceedings to allow parties to apply a non-court dispute resolution process does not constitute an infringement of access to courts under section 34 of the Constitution. We further propose below that mandatory mediation should apply in specific instances, namely insurance and subrogated insurance disputes; medical negligence disputes; professional negligence disputes; defended loan default disputes; construction contract disputes; personal injury claims arising from motor vehicle accident disputes; and defamation disputes.

2.173 If a new procedural requirement should limit the right of access to the courts, the limitation may be found to be justifiable, if it does not cause significant delay in the resolution of disputes and, if it does not involve costs that might preclude litigation by indigent parties.[347] The public interest requires that the workload which is placed on the courts should be managed more efficiently, and weighs favourably on the scale of indicating that mediating disputes should be mandatory. Mandatory mediation is therefore an allowable limitation on the right of disputants to access to courts.

2.174 The *Alassini* case identified the factors when mandatory mediation would not impair access to justice, namely where the outcome of the settlement procedure is binding on the parties and does not undermine the right of disputants to institute legal proceedings; the mediation settlement procedure must not cause an inordinate delay if a party wishes to institute legal proceedings; and mediation must suspend prescription.[348]

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346 *Port Elizabeth Municipality v Various Occupier*s para [40].

347 SALRC (2019) Discussion Paper 148 ADR in family matters para 5.3.72;

348 *Rosalba Alassini v Telecom Italia SpA* paras 54 to 56.

2.175 Our Mediation Bill provides in clause 29 for mandatory mediation, but the court still has the discretion in terms of clause 309 to direct that mediation should not be required, even though mandatory mediation is usually required. The *Churchill* case seems to provide authority for the view that the Commission should not provide a comprehensive test in legislation as to how that discretion should be exercised. The *Churchill* judgment seems to identify helpful factors and to leave it there. We agree we should not propose a set of guidelines for determining when mandatory mediation should not be required. We ask stakeholders to indicate what their view in this regard is in Chapter 5.

2.176 We note above in this Chapter the overwhelming and convincing evidence produced by the participation of defaulting homeowners in the opt-out foreclosure mediation programmes in the USA, the opt-out mediation programme in Italy and the findings made in the 2014 EU Mediation Directive Rebooting report that respondents favourably supported the option of mandatory mediation coupled with disputants being able to opt-out of mediation.

2.177 We further note the developments in Italy, Greece, India and Namibia where mandatory mediation was introduced in specific categories of disputes and for most civil disputes in Tanzania. We note the interesting and positive statistics produced in Italy, both in voluntary and mandatory mediation, but mainly in mandatory mediation, and the positive Namibian mediation statistics, since 2014. We also note the developments in England and Wales in small money claim disputes with the new scheme commencing from May 2024. We also note the options of permitting disputants to opt in or out of mandatory mediation.

2.178 These findings in these jurisdictions confirm the utility of providing for mandatory mediation provided the parties have an option of opting out of mandatory mediation once they have participated in an initial mediation session. We provide in clause 29 for disputants to be permitted to opt out of mandatory mediation.

CHAPTER 3: ACCREDITATION & PROFESSIONAL PRACTICE STANDARDS

A Introduction

3.1 Accreditation standards involve the formal recognition of individuals, organisations or programs in a particular profession, in terms of specified objective standards relating to qualifications, competence and performance.

3.2 Professional practice standards usually reinforce and promote the quality, standards and ethics of professional practice, by introducing requirements relating to codes of conduct, compliance mechanisms, and complaints and disciplinary systems.[1]

3.3 Accreditation standards and professional practice standards collectively form an accreditation system that seeks to regulate a profession.

3.4 The notion of an accreditation system for mediation forms part of the debate about how and if the mediation industry should be regulated. Alexander points out that even in the absence of formal and legislated systems, there is always some form of regulation:[2]

> Market regulation is often thought of as the absence of regulation or the result of deregulation. However 'deregulated' spaces are not empty. They refer to the reduction, removal or absence of one kind of regulation only, such as legislation. So-called deregulated spaces may be filled with other forms of regulation such as industry or professional codes of conduct, complaints and disciplinary mechanisms. Alternatively, as explained below, where the marketplace dominates, the laws of supply and demand have a regulatory effect.
>
> In short, the current debate about whether or not to regulate mediation is misinformed. Regulation is occurring already and it cannot be – and could not have been – avoided. **An exceedingly more useful question relates to the**

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1 Alexander (2008) *QUTLJJ* 20; SALRC Discussion Paper 148 ADR in family matters par 4.3.8.

2 Alexander (2008) *QUTLJJ* 3.

appropriate regulation of mediation in the context of culture and legal-political traditions.

3.5 This chapter will discuss and propose an approach towards regulating mediator accreditation and professional practice in South Africa.

B International experience

1 Regulation theory

3.6 Regulation theory describes best practice approaches towards designing and implementing regulatory systems. This theory applies to regulation in different environments and can equally be applied to the mediation industry.[3]

3.7 Research into regulation theory has developed a series of regulatory design principles that should be applied to ensure effective regulation.[4] These principles provide a guideline for evaluating any potential approach to regulation.

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3 For an overview see Gunningham & Sinclair (2107) “Smart regulation”.

4 According to Gunningham & Sinclair (2107) “Smart regulation” 134 – 135 these principles can be summarised as follows:

- The desirability of preferring complementary instrument mixes over single instrument approaches, while avoiding the dangers of ‘smorgasbordism’ (ie wrongly assuming that all instruments should be used rather than the minimum number necessary to achieve the desired result).
- The virtues of parsimony: why less interventionist measures should be preferred in the first instance and how to achieve such outcomes.
- The benefits of an escalating response up an instrument pyramid (utilising not only government, but also business and third parties) to build in regulatory responsiveness, to increase dependability of outcomes through instrument sequencing and to provide early warning of instrument failure through the use of triggers.
- Empowering third parties (both commercial and non-commercial) to act as surrogate regulators, thereby achieving not only better … outcomes at less cost but also freeing up scarce regulatory resources, which can be redeployed in circumstances where no alternatives to direct government intervention are available.
- Maximising opportunities for win-win outcomes by expanding the boundaries within which such opportunities are available and encouraging business to go "beyond compliance" within existing legal requirements.

2 Models for regulation mediators

3.8 Research indicates that four models of regulation are discernible in the mediation industry worldwide[5]. These are:

(a) Market-Contract Regulation

3.9 This approach to mediation:[6]

> is based on free market and contract law concepts and derives from values such as freedom of the individual, choice and competition. Anyone can engage in any kind of arrangement for mediation services subject to the laws of supply and demand, and of private contract …
>
> Where consumers have access to accurate information about mediators, reputations will influence choice of mediator and those with poor performance track records will gradually be pushed out of the market.

3.10 The risks associated with this model include:

- Consumers do not always have access to accurate information, to make informed choice;
- Consumer choice is often an illusion as a result of structural issues (education, money, power, bargaining position, etc);
- Absence of effective mechanisms to address unprofessional conduct.

3.11 Alexander indicates that these models are typical of the early mediation industry in many countries before organised and more structured and formalised approaches to regulation emerged.[7]

(b) Self-Regulatory Approach

3.12 Self-regulatory approaches typically imply collective, community and or industry led regulatory initiatives. Such systems of self-regulation are usually brought about by long-term consultation and collaboration between various organisations active in the mediation industry and result in commonly accepted standards.

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5 See Alexander (2008) *QUTLJJ*.

6 See Alexander (2008) *QUTLJJ 4*.

7 See Alexander (2008) *QUTLJJ* 7.

3.13 Alexander indicates that:[8]

- In the development of mediation practice around the world self-regulatory instruments have played and continue to play a significant role.
- Self-regulation of mediator approval and practice standards is a popular regulatory form, which enjoys the support of a growing number of national and provincial governments. In the absence of a supra-national government and judiciary it is the preferred method for regulating transnational mediation.
- In so far as courts, tribunals, government departments and other users specify by formal regulation that mediators are required to meet the [industry standards], a mixed model begins to emerge, embracing both reflexive and formalistic regulatory approaches.

3.14 Alexander further indicates that the perceived benefits of self-regulation are numerous:[9]

> Participants in the regulatory process are experts with an intimate and sensitive knowledge of the needs and interests of the regulated group and its various constituents. Self-regulation promotes innovation and choice in terms of the determination of the self-regulatory mix and is generally more flexible, adaptable and responsive than more formal regulatory forms. It is said to achieve a greater degree of 'buy-in' from industry members as they have the opportunity to participate in decision-making with respect to regulation issues. Legitimacy of the area subject to regulation and conformity with the regulation itself are also enhanced through the participatory nature of self-regulatory approaches. Self regulation is also associated with reduced costs in relation to information collection, reduced monitoring and enforcement and less formality compared with legislative regulation. Many of the costs of regulation are absorbed by the industry itself in self regulation models. Finally successful self-regulatory models may remove the need for or at least postpone the introduction of comprehensive legislation in a given industry.

3.15 The risks associated with this approach are around (i) the availability of resources to manage and implement the regulatory framework, (ii) the absence of buy-in from important stakeholders, such as the government, and (iii) the potential for such initiatives to be dominated by groups or individuals with their own agenda.[10]

(c) Formal Framework

3.16 In this form of regulation, formal parameters or guidelines are established within which the mediation community is then allowed to 'self-regulate' various aspects of

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8 See Alexander (2008) *QUTLJJ* 6 to 7.

9 See Alexander (2008) *QUTLJJ* 7.

10 See Alexander (2008) *QUTLJJ 8.*

mediation. This approach represents a meeting of top down and bottom up regulatory approaches. It is also referred to as co-regulation.[11]

3.17 Alexander indicates that the "framework usually takes the form of legislative or executive instruments such as international conventions, directives, legislation and model laws. It establishes formal and legally recognised parameters within which softer forms of regulation such as voluntary self-regulation can fill in the regulatory details".[12]

3.18 Alexander further says that this "approach may be attractive for countries able to maintain a manageable overview of their regulatory initiatives in mediation such as Australia. However, countries with significantly larger populations, a higher number of states and correspondingly numerous pieces of local and state legislation, such as the United States, are likely to find a national framework approach for all aspects of mediation inadequate. Here formal legislative approaches may be considered a more attractive option. [13]

(d) Formal Legislative

3.19 Legislative regulation involves legislative regulation of mediation practice supported by formal or statutory institutions to implement and enforce the legislation. The advantages of this system include: [14]

- It amounts to a strong endorsement of mediation by the state and serves to legitimise mediation as a dispute resolution practice and a profession
- It offers clarification of the status quo, and establishes certainty on legal issues and consumer protection
- It can serve to bring clarity in countries where there is a plethora of divergent regulation
- It is sometimes used by transitional democracies eager to attract investment, in order to demonstrate their investor friendly status.

3.20 Alexander points out that there are also several problems with this approach: [15]

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11 See Alexander (2008) *QUTLJJ 8.*

12 See Alexander (2008) *QUTLJJ 8.*

13 See Alexander (2008) *QUTLJJ 9.*

14 Alexander (2008) *QUTLJJ* 9 to 10.

15 Alexander (2008) *QUTLJJ* 10.

> Legislative mechanisms are restricted in their ability to deal with non-legal perspectives, high levels of generality, complexity, unpredictability and innovation. It is difficult to be rigidly exacting and sweepingly general at the same time. This goes some way to explaining the widespread use of sector-specific mediation legislation in common law countries such as Australia, the United States and England, which have deliberately chosen not to enact comprehensive general national mediation legislation. A focus on specific contexts, sectors and industries such as family dispute resolution in Australia allows for tailor-made legislative solutions.
>
> Furthermore, while delegation of discretion is possible in the legislative process, it typically falls to state-funded regulatory agencies operating in accordance with government-approved policies. Therefore the benefits of direct industry expertise lauded in self-regulatory schemes may be lost in the legal layers of the legislative process. Finally top down processes of statutory regulation are antithetical to the very values mediation is seeking to support, namely party autonomy and participation in democratic decision-making processes.

(e) Multi-layered approach

3.21 Alexander points out that: "These four approaches to mediation regulation are not exclusive of one another. Virtually all jurisdictions have aspects of at least two regulatory approaches and jurisdictions with extensive mediation experience are likely to show evidence of all four".[16]

3.22 Alexander further indicates that "contemporary best practice models recommend a combination of private and public mechanisms with a high level of responsiveness to needs, interests and change in regulated markets".[17]

3 Mediation accreditation elsewhere

(a) Components of accreditation systems

3.23 An overview of accreditation standards indicates that they commonly require some or all of the following components:[18]

- Proof that the mediator has undergone approved training as a mediator
- Confirmation that the mediator was independently assessed and found to be

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16 Alexander (2008) *QUTLJJ* 11.

17 Alexander (2008) *QUTLJJ* 11.

18 For a comprehensive comparative overview of mediation regulation see Hopt & Steffek *Mediation: Principles and Regulation in Comparative Perspective.*

competent

- Confirmation that the mediator has agreed to abide by a specified Code of Conduct,
- Confirmation that the mediator has agreed to practice under supervision (and disciplinary processes) of an identified organisation
- Confirmation that the mediator meets "fit and proper" requirements. These may differ but include no criminal conviction, and confirmation from peers as to their character, and
- Proof that the mediator participates in continued professional development programmes.

3.24 Accreditation is typically offered for a specified period, and annual or bi-annual confirmation of some of these components is required to renew or retain accreditation.

(b) Structure of other accreditation systems

3.25 An overview of the accreditation systems used elsewhere seems to confirm that a variety of the structures discussed above are in use:

(i) Examples of a self-regulatory approach

3.26 The following are examples of a self-regulatory approach:

- The International Mediation Institute offers an international accreditation as mediator.[19] This is completely voluntary and not tied to any formal regulatory framework.
- The Singapore International Mediation Institute (SIMI) is an independent professional standards body for mediation in Singapore and publishes accreditation standards.[20] This framework does not apply to mediation conducted under any written law or under direction of a court (section 6(2)), and applies to voluntary mediation.
- In Australia uniform mediation accreditation standards[21] were formulated by the mediation industry, and the National Mediation Standards Board was established to manage this system.[22] In 2019 the Mediation Standards Board

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19 See for detail about accreditation, the International Mediation Institute website imimediation.org/practitioners/certify/.

20 See for details about the SIMI Credentialing Scheme their website www.simi.org.sg/What-We-Offer/Mediators/SIMI-Credentialing-Scheme.

21 For detail about the National Mediator Accreditation System (NMAS) see www.ama.asn.au/wp-content/uploads/2012/04/AMA-Revised-NMAS-1-July-2015.pdf.

22 The Objectives of the Mediation Standards Board are to:

- develop, maintain and amend the NMAS, which includes the Approval Standards and the Practice Standards (the Standards).

(MSB) commissioned a review of the Australian National Mediator Accreditation System (NMAS) with a view to replace that system with the Australian Mediator and Dispute Resolution System (AMDRAS) Standards.[23] The MSB published draft AMDRAS standards;[24] a comparison guide on the NMAS v AMDRAS; guidelines for nationally accredited mediators to transition to AMDRAS; AMDRAS guidelines for certificates of training (COT); guidelines for the certificate of assessment (COA) mediation simulation; guidelines for certificates of assessment (written); and NMAS to AMDRAS transitional Rules.[25]

- No specific regulation governs mediators in Nigeria. No requirement is set that mediators be lawyers or of any specific profession. The laws governing some of the mediation institutions, such as the LMDC, simply require that a person carrying out the role of mediation within their institution (whether chosen from their panel of neutrals or appointed independently by the parties), be trained and certified by a reputable local or international mediation institution or body.[26]
- The 17 member countries of OHADA (Organization for the Harmonization of Business Law in Africa) has adopted a regional Uniform Act on Mediation in 2017. The Act does not include specific accreditation requirements, but section 5 specifies the appointment of an appropriate mediator.[27]

(ii) Examples of a formal framework

3.27 Examples of a formal framework are:

- In Kenya the Nairobi Centre for International Arbitration was established through legislation in 2013. The Centre has a legislative mandate to train and accredit mediators.[28] For Court Annexed Mediation Programme specific standards have

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- oversee the application of the Standards with a view to achieving consistency, quality and public protection regarding mediation services and mediation training.
- support, complement and encourage members in their quest to meet their objectives in relation to the Standards.
- ensure that training and accreditation of mediators continues to develop.
- require records to be maintained of mediators who are accredited under the Standards and facilitate access to mediators who have national accreditation (see MSB "About MSB").

23 Roy "Australia's Mediator Accreditation System Set to Evolve in 2024" Resolution Institute.

24 See Australian Law Council (Dec 2023) "Draft Australian Mediator and Dispute Resolution System Standards" Mediation Standards Board.

25 MSB Australia "NMAS review".

26 See Dike, Toby & Elekima (2020) *Journal of Property Law and Contemporary Issues* 240.

27 See section 5 of the OHADA Uniform Act on Mediation, 2017.

28 See https://www.ncia.or.ke/training-accreditation/.

been developed.[29]

- In Rwanda the Kigali International Arbitration Centre is established by legislation and has a mandate to provide "accreditation for members of the Centre to act as arbitrators or mediators in resolving domestic and international disputes".[30]
- The Singapore Mediation Act, 2017, empowers the Minister to designate any mediation service provider to be a designated mediation service provider for the purposes of this Act; and designate any accreditation or certification scheme administered by a mediation institution to be an approved certification scheme for the purposes of this Act.
- The Mediation Institute of Ireland oversees standards for mediators throughout the island of Ireland and formulates accreditation requirements.[31] The Irish Mediation Act empowers the Minister to designate a body as the Mediation Council of Ireland. In response to a parliamentary question regarding the delays in establishing the Mediation Council, Helen McEntee, the Minister for Justice of Ireland, reported in July 2024 that the establishment of the Mediation Council was a priority in the Department of Justice, that a Mediation Council Shadow Group was convened, and that the Group formulated the terms of reference for the establishment of the envisaged Mediation Council.[32]
- The Civil Mediation Council of England and Wales announced in May 2024 that steps are taken by the Council to establish an independent Mediation Standards Board.[33] The functions of the Board will include advising and developing standards for mediators, mediation trainers and mediation organisations.

(iii) Examples of a legislative approach

3.28 The following are examples of a legislative approach:

- In Trinidad & Tobago, the Mediation Act, 2004 contains very detailed regulation regarding accreditation.[34]
- Germany's mediation legislation contains specific requirements for mediators.[35]

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29 See kenyalaw.org/kenyalawblog/wp-content/uploads/2016/05/MAC-Accreditation-Standards.pdf.

30 See article 4 of Law N 51/2010 of 10/01/2010, at www.kiac.org.rw/IMG/pdf/kiac_law-ed.pdf.

31 For details see www.themii.ie/membership/overview

32 Parliamentary questions State Bodies Dáil Éireann Debate Tuesday 23 July 2024 Question (1502) Deputy Daly.

33 Rose (May 2024) *Legal Futures*; Herbert Smith Freehills (May 2024) "Civil Mediation Council to establish independent standard-setting body".

34 See sections 3 to 9. Also see the accreditation requirements of the Mediation Board of Trinidad and Tobago at www.mediationboard-tt.org/Mediation/Application-For-Certification.

35 See section 5 of the Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung.

- Section 22 of the Nepalese Mediation Act, (2086) 2011 contains detailed accreditation requirements.[36]

(iv) Examples of a multi-layered approach

3.29 The 2015 Brazil Mediation Act and the 2015 Civil Procedure Code codified the regulation of mediators.[37] Any person with legal capacity who enjoys the confidence of the disputants may act as an extrajudicial mediator under the Mediation Act. Under article 167(1) of the Civil Procedure Code, once a conciliator or mediator has attended a course offered by an accredited institution in accordance with the curricular prescribed by the National Council of Justice and the Ministry of Justice, the conciliator or mediator may apply to be registered on the national register, the register of the court of appeals or the regional federal appellate court. Once registration is effected by the court where the application of the conciliator or mediator was lodged, that court submits the registration particulars to the director of the judicial district, or sub-district, where the conciliator or mediator is to conduct mediation for inclusion of the name of the conciliator and mediator on the list concerned. Under article 167(3) of the Code, the register of conciliators and mediators includes information regarding the number of proceedings in which they participated, the success or failure of their conciliation or mediation activities, the subject dealt with in the disputes, and data that the court may deem relevant. Under Article 167(4) the courts report annually on the information they have collected, to inform the Brazilian population about conciliation and mediation for statistical purposes, and to evaluate conciliation and mediation. Under article 167(5) of the Civil Code, judicial conciliators and mediators registered as such, are prevented from practising law at the courts where they are registered to perform conciliation and mediation duties.[38]

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36 See extwprlegs1.fao.org/docs/pdf/nep137757.pdf.

37 See the Brazilian Mediation Act; Castro "The mediation agreement in Brazil".

38 Mellersh (27 June 2017) *International Mediation Institute*.

4 The need for accreditation systems

(a) Introduction

3.30 A national uniform system of mediator accreditation would usually have the following objectives: [39]

- the improvement of practitioner knowledge, skills and ethical standards;
- the promotion of standards and quality in mediation practice;
- the protection of the needs of consumers of mediation services and the provision of accountability where they are not met;
- the conferment of external recognition of practitioners for their skills and expertise; the development of consistency and mutual recognition of practitioner training, assessment and accreditation;
- and a broadening of the credibility and public acceptance of dispute settlement services and practitioners, here and abroad.

3.31 In most jurisdictions, the need for mediator accreditation becomes pressing as soon as the use of mediation is institutionalised through a government initiative and becomes more widely used.[40.]

3.32 The weight of opinion and practice in South Africa has long been towards the view that there should be a uniform system of practitioner accreditation.[41]

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39 Report 8th National Mediation Conference Hobart (2006) "National Mediator Accreditation System" 3 (29).

40 See Lovegrove & Cotton (2013) "Making Mediation a Profession".

If one looks at the more established and mature professions such as lawyers and doctors and some of the more recent "coming of age" professions such as financial advisers there is a history of professional metamorphosis. Groups such as the legal fraternity may have started out as a cartel of sorts. In the fullness of time society identified that the fraternity was sufficiently important to demand regulation. The criteria for importance had a lot to do with consumer protection because those whom are charged with responsibility for the management or protection of another`s affairs or whom alternatively could by their acts, errors or omissions have either a deleterious impact or a positive impact on another's affairs were considered paramount. So it seems that it gets to a point where there is both a critical mass and a sufficient level of prominence or notoriety of the members of a given sector to mobilise the forces of parliament and regulation. It could be argued that regulation and codification of the rules that govern a vocational fraternity go a long way to evolving a discipline or a vocational leaning into a profession.

41 For an overview of the debate and support for the development of standards within the South Africa mediation industry, see Chapter 1 of the Dispute Settlement Accreditation Council's "Mediation Accreditation Standards" of Nov 2011.

(b) Arguments for implementing mediator accreditation systems in South Africa

3.33 The following arguments are regularly advanced in support of implementing uniform accreditation systems for mediators:[42]

(i) Standardisation in the industry

3.34 In the absence of a uniform accreditation standard for mediators, regulation of the industry is at best ad hoc. Various organisations define their own sets of qualifications and practice standards. Standards therefore vary depending on where a mediator is affiliated. The net effect is variable competency, variable levels of experience, variable levels of ethical standards, variable levels of reputation, and ultimately variable levels of outcome.

3.35 Standardisation provides a uniform national set of minimum standards that all mediators are required to comply with in order to practice. If properly implemented and supervised, this should lead to more predictable and dependable outcomes and a continued improvement in standards,

(ii) Protecting the public

3.36 Currently any person can hold themselves out to be a mediator, irrespective of their qualifications, training or experience. They can also practice as mediators without any oversight being in place. This creates risk for members of the public who want to make use of mediation services. They may end up in a situation where an unqualified person provides a bad service, and then have no recourse.

3.37 A uniform system of accreditation protects the public by providing an external reference point for whether or not an individual is a qualified mediator. If in addition the system of accreditation is supported by professional practice management, members of the public have access to a system where they can lodge complaints that could lead to disciplinary action against unprofessional practitioners.

3.38 Many professions – such as legal, medical, and engineering – have progressed to a point where practitioners are required to have accreditation in order to practice, and

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42 See Hinshaw (2016) *Harvard Negotiation Law Review* 197 to 201.

where they are subject to professional practice management[43]. Mediation may well be at the point where this step is required.

(iii) Increased legislative reliance on mediation

3.39 Mediation has long been an essential part of labour legislation in South Africa,[44] However mediation is increasingly becoming a recommended or even a required step in many other processes regulated by Government.[45]

3.40 The argument is that wherever legislation requires mediation, there should be a degree of regulation around which people are qualified to provide these mediation services. Illustrative of this is the process that was followed when the Rules of Voluntary Court-Annexed Mediation were published. In the absence of any officially accredited body of mediators, the Rules contained a provision that enabled the Minister to determine standards of fitness and compile list of accredited mediators[46].

3.41 The Rules Board's 2018 draft Uniform Rule 41A ("Mediation as a dispute resolution mechanism") was further illustrative of this conundrum: The Rule offered two possible definitions of who a "mediator" is: The first definition ("*a person who has undergone training and is certified competent"*) struggles with the problem that there is no readily identifiable certifying authority. As a result, a second definition is also proposed ("*a person who in the opinion of the parties is competent*"). This second option has its own set of problems, which are further discussed in C below. These proposed definitions were not included in the final version of the amendment.

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43 Currently South Africa Qualifications Authority recognises some 389 professional designations. Some of these are legislatively recognised, whilst the majority are recognised "professions" in terms of the National Qualifications Framework Act, 67 of 2008. For more details see section F Structures for managing accreditation and professional practice below.

44 For an overview see Rycroft (2016) *Equinoxpub* 79 – 93

45 Illustrative of this are the following:

- The Rules of Voluntary Court-Annexed Mediation (Chapter 2 of the Magistrates' Courts Rules) were approved by the Minister and came into operation on 1 December 2014.
- The requirement in sect 33(5) of the Children's Act, 38 of 2005 that in preparing a parenting plan the parties must seek the "assistance of a family advocate, social worker or psychologist; or mediation through a social worker or other suitably qualified person".
- The Child Justice Act, 75 of 2007 provides for an informal procedure called victim-offender mediation, which is an expression of restorative justice.

46 See Rule 86 of the Court- Annexed Mediation Rules of the Magistrates' Courts.

3.42 As the use of mediation in legislation expands, it becomes more and more imperative that some uniform system of accreditation and practice oversight is implemented. The alternative would likely be a proliferation of the kind of ad hoc arrangements contained in the Rules of Voluntary Court-Annexed Mediation.

(iv) Promoting mediation

3.43 Some still regard mediation as a "dark art" that is more dependent on personality and experience than anything that can be taught. The reality though is that mediation has developed a strong academic foundation and is widely taught as a professional skill. The lack of recognition for the professional standing of trained and qualified mediators allows myths such as these to be perpetuated.

3.44 Like other professions mediation should be viewed as a viable professional career choice that has an entry point and a development path. The existence of a clearly defined and regulated standard for mediators will greatly assist with this. Research indicates that regulation tends to promote aspirations for more professional practice[47].

3.45 Though mediation is more widely used than a few years ago, it remains far from being mainstream. Formalising and regulating mediation as a profession will enhance its stature and visibility. This will likely also promote the use of mediation[48].

(v) A positive South African experience

3.46 In 2010 the formal mediation industry in South Africa adopted a voluntary system of uniformed accreditation and practice supervision[49]. This system applies to commercial and family mediation and is overseen by two voluntary entities – the Dispute Settlement Accreditation Council (for commercial mediation) and the National Board for Family Mediators (family mediation).

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47 See Alexander (2008) *QUTLJJ 11.*

48 See Jarret (2012) *Dispute Resolution International* 37, he argues that the Harvard model of facilitative and interest based bargaining approach has lent "brand" support for a less overtly legalistic approach to bargaining. The professionalisation of mediation will certainly enhance its "brand" visibility, and may therefore also contribute to its wider use.

49 See the DiSAC Mediation Accreditation Standards.

3.47 As indicated, the system is voluntary, and no one is compelled to apply for accreditation. Nonetheless the experience over the past 8 years has been that:

- A number of mediator training course providers have applied for accreditation
- Most of the prominent mediation service providers have applied for accreditation[50]
- Many qualified commercial and family mediators have affiliated with one or more of the accredited service providers.[51]

3.48 This voluntary collaboration probably confirms that many in the industry see the value of and support some form of accreditation and practice supervision.

(c) Concerns with mediation accreditation systems

3.49 There are also a number of arguments against, and concerns about the implementation of mediation accreditation systems. These include the following:

(i) Overlap with other Industry Bodies (Is mediation a discipline or inter-discipline?)

3.50 Some argue that mediation is simply an additional skill that many professionals add to their existing or main skill-set – such as lawyers or social workers who now also qualify as mediators. These professionals are already subject to professional accreditation and supervision for their main skillset (the Law Society or Bar Council for lawyers, and the SA Council for Social Service Profession for social workers). The argument therefore postulates that it would be inappropriate or over-burdening to require such professionals to also be subject to accreditation and supervision in their practice as mediators.

3.51 Aligned with this argument is one that views mediation not as a separate discipline but rather an inter-discipline, i.e. one that integrates knowledge and methods from different disciplines into the activity of mediation.

3.52 Though it is correct that mediators often hold other qualifications and have other accreditations, it is unrealistic to expect their activities as mediators to be regulated in

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50 For details of the service providers who have accredited in terms of the DiSAC standards see disac.co.za/?page_id=3513.

51 See for instance the Conlict Dynamics mediation panel: www.conflictdynamics.co.za/MediatorPanel.

this way. The professional accreditation and supervision offered by these other professional bodies regulates the core activities of their respective professions and is not aimed at evaluating the mediation qualifications or at regulating their activities as mediators.[52]

3.53 It is certainly recognised that certain kinds of mediation (such as divorce mediation) requires certain technical knowledge. It would therefore be prudent to ensure that accreditation for such mediators does require additional qualifications – possibly related to these "feeder" professions.

(ii) The need for inclusivity

3.54 Some warn that accreditation standards could become a real obstacle that keeps historically disadvantaged people from entering the profession. If tertiary academic qualifications, or even just a formal mediation qualification, become a requirement, many people would be excluded by virtue of the fact that they have not had access to such levels of education.

3.55 It is likely that all "professions" in South Africa struggle with this issue. There must be a balance between requiring minimum standards to ensure professional services, whilst not being exclusionary. Many professions address this concern not by lowering standards, but rather through development programmes that try to redress historical disadvantages[53].

(iii) Community mediators & informal mediation

3.56 Additional concerns are raised that accreditation could impact negatively on informal and community-based mediation. The practice of mediation on African soil predates even the millennium-old mediation guilds on the European subcontinent. As such it forms part of the cultural fabric of our societies.[54] The reality is that in many communities, some form of mediation services is offered by people with no academic qualifications, and with no formal training in mediation.

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52 For a discussion of this issue also see Hinshaw (2016) *Harvard Negotiation Law Review* 177.

53 See for instance Khan et al (2013) *Global Health Action.*

54 See for instance Boniface (2012) *PER/PELJ*.

3.57 These community members (via traditional structures, church or social organisations, or simply based on their stature in the community) play an important role in providing informal mediation in their communities. To require qualifications and accreditation and practice supervision of this could inhibit something that is a valuable community asset.[55]

(iv) Party choice

3.58 Some argue that the selection of a mediator is best left to the parties – their trust in the mediator is the most important element, rather than the mediator's qualifications or accreditation. If the parties wish to appoint a person that has no qualifications, they should be entitled to do so.

3.59 Whilst the notion of party choice is well established in our law, it becomes more contentious when the choice is exercised within the context of a state regulated or funded activity (such as court annexed mediation), and where people charge money for their services as a "mediator".[56]

3.60 Research further indicates that structural barriers (such as wealth, education, access to information and bargaining power) make choice more illusory than real.[57]

(d) What "activity" should be regulated?

3.61 From the discussion above two things seems clear:

a There is substantial argument for why at least some mediation activities do need to be regulated.
b There is also good reasons why not all mediation activity can or should be regulated.

3.62 It therefore seems that a decision will have to be made about what mediation activity does need to be regulated?

3.63 It probably does not serve a purpose to try and define "mediation" narrowly so that it excludes some of the practice areas identified above. The latter activity still

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55 Also see Dheka LLM 2016.

56 See p 9 in Hinshaw (2016) Harvard Negotiation Law Review 9.

57 See Alexander (2008) *QUTLJJ* 4 to 5.

constitutes “mediation” in the general sense of the word, and to exclude it from a definition of mediation would be artificial.

3.64 The most sensible method of defining what should be regulated is probably a two-pronged approach: Regulating mediators who either (a) seek to use mediation in a regulated environment or who get paid through government funding or (b) receive monies for conducting mediation services[58].

(e) Conclusions & preliminary proposals

3.65 Our preliminary conclusions and proposals on regulating mediators are as follows:

a Even in the absence of very formal regulation, mediation practice is regulated through market forces. Given South Africa’s political and social history such regulation may not always be ideal. Mediation practices probably require regulation that is appropriate within the context of South African culture and legal-political traditions.

b Mediation in South Africa has evolved to the point where a uniform system of accreditation and professional supervision of mediators is required. The increased reliance on mediation, also through legislative measures, requires that a system of standards and practice supervision be implemented. This will not only protect the public but will also lead to improved standards of practice.

c Supervision of mediation practice through other professional bodies is problematic. Mediators often hold other qualifications and have other accreditations. However, the accreditation and supervision offered by these other professional bodies is not aimed at evaluating the mediation qualifications or at regulating their activities as mediators. Mediation has reached a point where it needs to be established as a separate “profession”, with its own accreditation and practice supervision requirements. The implementation of a uniformed system of mediator accreditation and practice supervision will enhance the stature of mediation as a profession and will likely also contribute towards the use of mediation.

d It should also be recognised that certain kinds of mediation (for example divorce mediation) require certain technical knowledge. It would therefore be prudent to

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58 See Hinshaw (2016) *Harvard Negotiation Law Review* 208 – 9.

ensure that accreditation for such mediators does require additional qualifications.

e Any system of accreditation of mediators needs to be mindful of the requirements that (i) it should be inclusive, and (ii) should not disrupt the valuable work that informal mediators are doing in communities. This issue can probably be addressed through an understanding that there are different kinds of mediation with differing accreditation requirements. There is even room to argue that some kinds of mediation do not require any accreditation or regulation.

f The most sensible method of defining what mediation activity should be regulated is probably a two-pronged approach: Regulating mediators who either (a) seek to work within state sanctioned mediation schemes or (b) receive monies for conducting mediation services.

g There should always be room for party choice in the selection of mediators. However, where mediation is used in a legislative or Court annexed environment it is preferable that party choice be restricted to persons who are suitably qualified.

3.66 A national uniform system of mediator accreditation should have the following objectives:

- the improvement of practitioner knowledge, skills and ethical standards;
- the promotion of standards and quality in mediation practice;
- the protection of the needs of consumers of mediation services and the provision of accountability where they are not met;
- the conferment of external recognition of practitioners for their skills and expertise;
- the development of consistency and mutual recognition of practitioner training, assessment and accreditation;
- a broadening of the credibility and public acceptance of dispute settlement services and practitioners, here and abroad; and
- creation of a framework that allows disadvantaged practitioners to enter the profession and develop their skills.

3.67 Based on these preliminary proposals the rest of this chapter will consider the components that might be required to implement a uniform accreditation standard and practice supervision of mediators. These include:

- What accreditation standards do mediators need?
- What should an accreditation process for mediators look like?
- What should professional practice management of mediators entail?
- What is the best model for institutions to manage these processes?

C The content of accreditation standards for mediators

1 Introduction

3.68 Above we indicated that accreditation standards typically require that a mediator be able to provide proof that they:

- Have undergone approved training as a mediator
- Were independently assessed and found to be competent
- Have agreed to abide by a specified Code of Conduct
- Have agreed to practice under supervision (and disciplinary processes) of an identified organisation
- Meet “fit and proper” requirements, and
- Are subject to continued professional development requirements.

3.69 In this section we will investigate this further.

2 Mediator qualifications

(a) Mediator qualification vs experience

3.70 Most professional accreditation standard requires that practitioners should have successfully completed a specified qualification. The question for consideration is if the same should be required of mediators?

3.71 Some people argue that experience, rather than any academic qualification is the most essential element to making a successful mediator. Historically it is also true that South Africa does have a strong body of very competent mediators who do not have any formal qualifications.

3.72 Whilst it is evident that experience is vastly important for improving skills as a mediator, it is also undoubtedly true that any newcomers to the practice of mediation will benefit from a sound academic or theoretical basis of the practice of mediation. This not only is a way of transferring acquired knowledge in a structured manner, but also contributes to a uniformed approach in the practice of mediation.

3.73 As mediation moves towards becoming a profession, it becomes more urgent there should be a certification that a person has the required competency for entrance to the profession. The successful completion of a minimum qualification is a critical element of that certification of competency.

3.74 This does not mean that experienced mediators now all need to re-qualify: It is common practice that when mediator qualification standards are introduced, experienced practitioners can continue practicing, based on an evaluation of the experience.

3.75 Given the importance of experience in developing competency, a mediator qualification standard may well also include an experience requirement (typically achieved through co-mediation with a qualified mediator).

(b) Catering for different kinds of mediation

3.76 Mediation is applied in many different environments – such as labour mediation, commercial mediation, delictual claims mediation, family and divorce mediation, restorative justice mediation in criminal matters, community mediation, peace mediation, etc.

3.77 Different qualification standards are likely to apply to the different kinds of mediation. For example, family and divorce mediators should (in addition to mediator qualifications) have competency in the legal framework within which they need to mediate agreements. Similarly, in highly technical commercial disputes (such as mergers and acquisitions) mediators should ideally also have competency in the technical and legal aspects of the disputes that they are mediating. Mediators working in such fields may well be required to have mediator qualifications, as well as additional tertiary qualifications.

3.78 On the other hand, a community mediator who assists community members in resolving a private relationship dispute probably requires no technical knowledge, expertise, or qualification. They may be required to have a basic mediation contumacy qualification, but most likely no additional education requirements.

3.79 A framework for mediator accreditation should therefore recognise that different areas of mediation will each have different requirements. A standards framework should

take cognisance of the reasonable qualification requirements for each field – both with regard to qualification as a mediator, and other qualification requirements.

(c) Shaping mediation qualifications and careers

3.80 If mediation wants to move to a professional standard, mediator qualifications should ideally also be shaped to reflect an entry-level qualification, with a clear path towards professional growth and further qualification.

3.81 Some suggestions around this involve:

- An entry level qualification that is quite generic in nature, and teaches basic mediator skills and competency
- A specialisation qualification that teaches mediators the competency required in a specialised field of mediation (e.g. a divorce mediation specialist). These specialise courses would only be available to people who have successfully passed an entry level course.
- Mediators should adopt a grading system that identifies practitioners who have acquired a certain level of confirmed experience and expertise to be identified as “senior” practitioners.

3.82 All of this will assist to enhance the practice of mediation as a serious profession.

(d) Standards based mediation qualifications

3.83 The general agreement in the South African mediation industry is currently that the absolute minimum requirement is that a mediator training course should consist of at least 40 hours of training[59]. The training should contain theory as well as extensive use of role plays. Students should also be assessed as part of the course to determine whether they meet the minimum competency requirements.

3.84 This qualification is of course fairly basic and introductory. Ideally, mediators need to further enhance their knowledge and skills. A programme of continued professional development is therefore essential, and participation is normally required for continued accreditation.

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[59] See for instance the DiSAC training standard for commercial mediators

3.85 A substantial number of courses are offered, and some do prescribe to the minimum standard that was voluntarily adopted by the industry. However, in the absence of regulatory oversight and monitoring, the content and standard of these courses still vary.

3.86 An additional question is whether such a basic qualification is sufficient to develop and qualify "mediator professionals"? To this the answer should probably be no: If mediation wants to become a profession, it needs to move towards a minimum equalisation requirement that is at least NQF standards based[60]. This would ensure compliance with a minimum content requirement, as well as ongoing oversight by the South African Qualifications Authority[61] of the institutions offering these courses.

3.87 There are already NQF standards for mediator training, and a number of courses do meet this standard, and some organisations do require such a qualification for affiliation[62].

3.88 Without any regulation of the industry neither the standards based, nor the non-standards-based qualification is currently a minimum requirement for anyone who wants to hold him/herself out as a mediator.

3 Experience as a requirement

3.89 Most professions set an experience requirement for new entrants into the profession (e.g. pupillage for new advocates[63], and articles for new attorneys[64]). Experience serves to translate acquired learning into applied learning. For this reason, most professions have structured programmes that allow new entrants into the

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60 The NQF is essentially a quality assurance system with the development and registration of standards and qualifications as the first important step in implementing a quality education and training system in South Africa. See SAQA "The National Qualifications Framework and the Standards Setting".

61 See www.saqa.org.za/show.php?id=5658.

62 Such as the Labour Dispute Resolution Practice Programme offered by a number of Universities, in conjunction with the CCMA see www.ccma.org.za/Training/Programmes.

63 See johannesburgbar.co.za/pupillage-at-the-johannesburg-bar/.

64 See www.lssa.org.za/about-us/about-the-attorneys-profession/becoming-a-legal-practitioner.

profession to acquire applied learning under the supervision and mentorship of established professionals.

3.90 We consider it would be reasonable to expect that aspiring mediators should also undergo a degree of supervised practice before being allowed to practice on their own.

3.91 If such a requirement is imposed, the industry would also have to ensure that opportunities are offered for acquiring the necessary supervised experience. In practice this could be done though:

- Co-mediation programmes, where qualified mediators are required to do a certain number of co-mediations annually;
- Pro bono and community mediation programmes, where aspiring mediators provide free services under the supervision of qualified mediators;
- It is also possible to envisage young mediators doing supervised low fee mediation work for the Legal Aid Board, or / and in conjunction with certain court annexed mediation programmes.

4 Continued professional development

3.92 A requirement for continued professional development (or "CPD", i.e. the learning activities that professionals take part in to develop and enhance their skills on an ongoing basis). is now an entrenched requirement for most professions[65]. This is based on an understanding that professionals need to continuously keep up with developments in the workplace, enhance their professional skills, and take charge of their career development. CPD activities typically involve workshops, additional training courses, informal learning opportunities, peer group discussions, etc that help to develop knowledge and add related skills.

3.93 For mediation to move towards a profession, practitioners should therefore also be obliged to participate in CPD programmes if they want to retain accreditation. An

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65 See for example the following:

- Health Professionals Council of SA - www.hpcsa.co.za/CPD.
- Insurance Industry - www.iisa.co.za/cpd/cpd.
- Chartered Accountants - https://www.saica.co.za/Members/ContinuingProfessionalDevelopment/FAQ/tabid/756/language/en-US/Default.aspx

accreditation standard would therefore typically include a provision that participation in a stipulated CPD programme is required.

3.94 How such programmes are structured, and how many "CPD points" would be needed for continued accreditation is something that needs to be developed for the various mediation fields.

5 Subject knowledge

3.95 We have previously indicated that additional subject knowledge may be required for certain technical fields of mediation. An accreditation standard should therefore stipulate what these requirements are, if appropriate for a specific kind of accreditation.

3.96 As an example of this, the current industry standard for family mediators requires the following: [66]

ii) Candidates should be assessed for personality preferences, knowledge and prior learning and experience, and additional training needs should be identified. Unless special circumstances are identified:

(1) Social workers and psychologists should be required to undergo additional training sessions on each of the following subjects:

- Family law (including inter alia division of assets, maintenance, divorce, children's legal issues, cultural issues, pension interests, trusts and wills) (12 hours)

(2) Lawyers should be required to undergo additional training sessions on each of the following subjects:

- Mental health (including inter alia psychological issues relating to adults and children in divorce, children's special needs, development psychology, step-parenting, extended family issues, relevant psychopathology) (12 hours)

6 Additional requirements

3.97 Many accreditation standards have a "fit and proper" requirement – i.e. that a person's conduct should be such that they can be allowed into the profession. How this is measured may differ – a standard way of doing this is to stipulate that an applicant should not be convicted of any criminal offence.

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66 National Board for Family Mediators, Mediator Accreditation Standard.

3.98 In the absence of formal regulation of the mediation profession, mediators who affiliate with the voluntary system are also required to subject themselves to a Code of Conduct and Ethics, and the complaints and disciplinary procedures, of the accredited mediation organisation(s) with which they are affiliated. This ensures that the organisation has the necessary standing to handle complaints against the conduct of the mediator.

7 How should accreditation standards be set?

3.99 Some jurisdictions have taken the approach of defining criteria for mediators in legislation. Many jurisdictions however take an approach that such determination should be performed by a designated Council, or through regulation.

3.100 It appears from the discussion above that the determination of specific standards is a complex task that has to consider numerous factors. Such standards are also likely to be different for different areas of practice.

3.101 As a result it is probably preferable that the envisaged Mediation Act does not attempt to codify such standards, but rather that it creates responsible mechanisms for doing so.

8 Conclusion & preliminary proposals

3.102 Our conclusions and preliminary proposals on accreditation standards for mediators are as follows:

a As mediation moves towards being a recognised profession, greater regulation of the competency and qualification of mediators becomes necessary.

b A qualification requirement that certifies a minimum level of competency should be considered to be a requirement for entry into the mediation profession.

c the different skills and competency requirements imposed by the different environments within which mediators operate, should be considered when mediator qualification standards are developed. Standards should vary and

be appropriate to the demands of the environment in which mediators will practice. Where appropriate mediator qualification standards should also require additional tertiary qualifications for mediators.

d Mediator qualifications should be structured to allow for general or generic skills training, and more advanced specialisation training. In addition, a career path should be developed that allows for recognition of advanced skills and experience.

e Minimum mediator qualifications could become NQF standards based.

f Participation in continued professional development programmes for mediators should be a requirement for ongoing accreditation.

g Additional requirements for mediator accreditation should include:

- Experience requirements
- Competence in subject matter (where appropriate)
- “Fit and proper” requirements.

h The envisaged mediation Act should create responsible mechanisms that can formulate suitable mediation accreditation standards for the various fields of mediation practice in South Africa.

D The accreditation processes

1 Requirements for an accreditation process

3.103 An accreditation standard will usually also prescribe the process to be followed for obtaining accreditation. Some requirements for such a process would include:

- The process should be standardised – i.e. the process should be well defined and published, and preferably the same process should apply for all candidates (unless that leads to unfairness).
- The process should be accessible to applicants. This should apply to points of access to the process, as well as accessibility of information and assistance for those wanting to apply.
- The process should be fair & transparent – i.e. where applications are delayed, or people are not successful, they should have full insight and understanding of what this has happened and what they need to do to be successful.

2 Concerns about accreditation processes

3.104 Some of the concerns regarding application processes that will need to be addressed include the following:

(a) Creating administrative bottlenecks

3.105 Application processes should not create administrative bottlenecks that lead to delays, frustration and extra costs. This means that the administrative infrastructure that manages these application processes should have the necessary capacity.

(b) Fees / costs

3.106 Accreditation for most professionals comes at a cost. This sometimes includes an application fee, and normally an annual registration fee. The income from these fees is used to support and pay for the administrative infrastructure of the profession, and to support activities that advance the profession (such as publications and conferences).

3.107 Whilst the necessity of levying fees to support the infrastructure for the profession is understood, there is also concern that fees may be an obstacle to accessing the profession. This not only applies to disadvantaged mediators but also to professionals who are already paying professional registration fees in respect of their other professional qualifications.

3.108 These factors have to be considered when fees for registration of mediators are determined. It may initially be necessary to obtain some form of subsidisation for the administration of the profession in order to address this problem.

3 Conclusion & preliminary proposals

3.109 Our conclusions and preliminary proposals on the accreditation process are as follows:

a The accreditation process should ensure that mediators are committed to a specified Code of Conduct and Ethics and that they are subject to a specified complaints and disciplinary process. In a formally regulated environment, this is much easier to achieve, than through voluntary accreditation.

b Accreditation process should be standardised, accessible, fair and transparent.

c Whilst it is accepted that professional registration will come with a financial cost to mediators, these costs should not be an inhibitor for people to access the profession.

E Ensuring professional practice

3.110 The following components are typically required to put effective professional practice management in place:

1 Standards of practice or Codes of Conduct

3.112 Standards of practice codify what is meant by professional practice. This is a clear definition of the conduct and ethical standards that are required of professionals in that industry. The standards of practice also become the effective measure for misconduct – i.e. non-compliance with the standards of practice provides the basis for complaints and disciplinary action.

3.113 These standards of practice typically address matters such as[67]:

- Ethical standards to be observed by mediators during a mediation;
- Mediator appointment
- Independence, neutrality, impartiality
- Confidentiality of the mediation process
- Conduct of the mediation process, and
- Determination of the fees and costs of a mediation.

3.114 There are a number of recognised practice standards[68], some of which have been voluntarily adopted by the industry in South Africa[69]. In order to move towards a profession, a set of practice and ethical standards that are suitable for South Africa must be developed and adopted and enforced for all mediation practice.

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67 Section 9 of the Irish Mediation Act, 2017 provides a good summary of what should be included in a Code of Conduct.

68 See for instance the Code of Professional Conduct of the International Mediation Institute.

69 See the DiSAC Code of Conduct, which is based on the IMI Code of Professional Conduct.

3.115 At the same time and set of practice and ethical standards adopted for South Africa should acknowledge the wide international consensus that already exists around what such standards should entail.

2 Complaints & disciplinary process

3.116 A standardised, easily accessible complaints process is an essential component of professional practice management. This allows any member of the public who is of the opinion that a mediator has breached standards of practice to easily raise a complaint and to have a clear understanding of how that complaint will be managed.

3.117 A complaints process needs to be supported by a standardized and fair disciplinary process. This is an essential component of professional practice management, as it provides the mechanism that allows for action to be taken against mediators who make themselves guilty of unprofessional conduct. Such a mechanism typically identifies what a disciplinary process would look like and who the decisionmakers for such a process will be. It also prescribes the action that can be taken against a defaulting mediator (ranging from a warning to de-registration). [70]

3.118 In order to move towards a profession, it is critical that a uniform complaints and disciplinary mechanism is developed and adopted for all mediation practices.

3 Conclusion & preliminary proposals

3.119 Our preliminary conclusion and preliminary proposals on ensuring professional practice are as follows:

a Professional practice management is an essential component for establishing trust and credibility for the mediation industry in South Africa.

b Professionalisation of mediation practice in South Africa requires that a set of practice and ethics standards for mediators be defined and implemented.

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[70] See for instance the Professional Conduct Assessment Process of the International Mediation Institute. This is directly linked to its Code of Professional Conduct, and provides a mechanism for adherence to the Code.

Such a standard should be based on accepted international best practice but should also accommodate South Africa's unique requirements.

c Professionalisation further requires that accessible complaints procedures be implemented, and that fair disciplinary procedures be in place to deal with unprofessional conduct.

F Structures for managing accreditation and professional practice

1 Summary of the functional requirements

3.120 In the preceding sections we have provided details and made preliminary proposals regarding the typical functions that would be required for accreditation and professional practice management of mediators. These functions can be summarised as follows:

a Defining the qualification and accreditation standards, and Codes of Professional Conduct and Ethics, that mediators are required to meet for the various environments in which they provide mediation services

b Managing the administrative process of accrediting mediators, and of renewing such accreditations from time to time. The latter would include the management of a continued professional development programme

c Providing and managing complaints and disciplinary processes that are necessary for professional practice supervision

d Promoting the development of the mediation industry, and the use of mediation.

3.121 It would seem as though a permanent and full-time administrative capacity is required to perform these functions. Other professions have indeed established permanent administrative capacity to perform these functions for their profession.[71]

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[71] The South African Qualifications Authority lists the bodies registered with it at http://pbdesig.saqa.org.za/search.php.

3.122 In this section we will explore the various options for establishing and maintaining the administrative infrastructure that seems to be required to perform these functions.

(a) Option 1: Oversight by other existing professional bodies

(i) Summary of option 1 on oversight by other existing professional bodies

3.123 One option would be to require existing professional bodies to also certify and supervise their members for the mediation work that they perform (e.g. the Law Society would supervise the mediation work that attorneys do, the Health Professions Council of South Africa would supervise the mediation work that psychologists do, etc).

3.124 The advantages of this option are that:

- Existing administrative infrastructure is being applied.
- Professionals are not required to have membership of multiple professional bodies.

3.125 The disadvantages of this option are that:[72]

- These professional bodies would now be required to manage and supervise an activity that falls outside their core focus and competency, and may even be outside of their legal mandate
- Competency around mediation accreditation and supervision would have to be developed and maintained within each of these professional bodies. This is a proliferation of effort that would be avoided if competency is developed in a single professional body for mediators
- Many mediators mediate in a number of different fields – e.g. a psychologist may mediate relationship issues, but also work in mediating medical negligence claims. This would further enhance the problem for professional bodies who now have to oversee activities that are completely unrelated to their focus.
- If accreditation standards and practice supervision is spread over various different bodies, it will most likely lead to variance in standards.
- Some mediators do not already belong to a professional body. Such a system would exclude them, and therefore necessitate the establishment of further administrative capacity to cater for them.

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[72] For a discussion of this issue see Hinshaw (2016) *Harvard Negotiation Law Review* 177.

(b) Option 2: Voluntary Industry regulation

(i) Summary of option 2 on voluntary industry regulation

3.126 A second option would be voluntary industry regulation. In such a system there is no legal requirement for mediators to affiliate with any accrediting or supervisory body. However, mediators can voluntarily affiliate with organisations that vouch for their qualifications and offer practice supervision.[73]

3.127 Such a system of regulation could be one of the following:

- Various mediation organisations set their own standards of accreditation and practice supervision. All panellists who affiliate with that organisation are then subject to these requirements.
- The various mediation organisations work together to develop a uniform set of accreditation and practice standards. These standards are then administered and applied by the various organisations, or by an umbrella organisation to which these service providers voluntarily belong.

3.128 The advantages of this option are that:

- No additional regulation is required to establish and manage these structures
- Some mediators may see it as an advantage that they retain full control over how their profession is managed

3.129 The disadvantages of this option are that:

- Unless there is wide voluntary adoption of some uniformed accreditation and practice standards, this approach could still result in great variance and disparity about what such standards should be, and the standards of mediation would not be uniformly regulated.
- Because the system of accreditation and practice supervision is voluntary, no one can be forced to affiliate and subject themselves to it. This means that people can continue to practice as “mediators” without any qualification or supervision. The aim of protecting the public is therefore not well met.
- Because the system is voluntary, it may be difficult to levy enough membership fees to support the administrative infrastructure that is required. The standards of administrative support may therefore not be what it should be.
- Voluntary industry association does not in itself create a point of contact and engagement between the industry and the various policy makers in government. The danger exists that such contact does not develop, especially if

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[73] This option is aligned with the self-regulatory approach model discussed under para 3.8 and further above.

government does not recognise the voluntary efforts of the industry to regulate its activities.

- The add on effect of this may well be that many in government may be concerned that government has no real say in the regulation and oversight of the mediation industry.[74]

(c) Option 3: A Professional Body in terms of SAQA framework

(i) Summary of option 3 on a professional body under the SAQA framework

3.130 The National Qualifications Framework Act, 67 of 2008 ("NQF Act") allows for certain organisations to be recognised as a professional body, on fulfilment of the criteria for recognition. [75] Such a body will then have statutory embedded powers to represent and/or regulate a recognised community of expert practitioners within the regulatory framework of the NQF Act.[76]

3.131 The process of recognising such a professional body is managed by the South African Qualifications Authority, in accordance with a formal policy.[77] In terms of its 2023 policy, the criteria for recognition are under paragraph 32 that a non-statutory body of expert practitioners applying to be recognised as a professional body by SAQA will:

a. be a legally constituted entity registered with the Companies and Intellectual Property Commission (CIPC) as a non-profit company (NPC) or with the Department of Social Development as a non-profit organisation (NPO) of which membership is voluntary. Membership must be defined in the Memorandum of Incorporation (MOI). This entity must not be registered as a profit-making company;

b. be governed either by a MOI, statute, charter or a constitution, whichever is applicable, indicating the scope of practice and be compliant with, and adhere to, good corporate governance practices;

c. have a transformation policy that guides the constitution of the Board, staff and membership. Furthermore, the professional body must indicate activities that ensure representation of the demographics of the country and support

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74 Also see p 7-8, Alexander.

75 In terms of Sections 28, 29, 30 and 31, read with paragraphs 13(1)(i)(i), 13(1)(i)(ii) and 13(1)(l) of the NQF Act.

76 This option would conform to the formal framework model discussed in para 3.16 and further above.

77 SAQA (2023) *Policy and Criteria for Recognising a Professional Body and Registering a Professional Designation*.

transformation, and if there is no transformation, an explanation must be provided;

d. have the necessary human resources capacity to undertake its functions, which is separate from the Board, except for executive members;

e. have access to adequate premises and facilities to undertake its functions;

f. have the necessary financial resources to undertake its functions and be sustainable throughout the recognition period;

g. provide immediate past audited three-year financial statements or independently reviewed three-year financial statements;

h. in the awarding and withdrawal of its designations, a recognised professional body may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

i. have policy and criteria:

    i. to develop, award, monitor and revoke its professional designations in terms of its own rules;

    ii. on RPL [Recognition of Prior Learning] to award designations for members who do not have the required underlying qualifications;

    iii. on membership, which includes but is not limited to the responsibilities and benefits, voting right, use of designation, and different categories of memberships.

    iv. on Continuous Professional Development;

j. Policies from non-statutory professional bodies must adhere to the:

    i. Protection of Personal Information Act (POPIA), Act 4 of 2013,

    ii. Promotion of Access to Information Act (PAIA), Act 2 of 2000, and

    iii. Promotion of Administrative Justice Act (PAJA), Act 3 of 2000 for the processing and accessing of membership information.

k. Professional bodies must:

    i. have a database of individual members;

    ii. clearly define membership in terms of designated and non-designated members;

    iii. submit to SAQA a list of designated member data in a format determined for the purposes of the NQF for uploading to the [National Learners' Records Database] NLRD.

iv. make career related information available to the public;

v. publish a code of conduct and operate a mechanism for reporting and investigating members who have allegedly contravened the code, and protect the public interest in relation to services provided by its members and the associated risks; and

vi. establish a register of complaints and submit as part of the mid-term monitoring and re-recognition, the register must indicate number, and nature and date of the complaints received as well as the findings and or resolutions achieved.

3.132 Currently SAQA recognises some 107 professional bodies[78]:

- 17 of these professional bodies are established through other legislation (i.e. not in terms of the NQF Act). These professional bodies also fall under the supervision of SAQA.
- The other 90 professional bodies supervised by SAQA are established through registration in accordance with the NQF Act. These include the Corporate Counsel Association of South Africa, South African Institute of Tax Practitioners, South African Sports Confederation and Olympic Committee, Southern African Communications Industries Association, Southern African Institute of Government Auditors, and the Institute of Chartered IT Professionals. [79].

3.133 Once a professional body is recognised by SAQA, that professional body will then manage the designated professions recognised by SAQA as being part of its remit. *This means that the professional body can then set compulsory minimum qualification and accreditation standards for any person who wants to use the designation*.

3.134 The SAQA 2023 policy[80] sets the following criteria for the registration of new and additional professional designations, namely it must:

a. be submitted to SAQA by a statutory and non-statutory body of expert practitioners applying to be recognised by SAQA and recognised professional bodies in accordance with an application process determined by SAQA;
b. be developed, awarded, monitored and subject to revocation in terms of the policy as contemplated in clause 32 (i)i;
c. be part of a progression pathway within or across registered designations, where applicable;

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78 For a full list see http://pbdesig.saqa.org.za/search.php.

79 For a full list see http://pbdesig.saqa.org.za/search.php.

80 See section 40 of the SAQA Policy.

d. be linked to a validated database of the names of individuals who have been awarded the professional designation;
e. include, as an initial requirement, an underlying qualification that is registered on the NQF;
f. include, as general requirements, a clearly articulated competencies framework which defines the applied competencies of the specific designation and associated progression pathways;
g. include, as general requirements, assessment, RPL, designation competencies, and/or work experience, and
h. include, as retention requirements, CPD, adherence to a code of professional ethics/ conduct and payment of membership fees.

3.135 The advantages of this option are:

a. This option applies the existing legislative framework for the management of many professions in South Africa. If used, no additional or special legislation is required to manage the mediation profession.
b. A professional body set up in this manner will have to comply with all SAQA requirements and will continue to function under the supervision of SAQA. These requirements also ensure that the required administrative infrastructure exists.
c. The designation of a professional body in accordance with this legislation positions the professional body as the officially recognised voice of that profession. This enables engagement between government and that industry around matters of policy and strategy.
d. This system of regulation ensures that all mediators who use the designation as a “mediator” are required to meet the qualification, accreditation and practice standards. Affiliation is no longer voluntary, but compulsory. This ensures greater protection for the public.
e. Because membership is now compulsory, registration fees can be levied. This assists to ensure that the professional management of the industry remains sustainable.
f. This option ensures that mediation is recognised as a “profession”. This will increase the stature of mediation, and hopefully also contribute to wider use of mediation.
g. Professional bodies are established as non-profit companies, and are governed by the members of the profession, in accordance with the Memorandum of Incorporation. This means that the leadership of these professional bodies are appointed by the professionals in the industry. As a result, the industry remains able to manage its own affairs, obviously within the constraints of the SAQA framework.

3.136 The disadvantages of this option are:

a. This option requires the industry to collaborate on developing and establishing the infrastructure required by SAQA for recognition. No

assistance or funding is provided for this through government channels, and funding will have to be sourced from within the industry. This may delay or limit the ability to develop the required infrastructure.

b. Some people in government may view the fact that this model retains the principle of self-determination as a problem. This is especially a concern when qualification and accreditation standards are being determined on matters that affect government policy and strategy (such as court annexed mediation).[81] This problem may well be addressed by legislation that allows government to determine accreditation standards for specific activities.

(d) Option 4: Certification of mediators and provision for a Mediation Council

(i) Summary of option 4 on certification of mediators and provision for a Mediation Council: the preferred option

3.137 In terms of our preferred option, the envisaged Mediation Act will create a framework in accordance with which mediation accreditation and practice will be regulated. This option will require substantial legislative provisions to give the Minister of Justice power to designate a Council, to describe the duties of the Council, and to make provision for how such a Council is to be constituted. This option puts in place a framework for regulating mediators, and the Mediation Bill provides in several instances for accredited mediators to be used for specific functions. These are typically situations where the Bill requires mediation to be conducted as a required step before litigation. In these instances, the Bill prescribes that accredited mediators must perform these functions. Chap 3 of the Bill provides a mechanism that will apply at the commencement of the Act, where the Chief Justice must, after consultation with the Minister of Justice, recognise one or more established organisations to register persons as certified mediators for purposes of litigated civil matters. This is a relatively low level of regulation which effectively recognises that there are many mediation organisations in South Africa that have qualification standards, codes of conduct and they exercise supervision to evaluate, assess and certify people as mediators. The proposed mechanism enables the Chief Justice, where an organisation performs those functions effectively, to recognise that organisation as one that qualifies for certifying mediators. This mechanism is used in jurisdictions such as the UK and Australia, where it works very effectively, and has been in place for many years. The committee has positioned that as the starting position in the Bill. When the Bill comes into effect that would be the first level of certification to

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81 Also see Alexander (2008) *QUTLJJ* 8 – 9.

be put in place. It is a fairly low-level mechanism, fairly easy to implement and to maintain. Clause 7 also provides for a process, if the Minister of Justice considers that it is necessary to establish a mediation council. This would then be a more intense level of accreditation which would then be put in place. The committee referenced the existing mechanisms in South Africa under the NQFA organisations to be established and certified by the SA Qualifications Authority as a professional body. If there is such a professional body in place for mediation at that stage, then under clause 7 empowers the Minister of Justice to recognise such a body as the Mediation Council. This would unlock the functions in clause 8 and 9, to be performed by such a Mediation Council. This relates to generally setting qualification requirements and certifying mediators and putting codes of practise in place. When the Mediation Council is recognised by the Minister of Justice, then at that stage, the supervisory or the accreditation framework for mediators will step up a level and the Mediation Council will then function in terms of clauses 7 to 9. However, these clauses are elective provisions. There is no obligation on the Minister to take this step. What we envisage is that there may come a time, (with regard to the arrangements in terms of clause 5), when existing bodies are recognised, may no longer be enough and where an overarching approach to standard setting and accreditation might be required. Suppose that becomes necessary, and there is a professional body in place that is performing these functions. In that case, the option is given to the Minister of Justice to recognise such a body as the Mediation Council.

3.138 We propose that, under clause 5(1) of the Bill, at the commencement of this Act the Chief Justice must, after consultation with the Heads of Court, without delay and by way of notice in the Government Gazette, recognise one or more organisations to register persons as certified mediators for purposes of litigated civil matters under Chapter 7 of the Bill. Under clause 5(2), the Chief Justice may from time to time recognise additional organisations, by way of notice in the Government Gazette, to register persons as certified mediators. Under clause 5(3), when the Chief Justice has recognised an organisation, the persons certified as mediators by that organisation are certified mediators, and where applicable certified mediators for specific categories of disputes, for purposes of this Act and any other Act that requires mediation services to be rendered. Under clause 5(4), the Chief Justice will, before recognising any organisation as the Mediation Council ascertain details of the qualification and certification standards used by that organisation; the manner in which the organisation requires persons to be assessed for certification against these standards; the codes of conduct that the organisation requires certified mediators to comply with, and the complaints and disciplinary processes that apply to mediators certified by the organisation; and the

manner in which the mediator standards, the codes of practice, the complaints and disciplinary processes, and the register of mediators certified by the organisation, are published.

