# Mediation Legislation around the World—A Variety of Options for South Africa

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***Abstract***

Mediation has gained traction across the globe on account of its strengths. At present, it has widespread application in a range of civil disputes in areas that include the family, children, labour, medical malpractice, bioethics, environmental issues, the community and education, and even criminal matters. As a result, various jurisdictions have opted to regulate mediation, at first mostly through softer forms of regulation, but more recently increasingly through extensive legislation. However, the question is whether an informal process like mediation needs to be formally regulated, and if so, how it could be regulated. Although regulation is often associated with legislation, there are in fact four different regulatory approaches, namely market-contract regulation, self-regulation, the formal-regulatory approach, and the formal legislative approach. There are also different aspects of mediation that require regulation. In this regard, reference is made to triggering laws, procedural laws, standard-setting laws and beneficial laws. With regard to the scope of mediation legislation, a further distinction is made between general mediation legislation, sector-specific mediation legislation and context-integrated mediation legislation. Against this background, the regulation of mediation in general and family mediation in particular in four foreign jurisdictions—namely Ghana as an African jurisdiction, Singapore as an Asian jurisdiction, Austria as a European-Continental jurisdiction and Australia as an Anglo-American jurisdiction—is discussed. The experiences of these jurisdictions offer useful examples for the further development of mediation regulation in South Africa. The article therefore also provides a brief overview of the current state of mediation regulation in South Africa and concludes by highlighting the valuable lessons that can be learnt from the foreign jurisdictions examined. It is abundantly clear that South Africa needs extensive mediation legislation to give mediation the formal recognition it deserves, while simultaneously maximising the benefits of mediation, minimising its potential harms and protecting the mediator, the parties and outside parties.

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## INTRODUCTION

In comparison to litigation and other forms of alternative dispute resolution (ADR), mediation has many advantages.[1] It has proven to be cost and time efficient; to provide parties with access to justice, or at least to effective and fair dispute resolution; to deal creatively with the widely differing interests of the parties (because of its flexibility and informality); to improve communication between parties; to preserve their relationship with each other, and to strengthen their problem-solving abilities.[2] In addition, mediation preserves court resources and has high success and satisfaction rates because it entails participant-driven resolution.[3] As a result of these strengths, mediation has gained traction across the globe.[4] Currently, it has widespread application in a range of civil disputes in areas that include the family, children, labour and employment, personal injury, medical malpractice, bioethics, environmental issues, the community and education, and even criminal matters.[5] It enjoys 'a fresh and vibrant image' and 'symbolises a transformation in the way people approach dispute resolution, the way legal practitioners advise clients, and the way judges dispense justice.'[6] As a result, various jurisdictions have opted to regulate mediation; mostly through less prescriptive or softer forms of regulation at first, but also increasingly through extensive legislation more recently.[7]

The purpose of this article is first to provide some background information regarding the regulation of mediation, and second, to examine the manner in which mediation is regulated in various parts of the world. In this regard, Ghana as an African jurisdiction, Singapore as an Asian jurisdiction, Austria as a European-Continental jurisdiction, and Australia as an Anglo-American jurisdiction, have been selected. When examining the regulation of mediation in these jurisdictions, the focus will fall on

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1 Nadja Alexander and Felix Steffek, 'Making Mediation Law' (Research Collection School of Law Singapore Management University 2016) 17 <http://ink.library.smu.edu.sg/sol_research/2232> accessed 18 June 2018.

2 ibid 17, 41; Jacqueline Nolan-Haley, 'Mediation and Access to Justice in Africa: Perspectives from Ghana' (2015) 21 Harvard Negotiation LR 60, 67; Bethany Knox, *A Consideration of a Mandatory Family Mediation Model under Section 9 of the British Columbia Family Law Act* (University of Victoria 2014) 12; Rachael Field and Angela Lynch, '"Hearing Parties" Voices in Coordinated Family Dispute Resolution (CFDR): An Australian Pilot of a Family Mediation Model Designed for Matters Involving a History of Domestic Violence' (2014) 36 J of Social Welfare and Family L 392.

3 Alexander and Steffek (n 1) 20, 41; Nolan-Haley (n 2) 67; Lydia Nussbaum, 'Mediation as Regulation: Expanding State Governance over Private Disputes' (2016) 2 Utah LR 363.

4 Choong Choy, Tie Hee and Christina Siang, 'Court-Annexed Mediation Practice in Malaysia: What the Future Holds' (2016) 1 University of Bologna LR 271; Nolan-Haley (n 2) 66.

5 Nussbaum (n 3) 370–371.

6 Alexander and Steffek (n 1) v.

7 Nadja Alexander, 'Mediation and the Art of Regulation' (2008) 8 Queensland University of Technology L and Justice J 10; Gary Meggitt and Hussain Somji, 'The Regulation of Mediators in England and Wales, the United States and Australia – Lessons for Hong Kong' (2016) 46 Hong Kong LJ 465; Nussbaum (n 3) 414.

mediation in general and family mediation in particular. The experiences of these jurisdictions offer useful examples for the further development of mediation regulation in South Africa. The article will therefore also provide a brief overview of the current state of mediation regulation in South Africa and conclude by highlighting the valuable lessons that can be learnt from the foreign jurisdictions examined.

## THE REGULATION OF MEDIATION

In this section, the following questions will be looked at briefly, namely whether an informal process like mediation needs to be formally regulated, and if so, how it could be regulated, and which aspects of mediation could be regulated. Lastly, some comments will be made on the scope of mediation legislation. The information contained in this section will provide the necessary background against which the regulation of mediation in the chosen jurisdictions of Ghana, Singapore, Austria, and Australia will be examined.