3.139 Under clause 5(5), the Chief Justice may when recognising an organisation stipulate that the organisation is only recognised to register persons as certified mediators for one or more specified categories of dispute. These decisions are, under clause 5(6) at the discretion of the Chief Justice, provided that the Chief Justice may consult with any relevant stakeholders prior to making any such decision. Under clause 5(7), the Chief Justice may withdraw the recognition of any organisation previously made after consultation with the body and the Heads of Court for the reasons provided to the body. Under clause 5(8), if a supervisory body for the mediation profession is recognised as the Mediation Council, only persons registered by that body shall be certified mediators for purposes of this Act and any other Act that requires mediation services to be rendered. Such body may at its discretion and after consultation with the Chief Justice, continue to recognise persons who were regarded as certified mediators. The Mediation Bill makes provision in clause 6(1) for the recognition of an entity to be known as the Mediation Council. Under clause 6(2), no person, other than a professional body recognised under clause 7 may be known, or describe itself, as the Mediation Council or any variant of that name.

3.140 The Minister of Justice may, under clause 7(1), after consultation with the Chief Justice and with the relevant supervisory body, and by way of notice in the Government Gazette, recognise a supervisory body for a community of mediation expert practitioners,[82] provided that the supervisory body is recognised as a professional body

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82 The SAQA (2023) *Policy and Criteria for Recognising a Professional Body and Registering a Professional Designation* defines "community of expert practitioners" to mean a group of knowledgeable or appropriately skilled practitioners in a formalised and well-defined profession or occupation and a "body of expert practitioners" has the same meaning. This SAQA policy further provides that a statutory or non-statutory body of expert practitioners in an occupational field will be recognised by SAQA as a professional body on fulfilment of the criteria for recognition as a professional body (para 12); that the proliferation of professional bodies within the same community of practice will be discouraged, but will be balanced with the acknowledgement that healthy competition and freedom of association should not be impeded (para 13); and that where more than one non-statutory body for a specific community of practice applies for recognition, or where SAQA has already recognised a professional body in the same sector, SAQA will consider recognition based on the following: there must be no legal impediment to the operation of a second or subsequent body applying for recognition; the favourable outcome of a broad consultation within the community of practice and the wider society; and the distinctiveness of multiple

under the NQFA as the Mediation Council. The Minister may from time to time, after consultation with the supervisory body, under clause 7(2), for the reasons provided to the body, also if the Mediation Council loses its NQFA status as a professional body, withdraw the recognition previously made. Under clause 7(3), where a body is recognised as the Mediation Council, it must perform the functions and exercise the powers of the Mediation Council within the regulatory framework of the NQFA. Under clause 7(4), the functioning, composition and quorum of the Board of the body performing the functions of the Mediation Council, must be determined by that body subject to the regulatory framework of the NQFA. Subject to the provisions of the NQFA, the Mediation Council must, under clause 7(5), take steps to ensure that it is representative of the interests of mediators in general; and the public interest regarding mediation services.

3.141 Under clause 8, the functions and powers[83] of the Mediation Council include setting qualification requirements, and levels of training and experience for mediators in general; regulating the mediation profession to promote and protect the interests of the public in relation to mediation work; certifying persons as mediators, including levels of training and experience for mediators in general, and for mediators in specified categories of disputes; instituting and enforcing disciplinary action against registered persons contravening the provisions of the Act and or the Code of Practice.[84] The

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bodies in the same community of practice (para 14). SAQA (2023) *Policy and Criteria for Recognising a Professional Body and Registering a Professional Designation* 7.

83 Under section 38 of the Mediation Act of India, the functions and powers of the Mediation Council are to endeavour to promote domestic and international mediation in India through appropriate guidelines; endeavour to develop India to be a robust centre for domestic and international mediation; lay down the guidelines for the continuous education, certification and assessment of mediators by the recognised mediation institutes; provide for the manner of conduct of mediation proceedings; provide for manner of registration of mediators and renew, withdraw, suspend or cancel registration; lay down standards for professional and ethical conduct of mediators; present mediation training, workshops and courses in collaboration with mediation service providers, law firms and universities and other stakeholders, both Indian and international, and mediation institutes. The Mediation Council must further enter into memoranda of understanding or agreements with domestic and international bodies, organisations or institutions; recognise mediation institutes and mediation service providers and renew, withdraw, suspend or cancel such recognition; specify the criteria for recognition of mediation institutes and mediation service providers; call for any information or record of mediation institutes and mediation service providers; lay down standards for professional and ethical conduct of the mediation institutes and mediation service providers; publish such information, data, research studies and such other information as may be required; maintain an electronic depository of mediated settlement agreements made in India and for such other records related thereto in such manner as may be specified; and perform any other function as may be assigned to it by the Central Government.

84 The Irish Mediation Act also provides for reporting by the Mediation Council of Ireland. Under section 13 of the Act, the Council must, not later than 30 June in each year, make a

functions and powers of the Mediation Council further include promoting a high standard of education and training in the mediation sector; and advising the Minister on any matter referred to it by the Minister or on any matter it considers necessary to achieve the objects of the Act; compiling and publishing annually information about accredited mediator service providers and the mediation profession. The functions of the Mediation Council further include the promotion of mediation, by arranging of mediation awareness and settlement weeks; investigating and encouraging the establishment of public and private mediation schemes; co-operation with the Justice College to provide mediation training to mediation clerks and registrars; and by contributing towards the availability and distribution of mediation information documents, their delivery to courts and disputants; and overseeing their publication on the website of the Council or prescribed websites; and, finally, advising the Minister on the preparation or approval of a scheme for the delivery of mediation information sessions in family dispute law cases as envisaged in the Family Dispute Resolution Bill, developed under the Commission's project 100A.[85]

3.142 The Mediation Council must, under clause 9(1), within 90 days from the date of being recognised in terms of clause 7(1), a code or codes of practice to set standards for the conduct of mediations. A code or codes of practice of the Mediation Council must,

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report to the Minister of Justice and Equality on the performance of its functions under this Act and on its activities during the preceding year. The Minister must cause copies of the report to be laid before each House of the Oireachtas. The report must be in such form and include information regarding such matters as the Council considers appropriate or as the Minister may direct, including such information as the Minister may require relating to any matter concerning the policies and activities of the Council, or any specific document or account prepared by the Council. The Council may further from make other reports to the Minister on the performance of its functions. Under section 39 of the Mediation Act of India the Council must as soon as practicable after the end of each year or at such other intervals as directed by the Central Government, prepare a report on the implementation of the provisions of the Mediation Act during the year or such interval and forward a copy thereof to the Central Government. The Central Government may further take such additional measures as it deems necessary to supplement the functioning of the Council and for the effective implementation of the provisions of the Act.

85 Section 8 of the Auditing Profession Act 26 of 2005 regulates the functions of the Independent Regulatory Board for Auditors with regard to fees and charges. The Regulatory Board must prescribe accreditation, registration, registration renewal and re-registration fees; annual fees, or a portion thereof in respect of a part of a year; the date on which any fee is payable; and the fees payable in respect of any examination, conducted by an accredited professional body or the Regulatory Board. The Regulatory Board may further prescribe any fees payable for the purposes of the education fund; fees payable for an inspection or review undertaken by the Regulatory Board; the fees payable for any other service rendered by the Regulatory Board; and may grant exemption from the payment of any fees.

under clause 9(2), have due regard to the different requirements that may be applicable to the practice of mediation in various specialised areas of mediation. Under clause 9(3), a code of must include provisions in relation to: continuing professional development training requirements for mediators; procedures to be followed by mediators in the conduct of a mediation; procedures to be followed by mediators in the conduct of a mediation requiring consultation, by a mediator, with a child; ethical standards to be observed by mediators before, during and after a mediation; procedures to be followed by a party for redress in the event of dissatisfaction with the conduct of a mediator; determination of the fees and costs of a mediation; and any other matters relevant to the conduct of mediation.

3.143 Before publishing a code of practice the Mediation Council must, under clause 9(4), publish a notice in the Government Gazette and on the Council's website indicating that it proposes to publish or approve a code under this section; indicating where a draft of the code is available for inspection free of charge and for purchase for a period specified in the notice (being not less than 30 days from the date of the publication of the notice in the Government Gazette and on the Council's website. The Council must further state in the notice that submissions in relation to the draft code may be made in writing to the Mediation Council before a date specified in the notice. The Council must also indicate in its notice that as long as the code remains in force, copies of it are available on the Council's website, for inspection by members of the public free of charge at the Council's offices, and for purchase or copying by members of the public at a reasonable price at the Council's offices. The council must further have regard to any submissions received to the notice calling for comment. Under clause 9(5), when the Mediation Council approves a code of practice, it must cause a notice of the approval to be published in the Government Gazette and the notice must specify the date from which the code must come into operation. The Mediation Council may, under clause 9(6), amend or revoke a code of practice prepared or approved. Under clause 9(8), a code of practice also includes part of a code of practice. Under clause 9(9), certified mediators shall be required to comply with the codes of practice of the organisation or organisations that certified them as mediators and be subject to the complaints and disciplinary processes of these organisations. See also the considerations in Chapter 7 for a code of practice for community mediation set out in the paper, drawing on the comparative experience in Nepal, Sri Lanka, Trinidad and Tobago (see para 7.109). Under clause 10, expenditure incidental to the exercise of the powers or the performance of the functions of the Mediation Council in terms of this Act or any other law must be defrayed from the

funds of the Council and may include fees calculated in accordance with such rules as it must make for that purpose.

3.144 The advantages of this option are:

- The Council designated in this manner will have all the legislative power to regulate the mediation industry.
- The Chief Justice may even designate a professional body that was registered with SAQA in accordance with the NQF Act. This would effectively marry this Option with Option 3 discussed above. Such an approach would ensure that the Council also has to comply with all SAQA requirements and will continue to function under the supervision of SAQA, and thereby use the existing supervisory framework.
- This option gives the Chief Justice much more say into how the mediation profession is regulated. The Chief Justice will not be involved with the running of the Council but may de-designate the Council if it fails to do its work effectively.
- The mediation industry retains a substantial degree of self-determination through this option.
- The option is less costly than that of establishing a legislative Council (Option 5 below), as the burden of funding the Council falls on the mediator members affiliated with the Council, rather than on Government. The expenditure and the funding of the Council will be defrayed from the funds of the Council.[86] The way that clause 10 is framed means that any cost burden associated with the Council will not be carried by Government but would actually be carried by the professional body itself, which typically is funded through member contributions.[87] Clause 10 places an administrative and cost burden on the professional body. However, this is a cost that we foresee the profession is in any event willing to incur if it is keen to reach a position where a recognised professional body is established by legislation to govern the mediation profession.

3.145 The challenges presented by this option are:

a. There is potential for conflicting regulatory regimes if a professional body for mediators is registered under the SAQA framework and does not then become the designated Council. In order to avoid this, there would have to be a degree of cooperation between the Chief Justice and the SAQA authorities.

b. This option requires the existence of a Council that meets the minimum criteria. Such a body would have to be established by the mediation industry or if it does

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86 Section 22 of the Legal Practice Act regulates the finances, expenditure and accountability of the Legal Practice Council.

87 Section 12 of the Geomatics Act regulates the funding of the South African Geomatic Council and the duty of the Council to keep and audit its accounts (see www.saflii.org/za/legis/num_act/gpa2013230.pdf)

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not exist by the time of the commencement of the proposed legislation, by the Chief Justice making a designation.

(e) Option 5: A Council established by legislation

(i) Summary of option 5 a council established by legislation

3.146 The fifth option is that a statutory mediation council be established by legislation at the outset to regulate the mediation industry. Such a council would be established by legislation and be given a specific legislative mandate to regulate the mediation industry.

3.147 There are some 17 such legislative councils that have been established in South Africa:[88]

Professional Body Name
AHPCSA - Allied Health Professions Council of South Africa
ECSA - Engineering Council of South Africa
EAAB - Estate Agency Affairs Board
HPCSA - Health Professions Council of South Africa
IRBA - Independent Regulatory Board for Auditors
IPSAM - Institute of Professional South African Mariners
SACNASP - South African Council for Natural Scientific Professions
SACPCMP - South African Council for Project and Construction Management Professions
SACSSP - South African Council for Social Service Professions
SACAP - South African Council for the Architectural Profession
SACPVP - South African Council for the Property Valuers Profession
SACQSP - South African Council for the Quantity Surveying Profession
SADTC - South African Dental Technicians Council
SAGC - South African Geomatics Council
SANC - South African Nursing Council
SAVC - South African Veterinary Council
SAPC - The South African Pharmacy Council

3.148 These Councils, though established by legislation, must also register with SAQA, to be under its supervision.

3.149 There does not appear to be a clear policy document available on when government deems it necessary to establish a legislative council. If one reviews the cases where this has been deemed necessary, it would appear that such councils are established where the work of the professionals in that industry is of such a nature that public policy requires additional protection and regulation – over and above that which is

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88 For a full list see http://pbdesig.saqa.org.za/search.php.

offered within the SAQA framework.[89] This would apply to professionals responsible for people's medical treatment, professionals responsible for designing safe constructions, professionals responsible for financial audits on which financial regulation in the country depends, etc.

3.150 The advantages of this option are:

a. The mandate for regulating the mediation industry would be contained in legislation, which would provide finality about the standing of mediation as a profession, as well as about how that profession is to be regulated.

b. The legislative mandate will have to be supported by government funding, which would address any resource issues around how regulation infrastructure is to be funded.

3.151 The disadvantages of this option are:

a. Legislative mechanisms are often restricted in their ability to deal with high levels of generality, complexity, unpredictability and innovation. As a result, legislative regulation is not always efficient.

b. The benefits of direct industry expertise lauded in self-regulatory schemes may be lost in the legal layers of the legislated regulatory institutions."[90]

c. Treasury would have to provide funding for the regulatory environment, whereas other models are by nature self-funding. This option therefore puts additional pressure on Treasury's limited resources.

2 A Designated Council versus a Legislated Council?

3.152 If more formalised regulation is preferred, the pertinent question is if there is any specific rationale for preferring the establishment of such a Council in South Africa, over the use of the Council designated by the Minister (possibly one registered under the SAQA framework)?

(a) Nature of activities

3.153 Though mediation is important, it can probably not be argued that mediation is in the same league as the practice of medicine, engineering or accounting and that public interest therefore requires more stringent regulation.

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89 A number of the legislative councils also predate the NQF Act. As such the option of regulation through this framework would not then have been available anyway.

90 See Alexander (2008) *QUTLJJ* 10.

(b) Control over industry

3.154 Is there any pertinent reason why government would want such a degree of control over the mediation industry that it requires a government appointed council for this purpose? No clear requirement is presented for this. The Minister does in any event have a degree of control over a designated Council, and that should address any concerns around control issues.

(c) Control over accreditation standards

3.155 There are clear circumstances where it would be important for Government to have control over accreditation standards for specific mediation activities – qualifying as mediator for Court Annexed Mediation is a clear example. However, this level of control can be given to Government through the provision of the proposed Mediation Act, i.e. the mediation statute could contain a provision that allows the Minister to by regulation prescribe specific accreditation standards for specific mediation activities.

(d) Currently no Professional Mediation Body is registered in terms of SAQA framework

3.156 Currently no Professional Mediation Body is registered in terms of SAQA framework, nor does there exist a Council that meets the kind of minimum criteria envisaged in the Irish Mediation Act. The industry is working on a project to establish such a body, but there is no clear indication of if and when this will be established. This presents a practical challenge, but it is certainly one that can be overcome with a degree of collaboration between the Minister and the industry.

(e) Conclusion and preliminary proposals

3.157 Our preliminary conclusion and preliminary proposals on structures for managing accreditation and professional practice are as follows:

a Regulation of the mediation industry through other bodies, or through self-regulation are not sustainable models for the future. These models do not at a functional level address the requirements identified in earlier sections, nor the preliminary proposals contained in earlier sections of this chapter.

b A Professional Mediation Body in terms of SAQA framework will address most, if not all of the functional requirements for regulating the mediation industry. Regulation through this framework is also aligned with the Government's framework for regulating professions in South Africa. At

present no such body exists, and it is uncertain when and if it will be established.

c Further consultation with the mediation industry may be advised so that the Committee can have an informed view of whether or not such a body is likely to be established. This may influence the Commission's preliminary proposals regarding sub paragraph (b) above. If this development seems unlikely, the Commission may have to recommend that a legislated Mediation Council be established.

d A legislated Mediation Council would also address most, if not all of the functional requirements for regulating the mediation industry. However, no special circumstances seem to be present that would justify the expense of a legislated Mediation Council. There is also no clear argument as to why this option should be preferred over an industry led Council (possibly a Professional Mediation Body in terms of SAQA framework).

e The option of giving the Minister of Justice powers to designate a Council to oversee the mediation industry may well address a number of concerns. These include:

i The Minister will be able to designate a Council even if no professional body is registered with SAQA. The implementation of the Act is therefore not dependent on external events;

ii This model gives the Minister some degree of control over the management of the profession through the operation of the NQFA.

f The mediation statute should include provisions that allow the Mediation Council to prescribe accreditation and professional practice standards for specific fields of mediation practice, and to define certain Codes of practice by way of regulation.

3 Comparison of five options to be effected in the proposed legislation

3.158 The various options would require different legislative proposals:

(a) Options 1, 2 and 3

3.159 No additional legislation would be required to establish the accreditation and practice supervision mechanisms. These would either already exist (Option 1), be created by the industry itself (option 2) or rely on the existing National Qualifications Framework Act (Option 3).

(b) Option 4

3.160 This Option would require substantial legislative provisions to give the Minister powers to designate a Council, to describe the duties of the Council, and to make provision for how such a Council is to be constituted.

(c) Additional provisions codes of practice and accreditation standards

3.161 Options 1 to 3 and 5 above would benefit from legislative provisions that allow the Minister to (i) set certain Codes of Practice, and (ii) determine minimum accreditation standards for specific areas of mediation practice. Draft proposals setting out options 1 to 3 and 5 are set out in Annexure E.

3.162 It is proposed that section 9 of the Irish Mediation Act be used as the basis for drafting South African legislation relating to the introduction of a Code of Practice in option 5.

3.163 Provisions are also proposed that would allow the Minister to determine minimum accreditation standards for specific areas of mediation practice.

(d) Option 5

3.164 If a legislative Council is proposed, a comprehensive legislative provision would be required. In this regard, the South African Geomatics Council was established in 2013 by the Geomatics Profession Act, 19 of 2013. It provides a template for enabling legislation as to how a Mediation Council could be established.

4 Proposal

3.165 We prefer option 4 and therefore propose the following legislative provisions on the certification of mediators and provision for a mediation council:

Certification of Mediators and provision for Mediation Council

Arrangements for the certification of mediators

5.(1) At the commencement of this Act the Chief Justice must, after consultation with the Minister and the Heads of Court, without delay and by way of notice in the Government Gazette, recognise one or more organisations to register persons as certified mediators for purposes of Chapter 7 of the Act.

(2) The Chief Justice may from time to time recognise additional organisations, by way of notice in the Government Gazette, to register persons as certified mediators.

(3) When the Chief Justice has recognised an organisation in accordance with subsections (1) or (2), the persons certified as mediators by that organisation are certified mediators, and where applicable certified mediators for specific categories of disputes, for purposes of this Act and any other Act that requires mediation services to be rendered.

(4) Prior to recognising any organisation in terms of subsections (1) or (2), the Chief Justice must ascertain details of the –

(*a*) qualification and certification standards used by the organisation, including any such standards that may be applicable to mediation in specific categories of dispute;

(*b*) manner in which the organisation requires persons to be assessed for certification against these standards;

(*c*) codes of conduct that the organisation requires certified mediators to comply with, as well as the complaints and disciplinary processes that apply to mediators certified by the organisation; and

(*d*) manner in which the mediator standards, the codes of practice, the complaints and disciplinary processes, and the register of mediators certified by the organisation, are published.

(5) The Chief Justice may when recognising an organisation in terms of subsections (1) or (2) stipulate that the organisation is only recognised to register persons as certified mediators for one or more specified categories of dispute.

(6) Subject to subsection (4), the decisions in accordance with subsections (1), (2) and (5) are at the discretion of the Chief Justice, provided that the Chief Justice may consult with any relevant stakeholders prior to making any such decision.

(7) The Chief Justice may from time to time, after consultation with the body and the Heads of Court, for the reasons provided to the body, withdraw the recognition of any organisation previously made in accordance with subsections (1), (2) or (5).

(8) In the event that a supervisory body for the mediation profession is recognised as the Mediation Council in terms of section 7, only persons registered by that body shall be certified mediators for purposes of this Act and any other Act that requires mediation services to be rendered, provided that such body may at its discretion and after consultation with the Chief Justice, continue to recognise persons who were regarded as certified mediators in accordance with this section.

Provision for a Mediation Council

6.(1) Provision is hereby made for recognition of an entity to be known as the Mediation Council.

(2) No person, other than a professional body recognised under section 7 may be known, or describe itself, as the Mediation Council or any variant of that name.

Appointment of Mediation Council

7.(1) The Minister may, after consultation with the Chief Justice and with the relevant supervisory body, and by way of notice in the Government Gazette, recognize a supervisory body for a community of mediation expert practitioners, provided that the supervisory body is recognised as a supervisory body in terms of sections 28, 29, 30 and 31 of the National Qualifications Framework Act, as the Mediation Council for purposes of this Act.

(2) The Minister may from time to time, after consultation with the supervisory body, for the reasons provided to the body, also if the Mediation Council loses its NQFA status as a professional body, withdraw the recognition previously made in accordance with subsection (1).

(3) Where a body is recognised as the Mediation Council, it must perform the functions and exercise the powers of the Mediation Council as set out in sections 8 and 9 of this Act within the regulatory framework of the National Qualifications Framework Act.

(4) The functioning, composition and quorum of the Board of the body performing the functions of the Mediation Council referred to in subsection (1), must be determined by that body subject to the regulatory framework of the National Qualifications Framework Act.

(5) Subject to the provisions of the National Qualifications Framework Act, the Mediation Council must take steps to ensure that it is representative of -

(*a*) the interests of mediators in general; and

(*b*) the public interest with regard to mediation services.

Functions and powers of the Council

8. Subject to the provisions of the National Qualifications Framework Act, the functions and powers of the Mediation Council as referred to in section 7 include —

(*a*) setting qualification requirements, including levels of training and experience for mediators in general, and for mediators in specified categories of disputes, and establishing mechanisms for the evaluation and accreditation of training programmes offered by institutions in respect of the mediation profession;

(*b*) regulating the mediation profession so as to promote and protect the interests of the public in relation to mediation work, as long as it is not inconsistent with any other applicable law;

(*c*) certifying persons as mediators, and where applicable as certified mediators in specified categories of disputes, for purposes of this Act and any other Act that requires mediation services to be rendered, and establishing mechanisms for the evaluation and accreditation of training programmes offered by institutions in respect of the mediation profession;;

(*d*) instituting and enforcing disciplinary action against registered persons contravening the provisions of this Act and or the Code of Practice referred to in this Act;

(*e*) promoting a high standard of education and training in the mediation sector;

(*f*) publishing a code of practice contemplated by section 9 to set standards for the conduct of mediations

(*g*) advising the Minister on any regulations contemplated by section 48 or any matter referred to it by the Minister or on any matter it considers necessary to achieve the objects of this Act;

(*h*) annually compiling and publishing information about accredited service providers and the mediation profession;

(*i*) the promotion of mediation, by–

(i) the arranging of mediation awareness and settlement weeks;

(ii) investigating and encouraging the establishment of public and private mediation schemes;

(iii) co-operation with the Justice College for the purposes of providing mediation training to mediation clerks and registrars; and

(iv) by contributing towards the availability and distribution of mediation information documents, referred to in section 34, their delivery to courts and disputants; and overseeing their publication on the website of the Council or prescribed websites; and

(*i*) advising the Minister on the preparation or approval of a scheme for the delivery of mediation information sessions in family dispute law cases in terms of the Family Dispute Resolution Act, 20 …

Codes of practice

9.(1) The Mediation Council must, within 90 days of being recognised in terms of section 7(1) and having had regard to the matters specified in subsections (2) and (3), as well as the relevant provisions of this Act, publish a code or codes of practice to set standards for the conduct of mediations.

(2) A code or codes of practice of the Mediation Council must have due regard to the different requirements that may be applicable to the practice of mediation in various specialised areas of mediation.

(3) A code of practice referred to in subsection (1) must include provisions in relation to all of the following:

(*a*) continuing professional development training requirements for mediators;

(*b*) procedures to be followed by mediators in the conduct of a mediation;

(*c*) procedures to be followed by mediators in the conduct of a mediation requiring consultation, by a mediator, with a child;

(*d*) ethical standards to be observed by mediators before, during and after a mediation;

(*e*) procedures to be followed by a party for redress in the event of dissatisfaction with the conduct of a mediator;

(*f*) determination of the fees and costs of a mediation;

(*g*) any other matters relevant to the conduct of mediation.

(4) Before publishing a code of practice under this section, the body referred to in subsection (1) must—

(*a*) publish a notice in the Government Gazette and on the Council's website—

(i) indicating that it proposes to publish or approve a code under this section;

(ii) indicating where a draft of the code is available for inspection free of charge and for purchase for a period specified in the notice (being not less than 30 days from the date of the publication of the notice in the Government Gazette and on the Council's website~~)~~; and

(iii) stating that submissions in relation to the draft code may be made in writing to the Mediation Council before a date specified in the notice (which must be not less than 30 days after the end of the period referred to in subparagraph (ii));

(iv) indicating that as long as the code remains in force, copies of it are available –

(aa) on the Council's website;

(bb) for inspection by members of the public free of charge at the Council's offices; and

(cc) for purchase or copying by members of the public at a reasonable price at the Council's offices, and

(*b*) have regard to any submissions received pursuant to paragraph (a)(iii).

(5) When the Mediation Council approves a code of practice under this section, it must cause a notice of the approval to be published in the Government Gazette and the notice must specify the date from which the code must come into operation.

(6) Subject to subsection (6), the Mediation Council may amend or revoke a code of practice prepared or approved under this section.

(7) The requirements of subsections (3) and (4) must, with all necessary modifications, apply to a code of practice that the Mediation Council intends to amend or revoke.

(8) In this section "code of practice" includes part of a code of practice.

(9) When persons are regarded as certified mediators under the provisions of section 7(1) or (2), they shall be required to comply with the codes of practice of the organisation or organisations that certified them as mediators and be subject to the complaints and disciplinary processes of these organisations.

Funding of the Mediation Council

10. Expenditure incidental to the exercise of the powers or the performance of the functions of the Mediation Council in terms of this Act or any other law must be defrayed from the funds of the Council and may include fees calculated in accordance with such rules as it must make for that purpose.

CHAPTER 4: LONG TITLE, PREAMBLE, OBJECTIVES AND APPLICATION OF LEGISLATION

A Long title of the Bill

1 Mediation statutes in other jurisdictions

4.1 We consider we can learn from the mediation statutes of other jurisdictions to note which aspects are regulated by their mediation statutes. The long title of the Singapore Mediation Act sets cryptically out in its long title what it seeks to regulate. It provides that it is an Act to promote, encourage and facilitate the resolution of disputes by mediation and for connected purposes. The same is the case in the 2011 Australian Commonwealth Alternative Dispute Resolution Act. It provides that it is an Act relating to the resolution of civil disputes and for related purposes. The Long title of the 2004 Alternative Dispute Resolution Act of the Philippines is likewise brief. It provides that it is an Act to institutionalize the use of an alternative dispute resolution system in the Philippines and to establish an office for alternative dispute resolution and for other purposes. The 2020 Mediation Bill of Kenya is slightly more detailed. It provides for the settlement of all civil disputes by mediation; to set out the principles applicable to mediation; provides for the establishment of the Mediation Committee; provides for the accreditation and registration of mediators; recognition and enforcement of settlement agreements; and for connected purposes.

4.2 The ADR Act of 2010 of Ghana likewise deals briefly with what the statute seeks to regulate. It provides for the settlement of disputes by arbitration, mediation and customary arbitration, to establish an Alternative Dispute Resolution Centre and to provide for related matters. The 2012 Mediation Act of Malaysia provides that it is an Act to promote and encourage mediation as a method of alternative dispute resolution by providing for the process of mediation, thereby facilitating the parties in disputes to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters

4.3 The long title of the Mediation Act of Ireland is detailed. It provides, among others, that it is an Act to facilitate the settlement of disputes by mediation, to specify the

principles applicable to mediation, to specify arrangements for mediation as an alternative to the institution of civil proceedings or to the continuation of civil proceedings that have been instituted; to provide for codes of practice to which mediators may subscribe; to provide for the recognition of a body as the Mediation Council of Ireland for the purposes of this Act and to require that Council to make reports to the Minister for Justice and Equality as regards mediation in the State; and to provide for related matters.

4.4 The long title of the Mediation Act 32 of 2023 of India is less detailed.[1] It provides that it is an Act to promote and facilitate mediation, especially institutional mediation, for the resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for the registration of mediators, encourage community mediation and make online mediation as an acceptable and cost-effective process and for matters connected.[2]

2 Proposal

4.5 The long title of our Bill is informed by what the advisory committee considered ought to be covered as its terms of reference in this investigation. In 2018, the committee was of the view that this investigation ought to deal with mediation in civil matters, mediation in criminal matters and community mediation. It was decided in September 2022 that this investigation would not deal with mediation in criminal matters as it would be dealt with under the Commission's project 151, Review of the Criminal Justice System, particularly the Criminal Procedure Act, 51 of 1977.[3] For this reason, this investigation and the Bill does not deal with mediation in criminal matters. The committee also resolved that community mediation will be discussed in this investigation for consideration by our stakeholders but that provisions on community mediation will not

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1 Which the upper house or the Rajya Sabha passed on 1 August 2023 and to which the lower house or the Lok Sabha assented to 7 August 2023. News On Air Gov India (Aug 2023) "Parliament passes the Mediation Bill 2023"; Khanna (Aug 2023) *Indian Express;* Aragaki (Aug 2023) *Indisputably.* The President assented to the Act on 14 September 2023 and it was published on 15 September 2023, see Obhan & Dutta (Sept 2023) *Mondaq*.

2 The Supreme Court of India impressed in *M R Krishna Murthi v New India Assurance Co Ltd* (2020) 15 SCC 493, (India) at par 39 upon the Indian Government to consider the feasibility of implementing mediation legislation.

3 RSA Presidency (Oct 2022) *Response by President Cyril Ramaphosa to recommendations of Zondo Commission of Inquiry* 2.1.35 "The South African Law Reform Commission (SALRC) is considering deferred prosecution agreements as part of its review of the criminal justice system".

be included in the Bill. The committee further resolved that the Bill ought to facilitate the settlement of disputes by mediation; specify the principles applicable to mediation; arrangements for mediation as an alternative to the institution of civil proceedings or to the continuation of civil proceedings that have been instituted; codes of practice to which mediators may subscribe; create and regulate a mediation profession, and provide for recognition of a body as the Mediation Council of South Africa; provide for enforcement of international commercial mediation settlement agreements; and provide for related matters.

4.6 We therefore propose the inclusion of the following long title in the Mediation Bill:

> To facilitate the settlement of disputes by mediation; to specify the principles applicable to mediation; to specify arrangements for mediation as an alternative to the institution of civil proceedings or to the continuation of civil proceedings that have been instituted; to provide for codes of practice to which mediators may subscribe; to create and regulate a mediation profession; to provide for recognition of a body as the Mediation Council of South Africa for the purposes of this Act; to provide for enforcement of international commercial mediation settlement agreements; and to provide for related matters.

B Preamble

1 Background

4.7 The 2004, ADR Act of the Philippines contains a policy declaration section[4] which resembles a preamble. It declares that the policy of the State of Philippines is to actively promote party autonomy in parties resolving their disputes or parties enjoying freedom for working out their own arrangements to resolve their disputes. It states that the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important way for parties to attain speedy and impartial justice and parties to get their court cases unblocked. It provides that the State shall provide means to parties to use ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. It notes that the State undertakes to induct active private sector participation in the settlement of disputes through ADR. It declares that the Act does not detract from the adoption by the Supreme Court of any ADR system, such as mediation, conciliation,

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4 Section 2.

arbitration, or any combination thereof as a way of achieving speedy and efficient means of resolving cases pending before all courts in the Philippines. It further provides that such an ADR system shall be governed by such rules as the Supreme Court may approve from time to time.

4.8 The Court-Annexed Mediation Rules of the Magistrates' Courts contained a preamble. It referred to section 34 of the Constitution of the Republic of South Africa which guarantees everyone the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. It noted that whereas section 6(1) of the Rules Board for Courts Law Act 107 of 1985 empowers the Rules Board for Courts of Law (Rules Board) established under section 2 of that Act to review existing rules of court, to make rules for the Supreme Court of Appeal, the High Courts and the lower courts regulating the practice and procedure in connection with litigation and generally regulating any matter which may be necessary or useful for the proper conduct of the functions of the said courts in civil as well as criminal proceedings. It further noted the Access to Justice Conference held in July 2011, under the leadership of the Chief Justice, towards achieving the delivery of accessible and quality justice for all, and which resolved that steps must be taken to introduce alternative dispute resolution, preferably court-annexed mediation or the CCMA kind of alternative dispute resolution, into the court system.

4.9 The 2014 Rules of The Magistrates' Courts noted that the main purposes of mediation were to promote access to justice; promote restorative justice; preserve relationships between litigants or potential litigants which may become strained or destroyed by the adversarial nature of litigation; facilitate an expeditious and cost-effective resolution of a dispute between litigants or potential litigants; assist litigants or potential litigants to determine at an early stage of the litigation or prior to commencement of litigation whether proceeding with a trial or an opposed application is in their best interests or not; allow litigants or potential litigants to return to litigation should the attempt at mediation not be successful; dispense with litigation procedure and rules of evidence; and provide litigants or potential litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers. It also noted that the Minister of Justice and Constitutional Development directed the Rules Board to make rules to regulate the procedure for voluntary referral to court-annexed mediation of civil disputes, to be implemented on a pilot basis in certain courts. It finally noted that the Rules Board had therefore made rules to regulate the procedure for voluntary court-annexed

mediation of civil disputes in the Magistrates' Courts.

2 Proposal

4.10 We consider that there is a need for the inclusion of a preamble in the Mediation Bill, that a reference to section 34 of the Constitution should be made; the duty of the State to provide accessible, inexpensive, quality and expeditious justice to all parties; and to set out what the objectives of mediation are. We therefore propose the following preamble for inclusion in the proposed legislation:

PREAMBLE

RECOGNISING THAT –

- everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or independent and impartial tribunal or forum as provided in section 34 of the Constitution;
- the State is required to ensure accessible, inexpensive, quality and expeditious justice for all,

AND BEARING IN MIND THAT –

- the broad objectives of mediation are –
  - to promote access to justice;
  - to facilitate an expeditious and cost-effective resolution of a dispute between litigants;
  - to assist litigants to determine at an early stage of the litigation whether proceeding with a trial or an opposed application is in their best interest or not;
  - to allow litigants to return to litigation should the attempt at mediation not be successful;
  - to preserve the relationships between litigants which may become strained or destroyed by the adversarial nature of the litigation;
  - to promote restorative justice;
  - to protect and respect the inherent right to dignity of a person as provided in section 10 of the Constitution; and
  - to protect the right of a person to privacy as provided in section 14 of the Constitution;

AND NOTING
that it has been identified that in the light of the core constitutional values of ubuntu – botho, trial courts and disputants should be encouraged towards searching for processes which enhance the possibilities of resolving disputes between parties;

AND IN ORDER TO –
- enhance access to justice by promoting and encouraging mediation as a method of alternative dispute resolution in order to supplement litigation in the resolution of disputes and to encourage community mediation.

C Definitions considered for inclusion in the Bill

1 Views of stakeholders at SALRC experts meeting October 2017 on definitions

4.11 The meeting noted in October 2017 that in the legislation of other jurisdictions, two trends are seen. The one is to have a very broad definition of mediation, which is highly inclusive, which was the trend in the early mediation statutes from about 2004. A good example was the Philippines Mediation Act which defines mediation to mean a voluntary process in which a mediator selected by the disputing parties facilitates communication and negotiation and assists the parties in reaching of voluntary agreement regarding the dispute." A later definition, probably because of the European Union Directive on mediation, is the 2017 Mediation Act of Ireland. It defines mediation to mean a confidential, facilitative and voluntary process in which disputants, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute. A further example noted was the Singapore Mediation Act which provides that "mediation" means a process comprising one or more sessions in which one or more mediators assist the disputants to do all or any of the following to facilitate the resolution of the whole or part of the dispute to identify the issues in dispute; explore and generate options; communicate with one another; and voluntarily reach an agreement.

2 Definitions considered

4.12 Next we consider the definitions which we consider could be included in the Mediation Bill.

(a) Accredit

4.13 The Singapore Mediation Act defines "approved certification scheme" to mean an accreditation or a certification scheme designated as an approved certification scheme under section 7; and "certified mediator" to mean a mediator who is certified under an approved certification scheme. We propose that ''accredit'' means the process of evaluation and recognition by the Council of service providers and training programmes offered by institutions in respect of the mediation profession.

(b) Action

4.14 Under the Rules of the Magistrates' Courts of South Africa "action" means litigation commenced by the issue of summons.[5] We propose that "action" means litigation commenced by the issue of summons.

(c) Agreement to mediate

4.15 The Mediation Act of Ireland provides that "agreement to mediate" has the meaning assigned to it by section 7. Under this section, the parties and the proposed mediator prepare and sign a document which appoints the mediator and contains information about the manner in which the mediation is to be conducted; the manner in which the fees and costs of the mediation will be paid; the place and time at which the mediation is to be conducted; the fact that the mediation is to be conducted in a confidential manner; the right of each of the parties to seek legal advice; the manner in which the mediation may be terminated; and such other terms as may be agreed between the parties and the mediator. Based on the Irish definition, we propose that "agreement to mediate" means an agreement by two or more persons to refer for mediation the whole or part of a dispute which has arisen, or which may arise between them, and may include an agreement entered into between the disputing parties and a mediator before the mediation process commences which sets out the terms under which the mediation will be conducted.

(d) Application

4.16 The Magistrates' Courts Rules provide that "application" means litigation commenced by notice of motion. We propose that "application" means litigation commenced by notice of motion.

(e) Certified mediator

4.17 The Mediation Act of Ireland defines "certified mediator" to mean a mediator who is certified under an approved certification scheme; and "certified mediator" means a mediator who is certified under an approved certification scheme. We base our definition on the Irish provision. We propose that a "certified mediator" means a person who has

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5 Rule 73.

been certified as a mediator, or where applicable as a mediator in specified categories of disputes, in terms of section 8 of the Act.

(f) Community mediation

4.18 We propose that "community mediation" means a voluntary and accessible mediation process for resolving conflict and disputes between persons, groups, and organisations, including government entities, within a community, area or locality, to promote social harmony, empower community members, and prevent the escalation of conflicts.[6]

(g) Constitution

4.19 Examples of legislation which defines "Constitution" are the Legal Practice Act 28 of 2014, the Legal Aid South Africa Act 39 of 2014, the Protection of Investment Act 22 of 2015 and the Auditing Profession Amendment Act 5 of 2021. We therefore provide that "Constitution" means the Constitution of the Republic of South Africa, 1996.

(h) Costs of mediation

4.20 Under the UNCITRAL Mediation Rules of 2021 "costs" includes only the fees of the mediator; the travel and other expenses of the mediator; the cost of expert advice requested by the mediator with the agreement of the parties; the cost of any assistance provided pursuant to the Rules; and any other expenses that may have been accrued out of the mediation, including in relation to translation and interpretation services.[7] We propose that "costs of mediation" means the fees of a mediator; the travel .and other expenses of a mediator; the costs of any expert advice requested by a mediator with the agreement of the parties; the costs of any assistance by a service provider recommending or selecting the appointment of a certified mediator pursuant to sections 12(5) and (6); and the costs of the venue of the mediation.

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6 See para 7.28 for two definitions of community mediation, namely that it "endeavors to create a supportive and safe environment that encourages free and open expression of everyone's respective truths"; and that "[t]he goal of the community dispute resolution movement is to teach people to resolve conflict by cooperation, negotiation and mediation, thereby empowering the participants, relieving court caseloads and preventing escalation of disputes.

7 Article 11(2).

(i) Council

4.21 Under the Mediation Act of Ireland “Council” has the meaning assigned to it by section 12(1). The Mediation Act of India provides that "Council" means the Mediation Council of India established under section 33. We follow these examples and propose that “Council” means the Mediation Council of South Africa recognised in terms of sections 5 and 6 of this Act.

(j) Court

4.22 We propose that “court” means any court in the Republic as defined in section 166 of the Constitution.

(k) Deliver

4.23 Under the magistrates’ court rules “deliver” except when a summons is served on the opposite party only, and in rule 9, means to file with the registrar or clerk of the court and serve a copy on the opposite party either by hand-delivery, registered post, or, where agreed between the parties or so ordered by court, by facsimile or electronic mail (in which instance Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 will apply). “Delivery”, “delivered” and “delivering” have corresponding meanings. We propose that “deliver” means to serve a document on the opposite party in litigation and to file with the clerk or registrar of the court.

(l) Dispute

4.24 The Mediation Act of Ireland defines “dispute” to include a complaint. Under the Uniform rules of the High Court of South Africa, “dispute” means the subject matter of litigation between parties, or an aspect thereof.[8] We follow these examples and propose that “dispute” means the subject of a disagreement between parties, or an aspect thereof, and includes an alleged dispute.

(m) Family

4.25 The Department of Social Development defined in its White Paper on Families of 2013 family as: “a societal group that is related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation, and go

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8 Rule 41A(1).

beyond a particular physical residence".[9] We propose that "family" means a societal group that is or has been related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation.

(n) Family law dispute

4.26 Under the Canadian Family Law Act of 2011, "family law dispute" means a dispute respecting a matter to which the Act relates. We base our definition on the Canadian provision. We propose that "family law dispute" means a dispute, or alleged dispute, in which one party maintains a particular point of view or claim or contention regarding the parties' respective responsibilities, interests and rights towards, or with respect to, any member of the family to which both parties belong, and the other party maintains a contrary or different one.

(o) Heads of court

4.27 Under our Superior Courts Act 10 of 2013, "head of court", in relation to the Constitutional Court, means the Chief Justice; the Supreme Court of Appeal means the President of that Court; any Division of the High Court, means the Judge President of that Division; and any court of a status similar to the High Court, the most senior judge of such court. Under the Magistrates' Courts Act 32 of 1944 "head of the administrative region" means the magistrate designated as such by the Minister, after consultation with the Magistrates Commission. The heads of court of the high courts and magistrates' courts have crucial roles also to play in mediation. We foresee a role for the heads of court when the Chief Justice decides on the recognition of a body as the Mediation Council and when she contemplates the revocation of such recognition. We further foresee a role for the heads of court in issuing mediation directives. We therefore propose that heads of court be defined to mean under the Superior Courts Act, in relation to the Constitutional Court, the Chief Justice; the Supreme Court of Appeal, the President of that Court; any Division of the High Court, the Judge President of that Division; and any court of a status similar to the High Court, the most senior judge of such court. We further propose that "heads of court" means, under the Magistrates' Courts Act, the heads of the administrative regions designated as such by the Minister, after consultation with the Magistrates Commission.

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9 Par 2.1 11.

(p) Legal practitioner

4.28 We propose that "legal practitioner" means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 of the Legal Practice Act, 2014 (Act No. 28 of 2014).

(q) Litigant

4.29 Under the magistrates' court rules "litigant" means a party to litigation. We therefore propose that "litigant" means a party to litigation.

(r) Litigation

4.30 We follow the wording of the magistrates' courts rules by proposing that "litigation" means court proceedings commenced by action or application proceedings.

(s) Mediation

4.31 Many definitions define what the meaning of mediation is. Calls have been made from the 1990s in South Africa for a consistent use of terminology and the need to set the parameters of the meaning of mediation.[10] Defining mediation is problematic.[11] One definition is that "[m]ediation is a decision-making process in which a third party, the mediator, assists the parties, the mediator attempts to improve the process of decision-making and to assist the parties to reach an outcome to which each of them can assent".[12] The Canadian Bar Association defines mediation as "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no decision-making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."[13] Mediation is further defined as an "intervention into a dispute or negotiation by an acceptable, impartial and neutral third party (with no decision-making power) to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute".[14]

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10 Faris (June 1995) Analysis of theory and principles ADR 58 – 60; Boulle & Rycroft Mediation: principles, process, practice SA 3; Faris (2006) *CILSA* 428 – 429.

11 JAMS "The in-house counsel's guide to ADR".

12 Boulle & Rycroft *Mediation: principles, process, practice* SA 3.

13 Government Canada "Dispute Resolution Reference Guide".

14 Public Services and Procurement Canada "Definition and Characteristics Mediation".

4.32 Under the New South Wales Civil Procedure Act “mediation” means a structured negotiation process in which the mediator, as a neutral and independent party, assists the disputants to achieve their own resolution of the dispute.[15] Under the Mediation Act of India "mediation" includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute. Under the ADR Act of Tasmania mediation, which includes conciliation, means a structured negotiation process in which the mediator, as a neutral and independent party, assists the disputants to achieve their own resolution of the dispute.[16]

4.33 Under the Mediation Act of Singapore “mediation” means a process comprising one or more sessions in which one or more mediators assist the disputants to do all or any of the following to facilitate the resolution of the whole or part of the dispute, namely identify the issues in dispute; explore and generate options; communicate with one another; and voluntarily reach an agreement.[17] A session is a meeting between the mediator, or one or more mediators, and one or more of the parties to the dispute, and includes any activity undertaken, whether by a mediator, a party to the dispute or some other person, to arrange or prepare for such a meeting, whether or not the meeting takes place; and to follow up on any matter or issue raised in such a meeting.

4.34 Under the ADR Act of the Philippines “mediation" means a voluntary process in which a mediator, selected by the disputing parties, facilitates communication and negotiation, and assist the parties in reaching a voluntary agreement regarding a dispute. Under the USA Uniform Mediation Act “mediation” means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. Under the Malaysian Mediation Act of 2012 “mediation” means a voluntary process in which a mediator facilitates communication and negotiation between parties to assist the parties in reaching an agreement regarding a dispute.

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15 Section 25.

16 Section 3(2).

17 Mediation Act section 3(1).

4.35 Under the Mediation Act of Ireland "mediation" means a confidential, facilitative and voluntary process in which disputants, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute. Under the Mediation Act of Trinidad and Tobago "mediation" means a process in which a Mediator facilitates and encourages communication and negotiation between the mediation parties and seeks to assist the mediation parties in arriving at a voluntary agreement.

4.36 Under the European Directive 2008 on mediation in civil and commercial matters "mediation" means a structured process, however named or referred to, whereby two or more disputants attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.[18] This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes, however, attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

4.37 The DOJCD of South Africa defines mediation as a process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute. It is an alternative to having the dispute adjudicated in court.[19] "Mediation session" was defined in the 2014 magistrates' court rules to mean the period that a mediator and the parties are engaged in mediation of the dispute, but the term is not defined in the 2023 rules.

4.38 Under our Uniform Rules of the High Court "mediation" means a voluntary process entered into by agreement between the disputants, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to

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18 Article 3(a).

19 DOJCD SA Court-annexed mediation.

resolve the dispute.[20] The mediation definition in the 2023 magistrates' court rules is now identical to this definition.

4.39 We base our definition of mediation on the above definitions. We propose that "mediation" means a process in which a mediator facilitates and encourages communication and negotiation between the mediation parties and seeks to assist the mediation parties in arriving at a voluntary agreement regarding the dispute.

(t) Mediation communication

4.40 Under the Mediation Act of Singapore "mediation communication", means an oral or written statement made during a mediation; in relation to a mediation; or to consider, conduct, participating in, commencing, continuing, reconvening or concluding a mediation or retaining a mediator.[21] The definition in the Hong Kong Mediation Ordinance is very similar. It covers anything said or done; any document prepared; or any information provided, for the purpose of or in the course of mediation but does not include an agreement to mediate or a mediated settlement agreement.[22]

4.41 Under the USA Uniform Mediation Act "mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.[23] The Malaysian Mediation Act is substantially similar to this definition.

4.42 Under the ADR Act of the Philippines "confidential information"[24] means any information, relative to the subject of mediation or arbitration, expressly intended by the source not to be disclosed, or obtained under circumstances that would create a reasonable expectation on behalf of the source that the information shall not be disclosed. It includes a communication, oral or written, made in a dispute resolution proceedings, including any memoranda, notes or the work product of the neutral party

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20 Rule 41A(1).

21 Section 3.

22 Section 2. See also Green (Aug 2023) "Disclosure of mediation communications in litigation Hong Kong".

23 Section 2(2).

24 Section 3(h).

or non-party participant. It further includes an oral or written statement made or which occurs during mediation or for purposes of considering, conducting, participating, initiating, the continuing of a reconvening mediation or retaining a mediator; and pleadings, motions, manifestations, witness statements, reports filed or submitted in an arbitration or for expert evaluation.

4.43 We propose that “mediation communication” means a communication as referred to in clause 20(3). This is to prevent any contradiction with clause 20(3) which deals substantively with mediation communications.

(u) Mediated settlement agreement

4.44 Under the Mediation Act of Ireland “mediation settlement” means an agreement in writing reached by the disputants during the course of a mediation and signed by the parties and the mediator. Under the Mediation Act of India, "mediated settlement agreement" includes an agreement in writing between some or all of the parties resulting from mediation, settling some or all of the disputes between such parties, and authenticated by the mediator, although the terms of the mediated settlement agreement may extend beyond the disputes referred to mediation.[25] Under the Singapore Mediation Act “mediated settlement agreement”, means an agreement by some or all of the parties to the mediation settling the whole or part of the dispute to which the mediation relates. We propose that “mediated settlement agreement” means an agreement referred to in clause 23.

(v) Mediator

4.45 Under the 2014 magistrates’ court rules “mediator” means a person selected by parties or by the clerk of the court or registrar of the court from the schedule referred to in rule 86(2), to mediate a dispute between the parties. This definition was omitted from the 2023 rules. Under the Mediation Act of Ireland “mediator” means an individual who is appointed to be a mediator for a mediation. Under the USA Uniform Mediation Act “mediator” means an individual who conducts a mediation.[26] Under the ADR Act of Ghana “mediator” includes an impartial person appointed or qualified to be appointed to assist the parties to satisfactorily resolve their dispute and employees and persons hired

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25 Section 19.

26 Section 2(3).

by that person. Under the New South Wales Civil Procedure Act “mediator” means a person to whom the court has referred a matter for mediation.[27]

4.46 Under the Mediation Act of India "mediator" means a person who is appointed to be a mediator to undertake mediation, and includes a person registered as mediator with the Council. Under the European Directive of 2008 on mediation in civil and commercial matters “mediator” means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

4.47 Debates have been conducted about the distinction between the neutrality on the one hand, and impartiality of a mediator, on the other hand. Mediation must be conducted in an impartial manner which doesn't go to the quality of the mediator. Doubt has been expressed whether there is a need to refer to the neutrality of the mediator.[28] The code of conduct of mediators is the proper place to deal with how mediators should conduct themselves, rather than in this definition. “Mediator” should not refer to “a person” but to “individual or individuals”. Our definition is based on the local and foreign provisions. We propose that “mediator” means an individual or individuals who conduct the mediation.

(w) Minister

4.48 Both the Promotion of Administrative Justice Act 3 of 2000 and the Traditional Courts Act 9 of 2022 follow the modern drafting trend of defining “Minister” to mean the Cabinet member responsible for the administration of justice. The Legal Practice Act of follows the older drafting trend by defining “Minister” to mean the Minister of Justice and Constitutional Development. We propose that ‘‘Minister’’ means the Cabinet member responsible for the administration of justice, or where the context indicates another Cabinet member, that Cabinet member.

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27 Section 25.

28 Jordaan (2023) Linkedin; see also Field (2000) *ADR Bulletin* 16 to 20 who concludes at 19 that “if mediators do want to work in contexts where power imbalances exist then it is very important that they drop aspirations to, and claims of, neutrality”. See also Field (2012) *JCULawRw* at 45 who notes: “ … whilst the concept of neutrality is one that retains a strong historical resonance with practitioners, it is a concept that is troublesome, contentious, and even often unhelpful, to the realities of practice of an ethical mediation process”. See further Forester & Stitzel (July 1989) *Negotiation Journal* at 260; and Gautam (Jan 2023) *CPJ Law Journal* 21 – 34.

(x) NQF and National Qualifications Framework Act

4.49 Under the National Qualifications Framework Act 67 of 2008 "NQF" means the national qualifications framework contemplated in Chapter 2. Under section 4 of that Act, the NQF is a comprehensive system approved by the Minister for the classification, registration, publication and articulation of quality-assured national qualifications. We refer a number of times in the proposed legislation to the National Qualifications Framework Act. We therefore propose that the "National Qualifications Framework Act" means the National Qualifications Framework Act, 2008 (Act No. 67 of 2008).

(y) Non-party

4.50 Under the Trinidad and Tobago Mediation Act of 2004 a "non-party participant" means a person, other than a mediation party or mediator, who is present at a mediation session or otherwise participates in a mediation process.[29] According to a dictionary definition, a non-party means a person who participates in a mediation, other than a party or mediator, and includes counsel of each party, experts in the subject matter of a dispute and witnesses.[30] Under the Mediation Act of Malaysia a "non-party" means a person who participates in a mediation other than a party or mediator, and includes counsels of each party, experts in the subject matter of a dispute and witnesses. Under the USA Uniform Mediation Act a "non-party participant" means a person, other than a party or mediator that participates in a mediation.[31] Under the Mediation Act of Singapore a "third party", in relation to a mediation, means a person who is not a party to the mediation; not a mediator for the mediation; and not a mediation service provider.

4.51 In view of the above provisions, we propose that a "non-party" means a person, other than a mediation party or mediator, who is present at a mediation session or otherwise participates in a mediation process and includes the legal practitioner of each party, experts in the subject matter of a dispute and witnesses.

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29 Section 2.

30 *Law Insider Dictionary* non-party.

31 Section 2(4). The notes to the USA Uniform Mediation explains on page 5 in relation to the definition of mediation party that this provision is "designed to prevent someone with only a passing interest in the mediation, such as a neighbor of a person embroiled in a dispute, from attending the mediation and then blocking the use of information or taking advantage of rights meant to be accorded to parties. Such a person would be a non-party participant and would have only a limited privilege". It explains further that "counsel for a mediation party would not be a mediation party, because their agreement is not necessary to the resolution of the dispute".

(z) Party

4.52 Under the magistrates' court rules "plaintiff", "defendant", "applicant", "respondent" and "party" include the attorney or counsel appearing for any such party and the officer of any local authority nominated by it for the purpose.[32] Under the Mediation Act of Ireland "party" means a party to a mediation.[33] Under the Mediation Act of Trinidad and Tobago "mediation party" means a person who participates in mediation and whose consent is necessary to resolve the dispute.[34] Under the USA Uniform Mediation Act "mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute. Under the Mediation Act of Malaysia "party" means a party to a mediation agreement and includes the Federal Government and a State Government.

4.53 The Mediation Act of India further defines "participants" to mean persons other than the parties who participate in the mediation, who include advisers, advocates, consultants and any technical experts and observers; and "party" to mean a party to a mediation agreement or mediation proceeding whose agreement or consent is necessary to resolve the dispute and includes their successors. Under the Mediation Act of Singapore "party to a mediation" means any party to the whole or part of a dispute that is referred for mediation, but does not include any mediator conducting the mediation; and that "third party", in relation to a mediation, means a person who is not a party to the mediation; not a mediator for the mediation; and not a mediation service provider.

4.54 We propose a definition based the above provisions. We propose that "party" means a person or entity who participates in mediation and whose agreement is necessary to resolve the dispute.

(aa) Person

4.55 Under the South African Interpretation Act 33 of 1957 "person" includes any divisional council, municipal council, village management board, or like authority; any company incorporated or registered as such under any law; anybody of persons corporate or unincorporated. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 defines "person" to include a juristic person, a non-juristic

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32 Rule 2.

33 Section 1.

34 Section 2.

entity, a group or a category of persons. Under the USA Uniform Mediation Act, “person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

4.56 The question arose whether it was not sufficient to provide that a person means a person recognised in law. Unintended consequences might arise if this definition excluded other persons or entities. We therefore omitted this definition in the Bill.

(bb) *Prescribed*

4.57 In line with current South African drafting practice, prescribed means prescribed by regulation. Such examples are found in the National Credit Act 34 of 2005,[35] the Legal Practice Act 28 of 2014 and the Traditional Courts Act 9 of 2022.[36] We propose that ‘‘prescribed’’ means prescribed by regulation by the Minister in terms of section 46.

(cc) *Proceeding*

4.58 Under the USA Uniform Mediation Act “proceeding” means a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or a legislative hearing or similar process.[37] Under the Mediation Act of Ireland “proceedings” means civil proceedings that may be instituted before a court. The Mediation Act of Malaysia provides in section 3 that “proceedings” means any proceedings of a civil nature and includes an application at any stage of proceedings. The advisory committee questioned the need for the inclusion of this definition in the Bill and omits this term.

(dd) *Record*

4.59 The National Archives Act 43 of 1996 defines “record” and “recording” to mean recorded information regardless of form or medium; and 'recording' means anything on which sounds or images or both are fixed or from which sounds or images or both are capable of being reproduced, regardless of form. We base our definition on the National Archives definition. We propose that “record” means information that is inscribed on a

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35 “Prescribed” means prescribed by regulation.

36 “Prescribed” means prescribed by regulation and “prescribe” has a corresponding meaning.

37 Section 2(7).

tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(ee) *Regulation*

4.60 Under the National Credit Act 34 of 2005 “regulation” means a regulation made under the Act. We propose that ‘‘regulation’’ means any regulation made by the Minister in terms of section 46.

(ff) *Republic*

4.61 Under the Legal Practice Act 28 of 2014, **“Republic”** means the Republic of South Africa. We propose that that “Republic” means the Republic of South Africa.

(gg) *Rules of Court*

4.62 Since rules of courts are adopted to regulate proceedings in the high courts and magistrates’ courts and all other courts, we propose that “rules of court” means the rules of court applicable to any court in the Republic.

(hh) *Service provider*

4.63 Under the 2023 Mediation Act of India "mediation service provider" means a body or organisation that provides for the conduct of mediation under the Act and rules and regulations made thereunder, and are recognised by the Council and includes a mediation centre annexed to a court, tribunal or such other forum as may be specified. A dictionary definition is that “mediation provider” means any public or private entity (including court-related mediation schemes) which manages or administers a mediation process conducted by a third-party neutral mediator of whatever denomination or profession, (hereafter “mediator”) who provides service under its auspices in assisting parties to amicably resolve their dispute.[38] We propose that “service provider” means a body accredited by the Council or recognised by the Chief Justice which supplies mediation services to the public and maintains a roster of certified mediators.

(ii) *This Act*

4.64 Under the Legal Practice Act 28 of 2014, “this Act” includes any regulation, rule or notice made or issued in terms of the Act. Under the Protection of Personal Information Act 4 of 2013, “this Act” includes any regulation or code of conduct made under this Act. Under the Private Security Industry Regulation Act 56 of 2001, “this Act” consists of the

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[38] Law Insider dictionary “mediation provider”.

regulations and the code of conduct for security service providers. The proposed Bill provides for rules to be made to fund the expenditure of the Mediation Council by the Council, for rules to be made by the Rules Board, and for a code of conduct for mediators. We therefore propose that ‘‘this Act’’ includes any regulation, any rule and the code of conduct for mediators made in terms of this Act.

D Objectives of the legislation

1 Background

4.65 Under the 2014 mediation Rules of the Magistrates' Courts the main purposes of mediation were to promote access to justice; promote restorative justice; and preserve relationships between litigants or potential litigants which may become strained or destroyed by the adversarial nature of litigation.[39] The main purpose of mediation was further to facilitate an expeditious and cost-effective resolution of a dispute between litigants or potential litigants; assist litigants or potential litigants to determine at an early stage of the litigation or prior to commencement of litigation whether proceeding with a trial or an opposed application is in their best interests or not; and provide litigants or potential litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers. The purpose of these Rules was to provide the procedure for the voluntary submission of civil disputes to mediation in selected courts.[40] The 2023 mediation Rules of the Magistrates' Courts do not contain any purpose or objectives provision.

4.66 The objectives of the Australian Commonwealth Civil Dispute Resolution Act are to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted.[41] The objectives of the Lagos Multi-Door Courthouse[42] are to enhance access to justice by providing alternative mechanisms to supplement litigation in the resolution of disputes; minimise citizen frustration and delays in justice delivery by providing a standard legal framework for the fair and efficient

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39 Rule 70.

40 Rule 72.

41 Section 3.

42 Section 2.

settlement of disputes through ADR; serve as the focal point for the promotion of ADR in Lagos State; and promote the growth and effective functioning of the justice system through ADR methods.

4.67 The 2004 Alternative Dispute Resolution Act of the Philippines contains a policy clause, similar to an objectives clause:[43]

> [I]t is hereby declared the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the party to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. Likewise, the State shall enlist active private sector participation in the settlement of disputes through ADR. This Act shall be without prejudice to the adoption by the Supreme Court of any ADR system, such as mediation, conciliation, arbitration, or any combination thereof as a means of achieving speedy and efficient means of resolving cases pending before all courts in the Philippines which shall be governed by such rules as the Supreme Court may approve from time to time.

4.68 The Brazilian Mediation Act is governed by the following principles, namely the independence of the mediator; equality between the parties; oral communications; informality; free will of the parties; search for consensus; confidentiality; and good faith.[44]

2 Proposal

4.69 We take our cue from our 2014 mediation Rules of the Magistrates' Courts in framing our objectives clause. We therefore propose the following objectives clause:

> **Objectives of this Act**
> 1(1) The objectives of this Act are to –
> (*a*) minimise citizen frustration and delays in justice delivery by providing a standard legal framework for the fair and efficient settlement of disputes through mediation;
> (*b*) promote and encourage mediation as an appropriate method of dispute resolution;
> (*c*) afford parties the opportunity to resolve their disputes expeditiously and cost effectively;

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43 Section 2.

44 Article 2.

(*d*) regulate the mediator profession;
(*e*) regulate the procedure for the referral of disputes to mediation;
(*f*) direct the mediation process; and
(*g*) provide for the enforcement of settlement agreements under the rules of procedure and the conditions laid down in the Singapore Convention.

E Interpretation of the proposed legislation

4.70 We consider that an interpretation clause be included in the Bill. We wish to clarify that the Mediation Bill must be interpreted in a manner that gives effect to the objectives of the Mediation Bill.[45] We further consider the Bill should address conflicts between the

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[45] Chief Justice Mogoeng described the applicable interpretative principles as follows in *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society:*

> [18] ... First, a special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore to be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a word or expression in a statute, without straining the language, "promotes the spirit, purport and objects of the Bill of Rights", then that is the meaning to be adopted even if it is at odds with any other meaning in other statutes.

See also Justice Theron's reasoning in the *Independent Institute of Education* case on the interpretative approach to be adopted:

> [42] This Court has taken a broad approach to contextualising legislative provisions having regard to both the internal and external context in statutory interpretation. A contextual approach requires that legislative provisions are interpreted in light of the text of the legislation as a whole (internal context). This Court has also recognised that context includes, amongst others, the mischief which the legislation aims to address, the social and historical background of the legislation, and, most pertinently for the purposes of this case, other legislation (external context). (Footnotes omitted.)

provisions of the Mediation Bill and other general[46] and special legislation[47] which regulate mediation.

4.71 We propose the following interpretation clause in the Mediation Bill:

> 3(1) This Act must be interpreted in a manner that gives effect to the objects of the Act.
>
> (2) Whenever a provision in this Act is in conflict with the provision in other legislation, any reasonable interpretation of a provision that would best promote the objects and scope of both legislation must be preferred over any alternative interpretation of that provision that is in conflict with the purpose and scope of both legislation.
>
> (3) Whenever a provision of this legislation, excluding the provisions in Chapter 7 and Chapter 8, is in conflict with a provision in special legislation, then the provision in the special legislation shall prevail.

F Application of the proposed legislation

1 Background

4.72 The question for consideration is whether all matters are suitable for mediation.

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46 See *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy*:

> [53] The maxim lex posterior priori derogat has the effect that a later statute that is clearly inconsistent and irreconcilable with an earlier one will be treated as having implicitly revoked the earlier statute to the extent of the inconsistency. However, this maxim is invoked only with circumspection, as there are interpretive presumptions that work against it. One of these is the presumption that a statutory provision is not aimed at altering the existing law (both common law and statute law) more than is necessary. Another is the presumption encapsulated in the maxim generalia specialibus non derogant. In terms of this presumption subsequent general legislation does not revoke prior, specific legislation dealing with the same subject matter unless the general legislation professes to deal with this subject matter exhaustively. Finally, there is the presumption that the legislature has dealt exhaustively with the subject matter of an enactment. … (Footnotes omitted)

47 For the effect of general versus specific legislative provisions see *HTF Developers v Minister of Environmental Affairs and Tourism*:

> [13] … the procedural prerequisites for actions by the Minister under s 31(A) [of the Environment Conservation Act 73 of 1989] would be more onerous than those imposed by the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). But, if the legislature chose to afford a party affected by particular administrative action greater procedural protection by means of the specific provisions of the Act, those provisions cannot be ignored in favour of less onerous prescriptions in general legislation such as PAJA. It follows that it was intended that before a direction was issued there had to be compliance with s 32. There was none. The direction was therefore invalid.