### To Regulate or Not to Regulate

Because mediation is a private, informal, highly flexible and adaptable process with no predetermined structure, it has been suggested that mediation should not be controlled or structured through formal regulation.[8] It has been argued that regulation is counterproductive to the '"philosophies" or "qualities" of mediation' and might increase the cost of mediation and reduce its attractiveness when compared to litigation and other dispute resolution options.[9] On the other hand, mediation does not and cannot exist in a regulatory vacuum.[10] In view of its widespread use, consistent and reliable measures of quality in mediation service provision need to be established.[11] In view of the need to enhance fairness and justice, and to ensure that the process is beneficial to participants and affected outside parties, state regulation of mediation is inevitable.[12] For the very reason that mediation is a private and informal process driven by its participants, regulation is essential. The participants—the powerful and the marginalised alike—need to be empowered; the benefits of mediation need to be maximised, and its potential harms need to be minimised through effective regulation.[13]

### Approaches to Regulating Mediation

Although regulation is often associated with legislation, there are in fact four different regulatory approaches, namely market-contract regulation,

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8 Alexander and Steffek (n 1) 1; Meggitt and Somji (n 7) 464; Nussbaum (n 3) 363, 395.
9 Meggitt and Somji (n 7) 464.
10 Alexander and Steffek (n 1) 1.
11 ibid 2.
12 Nussbaum (n 3) 363–364; Meggitt and Somji (n 7) 470; Alexander and Steffek (n 1) 3.
13 Nussbaum (n 3) 402.

self-regulation, the formal-regulatory approach, and the formal legislative approach.[14] The first two forms of regulation are regarded as less prescriptive or softer forms of regulation, but the last two qualify as hard law.[15]

Market-contract regulation is based on free-market and contract law concepts, providing the greatest party autonomy and the least state intervention in matters concerning mediation.[16] In the early days of mediation, it was largely regulated in this manner.[17] The problem with this approach is that it assumes that those participating in the mediation have access to all the relevant information necessary to facilitate their decisions, when in fact this is often not the case.[18]

Self-regulation refers to collective, community- and industry-led regulatory initiatives.[19] It has been pointed out that self-regulatory instruments have played, and continue to play, a significant role in the development of mediation globally. Self-regulatory practice standards and accreditation requirements are often set by mediation organisations, professional associations and mediation providers.[20] The advantages of self-regulation are that it involves a greater range of regulatory experts and is better equipped to adapt to changing circumstances as the mediation profession develops.[21] However, there are also difficulties with this approach, such as limited resources and domination by specific individuals and groups, the latter which do not necessarily reflect the broader interests of the industry and consumers.[22]

The formal-regulatory approach refers to instruments, such as international conventions, directives and model laws, which establish formal and legally recognised parameters within which other forms of regulation can complete the regulatory details.[23] In other words, it provides a national framework approach to the various aspects of mediation.[24] The European Union's Directive on Certain Aspects of Mediation in Civil and Commercial Matters (the Mediation Directive)[25]—which provided member states with a predictable legal framework for mediation, primarily for cross-border disputes but also for internal mediation processes—is an example of this approach.

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14 Alexander (n 7) 3–4; Meggitt and Somji (n 7) 470.
15 Alexander and Steffek (n 1) 26.
16 Alexander (n 7) 4; Meggitt and Somji (n 7) 470.
17 Alexander (n 7) 5.
18 Meggitt and Somji (n 7) 470–471.
19 Alexander (n 7) 5.
20 ibid 6.
21 Alexander and Steffek (n 1) 26.
22 Alexander (n 7) 7–8; Meggitt and Somji (n 7) 471.
23 Alexander (n 7) 8.
24 ibid 9.
25 EUR-Lex Access to European Union Law, 'Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 of Certain Aspects of Mediation in Civil and Commercial Matters' <https://data.europa.eu/eli/dir/2008/52/oj> accessed 22 June 2018.

The formal legislative approach entails extensive regulation of the various aspects of mediation through legislation or the judiciary.[26] Specifically, legislation represents a strong endorsement of mediation by the state and gives mediation formal recognition as a legitimate dispute-resolution process and as a profession.[27] Although legislation is restricted in its ability to deal with non-legal issues, complexity, unpredictability, and innovation, it provides participant protection and establishes legal certainty and predictability.[28]

The four regulatory approaches are, however, not exclusive of one another and virtually all jurisdictions have aspects of more than one of these approaches, or in other words a mixed regulatory approach.[29] As will be seen under the next heading, different aspects of mediation can be regulated in different ways.

### Aspects of Mediation to be Regulated

There are different aspects of mediation that require regulation. In this regard, reference is made to triggering laws, procedural laws, standard-setting laws, and beneficial laws.[30]

Triggering laws facilitate access to mediation and include legislative requirements to mediate before litigating, voluntary or mandatory court referrals to mediation, mediation information sessions, mediation awareness programmes, and mediation clauses in contracts.[31] They also include other incentives that encourage parties to engage in mediation before litigation, such as possible penalty cost orders if parties fail to do so.[32] Thus, it is clear that triggering laws may adopt a variety of regulatory approaches, including both the softer forms of regulation and hard law, such as legislation and court orders.[33]

Procedural laws refer to the mediation process or procedure and regulate aspects such as the commencement and termination of mediation, the selection and appointment of mediators and other administrative matters.[34] Procedural laws may follow a variety of regulatory approaches but are often included in the softer forms of regulation, such as the mediation rules of mediation organisations.[35]

Standard-setting laws professionalise the field and address issues such as qualifications and competency standards for mediators and requirements for

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26 Alexander (n 7) 9; Meggitt and Somji (n 7) 471.
27 Alexander (n 7) 9.
28 ibid 8, 9, 21.
29 ibid 11.
30 ibid 14. See also Alexander and Steffek (n 1) 27.
31 Alexander (n 7) 14; Alexander and Steffek (n 1) 27.
32 Alexander and Steffek (n 1) 27.
33 ibid 37.
34 Alexander (n 7) 14; Alexander and Steffek (n 1) 28–29.
35 Alexander (n 7) 14; Alexander and Steffek (n 1) 29, 37.

mediator certification or registration.[36] Standard-setting laws are typically found in industry-led regulatory initiatives.[37] They may also be included in legislation, but it is pointed out that legislative solutions to professional certification are usually expensive and require government organisation and financing.[38]

Beneficial laws protect the integrity of the mediation process and set out the rights and obligations of mediation participants and outside parties.[39] Mediation participants include the mediator and the parties, and outside persons may include legal practitioners and, for example, the children of divorcing or separating parties. Generally, mediators have a duty to maintain impartiality, provide disclosure, preserve confidentiality and conduct the process,[40] while parties have a duty to engage in the process and to participate in good faith.[41] Parties usually also have the right to enforce a mediated settlement agreement.[42] Legal practitioners may be required to advise clients on the availability of ADR processes.[43] Furthermore, the best interests of the children should always prevail. Such rights and duties are typically embodied in legislation but may also be regulated by common-law principles, court rules, codes of conduct and private contracts.

As the above illustrates, the different aspects of mediation can be regulated in various ways.

## The Scope of Mediation Legislation

As regards the scope of mediation legislation, a further distinction is made between general mediation legislation, sector-specific mediation legislation, and context-integrated mediation legislation.

General mediation legislation extends to all mediation or mediators in a given jurisdiction.[44] As such, mediation is accorded a high level of recognition by the legislator as a dispute-resolution process.[45] However, general mediation legislation usually results in broadly worded provisions, which may be difficult to apply across all sectors.[46]

Sector-specific mediation legislation refers to stand-alone legislation that is dedicated to mediation in a specific industry, court or area of legislation.[47] While sector-specific legislation may be able to accommodate precise

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36 Alexander (n 7) 14; Alexander and Steffek (n 1) 30.
37 Alexander and Steffek (n 1) 30.
38 ibid.
39 Alexander (n 7) 15; Alexander and Steffek (n 1) 32.
40 Alexander and Steffek (n 1) 33.
41 ibid 35.
42 ibid.
43 ibid.
44 Alexander (n 7) 17; Alexander and Steffek (n 1) 23.
45 Alexander (n 7) 17
46 ibid 18.
47 Alexander (n 7) 17; Alexander and Steffek (n 1) 23.

language in response to specific needs in a specific sector, the drawback is that it could contribute to a piecemeal proliferation of statutes.[48]

Context-integrated legislation also focuses on a particular sector but is not stand-alone legislation and is incorporated in another piece of legislation with a broader application, such as the applicable civil procedure code, court statute or rules.[49]

## THE REGULATION OF MEDIATION IN GHANA

### Background

In recent years, ADR processes, particularly mediation, have been promoted in many African countries under the banner of access to justice.[50] This has also been the position in Ghana, which is said to lead sub-Saharan African countries 'in its promotion of modern ADR and incorporation of aspects of traditional dispute resolution into the formal legal system.'[51] Like South Africa, Ghana has a pluralistic legal system that includes customary dispute resolution by traditional authorities and a formal adversarial legal system introduced under British occupation/colonialism.[52] As a result of difficulties in both systems—inter alia the lack of resources for managing crowded court dockets in the formal legal system, challenges to the authority of traditional decision-makers, as well as the gradual breakdown of extended families due to urbanisation and rural-urban migration—the state has embraced and developed modern ADR processes. In Ghana, the term 'ADR' frequently refers to the mediation process, which is currently evolving rapidly in that country.[53] There are indeed many similarities between modern Western-style mediation and African-style mediation, and where differences exist, principles from the one process, which ensure greater fairness to parties, should be infused into the other in order to add value to or improve the other.[54] In this regard, for example, Ghana has included Western mediation values, such as neutrality[55] and confidentiality[56] in the formal legal system, in order to protect mediation participants.[57] Modern-day mediation is currently incorporated into Part 2 of Ghana's Alternative Dispute Resolution Act of

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48 Alexander (n 7) 19.

49 Alexander (n 7) 17; Alexander and Steffek (n 1) 23.

50 Nolan-Haley (n 2) 60.

51 ibid 64.

52 Senyo Adjabeng, 'Alternative Dispute Resolution in Ghana' (August 2007) <https://www.mediate.com//articles/adjabengS3.cfm> accessed 26 June 2018; Nolan-Haley (n 2) 81–84.

53 Nolan-Haley (n 2) 63.

54 Amanda Boniface, 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) 15 (5) Potchefstroom Electronic LJ 378; Nolan-Haley (n 2) 80–81.

55 See section 67 of the Alternative Dispute Resolution Act, 2010.

56 See section 79 of the Alternative Dispute Resolution Act, 2010.

57 Nolan-Haley (n 2) 80.

2010 (ADR Act).[58] Nonetheless, customary arbitration has been retained and is incorporated into Part 3[59] of the ADR Act (while present-day arbitration is incorporated into Part 1).[60] Ghana has therefore incorporated elements of both modern and traditional dispute resolution into the formal legal system.[61] This experience offers a useful example for the further development of mediation programmes in other African countries, which embrace modern mediation while still upholding traditional values.[62]

## The Regulatory Approach to Mediation

Mediation in Ghana is currently primarily regulated through hard law. Together with other forms of ADR, it is incorporated into comprehensive general legislation, namely the ADR Act, which covers all aspects of mediation; from triggering laws, procedural laws, and standard-setting laws, to beneficial laws. Mediation is also addressed by the Judicial Service of Ghana, the High Court Civil Procedure Rules[63] and the Courts Act of 1993[64] through triggering laws. In addition, there appear to be softer forms of regulation by industry-led initiatives of the Ghana Association of Certified Mediators and Arbitrators through standard-setting laws.[65]

No specific provision is made for family or divorce mediation.

## Triggering Laws

The ADR Act contains extensive triggering laws. In terms of section 63, parties to an agreement may voluntarily submit any dispute arising from that agreement to mediation on invitation by one party. Very importantly, section 64 provides that the court before which an action is pending, may refer a matter to mediation if it is of the view that mediation will facilitate the resolution of the matter or part thereof in dispute.[66] Parties to an action before the court may also, by agreement, refer the whole action or part of it to mediation.[67] The Act, therefore, makes provision for both voluntary and mandatory referral of disputes to mediation. In addition, Part 4 of the

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58 WIPO, 'Alternative Dispute Resolution Act, 2010' (Act 798) <http://www.wipo.int/wipolex/en/text.jsp?file_id=339485> accessed 25 June 2018. Part 2, entitled 'Mediation of Disputes' consists of sections 63–88.

59 Part 3, entitled 'Customary Arbitration', consists of sections 89–113.

60 Part 1, entitled 'Arbitration', consists of sections 1–62.

61 Nolan-Haley (n 2) 105.

62 ibid 63–64, 99.

63 CI 47. See Adjabeng (n 52).

64 Courts Act 459 of 1993 <http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh033en.pdf> accessed 25 June 2018.

65 Ghana Association of Certified Mediators and Arbitrators, 'Who We Are" <http://www.ghacma.org/index.html> accessed 25 June 2018.