In some disputes, the parties might be emotionally incapable of or unwilling to commit to an informal dispute resolution process facilitated solely by a mediator.[48] The Ghanaian ADR Act[49] applies to matters other than those that relate to the national or public interest; the environment; the enforcement and interpretation of the Constitution; or any other matter that by law cannot be settled by an alternative dispute resolution method. Justice Torgbor commented as follows about this application clause:[50]

> … "matters" other than those relating to "the national or public interest", "the environment" and "any other matter that by law cannot be settled by an alternative dispute resolution method" is not sufficiently definitive. This is because "matters", "any other matter" and the concepts of "national or public interest" and "environment" are nebulous.

4.73 The Singaporean Mediation Act applies to any mediation conducted under a mediation agreement where the mediation is wholly or partly conducted in Singapore or the agreement provides that the Act or the law of Singapore is to apply to the mediation.[51] Under the Singapore Mediation Act, the Minister may, after consulting the Chief Justice, extend all or any of the provisions of the Act to apply to any mediation under the Act. The Minister may also make any saving or transitional provisions or extensions as may be necessary or expedient. [52]

4.74 The Mediation Act of India of 2023 applies where mediation is conducted in India, and all or both parties habitually reside in or are incorporated in or have their place of business in India, or the mediation agreement provides that any dispute shall be resolved under the provisions of the Act, or there is an international mediation.[53] The Act does not apply where one of the parties to the dispute is the Central Government or a State Government, or agencies, public bodies, corporations and local bodies, including entities controlled or owned by the Government, except where the matter pertains to a commercial dispute.[54] However, nothing prevents the Indian Central Government or a

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48 SALRC Issue Paper 31 par 3.8.30.

49 Section 1.

50 Torgbor (2011) *International Journal of Arbitration, Mediation and Dispute Management* 212.

51 Section 6(1)..

52 Section 6(4).

53 Section 2(1).

54 Section 2(2).

State Government from determining kinds of dispute for resolution through mediation under the Act, if the Government, agencies, public bodies, corporations and local bodies including entities controlled or owned by them, is a party. Mediation under the Act may not be conducted for the resolution of any dispute listed in the indicative list under the First Schedule.[55] Nothing contained in the Act prevents any court from referring any dispute relating to compoundable offences, including matrimonial offences, pending between the parties, to mediation. Important is that the Mediation Act of India does not provide a mechanism for the enforcement of international commercial mediation settlement agreements.

4.75 The 2012 Mediation Act of Malaysia does not apply to any dispute regarding matters specified in the Schedule; any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in court; and any mediation conducted by the Legal Aid Department. Nothing in the ADR Act of Tasmania prevents the parties to proceedings from agreeing to and arranging for mediation or neutral evaluation of any matter otherwise than in accordance with the Act.[56] The Australian Commonwealth Civil Dispute Resolution Act excludes three categories of proceedings from the application of the statute, namely under section 15, proceedings of certain kinds;[57] under section 16, proceedings under certain statutes;[58] and under section 17, proceedings prescribed by regulations.

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55 Clause 6(1).

56 Section 4.

57 Such as for an order imposing a pecuniary penalty for a contravention of a civil penalty provision; proceedings by or on behalf of the Commonwealth or a Commonwealth authority for an order connected with: a criminal offence or the possible commission of a criminal offence; or a contravention of a civil penalty provision; proceedings that relate to a decision of, or a decision that has been subject to review by: the Administrative Appeals Tribunal; the Australian Competition Tribunal; the Copyright Tribunal of Australia; the Migration Review Tribunal; the Refugee Review Tribunal; the Social Security Appeals Tribunal; the Veterans' Review Board; a body prescribed by the regulations; proceedings in the appellate jurisdiction of an eligible court; proceedings arising from the exercise of a power to compel a person to answer questions, produce documents or appear before a person or body under a law of the Commonwealth; proceedings in relation to the exercise of a power to issue a warrant, or the exercise of a power under a warrant; proceedings that are, or relate to, proceedings in which the applicant or the respondent has been declared a vexatious litigant under a law relating to vexatious litigants; ex parte proceedings; and proceedings to enforce an enforceable undertaking.

58 Proceedings are also excluded proceedings to the extent that they are proceedings under, or under regulations made under, any of the following Acts: the Australian Citizenship Act 2007; the Child Support (Registration and Collection) Act 1988; the Fair Work Act 2009 ; the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009; the Family Law Act 1975; the Migration Act 1958; (g) the National Security Information

4.76 The USA Uniform Mediation Act[59] applies to a mediation in which the mediation parties are required to mediate by statute or court or administrative agency rule or if they are referred to mediation by a court, administrative agency, or arbitrator. It also applies if the mediation parties and the mediator agree to mediate where it is recorded that mediation communications will be privileged against disclosure. It further applies when the mediation parties use as a mediator an individual who holds themselves out as a mediator or the mediation is provided by a person that holds themselves out as providing mediation.[60] The Act further applies to a mediation arising out of a dispute filed with an administrative agency or court; if conducted by a judge who might make a ruling on the case; or if conducted under the auspices of a primary or secondary school, if all the parties are students or a correctional institution for youths, and if all the parties are residents of that institution. The USA Uniform Mediation Act further regulates the severability of invalid applications of provisions of the Uniform Mediation Act. If any provision of the Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect to without the invalid provision or application. The provisions of the Act are severable for these purposes.[61]

4.77 The Commercial Rules and Mediation Procedures of the American Arbitration Association (AAA) allow parties to opt-out of these Rules instead of parties opting into the application of the Rules to resolve their dispute by mediation.[62] The AAA has adopted Commercial Rules and Mediation Procedures to assist parties in resolving their commercial disputes.[63] The AAA has also adopted Construction Industry Arbitration Rules and Mediation Procedures to likewise assist parties in resolving their construction

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(Criminal and Civil Proceedings) Act 2004 ; (h) the Native Title Act 1993; (i) the Proceeds of Crime Act 1987; and the Proceeds of Crime Act 2002.

59 Section 3.

60 The Act does not apply to a mediation relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship, and also not to a dispute that is pending under or is part of the processes established by a collective bargaining agreement.

61 Section 14.

62 Leathes & Masucci (2014) *Kluwer Mediation Blog.*

63 See *AAA Commercial Rules and Mediation Procedures 1 Sept 2022.*

disputes.[64] Under the 2022 Commercial Rules and Mediation Procedures, in arbitrations administered by the AAA or at any stage of the pending arbitration, and where the value of the claim or counterclaim exceeds $ 100 000,[65] parties are required, unless the parties have otherwise agreed, to resolve their dispute under the Commercial Mediation Procedures.[66] The mediation must be conducted simultaneously with arbitration proceedings unless the parties have agreed otherwise. The mediation may not delay arbitration proceedings. Any party may unilaterally opt out of this Rule upon notice to the AAA and to the other parties to the arbitration proceedings. The parties are further required to notify the AAA once they have completed their mediation or of any decision to opt out of this Rule. Finally, the mediator appointed to mediate the dispute under this Rule, may not be appointed to arbitrate the dispute, unless all the parties and the mediator otherwise agree.

4.78 Under the 2021 UNCITRAL Mediation Rules, where parties agree that their disputes shall be submitted to mediation under the UNCITRAL Mediation Rules, then the Rules apply.[67] The parties may agree to exclude or vary any provision of the Rules at any time.[68] Where any provision of the Rules is in conflict with a provision of the law applicable to the mediation from which the parties cannot derogate, including any applicable instrument or court order, that provision of law prevails.[69]

4.79 The South African Arbitration Act 137 of 1965, applies to every arbitration under any law passed before or after the commencement of the Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement.[70] However, if that other law is an Act of Parliament, the Act does not apply to any such arbitration in so far as the Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorised or recognised by that other law.

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64 See *AAA Commercial Rules and Mediation Procedures 1 Sept 2022.*

65 Under Rule 9 of the 2013 Commercial Rules and Mediation Procedures, the limit was $ 75 000.

66 Rule 9.

67 Article 1(1).

68 Article 1(4).

69 Article 1(5).

70 Section 40.

2 Legislation which provides for alternative dispute resolution in South Africa

4.80 About 50 South African statutes, and regulations made under those statutes, provide for alternative dispute resolution, including the resolution of disputes by mediation. A brief reflection of how ADR measures were introduced into our law is required. We will not reflect on family dispute resolution measures as they are considered in the Commission's project 100A family dispute resolution investigation. Neither do we deal with mediation in criminal matters, including offender-victim mediation, as the Commission's Project 151 investigation into the review of criminal justice will deal with mediation in criminal matters. Under the Antarctic Treaties Act 60 of 1996, four treaties form part of the law of South Africa, namely the Antarctic Treaty, the Protocol on Environmental Protection to the Antarctic Treaty, the Convention for the Conservation of Antarctic Seals, and the Convention on the Conservation of Antarctic Marine Living Resources. Under article 18 of the Protocol on Environmental Protection to the Antarctic Treaty, under article XXV of the Convention on the Conservation of Antarctic Marine Living Resources and under article XXV of the Convention on the Conservation of Antarctic Marine Living Resources, if a dispute arises concerning the interpretation or application of these Conventions and the Protocol, the parties to a dispute must, at the request of any one of them, consult among themselves as soon as possible with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means. The Convention for the Conservation of Antarctic Seals does not contain a clause for dispute resolution, along the lines of the three other instruments.[71]

4.81 Under section 11 of the Commission on Gender Equality Act 39 of 1996, the Commission investigates any gender-related issues of its own accord or on receipt of a complaint. The Commission endeavours to resolve any dispute, or rectify any act or omission, by mediation, conciliation or negotiation. Under section 166 and Regulation 132 of the Companies Act 71 of 2008, as an alternative to applying for relief to a court, or filing a complaint with the Companies and Intellectual Property Commission, a party entitled to apply for relief, or file a complaint, may refer a matter subject of an application

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71 See for an insightful overview of dispute resolution mechanisms available to resolve disputes arising in the Polar region, Rothwell (April 2021) "Polar Dispute Settlement: Frameworks, Function and Future".

or complaint to the Companies Tribunal, or an accredited entity for resolution by mediation, conciliation or arbitration. Under section of 67 of the Constitution, a mechanism exists in respect of ordinary Bills affecting provinces, where if the National Council of Provinces rejects a Bill, or if the Assembly refuses to pass an amended Bill, the Bill and, also the amended Bill, must be referred to the Mediation Committee. Under Rule 107 of the Joint Rules of Parliament, the Mediation Committee must consider Bills referred to it with a view to finding agreement in the event of disagreement between the two houses.

4.82 Under section 70 of the Consumer Protection Act 68 of 2008, a consumer may seek to resolve a dispute in respect of a transaction or agreement with a supplier by referring the matter to an alternative dispute resolution agent who may be an ombud, an accredited industry ombud, or a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud, or by applying to the consumer court of the province. Under section 21 of the Continuing Education and Training Act 16 of 2006, if a dispute arises about the payment or employment conditions between a college and a lecturer or support staff employed by that college, any party to the dispute may refer the dispute to a bargaining council established under the Labour Relations Act, if the employer or employee parties to the dispute fall within the registered scope of a bargaining council. Any party to the dispute may refer the dispute to the Commission for Conciliation, Mediation and Arbitration, if no bargaining council has jurisdiction, and the CCMA must then attempt to resolve the dispute through conciliation. Under section 4(2)(c) of the Development Facilitation Act 67 of 1995, the officer and experts shall, before conducting a hearing or reaching a decision, enquire into and consider the desirability of first referring any dispute between two or more parties in relation to land development to mediation. If the officer or experts consider mediation appropriate, they must refer the dispute to mediation. It they consider mediation inappropriate, or if mediation has failed, the officer and experts must conduct a hearing appropriate in the circumstances and reach a decision binding upon persons or bodies affected thereby.

4.83 Under section 42 of the Electricity Regulation Act 4 of 2014, the National Energy Regulator must, in relation to any dispute arising out of the Act if it is a dispute between licensees, act as mediator, if so requested by both parties to the dispute. If it is a dispute between a customer or an end user on the one hand, and a licensee, registered person, or a person who trades, generates, transmits, or distributes electricity on the other hand, the Regulator must settle that dispute by such means and on such terms as the Regulator

thinks fit. Under section 10 of the Employment Equity Act 55 of 1998, any party to a dispute, other than a dispute about an unfair dismissal, may refer their dispute to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination. Under section 21 of the Extension of Security of Tenure Act 62 of 1997, a party may request the Director-General to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of the Act. Under the Financial Sector Regulation Act 9 of 2017, provision is made for the resolution of disputes under an industry ombud scheme. The latter is defined to mean an arrangement with the following characteristics: an arrangement established by one or more financial institutions; the purpose of which is to facilitate mediation and resolution of complaints from financial customers about financial institutions that are members of the ombud scheme; and mediation or resolution of the complaints in terms of the scheme undertaken by an ombud appointed under the ombud scheme's governing rules.

4.84 Under section 30 of the Gas Act 48 of 2001, the Gas Regulator may, with the approval of the parties to a dispute, act as mediator or arbitrator in any matter concerning the trading of gas or the rendering of services. Under section 31 of the Higher Education Act 101 of 1997, the institutional forum of a public higher education institution must advise the council on issues affecting the institution, including, among others, codes of conduct, mediation and dispute resolution procedures. One of the preamble paragraphs of the Labour Relations Act 66 of 1995 provides that this Act aims to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose. Under section 135 of the Labour Relations Act, the commissioner appointed to resolve a dispute by conciliation must determine a process to attempt to resolve the dispute which may include mediating the dispute, conducting a factfinding exercise, and making a recommendation to the parties, which may be in the form of an advisory arbitration award.

4.85 Under section 13 of the Land Court Act No. 6 of 2023,[72] if a matter is instituted in the Land Court Act, the Judge President of the Court must decide whether the matter is

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[72] See also Mqadi (Feb 2024) "The Establishment of a Specialist Land Court and the Land Court of Appeal" *NewsletterPro Bono*.

to be heard in Court or should be referred for mediation, which, in the Judge President's opinion, can deal more appropriately with the matter. The Judge President, before making a decision to refer a matter to mediation, must take all relevant circumstances into consideration, including whether mediation or arbitration in terms of any legislation took place before the institution of proceedings in the Court and the outcome thereof; the personal circumstances of the parties; the needs of and relief sought by the parties; and the nature of the intended proceedings: and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law. Further, under section 29(1), if, at any stage during proceedings, but prior to judgment, it becomes evident to the presiding judge that there is any issue which might be resolved through mediation, the presiding judge may make an order directing the parties to attempt to settle the issue through mediation, and that the proceedings be stayed pending such mediation. The details of mediation in land disputes will under section 29(3) be regulated by regulations to be developed by the Rules Board. These regulations will deal with the following, namely: the appointment of a mediator; the procedure for referral of matters to the mediator; the process by which mediation is initiated, and the form, content and use of that process; the joinder of any person having an interest in the dispute in any mediation proceedings; the proceedings of mediation; the prescribed forms to be used by parties in respect of mediation proceedings; the right of any party to be represented by any person or category of persons in any mediation proceedings, including the regulation or limitation of the right to be represented in those proceedings; the consequences for any party to mediation proceedings for not attending mediation proceedings; the qualification for appointment as mediator; the fees that are payable for mediation; the appointment, powers and functions of a mediator; and the issue of order at the conclusion of the mediation proceedings.

4.86 Under section 36 of the Land Reform (Labour Tenants Act) 3 of 1996, the Director-General may appoint one or more persons with expertise in relation to dispute resolution to facilitate meetings of interested parties, and to attempt to mediate and settle a dispute. Under section 44 of the Local Government: Municipal Finance Management Act 56 of 2003, whenever a dispute of a financial nature arises between organs of state, the parties concerned must as promptly as possible take all reasonable steps that may be necessary to resolve the matter out of court. If the National Treasury is not a party to the dispute, the parties must report the matter to the National Treasury and may request the National Treasury to mediate between the parties or to designate a person to mediate the dispute. If the National Treasury accedes to such a request, the National Treasury may determine the mediation process, provided that at least one of the organs of state

is a municipality or a municipal entity. Under section 134 of the National Credit Act 34 of 2005, as an alternative to filing a complaint with the National Credit Regulator, a person may refer a dispute following an allegation of a reckless credit agreement that could be the subject of such a complaint, if the credit provider concerned is a financial institution as defined in the Financial Sector Regulation Act, 2017, to the ombud with jurisdiction to resolve a complaint or settle a matter involving that credit provider. If the credit provider is not a financial institution, under the Financial Sector Regulation Act, the matter may be referred to either a consumer court, for resolution in accordance with the Act and the provincial legislation establishing that consumer court, or to an alternative dispute resolution agent, for resolution by conciliation, mediation or arbitration.

4.87 Under section 17 of the National Environmental Management Act 107 of 1998, a Minister, MEC or Municipal Council where a difference or disagreement arises concerning the exercise of any of its functions which may significantly affect the environment, or before whom an appeal arising from a difference or disagreement regarding the protection of the environment is brought under any law, may, before reaching a decision, consider the desirability of first referring the matter to conciliation. If the Minister, MEC or Municipal Council considers conciliation appropriate, they may either refer the matter to the Director-General for conciliation under the Act or appoint a conciliator on the conditions that they may determine. Where a conciliation or mediation process is provided for under any other relevant law administered by the Minister, MEC or Municipal Council, they may refer the matter for mediation or conciliation under such other law. If the Minister, MEC or Municipal Council considers conciliation inappropriate or if conciliation has failed, they may make a decision, but the provisions of section 4 of the Development Facilitation Act, 1995 (Act No. 67 of 1995), shall prevail in respect of decisions in terms of that Act.

4.88 Under section 31 of the National Forests Act 84 of 1998, a community forestry agreement must, among others, provide for dispute resolution through informal mediation or arbitration whether by a member of the panel established by the Minister from whom appointments of facilitators, mediators and arbitrators may be made. Instead of establishing this panel, the Minister may adopt the panel of arbitrators established in terms of section 31(1) of the Land Reform (Labour Tenants) Act of 1996, as the panel from which such appointments must be made. Under section 11 of the National Payment System Act 78 of 1998, if any Reserve Bank settlement system participant is aggrieved by a decision taken by the Reserve Bank under a provision of the Act, the matter is deemed to constitute a dispute between that Reserve Bank settlement system participant

and the Reserve Bank. The Reserve Bank settlement system participant must, within three months after the decision of the Reserve Bank, in writing, furnish the Reserve Bank with full particulars of its grievance. Thereafter the Reserve Bank settlement system participant and the Reserve Bank must attempt to settle the dispute by consensus within seven business days of the receipt by the Reserve Bank of those particulars. If the Reserve Bank settlement system participant and the Reserve Bank do not succeed in so settling the dispute, they may agree to attempt to settle the dispute by mediation within a further period of 10 business days.

4.89 Under section 13 of the National Sport and Recreation Act 110 of 1998, the Minister may, after consultation with the relevant MEC if applicable, intervene in any dispute, alleged mismanagement, or any other related matter in sport or recreation that is likely to bring a sport or recreational activity into disrepute. The Minister may further so intervene in any dispute about the non-compliance with guidelines or policies issued to promote equity, representivity and redress in sport and recreation or any measures taken to protect or advance persons or categories of persons, disadvantaged by unfair discrimination. The Minister may so intervene by referring the matter for mediation or by issuing a directive. However, the Minister may not intervene if the dispute or mismanagement in question has been referred to the Sports Confederation for resolution, unless the Sports Confederation fails to resolve such dispute within a reasonable time. The Minister may also not intervene in matters relating to the selection of teams, administration of sport and appointment of, or termination of the service of, the executive members of the sport or recreation body. If a national federation fails to adhere to a decision of the mediator or directive issued by the Minister, the Minister may direct Sport and Recreation South Africa to refrain from funding such federation, or notify the national federation in writing that it will not be recognised by Sport and Recreation South Africa, and may publish their decision in the Gazette.

4.90 Under section 150 of the National Water Act 36 of 1998, the Minister may at any time and in respect of any dispute between any persons relating to any matter contemplated in the Act, at the request of a person involved or on the Minister's initiative, direct that the persons concerned attempt to settle their dispute through a process of mediation and negotiation. The National Unity and Reconciliation Act 34 of 1995, provided for reconciliation. Under section 11 of the Pan South African Language Board Act 59 of 1995, the Board must, after an investigation of the alleged violation or threatened violation of any language right, language policy or language practice, and if it is of the view that there is substance in the allegation, by mediation or conciliation or

negotiation, endeavour to resolve and settle any dispute, or to rectify any act or omission, arising from or constituting a contravention or infringement of legislation or alleged contravention or infringement of legislation, language policy or language practice, or a violation of or threat, or alleged violation of or threat to any language right. Under section 30A of the Pension Funds Act 24 of 1956, complainants who are aggrieved about the administration of a pension fund, the investment of its funds or the interpretation and application of its rules, must lodge a written complaint to the board of the pension fund for its consideration. If the complainant the complainant is not satisfied with the reply by the fund, or if the fund or the employer who participates in the fund fails to reply within 30 days after the receipt of the complaint, the complainant may lodge a complaint with the Pension Fund Adjudicator. Under section 30D, the Adjudicator disposes of a complaint in a procedurally fair, economical and expeditious manner.

4.91 Regulation 12 made under the Petroleum Pipelines Act 60 of 2003, regulates mediation of disputes arising under the Act. Under section 17 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, if the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land, the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute under the Act. If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or their nominee, may, on the conditions that they may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and attempt to mediate and settle any dispute in terms of the Act. Since 2023, the amended the Customer Care Standards Regulations applicable to Postal Service Licensees, made by the Independent Communications Authority of South Africa (ICASA), provide for ADR. ADR is defined to mean a process or mechanism that helps resolve a customer's complaint through mediation. Licensees must publish a designated contact point for all customer complaints, and acknowledge receipt of a complaint from a customer, within three days upon receipt thereof. Upon the resolution of a complaint, or after fourteen days, whichever is sooner, a Licensee must advise the customer of the right to escalate the matter to the Authority should the customer dispute the outcome. An escalated complaint may be referred to the Authority's ADR process, as set out in the Consumer Complaints Procedure, should a Licensee not be able to resolve the complaint. Under Regulation 13 of the End-User and Subscriber Service Charter Regulations made by ICASA under the Electronic Communications Act 36 of 2005, an

end-user and subscriber may refer a complaint to the Authority's ADR where a licensee was not able to resolve a complaint.

4.92 Under section 21(4) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, an equality court may during or after an inquiry, refer its concerns in any proceedings before it, particularly in the case of persistent contravention or failure to comply with a provision of the Act or in the case of systemic unfair discrimination, hate speech or harassment to any relevant constitutional institution for further investigation, or any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation. Under section 29 of the Property Practitioners Act 22 of 2019, the Property Practitioners Regulatory Authority may, if it believes that a complaint may be resolved through mediation, or on application by the person concerned, refer the complaint for mediation. Under section 6(4)(b) of the Public Protector Act 23 of 1994, the Public Protector may endeavour, to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation. Under section 13(2) of the Rental Housing Act 50 of 1990, where the Rental Housing Tribunal is of the view that a dispute may constitute an unfair practice dispute and that such dispute may be resolved through mediation, it may appoint a mediator, with a view to resolving the dispute. Under section 6 of the Restitution of Land Rights Act 22 of 1994, the Commission on the Restitution of Land Rights must, at a meeting or through the Chief Land Claims Commissioner, a regional land claims commissioner or a person designated by any such commissioner, among others, mediate and settle disputes arising from land claims. Under section 3 of the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991, provision is made for mediation proceedings in certain civil matters. Under section 19 of the Skills Development Act 97 of 1998, disputes about learnerships may be resolved by the CCMA through conciliation. Under section 11 of the South African Institute for Drug-Free Sport Act 14 of 1997, when any national sports federation and sports organisation fails to co-operate with the Institute the failure must be reported to the Minister, who may refer the matter for mediation to resolve the matter.

4.93 In September 2023 the Department of Transport published proposed amendments to the Road Accident Fund Act 56 of 1996 for general comment. The draft Road Accident Fund Amendment Bill seeks to insert section 24A into the Road Accident Fund Act to provide for alternative dispute resolution. Under section 24A(1), the Fund will specify alternative dispute resolution procedures for the resolution of complaints. Under section 24(2), only once the alternative dispute resolution process fails to resolve

a dispute may the complaint be referred to the Adjudicator. Clause 24B seeks to establish the Office of the Road Accident Fund Adjudicator. Under Regulation 6, made under the State Information Technology Agency Act 88 of 1998, a department and the Agency must make every reasonable effort to settle a dispute between them amicably through conciliation and negotiation within 30 days after the aggrieved party gave written notice to the other party. If a dispute cannot be so settled or the subject-matter of the dispute necessitates settlement before the end of the required 30 day-period, either party to the dispute may refer the matter to the Minister for mediation. If mediation then fails, either party may refer the dispute for arbitration to the office of the State Attorney. Under section 4 of the South African Human Rights Commission Act 40 of 2013, the Commission may, by mediation, conciliation or negotiation, endeavour to resolve any dispute or to rectify any act or omission, emanating from or constituting a violation of or threat to any human right. On 23 March 2023, the South African Revenue Service published amended Rules, promulgated under section 103 of the Tax Administration Act 28 of 2011. These rules prescribe the procedures a taxpayer need follow in lodging an objection and appeal against a tax assessment or a SARS decision subject to objection and appeal referred to in section 104(2) of the Act, procedures for alternative dispute resolution, the conduct and hearing of appeals, application on notice before a tax court and transitional rules.[73] Important is section 146 of the Tax Administration Act which lists the circumstances where the settlement of a dispute is appropriate. This section empowers the Commissioner, if it is to the best advantage of the state, to settle a dispute, in whole or in part, on a basis that is fair and equitable to both the taxpayer concerned and to SARS, having regard to whether the settlement would be in the interest of good management of the tax system, overall fairness, and the best use of SARS' resources; and SARS' cost of litigation in comparison to the possible benefits with reference to the prospects of success in court. Further, whether there are any complex factual issues in contention; or evidentiary difficulties, which are sufficient to make the case problematic in outcome or unsuitable for resolution through the alternative dispute resolution procedures or the courts; a situation in which a participant or a group of participants in a tax avoidance arrangement has accepted SARS' position in the dispute, in which case the settlement may be negotiated in an appropriate manner required to unwind existing

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[73] For comments made about these amended rules, see Visser (Oct 2024) "Amendment to ADR process may resolve tax disputes faster"; Bouwer & Moore Choate (March 2023) "New Tax Dispute Resolution Rules"; Sebatana (April 2023) "Key changes to the dispute resolution rules"; Moosa (2023) "Review of the new ADR process for tax disputes" *TSAR* 660 to 680.

structures and arrangements; or whether settlement of the dispute is a cost-effective way to promote compliance with a tax Act by the person concerned or a group of taxpayers.

3 Discussion

4.94 The question for consideration is how the proposed legislation should apply generally to mediation. Should there be a default position under which the legislation will apply to a mediation and should parties also be allowed to opt in or opt out of the legislation? We are of the view that the default position on the application of the legislation should be that the legislation will apply to all mediations under the Mediation Bill. This will generally mean where the disputants are required to mediate by law or when they are directed by a court to mediate their dispute. We consider that the parties to a private mediation should be able to contract into aspects of the Act, since the principle of party autonomy means that parties should have the freedom to contract out of provisions of the legislation that they do not regard as essential. However, we also think that certain provisions should apply generally to all mediations. We analyse below the clauses which we consider ought to apply generally and those parties will be able to opt out of and exclude the application in their mediation.

4.95 Moreover, we highlight that although the Mediation Bill is a general enabling Bill, it also applies in two specific contexts, firstly, court-attached or court-connected mediation, and, secondly, the enforcement of cross-border international commercial mediation settlement agreements. The rest of the Mediation Bill contains the general enabling provisions. We consider that our approach is defensible to provide for these two specific areas in the Bill, and that there is a need for these provisions. We are of the view that excluding these provisions from the Bill would lead to unnecessary delays in the development of this area of the law. We, however, invite comments on whether these two specific areas should be separated from the proposed Mediation Bill and the reasons for adopting such an approach.

4.96 Our clause 11 deals with the requirements and consequences of disputant parties concluding agreements to mediate. Since the Bill requires mediation agreements to be in writing, an oral agreement to mediate a family dispute by a priest, pastor or a community mediation will be excluded from the operation of the legislation. These mediations would be informal, and they would fall outside the operation of the Act, since clause 11 restricts mediation to an agreement in writing. Another example of a category of mediations which will be excluded from the operation of the legislation is the

“playground mediations” by learners who conduct mediation in the school playground environment and who are trained as school ground mediators to resolve disputes. Each of those spheres would have their own regulatory frameworks, whether they be informal or formalised. We have also noted legislation which regulates ADR in more than 40 statutes above. The general principle is that the specific provisions in these statutes will apply and not the general provisions of the Mediation Bill.

4.97 Clause 12 deals with the appointment of a mediator. It requires that disputants appoint a certified mediator. We consider that if it is a statutory mediation or if it is a court ordered mediation or if the parties have contracted into the Act then the mediator has to be certified. We would be hesitant to require that in all private mediations where the mediation agreement is in writing, the mediator must be certified. The general rule should be that the parties are required to appoint a certified mediator but in any private mediation, i.e. a mediation other than court ordered or required by law, the parties may appoint a suitably qualified mediator who does not need to be certified. Clause 12 should therefore not generally apply to private mediations. A party under clause 12(5) seeking the assistance of a service provider that only applies for the appointment of a certified mediator is a permissive provision. The guidelines in 12(6) and (7) are useful if parties decide to seek the assistance of a service provider to appoint a mediator. Where the parties have chosen their private mediator and they thought the priest or pastor was a suitable candidate it is fine, and if the pastor has a financial interest or some other disqualification, then that should apply against the appointment of that priest or pastor. There is, however, no reason why the mediator’s duty of disclosure under clause 12(8), and also clause 12(10) which proposes that no appointment of the mediator is valid except with the written consent of the mediator, should not generally apply also to private mediations, i.e. a mediation not court ordered or required by law if parties entered into an agreement to mediate in writing. We further qualify clause 12 to clarify a certified mediator must be appointed if the mediation is required by law or is court ordered but that a certified mediator is not required in the other mediations but is left to the choice of the disputants.

4.98 Clause 13 deals with the grounds for the termination of the appointment of a mediator. In private mediation the parties may wish that some of the provisions regulating termination be available to the parties, but it need not be so prescriptive that the parties are restricted. We propose that the parties may agree in writing whether this provision will apply to their mediation. Clause 14 deals with the effect of mediation on time limits. We consider this provision should apply generally to all mediations and that parties

should not be permitted to opt out of the application of this provision if the parties enter into a mediation agreement. Clause 15 deals with the suspension of court proceedings which are subject to a mediation agreement. We are of the view that this clause should generally apply to all mediations and that parties should not be permitted to opt out of the application of this provision. Clause 16 deals with the liability of a mediator. We note the utility of providing for the liability of mediators. Disputant parties ought not to be encouraged to contract out of this provision. Therefore, this clause ought to apply in principle to all mediations and parties should not be permitted to opt out of the application of this provision. Clause 17 provides for the procedure to be followed at a mediation and the role of the mediator. This clause leaves the procedure to be adopted to the mediator after consultation with the parties. We consider in respect of clause 17(7) that legal presentation should not be left to the decision of the mediator as to whether parties can have legal representation. Clause 17(7) should be read with clause 22 which provides that a party may be assisted by a legally practitioner or other person in a mediation unless the parties agree otherwise. We consider that this clause should also apply generally to mediations regardless whether they are court ordered or required by the law or a private mediation.

4.99 Clause 18 deals with the date of the commencement of the mediation process and the time limit for completion of a mediation. We consider clause 18(1) deals with all the possibilities. This position should apply generally rather than the legislation making it possible for parties to reopen complex situations. However, we provide for parties in clause 18(2) that unless otherwise agreed by the parties, the time limit for the completion of a mediation is 30 days from the commencement of the mediation. It is therefore possible that the parties can agree on a time limit for completion of the mediation in a period other than 30 days. Clause 19 deals with the parties submitting information to the mediator which is a standard and non-contentious provision in any mediation agreement. We do not identify any problem with providing for its general application to all mediations. Therefore, we do not suggest that parties should be able to opt out of this provision in their mediation agreements. Clause 20 deals with confidentiality of mediation and clause 21 with legal privilege in mediation proceedings. These two provisions should apply generally to all mediations. Parties should not be able to opt out of these provisions in their mediation agreements.

4.100 Clause 22 provides for the right of dispuntants to be assisted by a legal practitioner or another person. We realise the utility of providing for the right of disputants to be assisted by legal representatives or another person of their choice unless they

otherwise agree. We consider this provision should also generally apply to mediations if the parties enter into a mediation agreement. Clause 23 regulates mediated settlement agreements and their enforcement. We consider their operation would be beneficial in mediation and should generally apply to all mediations if the parties enter into a mediation agreement. Clause 24 deals with the termination of a mediation and provides clarity when a mediation terminates. We consider it should also apply generally to all mediations if the parties enter into a mediation agreement. Clause 25 deals with the certification of a mediation outcome. We consider it is a very useful provision which should generally apply to all mediations if the parties enter into a mediation agreement. Clause 26 deals with unconditional and without prejudice tenders. It is an uncontentious provision and should generally apply to all mediations if the parties enter into a mediation agreement. Clause 27 regulates the role of experts and non-parties in mediations. This is also an uncontentious provision which should apply generally to all mediations if the parties enter into a mediation agreement.

4 Proposal

4.101 We propose that the default position on the application of the legislation in clause 4(1) is that the legislation applies to a mediation where the disputants are required to mediate a matter in accordance with the provisions of the proposed legislation. We further propose that parties to a mediation not otherwise covered by clause 4(1), may agree in writing that the provisions of sections 11 to 13 of the Bill will apply to their mediation: provided that the parties may not exclude the application of sections 12(8) and 12(10) from their mediation. We propose in clause 4(3) that the provisions of clauses 12(8), 12(10) and clauses 14 to 27 of the Bill shall apply to any mediation not otherwise covered by clause 4(1) if the parties enter into a mediation agreement. This is to clarify that only where the parties enter into an agreement, they have a duty to include these provisions. However, we further propose in clause 4(4) that mediations to which the Bill does not apply, it is nevertheless good practice to implement and comply with the principles set out in Chapters 4 and 5 of the Bill. The legislation should at least give some indication that these principles of Chapter 4 and 5 should also govern informal mediation although they may not have the force of law.

4.102 We further propose in clause 4(5) that subject to our clause 4(8), which deals with the Family Dispute Resolution Act (which is presently being developed also by the Commission), the provisions of the Mediation Bill only apply to mediations required by any other law to the extent that the provisions of this Bill are not inconsistent with that

other law or with the regulations or procedure authorised or recognised by that other law. This clause clarifies that the provisions of the Mediation Bill are subject to the provisions of any other applicable legislation, e.g. the Labour Relations Act, the Traditional Courts Act, the Companies Act, the Land Court Act, and a large number of other statutes which provide for alternative dispute resolution which we have noted above.

4.103 The question arises whether the Mediation Bill ought to provide for mediation in public administration matters, such as for example disputes which may arise from the administration of estates by the Master's Office. There may be more disputes which arise in the public administration sphere. We have clarified in this paper that the specific provisions in Chapter 7 relate to mandatory mediation in litigated civil matters. There is in all probability scope to establish mediation processes for the resolution of disputes regarding public administration matters, if these are disputes that are appropriate for resolution by mediation in accordance with the mechanisms established by the Mediation Bill. We therefore invite comment whether there are disputes regarding public administration matters that should explicitly be regulated in accordance with the provisions of the Mediation Bill?

4.104 We further propose in clause 4(6) that Chapter 8 of the Mediation Bill applies only to international commercial mediation settlement agreements. We propose in clause 4(7) that if any provision of the Mediation Bill or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of the Act are severable. We finally propose in clause 4(10), that the provisions of the proposed legislation apply to any mediation conducted in terms of the Family Dispute Resolution Act, 20…, to the extent that such matter has not been dealt with in the Family Dispute Resolution Act; and the applicable provision of the proposed Bill is capable of operating concurrently with the provisions of the Family Dispute Resolution Act, 20 …

4.105 We therefore propose the following application clause:

> **Application**
>
> **4.**(1) This Act applies to a mediation in which the mediation parties are required to mediate in accordance with the provisions of this Act.
>
> (2) Parties to a mediation not covered by subsection (1) may agree in writing that the provisions of sections 11 to 13 of this Act will apply to their mediation, but may not exclude the application of sections 12(8) and 12(10) from their mediation.

(3) The provisions of section 12(8), 12(10) and sections 14 to 27 of this Act shall apply to any mediation not covered by subsection (1) if the parties enter into a mediation agreement.

(4) In a mediation to which this Act does not apply, it is nevertheless good practice to implement and comply with the principles set out in Chapters 4 and 5 of this Act.

(5) Subject to subsection (8), the provisions of the Mediation Bill only apply to mediations required by any other law to the extent that the provisions of this Bill are not inconsistent with that other law or with the regulations or procedure authorised or recognised by that other law.

(6) Chapter 8 of this Act applies only to international commercial mediation settlement agreements.

(7) If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect to without the invalid provision or application, and to this end the provisions of this Act are severable.

(8) The provisions of this Act apply to any mediation conducted in terms of the Family Dispute Resolution Act, 20…, to the extent that –

(a) such matter has not been dealt with in the Family Dispute Resolution Act; and

(b) the applicable provision of this Act is capable of operating concurrently with the provisions of the Family Dispute Resolution Act, 20…

CHAPTER 5: RECOURSE TO MEDIATION AND THE MEDIATION PROCESS

A Agreement to mediate: clause 11

1 Background

5.1 Next we consider how other jurisdictions and South Africa regulate the initiation of mediation and agreements concluded whereby disputants agree to mediate their dispute.

5.2 Under the 2014 South African Magistrates' Court Rules, a party wishing to submit a dispute to mediation prior to the commencement of litigation, had to make a request in writing to the clerk or registrar of the court, with jurisdiction to hear the matter, if litigation were to be commenced. The request had to indicate whether relief was being claimed by or against the party seeking to mediate and the full names of the other party or parties or name or names by which the other party or parties to the dispute are known to the party seeking mediation. The request had to further indicate the nature of the dispute and the material facts on which the dispute was based. The clerk or registrar of the court had to inform all other parties to the dispute that mediation of the dispute was being sought.

5.3 The clerk or registrar had to further call upon the party seeking mediation and all other parties to the dispute to attend a conference within 10 days, for the purposes of determining whether all or some of the parties agree to submit the dispute to mediation. If at this conference some or all the parties between whom mediation was possible, agreed to submit the dispute to mediation, the clerk or registrar of the court had to in collaboration with the parties appoint a mediator. If the parties could not agree on a mediator, the clerk or registrar of the court had to appoint a mediator and had to confer with the mediator and set the date, time and venue for mediation.

5.4 The clerk or registrar had to assist the parties to conclude a written mediation agreement, which they had to sign. The written mediation agreement had to contain the particulars of the disputants seeking mediation; their physical and postal addresses; their

facsimile numbers or electronic mail addresses; a statement that the parties had agreed to mediate the dispute between them; the date, time and venue of the mediation; the name of the mediator; the period of time that would be allocated for each mediation session; and the time within which mediation would be concluded and the method by which any periods or time limits could be extended. The agreement to mediate further had to explain the confidentiality and privilege attaching to disclosures at the mediation and the consequences of any party not abiding by the agreement. Where there were multiple parties to the dispute, the agreement had to explain that the terms of the settlement agreement were not binding on any party who had not participated in mediation. These requirements were not included in the amended Magistrates' Courts Rules of 2023.

5.5 Under the Uniform Rules of the High Court the plaintiff or applicant must, in every new action or application proceeding, together with the summons, combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether the plaintiff or applicant agrees to or opposes referral of the dispute to mediation.[1] The Rule further requires of a defendant or respondent when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, to serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether the defendant or respondent agrees to or opposes referral of the dispute to mediation.[2] The notices must clearly and concisely indicate the reasons for such party's belief that the dispute is or is not capable of being mediated.

5.6 The 2023 Rules of the Magistrates' Court follow the approach of the Uniform Rules of the High Court, which requires parties to serve notices indicating their agreement or opposition to referring their dispute to mediation. [3]

5.7 However, in April 2023 and April 2024, the Rules Board announced that it contemplated aligning the provisions of Magistrates' Courts Rule 72 with the provisions of Uniform Rule 41A(2), which regulate the notice agreeing to or opposing mediation in

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1 Rule 41A(2)(a).

2 Rule 41A(2)(b).

3 Rule 72.

the Magistrates' Courts and the High Court, respectively.[4] The Rules Board explained that during 2023, and arising out of operation of Uniform Rule 41A in practice and from judgments, the Rules Board considered that certain amendments to the rule were either necessary or at least desirable for achieving the objects of mediation and the rule. The Rules Board noted that the Rules do not indicate what ought to happen in urgent applications if a party is unable to comply with the required notice. This applied particularly under applications brought under the Prevention of Organised Crime Act 121 of 1998. The Rules Board noted that under Rule 41A(9), when the court considers an order for costs, the court may have regard to the required notices and any relevant factor requiring the parties to seriously consider mediation. The Rules Board therefore proposed the insertion in Rule 41A(2) of the phrase "in urgent applications the court or a judge may dispense with compliance with paragraphs (a) and (b)". We note the judicial concern expressed in 2023 of parties circumventing mediation based on urgency.[5]

5.8 The Mediation Rules of the Hong Kong International Arbitration Centre (HKIAC) regulate the initiation of the mediation process.[6] If a dispute arises, a party may request the initiation of mediation by delivering a written request for mediation to the other party or parties with copies to HKIAC. The request must contain a brief self-explanatory statement of the nature of the dispute, the quantum in dispute, the relief or remedy sought and nominating a suitable mediator or mediators. The names, addresses, phone and fax numbers of all parties to the dispute, and those who will represent them, must be exchanged between the parties and furnished to the HKIAC. A party who receives a request for mediation must notify any other party and HKIAC within 14 days after receipt of the request whether any mediator nominated is acceptable. [7] Failure by any party to reply within 14 days is treated as a refusal to mediate.

5.9 Under the 2010 Alternative Dispute Resolution Act of Ghana,[8] a party to any mediation agreement may with the consent of the other party submit any dispute arising out of that agreement to mediation by an institution or a person agreed on by the parties.

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4 Rules Board Invitations to Comment aligning the provisions of Magistrates Courts Rule 72 with the provisions of Uniform Rule 41A(2). The closing date for comment was 30 June 2024.

5 *D.D v I.L* (16939/2024) [2024] ZAWCHC 215 (20 Aug 2024) para [16].

6 Rule 3.

7 Rule 4.

8 Section 63.

A submission to mediation must briefly state the nature of the dispute. A submission to mediation must, unless the parties agree otherwise, be confirmed in writing and must state the names, addresses, e-mail addresses and telephone numbers of the parties and, briefly, the nature of the dispute. Mediation proceedings commence when the other party accepts the invitation for mediation. An acceptance by telephone or verbally must be confirmed in writing. Failure to confirm an acceptance does not invalidate the mediation proceedings. Failure by the other party to accept the invitation to mediation within 14 days after receipt of the invitation or within the period specified in the invitation is a rejection of the invitation.

5.10 Under the 2012 Mediation Act of Malaysia, a disputant may initiate mediation by sending to the party with whom they have a dispute, a written invitation. The written invitation must briefly specify the matters in dispute. Upon receipt of a written invitation, that person may, in writing, accept the written invitation. Any disputants may, before commencing any civil action in court or arbitration, initiate mediation.

5.11 Under the 2023 Mediation Act of India, a mediation agreement must be in writing to submit to mediation all or certain disputes which may arise between the parties.[9] The agreement could also be an exchange of communications or letters;[10] and any pleadings or any other proceedings.[11] The parties may agree to submit to mediation any dispute arising between them under an agreement, whether entered into prior to the dispute arsing or subsequent thereto.[12]

5.12 Under the Mediation Act of Ireland of 2017, a mediation agreement may be in the form of a clause in a contract or the form of a separate agreement,[13] and must be in writing.[14] It is in writing if its content is recorded in any form, whether or not the mediation agreement has been concluded orally, by conduct or by other means.[15] The 2017 Mediation Act of Singapore deals in identical terms to the Mediation Act of Ireland in the

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9 Clause 4(1).

10 As provided under the Information Technology Act, 2000.

11 Clause 4(3).

12 Clause 4(5).

13 Section 4(2).

14 Section 4(3).

15 Section 4(4).

form of mediation agreements.

5.13 The 2012 Mediation Act of Malaysia regulates mediation agreements in less detail. Upon the commencement of a mediation,[16] the parties shall enter into a mediation agreement.[17] A mediation agreement must be in writing and signed by the parties.[18] A mediation agreement must contain an agreement by the parties to submit to mediation disputes which have arisen or which may arise, the appointment of a mediator, the costs to be borne by the parties and other matters the parties deem appropriate.[19]

5.14 Under the Arbitration and Mediation Act of Nigeria, if the initiation of mediation is prescribed by statute as a condition for conducting judicial or other proceedings, or where the parties agreed by a mediation agreement to attempt to resolve their dispute by mediation proceedings before resorting to judicial or other proceedings, the party concerned must propose to the other party, in writing, the conclusion of a mediation agreement.[20] Where that party does not receive an acceptance of the invitation within 30 days from the day on which the invitation was sent, or within any other time as specified in the invitation, the party may treat this as a rejection of the invitation to mediate.[21] A party may propose to the other party, recourse to mediation, regardless of other judicial or arbitral proceedings, before, during or after the initiation of the judicial proceedings.[22]

2 Discussion

5.15 The 2014 Rules of the Magistrates' Courts and foreign legislation deal appropriately with the initiation of mediation and agreements to mediate. We fully understand the requirement that a mediation agreement be in writing. We note that the additional requirement is imposed in mediation statutes that the agreement also be signed by the parties. The South African arbitration statutes of 1965 and 2017 require the arbitration agreement to be in writing, but it is not required to be signed. We support

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16 As specified under subsection 5(4).

17 Section 6(1)

18 Section 6(2).

19 Section 6(3).

20 Section 70(1).

21 Section 70(2).

22 Section 70(3).

that the mediation agreement should not need to be signed, but that it should be in writing. We therefore propose that where parties enter into an agreement to mediate, it must be in writing.

5.16 We further considered including in clause 11(2) that an agreement to mediate under this Act may contain an agreement by the parties to mediate the disputes which have arisen; the appointment of a mediator; the costs to be borne by the parties; and other matters the parties deem appropriate. We did not wish to invalidate mediation agreements which have been entered into because of the failure of parties to comply with clause 11(2).[23] We decided against the inclusion of clause 11(2) in the Mediation Bill due to the risk of mediation agreements being invalid should they not comply with the proposed clause. We therefore invite comment on the exclusion of clause 11(2).

3 Proposal

5.17 We propose the following clause on mediation agreements:

Agreement to mediate

11.(1) An agreement to mediate must be in writing.

(2) Where the parties have not entered into an agreement to mediate as contemplated in subsection (1), a person may initiate mediation by sending to the person with whom they have a dispute, a written invitation regarding the mediation

(3) The written invitation referred to in subsection (2) must briefly specify the matters in dispute.

(4) Upon receipt of a written invitation sent by the person initiating the mediation under subsection (2), the person with whom they have a dispute may, in writing, accept the written invitation, where there is a prior agreement to mediate as contemplated in subsection (1).

(5) If a party that invited another party to mediate does not receive an acceptance of the written invitation within 15 days from the day on which the invitation was sent, or within such longer period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to

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[23] We omitted clause 11(2) and request in particular comment on the inclusion or exclusion in the Bill of this clause:

11(2) An agreement to mediate under this Act may contain an agreement by the parties to –

(a) mediate the disputes which have arisen;

(b) the appointment of a mediator;

(c) the costs to be borne by the parties; and

(d) other matters the parties deem appropriate.

mediate.

(6) Once the written invitation of the person who initiates the mediation is accepted by the other party, the parties must enter into an agreement to mediate, if they have not entered into an agreement to mediate as contemplated in subsection (1).

4 Appointment of mediator: clause 12

(a) Background

5.18 Under the 2010 ADR Act of Ghana, unless the parties otherwise agree, there is one mediator, and where there is more than one mediator, the mediators shall act jointly.[24] The parties to a mediation may appoint any person or institution the parties consider acceptable to serve as a mediator.[25] Parties may request the assistance of a suitable institution or person in the appointment of a mediator. They may request the institution or person to recommend the names or provide a list of suitable persons to serve as mediators; or to conduct the mediation. Under the ADR Act,[26] in recommending a person to be a mediator, an institution or person must have regard to the independence and impartiality of that person and take into consideration the background of the parties. An institution or person that is requested to recommend a mediator may not recommend a person to serve as a mediator if that person has a financial or personal interest in the outcome of the dispute. The mediator has a duty to make disclosures.[27] A person appointed a mediator must before accepting the appointment, disclose any circumstance that may create a likelihood of bias; or affect the conduct of the mediation. A mediator must promptly disclose to the parties any circumstances that arise during the mediation which are likely to affect their impartiality; or to conduct of the mediation. Parties to a mediation may replace a mediator who makes such a disclosure.

5.19 Under the ADR Act of Ghana,[28] the parties may replace a mediator who without reasonable cause fails to start work within the period agreed by the parties; or operate within the ground rules of the mediation. The parties to the dispute may appoint another

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24 Section 64.

25 Section 65.

26 Section 66.

27 Section 68.

28 Section 69.

mediator to replace a mediator who is unable to perform the functions of a mediator.[29]

5.20 Under the 2017 Mediation Act of Ireland, prior to the commencement of the mediation, the parties and the proposed mediator must prepare and sign an agreement to mediate appointing the mediator. It must contain the following information,[30] namely the manner in which the mediation is to be conducted; the manner in which the fees and costs of the mediation will be paid; and the place and time at which the mediation is to be conducted. Further information the mediator has to provide is that the mediation is to be conducted in a confidential manner; the right of each of the parties to seek legal advice; the manner in which the mediation may be terminated;[31] and such other terms, if any, as may be agreed between the parties and the mediator.

5.21 Under the Mediation Act of Malaysia, the parties must appoint a mediator to assist them in the mediation.[32] An appointed mediator must possess the relevant qualifications, special knowledge or experience in mediation through training or formal tertiary education; or satisfy the requirements of an institution in relation to a mediator.[33] The parties may request assistance from the institution to appoint a mediator or mediator on their behalf.[34] The appointment of a mediator must be made by way of a mediation agreement. There shall be one mediator for mediation unless the parties agree otherwise.[35] If there is more than one mediator, the mediators shall act jointly in the mediation.[36] No appointment of any mediator will be valid except with the prior written consent of the mediator.[37] An appointed mediator must disclose, before accepting the appointment, any known facts that a reasonable person would consider likely to affect their impartiality as a mediator, including financial or personal interest in the outcome of the mediation.[38] The mediator may be paid a fee or given any other consideration as

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29 Section 70.

30 Section 7.

31 Subject to section 6(6).

32 Section 7(1).

33 Section 7(2).

34 Section 7(3).

35 Section 7(4).

36 Section 7(5).

37 Section 7(6).

38 Section 7(7).

agreed between the parties.[39]

5.22 Under the HKIAC Mediation Rules where the parties agree on a mediator and the proposed mediator is willing to serve, they will notify HKIAC.[40] The mediation must then proceed in accordance with the Rules. If the parties fail to agree within the time stipulated of 14 days, they will notify HKIAC who shall appoint a single accredited mediator who is prepared to serve and is not disqualified. Under the HKIAC Mediation Rules, no person may act as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation except by consent of the parties.[41] Before accepting an appointment, the proposed mediator must disclose to the parties (and to the HKIAC if the HKIAC has made the appointment) any circumstances likely to create a presumption of bias or prevent a prompt resolution of the dispute. Upon receipt of the information HKIAC must immediately communicate the information to the parties for their comments. If any party objects to the proposed mediator within 7 days that mediator may not be appointed, in which case the HKIAC must nominate another suitable accredited mediator.

(b) Discussion

5.23 The Mediation Act of Malaysia contains the required elements and deals adequately with the appointment of mediators. Based on party autonomy, the parties may appoint any person to be their mediator in terms of a mediation agreement. However, if it is a statutory mediation or if it is a court ordered or if the parties have contracted into the Act then we consider the mediator must be certified. We would be hesitant to require that in all private mediations where the mediation agreement is in writing the mediator must be certified.

(c) Proposal

5.24 We propose the following clause to regulate the appointment of a mediator:

> **Appointment of mediator**
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> 12.(1) If a mediation is required by law or ordered by a court, the parties must appoint a certified mediator to assist them in the mediation, provided that in a

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39 Section 7(8).

40 Rule 5.

41 Rule 6.

mediation other than mediation required by law or court ordered, the parties may agree to appoint any mediator to assist them.

(2) There should be one mediator, unless otherwise agreed.

(3) Where there is more than one mediator, the mediators must act jointly in the mediation.

(4) The parties must endeavour to appoint a mediator by agreement, unless a different appointment procedure has been indicated by a court, statute or contract.

(5) The parties may seek the assistance of a service provider for appointing a certified mediator by –

(a) requesting a service provider to recommend suitable candidates; or

(b) agreeing that the selection must be made directly by the service provider, in which case the parties must subsequently appoint the selected mediator.

(6) In recommending or selecting individuals to act as mediator, the service provider must have regard to:

(a) The professional expertise and qualifications of the prospective mediator, including expertise in the subject matter in dispute, experience as a mediator and ability to conduct the mediation;

(b) Any relevant certification of a prospective mediator, awarded by the Council, or in the absence of a Council, any relevant certification by an organisation recognised by the Chief Justice;

(c) The availability of the mediator;

(d) Such considerations as are likely to secure the appointment of an independent and impartial mediator and

(e) the complexity of the subject matter in dispute, and any diversity between the parties.

(7) When a person is approached in connection with a possible appointment as mediator, that person must –

(a) disclose, as soon as is practical before accepting an appointment, any circumstances that a reasonable individual would consider likely to give rise to justifiable doubts as to their impartiality or independence, including the disclosure of details of any personal, professional, financial or other interest that may influence the outcome of the mediation;

(b) from the time of appointment and throughout the mediation, without delay, disclose to the parties any such circumstances as they arise; and

(c) at the request of a party, disclose the mediator's qualifications to mediate a dispute.

(8) Prior to accepting the appointment, the prospective mediator must ensure their availability to conduct the mediation diligently and efficiently.

(9) No appointment of the mediator is valid except with the written consent of the mediator.

5 Termination of appointment of mediator: clause 13

(a) Background

5.25 Under the 2012 Mediation Act of Malaysia,[42] if a mediator appointed under the Act no longer possesses the relevant qualifications, special knowledge or experience in mediation as required; no longer satisfies the requirement of an institution in relation to a mediator as required; is found to have financial or personal interest in the dispute; is found to have obtained his appointment by way of fraud; or is unable to serve as a mediator for the mediation, the parties may terminate the appointment of the mediator and appoint another mediator for the mediation or request the institution to appoint another mediator. The parties may terminate the appointment of a mediator for any reason and shall inform the mediator of the reason for the termination.

(b) Proposal

5.26 The Mediation Act of Malaysia provides a basis to regulate the termination of the appointment of a mediator. We therefore propose the following clause on the termination of the appointment of a mediator:

Termination of appointment of mediator

13.(1) If a mediator appointed under this Part—

(a) is found to not possess the relevant qualifications, special knowledge or experience in mediation as required under section 12(6)(a);

(b) is found to no longer satisfy the requirement of an institution in relation to a mediator as required under section 12(6)(b);

(c) is found to have financial or personal interest in the dispute;

(d) is found to have obtained his appointment by way of fraud or any other improper means; or

(e) is unable to serve as a mediator for the mediation,

the parties may terminate the appointment of the mediator and appoint another mediator for the mediation or request the designated service provider to appoint another mediator.

(2) Notwithstanding subsection (1), the parties may agree to terminate the appointment of a mediator, or agree to replace a mediator at any time, for any reason.

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42 Section 8.

6 Effect of mediation on time limits: clause 14

(a) Background

5.27 Under the 2023 Mediation Act of India,[43] in computing the period of the prescription determined for any proceedings relating to disputes in respect of which mediation has been undertaken under the Act, the period from the date of commencement of mediation, up to the submission of the non-settlement report or the termination of mediation, must be excluded.

5.28 Under the 2017 Uniform Mediation Act of the Organization for the Harmonization of Business Law in Africa (OHADA),[44] unless otherwise agreed by the parties, the commencement of the mediation process shall suspend the prescription of the action. If the mediation process ends without any mediation agreement, prescription will commence again, for a period of no less than six months, from the date on which the mediation process ended without an agreement having been reached.

5.29 Under the 2017 Mediation Act of Ireland,[45] in reckoning a period of time for the purposes of a limitation period, the period beginning on the day on which an agreement to mediate is signed and ending on the day which is 30 days after either a mediation settlement is signed by the parties and the mediator, or the mediation is terminated, whichever first occurs, must be disregarded. The mediator in mediation must inform the parties in writing of the date on which the mediation ends. Mediation under the Mediation Act of Malaysia shall not prevent the commencement of any civil action in court or arbitration nor shall it act as a stay of, or extension of any proceedings, if the proceedings have been commenced.[46]

5.30 Under the South African Uniform Rules of the High Court the time limits prescribed by the Rules for the delivery of pleadings and notices and the filing of affidavits or the taking of any step is suspended for every party to the dispute from the date of signature of the joint signed minute, which records the election of the parties to refer the

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43 Section 29.

44 Article 4.

45 Section 18.

46 Section 4(2).

dispute to mediation, to the time of the conclusion of mediation.[47] Any party to the proceedings who considers that the suspension of the prescribed time limits is being abused may apply to the court for lifting the suspension of the prescribed time limits. Furthermore, mediation must be completed within 30 days from the date of signature of the joint minute, from which date the suspension of the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any steps will lapse. If the mediation is completed before the period of 30 days, the parties who engaged in mediation must deliver a notice to the registrar and all other parties indicating that mediation has been completed.

5.31 Under the 2023 South African rules of the magistrates' court the time limits prescribed by the rules for the delivery of pleadings and notices, the filing of affidavits or the taking of any step by any litigant are suspended from the time of conclusion of an agreement to mediate to the conclusion of the mediation proceedings.[48] These Rules follow the wording of the Uniform Rules of the High Court.

(b) Views of stakeholders in expert meeting in October 2017

5.32 The question was asked whether it was a good idea that prescription, after a specific period, should be covered in the envisaged legislation.[49] When would an agreement to mediate or a mediation process interrupt prescription, when would the interruption period end with or without a settlement, and how should the period be defined? A concern was noted about how abuse may be prevented, and that the prescription period will end at the conclusion of the mediation, successful or otherwise. The question arose as to how the skilful lawyer may be prevented from proposing on behalf of their client that the parties mediate the dispute, and thereby interrupt prescription.

(c) Discussion

5.33 The advisory committee considered that the adoption of a clause that an agreement to mediate or mediation proceedings must not prevent the commencement of any civil proceedings in court or arbitration proceedings by a party to the extent

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47 Rule 41A(4)(c).

48 Rule 74.

49 Adv Paul Pretorius.

considered necessary by the party to preserve their rights. Such a clause, however, raises the issue of the effect of mediation proceedings on the running of prescription. In terms of the Prescription Act 68 of 1969, the commencement of court or arbitration proceedings interrupts the running of prescription, but as the Act does not refer to mediation in this context, mediation does not interrupt the running of prescription.

5.34 Where parties resort to mediation after the commencement of litigation or arbitration, the running of the prescription has already been interrupted or delayed. The situation which requires consideration is where mediation commences regarding a dispute which is not yet the subject of court or arbitration proceedings. Mediation legislation and rules provide two options (or alternative methods) for dealing with the problem. The first is to permit a party to institute court or arbitration proceedings during the mediation, not to disrupt the mediation, but to stop the running of prescription. The second option is to ensure that the commencement of mediation proceedings will interrupt the prescription. It will then become necessary to deal with when the running of prescription resumes.

5.35 Under section 13(1)(f) of the Prescription Act, the completion of prescription is delayed when the debt is subjected to arbitration. Under section 13 of the Prescription Act, completion of prescription is delayed as opposed to being interrupted, which under section 14 has the effect of prescription starting to run afresh. Under section 14 of the Prescription Act, the admission of liability by the debtor will interrupt the running of prescription and cause prescription to start afresh. The Prescription Act is silent on the possibility of the parties expressly or tacitly agreeing to the interruption of or a delay in the completion of prescription. Under section 15, the service of the court process on the debtor will interrupt prescription, provided the creditor prosecutes the claim to final judgment.

5.36 We recommended in our 2022 published report on prescription that section 13(f) of the Prescription Act of 1969 be amended to include a reference to mediation.[50] The Commission recommended that a heading be inserted, namely “suspension of prescription in certain circumstances”. The Commission further recommended that section 13(f), which presently provides for a debt which is the object of a dispute subject

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50 *Report on Harmonisation of existing laws providing for different Prescription Periods* March 2022 (Project 125).

to arbitration, be amended to also provide for a dispute referred to an Ombud with jurisdiction or mediation or other process providing for the alternative resolution of a dispute other than negotiation.

5.37 Two options were considered by the advisory committee. Option 1 dealt with resorting to court or arbitration proceedings to interrupt prescription. The commencement of mediation, independently of court or arbitration proceedings does not interrupt the running of prescription. A party could also be under a contractual obligation to mediate a dispute as a precondition to approaching the court or commencing arbitration. The existence of such a precondition cannot be allowed to prevent a party from interrupting the running of prescription.

5.38 Both of the options we contemplated follow the approach of permitting a party to commence litigation or arbitration, by implication to interrupt the running of prescription. The first and more detailed option is based on the UNCITRAL Draft Mediation Rules, article 10. This provision basically corresponds to that contained in article 14 of the UNCITRAL Model Law on Mediation (2018 version).[51]

5.39 The alternative proposal we considered, is taken from the Malaysian Mediation Act and has the virtue of being much simpler but does not give any indication of the purpose of the arbitration or court proceedings, namely the preservation of rights. The expression "preservation of rights" is useful, as the proceedings are not restricted to stopping the running of prescription. It would also enable a party to seek urgent interim relief from a court.

5.40 A combined version of the two alternative options initially appeared to the advisory committee to best achieve the purpose of the option under consideration, namely:

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[51] Resort to arbitral or judicial proceedings

Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings. (The wording of article 15 of the Uniform Mediation Act of the OHADA substantially corresponds with this wording.)

> Resort to judicial or arbitral proceedings
> A mediation agreement or mediation proceedings must not prevent the commencement of any civil proceedings in court or arbitration proceedings by a party to the extent considered necessary by the party to preserve its rights.

5.41 The advisory committee's option 2, entailed that commencement of mediation interrupts prescription: An example of this possibility is provided by the Irish Mediation Act. Under this option, it is necessary to identify the event which interrupts or delays the running of prescription (e.g. the commencement of mediation or the signing of an agreement to mediate a particular dispute after the dispute has arisen) and also the circumstances under which the running of prescription resumes. It was suggested that prescription could start running a specified number of days after the conclusion (or termination) of the mediation under the proposed Bill.

5.42 An apparent disadvantage of this option is that it encourages the abuse of mediation as a way of interrupting or delaying the completion of prescription by a party who has no serious intention to settle the dispute by mediation. Where the running of prescription has already been interrupted or delayed by the commencement of court or arbitration proceedings, which may have been stayed pending the outcome of the mediation, the question arises whether the mediation should have any effect on the ordinary rules regarding prescription. Neither of these problems arises under the first option.

5.43 Upon reflection, the advisory committee noted, however, that disputants might not have the power to agree that by commencing mediation it would suspend prescription of any action in regard to their dispute, particularly with third parties or any other parties with an interest in the litigation who may want to claim prescription. The parties cannot agree to exclude prescription on behalf of any third party. The parties cannot agree that court rules do not apply to their dispute, it would effectively force third parties to incur additional costs. A referral to mediation should freeze other proceedings in time so that parties are not prejudiced by the disputant parties referring their dispute to mediation. We were of the view that Rule 41A(4)(c) and (8) of the Uniform High Court Rules be considered to provide for prescription.

5.44 We further note in our consideration of the application clause of the Bill, that our clause 14 should apply generally to all mediations where the parties entered into an agreement to mediate and that parties should not be given the opportunity to opt out of

this provision.

(d) Proposal

5.45 We propose the following clause on the effect of mediation on time limits:

Effect of mediation on time limits

14.(1) Where a dispute is referred to mediation—

(a) the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute who have elected to mediate from the date of signature of the agreement referred to in section 11 to the time of completion or termination of the mediation.

(b) any party to the proceedings who considers that the suspension of the prescribed time limits referred to in paragraph (a) is being abused, may apply to the court for the uplifting of the suspension of the prescribed time limits; and

(c) the suspension of the time limits referred to in paragraph (a) shall lapse upon the completion or termination of the mediation referred to in sections 18 and 24.

7 Suspension of court proceedings which are subject of a mediation agreement: clause 15

(a) Background

5.46 Mediation under the Mediation Act of Malaysia does not prevent the commencement of any civil action in court or arbitration nor does it act as a stay of, or extension of any proceedings, if the proceedings have been commenced.[52] The Ghanaian ADR Act of 2010 is the opposite of the Malaysian legislation, by providing that parties may not initiate, during the mediation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject matter of the mediation proceedings.[53]

5.47 Under the 2017 Mediation Act of Singapore, where any party to a mediation agreement institutes any proceedings before a court against any other party to that agreement in respect of any matter which is the subject of that agreement, any party to that agreement may apply to that court to stay the proceedings so far as the proceedings

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52 Section 4(2).