66 Section 64(1).

67 Section 64(2).

Act[68] makes provision for the establishment of an ADR Centre[69] with the objective of facilitating the practice of ADR in Ghana—inter alia through the conduct of research, the provision of education and the establishment of ADR centres throughout Ghana.[70] Besides the triggering laws contained in the Act, the High Court Civil Procedure Rules require mediation as a mandatory pre-settlement procedure in the Commercial Division of the High Court,[71] and section 72 of the Courts Act 1993 imposes a duty on civil court officers to promote reconciliation and to encourage and facilitate the settlement of disputes in matters before the court. It also appears that the Judicial Service of Ghana has been active in supporting mediation training and public education about ADR.[72]

### Procedural Laws

The ADR Act also contains extensive procedural laws. In the first place, it contains general procedural laws by making provision for the appointment of only one mediator, unless otherwise agreed upon;[73] by providing that the parties may appoint any person or institution they consider acceptable to serve as a mediator;[74] by making provision for a replacement mediator where the appointed mediator fails to start the process or operate within the ground rules of mediation, or where the appointed mediator is unable to perform the functions of a mediator;[75] and by providing that parties are to share the mediator's fees unless otherwise agreed upon.[76] The Act further specifies that communication between the mediator and parties may take place orally or in writing and that caucusing is allowed.[77] Interestingly, the Act also prescribes how the process is to be conducted by providing that parties should present the mediator and the other party or parties with a memorandum setting out their position with regard to the issues which require resolution.[78] Lastly, the occurrences which may terminate the mediation process are set out in section 80. These include the execution of a settlement agreement; termination by the mediator due to non-payment of his or her fees; a declaration by the mediator to the effect that the mediation is not worthwhile; and a termination declaration by the parties jointly or by one party only.

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68 Part 4, entitled 'Alternative Dispute Resolution Centre', consists of sections 114–124.
69 Section 114.
70 Section 115. See also Nolan-Haley (n 2) 87.
71 CI 47. See Adjabeng (n 52).
72 Nolan-Haley (n 2) 89.
73 Section 65.
74 Section 66.
75 Sections 69 and 70.
76 Section 87.
77 Section 76.
78 Section 73.

### Standard-setting Laws

Although Part 2 of the ADR Act dealing with the mediation of disputes contains no standard-setting rules, such rules are cursorily dealt with in Parts 4 and 5, which deal respectively with the ADR Centre and with administrative and miscellaneous provisions. In terms hereof, a person with the requisite qualification may apply to register with the ADR Centre as a mediator (or arbitrator)[79] and the Minister of Justice may make regulations by legislative instrument, inter alia to prescribe qualifications for persons who wish to be registered as mediators (or arbitrators).[80] No such regulations have been published to date. However, it appears that industry-led initiatives of the Ghana Association of Certified Mediators and Arbitrators (GHACMA), a network of professionals who offer affordable ADR services across the country, fills the gap in this regard.[81] They offer four different kinds of membership: a person who is undergoing training intended to lead to the acquisition of skills in ADR practice can become a student member; a person who has just undergone training in ADR practice, but has little or no experience, can become an associate member; a person who has been practising as an associate member for at least two years, and who has submitted him- or herself to a practical examination conducted by the GHACMA and re-examinations every two years thereafter, can become an accredited member; and a person who has passed a minimum of five examinations/re-examinations conducted by the GHACMA, and has presented a research paper on a topic relevant to ADR, can become a fellow.[82]

### Beneficial Laws

Wide-ranging beneficial laws are to be found in various sections of Part 2 of the ADR Act. Mediator rights include that a mediator may conduct the proceedings in a manner that he or she considers appropriate while taking into account the wishes of the parties;[83] may obtain expert advice on technical aspects of a dispute;[84] may terminate the process if he or she is of the opinion that further mediation will not be worthwhile;[85] and, very importantly, will not be liable for any act or omission in the bona fide discharge of his or her functions.[86] Mediator duties are quite extensive and include the duty of a mediator to be independent and impartial, and to disclose any circumstances that may create a likelihood of bias or affect his

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79 Section 123.
80 Section 134.
81 Ghana Association of Certified Mediators and Arbitrators (n 65).
82 Ghana Association of Certified Mediators and Arbitrators, 'Membership Type' <http://www.ghacma.org/membership.html> accessed 26 June 2018.
83 Section 74(6).
84 Section 74(3).
85 Section 74(7).
86 Section 86(2).

or her impartiality at any stage of the process;[87] to determine the date and time of each mediation session;[88] to be guided by principles of objectivity, fairness, and justice; and to give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute.[89] Furthermore, a mediator may not disclose information given in the course of the mediation process to a person who is not a party to the mediation without the consent of the parties;[90] may assist the parties in drafting a settlement agreement and must authenticate the settlement agreement and provide each party with a copy thereof;[91] and, lastly, may not act as an arbitrator or represent any party in subsequent arbitral or judicial proceedings.[92] As far as the parties' rights are concerned, it appears that parties may have a mediator who lacks impartiality replaced;[93] may be represented by lawyers, experts or other support persons in the process;[94] and may have a signed settlement agreement enforced in the same manner as an arbitral award, which is regarded as final and binding.[95] Parties' duties include determining a place for the mediation[96] and a duty of confidentiality with regard to all statements, suggestions or admissions made, or information obtained, during the mediation process.[97] It is further provided that a referral to mediation in terms of section 64 of the Act will serve as a stay of proceedings of the relevant court action.[98] Parties are also specifically prohibited from initiating any arbitral or judicial proceedings in respect of a dispute that is the subject matter of mediation proceedings.[99]

### Brief Discussion of Current Position Regarding Mediation

Although no specific mention is made of family or divorce mediation in Ghana, there are indications that the vast majority of matters that are referred to mediation and other ADR processes concern family or matrimonial affairs.[100] From an empirical study of parties' experiences of

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87 Sections 67, 68(1) and (2) and 74(1).
88 Section 72(1).
89 Section 74(5).
90 Section 79(2).
91 Section 81.
92 Section 84.
93 Section 68(3).
94 Section 71(1).
95 Sections 81(3) and 82 read with s 52.
96 Section 72(2).
97 Section 79(1) and (3) and s 85.
98 Section 64(4).
99 Section 83.
100 With reference to mediation in a certain sector, Richard Crook, 'Alternative Dispute Resolution and the Magistrate's Court in Ghana: A Case of Practical Hybridity' (2012) 5 <http://www.institutions-africa.org/filestream/20120703-alternative-dispute-resolution-and-the-magistrate-s-courts-in-ghana> accessed 25 June 2018, indicates that 'mediators reckoned that 70% of cases were family or "matrimonial" affairs, with most of the others breaches of contract and debt.'

procedural justice in mediation since the passage of the ADR Act in 2010, it further appears that parties observe the process as fair and accessible, and that they are generally satisfied with it and experience high degrees of procedural justice in mediation on the issues of voice, respect and fairness.[101] Some of the expressed reasons for favouring mediation are its differences from customary mediation, specifically in respect of the neutrality of the mediator and the fact that the mediation agreement can be enforced as a consent judgment similar to an arbitral award or court outcome.[102] On the other hand, it appears that chiefs, who are vested with the primary responsibility for resolving disputes through customary arbitration, are still the first port of call for many Ghanaians seeking justice.[103] A laudable aspect of the Act is thus its inclusion of customary arbitration within its ambit in addition to more contemporary ADR processes. The last aspect that needs to be pointed out is that it appears as though some chiefs felt excluded from consultations regarding the passage of the ADR Act and therefore resisted its implementation.[104] This is something that should be kept in mind by other African countries that are in the process of developing mediation legislation.

## THE REGULATION OF MEDIATION IN SINGAPORE

### Background

Mediation is not a new concept in Singapore. As in Africa, many Asian cultures have practised mediation in one form or another in their communities, often by using respected elders as mediators.[105] However, due to urbanisation and industrialisation, and a focus on legal rights, litigation was emphasised, causing mediation and other informal dispute resolution mechanisms to fall away.[106] Nonetheless, mediation and other ADR practices were re-introduced into Singapore in the 1990s after the Western mediation movement of the 1970s spilled over to Singapore.[107] Today, there are two main categories of mediation practice in Singapore, namely court-based mediation and private mediation.[108]

Court-based mediation refers to mediation that is conducted by in-house and volunteer specialist mediators in court once legal proceedings have

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101 Nolan-Haley (n 2) 97–98. See also Crook (n 100) 1.
102 Nolan-Haley (n 2) 97–98; Crook (n 100) 1.
103 Nolan-Haley (n 2) 84–85.
104 Nolan-Haley (n 2) 99.
105 Singapore Academy of Law 'Ch.03 Mediation' (30 April 2015) para 3.3.1 <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-3#top> accessed 3 July 2018.
106 Singapore Academy of Law (n 105) para 3.3.1.
107 Singapore Academy of Law (n 105) para 3.3.2.
108 Singapore Academy of Law (n 105) para 3.3.3.

commenced.[109] Its origins can be traced back to a 1994 pilot project in the Subordinate Courts (as they were known then) in which selected district judges assisted in resolving civil disputes using ADR processes.[110] Today, court-based mediation covers the entire range of cases filed in all courts, including civil claims, family disputes and minor criminal offences.[111] It is mainly carried out by the Family Justice Courts for family matters and the State Courts for other civil disputes,[112] but it appears that cases may also be referred to private mediators.[113] Court-based mediation services are free of charge, save for higher-value civil cases, for which a set fee per party is charged.[114] Court-based mediation forms an integral part of the justice system in Singapore and is said to be one of the best ways to increase access to justice because of the many benefits it brings to parties.[115]

Private mediation in Singapore is spearheaded and mainly carried out by three institutions, namely the Singapore Mediation Centre (SMC), the Singapore International Mediation Centre (SIMC) and the Singapore International Mediation Institute (SIMI), all of which enjoy the support of the government and the judiciary.[116] Like court-based mediation, the private mediation movement has expanded a great deal since its inception in the mid-nineties.[117] It is said that SMC remains at the forefront of the mediation movement in Singapore and Asia, conducting thousands of disputes with a very high success rate,[118] while SIMI is the premier independent professional standards body for all mediators, including court-based mediators, in Singapore.[119] On 1 November 2017, the Mediation Act,[120] which deals only with private mediations that are connected to Singapore,[121] came into

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109 Family Justice Courts Singapore, 'Mediation/Counselling' (26 October 2017) <https://www.familyjusticecourts.gov.sg/Common/Pages/MediationCounselling.aspx> accessed July 2018; Singapore Academy of Law (n 105) paras 3.3.4 and 3.5.4. Court-based mediators are generally district judges, court staff or community or volunteer mediators.

110 Doris Quek Anderson, 'The State Courts Centre for Dispute Resolution: Serving the Society with Quality Dispute Resolution Services' (2016) Singapore Law Gazette para 1 <http://ink.library.smu.edu.sg/sol_research/2369> accessed 2 July 2018.

111 Quek Anderson (n 110) para 1.

112 Singapore Academy of Law (n 105) para 3.3.4. The Family Justice Courts' mediation is currently conducted by the Family Resolution Chambers and the Child Focused Resolution Centre, while the State Courts' mediation is conducted by the State Courts Centre for Dispute Resolution.

113 Singapore Academy of Law (n 105) para 3.4.4.

114 Quek Anderson (n 110) para 7; Singapore Academy of Law (n 105) para 3.5.14.

115 Quek Anderson (n 110) para 1.

116 Singapore Academy of Law (n 105) para 3.3.5 and s 4.

117 Singapore Academy of Law (n 105) para 3.7.1.

118 Singapore Academy of Law (n 105) paras 3.4.3 and 3.7.1.

119 Doris Quek Anderson, 'A Coming of Age for Mediation in Singapore? Mediation Act 2016' (2017) 29 Singapore Academy of LJ 277; Singapore International Mediation Institute, 'About SIMI' (2018) <http://www.simi.org.sg/> accessed 3 July 2018.