53 Section 83.

relate to that matter.[54] The court hearing the application may make an order, upon such terms or conditions as the court thinks fit, staying the proceedings so far as the proceedings relate to the matter.[55] The court may, in making such an order, make such interim or supplementary orders as the court thinks fit for the purpose of preserving the rights of the parties.[56]

5.48 Under the Mediation Act of Ireland, where parties have entered into an agreement to mediate, and one or more of the parties commences proceedings in respect of the dispute the subject of the agreement to mediate, a party to the proceedings may, at any time after an appearance has been entered and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to adjourn the proceedings.[57] On application to it being made, the court must make an order adjourning such proceedings if it is satisfied that there is not sufficient reason why the dispute in respect of which the proceedings have been commenced should not be dealt with in accordance with the agreement to mediate, and the applicant party was at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary for the proper implementation of the agreement to mediate.[58] This section is in addition to and not in substitution for any power of a court to adjourn proceedings before it. Under the Queensland Uniform Civil Procedure Rules of 1999, subject to an order of the court, if a dispute in a proceeding is referred to an ADR process, the dispute and all claims made in the dispute are stayed until six business days after the report of the ADR convenor which certifies the finalisation of the ADR process is filed with the registrar.[59]

5.49 Under Rule 41A of the Uniform Rules of the High Court, where there are multiple parties in proceedings some of whom are agreeable to mediation and some of whom are not, parties who are agreeable to mediation may proceed to mediation notwithstanding any other party's refusal to mediate.[60] The time limits prescribed for the delivery of

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54 Section 8(1).

55 Section 8(2).

56 Section 8(3).

57 Section 19(1).

58 Section 19(2).

59 Rule 321 Proceedings referred to ADR process are stayed.

60 Rule 41(5).

pleadings and notices and the filing of affidavits or the taking of any step is then suspended for every party from the date of signature of the minute confirming their election to mediate to the time of the conclusion of the mediation. However, any party to the proceedings who considers that such suspension of time limits is being abused may apply to the court for the uplifting of the suspension. In any matter where there are multiple issues, the parties may agree that some issues be referred to mediation and that the issues remaining in dispute may proceed to litigation. If any issue remains in dispute after mediation, the parties may proceed to litigation on such issue in dispute. The wording of the 2023 South African Rules of the Magistrates' Courts now mirror the wording of the Uniform Rules of the High Court.[61]

(b) Discussion

5.50 The Mediation Act of Malaysia means that even though a party goes to mediation, that party may still commence civil action and the mediation is not a stay of any proceedings that have already commenced. This is prejudicial to the parties to have to run two proceedings at the same time.

5.51 If the disputants elect to resort to mediation, court proceedings should be suspended. We are of the view that the mechanism provided in terms of Rule 41A of the Uniform Rules and the 2023 magistrates' court Rules provides a simple and low-cost procedure in this regard and our legislation should follow that provision.

(c) Proposal

5.52 We propose the following clause on the suspension of court proceedings where the dispute is the subject of a mediation agreement:

> **Suspension of court proceedings which are subject of a mediation agreement**
>
> 15.(1) In court proceedings where there are multiple parties some of whom are agreeable to mediation and some of whom are not, parties who are agreeable to mediation may proceed to mediation notwithstanding any other party's refusal to mediate.

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61 Rule 75.

(2) In any matter where there are multiple issues, the parties may agree that some issues be referred to mediation and that the issues remaining in dispute may proceed to litigation.

(3) If any issue remains in dispute after mediation, the parties may proceed to litigation on such issue in dispute.

8 Immunity of mediator: clause 16

(a) Background

5.53 Under the Ghanaian Alternative Dispute Resolution Act, a mediator is not liable for any act or omission in the discharge of the functions of a mediator unless the mediator is proven to have acted in bad faith.[62] Under the Mediation Act of Malaysia, a mediator is also not liable for any act or omission in respect of anything done or omitted to be done in the discharge of their functions as a mediator unless the act or omission is proved to have been fraudulent or involves wilful misconduct.[63] Under the Mediation Act of Trinidad and Tobago, legal proceeding may not be commenced against a certified mediator or any person or official involved in the mediation process for any act done or omitted to be done in the course of the performance of his functions, in reference to such mediation process.[64] However, if a person suffers loss or damage as a result of the wrongful disclosure of confidential information by a certified mediator or by any person who in the course of their employment or training gained access to such confidential information, that person is entitled to bring a claim for damages.[65]

5.54 Under the Arbitration and Mediation Act of 2023 of Nigeria mediators and mediation providers are not liable for any act done or omitted in the discharge or purported discharge of their functions, unless their action or omission is shown to have been in bad faith.[66] Under the Civil Procedure Act of New South Wales a mediator to whom the court refers proceedings has, in the exercise of their functions as a mediator in relation to those proceedings, the same protection and immunity as a judicial officer

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62 Section 86(2).

63 Section 19.

64 Section 12(1).

65 Section 12(2).

66 Section 81.

of the court has in the exercise of their functions as a judicial officer.[67] In Hong Kong the motivation for mediator immunity was considered in detail in 2010. The conclusion there was that consideration be given to provide partial immunity for pro bono or community mediators.[68]

5.55 We considered whether the proposed standard for keeping a mediator liable if the mediator is shown to have acted in bad faith is adequate.[69] A further consideration is whether mediators should also be liable for their acts or omissions done in gross negligence. We invite comment whether gross negligence should explicitly be covered under the mediator immunity provision? We further note the comment that claimants in jurisdictions such as Australia, Canada, New Zealand, South Africa and the USA, will have little prospects of succeeding with their negligence claims against mediators, unless courts start integrating the disapproval they have already noted against mediator conduct by the development of tailor-made, custom-based mediator conduct standards.[70] The author warns that until courts adopt this suggested approach, mediators will be able to carry on their activities largely shielded from liability.

(b) Proposal

5.56 A combination of the above provisions from the jurisdictions considered would deal appropriately with mediator liability, subject to the question we pose above, whether gross negligence should explicitly be covered under the mediator immunity provision. We propose the following clause on the immunity of a mediator:

Immunity of mediator

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67 Section 33.

68 *Report Working Group on Mediation* (Feb 2010) Department of Justice Hong Kong 7.164 & 7.165. See also for a comprehensive overview of mediator immunity Lin (Aug 2024) *Chinese Journal of Transnational Law* 176 – 197; Brooker (2016) "Mediator immunity: time for evaluation in England and Wales?" *Legal Studies*.

69 See Moffit (2003) "Sueing Mediators" *Boston University Law Review* 207;

> … shielding mediators from liability in cases in which they breach a duty articulated outside of customary practice serves no persuasive policy. A mediator who engages in egregious behavior, violates contractual or statutory obligations, or breaches separately articulated duties should enjoy no legal or de facto immunity from lawsuits. Simultaneously, courts should favor lawsuits from parties who exercised their judgment in terminating an inadequate mediation. Wise policy and respect for autonomy demand deference both to mediators' subjective judgments and to parties' decisions regarding their continued participation in mediations.

70 Schulz (2023) *Ottawa Law Review* 151 – 186 at 186.

16. A mediator is not liable for any act or omission in respect of anything done or omitted to be done in the discharge of their functions as a mediator unless the act or omission is shown to have been done in bad faith.

9 Procedure to be followed at mediation and role of the mediator: clause 17

(a) Background

5.57 Under the Mediation Act of Ireland of 2017, disputants may engage in mediation as a means of attempting to resolve the dispute.[71] Participation in mediation is voluntary.[72] The fact that proceedings have been issued in relation to the dispute does not prevent the parties engaging in mediation at any time prior to the resolution of the dispute.[73] A party may withdraw from the mediation at any time during the mediation.[74] The mediator and the parties must, having regard to the nature of the dispute, make every reasonable effort to conclude the mediation in an expeditious manner which is likely to minimise costs.[75] The mediator must during the course of the mediation, declare to the parties any actual or potential conflict of interest of which they become aware or ought to reasonably be aware as such conflict arises. Unless the parties agree to the mediator continuing to act as such, the mediator will cease to act as the mediator.[76] The mediator must further act with impartiality and integrity and treat the parties fairly. The

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71 Section 6(1).

72 Section 6(2).

73 Section 6(3).

74 Section 6(4).

75 Section 6(5) subject to subsection 6(4)(a). The Lagos Multi-Door Courthouse law requires of parties to a dispute to co-operate with officers of the LMDC in resolving their dispute. Parties must consider seriously adoption of ADR procedures for resolving their disputes when encouraged to do so by the court, their legal adviser or the LMDC. Parties must initiate the resolution of a dispute through ADR and have due regard for notices and directives from the LMDC. Disputants must ensure their personal attendance at ADR sessions. If a disputant is a corporation or body, they must ensure the attendance by a suitably ranking official with authority to settle that dispute on behalf of that corporation or body. Disputants must attend ADR sessions in good faith without undue requests for adjournments or unwarranted delays. Disputants must further comply with directives from the Court and LMDC Practice Directions. Disputants have a duty to prepare adequately for an ADR session to ensure their active involvement. Finally, disputants must be willing to explore options towards settlement of the dispute.

76 Section 7(2).

mediator must complete the mediation as expeditiously as is practicable having regard to the nature of the dispute and the need for the parties to have sufficient time to consider the issues. The mediator must further ensure that the parties are aware of their rights to each obtain independent advice, including legal advice, prior to signing any mediation settlement. The outcome of the mediation must be determined by the mutual agreement of the parties and the mediator must not make proposals to the parties to resolve the dispute.[77] The mediator may, at the request of all the parties, make proposals to resolve the dispute, but the parties will determine whether to accept such proposals.[78]

5.58 Under the Mediation Act of Ireland, 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.[79] A withdrawal by the mediator from the mediation does not of itself prevent the mediator from again becoming the mediator in that mediation.[80] Where the mediator withdraws from the mediation, the mediator must return the fees and costs paid in respect of that portion of time during which the mediator was paid to act as the mediator and for which they will no longer act as the mediator.[81] It is for the parties to determine the outcome of the mediation.[82] The fees and costs of the mediation are not contingent on its outcome.[83]

5.59 Under the 2010 ADR Act of Ghana,[84] a mediator must determine in consultation with the parties the date and time of each mediation session. Subject to the mediator choosing a convenient place, the parties must determine the place for the mediation. A person who is not a party to the mediation may not attend a mediation session, except where the parties agree and the mediator consents. [85] Under this Act,[86] a mediator must in an independent and impartial manner do everything necessary to help the parties to

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77 Section 7(3) subject to subsection (4).

78 Section 7(4).

79 Section 6(6) subject to subsections (7) and (8).

80 Section 6(7) withdrawal under section 6(6).

81 Section 6(8) withdrawal under section 6(6).

82 Section 6(9).

83 Section 6(10).

84 Section 72.

85 Section 77.

86 Section 74.

satisfactorily resolve their dispute. A mediator may conduct joint or separate meetings with the parties and make suggestions to facilitate settlement. A mediator may obtain expert advice on a technical aspect of the dispute, where necessary, and if the parties agree, to pay the expenses. A request for the services of an expert may be made by the mediator or by one party with the consent of the other party. A mediator is guided by principles of objectivity, fairness and justice, and considers, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. A mediator may conduct the mediation proceedings in a manner that the mediator considers appropriate but must take into account the wishes of the parties including any request by a party that the mediator hear oral statements, and the need for a speedy settlement of the dispute. A mediator may end the mediation whenever they are of the opinion that further mediation between the parties will not help to resolve the dispute between the parties.

5.60 Under the ADR Act of Ghana,[87] in order to facilitate the conduct of mediation proceedings, the parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution or individual. The mediator may invite the parties to meet the mediator and may communicate with them orally or in writing and may meet or communicate with the parties together or with each of them separately. [88] Under the 2017 Mediation Act of Ireland,[89] the mediator must, prior to the commencement of the mediation, make such enquiry as is reasonable in the circumstances to determine whether they may have any actual or potential conflict of interest, and not act as mediator in that mediation if, following such enquiry, they determine that such conflict exists. A mediator must furnish to the parties their details that are relevant to mediation, namely their qualifications; training and experience; continuing professional development training. The mediator must also furnish to the parties a copy of any mediator code of practice published or approved to which the mediator subscribes. [90]

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87 Section 75.

88 Section 76.

89 Section 7.

90 Section 9.

5.61 Under the Mediation Act of Malaysia,[91] a mediator must facilitate a mediation and determine the manner in which the mediation is to be conducted. A mediator may assist the parties to reach a satisfactory resolution of the dispute and suggest options for the settlement of the dispute. The mediator must act independently and impartially. Under the Mediation Act of Malaysia,[92] a mediator must further ensure that a mediation is privately conducted, and they may meet with the parties together or with each party separately. A non-party of any party's choice may participate in a mediation to assist the party, subject to the consent of the mediator; and a non-party of a mediator's choice may participate in a mediation to assist the mediator during the mediation, subject to the consent of the parties.

5.62 Under the 2023 Mediation Act of India,[93] the mediation process is to be conducted in the manner as may be specified. The mediator must assist the parties in an independent, neutral and impartial manner in their attempt to reach an amicable settlement of their dispute. The mediator is guided by the principles of objectivity and fairness and protects the voluntariness, confidentiality and self-determination of the parties, and the prescribed standards for professional and ethical conduct. The mediator may take such measures as may be considered appropriate, including meeting with parties or participants, jointly or separately, as frequently as they deem fit, both in order to convene the mediation, and during the mediation for the orderly and timely conduct of the process and to maintain its integrity. The mediator also determines, with the consent of the parties, the language to be used during the mediation. The mediator must further attempt to facilitate voluntary resolution of the dispute by the parties; communicate the view of each party to the other to the extent agreed to by them; assist them in identifying issues; advance better understanding; clarify priorities; explore areas of settlement and generate options in an attempt to resolve the dispute expeditiously.[94] The mediator also advises that it is the responsibility of the parties to take decisions regarding their claims. The mediator must inform the parties that they only facilitate the parties in arriving at a decision to resolve a dispute and that they will not impose any settlement nor give any assurance that the mediation may result in a settlement. Further, the mediator must not act as an arbitrator or as a representative or legal representative of a party in any arbitral

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91 Section 9.

92 Section 11.

93 Section 15.

94 Section 16.

or judicial proceeding in respect of a dispute that is the subject matter of the mediation proceedings; and be presented by the parties as a witness in any arbitral or judicial proceeding. [95]

4.63 Under the New South Wales Civil Procedure Act, the mediator may, subject to the uniform rules and any relevant practice notes, by order, give directions as to the preparation for, and conduct of, the mediation.[96]

5.64 The 2014 Rules of the Magistrates' Courts of South Africa regulated the role and functions of mediators in detail.[97] At the commencement of mediation the mediator had to inform the parties of the following, namely the purposes of mediation and its objective to facilitate settlement between the parties; the facilitative role of the mediator as an impartial mediator who may not make any decisions of fact or law and who may not determine the credibility of any person participating in the mediation; the inquisitorial nature of mediation proceedings; and the rules applicable to the mediation session. The mediator further had to inform the parties that all discussions and disclosures, whether oral or written, made during mediation were confidential and inadmissible as evidence in any court, tribunal or other forum, unless the discussions and disclosures are recorded in a settlement agreement signed by the parties, or are otherwise discoverable in terms of the rules of court, or in terms of any other law.

4.65 Under the 2014 Rules of the Magistrates' Courts the mediator could during the mediation session encourage the parties to make full disclosure if in the opinion of the mediator such disclosure could facilitate a resolution of the dispute between the parties. No party could be compelled to make any disclosure, but a party could make voluntary disclosures. The mediator further had to inform the parties that they would assist the parties to draft a settlement agreement if the dispute was resolved. If the dispute was not resolved, the mediator had to refer the dispute back to the clerk or registrar of the court, informing them that the dispute could not be resolved. The mediator was required, within five days of the conclusion of mediation, to submit a report to the clerk or registrar of the court informing them of the outcome of the mediation. Finally, a mediator could postpone a mediation session if the parties agreed. These Rules were not repeated in

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95 Section 17.

96 Section 32.

97 Rule 80.

the 2023 Rules. The role of mediators is therefore no longer regulated under the 2023 Rules of the Magistrates' Court.

4.66 Under the Property Practitioners Act 22 of 2019, the Property Practitioners Regulatory Authority may, if it believes that a complaint may be resolved through mediation; or on application by the person concerned, refer the complaint for mediation, as prescribed.[98] Within seven days of referral to mediation, the Authority must appoint a suitably qualified person as a mediator. The mediator must within seven days of appointment give notice of the mediation as prescribed to all parties concerned; and set the matter down for mediation within 30 days. The mediator must assist the parties to resolve the dispute. If the parties come to an agreement which resolves the matter or mediation has failed, the mediator must issue a certificate stating the outcome of the mediation; and must serve a copy of that certificate on each party to the dispute. The Authority must keep the records of all mediation proceedings, including the agreements where applicable, as prescribed. Property practitioners may consent to refer an inter-property practitioners' dispute for mediation by the Authority, and the Authority may provide mediation services on a cost recovery basis.

(b) Proposal

5.67 A combination of our 2014 Magistrates' Courts Rules and the provisions of the foreign jurisdictions noted above appropriately regulate the role and functions of mediators in mediation. We therefore propose the following clause on the procedure to be followed at a mediation and the role of mediators:

> **Procedure to be followed at a mediation and role of the mediator**
>
> 17.(1) A mediator may determine the manner in which the mediation is to be conducted after consultation with the parties, taking into account –
>
> (a) the circumstances of the case;
>
> (b) any wishes that the parties may express; and
>
> (c) the need for a speedy settlement of the dispute.
>
> (2) A mediation must be conducted in private unless otherwise agreed by the parties.
>
> (3) Notwithstanding subsection (2)—
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> (a) a non-party of any party's choice may participate in a mediation to assist the party, subject to the consent of the mediator: provided that

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98 Section 29(1).

such consent by the mediator does not apply in regard to legal representation of a party contemplated in section 22; and

(b) a non-party of a mediator's choice may participate in a mediation to assist the mediator during the mediation, subject to the consent of the parties.

(4) In order to facilitate the conduct of the mediation, the -

(a) parties and the mediator may convene a meeting at an early stage to agree on the organisation of the mediation; and

(b) parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution/agency or person.

(5) A mediator must act independently and impartially and seek to maintain fair treatment of the parties and, in so doing, must take into account the circumstances of the case.

(6) At any stage of a mediation a mediator may meet or communicate with the parties together or with each of them separately.

(7) A mediator must not act as a representative or legal representative of a party in any arbitral, judicial or other dispute resolution proceedings in respect of the dispute that is related to the mediation.

(8) A mediator may assist the parties to reach a satisfactory resolution of the dispute and suggest options for the settlement of the dispute.

10 Commencement mediation & time-limit completion: clause 18

(a) Background

5.68 Under the 2012 Mediation Act of Malaysia, a mediation is deemed to have commenced upon the person initiating the mediation receiving the acceptance of the written invitation from the person with whom they have a dispute.[99] An invitation regarding a mediation is deemed to have been rejected if the person initiating the mediation does not receive a reply from the person with whom they have a dispute, within fourteen days from the date they send the person the written invitation or within such other period of time specified in the written invitation.[100]

5.69 Under the 2023 Mediation Act of India,[101] mediation proceedings is deemed to

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99 Section 5(4).

100 Section 5(5).

101 Section 14.

have commenced where there is an existing agreement between the parties to settle the dispute through mediation, the date on which a party or parties receives notice from the party initiating the mediation, to refer such dispute to mediation. Otherwise, the mediation commences where the parties have agreed to appoint a mediator of their choice for mediation and settlement of disputes between them on the date the mediator provides their consent to appointment; or where one of the parties applies to a mediation service provider for settlement of disputes through mediation, the date of appointment of a mediator. Mediation must be completed within a period of 120 days from the date determined for the first appearance of the disputants before the mediator.[102] This period may be extended for a further period as agreed by the parties, but not exceeding 60 days.[103]

5.70 The Arbitration and Mediation Act of Nigeria deals clearly with the date of the commencement of mediation where parties agree to mediate but also when a court refers parties to mediate. The date of commencement of the mediation process is the date that the agreement to mediate was signed, where this is drawn up in writing after a dispute has arisen, or in case of reference to mediation by a court, the date the court made its decision or, in any other case, on the date when the mediator took the first step to start the mediation process.[104]

5.71 Under Rule 41A of our Uniform Rules of the High Court, where a dispute is referred to mediation, the parties must deliver a joint signed minute recording their election to refer the dispute to mediation. The process of mediation must be concluded within 30 days from the date of signature of the minute. A Judge or the court may on good cause shown by the parties extend such time period for completion of the mediation session. The wording of the 2023 Rules of the Magistrates' Courts follows the wording of the Uniform Rules of the High Court.

5.72 Under the 2017 Uniform Mediation Act of the Organization for the Harmonization of Business Law in Africa (OHADA), the mediation procedure commences on the date

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102 Section 18.

103 The 2021 Bill provided in clause 21 that mediation under the Act shall be completed within a period of 180 days from the date fixed for the first appearance before the mediator, and that this period for mediation could be extended for a further period as agreed by the parties, but not exceeding 180 days. See HT Correspondents (July 2023) *Hindustan Times.*

104 Section 70(5).

when the most diligent party implements a written or oral mediation agreement.[105] If, in the absence of an agreement, the party which invited the other party to mediation has not received acceptance of its written invitation within 15 days of reception of the invitation, or on expiry of any other deadline specified therein, it may consider the absence of a response as a rejection of the invitation to mediation.

(b) Proposal

5.73 We ought to follow the approach of the Arbitration and Mediation Act of Nigeria in also setting out clearly the commencement of mediation and the time-limit for completion of a mediation. We therefore propose the following clause for the commencement and the time limit for the completion of a mediation:

> **Commencement and time limit for completion of mediation**
>
> 18(1) The date of commencement of the mediation process is the date that the agreement to mediate was concluded, where the agreement is drawn up in writing after a dispute has arisen, or, in case of reference to mediation by a court, the date the court made its decision known or, in any other case, on the date when the mediator took the first step to start the mediation process.
>
> (2) The time limit for completion of the mediation is 30 days from the date of commencement of the mediation unless otherwise agreed, and on expiry of this date the parties may institute or proceed with legal proceedings even if the mediation has not been completed.

11 Submission of information at mediation: clause 19

(a) Background

5.74 Under the 2010 ADR Act of Ghana[106] each party must present to the mediator and the other parties a memorandum setting out the party's position with regard to the issues which require resolution, not later than eight days before the first mediation session or within such period of time as the parties may mutually agree upon. The mediator may request each party to submit a written statement of that party's position and the facts and grounds in support of that position, supplemented by any documents and other evidence that the party considers appropriate. The mediator may further request a party to submit additional information as the mediator considers necessary, at any stage of the mediation proceedings.

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105 Article 4.

106 Section 73.

5.75 Under the Mediation Act of Malaysia,[107] a mediator may request each party to submit a statement setting out the brief facts of the dispute, supplemented by any documents that the party deems appropriate to submit. A mediator may request any party at any stage of a mediation to submit any additional information or document as the mediator deems appropriate. The UNCITRAL draft Model Rules covers an additional aspect in its clause on communications between the parties and the mediator, namely a description of the goals, interests, needs and motivations of the parties.[108]

(b) Proposal

5.76 A combination of the foreign legal provisions considered, cover adequately the required information to be submitted to the mediator and the other parties. We therefore propose the following clause on the submission of information at mediation proceedings:

> 19. At any stage of the mediation, -
>
> (a) the parties may submit to the mediator and or other parties information concerning the dispute, such as statements describing the general nature of the dispute, the points at issue, any supporting document or additional information deemed appropriate, a description of the goals, interests, needs and motivations of the parties, the terms of proposed settlement, as well as any relevant documents.
>
> (b) a mediator may request any party to submit any additional information or document as the mediator deems appropriate.

12 Confidentiality of mediation proceedings: clause 20

(a) Background

5.76 In *Kalagadi Manganese and Others* v *Industrial Development Corporation of South Africa Ltd* the court provided guidance on the confidentiality of mediation communications:

> 47. A number of cases in the United States have considered the confidentiality provisions in mediation agreements or applicable legislation. Generally there is a reluctance to open up the process to the dissemination of the documents. The starting point is that it is destructive of the mediation process and inhibits the functioning of the mediator and the frankness of engagement by the parties if they have to look over their shoulder every time they make a proposal or engage in seeking a way forward. In this regard there are a number of instructive cases.

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107 Section 10.

108 Article 5(2).

> In the present case the parties provided for detailed confidentiality and non-disclosure provisions. In considering the issue, sight should not be lost of the fact that confidentiality provisions are also there for the benefit of the mediators.

5.77 Under the Mediation Rules of the Arbitration Foundation of Southern Africa (AFSA), unless the parties expressly agree in writing to the contrary, every person involved in the mediation, including the parties and their representatives, the mediator and AFSA undertake to keep confidential all documents, information and materials and all proposals and terms of any settlement in connection with the mediation, save and to the extent that a disclosure may be required by law or to enforce the settlement agreement. [109]

5.78 Every person involved in the mediation, including the parties and their representatives, the mediator and AFSA, acknowledge that any information, materials and settlement terms passing between them are produced solely for the purposes of the mediation and may not be produced as evidence or disclosed in a court, or any other formal or informal dispute resolution process, except as otherwise required by law.[110]

5.79 If a party discloses any information to the mediator in confidence during the mediation, the mediator shall not disclose this information to any other party or person without the specific consent of the party that disclosed it, unless the mediator is compelled to do so by law.[111] The prohibition against disclosure does not apply to the extent that the relevant party or parties consent to the disclosure; the mediator is required in law to make the disclosure; the mediator reasonably considers that there is serious risk of significant harm to the life or safety of any person if the information in question is not disclosed.[112] The mediator, any employee of AFSA or any other person appointed in the mediation may not act or agree to act as a witness, expert, mediator or consultant in any legal proceedings related to the dispute, following the mediation.[113] The parties, including their representatives, shall not call or cause to be called the mediator, any employee of AFSA or any person appointed in the mediation, as a witness in any formal

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109 Rule 9.1.

110 Rule 9.2.

111 Rule 9.3.

112 Rule 9.4

113 Rule 9.5.

or informal dispute resolution process (including court proceedings) nor require them to produce in evidence any information, materials or settlement terms relating to the mediation.[114]

5.80 Under the 2017 Mediation Act of Ireland[115] all communications, including oral statements, and all records and notes relating to the mediation shall be confidential and shall not be disclosed in any proceedings before a court or otherwise.[116] This prohibition does not apply to a communication or records or notes, where disclosure is necessary in order to implement or enforce a mediation settlement; is necessary to prevent physical or psychological injury to a party; is required by law; is necessary in the interests of preventing or revealing the commission of a crime, including an attempt to commit a crime; or the concealment of a crime. It further does not apply to a threat to a party; or is sought or offered to prove or disprove a civil claim concerning the negligence or misconduct of the mediator occurring during the mediation or a complaint to a professional body concerning such negligence or misconduct. Evidence introduced into or used in mediation that is otherwise admissible or subject to discovery in proceedings shall not be or become inadmissible or protected by privilege in such proceedings solely because it was introduced into or used in mediation. An additional ground contained in the Mediation Act of Singapore is where the disclosure complies with a request or requirement imposed by a regulatory authority and is necessary to enable the regulatory authority to perform its duties or discharge its functions.[117]

5.81 The USA Uniform Mediation Act regulates privilege against disclosure; admissibility; and discovery in detail;[118] waiver and preclusion of privilege;[119] exceptions to privilege;[120] and prohibited mediator reports.[121] Under the 2023 Mediation Act of India, the mediator, mediation service provider, the parties and participants in the mediation must keep confidential acknowledgements, opinions, suggestions, promises, proposals,

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114 Rule 9.6.

115 Section 10.

116 Subject to section 10(2) and section 17, which deals with mediator reports to court.

117 Section 9(2)(i).

118 Section 4.

119 Section 5.

120 Section 6.

121 Section 7.

apologies and admissions made during the mediation proceedings; acceptance of, or willingness to, accept proposals made or exchanged in the mediation; documents prepared solely for the conduct of mediation or in relation thereto; and any other mediation communication.[122] No audio or video recording of the mediation proceedings may be made or maintained by the parties or the participants including the mediator and mediation service provider, whether conducted in person or online to ensure confidentiality of the conduct of mediation proceedings.[123]

5.83 Under the Mediation Act of India, no party to the mediation may in any proceeding before a court or tribunal, rely on or introduce as evidence any information or communication, including any information in electronic form, or verbal communication and the court or tribunal may not take cognizance of such information or evidence. [124] The mediator is not prevented from compiling or disclosing general information concerning matters that have been subject of mediation, for research, reporting or training purposes, if the information does not expressly or indirectly identify a party or participants or the specific disputes in the mediation.[125] Disclosure of the mediated settlement agreement is not prohibited where its disclosure is necessary for the purpose of its registration, enforcement and challenge.[126]

5.84 Under the Mediation Act of India no mediator or participant in the mediation, including experts and advisers engaged for the purpose of the mediation and persons involved in the administration of the mediation, are at any time permitted, or compelled to disclose to any court or tribunal, or in any adjudicatory proceedings, any communication in mediation. [127] These parties are also not permitted or compelled to state the contents or conditions of any document or nature or conduct of parties during mediation including the content of negotiations or offers or counter offers with which they have become acquainted during the mediation.[128] Nothing shall protect from disclosure,

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122 Section 22(1).

123 Section 22(2).

124 Section 22(3).

125 Section 22(4).

126 A similar provision is section 15(2)(d) of the Mediation Act of Malaysia which allows the disclosure of a mediation communication if the disclosure is required under any other written law for the purposes of implementation or enforcement of a settlement agreement.

127 Section 23(1).

128 Section 23(1).

information sought or provided to prove or dispute a claim or complaint of professional misconduct of mediator or malpractice based on conduct occurring during the mediation.[129] Privilege or confidentiality does not apply to a threat or statement of a plan to commit an offence punishable under any law in force; information relating to domestic violence or child abuse; and statements made during a mediation showing a significant imminent threat to public health or safety.[130]

5.85 Under the 2010 ADR Act of Ghana, when the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which that other party considers appropriate, except where a party gives information to the mediator subject to a condition of confidentiality.[131] A record, a report, the settlement agreement, and other documents required in the course of mediation is confidential and may not be used as evidence or be subject to discovery in any court proceedings, except where its disclosure is necessary for the purpose of implementation and enforcement. A mediator may not disclose information given in the course of the mediation to a person who is not a party to the mediation without the consent of the parties.[132] A party to a mediation may not rely on the record of the mediation; statement made at the mediation; or any information obtained during the mediation, as evidence in court proceedings.

5.86 Under the 2010 ADR Act of Ghana, the parties may not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not the proceedings relate to the dispute that is the subject of the mediation proceedings; views expressed or suggestions made by the other party in the mediation in respect of a possible settlement of the dispute; admissions made by the other party in the course of the mediation proceedings; or the fact that the other party had indicated that party's willingness to accept a proposal

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129 Proviso to section 23(1). Section 16(2)(e) and (f) contain similarly worded provisions: (e) it is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; or (f) it is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, non-party, or representative of a party based on their conduct during any mediation session.

130 Section 23(2). The Mediation Act of Malaysia also lists as exceptions to privilege in section 16(2)(c) and (d) information about threats to inflict bodily injury or commit a crime and criminal activity.

131 Section 78.

132 Section 79.

for settlement made by the mediator. [133]

5.87 Under the Kigali International Arbitration Centre (KIAC) Mediation Rules mediation is a private and confidential process.[134] Every document, communication or information disclosed, made or produced by any party for the purpose of or related to the mediation process shall be disclosed on a privileged and without prejudice basis and no privilege or confidentiality shall be waived by such disclosure. Confidentiality also extends to the settlement agreement except where its disclosure is necessary for implementation or enforcement. Nothing that transpires during the course of the mediation is intended to or shall in any way affect the rights or prejudice the position of the parties to the dispute in any subsequent arbitration, adjudication or litigation.

5.88 Under the UNCITRAL Model Law of 2018, when the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation.[135] However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information may not be disclosed to any other party to the mediation. Unless otherwise agreed by the parties, all information relating to the mediation proceedings must be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.[136] A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, may not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence irrespective of the form of the information or evidence.[137]

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133 Section 85.

134 Article 12.

135 Article 9.

136 Article 10.

137 Article 11(1). See also Morek (2013) "Confidentiality in mediation, legal safeguards EU" who concludes at 434 as follows:

> … The need for a more coherent approach to regulating confidentiality in mediation was already expressed in the European Parliament Resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take up by the courts. Thus far, however, no initiative in this respect has been undertaken. If the problem is not remedied, we may soon find ourselves in a situation similar to the one which existed in the United States, when the Uniform Mediation Act was enacted in 2001. At that time, there were more than

5.89 The UNCITRAL Model Law lists the following inadmissible evidence, namely an invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings; views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute; statements or admissions made by a party in the course of the mediation proceedings; proposals made by the mediator; the fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator; or a document prepared solely for purposes of the mediation proceedings. The disclosure of such information may not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of the Model Law, that evidence shall be treated as inadmissible.[138] Such information may, however, be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement. Importantly, however, such evidence remain inadmissible whether the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.[139] Furthermore, evidence subject to the limitations of admissibility that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.[140]

5.90 The 2008 European Directive regulates a minimum level of confidentiality of mediation proceedings. Under the Directive, given that mediation is intended to take place in a manner which respects confidentiality, Member States is required to ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in

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300 state statutes throughout the US providing some form of protection of confidentiality. The UMA was an attempt to create some uniformity in this area.

Sooner or later the mediation practice in Europe may face similar problems. The need for further harmonization to establish higher standards and greater clarity is already apparent.

138 Article 11(3).

139 Article 11(4). Feehily (2015) *TSAR / JSAL* 734 notes the comment by Boulle that since the inadmissibly of disclosure applies notwithstanding whether it concerns the same or another dispute which is not the subject of the mediation, the width of the confidentially is therefore extended.

140 Article 11(5).

connection with a mediation process.[141] The first exception is where disclosure is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person. The second exception which allows the disclosure of the content of the agreement resulting from mediation is where disclosure is necessary to implement or enforce that agreement.[142] However, Member States are not precluded from enacting stricter measures to protect the confidentiality of mediation.[143]

5.91 Under the New South Wales Civil Procedure Act[144] a mediator may disclose information obtained only with the consent of the person from whom the information was obtained; if it is in connection with the administration or execution of mediation proceedings; if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property; if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner; or in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

5.92 In Victoria, where the Court refers a proceeding or any part of a proceeding to mediation, other than judicial resolution conference, unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation.[145] It was proposed in 2011 in Australia that federal legislation should be adopted to clarify the admissibility and disclosure of ADR communications in courts and tribunals.[146] The general rule proposed was that an ADR communication should not without the consent of the

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141 Article 7(1).

142 Article 7(1)(b).

143 Article7(2).

144 Section 31.

145 Section 24A of the Supreme Court Act.

146 NADRAC (2011) “Maintaining and enhancing integrity of ADR processes” 4.7.1 – 4.7.6 68 & 69; see also Limbury (2012) *UNSW Law Journal* 927.

disputants be disclosed or admitted.[147] It was further proposed that legislation provide the power to courts and tribunals to grant leave for the admission or disclosure of ADR communications should be disclosed or admitted under three circumstances, namely to enable a party to protect a right or interest under an exception to confidentiality; the general public interest would be served by maintaining the confidentiality of the ADR communication; and the admission or disclosure of the communication would serve the administration of justice.[148]

5.93 Under the South African Uniform Rules of the High Court, except as provided by law, or discoverable in terms of the Rules or agreed between the parties, all communications and disclosures, whether oral or written, made at mediation proceedings are confidential and inadmissible in evidence.[149] The Rules of the Magistrates' Court, follows this wording by providing that except as provided by law or discoverable in terms of the rules in Chapter 1 or as agreed between the parties, all communications and disclosures, whether oral or written, made at mediation proceedings, are confidential and inadmissible in evidence.[150]

5.94 Ronán Feehily considers how South Africa could deal with confidentiality of information and inadmissibility of evidence in enacting reform in mediation whilst taking in account the UNCITRAL Model Law, commenting as follows:[151]

> It is submitted that if this law were to act as a framework for the introduction of a mediation statute in South Africa, as the author believes it should, it will require amendment to reflect the normal presumption that a mediator may divulge information to a party only when he or she is explicitly permitted to do so by the party furnishing the information. This would avoid any possible confusion in this area in future.

5.95 Ronán Feehily concludes as follows how a proper balance could be struck in South Africa in respect of confidentiality in mediation:[152]

> Clearly, the law on confidentiality in mediation is complex, partially unclear and seemingly incomplete. Confidentiality in mediation involves striking a balance

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147 NADRAC (2011) "Maintaining and enhancing integrity of ADR processes" 4.7.2.

148 NADRAC (2011) "Maintaining and enhancing integrity of ADR processes" 4.7.2

149 Rule 41A1(6).

150 Rule 76.

151 Feehily (2015) *TSAR/JSAL* 733.

152 Feehily (2015) *TSAR/JSAL* 734 – 735 and 737.

between encouraging settlement through the protected process of mediation and ensuring that litigants and courts have adequate access to evidence, between supporting mediation and not freezing litigation or upholding illegality. While the principle of sanctity of contract supports maintaining confidentiality where there is an agreement, if it is too wide, it will sterilise too much evidence and seriously undermine the trial process, and if it is too narrow, it will discourage parties from engaging in good faith in mediation.

…

While a balance is required between supporting mediation, on the one hand, and not freezing litigation or upholding illegality, on the other, we have seen that this balance is not easy to achieve. The approach of absolute rules or uniform statutes, while appearing to create straightforward rules for an informal process, can prove, as we have seen, to be either overreaching or inappropriate. The reforms proposed would adopt a middle path, protecting mediation confidentiality but allowing evidence about the mediation to be admitted in limited circumstances to be specified by the court on a case by case basis. This would also make South Africa a more alluring venue of choice for disputing parties from different jurisdictions who seek a mediated resolution of their dispute, but also wish to maintain confidentiality over their business affairs.

(b) Proposal

5.96 The provisions of the UNCITRAL Model Law and the Mediation Act of Malaysia deal appropriately with the confidentiality of the mediation process and should be followed in our proposed legislation. We therefore propose the following clause on confidentiality of the mediation process:

Confidentiality of mediation process

20.(1) Unless otherwise agreed by the parties, all information relating to the mediation, any mediation communication, and including, if relevant, the settlement agreement, must be kept confidential by those involved in the mediation, including a non-party, except where –

(a) disclosure is required by law; or

(b) the disclosure is required under this or any other law for the purposes of implementation or enforcement of a settlement agreement.

(2) When a mediator receives information concerning a dispute from a party, the mediator must keep such information confidential, unless the relevant party indicates that the information is not subject to the condition that it should be kept confidential, or express their consent to the disclosure of such information to another party to the mediation or unless a court otherwise directs.

(3) Mediation communication includes but is not limited to –

(a) views expressed, or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(b) statements or admissions made by a party in the course of the mediation;

(c) proposals made by the mediator or the parties;

(d) the fact that a party had indicated its willingness to accept a proposal (or parts thereof) for settlement made by the mediator or the parties; and

(f) a document prepared primarily for purposes of the mediation.

13 Legal privilege in relation to mediation proceedings: clause 21

(a) Background

5.97 In *Thint v NDPP* the Constitutional Court noted that the right to legal professional privilege is a general rule of the South African common law. Under this right, communications between a legal advisor and their clients are protected from disclosure. In order to qualify for protection, the legal advisor must act in a professional capacity at the time of the communication; the client must consult the advisor in confidence; the purpose of the communication between the client and legal advisor must be to obtain legal advice; the advice must not facilitate the commission of a crime or fraud; and the client must claim the privilege.[153] The reasoning for the existence and the recognition of this right is that the communication between a client and legal advisor requires protection. This privilege facilitates the proper functioning of the adversarial system of justice, it encourages full and frank disclosure between advisors and clients and promotes fairness in litigation.

5.98 The Constitutional Court further noted in *Thint v NDPP* that privileged materials may not be admitted as evidence without consent.[154] Privileged materials may also not be seized under a search warrant and they need not be disclosed in discovery. The person in whom the privilege vests cannot be compelled to testify about the content of the privileged material. The right-holder of privilege or their legal representative must further claim the common-law right to legal professional privilege. The right is not absolute; it may, depending upon the facts of a specific case, be outweighed by countervailing considerations.

5.99 In *South African Airways Soc v BDFM Publishers (Pty) Ltd* Judge Sutherland

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153 Par [183].

154 Par [184].

summarised our law of legal advice privilege as follows:

> 53.1. Legal advice privilege is a negative right to refuse to disclose, in proceedings, any confidential information exchanged between attorney and client.
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> 53.2. Legal advice privilege cannot be invoked to assert a positive right to the protection or preservation of information whose confidentiality has or may be breached through unauthorised means as a result of which the information has become or may become known to strangers.
>
> 53.3. The limitations on the application of legal advice privilege position does not inhibit a person from seeking relief to prevent publication of confidential information, whether confidential because of the claim of privilege or because its confidential in a general sense.
>
> 53.4 Any relief sought from a court to protect any form of confidential information is subject to any recognised public interest overrides, an exercise which requires a balancing of contending values in a fact-specific context.

5.100 The USA Uniform Mediation Act regulates privilege against disclosure; admissibility; and discovery in detail;[155] waiver and preclusion of privilege;[156] exceptions to privilege;[157] and prohibited mediator reports.[158] Subject to the exceptions to privilege, a mediation communication is privileged and is not subject to discovery or admissible evidence in a proceeding unless waived or precluded.[159] Privileges apply, however in proceedings such as that a mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication. A mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator. A non-party participant may also refuse to disclose and may prevent any other person from disclosing, a mediation communication of the non-party participant. Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation. A privilege may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and in the case of the privilege of a mediator, it is expressly waived by the mediator; and in the case of the privilege of a non-party participant, it is expressly waived by the non-party

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155 Section 4.

156 Section 5.

157 Section 6.

158 Section 7.

159 Section 4.

participant.[160] A person who discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.[161] A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege.

5.101 Exceptions to privilege are[162] that there is no privilege for a mediation communication that is in an agreement evidenced by a record signed by all parties to the agreement; available to the public or made during a session of a mediation which is open, or is required by law to be open, to the public; a threat or statement of a plan to inflict bodily injury or commit a crime of violence; intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity; sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator; sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, non-party participant, or representative of a party based on conduct occurring during a mediation; or sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party. Two alternatives exceptions are provided under the Uniform Act, namely, firstly unless for example, a child or adult protection case is referred by a court to mediation and a public agency participates, or secondly a public agency participates

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160 Section 5.

161 The motivation for the insertion of this clause in the USA Uniform Mediation Act is as follows:

> Earlier drafts included provisions that permitted waiver by conduct, which is common among communications privileges. However, the Drafting Committees deleted those provisions because of concerns that mediators and parties unfamiliar with the statutory environment might waive their privilege rights inadvertently. That created the anomalous situation of permitting the opportunity for one party to blurt out potentially damaging information in the midst of a trial and then use the privilege to block the other party from contesting the truth.
>
> To address this anomaly, the Drafters added Section 5(b), a preclusion provision to cover situations in which the parties do not expressly waive the privilege but engage in conduct inconsistent with the assertions of the privilege, and that cause prejudice. As under existing interpretations for other communications privileges, waiver through preclusion would not typically constitute a waiver with respect to all mediation communications, only those related in subject matter. See generally Unif. R. Evid. R. 510 and 511 (1986). (See Uniform Mediation Act page 21.)

162 Section 6.

in the, for example, child or adult protection mediation.

5.102 There is further no privilege if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in a court proceeding involving a felony or misdemeanour; or except, a proceeding to prove a claim to rescind or reform or a defence to avoid liability on a contract arising out of the mediation. A mediator may not be compelled to provide evidence of a mediation communication. If a mediation communication is not privileged, only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

5.103 Unless provided otherwise, a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.[163] A mediator may, however, disclose whether the mediation occurred or has terminated, whether a settlement was reached, and about the attendance of parties at the mediation; a mediation communication was permitted under these provisions; or a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment. A communication made in violation of this provision may not be considered by a court, administrative agency, or arbitrator.

5.104 Under the Civil Procedure Act of New South Wales the same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to a mediation session,[164] or a document or material sent to or produced to a mediator, or sent to or produced at the court or the registry of the court, for the purpose of enabling a mediation session to be arranged. This privilege extends only to a publication made at a mediation session, or

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163 Section 7.

164 "Mediation session" is defined to include any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.

in a document or other material sent to or produced to a mediator, or sent to or produced at the court or the registry of the court, for the purpose of enabling a mediation session to be arranged, or in circumstances of confidentially. Evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body. A document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body. However, the latter does not apply with respect to any evidence or document if the persons in attendance at, or identified during, the mediation session and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document. The inadmissibility does also not apply in proceedings with respect to any act or omission if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property.

5.105 Our Discussion Paper 148 on family dispute resolution regulated privilege in substantial detail and it closely followed the provisions of the USA Uniform Mediation Act.[165] We consider we ought to follow basically the same approach in our proposed legislation to regulate legal privilege in mediation.

(b) Proposal

5.106 We propose therefore the following clause on privilege in mediation:

> 21(1) Any mediation communication is privileged and is not subject to discovery or admissible in evidence in any proceedings unless required by law or otherwise agreed.
>
> (2) A privilege in terms of this section may be waived in writing in a record or orally during proceedings if it is expressly waived by all parties and, in the case of the privilege of a non-party participant, if it is also expressly waived by the non-party participant.
>
> (3) A person who makes a disclosure or representation about any mediation communication which prejudices another person in legal proceedings may not claim privilege in terms of this section, but this limitation on privilege only applies to the extent that it is necessary for the person prejudiced to respond to the disclosure or representation.
>
> (4) There is no privilege in terms of this section for any communication made in the mediation process that is—
>
> (a) available to the public in terms of any law or made during a session of the mediation process that is open to, or is required by law to be open,

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165 See paras 8.8.1 and 8.8.3.

to the public;

(b) a threat or statement of intention to inflict bodily harm or commit a crime of violence;

(c) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;

(d) part of an agreement resulting from the mediation process, reflected in a document signed by all parties to the agreement; or

(e) not subject to the privilege in accordance with the terms of an agreement to mediate between the parties and the mediator.

(5) Privileges in terms of this section do not apply to the extent that a communication is—

(a) sought or presented to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or relating to the mediation process; or

(b) sought or presented to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the child protection services agency or adult protection services agency is a party to or otherwise participates in the process.

(6) There is no privilege in terms of this section if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the importance of protecting confidentiality, and the communication made in the mediation process is sought or presented in—

(*a*) court proceedings involving an offence; or

(*b*) proceedings seeking rescission of a contract arising out of the mediation process or in which a defense to avoid liability under the contract is raised.

(7) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (4) or subsection (6).

(8) If a mediation communication is not privileged under subsection (6)(*a*) or (*b*), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted; provided that admission of evidence under subsection (6)(*a*) or (*b*) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

(9) If any communication made in the mediation process is subject to an exception in terms of subsection (5) or (6), only that part of the communication necessary for the application of the exception may be disclosed or admitted.

(10) Disclosure or admission of evidence excluded from privilege in terms of subsection (5) or (6) does not render the evidence or any other any communication made in the mediation process discoverable or admissible for any other purpose.

(11) The privileges under this section do not apply if the parties in a signed document agree in advance, or if a record of proceedings reflects that the parties agree, that all or part of the mediation process is not privileged.

14 Right of disputants to assistance by legal practitioner or another person: clause 22

(a) Background

5.107 Under the 2010 ADR Act of Ghana[166] a party to a mediation may be represented by a lawyer, an expert or any other person chosen by the party. A party must communicate in writing to the mediator and the other parties the name, address and the extent of the authority of any representative within seven days of the representative's appointment. Under the Brazilian Mediation Act, the parties may be assisted by lawyers or public defenders.[167] If one of the parties attends the proceedings assisted by their lawyer or public defender, the mediator must suspend the proceedings, until all the parties are duly assisted. Under the HKIAC Mediation Rules, the parties to the mediation may likewise be represented or assisted by persons of their choice. Each party must notify in advance the names and the role of such persons to the mediator and the other party. Each party must have full authority to settle or be accompanied by a person with such authority. Under the Mediation Act of Ireland of 2017, a party may withdraw from the mediation at any time during the mediation, be accompanied to the mediation, and assisted by, a person (including a legal advisor) who is not a party, or obtain independent legal advice at any time during the mediation.

5.108 The 2004 ADR Act of the Philippines allows any party to designate a legal representative or any other person to provide aid or legal representation in mediation. Should a party waive this right, the waiver must be recorded in writing, and may be rescinded at any time.[168] In England in *Kumar v London Borough of Hillingdon* the local authority took the view that the mother of a child with special needs education was not entitled to legal presentation in the mediation dispute with the authority.[169] The Court

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166 Section 71.

167 Article 10.

168 Section 12

169 [2020] EWHC 3326 (Admin) (04 December 2020), see also Clark (2021) *New Law Journal 15.* The Court held:

> 36. Ms Kumar is entitled to mediation of her EHCP dispute with Hillingdon, and Hillingdon has reciprocal legal duties to arrange, and participate in, that mediation. Ms Kumar is entitled to bring along any supporter she wishes. That supporter may be her lawyer, or anyone else she chooses. In refusing to accommodate her choice, and in

ruled against the local authority and allowed her legal representation.

5.109 The general rule under the 2014 South African Rules of the Magistrates' Courts[170] was that parties to mediation were required to attend mediation sessions in person. In proceedings where a juristic person or a firm or a partnership was a party to mediation proceedings that entity had to be represented by an official from that juristic person, firm or partnership, who had to be duly authorised to represent the entity, to conclude a settlement and sign a settlement agreement on behalf of such entity. If the state or an organ of state was a party to mediation proceedings, the state or such organ had to be represented by an official, duly authorised to represent the state or such organ to conclude a settlement and sign a settlement agreement on behalf of the state or organ of state, and be assisted by the State Attorney. Finally, any party to mediation proceedings could be assisted by a legal practitioner or practitioners. This Rule was repealed, and no similar provisions were included in the 2023 Rules. Amendments to Rule 25(1)(c) of the Rules for the Conduct of Proceedings before the CCMA commenced on 1 January 2019. Since then, a party is not entitled to be represented by a legal practitioner or a candidate attorney in proceedings unless the commissioner and all the parties consent; the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering the nature of the questions of law raised by the dispute; the complexity of the dispute; the public interest; and the comparative ability of the parties or their representatives to deal with the dispute.[171]

(b) Proposal

5.110 We should follow the example of the 2014 Magistrates' Court Rules, ADR Act

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> refusing to arrange and participate in mediation, Hillingdon is in breach of its statutory duties.
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> 37. I said above that this case raises a question of law in an unusually pure form. But at the heart of it all is a child with special educational needs, whose mother has had to persist for months to get their local authority to do its duty by him. Every month in that child's life matters. Local authorities are hard pressed, never more so than in this year of 2020, and every SEN child is a priority. But the case for getting this mediation back on foot and resolving Ms Kumar's son's EHCP is pressing, and Hillingdon must now do so.

170 Rule 85.

171 For a comprehensive discussion of the 2019 amendments, see Van Eck & Kuhn (2019) *ILJ* 721 to 725; and for the position before the 2019 amendments, Collier (2003) *ILJ* 753 to 770.

of Ghana, of the Philippines, the Mediation Act of Ireland and the Hong Kong Mediation Rules, to clarify that parties to a mediation may be assisted by a legal practitioner or other person of their choice. We propose the following clause:

> **Right of disputants to assistance by legal practitioner or another person**
>
> 21. A party may be assisted by a legal practitioner or another person of their choice unless the parties agree otherwise.

15 Mediated settlement agreements and enforcement: clause 23

(a) Background

5.111 Next we consider the requirements for mediated settlement agreements. Under the Rules of the High Court of South Africa, the parties who engaged in mediation and the mediator who conducted the mediation, shall within five days of the conclusion of the mediation, issue a joint minute indicating whether full or partial settlement was reached or whether mediation was not successful; and the issues upon which they reached agreement and which do not require hearing by the court.[172] It is the joint responsibility of the parties who engaged in mediation to file such minutes with the registrar.[173] The 2023 Rules of the Magistrates' Court follow this wording.[174]

5.112 The 2014 Rules of the Magistrates' Court provided for settlement agreements once a dispute was settled.[175] Once the parties had reached a settlement, their mediator had to assist the parties in drafting a settlement agreement.[176] The mediator was required to transmit the settlement agreement to the clerk or registrar of the court. If a settlement was reached at mediation in a dispute which was not the subject of litigation, the clerk or registrar of the court was required, upon receipt of the settlement agreement from the mediator, to file the settlement agreement.[177]

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172 Rule 41A(8)(b).

173 Rule 41A(8)(c).

174 Rule 77(4) and (5).

175 Rule 82.

176 Rule 82(1).

177 Rule 82(2).

5.113 In the USA, a mediated settlement agreement needs generally to comply with the following essentials to be valid and enforceable:[178]

a Identify the parties to the agreement;

b. List the terms of the resolution of the dispute, including any actions to be taken, the responsibilities and obligations of the parties, and any compensation or payment to be made under the settlement.

c The date the agreement was signed and the signature of each party, indicating their agreement to the terms set out in the agreement.

d That each party is receiving something of value in exchange for the undertakings the parties make in the agreement.

e Specify the jurisdiction whose laws will govern the interpretation and enforcement of the agreement.

f Provisions for resolving disputes that may arise in the future, such as arbitration or the requirement that the parties will participate in mediation.

g Specify under what circumstances the agreement can be terminated or modified.

5.114 Under the 2023 Mediation Act of India,[179] a mediated settlement agreement includes an agreement in writing between some or all of the parties resulting from mediation, settling some or all of the disputes between such parties and authenticated by the mediator. The terms of the mediated settlement agreement may extend beyond the disputes referred to mediation. Where a mediated settlement agreement is reached between the parties with regard to all or some of the disputes, it must be reduced into writing and signed by the parties. The signed mediated settlement agreement must be submitted to the mediator, who must, after authenticating it, forward it with a covering letter signed by them, to the mediation service provider and also provide a copy to the parties. In all other cases, the mediated settlement agreement must be submitted to the mediator who must, after authenticating the mediated settlement agreement, provide a copy to all the parties.[180] The parties, may, at any time during the mediation process, make an agreement with respect to any of the disputes which is the subject matter of

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178 Contracts Counsel "Mediation Settlement Agreements USA". Sussman (April 2006) *Mediation Committee Newsletter* 32; Feehily (2016) *CILSA 320.*

179 Section 19.

180 Subject to the provisions of section 26 which provides that the provisions of the Bill shall not apply to the proceedings conducted by Lok Adalat (a People's Court) and Permanent Lok Adalat under the Legal Services Authorities Act, 1987.

mediation.

5.115 Under the Mediation Act of Malaysia, the parties must enter into a settlement agreement upon the conclusion of a mediation and the reaching of an agreement by the parties regarding their dispute.[181] The settlement agreement must be in writing and signed by the parties.[182] The mediator must authenticate the settlement agreement and furnish a copy of the agreement to the parties.[183] Under the Arbitration and Mediation Act of Nigeria, where parties conclude an agreement settling a dispute, the mediator shall participate in the preparation and drafting of the settlement agreement, where the parties agree.[184]

5.116 Under the UNCITRAL 2021 Mediation Rules, once the parties agree on the terms of a settlement to resolve all or part of the dispute through mediation, they must prepare and sign a settlement agreement. If requested by the parties and if the mediator deems it appropriate, the mediator may provide support to the parties in preparing the settlement agreement.[185] Unless otherwise agreed by the parties, the mediator or the mediation institution may sign or stamp the settlement agreement or provide other evidence that the agreement resulted from mediation.[186] By signing the settlement agreement, the parties agree that the settlement agreement can be used as evidence that it results from mediation and that it can be relied upon for seeking relief under the applicable law.[187]

5.117 Under the Philippines ADR Act, a settlement agreement following a successful mediation must be prepared by the parties with the assistance of their respective counsel, and by the mediator. The parties and their respective counsel must endeavour

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181 Section 13(1).

182 Section 13(2).

183 Section 13(3).

184 Section 82(1).

185 Article 8(1). See also article 4(1) of the Singapore Convention which sets the requirements for reliance on settlement agreements such as that the settlement agreement was signed by the parties and evidence that the settlement agreement resulted from mediation, such as the mediator's signature on the settlement agreement; a document signed by the mediator indicating that the mediation was carried out; an attestation by the institution that administered the mediation; or any other evidence acceptable to the competent authority.

186 Article 8(2).

187 Article 8(4).

to frame the terms and conditions of the agreement comprehensively and to make adequate provision in the event of a breach of the agreement to avoid conflicting interpretations of the agreement.[188] The parties and their respective legal counsel must sign the settlement agreement.[189] The mediator must certify that they have explained the contents of the settlement agreement to the parties in a language known to them. Should the parties so desire, they may deposit their settlement agreement with the relevant Clerk of a Regional Trial Court where one of the parties resides.[190]

5.118 Under the Mediation Act of Ireland, the parties will determine if and when a mediation settlement has been reached between them, and whether the mediation settlement is to be enforceable between them.[191] A mediation settlement has the effect of a contract between the parties to the settlement except where it is expressly stated to have no legal force until it is incorporated into a formal legal agreement or contract to be signed by the parties.[192] A court may, on the application of one or more parties to a mediation settlement, enforce its terms except where the court is satisfied that the mediation settlement does not adequately protect the rights and entitlements of the parties and their dependents; is not based on full and mutual disclosure of assets, or is otherwise contrary to public policy, or a party to the mediation settlement has been overborne or unduly influenced by any other party in reaching the mediation settlement.[193] Where a mediation settlement relates to a child, a court, in determining any application with regard to the mediation settlement,[194] shall be bound by the Guardianship of Infants Act, 1964 to give effect to the welfare of the infant.[195]

5.119 Under the Arbitration and Mediation Act of Nigeria, a settlement agreement resulting from mediation is binding on the parties and enforceable in court as a contract,

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188 Section 17(a).

189 Section 17(b).

190 Section 17(c).

191 Section 11(1).

192 Section 11(2).

193 Section 11(3).

194 Section 11(4).

195 3. Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.

consent judgment or consent award.[196] Under the Lagos Multi-Door Courthouse Law, on the completion of an ADR proceedings, a settlement agreement which is duly signed by the parties is enforceable as a contract between the parties.[197] When such an agreement is endorsed by an ADR Judge or Magistrate, it is enforceable under the Sheriff and Civil Process Law.[198]

5.120 Under the Philippines ADR Act, should the parties so wish, they may deposit their mediation settlement agreement with the relevant Clerk of a Regional Trial Court where one of the parties resides.[199] Should there be a need to enforce the settlement agreement, any of the parties may file a petition at such court. That court must then proceed summarily to hear the application, in accordance with such rules of procedure as may be promulgated by the Supreme Court. The parties may further agree in the settlement agreement that the mediator shall become the sole arbitrator on the dispute. The arbitrator is obliged to treat the settlement agreement as an arbitral award subject to enforcement under the Arbitration Law of the Philippines.

5.121 Under the UNCITRAL Model Law on Mediation if the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.[200] Ronán Feehily comments on the criticism raised against the lack of detail provided in this provision, saying:[201]

> It is important that if the Model Law on International Commercial Conciliation is to be used as a template for the introduction of a mediation statute in South Africa, the wording used in the provision implementing article 14 must be sufficiently robust to ensure the enforceability of mediated settlement agreements. While article 14 may represent the lowest acceptable common denominator, it is up to South Africa, as with every nation when implementing it, to make up the difference.

5.122 Under the Mediation Act of Singapore, where a mediated settlement agreement has been reached in relation to a dispute for which no proceedings have been commenced in a court, any party to the agreement may, with the consent of all the other

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196 Section 82(2).

197 Section 26.

198 Section 11.

199 Section 17(c).

200 Article 15, binding and enforceable nature of settlement agreements.

201 Feehily (2016) *Stellenbosch Law Review* 56.

parties to that agreement, apply to a court to record the agreement as an order of the court.[202] The application must be made within 8 weeks after the mediated settlement agreement is made, or such longer period as the court may allow.[203] A court may record a mediated settlement agreement as an order of court if the mediation is administered by a designated mediation service provider or conducted by a certified mediator; the agreement is in writing and signed by or on behalf of all the parties to the agreement; and the agreement contains such information as may be prescribed.[204] The court may refuse to record a mediated settlement agreement as an order of the court if the agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground for invalidating a contract; the subject matter of the agreement is not capable of settlement; any term of the agreement is not capable of enforcement as an order of court; where the subject matter of the dispute to which the agreement relates involves the welfare or custody of a child, one or more of the terms of the agreement is not in the best interest of the child; or the recording of the agreement as an order of court is contrary to public policy.[205] A mediated settlement agreement that is recorded as an order of court may be enforced in the same manner as a judgment given or an order made by a court.[206]

5.123 Under the New South Wales Civil Procedure Act the court may make orders to give effect to any agreement or arrangement arising out of a mediation session.[207] Any party may call evidence, including evidence from the mediator and any other person engaged in the mediation, as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.

5.124 Under the South African Uniform Rules of the High Courts, if in any proceedings a settlement or an agreement to postpone or withdraw is reached, it is the duty of the attorney for the plaintiff or applicant immediately to inform the registrar accordingly.[208] Unless such proceedings have been withdrawn, any party to a settlement which has

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202 Section 12(1).

203 Section 12(2).

204 Section 12(3).

205 Section 12(4).

206 Section 12(5).

207 Section 29.

208 Rule 41(3).

been reduced to writing and signed by the parties or their legal representatives but which has not been carried out may apply for judgment in terms thereof on at least five days' notice to all interested parties.[209]

5.125 In 2023 the Supreme Court of Appeal held in *Road Accident Fund v Taylor* about the power of the court to make a compromise an order of court as follows:

> [51] … when the parties to litigation confirm that they have reached a compromise, a court has no power or jurisdiction to embark upon an enquiry as to whether the compromise was justified on the merits of the matter or was validly concluded. When a court is asked to make a settlement agreement an order of court, it has the power to do so. The exercise of this power essentially requires a determination of whether it would be appropriate to incorporate the terms of the compromise into an order of court.

(b) Proposal

5.126 We are of the view that we ought to follow the example of the jurisdictions considered above, and include a clause to regulate mediated settlement agreements and their enforcement in the Mediation Bill.[210] We consider once the parties agree on the terms of a settlement to resolve all or part of the dispute, they must prepare and sign a written settlement agreement. The mediator must provide support to the parties in preparing and accurately recording the settlement agreement. We initially considered that a mediator must authenticate the settlement agreement and furnish a copy of the agreement to the parties. However, upon reflection the Commission decided against including this requirement in the proposed legislation. We noted that the term

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209 Rule 41(4).

210 See *Eke v Parson* (CCT214/14) [2015] ZACC 30:

> [32] Litigation antecedent to enforcement is not necessarily objectionable. That is so because ordinarily a settlement agreement and the resultant settlement order will have disposed of the underlying dispute. Generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute, which – depending on the nature of the litigation – might have entailed many days of contested hearing.
>
> …
>
> [36] In sum, what all this means is that even with the possibility of an additional approach to court, settlements of this nature do comport with the efficient use of judicial resources. First, the original underlying dispute is settled and becomes res judicata. Second, what litigation there may be after the settlement order will relate to non-compliance with this order, and not the original underlying dispute. Third, matters that culminate in litigation that precedes enforcement are fewer than those that don't.

"authenticate" has a technical meaning that may not be intended in this clause. Concern was also expressed that in many mediations the parties might have entered into the settlement agreement, they have signed it, or they have gone away without the mediator having been present when the disputants finalised the settlement agreement. A mediated settlement agreement with the signatures of the parties will therefore suffice.

5.127 We also note that the High Courts are piloting specialised family courts where family law matters have a dedicated court roll and judges. One of the considerations could be that when the parties conclude a settlement agreement it could be put on a dedicated court roll that it may be expedited further. We are of the view that consideration ought be given that the heads of the courts issue court directives which establish a dedicated court roll for all mediated settlements, irrespective whether a family dispute, civil or commercial dispute is involved, which will result in parties securing expedited court orders which will enable them to enforce their mediated settlement agreements on an expedited basis. We therefore propose in clause 37 that the power of the Chief Justice and heads of court under the Superior Courts Act, to make directives, include the making of directives for expedited processes for the enforcement of mediated settlement agreements referred to in section 23. We further propose that the Rules Board for Courts of Law established under the Rules Board for Courts of Law Act, 1985 (Act No, 107 of 1985) may make Rules for mediation in the superior courts and the magistrates' courts under this Act in consultation with the Chief Justice.

5.128 We propose the following clause in regard to mediated settlement agreements and their enforcement:

Mediated settlement agreements and enforcement

23.(1) Once the parties agree on the terms of a settlement to resolve all or part of the dispute, they must prepare a settlement agreement in writing signed by the parties.

(2) The mediator must provide support to the parties in preparing and accurately recording the settlement agreement.

(3) A mediated settlement agreement is binding on the parties.

(4) By signing the mediated settlement agreement, the parties agree that the settlement agreement –

(a) may be made an order of court;

(b) may be used as evidence that it results from mediation; and

(c) may be relied upon for seeking relief under the applicable legal framework.

(5) If proceedings have been commenced in court, the mediated settlement agreement may be recorded before the court as a consent judgment or judgment

of the court.

16 Termination of a mediation: clause 24

(a) Background

5.129 Under the 2010 ADR Act of Ghana,[211] a mediation ends when the parties execute a settlement agreement; the mediator terminates the mediation proceedings for non-payment of a deposit under the legislation; the mediator after consultation with the parties makes a declaration to the effect that further mediation is not worthwhile; the parties jointly address a declaration to the mediator to the effect that the mediation is terminated; or a party makes a declaration to the mediator and the other party to the effect that the mediation is terminated. Such a declaration may be in writing or oral but where a declaration is not in writing the mediator must record the declaration.

5.130 Likewise, under the 2023 Arbitration and Mediation Act of Nigeria mediation proceedings are terminated by the conclusion of a settlement agreement by the parties, on the date of the agreement; a declaration of the mediator, to the effect that further efforts at mediation are no longer justified, on the date of the declaration; a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; a declaration of the mediation provider administering the mediation, if any, on the date of the declaration; or a declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration.[212]

5.131 Under the HKIAC Mediation Rules,[213] mediation proceedings come to an end upon the signing of a settlement agreement by the parties or; upon the written advice of the mediator after consultation with the parties that in their opinion further attempts at mediation are no longer justified; or on written notification by any party at any time to the mediator and the other parties that the mediation is terminated.

5.132 Under the UNCITRAL Model Mediation Law, mediation proceedings are

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211 Section 80.

212 Section 78.

213 Rule 11.

terminated by the conclusion of a settlement agreement by the parties, on the date of the agreement;[214] by a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;[215] by a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration;[216] or by a declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration;[217] or at the expiration of any mandatory period.[218]

5.133 Under the UNCITRAL 2020 draft Mediation Rules, mediation proceedings terminated by the signing of the settlement agreement by the parties, on the date of the agreement;[219] by a declaration of the parties to the mediator to the effect that the mediation is terminated, on the date of the declaration;[220] by a declaration of a party to the other party and the mediator, if appointed, to the effect that it no longer wishes to pursue mediation, on the date of the declaration, unless the parties are prohibited to unilaterally terminate the mediation before the expiration of a defined period;[221] by a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified or in the situation referred to in article 11(5), on the date of the declaration;[222] or at the expiration of any mandatory period.[223]

(b) Proposal

5.134 We ought to follow the example of the above jurisdictions on termination of the mediation process. We therefore propose the following clause on the termination of the mediation process:

Termination of mediation process

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214 Article 12(a).

215 Article 12(b)

216 Article 12(c).

217 Article 12(d).

218 Article 12(e).

219 Article 9(a).

220 Article 9(b).

221 Article 9(c).

222 Article 9(d).

223 Article 9(e).

24. The mediation terminates –

(a) by the signing of the settlement agreement by the parties, on the date of the of such signature;

(b) by a declaration of the parties to the mediator to the effect that the mediation is terminated, and the reason for the termination, on the date of the declaration;

(c) by a declaration of a party to the other party and the mediator, if appointed, to the effect that it no longer wishes to pursue mediation, on the date of the declaration, unless the parties are prohibited to unilaterally terminate the mediation before the expiration of a defined period;

(d) by a declaration of a mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified or that the agreed mediation fees have not been paid, on the date of the declaration;

(e) at the expiration of any mandatory period determined in law or by agreement; or

(f) by the death of any party or incapacity of any party.

17 Certification of outcome: clause 25

(a) Background

5.135 Under the USA Uniform Mediation Act, a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.[224] However, a mediator may disclose whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; a permitted mediation communication; or a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment. Under the ADR Act of the Philippines, a mediator may also not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court or agency or other authority that make a ruling on a dispute that is the subject of a

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224 Section 7.

mediation, except where the mediation occurred or has terminated, or where a settlement was reached; or as permitted to be disclosed, including conflict of interest.[225]

5.136 Our Uniform Rules of the High Court also require parties who engaged in mediation and the mediator who conducted the mediation to issue a joint minute within five days of the conclusion of mediation, indicating whether full or partial settlement was reached or whether mediation was not successful; and the issues upon which agreement was reached and which do not require hearing by the court.[226] It is the joint responsibility of the parties who engaged in mediation to file with the registrar such minute.

(b) Discussion

5.137 We considered whether the mediator must provide or on request provide the outcome of the mediation to the parties and decided that the mediator should provide the parties with a certificate of outcome of the mediation conducted. We also consider that the mediator's certificate indicates whether agreement on all or some of the issues in dispute has been reached between the parties; or agreement could between the parties not be reached; or, if applicable, setting out the reasons provided by a party why that party opted out of participation or refused to engage in mediation. Further, a mediator may not make a report, evaluation, recommendation, finding, or other communication regarding a mediation to a court, arbitrator, or other authority that may make a ruling on the dispute that is the subject of the mediation, and a communication made in violation of this prescript, may not be considered by a court, arbitrator, or other authority.

(c) Proposal

5.138 We propose the following clause on the mediator's certification of the outcome of mediation:

Certification of outcome

25.(1) A mediator must provide the parties with a certificate of outcome—

(a) stating that an agreement has been reached between the parties; or

(b) stating that an agreement could not be reached between the parties.

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225 Section 12.

226 Rule 41A(8)(b).

(c) if applicable, setting out the reasons why a party opted out of participation or refused to further participate in mediation as provided for in section 29(6).

(2) Except as required in subsection (1) a mediator may not make a report, evaluation, recommendation, finding, or other communication regarding a mediation to a court, arbitrator, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(3) A communication made in violation of subsection (2) may not be considered by a court, arbitrator, or other authority.

18 Unconditional and without prejudice tenders: clause 26

(a) Background

5.139 In *Van Der Westhuizen v Akarana Homeowners' Association* the court analysed the privileged nature of settlement offers as follows:

> 25. Where a plaintiff makes a settlement offer without prejudice to its rights to continue with its claim (or where a defendant makes an offer without prejudice to its right to advance its defence to the full), it invites the other party into privileged settlement discussions. The offeror and offeree are both protected: "both the person making the statement and the person to whom it is made are entitled to the privilege". The offer creates an opportunity for both parties to engage frankly without fear that the content of their communication - whether it be an offer or the refusal of an offer – will be disclosed. They engage in their discussions knowing that if the negotiations fail, they will be entitled to proceed with their claim or defence to the full. (Footnotes omitted.)

5.140 Under the Uniform Rules of Court, in any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim.[227] Such an offer must be signed either by the defendant in person or by their attorney if the latter has been authorised thereto in writing. Notice of any offer or tender must be given to all parties to the action and must state whether the same is unconditional or without prejudice as an offer of settlement; whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein. The notice must further state whether the offer or tender is made by way of settlement of both claim and costs or of the claim only; whether the defendant disclaims liability for the payment of costs or

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227 Rule 34(1).

part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone.

5.141 Under the High Court Rules no offer or tender made without prejudice may be disclosed to the court at any time before judgment has been given.[228] No reference to such offer or tender may appear on any file in the office of the registrar containing the papers in the said case. The fact that an offer or tender has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.[229]

(b) Proposal

5.142 A clause should be included in the Bill to regulate unconditional and without prejudice tenders, based on the Uniform Rules of Court. We propose the following clause on unconditional and without prejudice tenders made in mediation:

> **26.**(1) Where court proceedings have been instituted in respect of a dispute that is subsequently unsuccessfully submitted to mediation, a party may immediately make an offer, including one rejected during the mediation, as a tender without prejudice save as to costs under the relevant court rules.
> (2) In the case of all other disputes submitted unsuccessfully to mediation, a party may immediately make an offer, including one rejected during the mediation, as a tender without prejudice save as to costs by sending it to the other party.
> (3) No offer in terms of this section made without prejudice must be disclosed to the court at any time before judgment has been given and no reference to such offer must appear on any file in the office of the registrar containing the papers in the said case.
> (4) The fact that a tender referred to in subsection (1) or (2) has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.
> (5) If the court has given judgment on the question of costs in ignorance of the tender, a party may immediately request that the question of costs shall be considered afresh in the light of the tender: Provided that nothing in this subsection must affect the court's discretion as to an award of costs.
> (6) The provisions of this section apply with the changes required by the context to a tender made under subsection (2) in the context of a dispute that has been subjected to arbitration.
> (7) This section does not prevent any party from making an unconditional tender contemplated by Rule 34 of the rules of court.

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228 Rule 34(10).

229 Rule 34(11).

19 Role of experts and non-parties: clause 27

(a) Background

5.143 The general rule under the Mediation Act Malaysia, is that a mediator must ensure that a mediation is privately conducted and they may meet with the parties together or with each party separately.[230] Furthermore, a non-party of any party's choice may participate in a mediation to assist the party, subject to the consent of the mediator; and a non-party of a mediator's choice may participate in a mediation to assist the mediator during the mediation, subject to the consent of the parties.

5.144 Under the Rules of Mediation for Matters in District Criminal Court of North Carolina, others whose presence and participation is deemed helpful, either to resolving the dispute or addressing an issue underlying it, may in the mediator's discretion be permitted to attend and participate, unless and until the mediator determines that their presence is no longer helpful.[231] Mediators may exclude anyone wishing to attend and participate, but whose presence and participation the mediator deems would likely be disruptive or counterproductive.

5.145 Under the Victorian Civil and Administrative Tribunal Act of 1998, the Tribunal may order that a person cease to be a party to a proceeding if the Tribunal considers that the person's interests are not, or are no longer, affected by the proceeding; or the person is not a proper or necessary party to the proceeding, whether or not the person was one originally.[232]

(b) Proposal

5.146 We consider that a combination of the provisions contained in the foreign jurisdictions considered above deal appropriately with the role of experts and non-parties in mediation. We therefore propose the following clause on the role of experts and non-parties to mediation:

Role of experts and non-parties

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230 Section 11(1).

231 Rule 5.

232 Section 60A.

27.(1) In the mediator's discretion, non-parties whose presence and participation is deemed helpful, either to resolving the dispute or addressing an issue underlying it, may be permitted to attend and participate in the mediation, unless and until the mediator determines that their presence is no longer helpful.

(2) A mediator may, after consultation with the parties, give any directions that they consider appropriate in relation to expert evidence in a proceeding.

(3) A mediator may exclude anyone wishing to attend and participate, whose presence and participation the mediator deems would likely be disruptive or counterproductive.

20 Costs of mediation: clause 28

(a) Perspectives on the fees and costs from the Commission's 2019 family dispute resolution discussion paper

5.147 In 2019, we considered in detail costs and funding mediation in family disputes. Those principles considered in that investigation are still relevant.[233] We noted that most South Africans would not be able to afford the services of private mediators and would require assistance from the State in matters where mediation would be mandatory.

5.148 We noted in 2019[234] that commenting in 2011 to the Rules Board proposals for the magistrates' court annexed rules, the LSSA was of the view that the suggested proposals might be beneficial were it intended to promote access to justice.[235] The LASA commented as follows about the funding of mediation:

- Parties may not be willing to use the mediation route, especially because they have to pay costs within a shorter period of time.
- The LSSA was "gravely concerned" that parties will be responsible for mediator's fees, which would add a substantial cost to the ordinary litigation process. The costs of court-based mediation should therefore be covered by the state.
- The fees for mediators require more information. The LSSA said that mediators should be paid a reasonable fee to ensure a satisfactory level of competence and suggested that fees be payable on a tariff basis.

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233 SALRC (2019) *Discussion Paper 148 ADR in family matters* par 6.1.1.

234 SALRC (2019) *Discussion Paper 148 ADR in family matters par* 6.1.2.

235 Hawkey (2011) *De Rebus* 20 – 21 who provided an overview of the discussions conducted during a workshop at the annual general meeting of the Cape Law Society in November 2011, on the Rules Board 2011 draft rules and the comments and concerns raised.

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- Other questions included how the indigent would afford to pay for mediation and how this impacted on access to justice, how additional costs, such as those of interpreters would be covered, how legal aid would fit into the prosed regime change in the proposed change and how the proposed rules could be reconciled with existing court rules.
- …
- It is wrong in principle that the parties are compelled to pay the costs of mediation as parties do not have to pay the costs of the judge when a matter is heard in court. This imposes a cost obligation on the parties that they did not previously have. Mediators should therefore be part of the court structure and should be funded in the same way as judges are funded. …

5.149 We further said in 2019, that globally, states are confronted with having to make policy trade-offs because of limited financial and human resources that contributions from private, community and non-governmental sectors would be required.[236] We considered that buy-in from all these sectors may have to be obtained in South Africa, as budgetary constraints may hamper a fully state-funded mediation service. We considered two issues which are involved in costs and funding, namely the costs of implementing a mandatory mediation system in South Africa's civil justice system; and parties engaging in the actual mediation process.[237] We explained that in South Africa, mediation services for family dispute resolution are currently primarily offered through court-connected mediation services, private persons and professionals, non-governmental organisations, and community-based organisations.[238] We said it needs to be established whether the costs and fees related to a system of mandatory mediation in all family law matters (including the extent of funding for increased human resources required, increased office space, and the establishment of offices in outlying areas) should be regulated and whether they should be managed publicly, privately, or by means of a public-private partnership.

5.150 We noted also in 2019 the difference between the costs of settling a litigated dispute ahead of the trial and the costs of settling a dispute on the steps of the court.[239]

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236 SALRC (2019) *Discussion Paper 148 ADR in family matters par* 6.1.3.

237 SALRC (2019) *Discussion Paper 148 ADR in family matters par* 6.2.1.

238 SALRC (2019) *Discussion Paper 148 ADR in family matters par* 6.2.2.

239 SALRC (2019) *Discussion Paper 148 ADR in family matters par* 6.2.6.The Commission related anecdotal evidence which shows that Equillore, a private mediation service

We further noted that the DOJCD reported that it expected in the 2018 – 2019 performance year that a mediation policy would be adopted to deal with cases instituted against the State and which would result in reduced litigation costs to be incurred by the State. [240] It was envisaged that by by the performance year 2020 – 2021 50% of matters instituted against the State, would be resolved by mediation.[241] The Office of the Solicitor-General was established in 2020. The State Attorneys Amendment Act 13 of 2014 provided, among others, for the appointment of a Solicitor-General. The Office of the Solicitor-General finalised a state litigation mediation policy[242] which Cabinet approved in 2021. The Office of the Solicitor General commenced implementing the mediation policy in the period April 2023 – to March 2024.[243] The policy identifies two aims and objectives, namely the efficient and effective management of state litigation[244] and a skills development plan for state litigation officers and state attorneys.[245]

5.151 We noted further in 2019 the comment by Professor Arda Spijker on how funding was made available by the government in the Netherlands for the first five years of their mediation project.[246] During the first two and a half years the mediation was funded for free amd Legal Aid also provided for mediation. As mediation became a better-known process, it was incorporated in every court, except the Appeal Court, and people became obliged to pay for the service. Since mediation had proven itself, parties have been willing to pay for the service.

5.152 We noted further that at the 2017 meeting of experts, it was also argued that the

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provider, proposed that accredited and experienced mediators be appointed to assist the Road Accident Fund to settle claims well ahead of trial. This proposal would have cost the Road Accident Fund R2 150 per claim for four hours of mediation. It had the potential to save the Road Accident Fund millions in legal fees but the Road Accident Fund rejected the proposal.

240 SALRC (2019) *Discussion Paper 148 ADR in family matters par* 6.2.9.

241 DOJCD Annual Performance Plan 2018 – 2019 20.

242 Office of the Solicitor-General SA (March 2024) P*olicy implementation presentation SALGA Municipal Legal Practitioners Forum* 4 to

243 Office of the Solicitor-General SA (March 2024) P*olicy implementation presentation SALGA Municipal Legal Practitioners Forum* 14*;* DOJCD (2024) *DOJCD (2014) Alternative Dispute Resolution State Mediation Policy.*

244 *DOJCD (2014) Alternative Dispute Resolution State Mediation Policy* 2.1.

245 *DOJCD (2014) Alternative Dispute Resolution State Mediation Policy* 2.2.

246 SALRC (2019) *Discussion Paper 148 ADR in family matters* 6.2.11. See also "Court-connected Mediation in The Netherlands" (1999-2009) *The Judiciary Quarterly 33.*

mandatory mediation option to be chosen in the family dispute resolution investigation will affect the cost and funding of mediation since it will become a statutory mandate when applying to Treasury for funds.[247] The Children's Act requires the Minister to provide certain services. This obligation enables the Minister to approach Treasury for funds to execute this legislative mandate. However, if a voluntary mediation option were to be implemented, no such obligation would exist, funding would consequently never be made available for mediation and no regulatory framework would be established. The status quo would remain, namely a fragmented, discretionary and unfunded process.

5.153 We argued in 2019 that support for the argument that the costs for a mandatory court-based mediation system in the South African civil-justice system ought to be covered by the DOJCD, is to be found in a former Minister's speech at the Access to Justice Conference in 2011. Here the Minister stated that it was inexplicable that South Africa had taken such a long time to commit to reforming its civil-justice system by implementing mandatory court-based mediation.[248] The Minister explained that the DOJCD had provided for additional capacity in its budget and human resources in support of the CJRP for the implementation of mandatory court-based mediation.in order to fulfil the legislative mandate.

5.154 We also considered in 2019 that in some instances mediation services are offered and funded.[249] An example noted was that ADR has for centuries been practised in rural communities in South Africa, where under the culture of the rural population the services of a traditional leader, a chief, or an elder in the community is sought to "mediate" in personal and business disputes. We further explained that Legal Aid South Africa also provides legal aid to indigent persons, by non-litigious assistance through justice centres, including arbitration and mediation. The Legal Aid Board (as it then was) also initiated a national internship project supported by the French Government's Priority Solidarity Fund, which placed law graduates in LASA justice centres, initially for one year. Even though this programme was not aimed at mediation services, we considered in 2019 that its success could pave the way for a similar programme to assist in mandatory mediation.

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247 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.12.

248 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.13.

249 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.15.

5.155 We also noted, however, that indications were that governmental contributions to the legal aid systems were decreasing worldwide.[250]

5.156 We further considered the Short Process Courts and Mediation in Certain Civil Cases Act of 1991, which makes provision for short process courts and mediation proceedings.[251] Treasury was obliged to pay remuneration to mediators and adjudicators. However, half of this payment, or at least R50, was to be recovered from the parties.

5.157 We considered in 2019 that for the costs and funding of family disputes,[252] parties should be entitled to turn for assistance to an independent third party of their choice rather than one provided by the State. We noted that the private mediation services based in urban areas are mainly utilised by affluent members of society.[253] Further, under the court annexed mediation rules, although court-annexed mediation was a government initiative, parties would still have to make use of private mediators.[254] Mediation services offered by non-governmental organisations like Family Life and FAMSA are free of charge or at a minimal cost, although these organisations also experience mainly budgetary constraints.[255] Large numbers of people line up at university clinics, who would benefit from mediation, should these clinics had adequate budgets enabling them to offer mediation services. While these clinics do render a valuable service, they require more funding and trained mediators.

5.158 We also considered private versus state funded costs enabling disputants to engage in a mandatory mediation process. In South Africa's adversarial civil-justice system, litigation is usually funded by the litigating parties themselves.[256] In the 2011 draft Court-Annexed Mandatory Mediation Rules, provision was made for a privately funded mandatory mediation process.[257] These provisions required that the disputants

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250 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.16.

251 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.20.

252 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.21.

253 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.22.

254 SALRC (2019) Discussion Paper 148 ADR in family matters par par 6.2.23.

255 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.24.

256 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.27.

257 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.28.

to the mediation process pay the fees of the mediator proportionally.

5.159 We also noted in 2019 the arguments why mandatory court-based mediation is more cost effective than conventional litigation.[258] Even though parties must pay for mediation, the high costs of litigation would be reduced and the uncertainty of the final legal costs due would be addressed. Whereas the costs of litigation remain high and unpredictable, the legal costs of court-based mediation could be standardised and controlled. Disputants would pay a fee prescribed by the Minister of Justice and share the mediation costs. Furthermore, court-based mediation, if successful, would be speedy, thereby curbing the costs that would have been expended on lengthy litigation. The costs of mandatory court-based mediation, would, therefore, be considerably less than the costs of litigation.

5.160 It was argued in 2019 that disputants who could afford the payment of family dispute resolution services would have to be liable for these costs.[259] Indigent disputants ought to have access to public, community-based, or non-governmental organisation (NGO) mediation services. If such services were unavailable, it was proposed that private mediation services should, at the expense of the State, be available for indigent disputants and that the State ought to fund such services for its subjects. It was further proposed that a public, private or joint venture be established to accommodate disputants not qualifying for State-funded mediation and who also cannot afford private mediation. Stakeholders highlighted, however, that the State cannot afford to foot the costs of mediation under all circumstances. It was noted that it would be unreasonable to assume that the State, in its then-current financial situation, would be able to solely fund mediation.[260] A sliding scale was proposed according to which private mediation (privately funded), a joint venture between State and private enterprises, and, a state-funded mediation for indigent disputants, similar to the requirements of the LASA, be provided. It was further proposed that disputants be granted the option of engaging the services of a private mediator. If disputants had the means to pay the costs of a private mediator, they ought to be liable for the costs; if not, the mediation ought to be funded either by the State or by a State-private enterprise partnership. A means test was suggested to determine whether disputants qualified for state-funded family dispute

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258 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.29.

259 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.32.

260 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.33.

resolution mediation in whole or in part, or whether the disputants should fund the mediation themselves.[261] Under the means test, the payment of mediations costs by disputants would be based on a sliding scale according to their income, with free pro bono services provided to indigent disputants.

(b) Examples of mediation funding

5.161 Under the Uniform Rules of the High Court, unless the disputants agree otherwise, liability for the fees of a mediator are borne equally by the disputants participating in the mediation.[262] Any such party is entitled to bring such notices or offer or tender to the attention of the court. The 2023 Rules of the Magistrates Courts contain corresponding provisions.[263]

5.162 In Namibia, a court accredited mediator who performs court-connected mediation services and who is not in the employ of the Public Service or does not serve as a Judge or Magistrate is entitled to a gratification fee as determined by the Rules of Court. In the absence thereof, the mediator is entitled to a fee equal to those determined by the Office of the Prime Minister and payable to a Chairperson of an institution, board etc.[264] A court accredited mediator who performs private mediator services, is entitled to payment of the agreed fee as determined in the mediation agreement which the mediator concludes with the disputants.[265] Mediation fees are only due and payable, once the mediator has filed the mediation report.[266] Deputy Chief Justice Damaseb of Namibia has noted that under the Namibian court-connected mediation scheme the court concerned pays the mediator for conducting mediation sessions.[267] The mediator's fees being paid by the court and not by the disputants, has proved to encourage disputants to participate in mediation in attempting to settle their disputes which were litigated in the High Court Court up to the point of referral to mediation.[268] Some Namibian mediators also

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261 SALRC (2019) Discussion Paper 148 ADR in family matters par 6.2.34.

262 Rule 41A(9)(a).

263 Rules 78 and 79.

264 Registrar’s notes issued in terms of PD 65 Incorporating Judge President’s Practice Notes, para 7(1).

265 Registrar’s notes para 7(2).

266 Registrar’s notes para 7(3).

267 Damaseb (2019) *NLJ* 18.

268 Damaseb (2019) *NLJ* 21.

participate in court-connected mediation pro bono with the aim of establishing their mediation practices. [269]

5.163 In Tanzania, under the Civil Procedure Act the following persons are eligible to be appointed as a mediator, namely a judge; a registrar or deputy registrar; a magistrate, if a matter is litigated in a magistrates' court; a person with the relevant qualifications and experience in mediation appointed by the Chief Justice, a retired judge or magistrate, or a person with the relevant mediation qualifications and experience chosen by the parties.[270] A view is that the limited success of mediation in Tanzania may be partly ascribed to the use of judges and magistrates in conducting mediation.[271] Under the Code, a person with the relevant qualifications and experience in mediation appointed by the Chief Justice, or a retired judge or magistrate, is remunerated at the rate determined by the Chief Justice.[272] The latest such determination was published on 4 October 2024. Under this determination, a serving judicial officer and a mediator other than a serving judicial officer are entitled to remuneration to the amount of TZN 500 000 regarding a successful mediation.[273] A serving judicial officer is not entitled to any remuneration. A mediator other than a serving judicial officer, is entitled to remuneration to the amount of TZN 300 000 in regard to a partial successful mediation.[274] A serving judicial officer is not entitled to any remuneration, whereas a mediator, other than a serving judicial officer, is entitled to remuneration to the amount of TZN 200 000 in regard to an unsuccessful mediation.[275] When the disputants choose their mediator, they are liable to pay the fees of the mediator.[276]

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269 Damaseb (2019) *NLJ* 18.

270 Rule 25(6).

271 Lukumay (Jan – June 2016) *LST* 60; Hamisi (Nov 2022) *IJIRAS* 15.

272 Rule 25(7).

273 Schedule 2 of the Judicature and Application of Laws (Appointment, remuneration and disciplinary of mediators) Rules, 2024. Tanzanian Shilling 500,000 equalled 3,233.88 South African Rand on 25 Oct 2024.

274 Schedule 2 of the Judicature and Application of Laws (Appointment, remuneration and disciplinary of mediators) Rules, 2024. Tanzanian Shilling 300,000 equalled 1,940.33 South African Rand on 25 Oct 2024.

275 Tanzanian Shilling 200,000 equalled 1,293.55 South African Rand on 25 Oct 2024 at 20:57 UTC.

276 Civil Procedure Code Rule 25(8). Fees are also prescribed to cover air, road and train transport costs, as well as a subsistence allowance, which may not exceed TZS 200,000 per night.

5.164 Under the Irish Mediation Act, unless ordered by a court or otherwise agreed between the parties, the parties must pay to the mediator the fees and costs agreed in the agreement to mediate, or share equally the fees and costs of the mediation.[277] The fees and costs of a mediation must be reasonable and proportionate to the importance and complexity of the issues at stake and to the amount of work carried out by the mediator.[278]

5.165 Under the 2010 ADR Act of Ghana,[279] unless the parties agree otherwise, the parties must equally pay the expenses of the mediation including the fees and expenses of the mediator; and any administrative assistance received. The parties must further pay experts called; and any expenses incurred in connection with the mediation proceedings and a settlement agreement. The Act also regulates deposits made by the parties to the dispute.[280] The mediator may direct each party to deposit an equal amount as an advance for the expenses of the mediation which the mediator expects will be incurred. The mediator may direct supplementary deposits in an equal amount from each party during mediation proceedings. If the required deposits are not paid in full by both parties within 30 days of the direction, the mediator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration. On termination of the mediation proceedings, the mediator must render an account to the parties of the deposits received and must return any unexpended balance to the parties.

5.166 Under the UNCITRAL Mediation Rules of 2021,[281] the method for fixing the costs of mediation must be agreed upon by the parties and the mediator as early as possible in the mediation. Upon termination of the mediation, the mediator must fix the costs of the mediation, which must be reasonable in amount and give written notice thereof to the parties.[282] The term “costs” includes only the fees of the mediator; the travel and other expenses of the mediator; the cost of expert advice requested by the mediator with the agreement of the parties; the cost of any assistance provided pursuant to the Rules;

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277 Section 20(1).

278 Section 20(2).

279 Section 87.

280 Section 88.

281 Article 11.

282 Article 11(1).

and any other expenses that may have been accrued out of the mediation, including in relation to translation and interpretation services.[283] Unless otherwise agreed by the parties, the costs are borne equally by the parties and, in the case of multiparty mediation, they are shared pro rata. All other expenses incurred by a party are borne by that party. The mediator may, upon appointment, request each party to deposit an equal amount as an advance for the costs, unless otherwise agreed by the parties and the mediator.[284] The mediator may request supplementary deposits in an equal amount from each party, during the course of the mediation, unless otherwise agreed by the parties and the mediator.[285] If the required deposits are not paid in full by all parties within a reasonable period set by the mediator, the mediator may suspend the mediation or may declare the termination of the mediation.[286] Upon termination of the mediation and if deposits were received, the mediator must render an account to the parties of the deposits received and return any unexpended funds to the parties.[287]

5.167 Under the Uniform Act on Mediation of the OHADA, the parties must determine the costs of the mediation, including the mediator's fees.[288] Further, when a state court appoints a mediation institution, it shall invite the parties to comply with the schedule of fees set by the institution. The fees of the mediation must be borne by the parties equally, unless otherwise agreed.

5.168 Under the Mediation Act of India, the cost of mediation, other than community mediation shall be such as may be specified.[289] Unless otherwise agreed by the parties, all costs of mediation, including the fees of the mediator and the charges of the mediation service provider shall be borne equally by the parties.[290]

5.169 Under the voluntary 2004 European Code of Conduct for Mediators, unless parties reach agreement otherwise, mediators must provide complete information to the

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283 Article 11(2).

284 Article 11(3).

285 Article 11(4).

286 Article 11(5).

287 Article 11(6).

288 Article 13.

289 Section 25(1).

290 Section 25(2).

parties about the remuneration which is payable to them and the mediator will not participate in the mediation until their remuneration has been accepted by all parties concerned.[291] Under the 2018 European Code of Conduct for Mediation Providers,[292] mediation providers are required to provide mediation users with accurate and easy understandable information, including the fees and criteria for determining the costs of their services and how they are to be shared between the parties.[293]

5.170 The District of South Carolina Local Civil Rules regulate mediator compensation in four situations, namely by agreement; by court order; payment of compensation by the parties; and payment by indigent parties.[294] Mediator compensation is to be agreed upon between the parties and the mediator. When the mediator is appointed by the court, the mediator is compensated by the parties at an hourly rate set by agreement by the parties or by the appointing court. Unless otherwise agreed to by the parties or ordered by the court, fees for a mediation conference are paid in equal shares by each party. Fees are due upon conclusion of the mediation conference, unless other arrangements are made with the mediator, or unless a party advises the mediator of their intention to file an application to be exempted from the payment of mediation fees, due to their indigency. A party may apply to the court to be exempted from payment of mediation fees due to their indigency, which application is to be made and considered by the court before the mediation conference is scheduled.

5.171 In Ireland, family mediation services are provided for free by the Family Mediation Service, which forms part of the Irish Legal Aid Board. [295]

5.172 The implicit anxiety of lawyers that litigation is by far more lucrative than mediation, was addressed in Italy by the establishment of a scheme to remunerate lawyers for their participation in mediation.[296] In 2018, the Italian Ministry of Justice

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291 Zeitschrift Für Konfliktmanagement (ZKM) 4/2004.

292 Adopted at the European Commission for the Efficiency of Justice (CEPEJ) in December 2018.

293 Mediation Development Toolkit: Ensuring implementation of the CEPEJ Guidelines on mediation: European Code of Conduct for Mediation Providers.

294 Rule 16.11; see also Guidelines: Mediation South Carolina.

295 Legal Aid Board Ireland “Family Mediation”; Legal Aid Board Ireland *Family Mediation Booklet 3.*

296 Tondini (10 March 2023) *Mediate.com.*

issued fees payable to lawyers for rendering legal representation in mediation. In 2022 incentives were added to the fees when lawyers reach settlement of disputes. An Italian lawyer will receive the mediation fees much sooner once the dispute is settled, compared to when payment in protracted litigation would have been received, although these mediation fees may be less than if the dispute was litigated. Judgment is generally in the first instance courts only delivered after four or five years. A best-case scenario is that a lawyer may receive their fees after 2 years of having initiated litigation, whereas in mediation the lawyer may receive payment 3 to 6 months after having been briefed to institute mediation negotiations. The average fees for civil litigation in Italy amount to € 22 457, compared to the average mediation fee of € 9 454.

5.173 The fee which disputants are required to pay in Italy for the first mediation meeting amounts to an inexpensive amount of € 40 for a dispute to the value of up to € 250 000 and to an amount of € 80 for a dispute of which the value exceeds € 250 000.[297] Payment must be effected at the end of the initial mediation meeting. Proposals were considered in Italy with the aim of guaranteeing the availability of adequate mediation funding.[298] The proposals entail that the 2013 fee arrangements be revised to impose limited taxation on the mediation fees of mediators. The funds so generated would be reserved for defraying costs for managing mediator registers, mediator training, and mediation regulatory compliance. It would also result in an increase of the inexpensive initial mediation fee. Indigent parties may be totally or partially exempted from paying the set mediation fee.[299]

5.174 In July 2023, it was announced in England and Wales that mediation would be provided for free in small claims disputes not exceeding £10 000.[300] The focus would be at a later stage to extend mediation to claims in the range of £10 000 to £25 000 and even above £25 000 and disputants will be referred to external mediators. In 2018, the Civil Justice Council ADR Working Group of England and Wales noted that despite the availability of comparable mediation services provided by moderately priced and budget priced mediation schemes in mid-range and low cost disputes, these mediation services

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297 De Palo (2018) *Linkedin.com;* Matalon (2023) *Consulegis.com;* Handelskammer Bozen / Chamber of Commerce of Bolzano Tarife;

298 De Palo (2018) *Linkedin.com.*

299 Matalon (2023) *Consulegis.com.*

300 Ministry of Justice UK (July 2023) *Response on Consultation on increase mediation in small claims* 13.

enjoy a comparatively low rate of use.[301] Mediation would invariably seem to be an unappealing option in disputes to the value of £50 000, notwithstanding what seem to be quite modest mediator, venue and legal fees. Their interim report noted the peculiarity of disputants being able to access a free one-hour telephonic mediation service for claims of £5 000. However, no free mediation services were available at all for a disputant with a claim of £50 000.[302] Mediators commented that pro bono services would not be a meaningful solution for offering consistent mediation services in middle and low value disputes.[303]

5.175 Where disputants in Greece have not entered into a mediation agreement in respect of a dispute to which mandatory mediation applies, then the mediator fee for the mandatory initial session amounts to € 50, which is to be paid by the parties equally.[304] If a disputant who was duly notified of the initial mediation session, fails to appear at the initial mediation session or fails to effect payment to the mediator, then once the dispute is litigated in court, the court will order the defaulting party to make payment in full of the costs of the initial mediation session. The minimum hourly mediation fee, payable by disputants to proceed to mediation once they have attended the initial mediation session, amounts to € 80. This fee must be split equally between the disputants. The mediator has a duty to provide information to the disputants about the payment of the mediator fees.

5.176 In New York, not-for-profit community dispute resolution centres, (CDRCs) provide free or low-cost mediation and other ADR services.[305] These CDRCs deal in 62 New York counties with disputes between parents, parents and children, families and schools, landlords and tenants, neighbours, roommates, consumers and merchants, business partners, and others. Free and low-cost mediation options are also available in small claims and divorce matters. These CDRCs assist nearly 100 000 New Yorkers annually. A further not-for-profit agency with volunteer members is the New York Peace Institute whose members provide their mediation services for free to New York City

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301 ADR & Civil Justice Council (2018) *ADR Working Group Final Report* 7.4.

302 ADR & Civil Justice Council (2018) *ADR Working Group Final Report* 7.4.

303 ADR & Civil Justice Council (2018) *ADR Working Group Final Report* 7.8

304 E-Justice Europa “Mediation in EU countries: Greece”.

305 See https://ww2.nycourts.gov/ip/adr/mediation.

residents in Brooklyn and Manhattan.[306]

(c) Discussion

5.177 A crucial issue which also needs to be addressed is the cost implications arising from a legislative scheme which compels parties to engage in mediation. In 2022 in *DIY Superstores (Pty) Ltd v Kruger* Judge Daffue noted the Rule 41A requirement that the costs of mediation are to be defrayed equally by the parties. He stated that if mediation were to be mandatory then the State ought to fund the costs of the mediators.[307] Judge Daffue highlighted that mediation is expensive.[308] He also noted that since these Rules do not address the issue of whether legal representatives may represent disputants in mediation and should disputants not reach an agreement about legal representation in their mediation, the probabilities are that the disputants would be represented by the same set of legal representatives at the mediation and in any other judicial proceedings. The disputants would incur costs arising for them being legally represented in mediation proceedings, whereas in court proceedings the state would fund the salaries of the presiding judicial officers. The issue of costs where disputants might not be able to fund mediation in addition to legal proceedings, should their mediation attempts fail to resolve their dispute, have been raised by other authors as well.[309]

5.178 We note the concerns expressed in the case of *DIY Superstores (Pty) Ltd v Kruger,* but we consider that the reality is that the State would not be able to fund all

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306 https://nypeace.org/mediation

307 [12] … The rule makers apparently believed that speedy and less expensive resolution of disputes between parties would be achieved and possibly also an avoidance of over-congested court rolls. Unfortunately, this is a pie in the sky. Unless mediation is peremptory and provision is made for payment of mediators by the State, litigants will in most cases endeavour to obtain adjudication of their disputes by the court. This is especially true for plaintiffs and applicants who believe that they are entitled to certain relief. Obviously, some defendants and respondents who prefer not to be dragged into litigation may well try their level best to delay adjudication of the applicants' or plaintiffs' claims and in the process insist on compliance with Rule 41A.

308 Par [13].

309 De Vos & Broodryk Part 2 (2018) *JSAL/TSAR* 24 commented, among others, as follows:

> … have the courts not diluted the right of the parties to present their cases to a court for a judicial determination? In other words, has the right of the parties to their day in court not become a hollow guarantee? It is cold comfort to assure a party with limited financial resources that he or she could proceed to trial if mediation fails. One process may be all the party can afford, causing him or her to accept an unfavourable settlement. Is that justice? In the authors' opinion these are fundamental issues calling for serious consideration by Australian courts and other stakeholders. (Footnote omitted.)

mediation costs also not in the instances where mediation would be mandatory. The aim of mediation is to free the scarce resources of court time and judicial officers to those cases where the disputants attempted mediation but failed. Hence, the disputants are not forced into mediation processes, but they would only be able to access the court facilities and the court resources after they have exhausted their own private attempts at getting their dispute resolved. Therefore, disputants are required to try and resolve their dispute through mediation before they may access the court resources. Access to court will be subject to disputants exhausting their private remedies before litigating in the courts.

5.179 We further demonstrated above in Chapter 2, when considering the reasons why parties consider using mediation, that mediation is a cheaper and faster process than adversarial litigation. We further keep in mind findings such as were made in Canada in the case of *Executive Inn Inc v Tann*,[310] that mandatory mediation could contribute towards potential savings of significant fees, expenses and judicial resources, to the best interests of all parties, taking also into account the rather developed stage of the litigation and that a skilled mediator would only at that advanced stage have become engaged in the matter.

5.180 The advisory committee also arranged a meeting with representatives of Legal Aid SA for 15 July 2024 to discuss the costs of mediation and mandatory mediation. LASA colleagues represented by Mr Patrick Hundermark shared insightful information with members of the Project 94 advisory committee. LASA conveyed that according to its legal practitioners, family matters are best suited for mediation and LASA has had success in the past with mediation around so-called family houses. LASA explained that this resonates with the statistics provided in Tables A and B below.

Table A: ADR outcomes for FY 2022/23

Applicant Outcomes	EC	FS & NW	GP	KZN	L & MP	WC & NC	Total	% Of Total
Successful - dispute finally resolved by ADR	763	813	1 238	1 133	1 064	1 398	6 409	15%
Partially successful - dispute finally resolved by ADR	510	253	447	471	517	323	2 521	6%
Total	**6 572**	**6 125**	**8 734**	**7 657**	**7 448**	**7 404**	**43 940**	100%

[310] Par [30].

5.181 Table A shows that 6 409 (or 15%) out of the total matters (43 940) were successfully resolved by ADR. The Western Cape/Northern Cape and Gauteng Provinces had the highest number of matters that were resolved by ADR, with respectively 1 398 (or 22%) and 1 238 (or 19%) of the matters. A total of 2 521 (or 6%) out of the 43 940 matters were partially resolved successfully by ADR. Limpopo/Mpumalanga and Eastern Cape provinces had the highest number of disputes that were partially successfully resolved by ADR. Limpopo/Mpumalanga partially resolved a total of 517 (or 21%) matters and Eastern Cape partially resolved 510 (or 20%) matters successfully through ADR.

Table B: Type of matters resolved by ADR for FY 2022/23

Outcome	Application	Children	Civil Action	Civil Other	Family	Labour	Land Matters	Total
Successful - dispute finally resolved by ADR	719	1 540	333	432	2 403	51	931	6 409
Partially successful - dispute finally resolved by ADR	271	450	338	210	818	23	411	2 521
Total	**3 885**	**7 105**	**3 586**	**2 655**	**19 540**	**1 315**	**5 854**	**43 940**

5.182 Table B shows that mostly family matters are successfully resolved by ADR. A total of 2403 (or 37%) of 6 409 matters that were resolved successfully by ADR relate to family matters. The second highest number of matters that were successfully resolved by ADR are those relating to children. A total of 1 540 (or 24%) children matters were successfully resolved by ADR. Those that are partially successfully resolved by ADR include family matters (818 matters out of 2 521 matters which equates to 32%) and matters involving children (450 matters out of 2 521 which equates to 18%).

5.183 We requested LASA also to consider categories of disputes where mandatory mediation could possibly be applied. LASA consequently identified certain categories of matters/type of matters that could possibly be finalised through mandatory mediation, namely:

- Divorces, Contact and Care of children, Guardianship, Maintenance;
- Protection Orders for Domestic Violence and Harassment,
- Evictions and
- Claims sounding in money.

5.184 LASA further noted that during FY 2022/23 LASA finalised a total of 44 920 civil matters.

Table C: Total number of matters finalised in FY 2022/23 by way of mediation

Categories of matters / Type of matter	Total number of matters finalised
Civil – Divorce	14 715
Civil – Claim sounding in money (excl RAF)	3 369
Civil – Domestic Violence	3 305
Children – children in need of care and protection	945
Children – guardianship	684
Children - care	593
Children - maintenance	371
Children – domestic violence	127
Civil - maintenance	45
TOTAL	**24 154**

5.185 Table C shows that if there was compulsory mediation in the matters identified earlier, then a total of 24 154 (or 54%) matters from Legal Aid SA's perspective would be subjected to mandatory mediation. LASA reflected on additional budget requirements should they be acquired to take on responsibility for providing mediation services to disputants in more categories of cases. Lasa noted the fees payable to mediators were published in 31 October 2014 (GG 38163 of 31 October 2014) for mediation under the Magistrates' Court Rules. The mediators' tariff of fees distinguishes between Level 1 and Level 2 mediators and sets out the fees for perusal for documents, preparation of a reports, time spent in mediation with parties or litigation to the dispute/any witness as well as for travelling to and from the usual place of business to the mediation venue. It should be noted that some of the fees are capped, for instance:

- the fee payable for a single mediation for level 1 mediator is R 4 500.00 per day and R 6 000.00 for a level 2 mediator; and;
- preparation of a report is capped at R 1 350.00 for a level 1 mediator and R 1 800.00 for a level 2 mediator.

5.186 LASA notes that it has developed a Standard Operating Procedure (SOP) for the use of external mediators in civil matters. This LASA SOP provides for the tariffs payable for mediators in the following terms:

Table D: Tariff for mediators effective from 1 February 2024

Number	Matter	Magistrate's Court	Regional Court	High Court
1.	All-inclusive mediation fee – first session	R 1 750.00	R 2 500.00	R 3 500.00
2.	All-inclusive mediation fee – follow up sessions	R 1 000.00	R 1 500.00	R 2 000.00

5.187 If a total of 24 154 of LASA's matters would require compulsory mediation and the average is 3 hours and the hourly rate for a mediator is R 1 000.00 then Legal Aid

SA would require a total of-

- R 72 463 000 million in the Magistrate's Court;
- R 108 693 000 million in the Regional Court (average of 3 hours at a rate of R 1 500.00);
- R 144 924 000 million (average of 3 hours at a rate of R2 000.00) in the High Court in additional funding if no legal representation is permitted during the mediation.

5.188 The all-inclusive mediation fee (first session) for the 24 154 matters identified by Legal Aid SA would amount to:

- R 42 269 500 million in the Magistrate's Court
- R 60 385 000 million in the Regional Court and
- R 84 539 000 million in the High Court.

5.189 LASA further noted that they will face staff capacity constraints if their mediation mandate were to be extended as a LASA staff member would not be able to act both as a mediator and then subsequently as the legal representative of that disputant in legal proceedings. This would impact on their operations particularly in offices which have limited staff numbers and they would have to fund an external legal representative should LASA have provided mediation services. LASA also noted that a further option in respect of the provision and funding of mediation be considered, namely the community services which legal practitioners are required to provide under section 29 of the Legal Practice Act. Mediation services could be provided for free as part of the community services legal practitioners are required to perform. Candidate legal practitioners are required to perform 8 hours community service and legal practitioners 40 hours community service per annum.[311]

5.190 Legal Aid SA further conducted a pilot project during 2013 to test whether mediation could be utilised as an alternative form of legal service delivery. A total of 16 624 civil matters were assessed by civil principal attorneys. Only 4 512 (or 27%) were found to be appropriate for mediation. It should be noted that although this was a voluntary process, 40% of the 4 512 applicants accepted the mediation. This is 11% of the total matters that were assessed for the period of the pilot project. Where the applicants accepted mediation then the opposing party and/or their legal representatives were approached in order to determine if they were willing to settle the dispute by means

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311 Amendment of community service regulations for legal practitioners Aug 2023.

of mediation. A total of 538 (or 29%) respondents accepted mediation out of the total of 1 818 possible mediations. This represents just over 3% of the total civil matters that were assessed over the period of the pilot project. LASA also highlighted that their mandate is presently under section 3 of the Legal Aid Act: legal aid and legal advice; legal representation; and education and information. Thus, LASA is not mandated to provide mediation services where LASA legal practitioners act as mediators. The enabling provisions in the Legal Aid Act would have to be amended to incorporate such a mandate and such change would have to be properly costed. As legal representatives, LASA could participate in ADR and specifically mediation but then if it is compulsory, LASA would have to access these services via Pro Bono Services or by paying for such services. However, LASA will require specific funding if the parties are required to pay for the mediator.

(d) Proposal

5.191 We consider a combination of the provisions locally and in foreign jurisdictions would deal appropriately with the costs of mediation. A means test should then determine whether parties qualify for state-funded mediation in whole or in part, or whether the parties should fund the mediation themselves. The means test, and therefore payment, would be based on a sliding scale according to parties' income, the indigent getting a free pro bono service. An example is the Legal Aid SA Board's annually set means test threshold applicants need to comply with to qualify for legal aid.[312]

5.192 We realise that the resources of the State are extremely limited. We consider, however, that there is no reason in principle why legal aid at least should not be available for a mediator appointed by the court. If adopted, it will become part of the court process. The appointment of a mediator is intended to expedite the resolution of dispute before the court and it keeps costs down from the perspective of legal aid. Institutions like the RAF pay the claimant's legal fees in most instances. Maybe consideration could be given that a certain part of the petrol levy could be set aside for the payment of mediators for

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312 The 2023 thresholds for qualifying applicants who earn, after tax, and assets they own, are:

In applications for legal aid in civil cases where the applicant is a member of a household applicants must earn less than R9,000 per month.

If an applicant owns movable assets, their value must not exceed R151,700.

If an applicant owns immovable assets, their value must not exceed R711,700. See Legal Aid SA Amends Means Test 3 April 2023.

dealing with RAF matters. Internationally, the experience is that mediation settles between 60 and 70% of disputes, which means that spending money on mediation is a way for legal aid to save incurring additional expenses in matters which are litigation.

5.193 We also note above the substantial additional funding LASA would require, based on initial ballpark estimates LASA provided to us in July 2024, should their mandate to be extended to fund mediation also in broader categories of civil cases than their limited budget allow them presently to fund, which is now limited to providing legal presentation. The additional funding therefore needs to be properly costed. We are of the view that the LASA mandate ought to be extended by the State and that the LASA budget allocation be augmented substantially in order to enable LASA to fund indigent disputants to obtain mediation in extended categories of civil disputes. We also agree with the suggestion by LASA that consideration be given to certified mediators who are candidate legal practitioners and legal practitioners provide pro bono mediation services to disputants as part of their annual community service under the Legal Practice Act to provide mediation services to indigent disputants to overcome the in affordability of acquiring mediation services. The Legal Practice Council could assist disputants by establishing pro bono mediation panels and publicise information about these mediation panels. However, these mediators would need to be trained and accredited accordingly.

5.194 The State allocating a larger budget to Legal Aid SA earmarked for mediation might actually mean a saving to be effected by legal aid as fewer cases will be litigated since they will be resolved by way of mediation. We also note above proposals made in Italy that a part of the tax imposed on the fees of mediators, be earmarked to defray mediation costs, including training, maintaining mediator registers and other mediation regulatory matters. We also note the jurisdictions where mediation is provided for free to disputants such as by the court-connected mediators at the High Courts in Namibia and in family law disputes in Ireland. Will it be viable to establish a mediation scheme paid for by the state in South Africa, particularly regarding disputes subject to mandatory mediation?

5.195 We further propose that only the costs fees of the mediator are to be paid prior to the commencement of the mediation since the mediator could probably provide a pre-estimate of travel expenses that will be reasonably accurate. However, the cost of expert advice requested from a third party; the cost of any assistance by a service provider recommending or selecting the appointment of a certified mediator; or the costs of the venue, may not be known at the commencement of the mediation. We considered

whether the matter of when the fees should be paid should be dealt with in the Bill or whether the parties ought to deal with it contractually. We envisage that mediators could argue that they have a statutory right to have their fees regulated by the envisaged legislation.

5.196 We also considered whether provision ought to be made that parties be excused from mandatory mediation if the parties satisfy the Court that they cannot afford the costs of mediation where they fail to agree on the costs or any dispute arises in relation to the costs of mediation. We note above that such provision is made in Italy and in South Carolina.

5.197 We therefore propose the following clauses on the costs of mediation:

Costs of mediation

28.(1) The parties participating in the mediation must pay the costs of the mediation in full, unless the services of the mediator are provided free of charge or when a sliding scale, as prescribed, applies owing to the indigence of a party or the parties.

(2) The method for fixing the costs of mediation must be agreed upon by the parties and the mediator prior to the mediation commencing or as early as possible in the mediation.

(3) Unless otherwise agreed by the parties and the mediator–

(a) the costs of the mediation are borne equally by the parties, and are paid prior to the commencement of the mediation;

(b) in case of multiparty mediation, the costs referred to in subsection (1) are shared pro rata; and

(c) all other expenses incurred by a party are borne by that party.

(4) If the Court is satisfied by one or both of the parties, in the event of the parties failing to agree or any dispute arising in relation to costs, that they cannot afford mediation, the court may determine that –

(a) the parties be excused from mandatory mediation subject to the court having without success –

(i) explored with parties the possibility of the non-indigent party carrying the mediation costs; and

(ii) referred them to a service provider that provides pro-bono mediation.

(b) the mediation costs will be such as determined by the court, unless the court decides otherwise.

B Mandatory mediation: clause 29

1 Background

5.198 We have set out in detail in Chapter 2 above how other jurisdictions are grappling with the question of whether mediation ought to be mandatory, where mandatory schemes were introduced and where such schemes have lately been contemplated. We also note above the procedure introduced by Rule 41A of the High Court Rules for mediation whereby in every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.[313] In 2023, the amended Rules of the Magistrates' Courts introduced corresponding provisions on the referral of disputes to mediation.[314] This duty is therefore now also imposed on disputants under the 2023 Rules of the Magistrates' Courts which replicated the Rules of the High Court.[315] We further note that under the Italian mediation legislation, parties need to participate in mandatory mediation before they may enrol their matter in court in defined disputes. The same approach is followed in Greece in respect of a range of disputes. We also noted the introduction in England and Wales of mandatory mediation in small claims disputes. Since 2018, under section 12A of the 2015 Commercial Courts Act of India, a plaintiff is required to institute mediation and attempt settlement of their commercial dispute before instituting litigation. Under Rule 24 of the Civil Procedure Code of Tanzania, a court will refer every civil action for negotiation, conciliation, mediation or arbitration or a similar alternative dispute resolution procedure, before the civil action can proceed to trial.

5.199 We also need to reflect on the powers of the court to refer disputants to mediation. Under the 2008 *EU directive on certain aspects of mediation in civil and commercial matters* a court before which a matter is brought, may, having regard to the

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313 See paras 5.5 – 5.7.

314 Rule 73(1) and (2) of the Magistrates' Court Rules correspond with the Rule 41A(3) (a) and (b) of the High Court Rules and Rule 37(3)(a) and (b) correspond with Rule 41A(4) (a) and (b) of the High Court.

315 Rule 77 Conclusion of mediation.

circumstances of the case, invite disputants to settle their dispute by mediation.[316] Under the 2023 Mediation Act of India,[317] the court or tribunal may, at any stage of proceedings, refer the parties to participate in mediation.[318] The parties are under no obligation to reach a settlement in their mediation.[319]

5.200 Under the Mediation Act of Trinidad and Tobago, where the court considers it appropriate in a civil matter, it may refer parties to participate in mediation conducted by a certified mediator.[320] Under the Mediation Act of Ireland, the court may invite parties to consider mediation.[321] A court may, on the application of a party involved in proceedings, or of its own motion, if it considers it appropriate, having regard to all the circumstances of the case, invite the parties to consider mediation to resolve their dispute.[322] Where the parties decide to engage in mediation, the court may adjourn the proceedings. The court may give such direction as the court considers necessary to facilitate the effective use of mediation.

5.201 Under the ADR Act of Ghana,[323] a court before which an action is pending may at any stage in the proceedings if it is of the view that mediation will facilitate the resolution of the matter or a part thereof, refer the matter or a part of the matter to mediation. A party to an action before a court may, with the agreement of the other party and at any time before final judgment is given, apply to the court to refer the matter or part thereof to mediation. Where the mediation reference does not lead to a settlement, the court continues with the proceedings from the point where the reference was made.

5.202 Under the Queensland Uniform Civil Procedure Rules of 1999, the court may direct the registrar to give written notice to the parties that their dispute will be referred to an ADR process which a mediator or case appraiser will conduct.[324] A party who

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316 Article 5.1.

317 Clause 7.

318 Clause 7(1).

319 Clause 7(3).

320 Section 14.

321 Section 16.

322 Section 16(1).

323 Section 64.

324 Rule 319.

objects to the reference must file an objection notice in the registry. The objection notice must state the reasons for the objection and must be filed within 7 days after the objecting party receives the referral notice. If an objection notice is filed, the court may require the parties or their representatives to attend a hearing. The court may make an order at the hearing which it considers appropriate in the circumstances.

5.203 Under the South African Uniform Rules of the High Court a Judge, a Case Management Judge or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation.[325] The 2023 Rules of the Magistrates' Courts follow the wording of the High Court Rules.[326]

5.204 In 2017, in England and Wales in *Gore v Naheed* the court held as follows about the refusal of a party to participate in mediation:

> 49. … Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated. But, as Briggs LJ makes clear in his judgment, a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion.
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> 50. In this case the judge did take it into account but concluded that it was not unreasonable for Mr Gore to have declined to mediate. His solicitor considered that mediation had no realistic prospect of succeeding and would only add to the costs. The judge said that he considered that the case raised quite complex questions of law which made it unsuitable for mediation. His refusal to make an allowance on these grounds cannot in my view be said to be wrong in principle.

5.205 In 2022 the London Circuit Commercial Court (QBD) court held in *Richards v Speechly Bircham* that the failure of the claimants to engage in mediation was unreasonable but that it would not justify an order for costs on the indemnity basis.[327] In

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325 Rule 41A(3)(b).

326 Rule 73(2).

327 24. … "the conduct of all the parties", together with any measure of qualified success that a party may have achieved, is just one factor amongst all the circumstances that are to be considered alongside the general rule favouring the overall successful party when it comes to exercising it. A "failure" to engage in (or at) a mediation clearly does not carry the clearly defined costs consequences of an unaccepted but effective Part 36 offer; not least because of the difficulty of identifying with confidence, even in hindsight on what should be a

2016, the Ontario Superior Court of Justice held in *David v Transamerica Life Canada* on the question of making a cost order when a party unreasonably refused to participate in mediation as follows:

> [97] In cases where each of the parties has an arguable case, and each faces a risk of loss in the proceeding, mediation can offer a reasonable prospect of settlement. In such cases, a refusal to participate in mediation is a factor that the court can properly consider in determining whether the party has engaged in unreasonable conduct that has caused unnecessary costs to be incurred and that warrants rebuke by means of a costs sanction. This determination requires a case-by-case analysis.

5.206 In 2018 the Ontario Superior Court of Justice held in *Canfield v. Brockville Ontario Speedway*, as follows about the costs consequences, taking into the stance of the defendant who declined the offer to mediate:

> [56] The present case is not one of those circumstances where a plaintiff was trying to shake down an insurer by demanding mediation of a wholly unmeritorious case. To the contrary, it is a case where the insurer took a tough and uncompromising stance. That, of course, is a defendant's prerogative. Defendants do not have to settle. But if reasonable opportunities to mediate are spurned, that can be a relevant factor when fixing costs.
>
> [57] It was, in my view, unreasonable for the insurer to decline mediation in this case. That should be reflected in the disposition of costs. Had a mediation occurred in 2015 or even in 2017, substantial costs could have been avoided.

5.207 The Mediation Act of Ireland, empowers a court in awarding costs in respect of proceedings, that a court may, where it considers it just, have regard to any unreasonable refusal or failure by a party to the proceedings to consider using mediation, and any unreasonable refusal or failure by a party to the proceedings to attend mediation, following an invitation to do so.[328]

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summary determination rather than a further mini-trial, where any "blame" really lay within the pursuit and conduct of what is a privileged process. The uncertainty of outcome at any proposed mediation also means that the party who is suggesting unreasonableness on the part of the other cannot point to the result at trial and demonstrate that costs have been wasted through the mediation not having taken place.

328 Section 21. See Feehily (2019) *Vindobona Journal of International Commercial Law and Arbitration* 52 – 53 about cost orders made in Ireland under circumstances where mediation is unreasonably refused:

> As costs jurisprudence for an unreasonable refusal to mediate develops, the *Halsey* approach is the correct one for the courts in Ireland to follow. The guidelines set out in Halsey will provide an effective framework for the Irish courts to adopt in deciding whether costs sanctions could or should be applied in appropriate cases, and this approach also means that the courts do not have to explore the subjective intentions of the parties during the process. For a party in a dispute, it is critical that the court in

5.208 In South Africa, the court expressed in 2008 in *MB v NB* its displeasure in the way the lawyers shunned mediation, and did not advise their clients about the advantages which mediation held.[329] We consider Ronán Feehily suggests convincingly that South African courts should be empowered in our proposed legislation to be able to make cost awards against parties in mediation, depending on their conduct:[330]

> It is at least arguable that a party to an agreement to mediate, who refuses to engage in the process and consequently denies the possibility of resolving many of the issues in dispute, causes the proceedings to be unduly prolonged.
>
> With a willing judiciary, it might be the case that costs sanctions could be awarded under this provision against a party who is successful at trial, but unreasonably refused an offer to mediate the dispute. It remains to be seen whether the judiciary proves sufficiently proactive to make such a ruling when an appropriate case arises.

> recommending mediation remains mindful of the power to excuse them if they can show that mediation would be unreasonable in the circumstances. As noted above, the Irish courts have already demonstrated their willingness to do this in refusing to provide an order to adjourn proceedings where they believe mediation would not be reasonable. It would simply mean extending this principle to circumstances where costs sanctions are not appropriate in light of the reasonable nature of a refusal to mediate. This would provide assistance to parties who have a genuine reason to avoid mediation, for example, where a party needs to have a legal point determined, or where unreasonable behaviour by the other side can be shown, but would otherwise assist in developing a mediation culture.

329 59. In short, mediation was the better alternative and it should have been tried. On the facts before me it is impossible to know whether the parties knew about the benefits of mediation, but I can see no reason why they would have turned their backs on the process, especially if they had been counselled on the matter by the attorneys. What is clear, however, is that the attorneys did not provide this counsel; in fact, in the course of the pre-trial conference they positively rejected the use of the process. For this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients.

60. In the course of the hearing, I asked counsel whether I had the power to cap the fees that the lawyers might derive from the case, and it was agreed that this is indeed my right. I can find nothing in the conduct of counsel to warrant such a move – they take their instructions from the attorney - but I am persuaded that the failure of the attorneys to send this matter to mediation at an early stage should be visited by the court's displeasure. On this basis, I propose to limit the fees they can recover from their clients to the costs they can tax on a party and party scale. The client retains the right to pay more, but the attorney should not ask for this unless the client has obtained the advice of an independent practitioner.

330 Feehily (2009) *SALJ* 315.

2 Discussion

5.209 Unless the proposed legislation contains elements of compulsion, it is likely that we will not see the desired uptake of mediation in our civil justice system. In April 2024, the Rules Board announced that it contemplated aligning the provisions of Magistrates' Courts Rule 72 with the provisions of Uniform Rule 41A(2), which regulate the notice agreeing to or opposing mediation in the Magistrates' Courts and the High Court, respectively. We are of the view if these proposals were to be implemented, it would lead to disputants being further discouraged from resorting to mediation. We note calls which are made that a change is required in the prevailing legal culture of resolving disputes by litigation not only by legal practitioners, also by litigants and our judiciary and if disputants were to resort to mediation on a larger scale, disputes may be resolved without much delay and more cost effectively.[331] Questions will be asked about the certified mediator appointed by the court and as to who would be paying those costs. We dealt with the issue of costs of mediation in the previous heading. We are of the view the funding of mediation ought to receive the attention of the legislature.

5.210 We propose that whenever an appearance to defend is entered in action proceedings or a notice of intention to oppose is delivered in application proceedings, the parties to any dispute, must, in order to attempt the resolution of the dispute, submit themselves to mediation, and enter into an agreement to mediate. The court may, in accordance with relevant screening guidelines to be adopted by the Chief Justice and the Heads of Court, at any stage of litigation, in any civil matter, refer a dispute between the parties to a certified mediator to facilitate mediation of the dispute in terms of this legislation, and may do so either with or without the consent of the parties to the proceedings. In cases to which mandatory mediation apply, the parties should inform the court whether they have participated in mediation and whether they have reached an

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331 Sidimba (Sept 2024) "Top judge concerned about court case delays" Sunday Independent; Eloff (June 2024) "Should mediation in terms of rule 41A be mandatory?" *De Rebus* 24:

> … while the idea of mandatory r 41A processes may seem like a pragmatic response to the challenges faced by the legal system, a more sustainable solution lies in reshaping the legal culture. Embracing mediation as an integral aspect of legal practice can alleviate the strain on the courts, reduce delays, and enhance access to justice. This shift towards a more collaborative and proactive approach reflects not only the changing dynamics within SA, but also aligns with the broader continental trend towards embracing ADR mechanisms. As legal practitioners navigate the evolving landscape, a comprehensive embrace of mediation stands poised to offer efficiency, cost-effectiveness, and harmonious dispute resolution within litigation.

outcome. Unless that party files with the court a certificate of outcome furnished to that party by a certified mediator, the court will not hear a dispute. The discretionary powers which a court may exercise during proceedings with a view to facilitating the resolution of a dispute, are not limited by any other powers conferred in terms of the legislation. The court may impose an appropriate cost order against a party who unreasonably refuses to engage in mediation. We further propose that the mediation must be performed by a certified mediator appointed by the parties; or where the parties are indigent, by a certified mediator appointed by the Court. A party may after attending one session of mediation with a certified mediator, opt out of further mediation, and may provide to the mediator the reasons in writing for opting out of mediation or refusing to engage in mediation.

3 Proposal

5.211 We propose the following clause on mandatory mediation:

Mandatory mediation

29. (1) Whenever an appearance to defend is entered in action proceedings or a notice of intention to oppose is delivered in application proceedings, the parties to any dispute set out in section 30(1), or delineated in terms of section 30(2), must, in order to attempt the resolution of the dispute -

(a) submit themselves to mediation in terms of this Act; and

(b) enter into an agreement to mediate in terms of section 11.

(2) The court may, in accordance with relevant screening guidelines contemplated in section 37(1)(*b*), at any stage of litigation, in any civil matter, refer a dispute between the parties to a certified mediator to facilitate mediation of the dispute in terms of this Act, and may do so either with or without the consent of the parties to the proceedings.

(3) A court exercising jurisdiction under this Act must not hear a dispute unless a party whose dispute is one to which mandatory mediation applies, files with the court a certificate of outcome furnished to that party by a certified mediator in terms of section 25.

(4) The discretionary powers which a court may exercise during proceedings with a view to facilitating the resolution of a dispute, are not prejudiced by any other powers conferred in terms of this Act.

(5) In addition to subsection (2), the court may impose an appropriate cost order against a party who unreasonably refuses to engage in mediation.

(6) The mediation must be performed –

(*a*) by a certified mediator appointed by the parties in terms of section 12; or

(*b*) where the parties are indigent, by a certified mediator appointed by the Court.

(7) Notwithstanding the provisions of this section, a party may after attending one session of mediation with a certified mediator, opt out of further mediation contemplated in this section, and may provide to the mediator the reasons in writing for opting out of mediation or refusing to engage in mediation.

C Categories of disputes subject to mandatory mediation: clause 30

1 Background

5.212 The question arises whether the envisaged legislation ought to provide for categories of dispute which are subject to mandatory mediation. Under ADR Rules of the High Court of Namibia unless a managing judge directs otherwise, mediation is compulsory in the following cases, namely insurance claims; medical negligence; professional negligence against legal practitioners; building contract claims; divorce, custody of, and access to minor children; spousal and child maintenance; loan default claims; motor vehicle accident claims; and defamation.[332]

5.213 In South Africa, the draft Road Accident Fund Amendment Bill was published in September 2023 for comment. It seeks to insert into the Road Accident Fund Act of 1996 a section 24A to provide for alternative dispute resolution. Under section 24A(1) the Fund will specify alternative dispute resolution procedures for the resolution of complaints. Under section 24(2), only once the alternative dispute resolution process fails to resolve a dispute may the complaint be referred to the Adjudicator. Clause 24B seeks to establish the Office of the Road Accident Fund Adjudicator. Under section 24B(3) the Adjudicator will determine procedures for the resolution of complaints. These provisions will therefore introduce mandatory ADR in respect of claims arising from motor vehicle accidents.