120 Mediation Act 1 of 2017 <https://sso.agc.gov.sg/Act/MA2017?ValidDate=20171101> accessed 1 July 2018.

121 Sections 6(1) and (2). See also Quek Anderson (n 119) 276.

operation.[122] However, in terms of section 6(3) of the Act, the Minister is allowed to make a future order extending the application of the Act to court-based mediation and other types of mediation.[123]

### Regulatory Approach to Mediation

It is clear that Singapore follows a mixed regulatory approach with hard law governing beneficial laws, triggering laws, and mainly softer forms of regulation governing standard-setting laws and procedural laws. The new Mediation Act of 2017 contains mainly beneficial laws. Triggering laws are contained in other pieces of legislation, such as the Women's Charter,[124] the Rules of Court and the State Court Practice Directions.[125] Procedural and standard-setting rules are pertinently left to industry-led initiatives, which are also backed by the government.[126]

In court-based mediation, a clear distinction is drawn between family matters, which are dealt with in the Family Justice Courts, and other civil matters, which are dealt with in the State Courts. As regards private mediation, the Mediation Act can be seen as general mediation legislation; however, it specifically integrates family mediation by explicitly making provision for the best interests of the child.[127]

### Triggering Laws

Although the object of the Mediation Act of 2017 is to promote, encourage and facilitate the resolution of disputes by mediation, it contains no triggering laws as such. It does, however, indirectly recognise that the mediation process may be mandatory by indicating in the definition of mediation that the term 'voluntariness' refers to the fact that parties cannot be compelled to reach a decision and does not necessarily indicate that parties have a choice as to whether to attend mediation.

Triggering laws specific to family mediation are contained in the Women's Charter. In terms of section 50(3A) to (3E) of the Charter, the Family Justice Court must refer all divorces where minor children are involved to mediation conducted by a court-appointed mediator. In terms of section 50(1) of the Charter, the court may further, with the consent of the parties, refer all other divorce and ancillary matters to mediation conducted

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122 Ministry of Law Singapore, 'Mediation Act to Commence from 1 Nov 2017' (November 2017) <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/mediation-act-to-commence-from-1-november-2017.html> accessed 4 July 2018.

123 Such as community-based mediation.

124 Women's Charter (Chapter 353) (revised edn 2009) <https://sso.agc.gov.sg/Act/WC1961> accessed 4 July 2018.

125 Singapore Academy of Law (n 105) para 3.3.12; Quek Anderson (n 110) para 8. See also the discussion below under triggering laws in Singapore.

126 Alexander and Steffek (n 1) 30.

127 Section 12(4)*(d)*. This section will be elaborated upon in the discussion of beneficial laws below.

by a mediator, with the latter being one agreed upon by the parties or one appointed by the court. The Charter therefore makes provision for both mandatory and voluntary referrals to family mediation. In addition, in terms of rule 854*(c)* of the Family Justice Rules,[128] the court, in exercising its discretion as to costs, may take into account the parties' conduct in relation to any attempt at resolving the matter by mediation or any other means of dispute resolution.

In other civil cases 'a presumption of ADR' was introduced in 2012 in terms of which all civil cases are automatically referred to court-based mediation or other forms of ADR, unless one or more of the parties opt out.[129] In terms of this presumption, the court encourages parties to consider ADR options, such as mediation and neutral evaluation, as a 'first stop' at the earliest possible stage. The court will also, as a matter of course, refer appropriate matters to ADR. Referrals can take various forms[130] and include a call to attend a court ADR session;[131] a call to attend a case management conference before a judge and complete an ADR form;[132] and a call to attend a pre-trial conference and complete an ADR form.[133] Refusal to use ADR for reasons deemed unsatisfactory by the court would result in cost sanctions under Order 59 rule 5*(c)* of the Rules of Court as the court, in exercising its discretion as to costs, may take into account the parties' conduct in relation to any attempt at resolving the matter by mediation or any other means of dispute resolution.[134]

Lastly, it appears that the government has been actively promoting mediation in Singapore through the establishment of a network of easily accessible community mediation centres. In this regard, the Community Mediation Centres Act[135] was enacted to provide for the establishment and operation of these centres under the supervision of the Ministry of Law.[136] Community-based mediation is, therefore, another type of mediation currently conducted in Singapore.

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128 Family Justice Rules Committee, 'Family Justice Rules, 2014' <https://sso.agc.gov.sg/SL/FJA2014-S813-2014#pr3-> accessed 3 July 2018.

129 State Courts Singapore, 'State Courts Practice Directions' para 35(9) <https://www.statecourts.gov.sg/Lawyer/Documents/EPD/State%20Courts%20ePD%20-%20effective%201%20Oct%202017.pdf> accessed 6 July 2018. See also Singapore Academy of Law (n 105) paras 3.3.12 and 3.5.4.

130 See Quek Anderson (n 110) para 8.

131 State Courts Singapore (n 129) para 38.

132 Order 108 rule 3 of the Rules of Court (chapter 322, r 5, 2014 edn); State Courts Singapore (n 129) paras 20 and 35.

133 State Courts Singapore (n 129) paras 26, 35–36.

134 Rules of Court (chapter 322, r 5, 2014 edn).

135 Community Mediation Centres Act (chapter 49A) <https://sso.agc.gov.sg/Act/CMCA1997> accessed 5 July 2018.

136 Singapore Academy of Law (n 105) paras 3.3.16–3.3.17.

### Procedural Laws

The Mediation Act contains very few procedural laws. In the definition of mediation, it makes provision for mediation sessions to be conducted online by electronic means.[137] In addition, sections 13 and 14 provide that the Rules Committee under the Supreme Court of Judicature Act[138] and the Family Justice Rules Committee under the Family Justice Act[139] may respectively make Rules of Court and Family Justice Rules regulating the practice and procedure of the relevant courts in respect of any matter that falls under the Mediation Act. It further transpires that the Mediation Rules drafted by SIMC—the private, independent mediation organisation which aims to provide world-class mediation services and products targeted at the needs of parties in cross-border commercial disputes[140]—contain many prescriptions for the commencement, administration and termination of mediations administered by the Centre.[141]

### Standard-setting Laws

Section 7 of the Mediation Act provides that the Minister may, for the purpose of this Act, designate any mediation service provider as a designated mediation service provider, and also designate any accreditation or certification scheme administered by a mediation institution as an approved certification scheme. To date, both SMC and SIMC have been designated as such.[142] However, the Act itself does not legislate on mediation standards or accreditation issues,[143] and a deliberate choice appears to have been made to develop non-legislative uniform standards drawn from the mediation industry.[144] In this regard, SIMI was chosen to regulate mediation standards and to set professional standards for all mediators in Singapore.[145] This private, independent professional standards body for mediation in Singapore currently administers a four-tiered mediation credentialling scheme,[146] in terms of which individuals with diverse mediation skills and

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137 Section 3(3).

138 Supreme Court of Judicature Act (chapter 322).

139 Family Justice Act 27 of 2014.

140 Singapore International Mediation Centre, 'About the Singapore International Mediation Centre (SIMC)' <http://simc.com.sg/> accessed 6 July 2018.