5.214 Under the Italian 2010 mediation legislation a variety of civil and commercial disputes are subject to compulsory mediation, such as disputes about: shared title

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[332] Rule 19(5) of the High Court Practice Directions: Rules of High Court of Namibia, 2014.

property; property; division of assets; wills and inheritance; family arrangements and agreements; lease; loans; business rent; medical and healthcare liability disputes; defamation through the press or by other means of advertising; insurance; and banking and financial contracts.[333] Mandatory mediation was extended in 2020 to economic disputes related to the Covid 19-pandemic. In 2023 amendments commenced which extended the categories of mandatory mediation also to the following disputes: joint venture agreements, association agreements, franchising and service agreements, network agreements, supply agreements, personal partnerships, subcontracting and disputes involving relationships of duration. We note above the categories to which mandatory mediation applies in Greece, namely all civil and commercial disputes within the jurisdiction of Single-Member Courts of Greece with a claim value exceeding € 30 000; all civil and commercial disputes within the jurisdiction of Multi-Member Courts of Greece; and disputes governed by mediation agreements containing an unequivocal mediation clause. In India all commercial disputes are subject to mandatory mediation.

2 Discussion

5.215 We note that there is a large category of insurance disputes called subrogation disputes, where one insurer has paid its client for the damages its client suffered, and another insurer has paid its client for the damage it suffered. We therefore resolved that this clause should refer to insurance disputes and subrogated insurance claims. We further consider that disputes about professional negligence should be covered and not only professional negligence against legal practitioners. We also retain in clause 30 the construction contract disputes, but it would still be open to the parties to resolve their disputes by way of a contractual arrangement.[334]

5.216 We consider the proposed legislation should follow the legislation noted above, and deal with the powers of a court to refer disputants to mediation. We propose that in accordance with screening guidelines which will be made by the Chief Justice and the Heads of Court as practice directives, the court be empowered, at any stage of litigation, in any civil matter, to refer a dispute between the parties to a certified mediator to facilitate

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333 Matteucci (2023) *Revista Eletrônica de Direito Processual* 77 & 78; Balestra (2023) *Lex IBC;* Milan Chamber of Arbitration (2023) Annual Report 2 & 3.

334 See also Povey, Cattell & Michell (2006) *Acta Structilia* 44 – 64 for their discussion of the state of mediation practice in the South African construction industry in 2006.

mediation of the dispute. The court may do so either with or without the consent of the parties to the proceedings.

3 Proposal

5.217 We note the examples in Italy, Greece, India, Tanzania and Namibia which provide for categories of mandatory mediation. In May 2024 mandatory mediation also commences in small money claim disputes in England and Wales. We consider that it is appropriate to follow the examples of mandatory mediation in Italy, Greece, India, Tanzania and Namibia. We therefore propose that unless a court directs otherwise, mediation is mandatory in the following disputes, namely insurance and subrogated insurance disputes; medical negligence disputes; professional negligence disputes; defended loan default claims; construction contract disputes; personal injury claims arising from motor vehicle accident disputes; and defamation. We further propose that the Chief Justice request the Minister to delineate, by regulation, any additional categories of disputes that, in the opinion of the Chief Justice, should be subject to mandatory mediation. Any such regulation must be made after consultation with the Cabinet Minister under whose control the matters within which the categories of disputes fall, resides. Finally, this clause does not detract from the power of the court under clause 31(1) to exempt parties in certain circumstances from mandatory mediation. We heed the concerns raised against introducing mandatory mediation in defamation disputes.[335] We also note that Schedule 2 of the Traditional Court Aact includes crimen injuria and "altercations between members of the community". It appears that the possibility for overlap between at least one item on the proposed items of mandatory matters (defamation) and items referred to in Schedule 2 of the Traditional Courts Act regarding matters falling within the jurisdiction of traditional courts exists (compare para 7.24 below). Comments and input by respondents to the discussion paper on this point will be welcome.

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[335] Eloff (June 2024) "Should mediation in terms of rule 41A be mandatory?" De Rebus 24:

> Mandating mediation might not be universally suitable, especially in cases where parties are entrenched in their positions, making compromise an elusive prospect. The intricate nature of defamation claims necessitates a more bespoke and flexible approach, one that accommodates the idiosyncrasies of each case rather than adhering to a rigid, one-size-fits-all mandatory mediation framework, much how the current r 41A reads, which requires parties to contemplate mediation but does not impose it as a mandatory step. Defamation cases frequently involve complex legal issues intertwined with intricate factual details, demanding a nuanced understanding of the context and nuances of each statement …

5.218 We therefore propose the following clause on the categories of disputes which are subject to mandatory mediation:

Categories of disputes subject to mandatory mediation

30.(1) Unless a court directs otherwise, mediation is mandatory in the following disputes –

(a) insurance and subrogated insurance disputes;

(b) medical negligence disputes;

(c) professional negligence disputes;

(d) defended loan default disputes;

(e) construction contract disputes;

(f) disputes in personal injury claims arising from motor vehicle accidents; and

(g) defamation disputes.

(2) The Chief Justice may submit a request to the Minister to delineate, by regulation, any additional categories of disputes that, in the opinion of the Chief Justice, must be subject to mandatory mediation.

(3) Any regulation envisaged under this section must be made after consultation with the Cabinet Minister under whose control the matters, within which the categories of disputes fall, resides.

(4) This section does not detract from the power of the court under section 31.

D Parties may be exempted from mandatory mediation in certain circumstances: clause 31

1 Background

5.219 The question needs to be asked whether under certain circumstances disputants may be excused from participating in mandatory mediation. We note in Chapter 2 above the British Columbia case of *Matsqui First Nation v. Canada (Attorney General)* where the court noted certain circumstances under which mandatory mediation would be inappropriate.[336] We also highlight the "special cause exemption" grounds listed in the

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[336] See paras 2.102 to 2.106 above.

2019 Scottish report which proposed the introduction of a mandatory mediation referral and initial mediation meeting.[337] The government response on mandatory mediation in small money claims in England in Wales in 2023 did not favour the adoption of specific exemptions against mandatory mediation.

5.220 Ought exemptions or guidelines ought to be proposed in the Mediation Bill for consideration by courts in referring a matter to mediation. We note that under section 13 of the Land Court Act, the Judge President, before making a decision to refer a matter to mediation, must take all relevant circumstances into consideration, including whether mediation or arbitration in terms of any legislation took place before the institution of proceedings in the Court and the outcome thereof; the personal circumstances of the parties; the needs of and relief sought by the parties; and the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law. Further, under section 29(1), if, at any stage during proceedings, but prior to judgment, it becomes evident to the presiding judge that there is any issue which might be resolved through mediation, the presiding judge may make an order directing the parties to attempt to settle the issue through mediation, and that the proceedings be stayed pending such mediation.

5.221 In Alberta, in Canada, disputants are under the Alberta Rules of Court Regulation[338] required to manage their dispute by good faith participation in one or more of the following dispute resolution processes with respect to all or any part of their action, namely: a dispute resolution process in the private or government sectors involving an impartial third person; a Court annexed dispute resolution process; a judicial dispute resolution process; or any program or process designated by the Court. However, on application, the Court may waive this responsibility of the disputants only if: before the action started the parties engaged in a dispute resolution process and the parties and the Court believe that a further dispute resolution process would not be beneficial; the nature of the claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties; there is a compelling reason why a dispute resolution process should not be attempted by the parties; the Court is satisfied that engaging in a dispute resolution process would be futile; or the claim is of such a nature that a decision

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337 Scottish Mediation (June 2019) *Report: bringing mediation into mainstream* 133.

338 124 of 2010.

by the Court is necessary or desirable.

5.222 We also noted in Chapter 2 that the English Bar Council proposed guidelines for the referral of a matter to mediation in the *Churchill* case. We suggest the following guidelines based on the *Churchill* case as possible guidelines for consideration, whether the parties were legally advised or represented; whether mediation was likely to be effective or appropriate without legal advice or representation; whether it was made clear to the parties that, if they did not settle, they were free to pursue their claim or defence; the urgency of the case and the reasonableness of the delay caused by mediation; whether the delay caused by participating in mediation would vitiate the claim or give rise to or exacerbate any prescription issue, not relevant as we say mediation would stop prescription from running; the costs of mediation, both in absolute terms, and relative to the parties' resources and the value of the claim; whether there was any realistic prospect of the dispute being resolved through mediation; whether there was a significant imbalance in the parties' levels of resource, bargaining power, or sophistication; the reasons given by a party for not wishing to mediate, for example, whether there had already been a recent unsuccessful attempt at mediation; and the reasonableness and proportionality of a cost order, in the event that a party declined mediation in the face of an order of the Court.

5.223 We invite comment on the inclusion of guidelines in the Mediation Bill to guide courts in deciding to refer a matter to mediation, and the adequacy of the guidelines or exemptions based on the *Churchill* case, whether home-grown guidelines or exemptions should be developed for adoption in South Africa or would such an approach stifle legal development in this area of the law. We further invite comment on our proposal that the Chief Justice and the Heads of Court make, as practice directives, screening guidelines to empower courts, at any stage of litigation, in any civil matter, to refer a dispute between the parties to a certified mediator to facilitate mediation of the dispute.

2 Proposal

5.224 We consider that in certain circumstances parties may be exempted from mandatory mediation, namely if they intend to file a consent order and both parties consent to the order that is being requested; or a court determines that participation is not in the best interests of the parties, including, but not limited to urgency or potential hardship. We invite comment on the adequacy of this proposal considering the request for comment set out in the preceding paragraph. We therefore propose the following

clause on parties being exempted from mandatory mediation in certain circumstances:

> **Parties may in certain circumstances be exempted from mandatory mediation**
>
> 31. The parties are not compelled to submit to mediation in terms of section 30 if—
>
> (a) they intend to file a consent order and both parties consent to the order that is being requested; or
>
> (b) a court determines that participation is not in the best interests of the parties, including, but not limited to urgency or potential hardship.

E Notice by parties agreeing to or opposing mediation: clause 32

1 Discussion

5.225 Under the 2023 Mediation Act of India, whether any mediation agreement exists or not, the parties before filing any suit or proceedings of a civil or commercial nature in any court, may voluntarily and with mutual consent take steps to settle the disputes by pre-litigation mediation in accordance with the provisions of the Act.

5.226 The 2014 Rules of the Magistrates' Courts of South Africa, regulated the voluntary referral by litigants of disputes to mediation.[339] Any party could at any stage after litigation had commenced, but before trial, request the clerk or registrar of the court, in writing, to refer the dispute to mediation. The clerk or registrar of the court had to inform all other parties to the dispute that mediation of the dispute was being sought and had to call upon the party seeking mediation and all other parties to the dispute to attend a conference within 10 days for the purposes of determining whether all or some of the parties agree to mediation. After the commencement of trial but prior to judgment, any party could apply to court to refer the dispute to mediation. Disputants could refer a dispute to mediation prior to the commencement of litigation or after the commencement of litigation but prior to judgment. The condition which applied was that where the trial had commenced the parties had to obtain the leave of the court. The Rules of the Magistrates' Courts in so far as they apply to mediation, have been replaced in June

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339 Rule 78.

2023.[340] They are now aligned to the Rule 41A Uniform Rules of the High Court which apply to mediation in the High Courts. Rule 71 of the Magistrates' Courts now regulates the notice whether the plaintiff or the applicant agrees to or opposes referral of the dispute to mediation.

5.227 We noted in detail above the obligations imposed on parties in terms of Rule 41A of the Uniform Rules of the High Court to disclose to the court whether they considered resorting to mediation to resolve their dispute and the reasons for their belief that the dispute is or is not capable of being mediated. Concerns have also been raised that our legal practitioners do not comply with the obligations this rule require, that they largely regard their obligations as a tick-box exercise which they easily circumvent.[341]

2 Proposal

5.228 We propose that the proposed legislation impose on disputants the duty to disclose whether they resorted to mediation or not, based on the existing Rule 41A of the High Court. We therefore propose the following clause on the notice by parties agreeing to or opposing mediation:

> **Notice by parties agreeing to or opposing mediation**
>
> 32.(1) In every new action or application proceeding in any category of dispute not referred to in section 30, the plaintiff or applicant must, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation in terms of this Act.
>
> (2) A defendant or respondent in every action or application proceeding must, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiffs or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation in terms of this Act.
>
> (3) Notwithstanding the provisions of subsections (1) and (2) the parties in every

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340 Rules 70 to 79.

341 See Morgan (Oct 2022) "Compliance with Rule41A" Dunsters Attorneys who cautions about the consequences of failing to comply with the rule and the inconsistent outcomes non-complaince has. See also *D.D v I.L* (16939/2024) [2024] ZAWCHC 215 (20 Aug 2024) where Acting Judge Parker remarked:

> [16] Mediation provides for disputes to be resolved in a reconciliatory manner and therefore, promotes restorative justice. I remain of the view that Court annexed mediation should be utiltised more effectively. The practice of it becoming a tick box exercise or to bypass it on urgency needs to be addressed more vigorously.

action or application proceeding may at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or the hearing of the opposed application has commenced and the parties wish for the trial or the hearing to be adjourned as a result of the referral to mediation, the parties must obtain the leave of the court on such order as to costs as the court may deem appropriate.

F Powers of court: clause 33

1 Discussion

5.229 We note above that under the Uniform Rules of the High Court a Judge, or a Case Management Judge or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation.[342] The 2023 Rules of the Magistrates' Courts follow the wording of the High Court Rules.

5.230 Under the Mediation Act of India, when a court or tribunal refers the disputants to mediation, it may make an interim order to protect the interest of any party if deemed appropriate.[343]

5.231 We consider that we ought to clarify that nothing in the proposed legislation prevents a court from exercising its powers to apply judicial case management in any civil matter. Furthermore, during a mediation process, a court may at any time issue an urgent order to protect the health, safety, welfare or interest of a party to the dispute.

2 Proposal

5.232 We propose the following clause to regulate the powers of court:

> 33.(1) Nothing in this Act will prevent a court from exercising its powers to apply judicial case management in any civil matter.
>
> (2) During a mediation process, a court may at any time issue an urgent order to protect the health, safety, welfare or interest of a party to the dispute.

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342 Rule 41A(3)(b).

343 Clause 7(2).

G Information and education document: clause 34

1 Background

5.233 In 2019, we analysed in great detail the benefits of information and education programmes in its family dispute resolution investigation.[344] We recommended at the time, among others, that the Minister of Social Development, in collaboration with the Minister of Justice, should develop minimum standards for an information and education programme to educate family members about the effect of a family dispute on adults and children, and about the manner in which such a dispute may be resolved; and an information and education programme in accordance with the minimum standards and in accordance with the Act.[345] We further proposed that, once the information and education programme has been developed, but prior to implementation, it must be submitted to the Chief Justice for consultation. The 2018 EU Directive on Mediation also called on increased information campaigns by States to educate their citizens on mediation.[346]

2 Proposal

5.234 There is a general need for the development of information and education documents to inform and educate disputants about mediation. We propose that aspects to be covered are the benefits of mediation over court-based resolutions in respect of relevant disputes; nature and operation of mediation, including mandatory mediation, in respect of disputes; the role of the mediator in a mediation; types of mediation settlements available in a mediation; costs of mediation; and the availability of legal advice at any time during the mediation. We propose further that the Chief Justice must, to ensure that information concerning mediation is available to parties in mandatory

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344 See Chap 3 of the SALRC (2019) Discussion Paper 148 ADR in family matters.

345 Clause 9(1).

346 Calls on the Member States to step up their efforts to encourage the use of mediation in civil and commercial disputes, including through appropriate information campaigns providing citizens and legal persons with appropriate, comprehensive information regarding the thrust of the procedure and its advantages in terms of economising time and money and to ensure improved cooperation between legal professionals for that purpose; stresses in this context the need for an exchange of best practices in the various national jurisdictions, supported by appropriate measures at Union level, in order to boost awareness of how useful mediation is.

mediation proceedings, prepare and publish an information and education document for delivery to parties, or approve an information and education document for delivery to parties prepared by a person other than the Chief Justice.

5.235 We, therefore, propose the following clause to address information and education documents to be made available to disputants about mediation:

Information and education document

34.(1) The Chief Justice must, for the purposes of ensuring that information concerning mediation is available to parties in proceedings in terms of sections 29, 32 or 33 -

(a) prepare and publish an information and education document for delivery to parties, or

(b) approve an information and education document for delivery to parties prepared by a person other than the Chief Justice.

(2) An information and education document referred to in subsection (1) must address the -

(a) benefits of mediation over court-based resolutions in respect of relevant disputes;

(b) nature and operation of mediation, including mandatory mediation, in respect of disputes;

(c) role of the mediator in a mediation;

(d) types of mediation settlements available in a mediation;

(e) costs of mediation; and

(f) availability of legal advice at any time during the mediation.

(3) The Chief Justice may amend or revoke an information and education document prepared or approved under sub-section (1).

H Role of legal practitioners: clause 35

1 Background

5.236 The question arises whether we ought to provide specific clauses setting out the role of legal practitioners in the proposed legislation. We believe we can take our cue from other jurisdictions in this regard. In September 2009 the National Alternative Dispute Resolution Advisory Council (NADRAC) of Australia made the following

recommendations about the obligations to be imposed on legal practitioners to inform their clients about ADR proceedings, namely:[347]

- requirement to take genuine steps to resolve the dispute before commencing court or tribunal proceedings;
- private and community-based services that may help them resolve their dispute;
- advantages of resolving their dispute voluntarily, if possible, and the benefits of ADR;
- lawyer's own likely costs and the likely costs of other parties for which the client may be liable if unsuccessful, and
- likely timeframe for any legal proceedings.

5.237 The South African Legal Practice Act requires legal practitioners to disclose the costs when they first receive instructions from a client for the rendering of litigious or non-litigious legal services, or as soon as practically possible thereafter, to provide the client with a cost estimate notice, in writing, specifying all particulars relating to the envisaged costs of the legal services.[348] The cost estimate notice must indicate the likely financial implications including fees, charges, disbursements and other costs; their hourly fee rate and an explanation to the client of their right to negotiate the fees payable to their legal practitioners; an outline of the work to be done in respect of each stage of the litigation process; the likelihood of engaging an advocate, as well as an explanation of the different fees that can be charged by different advocates, depending on aspects such as seniority or expertise; and if the matter involves litigation, the legal and financial consequences of the client's withdrawal from the litigation as well as the costs recovery regime. The legal practitioner must further also verbally explain to the client every aspect contained in that cost notice, as well as any other relevant aspect relating to the costs of the legal services to be rendered.[349] A client is required to agree, in writing, to the envisaged legal services by the legal practitioners and incurring the estimated costs.[350] Non-compliance by any legal practitioner with these cost disclosing duties constitutes misconduct. If any legal practitioner does not comply with these cost disclosing duties, the client is not required to pay any legal costs to the legal practitioner until the Council has reviewed the matter

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347 NADRAC Australia (Sept 2009) "The resolve to resolve" 2.66 34.

348 Section 35(7).

349 Section 35(8).

350 Section 35(9).

and made a determination regarding the amounts to be paid.[351] These provisions do not preclude the use of contingency fee agreements as provided for in the Contingency Fees Act 66 of 1997.[352]

5.238 In 2022 already, we considered at length the background to, the concerns raised against these cost disclosing duties of legal practitioners which the Legal Practice Act introduced, and the support stakeholders expressed in favour of these duties.[353] In 2022, the Commission motivated as follows its support for legal practitioners entering into mandatory fee agreements with and disclosing cost estimates to their clients:

> 4.47 It is submitted that the requirement of a mandatory fee agreement will assist in improving the assessment process of contingency fees, and help address the abuse of contingency fees agreements. The LPA mechanisms will require legal practitioners to furnish particulars of the risk and costs in advance to their clients. Clients will also learn in advance the expectations and the cost implications of the impending legal actions. This will assist them in making a more informed decision about whether or not to proceed with the legal action/s. The mechanisms in the LPA will, it is hoped, reduce the abuse and exploitation of indigent clients by their lawyers. Similarly, the introduction of a mandatory fee arrangement between clients and legal practitioners is long overdue. Clients need to know upfront what their legal costs/fees are, and such an agreement would set the parameters. Lawyers and clients would be bound by this agreement, and safeguards would need to be in this agreement to protect clients from abuse and exploitation by their legal practitioners.
>
> 4.48 Section 35 of the LPA is a step in the right direction towards achieving access to justice for all clients and reducing the exploitation and abuse of clients by their legal practitioners.

2.239 Under the Irish Mediation Act,[354] a practising solicitor must, prior to issuing proceedings on behalf of a client advise the client to consider mediation as a means of attempting to resolve the dispute the subject of the proposed proceedings.[355] They must

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351 Section 35(10).

352 Section 35(9).

353 SALRC (2022) *Report on legal fees* paras 4.1 to 4.52, pages 226 to 243.

354 Section 14, although these duties do not apply to proceedings or applications under sections of the Guardianship of Infants Act 1964, section 2 of the Judicial Separation and Family Law Reform Act 1989, or section 5 of the Family Law (Divorce) Act 1996.

355 Section 14(1). Under section 24 of the Lagos Multi-Door Courthouse Law, the responsibility of a legal adviser in regard to ADR is to the court, the LMDC and the legal profession in promoting a better and more efficient justice delivery system. A legal adviser has a duty, to expose clients to alternative methods of dispute resolution and explore with them the most appropriate resolution of matters. A legal adviser must give due consideration and support to suggestions, orders and directives from the Courts for an amicable settlement or the referral of on-going matters to the LMDC; give regard and ensure clients accord respect to

provide the client with information in respect of mediation services, including the names and addresses of persons who provide mediation services. The solicitor must further provide the client with information about the advantages of resolving the dispute otherwise than by way of the proposed proceedings, and the benefits of mediation. They must also advise the client that mediation is voluntary and may not be an appropriate means of resolving the dispute where the safety of the client and or their children is at risk. They must further inform the client of confidentiality in mediation and enforcement of mediation settlement agreements. If, under the Irish Mediation Act, a practising solicitor acts on behalf of a client who intends to institute proceedings, they must attach to the originating document by which proceedings are instituted a statutory declaration by the solicitor evidencing that they have performed the obligations imposed on them in relation to the client and the proceedings.[356] The solicitor must inform the client about this declaration. If the originating document is not accompanied by the statutory declaration, the court will adjourn the proceedings for such period as it considers reasonable in the circumstances to enable the solicitor to provide the declaration.[357] If the solicitor has already complied with this requirement, they must provide such a declaration and must inform the client about this declaration.

5.240 The Irish Mediation Act provides further that obligations analogous to those imposed on a practising solicitor in relation to a client of the solicitor may be prescribed, subject to such modifications as may be specified in the regulations concerned, to be performed by a practising barrister in relation to a client of the barrister.[358] The Minister would prescribe the obligations to be performed by a practising barrister in relation to a client of the barrister after consultation with the Law Society of Ireland and the General Council of the Bar of Ireland.[359]

5.241 The Law Council of Australia has developed guidelines to assist lawyers representing clients in the mediation of civil and commercial disputes.[360] The guidelines

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notices, invitations and directives from the LMDC; and further the cause of ADR and give effect to the overriding objectives of the LMDC.

356 Section 14(2).

357 Section 14(3).

358 Section 15(2).

359 Section 15(4).

360 Law Council of Australia *Guidelines for lawyers in Mediation* April 2018.

address the following issues: role of lawyers, ethical issues, when to mediate, selecting the mediator, preparing for the mediation, preparing the client, conference with the mediator, at the mediation, offers and settlement, professional conduct and post mediation reporting to clients. The New South Wales Legal Profession Act of 2014 regulates the disclosure by legal practitioners of legal costs to their clients[361] and costs agreements[362] in detail. The Queensland Legal Profession Act of 2007, likewise, regulates cost disclosure by legal practitioners in detail[363] and cost agreements,[364] as does the Australian Capital Territory Legal Profession Act of 2006 regulates cost disclosure[365] and cost agreements.[366]

5.242 The New South Wales Legal Profession Act requires that a law practice must disclose to a client the basis on which legal costs will be calculated, including whether a

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361 Sections 309 to 318 which address s 309 disclosure of costs to clients; s 310 disclosure if another law practice is to be retained; s 311 how and when must disclosure be made to a client?; s 312 exceptions to disclosure; s 313 additional disclosure—settlement of litigious matters; s 314 additional disclosure—uplift fees; s 315 form of disclosure; s 316 ongoing obligation to disclose; s 317 effect of failure to disclose; s 318 progress reports; and s 318a disclosure to associated third party payers.

362 Sections 322 to 328: in s 322 costs agreements; s 323 conditional costs agreements; s 324 conditional costs agreements involving uplift fees; s 325 contingency fees prohibited; s 326 effect of costs agreement; s 327 certain costs agreements void; and 328 setting aside costs agreements or provisions of costs agreements; see also Lancken (2016) *Precedent AULA* 74.

363 Sections 307A to 318 which address in s 307A when disclosure is not required; s307b abbreviated disclosure of costs to clients; s 308 detailed disclosure of costs to clients; s 309 disclosure if another law practice is to be retained; s 310 when disclosure must be made; s 310a how disclosure must be made; s 311 exceptions to requirement for disclosure; 312 additional disclosure—settlement of litigious matters; s 313 additional disclosure—uplift fees; s 314 form of disclosure; s 315 ongoing obligation to disclose; 316 effect of failure to disclose; s 317 progress reports; and 318 disclosure to associated third party payers.

364 Sections 322 to 328, which address in s 322 making costs agreements; s 323 conditional costs agreements; s 324 conditional costs agreements involving uplift fees; s 325 contingency fees are prohibited; s 326 effect of costs agreement; s 327 particular costs agreements are void; and s 328 setting aside costs agreements.

365 Sections 269 to 278A which address in s 269 disclosure of costs to clients; s 270 disclosure if another law practice is to be retained; s 271 how and when must disclosure be made to a client?; s 272 exceptions to requirement for disclosure; s 273 additional disclosure—settlement of litigious matters; s 274 additional disclosure—uplift fees; s 275 form of disclosure; s 276 ongoing obligation to disclose etc; s 277 effect of failure to disclose; s 278 progress reports; and s 278a disclosure to associated third party payers.

366 Sections 282 to 288, which address in s 282 making costs agreements; s 283 conditional costs agreements; s 284 conditional costs agreements involving uplift fees; s 285 contingency fees prohibited; s 286 effect of costs agreement; s 287 certain costs agreements void; and s 288 setting aside costs agreements or provisions of costs agreements.

fixed costs provision applies to any of the legal costs.[367] The law firm is further required to disclose the right of the client to negotiate a costs agreement with the law practice; receive a bill from the law practice; request an itemised bill after receipt of a lump sum bill; be notified of any substantial change to the matters disclosed; an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs; details of the intervals at which the client will be billed; the rate of interest, whether a specific rate or a benchmark rate; that the law practice charges on overdue legal costs, and whether that rate is a specific rate of interest or is a benchmark rate of interest. The law firm must further disclose if the matter is a litigious matter, an estimate of the range of costs that may be recovered if the client is successful in the litigation; the range of costs the client may be ordered to pay if the client is unsuccessful; the client's right to progress reports; and details of the person whom the client may contact to discuss the legal costs. The law firm must also disclose the avenues that are open to the client in the event of a dispute in relation to legal costs assessment; the setting aside of a costs agreement or a provision of a costs agreement; mediation; any time limits that apply to the taking of any action; and that the law of New South Wales applies to legal costs in relation to the matter. The law firm must further disclose information about the client's right to accept under a corresponding law a written offer to enter into an agreement with the law practice that the corresponding provisions of the corresponding law apply to the matter or to notify under a corresponding law (and within the time allowed by the corresponding law) the law practice in writing that the client requires the corresponding provisions of the corresponding law to apply to the matter.

5.243 In Italy, disputants to a dispute to which mandatory mediation applies, are required to participate in mediation assisted by their legal representatives.[368] A duty is imposed on legal representatives to provide written information to their clients about voluntary and mandatory mediation and the available tax benefits which flow from taking part in mediation. If a legal representative fails to provide information to the client, then the agreement between the representative and the client is voidable. Lawyers in Greece have a duty to attend voluntary and mandatory mediation sessions with their clients unless it is a consumer dispute or dispute not exceeding € 5 000.[369]

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367 Section 309.

368 Van Rhee (2021) *Access to Justice in Eastern Europe* 13; Bruni (2019) *Lexology.*

369 Kriketou & Vrachasotakis (2019) *Kyriakides Georgopoulos Law Firm.*

2 Proposal

5.244 Provisions generally based on the Irish Mediation Act will deal appropriately with the duties of legal practitioners to clients about mediation and the information they must provide to clients and the court. We should add to our legislation the duty of legal practitioners to provide information and education documents and that the court may consider compliance by the legal practitioner with these obligations when making a costs order. We propose that a legal practitioner must, prior to issuing or defending proceedings on behalf of a client provide to and discuss with the client the information and education document. We further propose that the legal practitioner must provide the client with information in respect of mediation services; discuss with the client and provide in writing an assessment of the risks involved in litigating the case; and disclose, in writing, an estimate of the costs of proceeding with litigation without mediating.

5.245 We further note that the South African Legal Practice Act already imposes a duty on legal practitioners to provide an estimate of costs to their clients for the rendering of litigious or non-litigious legal services. Our proposed legislation confirms this obligation of the legal practitioner to disclose to their client an estimate of the costs of proceeding with litigation with or without mediation. If a legal practitioner is acting on behalf of a client who intends to institute or defend proceedings, the originating document by which proceedings are instituted or defended must be accompanied by a sworn declaration made by the legal practitioner evidencing that they have performed the obligations imposed on them in relation to the client and the proceedings to which the declaration relates. If the originating document is not accompanied by a sworn declaration, the court concerned may adjourn the proceedings for such period as it considers reasonable in the circumstances to enable the legal practitioner to comply and provide the court with such declaration or, if the legal practitioner has already complied, to provide the court with such declaration. Finally, the court may consider compliance by the legal practitioner about the required declaration when making a costs order. Is there a need to qualify this clause to exclude its application to an ex parte urgent application in a matter not already subjected to mediation? On the other hand, where the matter has been subjected to mediation, the parties can still approach a court for urgent relief including on an ex parte basis. We also note that under Rule 41A(9), when the court considers an order for costs, the court may have regard to the required notices and any relevant factor requiring the parties to seriously consider mediation. The Rules Board proposed the insertion in Rule 41A(2) of the phrase “in urgent applications the court or a judge may dispense with compliance with paragraphs (a) and (b)”. We note the judicial concern expressed in 2023

of parties circumventing mediation based on urgency.[370] We request comment on legal practitioners complying with clause 35 in urgent applications.

5.246 We, therefore, propose the following clause about the duties of legal practitioners to clients regarding mediation and the information they must provide to clients and the court:

Role of legal practitioners

35.(1) A legal practitioner must, prior to issuing or defending proceedings on behalf of a client in terms of either section 29 or 32—

(a) provide to and discuss with the client the information and education document referred to in section 34;

(b) provide the client with information in respect of mediation services;

(c) discuss with the client and provide in writing an assessment of the risks involved in litigating the case; and

(d) disclose, in writing, an estimate of the costs of proceeding with litigation without mediating.

(2) If the legal practitioner concerned is acting on behalf of a client who intends to institute or defend proceedings, the originating document by which proceedings are instituted or defended must be accompanied by a sworn declaration made by the legal practitioner evidencing (if such be the case) that the legal practitioner has performed the obligations imposed on them under subsection (1) in relation to the client and the proceedings to which the declaration relates.

(3) If the originating document referred to in subsection (2) is not accompanied by a sworn declaration made in accordance with that subsection, the court concerned may adjourn the proceedings for such period as it considers reasonable in the circumstances to enable the legal practitioner concerned to comply with subsection (1) and provide the court with such declaration or, if the legal practitioner has already complied with subsection (1), provide the court with such declaration.

(4) A Court may consider compliance by the legal practitioner concerned with this section when making a costs order.

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370 See par 5.7 above.

I Functions and duties of clerks and registrars: clause 36

1 Background

5.247 Under the 2014 Rules of the Magistrates' Courts, a clerk or registrar of the court was required to explain to all parties the purpose of alternative dispute resolution, the meaning, objectives and benefits, including costs saving, of mediation; and their liability for the fees of the mediator.[371] They also had to inform the parties that they may be assisted by practitioners of their choice, at their own cost; in consultation with the parties, execute the duties in regard to referral of a dispute to mediation prior to commencement of litigation and referral to mediation by litigants; if the parties agreed to mediation, to assist them to conclude a written agreement to mediate, which must be signed by the parties and accepted by the mediator. The clerk or registrar further had to, upon conclusion of an agreement to mediate, forward to the mediator a copy of the agreement to mediate; copies of the statement of claim and statement of defence, if mediation was to occur prior to commencement of litigation. In action proceedings, the clerk or registrar upon conclusion of an agreement to mediate, had to forward copies of the summons and plea, or statement of defence if no plea has been filed; and in application proceedings, copies of the founding, answering and replying affidavits, or statement of defence, if no answering affidavit has been filed. These Rules are no longer part of the 2023 Rules of the Magistrates' Court and the duties of clerks of the magistrates' courts are therefore no longer regulated. We note John Brand suggesting in 2020, among others, that it would be of assistance "if Judges and Court registrars publicly promoted mediation and informed parties about what mediation is; what its advantages are".[372]

5.248 We note that the DOJCD's Brigitte Mabandla Justice College offers mediation courses which is targeted to provide training for magistrates' court clerks; registrars of the magistrates' court; High Court clerks; Registrars of the High Court; employees of the Public Protector; Legal Aid Board attorneys; and State attorneys.[373] These courses are structured on four levels, namely level 1: Introduction to Mediation; level 2: Court-

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371 Rule 76.

372 Brand (2020) *Conflict Dynamics*.

373 *Brigitte Mabandla Justice College prospectus 2024 – 2025* 25 to 31.

annexed Mediation; level 3: Uniform Rule 41A Mediation; and level 4: Commercial Mediation. The foreseen outcome of the level 4 Commercial Mediation course is that the course attendee will:[374]

- Gain a practical understanding of Alternative Dispute Resolution, conflict, mediation, conciliation, arbitration and mediation techniques in civil procedure.
- Will be in a better position to chair mediation meetings and procedures.
- Be able to apply the basic mediation techniques.
- Be able to understand the process of reaching a settlement.
- Be able to apply consensus seeking processes, techniques and skills.
- Will have a basic knowledge on how to mediate a dispute and to assist the parties to reach an agreement.
- Gain a basic understanding of social context and diversity management.
- Understand delictual law in South Africa.
- Understand pure economic losses and the case law in that field.
- Understand compensation techniques.
- Understand contract law.
- Understand the essentials to contract law.

2 Proposal

5.249 The duties of magistrates' court and High Court clerks and registrars regarding mediation ought to be included in the Bill. We consider an adapted version of the provisions of the 2014 Rules of the Magistrates' courts should set out the duties of court clerks and registrars. We note that the appointment of clerks of the Equality Courts is subject to the clerk complying with the appointment requirements of the Public Service Act, 1994 (Proclamation 103 of 1994), the appointment policies for a post of administrative clerk in the Department, and the completion of a course approved by the Director-General. [375] We further note above that the DOJCD's Brigitte Mabandla Justice College provides mediation training to court clerks and registrars. The proposed legal training requirement for magistrates' court and High Court clerks and registrars to receive

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374 *Brigitte Mabandla Justice College prospectus 2024 – 2025* 31.

375 Regulations made under the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000), Regulation 3.

training on mediation should therefore not impose an additional training burden on the State.

5.250 We therefore propose the following clause on the duties of clerks and registrars in mediation:

Functions and duties of clerks and registrars

36.(1) A clerk or registrar of the court, who has completed a course approved by the Director-General, must –

(a) provide to and discuss with unrepresented parties the information and education document referred to in section 34; and

(b) explain the liability of the parties, as applicable, for the fees of a mediator.

(2) A clerk or registrar referred to in subsection (1) of a court must assist unrepresented parties ─

(a) by keeping a list of certified pro bono mediators in accordance with the different levels of certification;

(b) by informing the parties that they may be assisted by certified mediators of their choice, at their own cost;

(c) if the parties agree to mediation, to conclude a written agreement to mediate, which must be signed by the parties; and

(d) upon conclusion of an agreement to mediate, forward to the mediator─

(i) a copy of the agreement to mediate;

(ii) in action proceedings, copies of the summons and plea; and

(iii) in application proceedings, copies of the founding, answering and replying affidavits.

(3) In the event of the unrepresented parties not being able to resolve their dispute or conclude a settlement agreement where the dispute has been referred to mediation, the clerk or registrar of the court must upon receipt of a certificate of outcome from a mediator, file the certificate of outcome to enable the dispute to proceed as a defended action or opposed application.

J Chief Justice and Heads of Court may make Directives and Rules Board may make Rules: clause 37

1 Background

5.251 The Chief Justice, and Heads of Court, under the Superior Courts Act, should issue practice directives for the following matters, including mediation under the Act;

screening guidelines for referring matters to mandatory mediation; expedited processes for the enforcement of mediated settlement agreements referred to in section 23; the promotion of mediation in small claims disputes; and the integration of mediation into case management. We consider that the Chief Justice and the Heads of Court must consult with the Legal Practice Council, the Mediation Council and members of any relevant professional bodies before issuing any practice directive in this regard. We are further of the view that we should provide for the power for the Rules Board for Courts of Law to make Rules for mediation in the superior courts and the magistrates' courts under the Act, in consultation with the Chief Justice.

2 Proposal

5.252 We therefore propose the following clause to provide for the Chief Justice and Heads of Court to make directives for mediation and the Rules Board to make Rules:

> **Chief Justice and Heads of Court may make Directives**
> **37.**(1) The Chief Justice, and Heads of Court under the Superior Courts Act, may issue practice directives providing for the following matters, including –
>
> (*a*) mediation under this Act;
> (*b*) screening guidelines for referring matters to mandatory mediation;
> (*c*) expedited processes for the enforcement of mediated settlement agreements referred to in section 23;
> (*d*) the promotion of mediation in small claims disputes; and
> (*e*) the integration of mediation into case management.
>
> (2) The Chief Justice and the heads of Court must consult with the Legal Practice Council, the Mediation Council and members of any relevant professional bodies before issuing any practice directive in terms of sub-section (1).
>
> (3) The Rules Board for Courts of Law, established under the Rules Board for Courts of Law Act, 1985 (Act No, 107 of 1985), may make Rules for mediation in the superior courts and the magistrates' courts under this Act, in consultation with the Chief Justice.

K The Minister make regulations: clause 46

1 Background

5.253 We consider we should follow the usual practice that the proposed legislation provides for the Minister to make regulations on any matter the legislation requires or

permits to be prescribed; and any matter that may be necessary for the application of the legislation. We consider, however, that the legislation clarifies that the power of the Minister does not extend to making practice directives which are in the jurisdiction of the Chief Justice and the heads of Court under clause 37. We therefore explicitly provide that the power of the Minister to make regulations excludes the matters contemplated by section 37.

5.254 We further consider that before making any regulations, the Minister must consult such persons who can provide relevant information as they consider appropriate.

2 Proposal

5.255 We therefore propose the following provision for the power of the Minister to make regulations:

Regulations

47.(1) The Minister may make regulations concerning—

(a) any matter this Act requires or permits to be prescribed;

(b) any matter that may be necessary for the application of this Act; but

(c) excluding the matters contemplated by section 37.

(2) Before making any regulations, the Minister must consult such persons who may provide relevant information as they consider appropriate.

L Short title and commencement: clause 47

1 Background

5.256 The short title of the statute should be the Mediation Act. We further considered whether we should provide that the legislation will come into operation on a date fixed by the President by proclamation in the Gazette. The International Arbitration Act was deliberately worded that the actual coming into operation was the date that it was published in the Gazette. The latter Act did not leave it to an additional act performed by the President, on advice given during the legislative process. However, in this case, because of the difficulties regarding the body representing the mediation profession, there might be a need to have different dates for different parts of the statute commencing. Therefore, at this stage it seems to make sense that different parts of the legislation may commence on different dates and in respect of different categories of dispute.

2 Proposal

5.257 We propose the following short title and commencement clause:

Short title and commencement

48.(1) This Act is called the Mediation Act, 20 ... and will come into operation on a date fixed by the President by proclamation in the Gazette.

(2) Different dates of commencement may be determined in respect of –

(a) different provisions of this Act; and

(b) different categories of disputes.

CHAPTER 6: THE ENFORCEMENT OF INTERNATIONAL SETTLEMENT AGREEMENTS ACHIEVED THROUGH COMMERCIAL MEDIATION

A Introduction

6.1 In June 2018, UNCITRAL adopted amendments to its Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, which has its origins in a previous Model Law of 2002, namely the UNCITRAL Model Law on International Commercial Conciliation. Apart from two changes to the title of the original Model Law, the most significant change to the content of the Model Law was the addition of a new Section 3, which provides a model for national legislation to facilitate court enforcement by parties of international settlement agreements achieved through mediation.

6.2 At the same meeting in June 2018, UNCITRAL approved the text of the United Nations Convention on International Settlement Agreements Resulting from Mediation (now known as the Singapore Convention on Mediation) for submission to the UN General Assembly.[1] The Singapore Convention was developed concurrently with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Model Law of 2018). In December 2018, the General Assembly adopted the text of the Singapore Convention by consensus and authorised a signing ceremony to be held in Singapore on 6-7 August 2019. On that occasion, 46 countries signed the Convention, including China, India, Nigeria and the United States of America.[2] South Africa was not a signatory.[3] Several countries have since signed the Convention including Australia, the United Kingdom, Ghana, Rwanda,

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1 See www.singaporeconvention.org/about-convention.html; Schnabel (2019) *Pepperdine Dispute Resolution Law Journal* 1 – 2.

2 Eight of the original signatories were from Africa, namely Benin, Congo, the Democratic Republic of Congo, Eswatini, Mauritius, Nigeria, Sierra Leone, and Uganda.

3 Of the now 10 BRICS countries, China, India, Iran and Saudi Arabia were among the original signatories, with Brazil as a subsequent signatory. Saudi Arabia is the only BRICS member who ratified the Convention.

and three further countries from Africa.[4] The Convention now has 14 parties, including Singapore, Japan and Saudi Arabia, with Nigeria being the only party from Africa who ratified the Convention.[5] The contents of the Convention are considered in greater detail in parts C and D of this Chapter below. If South Africa signs the Convention, it will be able to ratify it. Failing such signature, South Africa may accede to the Convention.[6] The text of the Convention is in Schedule 1 to the Draft Bill with the discussion paper.

6.3 We are examining in this discussion paper the desirability of generic legislation for South Africa to promote the use of mediation for the settlement of disputes. One of the issues which we must address is a recommended response by South Africa to the UNCITRAL Model Law referred to above as a whole. This Chapter recommends a provisional response on this issue, without dealing with the content of the original Model Law of 2002 in any detail. This Chapter also provides proposed legislation to give effect to South Africa's accession to the Singapore Convention on Mediation. In view of the close similarity between the text of the Singapore Convention on Mediation and Section 3 of the Model Law, namely, the 2018 addition dealing with international settlement agreements, the draft legislation proposed to give effect to accession to the Convention is virtually identical to that which would be required to include Section 3 of the Model Law in the Committee's proposed generic legislation on mediation. The former option requires the addition of two definitions, one extra clause and one further minor addition to the Mediation Bill.[7] The reasons for preferring the former option appear from this Chapter.

6.4 We commence by providing some background on current mediation legislation in African jurisdictions, and a suggested response by South Africa to the work of UNCITRAL in promoting national legislation in this field. This will be followed by a brief examination of the text of the text of the Singapore Convention on Mediation and Section 3 of the UNCITRAL Model Law. Suggestions will be made regarding the legislation necessary to give effect to South Africa's accession to the Convention.

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4 Chad, Guinea-Bissau, and Gabon. See Annex D for a complete list of signatories and parties.

5 See also the Nigerian Arbitration and Mediation Act of 2023 s 87.

6 See the Singapore Convention article 11(2) and (3).

7 See the definitions of "Convention" and "mediation" in s 39, the reference to the Convention in s 42(1) and also s 46, which gives effect to article 7 of the Convention. References should also arguably be made to the Convention in the long title to the Draft Bill and in any clause dealing with the objects of the Draft Bill.

B Background

6.5 Currently at least 27 African jurisdictions have generic national mediation laws. 17 of these, being the members of OHADA,[8] in 2017 implemented the (OHADA) Uniform Act on Mediation, which is based on the UNCITRAL Model Law on International Commercial Conciliation of 2002.[9] As mentioned above, the UNCITRAL Model Law on Mediation was amended and expanded in 2018.

6.6 South Africa adopted the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006, in chapter 2 of the International Arbitration Act 15 of 2017. Chapter 3 of the same statute gives full effect in South African domestic legislation to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereafter "the New York Convention").[10] This may possibly create the expectation that South Africa will seriously consider adopting the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (hereafter "the Model Law on Mediation") or acceding to the Singapore Convention, or both. At UNCITRAL's meeting in July 2018, it agreed to replace the term "conciliation" with "mediation", as the latter was understood to be the more generally accepted term.[11]

6.7 The circumstances regarding the two Model Laws in a South African context are however very different. When the SALRC commenced with Project 94 in 1996, the

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8 The French acronym for the Organisation for the Harmonisation of Business Law in Africa, which has 17 member states, mainly Francophone countries from West Africa.

9 See Aragaki (2019) SOAS Arbitration Conference Arusha 177 - 179. See also Iyodu & Ng (Aug 2019) NTU-SBF Centre for African Studies *Africa Current Issues* 1 – 7.

10 The 2017 legislation repealed and replaced the defective Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

11 See UNCITRAL's Report on its 51st session (25 June -13 July 2018) paras 19 and 51. The UNCITRAL Secretariat provided the following motivation for this change:

> "'Mediation' is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts and relevant documents, UNCITRAL used the term 'conciliation' with the understanding that the terms 'conciliation' and 'mediation' were interchangeable. In preparing the [Convention/amendment to the Model Law], the Commission decided to use the term 'mediation' instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the [Convention/ Model Law]. This change in terminology does not have any substantive or conceptual implications." (See Note by the Secretariat A/CN.9/WG.II/WP.205, 23 November 2017, para 5.)

country already had generic arbitration legislation, the Arbitration Act 42 of 1965, which applied to both domestic and international arbitrations taking place in South Africa. By international standards, the supervisory powers of the court in that statute were considered as inappropriately wide. An important aim of the UNCITRAL Model Law on International Commercial Arbitration was to limit the powers of the court. Moreover, as an international arbitration normally takes place under the arbitration law of the seat, the Model Law is intended to harmonise the powers of the court in national jurisdictions adopting the Model Law.[12] The Model Law on Mediation, Sections 1 and 2, have no provisions dealing with the powers of the court in the context of the mediation process.[13] As a result, the need for harmonisation of national mediation laws relating to cross-border disputes is correspondingly less.[14]

6.8 It has been said that the Model Law on Mediation "has a tendency to regulate details internal to the mediation process that do not actually require regulation."[15] It is submitted that this criticism is misplaced. Section 2 of the Model Law, which deals with the process for an international commercial mediation, has only one mandatory provision.[16] The rest of the provisions are merely default or contract-out provisions, which only apply where the parties have not agreed to their own process. However, this does not mean that the default provisions of the Model Law on Mediation are necessarily appropriate for a generic mediation statute for South Africa. It is suggested that the Model Law, along with other generic national mediation legislation, can be consulted for guidance on the drafting of specific provisions in the proposed South African statute, without it being necessary to base the generic South African legislation closely on the provisions of the Model Law on Mediation.

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12 See Aragaki (2019) SOAS Arbitration Conference Arusha 179.

13 Compare art 11(1) regarding the duty of confidentiality regarding mediation in subsequent court proceedings and art 14 regarding the effect of an agreement to mediate on the right of a party to approach the court.

14 See Aragaki (2019) SOAS Arbitration Conference Arusha 179.

15 See Aragaki (2019) SOAS Arbitration Conference Arusha 179.

16 See art 4 regarding art 7(3), which requires the mediator to seek to maintain fair treatment of the parties. This is the only provision in Section 2 which cannot be excluded or varied by agreement.

C Section 3 of the Model Law on Mediation regarding International Settlement Agreements and the Singapore Convention on Mediation

6.9 Unlike the rest of the Model Law on Mediation, the new Section 3 is primarily concerned with the recognition and enforcement of settlement agreements, which result from the mediation of cross-border commercial disputes, by the courts. Although the need to resort to the courts should only occur in a small minority of cases, it is precisely in this field that the need for harmonisation of national mediation laws exists. One of the failings of the original UNCITRAL Model Law on International Commercial Conciliation of 2002 was the omission to regulate court recognition and enforcement of settlement agreements.[17] UNCITRAL has now adopted a dual approach to the problem by providing both a Model Law and the Singapore Convention.[18] UNCITRAL aimed to maintain a level of consistency in the wording of the relevant provisions of the Model Law and the draft Convention.[19] As appears from the formal title of the Convention, namely the United Nations Convention on International Settlement Agreements Resulting from Mediation of 2018, the Convention deals only with the enforcement of cross-border settlement agreements arising from mediation.[20] It therefore covers the same ground as Section 3 of the Model Law and other aspects of mediation fall outside the Convention.

6.10 The primary purpose of both instruments is to promote the use of mediation for the resolution of international commercial disputes. The Singapore Convention is intended to provide the international legitimacy for mediated settlement agreements that

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17 Compare the original art 14, which has now been replaced by Section 3, which comprises 5 articles.

18 See Schnabel (2019) *Pepperdine Dispute Resolution Law Journal* 4-11 regarding the work of UNCITRAL and the compromise that led to the decision to draft both the Convention and Section 3 of the Model Law.

19 See UNCITRAL's Report on its 51st session A/73/17 para 52. See also para 49 of the report for UNCITRAL's decision recommending the draft Convention to the UN General Assembly. The Convention was subsequently approved by the General Assembly and was signed by 46 states in Singapore on 7 August 2019 and remains open for signature at the UN offices in New York. See uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

20 See Schnabel (2019) *Pepperdine Dispute Resolution Law Journal* 14 as to the Convention containing no equivalent to Art II of the New York Convention to facilitate the enforcement of an agreement to mediate.

the New York Convention provided for arbitral awards.[21]

6.11 We are of the view that South Africa should give serious and urgent consideration to ratifying or acceding to the Singapore Convention and Chapter 8 of the Draft Bill has been worded accordingly.[22] In the available literature on the Singapore Convention we are not aware of any reason being suggested as to why a nation intent on promoting foreign trade should not join the Convention. In an African context, the initiative has been seized by Nigeria through first signing and then joining the Convention and including the necessary provision for it to have effect in domestic law by means of appropriate provisions in its new Arbitration and Mediation Act of 2023.[23] African commentators have urged the adoption of the Convention by other African states.[24] In Asia the government of India signed the Convention but has since been severely criticised for failing to ratify the Convention and to make provision for such ratification in domestic law in its new generic Mediation Act.[25] The Commission requests respondents to the discussion paper

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21 See Schnabel (2019) *Pepperdine Dispute Resolution Law Journal* 2-3; the response of the Civil Mediation Council, referred to in fn 29 below, para 1(b) and (c); Muigua (July 2024) *Enforcing Mediated Agreements and the Singapore Convention: The African Experience* 5-6.

22 See also the recommendation of the Civil Mediation Council of 16 September 2019 to the effect that the United Kingdom should adopt the Singapore Convention. According to its website, the Civil Mediation Council is increasingly recognised, also by government, as the representative body for civil, commercial and workplace mediation in England and Wales. Its members include the Centre for Effective Dispute Resolution (CEDR) and the Chartered Institute of Arbitrators. (See civilmediation.org/about/history.) See also Schnabel (2019) *Pepperdine Dispute Resolution Law Journal* 2-4 regarding the primary goal of the Convention.

23 See the (Nigerian) Arbitration and Mediation Act s 87, read with ss 83-86. The provisions concerned incorporate the provisions of arts 4-6 and 3 of the Singapore Convention, in that order.

24 Muigua (July 2024) *Enforcing Mediated Agreements and the Singapore Convention: The African Experience* 13, who argues that joining the Singapore Convention is crucial for African states wishing to reap the benefits of AfCFTA. At 15-16 he notes the reluctance of the business community to use mediation for resolving cross-border commercial disputes in Africa because of concerns regarding the enforceability of mediated settlement agreements. He therefore regards it as essential for all African countries to adopt the Convention as it provides the necessary framework for the enforcement of cross-border mediated settlement agreements (16-18). While Mizner noted on 29 September 2020 that Ghana had signed the Convention on 22 July 2020, thus signaling its support for cross-border mediated settlement agreements, he rightly points out that it is the adoption of the Convention that is necessary for effective implementation. See Mizner (Sept 2020) "Ghana embraces mediation through Singapore Convention".

25 Compare the response of Kanuga (Feb 2020) "Mediated settlements – the Next Realm of Dispute Resolution in India", in praise of the Indian government's decision to sign the Convention as one of the first group on 7 August 2018 in Singapore, with the subsequent disappointment regarding India's decision to introduce a Mediation Act in 2023 without providing for the ratification of the Convention: see e.g. Gulati, Sahu & Kanuga (Sept 2023)

who hold different views on South Africa joining the Singapore Convention or even on adopting Section 3 of the Model Law on Mediation to motivate their reasons in their responses so that the Commission can take these views into account when drafting its report.

6.12 It is furthermore suggested that it is unnecessary for South Africa to adopt either of the two reservations permitted by the Singapore Convention. The reservations are contained in article 8.[26] In terms of the first, the Convention would not apply to a settlement agreement, as defined, to which the state or other public body ("government agency") is a party. In terms of the second, the Convention will only apply to a settlement agreement if the parties to that agreement so agree. Regarding the first, the Civil Mediation Council states bluntly that it would be wrong for government to join the Convention while exempting itself from its provisions.[27] In a South African context legislation furthermore provides for mediation as the primary vehicle for resolving investment disputes between the state and foreign investors, to the exclusion of arbitration.[28] The second reservation is also inappropriate. It would mean that parties would have to "contract in" to the Convention before it would apply to their settlement agreement, which would seriously reduce the efficacy of the Convention. Nigeria found it unnecessary to make either reservation.[29]

"Decoding the Mediation Act, 2023". While acknowledging that the Mediation Act, once in force, will lay the groundwork for a comprehensive mediation framework in India, they note the absence of statutory provision for the enforcement of cross-border mediated settlement agreements concluded outside India. They are of the view that this is likely to have a significant negative effect on the use of mediation to resolve such cross-border disputes involving an Indian party. They therefore recommend the adoption of the Convention. Roy, Guha & Bharucha (May 2024) "Mediation Act 2023 – Two Steps Forward, One Step Back" suggest two possible reasons for not incorporating provisions on the Singapore Convention in the (Indian) Mediation Act of 2023. The first is a wait and see attitude in the absence of other major economies (except Japan) joining the Convention. The second relates to the aim of making India a major international ADR hub, namely the discouragement of cross-border commercial mediations with a clear Indian link being held outside India.

26 See Schnabel (2019) *Pepperdine Dispute Resolution Law Journal* 55-58 for a more detailed discussion of the two potential reservations.

27 See the recommendation of the Civil Mediation Council of 16 September 2019 para 4. The Civil Mediation Council is a charitable organization based in England that provides trained persons subject to a code of conduct for appointment as mediators by members of the (English) public.

28 See the Protection of Investment Act 22 of 2015 s 13.

29 S 87 of the Nigerian Arbitration and Mediation Act of 2023 makes two different reservations equivalent to the reciprocity and commercial reservations permitted under the NYC and made by Nigeria when it joined that Convention (see also s 60 of the Nigerian Act of 2023). It is submitted that Nigeria's example should not be followed by South Africa for three main reasons: first, South Africa acceded to the NYC without reservation. Second, the

6.13 An important difference between a multilateral convention and a model law relates to the ability of the adopting state to make adaptations to suit local requirements. The Advisory Committee at its August 2019 meeting accepted that no adaptations were necessary to Section 3 of the Model Law before it could be implemented in South Africa. As it is submitted above that South Africa should not make either of the permitted reservations before joining the Singapore Convention, it follows that the wording of the Convention poses no obstacles to its adoption by South Africa. By adopting the Convention rather than Section 3 of the Model Law, South Africa sends out a stronger message of support to the global and African communities of South Africa's support for the use of mediation to resolve cross-border commercial disputes. It also encourages other states to ratify or accede to the Convention, for the benefit of South African commercial entities wishing to enforce or rely on settlement agreements achieved through mediation in states which are parties to the Convention.

6.14 In this Chapter, the wording of the provisions of the Singapore Convention on Mediation, contained in Schedule 1 to the Mediation Bill, and the provisions of Section 3 of the Model Law on Mediation,[30] will mainly be dealt with together, because the wording of the provisions is usually so similar. A brief overview of these provisions will now be provided followed by a basic commentary on proposed South African legislation based on the Convention, for suggested inclusion in the proposed generic statute on mediation.

6.15 The main legal principles which UNCITRAL wished to implement in its Model Law and Convention are set out in article 3 of the Convention (article 17 of Section 3).They are the mediation equivalent of the recognition and enforcement of a foreign arbitral award achieved by the New York Convention of 1958[31] and the recognition and enforcement of international arbitration awards provided by the UNCITRAL Model Law on International Commercial Arbitration.[32] Article 3(1) therefore enables a court to

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commercial reservation is unnecessary in view of non-commercial transactions being excluded from the ambit of the Singapore Convention by article 1(2). The Convention, unlike the NYC, does not permit the reciprocity reservation. Third, as article 8(2) of the Singapore Convention permits no other reservations except the two expressly permitted by article 8(1), Nigeria's imposition of the reciprocity reservation in its domestic law appears to be a breach of its duties under international law.

30 See uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral /en/annex_ii.pdf.

31 Compare Article I(1) of the New York Convention.

32 Whereas the New York Convention applies to foreign awards, the Model Law articles 35 and 36 apply to the recognition and enforcement of arbitral in an international arbitration,

enforce a settlement agreement pertaining to a cross-border mediation on application. Article 3(2) enables a party to invoke the settlement agreement in court, where another party brings a claim in court which has already been resolved by the settlement agreement. In both cases the court can only prevent a party from relying on the settlement agreement on the exhaustive list of grounds contained in article 5 of the Convention (article 19 of Section 3).

6.16 Articles 1 and 2 of the Convention and article 16 of the Model Law explain the scope of application of the Convention / Section 3 of the Model Law as well as setting out certain definitions. The instruments[33] apply to settlement agreements, which are defined as "international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute" (article 1(1) of the Convention, corresponding to article 16(1) of the Model Law). Consumer disputes and disputes relating to family, inheritance or employment law are expressly excluded (article 1(2) / article 16(2)). To prevent overlapping with other legislation, settlement agreements approved by a court or concluded in the course of court proceedings are expressly excluded. (See article 1(3)(a) / 16(3)(a)). Similarly, settlement agreements that have been recorded as an arbitral award will be enforceable as such[34] and are therefore also excluded from the application of the instruments (see article 1(3)(b) / 16(3)(b)). Articles 1(1) and 2(1) / 16(4) and (5) define when a settlement agreement is to be regarded as international. Finally, article 2(2) / 16(6) sets out when a settlement agreement will be "in writing". The writing requirement is met where the settlement agreement is contained in an electronic communication if the information which it contains is accessible for subsequent reference.[35]

6.17 Article 4 / 18 of the instruments contains the requirements which a party will have to comply with in order to rely on a settlement agreement in court. Article 5 /19 of the instruments set outs the exhaustive list of grounds on which a party may be prevented

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including recognition and enforcement by the court at the seat of the arbitration of an international award made in the area of the court's jurisdiction.

33 To simplify the text of the overview, the Convention and section 3 of the Model Law are below collectively referred to as "the instruments".

34 See the International Arbitration Act 15 of 2017 Sch 1 art 30.

35 The definition is deliberately less detailed than the definition of an arbitration agreement in writing contained in art 7 of the UNCITRAL Model Law on International Commercial Arbitration 2006, option 1.

by the court from relying on the settlement agreement.[36] The UNCITRAL drafters accepted that there is a degree of overlap between some of the grounds. Article 5(1)(b)(i) / 19(1)(b)(i) of the instruments is generic and based on the wording of the New York Convention, whereas article 5 / 19 subparagraphs (1)(b)(ii) and (iii), (c) and (d) are arguably illustrative of situations where the ground in article 5(1)(b)(i) /19(1)(b)(i) could apply. The grounds in article 5 / 19 subparagraphs (1)(e) and (f) specifically concern conduct by the mediator which could prevent reliance on the settlement agreement. The two grounds in article 5(2) / 19(2), which the court can raise on its own initiative, are reminiscent of the corresponding grounds in Article V(2) of the New York Convention on foreign arbitral awards.

6.18 Article 6 / 20 of the instruments gives the court the power to adjourn its proceedings in appropriate circumstances where there are parallel proceedings.

6.19 Article 7 of the Singapore Convention has a similar function to article VII of the New York Convention,[37] and makes it clear that the Singapore Convention does not exclude a party from using any other remedy in domestic law or under another treaty to rely on the settlement agreement.

6.20 Article 8 of the Singapore Convention, which deals with permissible reservations, has been discussed above.[38]

D Possible draft legislation based on the provisions of the Singapore Convention and Section 3 of the Model Law

6.21 Chapter 8 of the proposed legislation is based on the Singapore Convention and

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36 As is the case with Article V of the New York Convention, the effect of article 5 /19 of the instruments is to give them a "pro-enforcement bias". The grounds on which the court may prevent relief are limited to an exhaustive list of grounds. Also, in the case of grounds that must be raised by a party opposing relief, the onus is on that party to prove the existence of the ground in order to succeed with its opposition.

37 The International Arbitration Act 15 of 2017 s 19 gives effect to this provision of the New York Convention.

38 See para 6.13 above.

article 3 of the Model Law, while trying to comply with the drafting conventions for modern South African statutes.

6.22 As South African statutes or chapters of legislation commence with definitions, clause 38 of the Bill contains definitions. The definitions of “international” and “settlement agreement” are taken from articles 1(1) and 2(1) of the Convention and article 16 of the Model Law on Mediation. The definitions of “court” and “UNCITRAL” are taken from the International Arbitration Act 15 of 2017. The definition of court excludes a magistrate’s court. Where a settlement is reached under the mediation provisions of the Magistrates’ Courts Rules, even if the matter concerns a cross-border commercial dispute, the settlement agreement would be enforceable in South Africa as provided by the Rules. The definitions of “Convention” and “mediation” have been added, the latter being taken from article 2(3) of the Convention. This definition is only necessary if the general definition of mediation for the draft legislation differs materially from that used in the Convention.

6.23 Clauses 41 to 44 of the draft legislation ~~in~~ are based on the corresponding provisions of articles 3-6 of the Convention, which are virtually identical with articles 17-20 of the Model Law on Mediation.

6.24 The International Arbitration Act allows reference to be made to reports of UNCITRAL and its secretariat for purposes of interpreting Schedule 1 of that Act. A similar provision is included in the Bill as clause 39.

6.25 Clauses 40(2) and (3) attempt to deal with the exceptions where the draft legislation does not apply, based on article 1(2) and (3) / 16(2) and (3) of the instruments.

6.26 Clause 45 attempts to give effect to article 7 of the Singapore Convention.

E Proposal

6.27 We propose the following provisions to regulate the enforcement of international

settlement agreements achieved through commercial mediation: [39]

Definitions

38.(1) In this Chapter, unless the context otherwise indicates –

"court" means any Division of the High Court referred to in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013), or any local seat thereof having jurisdiction;

"Convention" means the United Nations Convention on International Settlement Agreements Resulting from Mediation of 2018, the text of which is set out in Schedule 1.

"international" in the context of a settlement agreement means that at the time of the conclusion of the settlement agreement -

(a) at least two parties to the settlement agreement have their places of business in different states; or

(b) the state in which the parties to the settlement agreement have their places of business is different from either the state -

(i) in which a substantial part of the obligations under the settlement agreement is to be performed; or

(ii) with which the subject matter of the settlement agreement is most closely connected;

"**mediation**" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.[40]

"settlement agreement" means an international agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute; and

"UNCITRAL'' means the United Nations Commission on International Trade Law.

(2)(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

(3) A settlement agreement is in writing if its content is recorded in any form, which requirement is met by an electronic communication, if the information contained therein is accessible so as to be useable for subsequent reference.

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39 In terms of the Model Law a State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles. This provision is not included in the Singapore Convention.

40 This definition is taken from article 2(3) of the Singapore Convention.

Interpretation of this Chapter

39. The material to which a court may refer in interpreting this Chapter includes relevant reports of UNCITRAL and its secretariat.

Application of this Chapter

40.(1) Subject to the provisions of this section, this chapter applies to settlement agreements as defined in section 38(1).

(2) This chapter does not apply to settlement agreements -

(a) concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) relating to family, inheritance or employment law.

(3) This chapter does not apply to -

(a) settlement agreements that –

(i) have been approved by a court or concluded in the course of proceedings before a court; and

(ii) are enforceable as a judgment in the State of that court;

(b) settlement agreements that have been recorded and are enforceable as an arbitral award.

General principles

41.(1) A settlement agreement must be enforced in accordance with the rules of procedure of the Republic,[41] and under the conditions laid down in the Convention subject to this Chapter.

(2) If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of the Republic, and under the conditions laid down in this chapter, in order to prove that the matter has already been resolved.[42]

Requirements for reliance on settlement agreements[43]

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41 See Schnabel (2019) *Pepperdine Dispute Resolution Law Journal* 11-13 regarding the fact that the Convention does not just apply to settlement agreements providing for monetary relief.

42 See Schnabel (2019) *Pepperdine Dispute Resolution Law Journal* 35-41 and specifically 39-41 as to why the particular wording was chosen in art 3(2) of the Convention to replace the term “recognition” in the context of arbitral awards under the New York Convention.

43 See Schnabel (2019) *Pepperdine Dispute Resolution Law Journal* 27-34 for an in-depth discussion of the requirements imposed by the Convention, particularly art 4.

42.(1) A party relying on a settlement agreement under this Chapter must supply to the court –

(a) the settlement agreement signed by the parties;

(b) evidence that the settlement agreement resulted from mediation, such as –

(i) the mediator's signature on the settlement agreement;

(ii) a document signed by the mediator indicating that the mediation was carried out;

(iii) an attestation by the institution that administered the mediation; or

(iv) in the absence of (i), (ii) or (iii), any other evidence acceptable to the court.

(2) The requirement that a settlement agreement must be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if -

(a) a method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) the method used is either –

(i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) proven in fact to have fulfilled the functions described in subsection (2)(a), by itself or together with further evidence.

(3) If the settlement agreement is not in an official language of the Republic, the court may request a translation thereof into such language.[44]

(4) The court may require any necessary document to verify that the requirements of this Chapter have been complied with.

(5) When considering the request for relief, the court must act expeditiously.

Grounds for refusing to grant relief[45]

43.(1) A court may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the court proof that –

(a) a party to the settlement agreement was under some incapacity;

(b) the settlement agreement sought to be relied upon –

(i) is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or,

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44 Cf IAA s 17(b).

45 See Schnabel (2019) *Pepperdine Dispute Resolution Law Journal* 41-55 for a detailed discussion of these grounds.

failing any indication thereof, under the law deemed applicable by the court;

(ii) is not binding, or is not final, according to its terms; or

(iii) has been subsequently modified;

(c) the obligations in the settlement agreement –

(i) have been performed; or

(ii) are not clear or comprehensible;

(d) granting relief would be contrary to the terms of the settlement agreement;

(e) there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

(2) The court may also refuse to grant relief if it finds that –

(a) granting relief would be contrary to the Constitution; or

(b) the subject matter of the dispute is not capable of settlement by mediation under the law of the Republic.

Parallel applications or claims [46]

44. If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under section 58, the court from which such relief is sought may, if it considers it proper, adjourn its decision and may also, on the request of a party, order the other party to provide suitable security.

Saving for other laws or treaties

45. The provisions of this Chapter do not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Republic. [47]

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46 Compare the IAA s 18(3).

47 Compare the IAA s 19.

CHAPTER 7: COMMUNITY MEDIATION

A The Commission's investigation into community dispute resolution systems

7.1 As we noted in Chapter 1 of this discussion paper, the Commission has been engaged in its initial Project 94 investigation into arbitration since 1995. In 1996, the Commission was requested to broaden this investigation to include all facets of ADR. It then became clear that this project could be a vehicle for exploring how community structures, (whether indigenous, urban, township or religious), may play an important role in ensuring that South Africans, particularly the poorest of the poor, gain improved access to justice. It was then decided that the investigation into the viability of community courts and other community justice structures should be one of the components of this investigation. The terms of reference of this investigation were as follows:

(a) To investigate the possible recognition of community courts as structures that offer access to justice to the majority of South Africans;
(b) Do community courts have a place within our court system?
(c) Can a community court be a vehicle to advance access to justice?
(d) If possible, to recommend any legislative or other steps which should be taken in this regard.

7.2 The Commission therefore investigated all aspects relating to community courts (community dispute resolution structures), whether they could be recognised as formal structures of court or whether they should be left as they were. The purpose would be to deliver justice to the communities in a cost-effective, speedy way that is accessible and operates within a culture of human rights and respect for the Constitution. The questions considered were how they would be recognised and whether legislation would be required.

7.3 In accordance with the Commission's policy to consult as widely as possible, we published an issue paper for information and comment on 15 July 1997.[1] In a separate investigation of the Commission, an issue paper was published on Project 73, the

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[1] SALRC (Oct 1999) *Discussion Paper 89 Community dispute resolution structures* 1.1.1 – 1.1.2.

simplification of the criminal procedure,[2] and questions on community courts were included in that investigation. The project committee (now called advisory committee) decided to venture directly into the workshop process before compiling a discussion paper. The purpose of the workshops was essentially information gathering on the part of the Commission, and the workshops would also afford communities, through their representatives, the opportunity to address the issue of community justice. These workshops would enable people at grassroots level to "own" the process from its early stages. The project committee decided that an audit of the existing structures had to be undertaken to establish precisely how many informal community forums exist, where they were located and on what basis they were run. Their role in resolving disputes and their needs, interests and goals were to be observed. It would also be important to ascertain why people used these structures; was it to seek retribution, or did they derive some benefits from them? Finally, the development of these structures had to be tracked, and their effectiveness evaluated.

7.4 In September 1999, the Commission issued Discussion Paper 87 on community dispute resolution structures and called for public submissions to enable the Committee to draft a report for the Minister on this issue. The Commission noted that over the years, South Africa's formal legal system has been perceived by many South Africans as illegitimate (because of its association with the apartheid government), as repressive (through its implementation by the police force) or as an expensive process in which the cost of justice is prohibitive.[3] The Commission explained that for many, a foreign, dominant, Western legal system, is seen to be superimposed on an intuitive, indigenous legal system.[4] It was further seen as alien, inaccessible and inappropriate for dealing with conflict which most South Africans experience in their daily lives.[5] This invariably prevents meaningful access to courts: even those with access are often victims of delay. Many communities actively rejected this system which has been seen as intricately linked to their oppression.

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2 SALRC (1997) Issue Paper 6 *Access to the Criminal Justice System*.

3 *Discussion Paper 87 Community dispute resolution structures* para 1.2.1.

4 Van Niekerk (1994) *De Jure* 19.

5 Van der Merwe & Mbebe (1994) "Informal Justice" *CALS* 2

7.5 The Commission noted[6] that the inability to meet the needs of the ordinary citizens was however not merely due to the content of the substantive law, but also because the structure and procedural requirements of the courts meant that many people were denied access to the courts.[7] Many of the particular problems facing the black community stemmed from the largely ineffective administration of the justice system in black areas. The legal problems as well as problems of social adjustment encountered by urban black people were not being solved. The Commission remarked that it is therefore understandable that in urban areas different forms of community courts were instituted.

7.6 The Commission explained that "community courts" had become the contemporary term used when referring to popular justice structures, or the many types of informal tribunals existing outside the formal legal structures,[8] such as street committees and yard, block or area committees operating in urbanised African townships and informal settlements. Mncadi and Citabatwa[9] refer to these justice systems as being informed by African traditional law, urban popular justice practices and religious law. They do not include uncontrolled mob action or 'self-help' violence which imposes brutal sentences. The Commission noted that community courts were not unique to South Africa but were a common phenomenon in societies undergoing profound transformation.[10]

7.7 The Commission noted that in most stable, organised communities there were street committees and civic structures that were functional.[11] Indigenous township structures were more than merely courts. They are an integral part of the communalised worldview which underpins the efforts of residents to compensate for the inadequacy and inappropriateness of state structures. This worldview is based on the principle of reciprocity. People obey because they know that they are going to need their peers at some future date. Family, tribe or village solidarity is often an indispensable requirement

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6 Discussion Paper 87 *Community dispute resolution structures* para 1.2.2.

7 Grant & Schwikkard (1991) *SAJHR* 304.

8 *Discussion Paper 87 Community dispute resolution structures* para 1.2.3. W Schärf (1989) "The role of people's courts in transition" 167.

9 Mncadi & Citabatwa (1996) "Exploring community justice" Imbizo.

10 Schärf (1989) "The role of people's courts in transition" 169.

11 *Discussion Paper 87 Community dispute resolution structures* para 1.2.4.

for survival. In addition to being courts, these structures are surrogate welfare, childcare and support systems, burial societies and savings clubs, to name but a few functions. They thus form an integral part of organic township life throughout the country, be it Cape Town, Port Elizabeth, Soweto, Alexandra or Kwa-Zulu Natal.

7.8 The Commission pointed out that in contrast to the Roman-Dutch legal system based on retributive justice, where the object is to establish blame and administer punishment, the informal structures attempt to promote healing and enforce community values by using social pressure.[12] Restorative justice and reiterative shaming are two of the most important tools of the enforcement process. The approach and reasoning used are elements which echo indigenous African procedures.[13] They echo the practice of *makgotla, tinkundla, ibunga* and *imbizos* where members of the community directly participate in questions and decisions. These popular justice systems have evolved, and their practices have been adapted to urban circumstances.

7.9 The Commission highlighted that community courts should be distinguished from the kangaroo courts which existed within a political context in the 1980s, when "mob justice" was meted out by people who did not represent structures which ordinarily would deal with justice issues in those communities, and which earned popular justice an unsavoury reputation.[14]

7.10 The Commission noted that many government and non-governmental organisations have been striving at different levels to provide affordable and appropriate dispute resolution institutions and procedures in different communities of society.[15] This has been done to promote more effective access to justice for all the people of South Africa. Organisations such as the Community Dispute Resolution Trust, the Community Peace Foundation in the Western Cape, the Urban Monitoring Awareness Committee in the Eastern Cape, Community Conflict Management and Resolution and others all came to mind.

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12 *Discussion Paper 87 Community dispute resolution structures* para 1.2.5.

13 See also Van Niekerk (2013) *Fundamina* 399 – 402.

14 *Discussion Paper 87 Community dispute resolution structures* para 1.2.6. See also PMG (March 2017) "Pilot projects on community courts & legislation to regulate paralegals"; Bogopa (2007) *Acta Criminologica* at 144.

15 *Discussion Paper 87 Community dispute resolution structures* para 1.2.7; see also Ampeire (Dec 2017) "ADR in South Africa: A Brief Overview".

7.11 The Commission explained that effective government is largely dependent on a legal system that is respected by those it is intended to serve.[16] The challenge facing the democratic state is therefore to ensure that the justice system is acceptable and accessible to the larger community. A great need exists to create an alternative but an integrated system where the resolution of community disputes can be handled much more effectively and, in less time, than in the formal courts. The purpose would be to deliver justice in the community in an informal, cost-effective and speedy way.

7.12 The Commission noted that community forums as a phenomenon within the South African justice arena and as a social institution are accepted as a reality.[17] Opinions differ as to whether these structures are courts and if so to what extent the state should administer and regulate them or lend state support to private initiatives in the field. The Commission highlighted that the view that community forums should be accepted as courts of law departs from the premise that community forums organically began addressing problems that should have been addressed by the formal courts.[18] This was caused by the fact that the formal courts were not meeting the needs of the people. Community justice then evolved parallel to the formal system. The Commission noted that with the advent of a new democracy the need to make justice accessible to all is one of the state's priorities. A proliferation of dual systems has been an apartheid legacy. A transformed justice system that meets the needs of the people would ensure that perpetuation of parallel systems is avoided. The creation of a unitary system as part of the transformation of the judiciary would also ensure a more efficient utilisation of resources.

7.13 The Commission made several recommendations on community dispute resolution structures, namely:

1 Because community-based dispute- resolution structures (called “community forums”) serve a useful purpose in meeting the needs of the majority of the South African population for accessible justice, these structures must now be recognised and supported by law.

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16 *Discussion Paper 87 Community dispute resolution structures* para 1.2.8; Carpenter (1996) *South African Public Law*.

17 *Discussion Paper 87 Community dispute resolution structures* para 2.4.

18 *Discussion Paper 87 Community dispute resolution structures* para 2.5.

2 Reference to these structures as “community courts” is misleading and a new name should be found for them. Community forums should not be considered to be “courts” but dispute-resolution and peace-making structures which provide “first aid” justice for local communities. To call them “courts” confuses the issue because it pre-empts many questions including those of jurisdiction, training of personnel, voluntariness of participation and the binding nature of decisions.

3 Recognition of community structures should be based on a statute passed by Parliament setting out their status, role, function, jurisdiction, procedure and other related matters.

4. Any such legislation should be drafted only after careful investigation and consultation and should take the form of creating a broad framework which is flexible enough to accommodate the different kinds of community structures that exist in the country whilst setting out a set of minimum standards for the operation of these structures.

5 Attendance at any community forum should be entirely voluntary at the inception of each attempt to resolve a dispute, as well as for the duration of the dispute-resolution process.

6 In view of paragraph 5 above, decisions of a community forum are binding on the parties only if they have agreed beforehand to be bound by such decisions. Certain levels of community forum should not have decision-making powers at all, their task being mainly to facilitate reconciliation between the disputants.

7 Where a community forum arrives at a decision that the parties have agreed to be bound by, the role of the law should be to make sure that the agreement or settlement is respected.

8 In the legislation, care must be taken to ensure that community forums remain informal and flexible in their procedures, inexpensive in their operations; accessible, non-alienating and responsive to the needs of the communities in which they operate.

9 Since community forums do not stand in a hierarchical relationship to the formal courts, there should be no question of appeal from these structures to the formal courts. If a matter remains unresolved, the parties retain their rights as citizens to pursue the dispute in any other forum of their choice.

10 Separation from the formal justice system should not mean the insulation of community courts from supervision or accountability. A system of regional (or provincial) ombudsmen should be established to oversee the work of community forums and to enforce uniform standards.

11 Community forums shall function at all times within the laws and the Constitution of the Republic of South Africa.

12 Where there is a functioning customary court in a rural area, a community forum should not be introduced. Duplication of functions should be avoided, even though in exceptional cases there might be such a mixed population in a particular area that the claims of the community to a choice of forums should be respected.

13 Training in various aspects of leadership, mediation and the ideas of restorative justice must be given to the individuals who operate community forums in order to empower them.

7.14 The Commission decided at its meeting on 14 May 2011 to discontinue this subproject into community dispute resolution structures. Subsequent developments include the recent legislation for the establishment of traditional courts.

B Dispute resolution under the Traditional Courts system

7.15 The South African government realises that an estimated 16 million South Africans constitute the traditional communities that continue to adhere to customary law, and that the "institution of traditional leadership plays a crucial role in promoting social cohesion, peace and harmony" in these communities.[19]

7.16 Section 211 of the Constitution[20] provides recognition of the institution of traditional leadership in accordance with customary law and subject to the Constitution. Customary law is not, however, defined in the Constitution. Section 39(2) and (3) of the Constitution[21] requires our courts in their development of customary law to promote the spirit, purport and objects of the Bill of Rights.

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19 *DOJCD Policy Framework on the Traditional Justice System under the Constitution* March 2009 1.1.2. A 2018 estimate was that about 16 million people life under traditional authority, see also Moore & Himonga (2018) "Living Customary Law and Families in South Africa" 61.

20 Section 211 of the Constitution provides as follows:

> Recognition
>
> 211.(1) The institution, status and role of traditional leadership, according to customary law, is recognised, subject to the Constitution.
>
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
>
> (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

21 Section 39(2) and (3) of the Constitution provides as follows:

> Interpretation of Bill of Rights
>
> 39.(1) …
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

7.17 The administration of justice in traditional communities in rural South Africa is predominantly carried out by chiefs' courts.[22] A community may be recognised[23] as a traditional community if it is subject to a system of traditional leadership in terms of that community's customs; and observes a system of customary law.[24]

7.18 The Traditional Leadership and Governance Framework Act of 2003[25] and the National House of Traditional Leaders Act of 2009[26] provide a framework and norms and standards on traditional leadership and governance.[27] The Traditional and Khoi-San Leadership Act 3 of 2019 repealed and replaced both Acts. However, in May 2023 the Constitutional Court held that the latter statute was unconstitutional since Parliament had failed to comply with its constitutional obligation to facilitate public involvement before adopting the statute.[28]

7.19 The current application of customary law operates as a decentralised system, at several levels, and the traditional court often acts as a kind of appeals court.[29] This

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(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

22 SALRC (Mar 2003) *Report on Traditional Courts and the Judicial Function of Traditional Leaders* at 1.

23 The recognition is to be done by the premier of a province in accordance with provincial legislation and after consultation with the provincial house of traditional leaders, the community concerned and the king or queen, if any, under whose authority that community would fall.

24 Section 2 of the Traditional Leadership and Governance Framework Act 41 of 2003.

25 Traditional Leadership and Governance Framework Act 41 of 2003.

26 National House of Traditional Leaders Act 22 of 2009.

27 The objectives of the Act, as stated in the Preamble to the Act, are –

(a) to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;

(b) to transform the institution in line with constitutional imperatives; and

(c) to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices. The transformation and adaptation should be effected by preventing unfair discrimination, promoting equality and seeking to advance gender representation in traditional leadership positions.

28 *Mogale v Speaker of the National Assembly* (CCT 73/22) [2023] ZACC 14; 2023 (9) BCLR 1099 (CC) (30 May 2023); see also Broughton (30 May 2023) Groundup.org.

29 Cousins (May 2008) PMG 2.1 A decentralized system.

system has various checks and balances, including the cultural norms informing restorative principles, the broad presentation of views, good understanding of the context and meaning of behaviour, a fully consultative process and the possibility of appeal to a Magistrate. The presence at the tribal courts of indunas and councillors, who are charged with assisting the court, mediates and constrains the powers and decisions of the presiding officer.[30]

7.20 In its White Paper on Families, 2013[31] the Department of Social Development states that traditional leaders have an important role to play in the implementation of their White Paper as traditional leaders not only remain the custodians of the traditional value system, but also preside over land, marriages and the family in rural areas.

7.21 The Traditional Courts Act of 2022[32] refers in several preambular paragraphs that disputes in traditional communities must be resolved in accordance with customary law. The pre-amble recognises that customary law plays an integral role in the resolution of disputes in communities between members of communities who observe the accepted practices and customs applicable in those communities.[33] It further recognises that the flexibility of customary law provides for consensus seeking and the prevention of and resolution of disputes and disagreements. It also recognises different levels of dispute resolution in terms of customary law, in addition to the role played by traditional courts.

7.22 All the objectives of the Traditional Courts Act refer to the resolution of disputes.[34] The first objective of the Traditional Courts Act is to affirm the values of customary law and customs in the resolution of disputes, based on restorative justice and reconciliation and to align them with the Constitution. A further objective of the Act is to affirm the role

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30 Cousins (May 2008) PMG 2.5 Checks and balances.

31 Department of Social Development *White Paper on Families* 2013 at 54.

32 On 16 September 2023 the President signed the Bill and it became Act 9 of 2022. "Parliament passes problematic Traditional Courts Bill" (Sept 2022) *Mail & Guardian*; Diala (Sept 2022) *Conversation.com*.

33 The Commission notes the comment on the Traditional Courts Bill by the SA Human Rights Commission about the recognition of the resolution of disputes in terms of customary law under the then Traditional Courts Bill: "Recognising the diverse and cultural richness inherent to South Africa, the SAHRC maintains that customary law remains integral to many who live in the country and continue to practice and rely on its dispute resolution mechanisms". See SAHRC (March 2017) "Submission on the Traditional Courts Bill [B1-2017]" par 4 at 7.

34 Section 2.

of traditional courts in terms of customary law by promoting co-existence, peace and harmony in the community; enhancing access to justice by providing a forum for dispute resolution in accordance with the principle that recognises participation by all parties; and promoting and preserving those traditions, customs and cultural practices that are beneficial to communities, in accordance with constitutional values. A further objective of the Act is to create a uniform legislative framework regulating the structure and functioning of traditional courts in the resolution of disputes, in accordance with constitutional imperatives and values. Another objective is to enhance the effectiveness, efficiency and integrity of traditional courts in the resolution of disputes. A final objective is to facilitate the full and meaningful participation without discriminating against any member of a community in a traditional court in order to create an enabling environment which promotes the rights enshrined in Chapter 2 of the Constitution.

7.23 Section 3 of the Traditional Courts Act sets out the guiding principles of this legislation. One of these guiding principles is the promotion of restorative justice measures through mediation and conciliation.[35] A further guiding principle of the legislation is the need to promote and preserve values which are based on reconciliation and restorative justice. Restorative justice is defined to mean an approach to the resolution of disputes that aims to involve all disputants, the families concerned and community members to collectively identify and address harms, needs and obligations by accepting responsibility, making restitution and taking measures to prevent a recurrence of the incident which gave rise to the dispute and promoting reconciliation. The meaning of restorative justice further does not extend to measures which, in good faith, purport to give effect to the objectives which, in fact, do not meaningfully restore the dignity of, or redress any wrongdoing against any, person involved in the dispute. Restorative justice finally results in redressing the wrongdoing in question and ensuring the restitution of the dignity of the person in question in a just and fair manner.

7.24 Schedule 2 of the Traditional Courts Act determines in accordance with section 4(2)*(a)* the disputes which a traditional court may hear and determine, namely advice relating to customary law practices in respect of *ukuThwala*; initiation; customary law marriages; custody and guardianship of minor or dependent children; succession and inheritance; and customary law benefits.

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35 Section 3(1)(b).

7.25 Section 6 of the Traditional Courts Act deals with the nature of traditional courts. Traditional courts are courts of law the purpose of which is to promote the equitable and fair resolution of certain disputes, in a manner that is underpinned by the value system applicable in customary law; and function in accordance with customary law, subject to the Constitution. Traditional courts must be constituted and function under customary law to promote access to justice; prevent conflict; maintain harmony; and resolve disputes where they have occurred, in a manner that promotes restorative justice, Ubuntu, peaceful co-existence and reconciliation, in accordance with constitutional imperatives and the provisions of the Act.[36] The traditional court system is made up of the following levels, namely a headman or headwoman's court; a senior traditional leader's court; a principal traditional leader's court; and a king or queen's court.

7.26 Although the Traditional Courts Act makes provision for a comprehensive set of regulations,[37] it does not deal with mediation in particular and neither does the Act provide any guidance on the envisaged dispute resolution.

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36 Section 6(2).

37 See Section 17: The Minister must make regulations regarding the following:

(a) The role and responsibilities of clerks as contemplated in section 5(4);

(b) the pledge to be said or affirmation to be made by the traditional leader presiding over the traditional court or the person designated by him or her in accordance with customary law as contemplated in section 5(5);

(c) the qualifications and experience required to be appointed or designated as a Provincial Registrar as contemplated in section 10(1)*(b)*;

(d) the register to be kept by Provincial Registrars of Traditional Courts of all traditional courts as contemplated in section 10(2)*(a)*;

(e) the manner and circumstances in which Provincial Registrars of Traditional Courts may refer matters on review, as contemplated in section 10(2)*(b)*;

(f) the time period and manner for taking proceedings of a traditional court on review to the High Court, as contemplated in section 11(1);

(g) the time period and manner orders or decisions of a traditional court may be referred to a Magistrate's Court, as contemplated in section 12(1);

(h) the manner in which the records of proceedings of traditional courts must be dealt with, as contemplated in section 13;

(i) the manner in which a matter may be transferred from a traditional court to a Magistrate's Court or small claims court, as contemplated in section 14(1);

(j) the manner in which to report alleged breaches of the code of conduct, as contemplated in section 16(5)*(a)*;

(k) the training of traditional leaders and persons designated by traditional leaders to preside over traditional courts;

C Community mediation (comparative jurisdictions)

1 Community mediation in the United States of America

7.28 Community mediation provided by community mediation centres originated in the 1960s in the USA.[38] These community mediation centres were established under the Civil Rights Act of 1964. A definition of community mediation in the USA is that it "endeavors to create a supportive and safe environment that encourages free and open expression of everyone's respective truths".[39] A further definition of community mediation is that "[t]he goal of the community dispute resolution movement is to teach people to resolve conflict by cooperation, negotiation and mediation, thereby empowering the participants, relieving court caseloads and preventing escalation of disputes".[40]

7.29 The National Association for Community Centres reflects the nine hallmarks, characteristics or the commitments of mediation centres as follows:[41]

> Community-Based (1) A private non-profit or public agency or program thereof, with mediators, staff and governing/advisory board representative of the diversity of the community served.
> Open (2) The use of trained community volunteers as providers of mediation services; the practice of mediation is open to all persons.

(l) the involvement and training of paralegals and interns in the functioning of traditional courts; and

(m) any other matter which is necessary or expedient to prescribe in order to give effect to this Act.

38 Mawn Washington Felicia, D.G. & Julie Shedd *State of Community Mediation* 2019 National Association for Community Mediation 3. See also Wahrhaftig "Community Dispute Resolution (CDR)".

39 Washington, Mawn & Shedd (2019) *State of Community Mediation* 3. A 2012 report on the state of community mediation in the USA reflected as follows on what community mediation entails: "Community mediation moves us beyond conflict. It reunites families, rebuilds friendships, mends neighborly fences, and generally creates spaces within which those formerly burdened with conflict can discover personal enrichment, renewed connections, understanding, and peace", see Corbett & Corbett (2012) *2011 State of community mediation USA* 6.

40 Miranda Grange (2014) *Community Mediation* 7.

41 National Association of Community Centres "9 Hallmarks of Community Mediation Centers".

Accessible (3) Providing direct access to the public through self-referral and striving to reduce barriers to service including physical, linguistic, cultural, programmatic and economic.
Low-Cost (4) Providing service to clients regardless of their ability to pay.
Inclusive (5) Providing service and hiring without discrimination on the basis of race, colour, religion, gender, age, disabilities, national origin, marital status, personal appearance, gender identity, sexual orientation, family responsibilities, matriculation, political affiliation, source of income.
Timely (6) Providing a forum for dispute resolution at the earliest stage of conflict.
Innovative (7) Providing an alternative to the judicial system at any stage of a conflict.
Outcome-Oriented (8) Initiating, facilitating and educating for collaborative community relationships to effect positive systemic change.
Newsworthy (9) Engaging in public awareness and educational activities about the values and practices of mediation.

7.30 The 2019 reflection on the state of community mediation in the USA, indicated that 66% of disputes referrals could be categorised as either self-referrals; court program referrals; governmental agency referrals; local non-profit or charitable organisation referrals; legal service organisation referrals; legal representation or attorney referrals; mediation or ADR network referrals; school system or organisation referrals; or housing agency referrals.[42] The surveys to which community centres responded, indicated that the prevalent disputes which were mediated were: between landlord and tenants at 2.5%; small claim disputes at 2.19%; consumer and merchant or service provider disputes at 2.1%; custody and visitation disputes at 2%; parenting plan disputes at 2%; homeowner and condominium or apartment associations at 2%; and elder issues at 2%. Further examples of disputes mediated by community centres were between parents or guardians and their children; involved family business; involved animals or pets; were automotive disputes; commercial disputes; divorce disputes; involved domestic relations; and involved support plans.[43]

7.31 The 2019 reflection on community mediation in the USA further indicated that most community centres were non-profit or charity entities at 87%; that 10.7% comprised government entities; 1.5% comprised college or university-based programs; whilst

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42 Washington, Mawn & Shedd (2019) *State of Community Mediation* 12.

43 Washington, Mawn & Shedd (2019) *State of Community Mediation* 18. See also Corbett & Corbett (2012) *2011 State of community mediation USA* 18 for the range of disputes community mediation centres dealt with in 2011.

0.79% were identified as being other. These categories have not changed since 2011.[44] Furthermore, the statistics concerning the budgets of the community mediation centres who participated in the 2019 surveys indicate that the annual budgets of the majority, namely 35.4% of these centres, exceeded $ 250,001; 11.2% of these centres reported being in the bracket of $200,001 to 250,000; 8.8% were in the bracket of $150,001 to $ 200,000; 13.7% were in the bracket of $100,001 to 150,000; 16.9% were in the bracket $50,001 to $100,00; with 8% in the bracket of $25,000 to 50,000; and 2.4% in the bracket of $1 to 25,000; whilst 3.2% of the community centres did not disclose any budget information.

7.32 The 2019 reflection of community mediation in the USA listed the following findings about the community centres, namely:[45]

- they are a valued community tool regardless of the type of conflict involved;
- they are headed by dedicated and passionate staff;
- they have the ability to impact the systems and environment of their communities by assisting another to embrace self-reliance, empowerment, support for other sectors, inclusion, and mending relationships.
- they offer a diversity of services, in addition to mediation, to help individuals, families, groups, and communities in conflict.
- they share a common origin under Title 10 of the 1964 Civil Rights Act;
- diversified funding sources and increased human capital are important to the future stability of community mediation centres.
- they are different in their focus, impact and the significance they are invited to create in its community.
- for the reasons above, community mediation has and must continue to develop and adapt to meet the needs of changing communities.

2 Community mediation in India

7.33 According to 2023 and 2024 media coverage, estimates are that the backlog of about 50 million criminal and civil cases in India will only be disposed of in 300 years.[46] On average, the approximately 11 million unresolved civil cases, the majority of which relate to land or other property disputes, were initiated five years earlier. As the Indian government is involved in practically 50% of these cases, it has the largest stake in

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44 Washington, Mawn & Shedd (2019) *State of Community Mediation* 5.

45 NACFM Brochure (3).

46 Sameer (Jan 2024) *New York Times*; Bedi (June 2023) *Irish Times*; Singh (Jan 2024) *Diplomat*.

addressing the delays in order to dispose of the backlog of cases.[47] By 28 December 2023, 80 439 cases lodged in the Supreme Court of India were still pending.[48] In 2012, about 30 million cases were pending in India with the average length of disposing of a case requiring 15 years,[49] which in 2017 still seemed to be the norm in India for disposing of civil and commercial cases.[50] The estimate in 2009 was that the backlog of cases in the New Delhi High Court would require 466 years to be resolved.[51] The Indian saying seems to be "that litigation is an unwelcome house guest that stays for years or even decades".[52]

7.34 The dire state of litigation in India resulted in the Indian Institute of Arbitration & Mediation (IIAM) setting up community mediation clinics as a low-cost alternative to expensive and protracted litigation under the slogan "Resolving conflicts; promoting harmony".[53] The Chief Justice of India introduced community mediation clinics on 17 January 2009 in New Delhi, India. The objective with community mediation clinics was that they would be created in the villages of India at local level in order to amplify access to justice for the population to avert the high costs of litigation.

7.36 The 2023 Mediation Act of India regulates community mediation with hardly any detail. Community mediation may be used to settle any dispute likely to affect peace, harmony and tranquillity amongst the residents or families of any area or locality with the mutual consent of the parties to the dispute.[54] A party may apply to the district authority or in the absence of such an authority, the district magistrate or sub-divisional magistrate for the resolution of a dispute by community mediation.[55] The authority, the district magistrate or sub-divisional magistrate, must establish a panel with three community mediators.[56] They must further establish a permanent panel of community mediators, the

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47 Sameer (Jan 2024) *New York Times.*

48 Kashyap (Dec 2023) *Scob Server*.

49 Kumar (2012) *Journal of Law, Polic and Globalization* 1.

50 Mellersh (Feb 2017) *GPC News*.

51 Associated Press (Feb 2009) "India court 466 years behind schedule".

52 Mellersh (Feb 2017) *GPC News*.

53 Mellersh (Feb 2017) *GPC News*.

54 Section 43(1).

55 Section 43(2). Under section 9 of the Legal Service Authorities Act, a District Legal Service Authority must be constituted in every district in the State.

56 Section 43(3).

membership of which they may change occasionally.[57] The requirements for eligibility to serve in a community mediation panel is that the candidate must be a person of standing, integrity and respectability in the community; be a local person whose contribution to the society has been recognised; be a representative of an area or a resident welfare association; have experience in mediation; or any other person deemed appropriate.[58] The representation of women or any other class or category of persons may also be considered in constituting a community mediation panel.[59]

7.36 A panel of three community mediators conducts a community mediation. The members may decide on the procedure to be adopted in the mediation for resolving a dispute.[60] The community mediators endeavour to resolve the community dispute and assist the disputants in an attempt to resolve the dispute amicably.[61] If a settlement agreement is reached by community mediation, then the agreement is concluded in writing, signed by the disputants and authenticated by the community mediators.[62] The disputants receive a copy of the settlement agreement. Where the community mediation does not result in a settlement agreement being drafted, then the community mediators may submit a non-settlement report to the disputants, the authority, the district magistrate or sub-divisional magistrate.

7.37 The purpose of a settlement agreement reached by community mediation is to maintain peace, harmony and tranquillity amongst the population.[63] A settlement agreement reached by community mediation is not enforceable in a civil court In India.

3 Community mediation in Nepal

7.38 The landlocked Federal Democratic Republic of Nepal is a South Asian central Himalayan country.[64] Nepal consists of 7 states and 77 districts. It has 753 local units

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57 Section 43(4).

58 Section 43(5).

59 Section 43(6).

60 Section 44(1).

61 Section 44(2).

62 Section 44(3).

63 Majid & Siddiqui (Oct 2023) “Harmonizing Justice: a new mediation law for India”.

64 Embassy Nepal Canberra Australia “About Nepal”.

with 6 metropolises, 11 sub-metropolises, 246 municipal councils and 481 villages. In 2021, 19 296 788 Nepalis resided in urban municipalities and 9 867 790 Nepalis in rural municipalities.[65] According to the 2023 National Population Census, there were in 2021, 142 ethnic groups in Nepal,[66] with about 124 spoken languages.[67] The Constitution recognises all languages spoken in Nepal as mother languages of the Nepalese nation.[68] The Constitution further recognises the Nepali language in the Devnagari script as the official language of Nepal.[69] The 2021 census further indicates that in 2021, 76% of the population above the age of 5 years, could read and write; 0,4% of the population could read only; and 23,3% of the population could not write or read.[70] In 2021, of the population aged 5 to 25 years, who have completed educational levels below the secondary education examination of grade 10 or the school leaving certificate of grades 11 and 12, 70% were attending education in 2021; 21% of this group ever attended school; 8,1% never attended education; and 0,1% never started education.[71]

7.39 The geography of Nepal is further diverse, consisting of fertile plains, subalpine forested hills, and eight of the ten tallest mountains on the planet.[72] The altitudes of Nepal vary from below 100 m in the southern lowlands of Nepal, to more than 8 000 m in the north.[73] The geography of Nepal means that a large part of the country is mountainous and outlying, with undeveloped roads. [74] Rural Nepalis reside remote from the facilities and conveniences which the cities offer. They further suffer implausible access to a municipal court. Disputants must to invest much energy and substantial costs to reach a municipal court should they wish to enforce their rights. Illiteracy is rife under rural Nepalis, leaving Nepalis largely uninformed of their rights or the benefits which the

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65 National Statistics Office Nepal *National Population and Housing Census 2021* 70.

66 Nepal News (June 2023) "Number of ethnic groups increases in the National Census".

67 Poudel & Costley (Dec 2023) "Understanding the impact of languages and language policies on children's learning outcomes in Nepal" summary of context.

68 Section 6.

69 Section 7.

70 National Population and Housing Census 2021 results literacy; Nuffic "Education systems Nepal primary and secondary education".

71 National Population and Housing Census 2021 results literacy.

72 Embassy Nepal Canberra "About Nepal".

73 ROA Online "Nepal Geology".

74 Thapa & Wagley (Feb 2019) "Community Mediation in Nepal: A Hospital That Stitches Broken Hearts"; Khanal & Thapa (Oct 2014) "Community Mediation and Social Harmony in Nepal".

Nepalese legal system holds. Nepalis have a long tradition, on the other hand, of resolving community disputes in traditional ways. The traditional dispute resolution systems were influenced by patriarchy and practised by societies divided by caste and class. The traditional dispute resolution systems benefitted the prosperous, influential and literate in the community, whereas the weak, women, Dalits,[75] the poor and the aged were disadvantaged by the traditional systems.

7.40 The Constitution of Nepal also recognises the diversity of its population.[76] A variety of factors resulted in the Nepalese population becoming increasingly diversified such as the vast resettlement of its population amidst their decade-long civil war, its population embarking upon migration in order to seek employment and schooling, and its towns and cities experiencing speedy urban sprawl.[77] Village communities were confronted by the changes in their societies where many of their members no longer accepted that the traditional ways to settle disputes were appropriate. Many members considered that the traditional methods preserved the disadvantages which some members of traditional communities have suffered in the past and that the traditional methods supported the power imbalances between parties, that they preserved the old patriarchal traditions and communal ostracism of members of the community and that they were also not geared towards restoring shattered relationships. Nepalis therefore required the introduction of a new way to resolve their local community disputes.

7.41 The 1999 Local Self-Governance Act of Nepal provided for judicial functions to be performed by the local village development committees to hear and settle disputes.[78]

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75 The Dalit Welfare Organisation notes the National Dalit Commission's definition of Dalit: "those communities who, by virtue of atrocities of caste based discrimination and untouchability, are most backward in social, economic, educational, political and religious fields, and are deprived of human dignity and social justice". See Dalit Welfare Organisation Nepal/Dalit. See also Office High Commissioner for Human Rights Nepal (Dec 2011) *Opening the door to equality: access to justice for Dalits in Nepal*.

76 A preambular paragraph to the Constitution recalls, among others, protection for and promotion of unity in diversity, social and cultural solidarity, tolerance and harmony, by recognising the multi- ethnic, multi-lingual, multi-religious, multi-cultural and geographically diverse characteristics of the Nepalese; and resolving to build an egalitarian society based on the proportional inclusive and participatory principles in order to ensure economic equality, prosperity and social justice by eliminating discrimination based on class, caste, region, language, religion and gender and all forms of caste based untouchability.

77 Thapa & Wagley (Feb 2019) "Community Mediation in Nepal: A Hospital That Stitches Broken Hearts".

78 Under section 33, the disputes they would be able to resolve were about: land boundaries; public land, canals, dams, ditches or allocation of water and encroachment on roads or way-outs; compensation for damage of crops; forced labour; wages; paupers; missing and

These judicial functions would have allowed the village development committees to use community mediation to resolve disputes.[79] These provisions were, however, never put into operation.[80] The Asia Foundation has been involved in Nepal in community mediation pilot programmes since 2001.[81] A further initiative of dispute resolution at community level in Nepal was the initiative of the Japan International Cooperation Agency which was involved in developing the capacity to facilitate dispute resolution in the period February 2014 to October 2014.[82] USAID also used its local governance programme, Saajhedari, in the training of mediators in 11 Community Mediation Centres in Kailali. This programme resulted in a resounding success since women mediators settled 70% of the disputes cases filed at the Community Mediation Centres.[83] Facilitated community mediation presented the opportunity to Nepalese communities to curtail their disputes connected to land, property, business dealings, family squabbles, defamation, and also domestic violence,[84] excluding criminal matters such as murder, rape or offences committed against the state.[85] The Asia Foundation has since 2012 aided community mediation in 114 of the 3 915 village development committees and 58 municipalities, and an additional 370 mediation sites were launched in 2016.[86] In 2019, five more districts were added to the community mediation programme which now covered 5 further municipalities.[87]

7.42 The change which community mediation introduced in Nepal was a shift away

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finding of four legged animals (quadrupeds); construction of dwellings; hidden and unclaimed properties; deposits; expenses for fooding and clothing according to status and income; use of water banks; security of public property; disputes about four legged animals other than the killing of a cow; pasture on land, grass, and fuel woods; trespass into or attempts to enter a dwelling; and other disputes to be listed by the Nepal Government.

79 Valters (Oct 2016) *Supporting Community Dispute Resolution in Asia* 2.

80 Khanal & Thapa (Oct 2014) "Community Mediation and Social Harmony in Nepal" 2.

81 Thapa & Wagley (Feb 2019) "Community Mediation in Nepal: A Hospital That Stitches Broken Hearts".

82 JICA (Oct 2014) "Strengthening Community Mediation Capacity for Peaceful and Harmonious Society Project Report".

83 US Aid (April – May 2015) "Brokering Peace and Strengthening Nepal's Social Fabric".

84 Thapa & Wagley (Feb 2019) "Community Mediation in Nepal: A Hospital That Stitches Broken Hearts".

85 Valters (Oct 2016) *Supporting Community Dispute Resolution in Asia* 2.

86 Valters (Oct 2016) *Supporting Community Dispute Resolution in Asia* 2.

87 Jhapa, Kailali, Syanja, Surkhet and Palpa, see Natural Resource Conflict Transformation Center Nepal (May 2019) "Community Mediation Program".

from the traditional dispute resolution model to a facilitated interest-based mode of dispute resolution. This model underscores questioning, empathy, and appreciation for the needs and the lawful interests of disputants.[88] Essential for identifying the choice when Nepalese community mediators are to be appointed, is to duly consider the demographics of the community concerned, including their ethnicity, class, gender and belief.[89] This choice is relevant not only to the disputants but also to their community and the local authorities for purposes of their cooperation within the local state structure. Training is provided to community mediators to resolve disputes in an unbiased manner, to promote standards of freedom, justice, dignity, respect, and fundamental human rights.

7.43 Under the Nepal Mediation Act, candidates are eligible for selection for appointment as mediators if they are Nepali citizens, have attained 25 years of age, completed at least a Bachelor's Degree at a recognised academic institution, and have completed mediation training for a prescribed period.[90] However, the Act also allows disputants to select the mediator of their choice if the candidate is literate and has attained 25 years of age, regardless of whether the candidate has completed mediation training.[91] A view is that this allowance confirms the harmony that exists between formal and informal mediation practices in Nepal.[92]

7.44 One of the changes that community mediation effected in Nepal is that mediation capacitated the traditionally less powerful members of the community since mediators have now made allowances for the interests of the voiceless members of the society too.[93] Particularly women and the disparaged members of the community realised they were no longer deserted or defenceless in attempting to resolve their disputes. A community mediator was now able to refer a powerless disputant to legal aid, whereas in the past disputants might have feared they might be bulldozed into agreeing to a

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88 Thapa & Wagley (Feb 2019) “Community Mediation in Nepal: A Hospital That Stitches Broken Hearts”.

89 Thapa & Wagley (Feb 2019) “Community Mediation in Nepal: A Hospital That Stitches Broken Hearts”.

90 Section 22(1).

91 Section 22(2).

92 Bhandari “Mediation in Nepal: A Synthesis of Formal and Informal Practices”.

93 Thapa & Wagley (Feb 2019) “Community Mediation in Nepal: A Hospital That Stitches Broken Hearts”.

hurried settlement if they were uninformed of the protections of or entitlements which existed under Nepalese law. Further assistance community mediators were now able to render to Nepali disputants, in circumstances where disputants could benefit from psychological or physical protection, was that the mediators were now able to refer disputants to psychologists, social workers or the police.[94]

7.45 One of the crucial beneficial consequences which community mediation brought about in Nepal, was modifications were made to social standards. There was also the more obvious satisfying results mediation held for disputants when a dispute was effectively resolved or when disputants gained access to justice.[95] Community mediation further contributed towards more effective communication between communities and disputants. Community mediation further brought about a change whereby disputants now displayed communal consideration of their respective interests, regardless of the standing of or group to which they belonged, or their respective financial status. A growth in the public participation of previously disadvantaged parties was also noted. The facilitated community mediation approach of recognising the interests of disputants was gradually embraced, particularly by the traditionally privileged members of the community as they needed to overcome their opposition to community mediation. The reasons why communities embraced community mediation were that communities were able to recognise that the settlements which community mediation brought about, were mutually advantageous to disputants, and that mediation was constructive and long-standing. Nepalese therefore accepted community mediation, which was since 2011 regulated by legislation and also acknowledged in the 2015 Nepalese Constitution.[96] To overcome the devastation of the 10-year civil war in Nepal, which only ended in 2006, peace building was required in Nepal at the local government level to also enhance peace at the national government level. Community mediation in Nepal is portrayed as

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94 Thapa & Wagley (Feb 2019) "Community Mediation in Nepal: A Hospital That Stitches Broken Hearts".

95 Thapa & Wagley (Feb 2019) "Community Mediation in Nepal: A Hospital That Stitches Broken Hearts".

96 Thapa & Wagley (Feb 2019) "Community Mediation in Nepal: A Hospital That Stitches Broken Hearts". Under section 51 of the Constitution the Nepalese State must pursue a large number of policies, including policies relating to justice and the penal system. The State must pursue the shaping of the administration of justice to be speedy, efficient, widely available, cost effective, impartial, effective, and accountable to the people. The State must further pursue mediation and arbitration for the settlement of ordinary disputes.

having succeeded to become the "hospital stitching broken hearts."[97]

7.46 The 2011 Mediation Act of Nepal deals in three sections with community-based mediation.[98] Any dispute which may be settled through mediation pursuant to the Mediation Act may be settled by community-based mediation. For the purpose of settling a dispute, a community may establish a panel of mediators before or after a dispute has arisen. The Act provides guidance on the candidates to serve on a community mediation panel, such as respected persons in the local community; persons designated by community organisations who operate at a local level; local social workers; and teachers or professors at local schools or colleges. The Act also requires that a representative number of women be included in a community mediation panel in so far as the circumstances may require.

7.47 The Mediation Act further provides guidance on how community mediation should be applied to resolve disputes.[99] Community mediators are required to aid the parties to resolve their dispute. It is further expected of community mediators to motivate the disputing parties to reach a consensus, to conclude an agreement which is acceptable for the parties. The Act guides disputants that they should not approach the settlement of their disputes as a win or lose outcome. Non-governmental organisations operating at the local community level are permitted to provide technical or other assistance, as may be required, to a community-based mediator for resolving a dispute. The community mediators are further permitted to adopt the procedure as may be required in order to resolve a dispute through community-based mediation. The local body may record the settlement of a dispute by way of community mediation.

7.48 The Mediation Act further deals with the training and other technical services to be provided in community mediation.[100] Under the Mediation Act, the respective District Development Committees, the Village Development Committees or municipalities are empowered to provide the required technical services to community based mediators so that disputes can be settled by community based mediation. The Government of Nepal

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97 Thapa & Wagley (Feb 2019) "Community Mediation in Nepal: A Hospital That Stitches Broken Hearts".

98 Sections 33 to 35.

99 Section 34.

100 Section 35.

is further empowered to mobilise national or local level non-governmental or community-based organisations as may be required to develop the expertise of community-based mediators and to provide the required training to community mediators.

7.49 The Nepal Constitution recognises the establishment of a three-member judicial committee in each of the 735 rural municipalities and of the 75 municipalities in Nepal, in order to settle disputes.[101] The reason for their establishment is to address the shortcomings of the formal Nepalese legal system and to create a connection between the informal and the formal legal systems.[102] Judicial committees comprise of two members elected by the members of the rural municipal assembly or the municipal assembly from amongst their members. The judicial committees were conceived to become the first port in the justice system which its users will be able to turn to. It was envisaged that the judicial committees would be the tie between mediation centres at the ward or district level on the one hand, and the police, other government legal agency departments, and any other justice or social service agencies on the other.[103] One of the functions of the judicial committees is to identify candidates to receive community mediation training.[104]

7.50 Mediation training is provided to aspirant mediators during 48 hours of training over a duration of eight days.[105] The training material consists of a training manual approved by the Mediation Council. Once the candidates have completed their basic mediator training, they submit their training reports and certificates for registration at the judicial committee in their wards for their listing as mediators. The listing of new mediators is announced publicly at village assemblies. Under the Local Governance Act, judicial committees may constitute mediation centres in every ward to settle disputes through mediation.[106] Where there is more than one mediation centre in one ward, the

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101 Section 217.

102 Shrestha & Wagley "Judicial Committees in Nepal: A Closer Look" 2.

103 Shrestha & Wagley "Judicial Committees in Nepal: A Closer Look" 2.

104 Natural Resource Conflict Transformation Center-Nepal "Basic Mediation Training".

105 Natural Resource Conflict Transformation Center-Nepal "Basic Mediation Training".

106 Section 48. Section 47(2) lists the disputes which may be mediated such as encroaching on land other than government, public or community land; constructing a house or structure on land of another, other than government, public or community land; a divorce between wife and husband; physical assault for which the perpetrator may be liable to a maximum of imprisonment of one year; defamation; looting and assault; allowing cattle stray or affecting other persons due to negligence in the keeping of animals and birds; unauthorised entry of another person's residence; cultivating or possessing land of another person;

judicial committee may refer the disputants to the mediation centre of the choice of the disputants. Should the disputants fail to agree on the mediation centre they will attend, the judicial committee may refer the disputants to any mediation centre in the ward for resolving their dispute through mediation. The Natural Resource Conflict Transformation Centre of Nepal has trained 8 793 mediators in 334 training sessions in 198 municipalities in 46 districts with the support of donors, local government and the Mediation Council.

7.51 The Asia Foundation developed a Code of Practice for community mediators.[107] (See Annexure A to this paper.) The code deals with aspects such as mediator neutrality and not being a representative of any disputant; agreements and settlements are determined by the disputants; a mediator not to exhibit any bias towards the disputants; confidentiality of mediation; mediators only discussing a dispute with the disputants during a mediation; mediators not getting involved in a mediation where they are conflicted; mediators not representing disputants in any proceedings following the mediation; mediators not to accept any remuneration; mediators to maintain a good reputation in the local community; mediator recusal if they consider they would be unable to comply with the Code; and their disqualification, and removal from membership of the local Mediation Board.

4 Community mediation in Sri Lanka

7.52 Sri Lanka is an Indian Ocean island situated to the south of India with a length of about 432 km and at its widest point, a width of about 224 km.[108] In 2023, Sri Lanka had a total population of 22,037 million people with 10,670 million females and 11,367 million males.[109] The ethnicity of the Sri Lankan population in 2012 was made up of Sinhalese at a majority of 74.9%, Sri Lankan Tamils at 11.2%, Sri Lankan Moors at 9.3%, Indian

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affecting neighbours by noise pollution or the throwing of solid waste; other civil disputes filed by an individual which may be mediated under Nepal law and criminal disputes that may lead to up to one year imprisonment.

107 Which Ms Preeti Thapa made available to the Commission in Aug 2024. Ms Thapa advised that this version of the Code of Practice, which was included in the Mediation Regulations, are available in Nepali only, but that the Nepali version is very similar to the Code developed by the Asia Foundation.

108 Ministry of Education Sri Lanka “Geographical Identity of Sri Lanka”.

109 Department of Census and Statistics Sri Lanka “Mid-year population estimates by district & sex, 2014 - 2023 3.

Tamils at 4.1%, and other ethnic groups at 1.5%.[110]

7.53 In 1958, the Conciliation Boards Act was passed enabling disputants to refer civil disputes and minor offences to conciliation boards for inquiry. The objectives of the legislation were to provide speedy and inexpensive dispute resolution to disputants.[111] The aims of the Act were to resolve disputes in respect of movable property that were kept, or immovable property situated in a conciliation board area; disputes in respect of matters that may be a cause of action arising in that conciliation board area for the purpose of the institution of an action in a civil court; any dispute in respect of a contract made in that conciliation board area; and offences specified in the Schedule to the Act alleged to have been committed in that conciliation board area.[112] The conciliation boards did not have the positive effect which was hoped they would achieve. The shortcomings of the conciliation boards can be attributed to reasons such as a lack of organised training conciliation panel members received; and the absence of a professional structure for resolving disputes.[113] A further complicating factor was that the findings of the conciliation boards had binding effect, although the range of disputes the boards had jurisdiction to inquire into meant that the lay panellists who served on the boards did not necessarily have the requisite knowledge of all the matters they were tasked to inquire into.[114] Political motives also played a role in the selection of male candidates of doubtful credentials to serve as panellists in the conciliation boards. This generated exceptional disapproval in the communities. This was seen as the foundation of the exploitation of the powers which community mediators enjoyed as conciliation boards members, in addition to their capacity under the legislation to issue summonses for purposes of inquiries into civil disputes and offences.[115] It is therefore not surprising that conciliation

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110 Lanka Statistics (2012) "Composition of population Sri Lanka".

111 Alexander (April/May 2001) "From communities to corporations: The growth of mediation in Sri Lanka" 8.

112 Section 6.

113 Gunawardana (211) "A just alternative: providing access to justice" 11.

114 Gunawardana (2011) "A just alternative: providing access to justice" 11; see also Alexander (April/May 2001) "From communities to corporations: The growth of mediation in Sri Lanka" 8.

115 Section 7(b) of the Conciliation Boards Act provided that conciliation boards had the power, in respect of any dispute or offence referred to it for inquiry, to summon any person residing in Ceylon to attend any meeting of the Board to give evidence or produce any document or other thing in their possession, and to examine them as witnesses or require them to produce any document or other thing in their possession.

boards were dissolved in 1977.[116]

7.54 Conciliation boards were replaced by mediation boards under the Mediation Boards Act of 1988. This Act aimed to address the overburdened court system by once again establishing dispute resolution for disputants involved in minor civil disputes and offences.[117] The Act defines disputant to mean any party to a dispute or any person involved in the commission of an alleged offence or any person against whom an offence is alleged to have been committed.[118] The Act established a Mediation Boards Commission of five persons, three of whom at least must hold judicial office in the Supreme Court or the Court of Appeal.[119] The powers of the Mediation Board Commission are to appoint, transfer, dismiss and exercise disciplinary control over mediators; to supervise and control the performance and discharge by mediators of their duties and functions; and to issue such directions as may be necessary to mediators.[120]

7.55 The Mediation Board Commission Act requires the Minister of Justice to specify, from time to time, by order published in the Government Gazette, each mediation board area to which the provisions of the Act apply.[121] Once these mediation boards' area orders are published, the Mediation Boards Commission is required to appoint a chairman and a mediation panel to such area.[122] Candidates are eligible for appointment to any panel of mediators if they are resident in a mediation board area or engaged in any work in that area; resident or engaged in any work outside such mediation board area if the Commission so decides, in exceptional circumstances; and any public officer nominated by the Government Agent of the administrative district within which such mediation board area is situated. An officer nominated is eligible for appointment to the panel appointed for every mediation board area within that administrative district.

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116 Alexander (April/May 2001) "From communities to corporations: The growth of mediation in Sri Lanka" 8.

117 Moore, Jayasundere & Thirunavukarasu (2011) "The mediation process: Trainee's Manual Community Mediation Programme" Ministry of Justice 21.

118 Section 24.

119 Section 2.

120 Section 3.

121 Section 4.

122 Section 5.

7.56 The Mediation Boards Commission of Sri Lanka announces vacancies on mediation panels which will arise by the publication of a notice in the Government Gazette.[123] Such a notice announces the administrative districts in which vacancies will arise, the Mediation Board area concerned and the date when chairpersons and mediators will vacate their panel posts. The notice further calls upon individuals, bodies, organisations and institutions of a non-political nature, and district secretaries or divisional secretaries to submit to the Mediation Boards Commission names of eligible candidates for appointment as mediators. Individuals who are permitted to submit nominations, other than themselves for appointment to a mediation panel, are a public officer or a provincial public officer serving as the head of a department or as the regional head of a department in an office located within the administrative district at which that particular mediation board area is situated; a head of a place of religious worship or the head of a school situated in the mediation board area; a retired head of a department or school principal residing in that mediation board area; or the chairperson of a panel of mediators.

7.57 The bodies, organisations and institutions of a non-political nature which are permitted to submit nominations to fill vacancies in mediation panels are: boards, organisations or institutions which have been in existence for at least five years and are engaged in or advance objectives to promote the educational, religious, moral or spiritual progression of the community; promote the social welfare of the community or eradicate poverty; promote rural or community development; promote a sport culture; promote projects, programmes and activities intending to meet the basic needs of the community in respect of health, food and shelter, etc. [124]

7.58 District secretaries of the administrative district in which a mediation board area is situated may also submit nominations of candidates for appointment to the panel of that Mediation Board Area. District secretaries or divisional secretaries may further nominate persons for appointment to mediation panels, namely any person resident in that Mediation Board Area and engaged in any work in that area; and any person resident or engaged in any work outside that Mediation Board Area, only if the Mediation Boards

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123 Mediation Boards Commission (Feb 2018) “Notice Calling for Nominations for the Appointment of Mediators” 1.

124 Mediation Boards Commission (Feb 2018) “Notice Calling for Nominations for the Appointment of Mediators” 1.

Commission is of the opinion that such particular person is eligible due to exceptional circumstances. Any public officer nominated by the District Secretary of the Administrative District situated within that Mediation Board area is eligible for appointment to any mediation panel within that administrative district. District Secretaries or Divisional Secretaries may further nominate an already serving Chairperson, and already serving mediators about to vacate their posts upon them having completed a service period of three years. The minimum requirement for new nominees, other than members who are already members of mediation panels, is the completion of a general certificate of education or ordinary level certificate[125] (obtainable once a learner sits a grade 11 examination).[126] Individuals, bodies, organisations or institutions are discouraged to nominate more than three candidates for one mediation board area.[127] Serving chairpersons of mediation panels, District Secretaries, and Divisional Secretaries are not limited to nominating more than three candidates.

7.59 A notice calling nominations for the appointment of community mediators also provides general guidance about the information a nominator is to provide when nominating a candidate.[128] The nominator is requested to indicate facts and circumstances to enable the Mediation Boards Commission to determine the suitability of the nominate. Nominators are invited to reflect on the present or past occupation of the candidate; the period of service in an occupation; any position of trust or responsibility held by the candidate; and any office, held by the candidate in any social service, religious, charitable organisation, society or body. A 2011 evaluation of the operation of mediation boards highlighted that the gazetting of the calls for nominations does not effectively reach the local communities and that other modes of communication at local government level ought to be considered.[129]

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125 Mediation Boards Commission (Feb 2018) "Notice Calling for Nominations for the Appointment of Mediators" 1 to 2.

126 Nuffic "Education systems Nepal primary and secondary education".

127 Mediation Boards Commission (Feb 2018) "Notice Calling for Nominations for the Appointment of Mediators" 3.

128 Mediation Boards Commission (Feb 2018) "Notice Calling for Nominations for the Appointment of Mediators" 3.

129 Siriwardhana (Jan 2011) "Evaluation of the Community Mediation Boards Program in Sri Lanka" MoJ 22.

7.60 The aim of the requirement that non-political organisations are permitted to nominate community mediators, is to guard against persons with political agendas being appointed.[130] A 2011 evaluation of the work performed by community mediators under the Sri Lankan community programme found that in the selection of mediators, diversity ought to receive more attention.[131] This evaluation found about the ages of mediators, that the majority, namely 56% were in the age group 60 or even older; that less than 10% were younger than 45; and only about 14% of mediators were female. It was further found that there were clearly preferences for candidates who previously served in the public service, with 43% of public service candidates being selected for appointment to the mediation boards, whilst 36% of mediators still held public service positions. The residual 21% of candidates came from diverse environments. Most mediators, at a rate of 64%, also complied with the minimum levels of education or surpassed these requirements.

7.61 The Mediation Boards Commission highlights that candidates nominated for appointment as mediators need to attend training as part of the appointment process to become community mediators. Mediator trainers present training to nominees and appraise the competence of the nominees considering their mediation techniques and skills.[132] Only those candidates who the mediator trainers consider have mastered the requisite competence, techniques and skills will be appointed.

7.62 The 2011 evaluation of the performance of the mediator's board also reflected on the five-day training which aspirant mediators receive.[133] This evaluation noted that the ultimate choices for the appointment of mediators are done once the five-day training is completed. The recommendations which the mediator trainers submit to the Mediation Boards Council who they propose ought to be appointed, are informed by their assessments of the candidates who they consider have mastered the mediation training. The expectation is that the Mediation Boards Commission ought to be guided by the findings of the mediation trainers. The 2011 evaluation noted that mediation trainers were

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130 Ministry of Justice Sri Lanka "Mediation Boards Commission".

131 Siriwardhana (Jan 2011) "Evaluation of the Community Mediation Boards Program in Sri Lanka" MoJ 20.

132 Ministry of Justice Sri Lanka "Mediation Boards Commission".

133 Siriwardhana (Jan 2011) "Evaluation of the Community Mediation Boards Program in Sri Lanka" MoJ 22.

of the view that the Mediation Boards Commission had not adequately appraised their appointment proposals. They argued that the Mediation Boards Commission occasionally appointed trainees not proposed for possible appointment by the mediation trainers. Candidates appointed included even persons who did not attend the prescribed training sessions. Some mediator trainers had a perception that the Mediation Boards Commission preferred appointing candidates from the older age ranges since it seemed as if the Commission considered these candidates would function more competently as mediators. Some mediator trainers held the view that it seemed the Mediation Boards Commission disregarded more dynamic, proficient and younger candidates. In 2022, it was found that the 2011 challenges in respect of the age of mediators still persisted, since mediators were still mainly in the elderly age group, with hearing and eye sight impediments.[134] The 2022 recommendation was consequently that the effectiveness of mediation could be improved in Sri Lanka if younger and competent candidates or candidates in the age range of 45 to 65 were to be appointed to the mediation boards.[135]

7.63 The duties of a mediation board includes, where any dispute or offence is referred to any board, to endeavour by all lawful means to bring the disputants to an amicable settlement and to remove, with the consent of the disputants and, wherever practicable, the real cause of grievance between the disputants to prevent a recurrence of the dispute, or offence.[136] The mediation board notifies the disputants and such other persons as the Board may consider necessary to be present at a mediation conference at a specified time and place. Any person notified to be present must bring to any such board conference any witnesses or documents which may assist the disputants to arrive at a settlement. The board may further convene as many mediation conferences as may be necessary to arrive at a settlement. The board must complete its proceedings, in a civil dispute, within 60 days of the constitution of the Board; and in the case of an offence, within 30 days of the constitution of the Board. In the event of a failure to complete the mediation proceedings, the board must issue a certificate of non-settlement signed by the chief mediator stating that it was not possible to settle the dispute or offence.

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134 Hewawasam (2022) "The Role of Mediation Board in Solving Minor Disputes" *VJHSS* 189.

135 Hewawasam (2022) "The Role of Mediation Board in Solving Minor Disputes" *VJHSS* 189.

136 Section 10.

7.64 Any person may make an application to the chairman of the panel of any mediation board area, for settlement of any dispute by mediation, which arose wholly or partly within that Mediation Board area, or any offence specified in the Second Schedule[137] and alleged to have been committed within that Mediation Board area. Where the dispute relates to movable or immovable property, the application must be made to the Chairman of the Panel appointed for the Mediation Board area within which such movable property is kept, or immovable property is situated. If the dispute relates to a contract, the application must be made to the Chairman of the Panel appointed for the Mediation Board area within which such contract was made. If the dispute relates to a matter which constitutes a cause of action in a court of law, the application must be made to the Chairman of the panel appointed for the Mediation Board area within the territorial limits of the court having jurisdiction over such action. No application is to be entertained by the Chairman of a Panel, if one of the disputants is the state; or a public officer acting in his capacity as such officer, where the dispute relates to the recovery of any property, money or other dues; or the Attorney-General, where the offence is an offence in respect which proceedings are instituted by the Attorney- General.

7.65 Mandatory community mediation applies to many disputes and minor offences. Where a mediation panel has been appointed for a Mediation Board area, no proceeding in respect of any dispute arising within that area or an offence alleged to have been committed within that area may be instituted in, or be entertained by any court of first instance if the dispute is in relation to movable or immovable property or a debt, damage or demand, if the value thereof in the period 1988 to 2011 did not exceed 25 000 rupees. This value was increased in 2011 to 250 000 rupees;[138] in 2016 to 500 000 rupees;[139]

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137 Rioting (s 157 of the Penal Code), Voluntarily causing hurt, grievous hurt or grievous hurt on provocation (ss 314,315,325,316,326 of the Penal Code), Causing hurt by an act which endangers life (s 323 of the Penal Code), Causing grievous hurt by an act which endangers life or the personal safety of others (s 329 of the Penal Code), Wrongfully restraining or confining person (ss 332,333 of the Penal Code), Assault or use of criminal force (ss 343,346,348,349 of the Penal Code), Dishonest misappropriation of property where the loss is to a private person (s 386 o the Penal Code), Mischief when the loss is caused to a private person (ss 409, 410 of the Penal Code), Mischief by killing, maiming any animal of the value of rupees 10 where the loss is to a private person (s 411 of the Penal Code), Mischief by killing or maiming cattle where the loss is to a private person (s 412 of the Penal Code), Criminal trespass (s 433), House trespass (434), Painting, engraving defamatory matter or sale of such matter (ss 481,482 of the Penal Code), Insult intended to provoke breach of peace (s 484 of the Penal Code), Criminal intimidation (s 486 of the Penal Code).

138 Mediation Boards Amendment Act 4 of 2011 section 2.

139 Mediation Boards Amendment Act 9 of 2016 section 2.

and in 2024, to 1 million rupees.[140] No proceeding in respect of any dispute arising within that area or an offence alleged to have been committed within that area may be instituted in, or be entertained by any court of first instance if the dispute gives rise to a cause of action in a court not being an action specified in the Third Schedule[141] to the Act; or the offence is one specified in the Second Schedule[142] to the Act, unless the person instituting such action produces the certificate of non-settlement. Since 2011, matters involving alleged theft by accused below the age of 18, where the value of the property concerned did not exceed 5 000 Sri Lankan Rupees, could also be resolved by the diversion of the matter from the criminal justice system to mediation by a mediation board.[143] In January 2024, the threshold for diversion if a child allegedly stole goods, was increased from 5 000 Sri Lankan Rupees to 100 000 Rupees (which equals about R 6 046).[144]

7.66 Where an action is filed in any civil court with jurisdiction over a mediation board area, in respect of any dispute, the court may, with the written consent of the parties, refer the dispute to the chairman of the mediation panel appointed for that area, for settlement by mediation.[145]

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140 See the Mediation Boards Amendment Act 2 of 2024 section 4. On 30 August 2024, 1 million Sri Lankan rupees equalled SA R 58 682.00.