141 Singapore International Mediation Centre, 'SIMC Mediation Rules' (2017) <http://simc.com.sg/mediation-rules/> accessed 6 July 2018. See eg rules 2 to 8 dealing respectively with the commencement of mediation, the appointment of a mediator, fees and costs, the manner in which the mediation process should be conducted, the termination of the process and requirements regarding a settlement agreement.

142 Ministry of Law, Singapore (n 122).

143 Quek Anderson (n 119) 277.

144 Alexander and Steffek (n 1) 30.

145 Quek Anderson (n 119) 277, 278; Singapore International Mediation Institute (n 119).

146 Similar to the position in Ghana.

experience are able to receive recognition.[147] The four tiers under the SIMI credentialling scheme are as follows: a SIMI-accredited mediator Level 1 must have completed and passed a SIMI-registered training programme within two years before the date of the accreditation application; a SIMI-accredited mediator Level 2 must have completed and passed a SIMI-registered training programme and conducted five full-scale mediations or mediation sessions lasting at least fifty hours within two years before the date of the accreditation application; a SIMI-accredited mediator Level 3 must have completed and passed a SIMI-registered training programme and conducted twelve full-scale mediations or mediation sessions lasting at least 120 hours within two years before the date of the accreditation application; and a SIMI-certified mediator must have completed and passed a SIMI-registered training programme and conducted twenty full-scale mediations or mediation sessions lasting at least 200 hours within three years before the date of the accreditation application.

### Beneficial Laws

As indicated above, the Mediation Act contains important beneficial laws. In the first place, section 8 of the Act allows parties to a mediation agreement to apply for a stay of court proceedings in relation to any matter that is the subject of that agreement.[148] Second, sections 9 and 10 of the Act deal with the confidentiality and admissibility of mediation communications. In terms of the Act,[149] a mediation communication means anything said or done, any document prepared or any information provided for the purposes of, or in the course of, the mediation and includes a mediation agreement or mediated settlement agreement. Subject to certain narrow exceptions,[150] all such communications are confidential and may not be disclosed to a third party, or in court, or at any arbitral proceedings.[151] Without leave of the court, mediation communications may, however, be disclosed to third parties on relevant grounds, such as consent of the parties, seeking legal advice, avoiding harm and injury, and the investigation of potential offences.[152] With leave of the court, mediation communications may be

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147 Quek Anderson (n 119) 278; Singapore International Mediation Institute, 'About the SIMI Credentialing Scheme' <http://www.simi.org.sg/What-We-Offer/Mediators/SIMI-Credentialing-Scheme> accessed 6 July 2018.

148 Baker McKenzie, 'Singapore Passes New Mediation Act' (9 Feb 2017) <https://www.bakermckenzie.com/en/insight/publications/2017/02/singapore-passes-new-mediation-act> accessed 6 July 2018 comment that this provision allows parties to be sure that their legal positions in any ongoing litigation will be preserved pending the outcome of their mediation, and Quek Anderson (n 119) 293 comments that this provision is likely to encourage more widespread use of mediation clauses.

149 Section 2.

150 Contained in s 9(2) and (3).

151 Sections 9(1) and 10.

152 Section 9(2).

disclosed to third parties or the court inter alia for purposes of enforcing or disputing a mediated settlement agreement and establishing or disputing an allegation of professional misconduct against a mediator.[153] Lastly, section 12 of the Mediation Act provides an expedited process for parties to enforce their mediated settlement agreements, by allowing such agreements, even those that have never stood before the courts, to be recorded as court orders and enforced as such.[154] Before a mediated settlement can be recorded as an order of the court, certain requirements must be met, including that the mediation must have been administered by a designated mediation service provider, such as SMC and SIMC, or conducted by a SIMI-certified mediator.[155] In terms of section 12(4), the court may, however, refuse to record a mediated settlement agreement as an order of court if, inter alia, the terms of the agreement are not in the best interests of a child where the dispute involves the welfare of a child or the settlement is contrary to public policy. These provisions clearly make the Act applicable to family and divorce mediation. Before the Act came into operation, it was acknowledged that parties reaching an agreement on matrimonial disputes will probably seek to make use of the expedited enforcement mechanism in section 12.[156] Nonetheless, it appears that for the time being, this provision will not apply to any agreement where the subject matter of the dispute falls within the jurisdiction of the Family Justice Courts.[157]

Besides the beneficial laws contained in the Mediation Act, the Mediation Rules drafted by SIMC contain more beneficial laws for mediations administered by the Centre, such as the requirement that all parties act in good faith while preparing for and participating in the mediation.[158]

### Brief Discussion of Current Position Regarding Mediation

It appears that mediation is alive and well in Singapore. It is conducted extensively in the courts, privately and in communities. Nevertheless, it seems anomalous that court-based mediation and community-based mediation have been excluded from the newly introduced Mediation Act. It is pointed out that the narrow scope of the Act (which at this stage deals only with private mediations) also runs counter to the policy of having SIMI set professional standards for all mediators in Singapore.[159] Therefore, there is no uniform set of legal principles governing all the different types of mediation in Singapore. Nonetheless, it is hoped that the Minister will exercise his or her powers in terms of section 6(3) of the Mediation Act

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153 Section 9(3).
154 See also Quek Anderson (n 119) 286.
155 Section 12(3). See also Ministry of Law Singapore (n 122); Quek Anderson (n 119) 287.
156 Quek Anderson (n 119) 290.
157 Ministry of Law Singapore (n 122).
158 Singapore International Mediation Centre (n 141) r 6.9.
159 Quek Anderson (n 119) 277.

to make a future order extending the application of the Act to all types of mediation.[160]

## THE REGULATION OF MEDIATION IN AUSTRIA

### Background

Austria is said to be the European pioneer in mediation law and practice.[161] In 2004, Austria enacted the first Mediation Act in Europe, the *Zivilrechtsmediationsgesetz* (the Civil Law Mediation Act).[162] It served as a model for and influenced much other mediation legislation in Europe.[163]

### Regulatory Approach to Mediation

Mediation in Austria is regulated extensively through hard law in the areas of standard-setting and beneficial laws. However, due to lacunas in legislation, specifically with regard to triggering laws, softer forms of regulation also play a role.