141 Matrimonial disputes; matters pertaining to persons and estates of persons of unsound min, minors and wards, guardians, curators and receivers; trusts; adoption of children; applications under the Registration of Births and Deaths Ordinance; partition or division; testamentary and actions under the Insolvency Ordinance; Admiralty Actions; Election Petitions; fundamental rights applications in the Supreme Court; Mortgage Act; breaches of the privileges of Parliament; applications pending before the Debt Conciliation Board on the date of commencement of this Act or dealt with by the Debt conciliation Board by settlement or dismissal of the application; matters where one of the disputants is the State; where the dispute relates to the recovery of any property, money or other dues on behalf of the State; or where the Attorney-General has instituted proceedings for any offence.

142 We noted the list of offences specified for possible mediation in the Second Schedule above.

143 See the Mediation Boards (Amendment) Act, No. 4 of 2011.

144 Multi-Partner Trust Fund Office (Jan – Dec 2023) "The Support to Justice Sector Project" 41. Sri Lankan Rupees 100 000 equalled on 18 Aug 2024, R 6 046. See however, the outcry when a juvenile was criminally charged in 2013 for the theft of four coconuts when the complainant did not agree to the diversion to mediation to be conducted by a mediation board although the value of the coconuts did not even amount to 400 Rupees, Mediation.com (Feb 2013) "Sri Lankan teenager sent to court over theft of coconuts despite Mediation Act".

145 Section 8.

7.67 Once a dispute is referred to a mediation board, it is the duty of that board to endeavour by lawful means to bring the parties to the dispute to an amicable settlement.[146] The board must eliminate, with the consent of the disputants, wherever practicable, the real cause of the dispute between the disputants so as to prevent a recurrence of that dispute. The board must then notify the parties concerned and any other persons involved, to attend a mediation conference either together or individually at a specified time and place. The notification must further inform the disputants that if any of the parties fails to appear at such mediation conference, such absence will be recorded in the certificate of non-settlement issued or in the report submitted to court.[147] The board may further require any person notified to bring to any such conference any witnesses or documents which may be of assistance in arriving at a settlement.[148] The board may convene as many mediation conferences as may be necessary to arrive at a settlement.[149] The board is required to comply with the prescribed procedure to conduct mediation sessions.[150] The board must maintain confidentiality in relation to all evidence given, documents submitted and of any other matters that are revealed or discussed during the conduct of mediation sessions.[151] The board may obtain, where necessary, the advice of any person who has special knowledge or expertise pertaining to the subject matter of the dispute in instances where the Board considers it necessary and helpful in arriving at a settlement.[152] The board must further endeavour to reach a settlement acceptable to both disputants.[153] The mediation board must, in respect of every dispute brought before it for settlement by mediation, endeavour to complete its deliberation and bring about a settlement or issue a certificate of non-settlement, in the case of a civil dispute, within 60 days of the constitution of the Board; and in the case of an offence, within 30 days of the constitution of the Board.[154] If it fails to do so, the board must issue a certificate of non-settlement or submit a report to court.[155]

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146 Section 11(a).

147 Section 11(a).

148 Section 11(b).

149 Section 11(c).

150 Section 11(d).

151 Section 11(e).

152 Section 11(f).

153 Section 11(g).

154 Section 15. (1).

155 Section 11(h).

7.68 The Mediation Boards Act also prescribe the duties of disputants. Every disputant notified by a mediation board has a duty to disclose fully and honestly all matters which are relevant and necessary for reaching a settlement; and to refrain from revealing any information of a confidential nature disclosed or discussed at a mediation session.[156]

7.69 Where the disputants agree to a settlement, then the terms of the settlement must be reduced to writing and be signed by the chief mediator and the parties. Where the settlement is in respect of any dispute brought before the Board by an application other than in respect of any dispute referred by a court or a labour tribunal, the board must immediately issue a copy of the settlement to all disputants.[157] Where the settlement is in respect of any dispute referred by a court or a labour tribunal, the board must forward a copy of the settlement to the court or labour tribunal and also issue a copy to all disputants.[158] Where a copy of the settlement is forwarded to any court or labour tribunal, the court or labour tribunal, must after issuing notice to the disputants, in the case of a reference by a court, enter a decree; or in the case of a reference by a labour tribunal, make an order, in accordance with such settlement.

7.70 Where the disputants do not agree to a settlement, the board must in the case of a dispute referred to the Board upon an application made, issue a certificate of non-settlement signed by the Chief Mediator, stating that such dispute has been referred to such Board and that it has not been possible to settle the dispute by mediation and stating the reasons for non-settlement.[159] Where the disputants do not agree to a settlement, in the case of a dispute referred by any court or labour tribunal for settlement, the board must report to such court or labour tribunal, signed by the Chief Mediator, that it has not been possible to settle the dispute by mediation and stating therein the reasons for not settling the dispute.[160]

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156 Section 12.

157 Section 13(1) (a).

158 Section 13(1) (b).

159 Section 14(a).

160 Section 14(b).

7.71 The procedure to be observed in the conduct of a mediation session is prescribed by regulation.[161]

7.72 The Mediation Boards Act further provides that no lawyer, agent or other person shall be entitled or be permitted to appear on behalf of any disputant in any matter before a mediation board. The Act however, permits representation before a mediation board of one spouse by another spouse; or of a minor or other person under any disability, by their parent, guardian or curator.[162] The members of a mediation board are further bound by a Code of Conduct to conduct a mediation session.

7.73 Where any dispute referred to a mediation board in pursuance of an application is settled, and one of the parties to the settlement thereafter fails to comply with, or violates the terms of such settlement at any time, the other party must forthwith report such failure or violation, to the mediation board.[163] Upon receipt of a such a report the board will notify the parties to the settlement and such other persons as it may consider necessary, to be present at a specified time and place and shall endeavour to resolve any differences that may have arisen between the parties and will assist them to enter into a fresh settlement. Where the resolution of such differences is not possible, the mediation board will issue a certificate of non-settlement, signed by the Chief Mediator, stating that it has not been possible to settle such dispute, stating the reasons for not settlement.[164]

7.74 Further legislation which was adopted to regulate mediation in special categories of disputes, is the 2003 Mediation (Special Categories of Disputes) Act. A notice which was issued under this legislation, provided for the settlement through mediation of disputes in respect of debt, damage or claims which arose from the Tsunami of 26 December 2004.[165]

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161 Section 15. (2).

162 Section 15.

163 Section 17 (1).

164 Section 17(2).

165 Ministry of Justice Sri Lanka “Mediation Boards Commission”.

7.75 A 2016 evaluation of community mediation in Sri Lanka,[166] concluded that a number of factors persuade disputants to use informal community mediation to resolve their disputes rather than formal litigation in the courts, such as: the closeness of mediation being conducted to the local residence of disputants; the uncomplicated way of being able to make progress in a dispute; an elevated degree of foreseeable outcomes; and a less expensive collaborative and conversation based procedure. These benefits are amplified if the community mediators were valued members of their community, when they conducted the mediation impartially and with a firm appreciation of the socio-cultural characteristics of their community.

7.76 In Sri Lanka, 329 Mediation Boards have been established, with about 8 266 mediators who assist the Sri Lankan population voluntarily to amicably settle their disputes.[167] In excess of 100 000 disputes are annually referred to the Mediation Boards for resolution.[168] From 1 January to 31 December 2022, 173 087 disputes were filed for resolution to Mediation Boards of which 65 453 disputes were resolved by settlement, which translates to a settlement rate of 69.4%.[169] In 2023, the Sri Lankan Mediation Boards successfully resolved approximately 68 000 disputes, with a 69% settlement rate with continued elevated levels of content achieved between disputants.[170]

7.77 Noteworthy is further, that whereas in the period between 2003 to 2009, the budget of the Mediation Boards Commission grew from 30,75 million rupees to over 85 million rupees,[171] in the 2022 year, the recurrent expenditure of the Mediation Boards Commission was 390.64 million rupees.[172] In the period 2003 to 2009, a major part of the budget was spent on mediator training and not on items such as board staff salaries,

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166 Munas & Lokuge (March 2016) “Community mediation: a just alternative? expectations and experiences” 39.

167 Ministry of Justice Sri Lanka “Mediation Boards Commission”.

168 Ministry of Justice “Mediation Boards Commission”.

169 Ministry of Justice (2022) “Annual Performance Report – 2022” 17.

170 Asia Foundation (May 2024) “Enabling Citizen Access to Justice and Community Harmony: Three Decades of Support for Sri Lanka Mediation Boards”.

171 Siriwardhana (Jan 2011) “Evaluation of the Community Mediation Boards Program in Sri Lanka” MoJ 16.

172 Ministry of Justice (2022) “Progress Report 2022 - Jan to Sept” 10. At the exchange rate on 18 Aug 2024, 390 million Sri Lankan rupees equalled 23,358 million South African Rand.

although staff numbers grew.[173]

7.78 A code of conduct was also adopted to regulate the conduct of community mediators in Sri Lanka, (see Annexure B in this paper). This code explains that the reasons for the adoption of the code is to establish an understanding of how mediators are expected to conduct themselves during mediation; to reposition mediation towards professionalism; and to ensure observance to prevent possible misconduct by mediators. The code addresses aspects such as mediators recognising self-determination of disputants; facilitating disputants to arrive at a solution on their own; neutrality; impartiality; confidentiality; to avoid concerns about interests of disputants; recusal; avoidance of self-interest; politeness and courteousness; display of patience; assertiveness; and focussing the parties on their dispute. It further requires that mediators do not provide legal advice; take decisions for disputants; to avoid personal interests in a settlement; to avoid dictatorial approaches; not to coerce, threaten, induce, force, or intimidate disputants into an agreement; not to judge or discriminate against disputants on any ground; and not to receive any compensation for mediating disputes.

5 Community Mediation in the Philippines

7.79 In 2020, the population number of the Philippines was about 108,67 million people.[174] The population of the Philippines is diverse. Participants in the 2020 census reported their ethnicity as follows: approximately 26.0% Tagalog; 14,3% Bisaya or Binisaya 14%; 8% each Ilocano and Cebuano; 7,9% Ilonggo; 6,5% Bikol/Bicol; 3,8% Waray; 3% Kapampangan; 1,9% each Maguindanao and Pangasinan; and 1,8% other local ethnicities.[175] The census further indicated that 93,09 million or 85,7% of the population classified themselves as non-Indigenous Peoples, with 15.56 million of the population having reported themselves as Indigenous Peoples, as identified by the National Commission on Indigenous People of the Philippines.[176]

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173 Siriwardhana (Jan 2011) “Evaluation of the Community Mediation Boards Program in Sri Lanka” MoJ 16.

174 Philippine Statistics Authority July 2023) “Ethnicity in the Philippines (2020 Census of Population and Housing)”.

175 Philippine Statistics Authority July 2023) “Ethnicity in the Philippines (2020 Census of Population and Housing)”.

176 Philippine Statistics Authority July 2023) “Ethnicity in the Philippines (2020 Census of Population and Housing)”.

7.80 The Local Government Code of 1991 regulates community mediation at the local government level in the Philippines. The code creates and deals in detail with the role of the Barangay. A dictionary description of Barangay is that it is a small district in the Philippines forming the most local level of government.[177] Another dictionary description is that the Barangay is a unit of administration in Philippine society consisting of 50 to 100 families under a headman.[178] The Local Government Code sets out the role of the Barangay, as being the basic political unit, to serve as the primary planning and implementing unit of government policies, plans, programs, projects, and activities in the community, and as a forum wherein the collective views of the people may be expressed, crystallised and considered, and where disputes may be amicably settled.[179] The code further creates in each Barangay a Lupong Tagapamayapa or the lupon, composed of the Punong Barangay as chairman and ten to twenty members. The lupon is constituted every three years.[180]

7.81 The Code also regulates the eligibility of persons to be appointed as members of a lupon. Any person who resides or works in the Barangay, and who is not otherwise disqualified by law, and who possesses integrity, impartiality, independence of mind, sense of fairness, and a reputation for probity, may be appointed as a member of the lupon.[181] It is the duty of the Punong Barangay to prepare a notice to constitute the lupon, with the names of proposed members who have expressed their willingness to serve on the lupon, within the first 15 days from the start of the term of office of the lupon. The notice must be posted in three conspicuous places in the Barangay continuously for a period of not less than three weeks. The Punong Barangay takes into consideration any

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177 Oxford learners' dictionary: definition of barangay.

178 Merriam-Webster dictionary meaning of barangay.

179 Section 384. Also significant is section 16 of the Code which deals with the general welfare of every local government unit. It provides that every local government unit shall exercise the powers expressly granted, those necessarily implied there from, as well as powers necessary, appropriate, or incidental for its efficient and effective governance, and those which are essential to the promotion of the general welfare. Within their respective territorial jurisdictions, local government units mustl ensure and support, among other things, the preservation and enrichment of culture, promote health and safety, enhance the right of the people to a balanced ecology, encourage and support the development of appropriate and self-reliant scientific and technological capabilities, improve public morals, enhance economic prosperity and social justice, promote full employment among their residents, maintain peace and order, and preserve the comfort and convenience of their inhabitants.

180 Section 399.

181 Section 399.

opposition to the proposed appointment or any recommendations for appointments as may have been made within the period of posting, and appoints within 10 days thereafter, as members, those whom it determines to be suitable. Appointments are in writing, signed by the Punong Barangay, and attested to by the Barangay secretary. The list of appointed members is posted in three conspicuous places in the Barangay for the entire duration of the term of office of the lupon. In Barangays where most of the inhabitants are members of indigenous cultural communities, their local systems are recognised through their councils of *datus* or elders.

7.82 Amongst the functions of the lupon is to meet once a month to provide a forum for the exchange of ideas among its members and the public on matters relevant to the amicable settlement of disputes, and to enable various conciliation panel members to share their observations and experiences in effecting speedy resolution of disputes.[182] The lupon of each Barangay has authority to bring together the parties residing in the same city or municipality for amicable settlement of all disputes. However, the following exceptions apply:[183] where one party is the government, or any subdivision or instrumentality thereof; where one party is a public officer or employee, and the dispute relates to the performance of their official functions; offenses punishable by imprisonment exceeding one year or a fine exceeding five thousand pesos; offenses where there is no privately offended party; where the dispute involves real properties located in different cities or municipalities, unless the parties thereto agree to submit their dispute to amicable settlement by an appropriate lupon. Further disputes which may not be resolved by mediation are disputes which involve parties who reside in Barangays of different cities or municipalities, except where such Barangay units adjoin each other and the parties thereto agree to submit their dispute to amicable settlement by an appropriate lupon; and such other classes of disputes which the President may determine in the interest of justice or upon the recommendation of the secretary of Justice. However, any court in which non-criminal cases, not falling within the authority of the lupon under the Code, are filed, may at any time before trial, of its own accord refer the case to the lupon concerned for amicable settlement.

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182 Section 402.

183 Section 408.

7.83 The Civil Code deals in detail with all aspects of community mediation. It deals, among others, with the duties of the secretary of the lupon,[184] including recording of the outcome of mediation proceedings before the Punong Barangay and reporting thereon to the city or municipal courts. It also deals with the *Pangkat ng Tagapagkasundo* (the pangkat*),* which is constituted for each dispute brought before the lupon as a conciliation panel or the pangkat. The pangkat consists of three members chosen by the disputants from the list of members of the lupon.[185] The Code also deals with the filling vacancies in the lupon.[186] The Code regulates the character of the office and service of lupon members that they are deemed as persons in authority,[187] and that members serve without compensation. The Code further deals with disputes about the venue where a dispute is to be heard,[188] the procedure to be adopted for an amicable settlement,[189] the form of settlement,[190] proceedings to be open to the public,[191] the effect of amicable settlements and arbitration awards,[192] enforcement of settlement or arbitration awards,[193] repudiation of a settlement within 10 days from the date of the settlement,[194] and the transmittal of settlement and arbitration awards to the court.[195]

7.84 Should the parties fail to agree on the pangkat membership, members are determined by lots drawn by the lupon chairperson. The three members who constitute the pangkat, elect from their membership a chairperson and the secretary. The secretary prepares minutes of the pangkat proceedings and submits a copy attested to by the chairperson to the lupon secretary and to the city or municipal court. The secretary issues and causes notices to be served on the parties concerned. The lupon secretary issues certified copies of any public record in their custody that is not by law otherwise declared

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184 Section 403.

185 Section 404.

186 Section 405.

187 Section 406.

188 Section 409.

189 Section 410.

190 Section 411.

191 Section 414.

192 Section 416.

193 Section 417.

194 Section 418.

195 Section 419.

confidential.

7.85 The Code also regulates in detail the procedure for amicable settlements. Any individual who has a cause of action against another individual involving any matter within the authority of the lupon may complain, orally or in writing, to the lupon chairman of the Barangay upon payment of the filing fee.[196] The lupon chairperson must, upon the receipt of the complaint within the next working day summon the respondent, with notice given to the complainant and their witnesses to appear before the chairperson for mediation. If the chairperson fails in a mediation effort within 15 days from the first meeting with the parties, the chairperson must set a date for the constitution of the pangkat. While a dispute is under mediation, conciliation, or arbitration, then the prescriptive periods for offenses and cause of action under laws are interrupted upon filing of the complaint with the Punong Barangay. The prescriptive periods resume upon receipt by the complainant of the complaint or the certificate of repudiation or of the certification to file action issued by the lupon or pangkat secretary. Such interruption may not exceed 60 days from the filing of the complaint with the Punong Barangay.

7.86 The pangkat must convene not later than three days from its constitution, on the day and hour set by the lupon chairperson, to hear parties and their witnesses, simplify issues, and explore all possibilities for amicable settlement. The pangkat may issue summons for the personal appearance of parties and witnesses. In the event that a party moves for the disqualification of any member of the pangkat by reason of relationship, bias, interest, or any other reason discovered after the constitution of the pangkat, the matter is resolved by the affirmative vote of the majority of the pangkat, whose decision is final. If the disqualification of a member is decided upon, the resulting vacancy must be filled. The pangkat must arrive at a settlement or resolution of the dispute within 15 days from the day it convenes. This period may, at the discretion of the pangkat, be extended for another period which may not exceed 15 days, except in clearly meritorious cases.

7.87 No complaint, petition, action, or proceeding involving any matter within the authority of the lupon may be filed or instituted directly in court or any other government office for adjudication, unless there has been a confrontation between the parties before

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196 Section 410.

the lupon chairman or the pangkat. Neither may a disputant institute such steps if conciliation or settlement has been reached, unless the settlement has been repudiated by the parties thereto.[197] Parties may approach a court directly in the following instances: where the accused is in detention; where a person has otherwise been deprived of personal liberty calling for habeas corpus proceedings; where actions are connected to provisional remedies such as a preliminary injunction, attachment, delivery of personal property, and support pendente lite; and where the action may otherwise be barred by the statute of limitations. The customs and traditions of indigenous cultural communities are to be applied in settling disputes between members of cultural communities.

7.88 Commentators note that community mediation has succeeded in the Philippines to augment justice and that community mediation contributes towards reducing the overburdened court rolls.[198]

6 Community mediation Trinidad and Tobago

7.89 In June 2023, Trinidad and Tobago had a population of about 1,367,510 people.[199] Under the Mediation Act of 2004 of Trinidad and Tobago, "community mediation" is defined to mean State-sponsored mediation in the communities of Trinidad and Tobago, which may be specified by regulations. "Minister" means the Minister to whom responsibility for community mediation is assigned.[200] The Minister nominates one of the members of the Mediation Board to whom responsibility for community mediation is assigned. The Minister may make regulations governing community mediation, namely, the demarcation of communities for the purposes of the Act; the procedure for

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197 Section 412.

198 Tabucanon, Wall & Yan (2008) "Philippine Community Mediation" *J. Disp. Resol*. 512. See also Vigo & Manuel (2004) "Katarungang Pambarangay: A Handbook" Philippines – Canada Local Government support at xi who comment among others as follows on the difference which community mediation has made in the Philippines:

> … the Local Government Code of 1991 expanded the scope and powers of the Katarungang Pambarangay or the Barangay Justice System designed not merely to decongest the courts of cases but to address inequalities in access to justice, particularly experienced by marginalized communities. The barangays, being the basic political unit in the country, is in the most strategic position to facilitate resolution or mediation of community and family disputes, alongside its mandate to deliver basic services.

199 Central Statistical Office Ministry of Planning and Development Trinidad and Tobago "Population Statistics".

200 Regulation 2.

community mediation as a result of self-referral or voluntary access; and the use of certified mediators and mediation centres.[201]

7.90 Community mediation is regulated in detail in the community mediation regulations, under 22 headings.

7.90 Parties to any of the following disputes may apply to a community mediation centre for mediation:[202] landlord and tenant disputes; merchant and consumer disputes; organisational disputes; small claims; threat and harassment disputes; neighbourhood conflicts; family and relationship disputes; small contractor and home owners disputes; community disputes; and juvenile conflicts (truancy, delinquent children, and gang related activities).

7.91 A mediation request must be made on the mediation intake form. When one party makes a request for mediation, the centre must ensure that the other disputants are informed of the request for mediation. When parties to any dispute or matter listed in regulation 22, agree to mediation, the parties must complete and submit to the manager the agreement to participate in mediation form and provide a brief statement of the matter in dispute.[203]

7.92 The date of the commencement of mediation proceedings is the date on which the agreement to participate in mediation is received at the community mediation centre.[204] Where a manager of a community mediation centre receives a request for mediation, they must within 14 days after receiving the request, appoint a mediator to mediate the dispute between the parties; and give to the parties notice in writing of the name of the mediator appointed to the matter, and the date and time of the mediation sessions. A mediator assigned to mediate a dispute must ensure that the matter is concluded within 90 days from the date of its commencement.

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201 Regulation 16.

202 Regulation 5(1).

203 Regulation 6.

204 Regulation 7.

7.93 All parties to mediation or their appointed representatives, with authority to settle the matter, must attend all mediation sessions.[205] A person other than the parties to mediation may attend the mediation sessions with approval granted by the mediator.[206]

7.94 The manager of a community mediation centre must ensure that all mediation matters are properly scheduled. The manager must also assist the mediator in obtaining the relevant advice or guidance; take the necessary action reasonably required to facilitate the mediation of disputes at all community mediation centres; and ensure that mediators and other members of staff at the community mediation centre maintain a high standard of work and are kept abreast of any matter which may impact upon their work.[207]

7.95 A mediator must conduct mediation sessions in the way agreed to by the parties to the mediation. Where parties to mediation are unable to agree on the way the mediation sessions are to be conducted, the mediator determines the way the proceedings are to be conducted. Parties to mediation must, in good faith, co-operate with the mediator.[208]

7.96 A mediator is free to meet and communicate separately with both parties to a mediation during the course of the mediation hearing; and must be neutral, impartial and independent in the conduct of mediation sessions.[209] Where an agreement is reached by the parties to mediation, the agreement must be recorded in writing and signed by the parties.[210]

7.96 A mediator must within three days inform the community mediation centre of the conclusion of the mediation session; and file with the community mediation centre a mediator's report in the mediator's report form.[211] No person may make any recording of any meeting of the parties with the mediator.[212]

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205 Regulation 9(1).

206 Regulation 9(2).

207 Regulation 10.

208 Regulation 11(3).

209 Regulation 12.

210 Regulation 13.

211 Regulation 14.

212 Regulation 15.

7.97 A party to mediation may at any time, upon giving reasonable notice to the community mediation centre, the mediator and the other party, terminate the mediation.[213] A mediator may at any time terminate a mediation session where in their opinion further efforts at the mediation are unlikely to resolve the dispute.[214] Where a mediation session is terminated, the mediator must within three days submit the mediator's report to the manager of the community mediation centre. A mediation session may be terminated by either of the parties to the mediation, or when both parties complete and submit the settlement agreement form.

7.98 Where a request is made by a person for mediation, that person shall not be required to pay any fee to the Ministry or any person acting on the Ministry's behalf.[215] No person may be employed as a mediator for the purpose of conducting community mediation unless that person is registered as a certified mediator.[216] This means that community mediators also need to comply with the code of ethics for mediators (which is included in this paper as Annexure C).

7.99 The Ministry is required to establish a register of certified mediators.[217] The register must contain all relevant information in respect of the status of a mediator's registration.[218]

7.100 A party to mediation or their lawyer may at any time during a mediation session or up to 30 days after the last day of a scheduled mediation session, in writing complain to the Manager of the community mediation centre in respect of the conduct of the mediator who conducts the mediation session.[219] Where a complaint is made against a mediator, the manager of the community mediation centre must, in writing, inform the mediator and the Executive Director of the nature of the complaint within 14 days from

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213 Regulation 16(1).

214 Regulation 16(2).

215 Regulation 17.

216 Regulation 18.

217 Regulation 19(1).

218 Regulation 19(2).

219 Regulation 20(1).

the date the complaint was made. [220] A mediator who is informed of any complaint made against them, must within 14 days from the date of being informed, submit a written response to the complaint to the Manager of the community mediation centre. [221]

7.101 Where the Executive Director receives a complaint and determines that the complaint should be investigated, the Executive Director must direct the Manager or any other suitable person to investigate the complaint.[222] The Manager or such other person as directed by the Executive Director may, in conducting the investigation, solicit information from the complainant, the mediator or any other person with relevant information about the complaint.[223] At the conclusion of an investigation, the Manager or such other person directed by the Executive Director, must submit a report with recommendations to the Executive Director.[224] Where the Executive Director determines that further action is required in respect of a complaint made against a mediator, the Executive Director must appoint a Complaints Panel comprising three persons to review the complaint.[225] The Complaints Panel reviews the report of the Manager or such other person appointed by the Executive Director and thereafter gives the complainant and the mediator, against whom the complaint was made, an opportunity to present additional information in respect of the complaint. [226] Where the Complaints Panel is satisfied that the allegations of the complaint are true and constitute a violation of the Code of Ethics under the Act, it may recommend to the Executive Director, any of the following decisions: counsel the mediator; reprimand the mediator verbally or in writing; or remove the mediator from the Ministry's Register. [227]

7.102 The Government of Trinidad and Tobago funds the costs of community mediation fully, unless the disputes involve the services of a lawyer, an expert or any other party.[228] The Mediation Board of Trinidad and Tobago had 10 mediation agencies and registered

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220 Regulation 20(2).

221 Regulation 20(3).

222 Regulation 21(1).

223 Regulation 21(2).

224 Regulation 21(3).

225 Regulation 21(4).

226 Regulation 21(5).

227 Regulation 21(6).

228 Ministry of Sport and Community Development Trinidad and Tobago "Benefits of Mediation".

583 mediators by 2018.[229] The Community Mediation Regulations listed 20 community mediation centres which were to be established.[230] Community mediation services are rendered under the jurisdiction of the Ministry of Community Development, Culture and The Arts. The 20 mediation centres are situated at the main community mediation centres, district centres and sub-centres throughout Trinidad and Tobago.[231] The community centres are responsible for the administration and coordination of community mediation activities within that region. District centres are situated in selected communities and provide the complete range of community mediation services. Sub mediation centres operate in supporting roles in respect of mediation activities conducted in a region, depending on the density of the population in the region.

7.103 A comprehensive code of ethics applies to all mediators in Trinidad and Tobago, also to community mediators,[232] (see Annexure C to this discussion paper). The code therefore applies to all certified mediators and is intended to assist and guide certified mediators in their conduct and to provide a framework within which mediation is to be conducted and regulated.

D Conclusion on community mediation

1 Discussion

7.104 We can learn valuable lessons from the jurisdictions we considered in our overview of community mediation in other jurisdictions. We note the minimalist regulation of community mediation in India, compared to the substantive regulation of community mediation in the Philippines and less substantive regulation in Trinidad and Tobago. We note that much experience has been gained in Nepal and Sri Lanka on their community mediation programmes, although concerns have been raised about the appointment of

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229 Konzales "Mediation Developments in Trinidad and Tobago" Weinstein International.

230 Regulation 3, namely Arima; Cedros and Icacos; Chaguanas; Cocorite; Couva; Cunupia; Diego Martin; La Horquetta; Laventille; Maloney; Morvant; Mayaro; Penal and Debe; Point Fortin; Port-of-Spain; San Fernando; Sangre Grande; San Juan; Toco; and Tunapuna.

231 Ministry of Sport and Community Development Trinidad and Tobago "Community mediation Centres.

232 Under regulation 18, no person may be employed as a mediator for the purpose of conducting community mediation unless that person is registered as a certified mediator.

mediators, in Sri Lanka.

7.105 We consider further that we can learn lessons from the jurisdictions which situate their community mediation programmes at local government level. We propose that community mediation at local government level should be promoted by the proposed legislation, however, we did not attempt to exhaustively regulate community mediation in our proposed legislation. Further discussions with community mediators and local authorities should be undertaken. We are moreover, of the view that consideration ought to be given to the adoption of a code of conduct or code of ethics along the lines of those adopted in Nepal, Sri Lanka and Trinidad and Tobago (see Annexures A to C to this paper). The envisaged Mediation Council could be tasked with the adoption of such a code of conduct to apply to community mediators.

7.106 The following comment made in Australia also resonates with us, as we believe that these remarks also apply to our female community mediators in our jurisdiction, although we also wish to recognise the role our male community mediators play in resolving community disputes in our country:

> The NAIDOC theme 'Because of her, we can!' resonates powerfully in all sectors, but particularly for us in dispute resolution." says Ms Lockhart "Over fifty percent of our trained Aboriginal and Torres Strait Islander mediators are female and at a personal level this means more employment opportunities for these highly skilled and talented women. At a societal level, it also means that many more people within communities are benefitting from mediation, and not just the disputing parties. If conflict moves laterally, so does peace. We know that harmony helps all families, businesses and communities to thrive.

7.107 A further crucial issue is the matter of funding of community mediation. We note that substantial funding is allocated annually to the community programme in Sri Lanka, particularly to cover community mediation training costs. The question for consideration is, could funding be allocated at local government level to support and grow existing community mediation programmes in our country like the Sri Lankan model we note in this paper?

2 Proposal on community mediation

7.108 We therefore request our stakeholders who are active in the community mediation field in South Africa, to engage with the Commission on the regulation and

funding of community mediation and on promoting mediation in resolving our community disputes.

7.109 A question is whether funding could be allocated at local government level to support and grow existing community mediation programmes in our community like the Sri Lankan model we note in this paper?

7.110 We noted the codes of conduct or code of ethics adopted in Nepal, Sri Lanka and Trinidad and Tobago which apply to community mediators (see Annexures A to C to this paper). A further question is whether stakeholders agree with our view that the envisaged Mediation Council be tasked with the adoption of a code of conduct for community mediators and if so, what issues should it address?

ANNEXURE A: COMMUNITY MEDIATOR'S CODE OF CONDUCT: NEPAL[233]

1. The Mediator is Neutral and is NOT a representative of any Disputant.

2. Agreements are entirely determined by the Disputants. The Mediator does NOT coerce or influence decisions and has NO authority to impose a settlement.

3. The Mediator does not exhibit any bias based on gender, caste, economic status, or political affiliation.

4. The Mediators keeps confidential everything that is said in the Mediation session.

5. The Mediator does NOT to give testimony in any other proceedings regarding settlement offers made by either Disputant.

6. The Mediator does not discuss the case with Disputants, except during the mediation session.

7. The Mediator does NOT to participate in any mediation where there may be a conflict of interests, or he/she may be affected by the outcome of the settlement.

8. The Mediator does NOT to act as an Advocate or an Arbitrator in any proceedings following Mediation which concern these same Disputants with the same or similar issues.

9. The Mediator does NOT accept any money, or other form of remuneration, from the Disputants or any parties associated with the dispute.

10. The Mediator maintains a good reputation in the local community.

11. The Mediator may disqualify him/herself from any particular case, if s/he believes that s/he cannot maintain this Code of Conduct due to the circumstances of the case.

12. Violation of any item under this Code of Conduct may result in the disqualification of the Mediator, and removal from the local Mediation Board.

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233 The Commission acknowledges its appreciation to Ms Preeti Thapa of Nepal for making available the Asia Foundations Community Mediator's Code to the Commission.

ANNEXURE B: CODE OF CONDUCT MEDIATORS SRI LANKA

Code of Conduct[234]

A code of Conduct for Mediators is essential –

- To establish an understanding of how Mediators are expected to conduct themselves during mediation.
- To move the field of mediation towards professionalism.
- To ensure the observance of Code in order that the concept of Mediation is not prejudiced by the possible misconduct of Mediators.

Community Mediation Programme (CMP) Mediators shall:

- Follow the mediation process and conduct the process in a manner consistent with the principle of self-determination
- Facilitate parties to arrive at a solution or decision taken by themselves.
- Be neutral in regards to all parties (not demonstrate side-taking)
- Be impartial; be free from conflict of interest with regard to the issues of the dispute and the parties to the dispute.
- Maintain confidentiality as per the expectations of the parties
- Avoid concerns with the vested interests of parties.
- Withdraw from mediations for which they are ill suited.
- There could be a perception of a personal interest
- Be polite and courteous.
- Be patient and afford parties ample opportunity to discuss their concerns.
- Be assertive in focusing and refocusing the process when necessary
- Avoid wasting of time by having the discussion stray from the agreed upon issues…

CMP Mediators shall not:

- Provide legal advice
- Make decisions for parties
- Place personal interest on or benefit from the terms of settlement of the dispute.
- Be dictatorial in approach.
- Coerce, threaten, induce, force, intimidate or use any other unlawful measures to push parties into agreement.
- Make judgements or discriminate based on social differences (sex, ethnicity, class, caste, religion, education or other)
- Take payments or compensation in any form.

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234 See Ministry of Justice Law Reform and National Integration (2003) *Guide to Community Mediation Programme and Mediation Boards of Sri Lanka* 13.

ANNEXURE C: CODE ETHICS FOR CERTIFIED MEDIATORS: TRINIDAD AND TOBAGO

Code of Ethics[235]

1. This Code of Ethics shall apply to certified mediators and is intended to assist and guide certified mediators in their conduct and to provide a framework within which mediation is conducted and regulated.

2. In this Code—

"Conflict of interests" means direct or indirect financial personal interests in the outcome of the dispute or an existing or past financial, business, professional, family or social relationship which is likely to affect the impartiality or reasonably create an appearance of partiality or bias;

"impartiality" means freedom from favouritism and bias either by words, action or by appearance and implies a commitment to serve all mediation parties as opposed to a single mediation party in moving towards or reaching agreement.

General responsibilities

3. Certified mediators shall—

(a) conduct themselves in a manner which will instil confidence in the mediation process, confidence in their integrity and confidence that disputes entrusted to them are handled in accordance with the highest ethical standards;

(b) be responsible to the parties, to the profession, to the public and to themselves, and accordingly shall be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interest, but rather the needs and interests of the mediation parties;

(c) fairly in dealing with the mediation parties, have no personal interests in the terms of the settlement, show no bias towards individuals or parties involved in the disputes and be certain that the mediation parties are informed of the process in which they are involved.

Ethical standards

4.(1) The primary role of the mediator is to facilitate the voluntary resolution of a dispute.

(2) The primary responsibility for the resolution of the dispute and the shaping of a settlement rests with the mediation parties.

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235 See Mediation Act, Laws of Trinidad and Tobago, First Schedule.

(3) A mediator shall recognise that mediation is based on the principle of self-determination by the mediation parties and upon the ability of the mediation parties to reach a voluntary un-coerced agreement.

(4) A mediator shall request and encourage self-determination by the mediation parties in their decision whether, and on what terms, to resolve their dispute, and, subject to paragraph 13, shall refrain from being directive or judgmental regarding the issues in dispute and options for settlement.

(5) A mediator shall encourage mutual respect between the mediation parties, and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

(6) A mediator shall make the mediation parties aware, where appropriate, of the option and importance of consulting other professionals to assist the mediation parties in the making of informed decisions.

(7) When a mediator believes a mediation party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the mediation parties to seek independent professional advice.

(8) While a mediator may point out possible outcomes of a case, the mediator shall not offer a personal or professional opinion as to how the Court in which the case has been filed will resolve the dispute.

(9) A mediator shall not use during the mediation process any title or honorific to which he may be entitled.

5.(1) A mediator shall mediate only when the mediator has the necessary qualifications, training and experience to enable him to satisfy the reasonable expectation of the mediation parties.

(2) A mediator shall acquire and maintain professional competence in mediation, and shall at all times strive to improve his professional skills and abilities by participating in relevant continuing education programmes.

(3) A mediator shall have information regarding his relevant training, education and experience available to the mediation parties.

6.(1) A mediator shall provide mediation services only for those disputes in which he can be impartial with respect to all the mediation parties and the subject matter of the dispute.

(2) A mediator shall in words and action, maintain impartiality towards the mediation parties and where his impartiality is in question, shall decline to serve or shall withdraw from serving as a mediator.

(3) Where at any time prior to, or during the mediation process the mediator is unable to conduct the mediation process in an impartial manner, the mediator shall so inform the mediation parties and shall withdraw from providing services, even if the mediation parties express no objection to the continuation of the mediator's services.

7.(1) A mediator shall discuss issues of confidentiality with the mediation parties before beginning the mediation process including, limitations on the scope of

confidentiality and the extent of confidentiality provided in any private session that the mediator holds with a mediation party.

(2) All proceedings shall be confidential and the mediator shall not voluntarily disclose to anyone who is not a mediation party to the mediation process, any information obtained through the mediation process except, with the written consent of the mediation parties, or when the information discloses an actual or potential threat to human life or safety.

(3) In the cases referred to in subparagraph (2), the mediator shall advise the mediation parties, when appropriate to the mediation process, that the confidentiality of the mediation proceedings cannot necessarily be guaranteed.

8.(1) A mediator shall structure the mediation process so that the mediation parties make decisions based on sufficient information and knowledge.

(2) The mediator has an obligation to ensure that all mediation parties understand the nature of the process, the procedures, the particular role of the mediator and the mediation parties' relationship to the mediator

(3) Where at any time the mediator believes that any mediation party is unable to understand the mediation process or participate fully in it, whether because of mental impairment, emotional disturbance, intoxication, language barriers or other reasons, the mediator shall limit the scope of the mediation process in a manner consistent with the mediation party's ability to participate, and/or recommend that the mediation party obtain appropriate assistance in order to continue with the mediation process or shall terminate the mediation process.

9.(1) A mediator shall disclose all actual and potential conflict of interests known to him and thereafter shall withdraw from the mediation, if any mediation party objects to him continuing as mediator.

(2) Where the mediator determines that the conflict is so significant as to cast doubt on the integrity of the mediation process, the mediator shall withdraw from the process even if the mediation parties express no objection to the continuation of the mediator's services.

(3) Save with the consent of the mediation parties, and for a reasonable time under the particular circumstances, a mediator who also practises in another profession shall not establish a professional relationship in that other profession with one of the mediation parties, or any person or entity, in a substantially factually related matter.

(4) Subject to paragraph 13, a mediator shall limit himself solely to the role of mediator, and shall refrain from giving legal or therapeutic information or advice and otherwise engaging during mediation in counselling or advocacy.

(5) The duty to disclose conflict of interests shall be a continuing obligation throughout the mediation process.

10. In family mediation, the mediator has a responsibility to promote the mediation parties' consideration of the interest of children in relation to the issues being mediated. The mediator also has a duty to assist the mediation parties to examine, apart from their own desires, the separate and individual needs of such children.

11.(1) A mediator shall at the outset of the mediation process, fully disclose and explain the basis of compensation, fees and charges, if any, to the mediation parties.

(2) A mediator shall not enter into a fee agreement which is contingent upon the results of the mediation or the amount of the settlement but may, however, specify in advance a minimum charge for a mediation session without violating this provision.

12.(1) A mediator shall not make untruthful or exaggerated claims about the mediation process, its costs and benefits, its outcome or the mediator's qualifications and abilities.

(2) All advertising shall honestly represent the services to be rendered and no claims of specific results or promises which apply to one party over another party should be made for the purpose of obtaining business.

(3) No commission, rebates, or other similar forms of remuneration shall be given or received by a mediator for the referral of clients.

13. Unless the parties have agreed in writing before the commencement of the mediation session that they wish the mediator to evaluate or adjudicate upon the merits of their respective positions, as for example in procedures typically known as "early neutral evaluation" and "med-arbs", a certified mediator may not do so.

ANNEXURE D: UN TREATIES STATUS SINGAPORE CONVENTION[236]

Country	Date Signed	Date Ratified	Entry into Force
Afghanistan	7-Aug-19	-	-
Armenia	26-Sep-19	-	-
Australia	10-Sep-21	-	-
Belarus	7-Aug-19	15-Jul-20	15-Jan-21
Benin	7-Aug-19	-	-
Brazil	4-Jun-21	-	-
Brunei Darussalam	7-Aug-19	-	-
Chad	26-Sep-19	-	-
Chile	7-Aug-19	-	-
China	7-Aug-19	-	-
Colombia	7-Aug-19	-	-
Congo	7-Aug-19	-	-
Democratic Republic of Congo	7-Aug-19	-	-
Ecuador	25-Sep-19	9-Sep-20	9-Mar-21
Eswatini	7-Aug-19	-	-
Fiji	7-Aug-19	25-Feb-20	12-Sep-20
Gabon	25-Sep-19	-	-
Georgia	7-Aug-19	29-Dec-21	29-Jun-22
Ghana	22-Jul-20		
Grenada	7-Aug-19	-	-
Guinea-Bissau	26-Sep-19	-	-
Haiti	7-Aug-19	-	-
Honduras	7-Aug-19	2-Sep-21	2-Mar-22
India	7-Aug-19	-	-
Iran (Islamic Republic of)	7-Aug-19	-	-
Iraq	19-Apr-24	-	-
Israel	7-Aug-19	-	-
Jamaica	7-Aug-19	-	-
Japan	-	1 Oct 2023	1 Apr 2024
Jordan	7-Aug-19	-	-
Kazakhstan	7-Aug-19	23 May 2022	23 November 2022
Lao People's Democratic Republic	7-Aug-19	-	-

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236 See https://www.singaporeconvention.org/jurisdictions.

Malaysia	7-Aug-19	-	-
Maldives	7-Aug-19	-	-
Mauritius	7-Aug-19	-	-
Montenegro	7-Aug-19	-	-
Nigeria	7-Aug-19	27 Nov 2023	27 May 2024
North Macedonia	7-Aug-19	-	-
Palau	7-Aug-19	-	-
Paraguay	7-Aug-19	-	-
Philippines	7-Aug-19	-	-
Qatar	7-Aug-19	12-Mar-20	12-Sep-20
Republic of Korea	7-Aug-19	-	-
Rwanda	28-Jan-20		
Samoa	7-Aug-19	-	-
Saudi Arabia	7-Aug-19	5-May-20	5-Nov-20
Serbia	7-Aug-19	-	-
Sierra Leone	7-Aug-19	-	-
Singapore	7-Aug-19	25-Feb-20	12-Sep-20
Sri Lanka	7-Aug-19	28-Feb-24	28-Aug-24
Timor-Leste	7-Aug-19	-	-
Turkey	7-Aug-19	11-Oct-21	11-Apr-22
Uganda	7-Aug-19	-	-
Ukraine	7-Aug-19	-	-
United Kingdom of Great Britain and Northern Ireland	3-May-23	-	-
United States of America	7-Aug-19	-	-
Uruguay	7-Aug-19	28-Mar-23	28-Sep-23
Venezuela (Bolivarian Republic of)	7-Aug-19	-	-

ANNEXURE E: ACCREDITATION & PROFESSIONAL PRACTICE STANDARDS OPTIONS

E Option 1: oversight by other existing professional bodies:

Establishment/Recognition of Council

5. Subject to section 6, a professional body may perform the functions and exercise the powers of the Mediation Council as provided for in section 8 of this Act with respect to a mediator who is a member of such a professional body.

Appointment or designation of Council

6. A professional body referred to in section 5 acquires authority to perform the functions and exercise the powers of the Mediation Council as set out in section 9 in terms of legislation regulating the professional body.

Composition and quorum of the Council

7. The composition and quorum of the subsection of the professional body performing the functions and powers of the Mediation Council contemplated in section 8 will be determined in accordance with the legislation regulating the professional body.

Functions and powers of the Council

Sub-option 1:

8.(1) The general functions and powers of the subsection of the professional body performing the functions of the Mediation Council must include -

(a) promoting public awareness of, and providing information to the public, on the availability and operation of mediation in the State;

(b) maintaining and developing standards in the provision of mediation, including the establishment of a system of continuing professional development training;

(c) preparing codes of practice for mediators for approval by the Minister under section 9 and overseeing the implementation of any code of practice published or approved under that section;

(d) establishing and maintaining a register of mediators who have subscribed to a code of practice published or approved under section 9;

(e) advising the Minister on the preparation or approval of a scheme for the delivery of mediation information sessions in family dispute law cases in terms of the Family Dispute Resolution Act, 202…

Sub-option 2

8.(1) The functions and powers of the Council include —

(a) regulating the mediation profession so as to promote and protect the interests of the public in relation to mediation work, as long as it is not inconsistent with any other applicable law;

(b) registering persons in terms of this Act;

(c) instituting and enforce disciplinary action against registered persons contravening the provisions of this Act;

(d) supporting the functioning of disciplinary and appeal structures established under this Act;

(e) ensuring and promoting a high standard of education and training in the mediation

sector;

(f) advising the Minister on any matter referred to it by the Minister or on any matter it considers necessary to achieve the objects of this Act; and

(g) advising the Minister on the preparation or approval of a scheme for the delivery of mediation information sessions in family dispute law cases in terms of the Family Dispute Resolution Act, 202 …

Codes of practice

9.(1) The Minister must, soon as practicable after the coming into operation of this section and having had regard to the matters specified in subsection (2)—

(a) prepare and publish a code or codes of practice to set standards for the conduct of mediations; or

(b) approve a code or codes of practice prepared by a person other than the Minister which purports to set standards for the conduct of mediations.

(2) A code of practice referred to in subsection (1) may include provisions in relation to any of the following:

(a) qualification requirements, including levels of training and experience for mediators;

(b) continuing professional development training requirements for mediators;

(c) procedures to be followed by mediators in the conduct of a mediation;

(d) procedures to be followed by mediators in the conduct of a mediation requiring consultation, by a mediator, with a child;

(e) ethical standards to be observed by mediators during a mediation;

(f) confidentiality of a mediation;

(g) procedures to be followed by a party for redress in the event of dissatisfaction with the conduct of a mediation;

(h) determination of the fees and costs of a mediation;

(i) any other matters relevant to the conduct of mediation.

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

(a) publish a notice in the Government Gazette and in at least one daily newspaper circulating generally in the Republic —

(i) indicating that they propose to publish or approve a code under this section,

(ii) indicating where a draft of the practise standard is available for inspection for a period specified in the notice (being not less than 30 days from the date of the publication of the notice in the newspaper), and

(iii) stating that submissions in relation to the draft code may be made in writing to the Minister before a date specified in the notice (which must be not less than 30 days after the end of the period referred to in subsection (ii)), and

(b) have regard to any submissions received pursuant to subsection (a)(iii).

(4) Where the Minister prepares or approves a code of practice under this section, they must cause a notice of the preparation or approval to be published in the Government Gazette and the notice must specify the date from which the code must come into operation.

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

(a) amend or revoke a code of practice prepared or approved under this section, or

(b) withdraw approval in respect of any code of practice previously approved under this section.

(6) The requirements of subsections (3) and (4) must, with all necessary modifications, apply to a code of practice that the Minister intends to amend or revoke or in relation to which the Minister intends to withdraw his or her approval.

(7) Where the Minister amends or revokes, or withdraws their approval in respect of, a code of practice under this section, they must cause a notice to that effect to be published in the Government Gazette specifying—

(a) the code to which the amendment, revocation or withdrawal of approval, as the case may be, relates;

(b) whether the code is to be amended or revoked or whether approval in relation to the code is to be withdrawn;

(c) if the code is to be amended, particulars of the amendment; and

(d) the date from which the amendment, revocation or withdrawal of approval, as the case may be, must come into operation.

(8) In this section "code of practice" includes part of a code of practice.

Funding of the Council

10. Expenditure incidental to the exercise of the powers or the performance of the functions by the subsection of the professional body performing the functions of the Mediation Council in terms of this Act or any other law must be defrayed from the funds of the relevant professional body.

F Option 2: voluntary industry regulation

Establishment/Recognition of Council

5. Subject to section 6, a mediation industry supervisory body may perform the functions and exercise the powers of the Mediation Council as provided for in section 8 of this Act with respect to a mediator who is, or wish to be, affiliated with this body.

Appointment or designation of Council

6. A mediation industry supervisory body referred to in section 5 acquires authority to perform the functions and exercise the powers of the Mediation Council as set out in section 8 in terms of the rules of the industry supervisory body.

Composition and quorum of the Council

7. The composition and quorum of the mediation industry supervisory body performing the functions and powers of the Mediation Council contemplated in section 8 will be determined in in terms of the rules of the industry supervisory body.

Functions and powers of the Council

Sub-option 1:

8.(1) The general functions and powers of the mediation industry supervisory body referred to in section 5 must include -

(a) promoting public awareness of, and providing information to the public, on the availability and operation of mediation in the State;

(b) maintaining and developing standards in the provision of mediation, including the establishment of a system of continuing professional development training;

(c) preparing codes of practice for mediators for approval by the Minister under section 9 and overseeing the implementation of any code of practice published or approved under that section;

(d) establishing and maintaining a register of mediators who have subscribed to a code of practice published or approved under section 9;

(e) advising the Minister on the preparation or approval of a scheme for the delivery of mediation information sessions in family dispute law cases in terms of the Family Dispute Resolution Act, 202…

Sub-option 2

8.(1) The functions and powers of the mediation industry supervisory body referred to in section 5 include —

(a) regulating the mediation profession so as to promote and protect the interests of the public in relation to mediation work, as long as it is not inconsistent with any other applicable law;

(b) registering persons in terms of this Act;

(c) instituting and enforce disciplinary action against registered persons contravening the provisions of this Act;

(d) supporting the functioning of disciplinary and appeal structures established under this Act;

(e) ensuring and promoting a high standard of education and training in the mediation sector;

(f) advising the Minister on any matter referred to it by the Minister or on any matter it considers necessary to achieve the objects of this Act; and

(g) advising the Minister on the preparation or approval of a scheme for the delivery of mediation information sessions in family dispute law cases in terms of the Family Dispute Resolution Act, 202…

9. Codes of practice

9.(1) The Minister must, as soon as practicable after the coming into operation of this section and having had regard to the matters specified in subsection (2)—

(a) prepare and publish a code or codes of practice to set standards for the conduct of mediations, or

(b) approve a code or codes of practice prepared by a person other than the Minister which purports to set standards for the conduct of mediations.

(2) A code of practice referred to in subsection (1) may include provisions in relation to any of the following:

(a) qualification requirements, including levels of training and experience for mediators;

(b) continuing professional development training requirements for mediators;

(c) procedures to be followed by mediators in the conduct of a mediation;

(d) procedures to be followed by mediators in the conduct of a mediation requiring consultation, by a mediator, with a child;

(e) ethical standards to be observed by mediators during a mediation;

(f) confidentiality of a mediation;

(g) procedures to be followed by a party for redress in the event of dissatisfaction with the conduct of a mediation;

(h) determination of the fees and costs of a mediation;

(i) any other matters relevant to the conduct of mediation.

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

(a) publish a notice in the Government Gazette and in at least one daily newspaper circulating generally in the Republic —

(i) indicating that they propose to publish or approve a code under this section,

(ii) indicating where a draft of the practise standard is available for inspection for a period specified in the notice (being not less than 30 days from the date of the publication of the notice in the newspaper), and

(iii) stating that submissions in relation to the draft code may be made in writing

to the Minister before a date specified in the notice (which must be not less than 30 days after the end of the period referred to in subsection (ii)), and

(b) have regard to any submissions received pursuant to subsection (a)(iii).

(4) Where the Minister prepares or approves a code of practice under this section, they must cause a notice of the preparation or approval to be published in the Government Gazette and the notice must specify the date from which the code must come into operation.

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

(a) amend or revoke a code of practice prepared or approved under this section, or

(b) withdraw approval in respect of any code of practice previously approved under this section.

(6) The requirements of subsections (3) and (4) must, with all necessary modifications, apply to a code of practice that the Minister intends to amend or revoke or in relation to which the Minister intends to withdraw his or her approval.

(7) Where the Minister amends or revokes, or withdraws their approval in respect of, a code of practice under this section, they must cause a notice to that effect to be published in the Government Gazette specifying—

(a) the code to which the amendment, revocation or withdrawal of approval, as the case may be, relates;

(b) whether the code is to be amended or revoked or whether approval in relation to the code is to be withdrawn;

(c) if the code is to be amended, particulars of the amendment; and

(d) the date from which the amendment, revocation or withdrawal of approval, as the case may be, must come into operation.

(8) In this section “code of practice” includes part of a code of practice.

Funding of the Council

10. Expenditure incidental to the exercise of the powers or the performance of the functions of the Council in terms of this Act or any other law must be defrayed from the funds of the relevant mediation industry supervisory body.

G Option 3: a professional body under the SAQA framework

Establishment/Recognition of Council

5. Subject to section 6, an independent supervisory body for the mediation profession may perform the functions and exercise the powers of the Mediation Council as provided for in section 8 of this Act with respect to a mediator who is, or wish to be, affiliated with such a body.

Appointment or designation of Council

6. A supervisory body for the mediation profession as referred to in section 5 must –

(a) be recognised in terms of sections 28, 29 30 and 31 of the National Qualifications Framework Act; and

(b) perform the functions and exercise the powers of the Mediation Council as set out in section 8 within the regulatory framework of the National Qualifications Framework Act.

Composition and quorum of the Council

7. The composition and quorum of the Board of the SAQA recognised body performing the functions of the Mediation Council as set out above will be determined by the body in accordance with the regulatory framework of the NQF Act.

Functions and powers of the Council

8.(1) The functions and powers of the supervisory body for the mediation profession referred to in section 5 include —

(a) regulating the mediation profession so as to promote and protect the interests of the public in relation to mediation work, as long as it is not inconsistent with any other applicable law;

(b) registering persons in terms of this Act;

(c) instituting and enforce disciplinary action against registered persons contravening the provisions of this Act;

(d) supporting the functioning of disciplinary and appeal structures established under this Act;

(e) ensuring and promoting a high standard of education and training in the mediation sector;

(f) advising the Minister on any matter referred to it by the Minister or on any matter it considers necessary to achieve the objects of this Act; and

(g) advising the Minister on the preparation or approval of a scheme for the delivery of mediation information sessions in family dispute law cases in terms of the Family Dispute Resolution Act, 20…

Codes of practice

9. See clause 6(b) above. Not applicable

Funding of the Council

10. Expenditure incidental to the exercise of the powers or the performance of the functions of the Council in terms of this Act or any other law must be defrayed from the funds of the SAQA recognized body for the mediation profession.

H Option 4: See chapter 3 and the Bill above

I Option 5: Council established by legislation

Establishment/Recognition of Council

5.(1) There is hereby established a juristic person to be known as the South African Mediation Council.

(2) The Council must perform the functions and exercise the powers provided for in this Act.

(3) The Council must, in accordance with sections 13(1)(i)(i) and 29 of the National Qualifications Framework Act, and within 90 days from the date of its first meeting, apply to be recognised as a professional body in terms of that Act.

(4) The Council is independent in the performance of its functions.

Appointment or designation of Council

6. The Minister, by regulation, appoints the Mediation Council of South Africa for the purposes of this Act.

Composition and quorum of the Council

7.(1) The Council must comprise of the following members—

(a) a Chairperson, who must be a judge of the Constitutional Court, the Supreme Court of Appeal or the High Court, or a judge who held the office of judge of the Constitutional Court, the Supreme Court of Appeal or the High Court and who is discharged from active service in terms of section 3 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), nominated by the Chief Justice;

(b) two certified mediators nominated by the bodies promoting mediation services;

(c) a practising psychologist nominated by Professional Board for Psychology established in terms of section 15 of the Health Professions Act, 1974 (Act No. 56 of 1974);

(d) a legal practitioner nominated by the South African Legal Practice Council

established in terms of section 4 of the Legal Practice Act, 2014 (Act No. 28 of 2014);

(e) a representative of the academic staff of a South African University nominated by the public;

(f) a person nominated by the Minister to whom responsibility for community mediation and mediation in criminal matters is assigned;

(g) two persons nominated by the Departments of Justice and Constitutional Development and Social Development, respectively; and

(h) a member of the public nominated by the public.

(2) The Secretary to the Council and such other officers and employees as are required for the proper performance of the Council's functions, must be appointed in terms of the Public Service Act, 1994 (Proclamation 103 of 1994).

(3) The members of the Council must hold office for a term of four years and may not serve more than two consecutive terms of office.

(4) The Chairperson or Deputy Chairperson, and any four members of the Mediation Board constitute a quorum.

(5)(a) The Minister must invite written nominations of persons to be considered for appointment as members of the Council—

(i) through advertisements in the Gazette and other media circulating nationally or otherwise;

(ii) by any other method, including approaching persons directly; or

(iii) in any prescribed manner.

(b) The invitation must require any person making a nomination to indicate which category and which branch of registered persons is to be represented by such nominated person.

(6) A nomination must be supported by—

(a) the personal details of the nominee;

(b) particulars of the qualifications, experience in mediation or related matters or skills which may make the nominee suitable for appointment; and

(c) any other information that may be prescribed.

(7) In appointing a member, the Minister must have due regard to the—

(a) objects of the Act referred to in section 2;

(b) different constituencies to be represented in terms of subsection (1);

(c) different categories of registered persons referred to in section 9;

(d) need to promote representation, including gender, disability and other demographic representation; and

(e) need to broadly reflect the different branches of the mediation profession.

(8) The Minister must appoint from the members of the Council, a deputy chairperson of the Council.

(9) When the chairperson is unable to perform the functions of that office, they must be performed by the deputy chairperson.

(10) The Minister must, by notice in the Gazette, publish the names of and the position held by an appointee to the Council, including alternate members, and the date on which their appointment takes effect.

(11) If a vacancy in the membership or alternate membership or in an office of the Council occurs, the Minister may appoint, in accordance with this section, a replacement member or office-bearer for the unexpired portion of the four-year period applicable to such vacancy.

(12) The Minister may, in writing and on such conditions as they consider appropriate, extend the

term of office of a member or alternate member or office-bearer until a new Council, member or office bearer is appointed

(13) The Minister may not appoint as a member or an alternate member of the Council a person who—

(a) is not a South African citizen or a permanent resident, and who is not ordinarily resident in the Republic of South Africa;

(b) is an unrehabilitated insolvent;

(c) is declared by a court of law to be mentally incompetent or is detained in terms of the Mental Health Care Act, 2002 (Act No. 17 of 2002);

(d) has been convicted, whether in the Republic or elsewhere, of an offence involving dishonesty and for which they were sentenced to imprisonment without the option of a fine, unless they have received a grant of amnesty or a free pardon before the date of their appointment;

(e) has been removed from an office of trust on account of improper conduct;

(f) has had their name removed from any professional register on account of misconduct and who has not been reinstated;

(g) is a political office-bearer in the national, provincial or municipal sphere of government; or

(h) is not a fit and proper person to be appointed as member or an alternate member.

(14) A member or alternate member of the Council must vacate his or her office, if such member—

(a) becomes disqualified by virtue of subsection (13) from being appointed as a member of the Council;

(b) resigns by written notice to the Minister;

(c) is incapable of performing their duties due to ill health;

(d) has, without the leave of the Council, been absent from two consecutive meetings of the Council; or

(e) has allowed their registration with the Council to lapse or if such member's name has been removed or suspended from the register: Provided that this section does not apply to persons appointed in terms of section 4(1)(c) or (d).

(15) A decision whether or not a member must vacate office in terms of subsection (14) must be taken by the Minister, after consultation with the Council.

(16) The Minister may in the prescribed manner remove any member of the Council from office on the grounds of misconduct or incompetence.

(17)(a) The Council may, on such conditions as may be prescribed, establish committees to assist it in the performance of its functions, and may appoint such of its members, registered persons and other persons as it may deem fit to be members of such committees.

(b) The Council may designate one of the members of a committee as chairperson of the committee.

(c) If the Council does not designate a chairperson of a committee, the committee may, at its first meeting, elect a chairperson from amongst its members as chairperson of the committee.

(18) The Council must, in the prescribed manner, establish an Education and Training Committee, which—

(a) serves solely as a committee on educational and training matters; and

(b) must advise and assist the Council at the request of the Council on—

(i) the methods and procedures for the assessment of and registration in the various categories and branches of registered persons; and

(ii) all educational, training, skills development and related matters.

Functions and powers of the Council

8.(1) The functions and powers of the Council include —

(a) regulating the mediation profession so as to promote and protect the interests of the public in relation to mediation work, as long as it is not inconsistent with any other applicable law;

(b) registering persons in terms of this Act;

(c) instituting and enforce disciplinary action against registered persons contravening the provisions of this Act;

(d) supporting the functioning of disciplinary and appeal structures established under this Act;

(e) ensuring and promoting a high standard of education and training in the mediation sector;

(f) advising the Minister on any matter referred to it by the Minister or on any matter it considers necessary to achieve the objects of this Act; and

(g) advising the Minister on the preparation or approval of a scheme for the delivery of mediation information sessions in family dispute law cases in terms of the Family Dispute Resolution Act, 202…

Codes of practice

9.(1) The Minister may, subject to such terms and conditions as the Minister thinks fit to impose, prescribe an accreditation and professional practice standard for any identified field of mediation practice, which practice standards may impose such requirements as the Minister deems necessary, and could include:

(a) Qualification requirements;

(b) Experience requirements;

(c) Continued professional development requirements; and

(d) Requirements that the mediator be a fit and proper person.

(2) Where the Minster has prescribed an accreditation and professional practice standard, no person may practice as mediator in the identified field of practice without being accredited by the responsible or designated institution.

(3) Before publishing an accreditation and professional practice standard under this section, the Minister must:

(a) publish a notice indicating that:

(i) they propose to publish or approve a practice standard under this section;

(ii) indicating where a draft of the practice standard is available for inspection for a period specified in the notice (being not less than 30 days from the date of the publication of the notice in the newspaper); and

(iii) stating that submissions in relation to the draft practice standard may be made in writing to the Minister before a date specified in the notice (which must be not less than 30 days after the end of the period referred to in subsection (ii)), and

(b) have regard to any submissions received pursuant to subsection (a)(iii).

(4) The Minister may amend or revoke any practice standard prescribed under this section.

(5) Where the Minister prescribes a practice standard under this section, they must cause a notice to be published in the Gazette and the notice must specify the date from which the practice standard must come into operation.

(6) A person may be registered in terms of subsection (4) in one or more of the following

categories and in one, more or all of the applicable branches of the mediation profession, including:

(a) commercial mediation;

(b) civil mediation; or

(c) family dispute resolution.

(7) A person may not practice in or perform any work, whether for reward or otherwise, which is reserved for any of the categories or branches referred to in subsection (6), unless they are registered in that category or branch or they perform such work under the supervision of a registered person of the same discipline and such registered person assumes responsibility for any work so performed.

(8) Any person intending to be registered in a category or branch contemplated in subsection (1) must apply for registration in the manner as prescribed.

(9) The Council must consider an application for registration, register the applicant in the relevant category and branch and issue to them a registration certificate in the form as prescribed if the Council is satisfied that the applicant—

(a) in the case of a person applying for registration as a mediator as contemplated in subsection (6), is registered for an accredited and appropriate mediation educational programme registered on the NQF and recognised in terms of subsection (5);

(b) in the case of a person applying for registration as a mediator as contemplated in subsection (6) —

(i) has completed an accredited and appropriate mediation educational programme registered on the NQF and recognised in terms of subsection (5);

(ii) has completed such practical training as may be prescribed; and

(iii) has passed a competency assessment determined by the Council;

(10) The Council must, in liaison with the relevant quality council referred to in Chapter 5 of the National Qualifications Framework Act, and in accordance with section 28 of that Act, determine which educational programmes and qualifications relating to mediation, registered or to be registered on the NQF by the South African Qualifications Authority in terms of that Act, would be recognised for the purposes of subsection (9)(a) and (b)(i),

(11) The Council must, within 90 days from the date of its first meeting and in consultation with the Minister, prepare a code of conduct, in accordance with the requirements of the First Schedule, for registered persons which must be published in the Gazette.

Funding of the Council

10.(1) Funds of the Council consist of –

(a) such sums of money that Parliament appropriates annually for the use of the Council as may be necessary for the proper exercise, performance and discharge of its powers, duties and functions under this Act; and

(b) registration fees of mediators as may be prescribed.

(2) A member of the Council who—

(a) is a judge of the Constitutional Court, the Supreme Court of Appeal or a High Court shall, notwithstanding anything to the contrary contained in any other law, in addition to their salary and any allowance, including any allowance for reimbursement of travelling and subsistence expenses, which may be payable to them in their capacity as such a judge, be entitled to such allowance (if any) in respect of the performance of their functions as such a member as the President may determine;

(b) is not such a judge and is not subject to the provisions of the Public Service Act, 1994 (Proclamation 103 of 1994), shall be entitled to such remuneration, allowances (including allowances for reimbursement of travelling and subsistence expenses incurred by them in the performance of their functions under this Act), benefits and privileges as the Minister in consultation with the Minister of Finance may determine.

ANNEXURE F: LIST OF SOURCES

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(d) England and Wales

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(e) European Union

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