There are a number of Acts dealing with mediation. The most important one is the Civil Law Mediation Act, which has never been amended since its introduction in 2004.[164] It applies to national and cross-border civil cases conducted by registered mediators.[165] This Act, and the regulation issued under it,[166] contains extensive standard-setting laws as well as beneficial laws. Although the Act can be regarded as general mediation legislation, it does make specific provision for family mediation in one instance.[167] Second, the *EU-Mediationsgesetz* (the EU Mediation Act)[168] was enacted in 2011 to implement the European Union's Mediation Directive and applies only to cross-border cases conducted by a mediator who is not registered under the Austrian Civil Law Mediation Act. It contains some additional beneficial laws for non-registered mediators. Third, the *Zivilprozessordnung* (the Austrian Code of Civil Procedure)[169] includes more beneficial laws for mediators as well as the parties and some triggering laws for parenting matters. Similarly, the *Außerstreitgesetz* (the Non-Contentious Proceedings

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160 ibid.

161 Markus Roth and David Gherdane, 'Mediation in Austria: The European Pioneer in Mediation Law and Practice' in Klaus Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 249.

162 BGBl I Nr 29/2003. An English translation of the Act is available at <http://www.arbiter.com.sg/pdf/laws/AustrianMediationAct2003.pdf> accessed 29 June 2018.

163 Roth and Gherdane (n 161) 249.

164 Roth and Gherdane (n 161) 253.

165 Sections 2(2) and 3 of the Austrian Civil Law Mediation Act. See also Marianne Roth and Marianne Stegner, 'Mediation in Austria' (2013) 3 YB Intl Arbitration 368.

166 The Zivilrechts-Mediations-Ausbildungsverordnung BGBI II Nr 47/2004.

167 As will be discussed below under beneficial laws in Austria.

168 BGBl I Nr 21/2011.

169 RGBl Nr 113/1895.

Act)[170] also regulates mediation and contains some triggering laws for parenting matters and children's issues.

In addition, softer forms of regulation are applied by industry-led initiatives of mediation organisations, such as the *Österreichische Bundesverband für Mediation* (the Austrian Federal Association for Mediation), in the form of triggering provisions.

## Triggering Laws

The Civil Law Mediation Act neither provides a path for parties to mediation nor contains any incentives which could help to promote mediation.[171] Austria generally adheres to the notion that voluntariness in mediation extends to the choice whether to attend mediation or not[172]—and not just to the fact that any agreements which parties reach in the mediation process should be voluntary. This is evident from section 1 of the Civil Law Mediation Act, which provides that mediation is an activity entered into voluntarily by the parties.[173] However, it appears that family mediation holds a special position in Austria.[174] Even though Austria is not familiar with court-ordered mediation, a judge may indicate the possibility of mediation in parenting matters and certain children's issues in terms of the Non-Contentious Proceedings Act[175] and the Austrian Code of Civil Procedure.[176] In terms of these other two pieces of legislation, the court must take steps to ensure that the parties reach an amicable agreement throughout proceedings concerning parental responsibilities, the child's residence, or the exercise of contact.[177] Nonetheless, it appears that the court can only order a first mediation session,[178] which may be state-subsided depending on the income of the parties and the number of joint children.[179] In addition, the Austrian Supreme Court has made it very clear that mediation cannot be conducted against a party's will.[180] Furthermore, there are no negative consequences or sanctions for a party who does not participate in mediation or who does not participate in the process in good faith.[181] Therefore, instead of hard

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170 BGBl I Nr 111/2003.

171 Alexander (n 7) 15.

172 Roth and Stegner (n 165) 369.

173 It is also evident from Section 2(1) of the EU Mediation Act, which stipulates that the parties must try to resolve their dispute on a voluntary basis.

174 Roth and Stegner (n 165) 376.

175 Section 13(3) and s 108.

176 Section 177a(1)–(2).

177 Marianne Roth, 'National Report: Austria' <http://ceflonline.net/wp-content/uploads/Austria-Parental-Responsibilities.pdf> accessed 1 July 2018.

178 *Geschlichtet! Editorial* '*(Keine) Verpflichtende Mediation*' (September 2017) <https://www.geschlichtet.at/keine-verpflichtende-mediation-und-schlichtung/> accessed 1 July 2018.

179 Roth and Stegner (n 165) 372.

180 Austrian Supreme Court Judgment of 15 July 1997, 1Ob161/97a; Austrian Supreme Court Judgment of 14 December 2011, 30b196/11m.

181 Roth and Stegner (n 165) 369.

law, a variety of market-contract and self-regulatory approaches are used to mobilise mediation in civil disputes in Austria.[182] In this regard, mediation organisations, such as the *Österreichische Bundesverband für Mediation*,[183] conduct information sessions at various courts to increase awareness of the availability of mediation and encourage disputants to engage in mediation.[184]

### Procedural Laws

The Civil Law Mediation Act is not regarded as a law for guiding the mediation process and does not really indicate how the process is to be conducted.[185] However, the obligations of a registered mediator do include some general rules regarding the process, including that the date on which the parties agreed to resolve the conflict by mediation will be regarded as the beginning of the process and that the process will be terminated if the parties or the mediator no longer wishes to proceed, or if an agreement is reached.[186] Hence, within these limited rules the parties can tailor their proceedings as they wish, for example, they may choose to have joint sessions, caucusing, or both.[187] But here too, family mediation seems to be the exception. A very specific form of mediation, namely co-mediation, is prescribed for divorce and family mediation.[188] The mediator team of two should consist of a registered mediator with a legal education and a registered mediator with psycho-social training, and should preferably include a man and a woman.[189]

### Standard-setting Laws

The Civil Law Mediation Act contains intense and extensive standard-setting laws and upholds high quality standards for mediators and training institutions and courses.[190] In the first place, a very important distinction is made between registered and unregistered mediators,[191] and it is clear that

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182 Alexander (n 7) 11, 23; Alexander and Steffek (n 1) 27.

183 According to Öbm 'Über den ÖBM' the *Österreichische Bundesverband für Mediation* is the biggest mediation association in Europe. Its objective is to further integrate mediation into society and anchor it as an integral part of Austrian conflict culture <https://www.tagdermediation.at/Startseite-OEBM> accessed 10 June 2019.

184 Alexander (n 7) 11; Alexander and Steffek (n 1) 28.

185 Alexander (n 7) 15; Roth and Stegner (n 165) 370.

186 Section 17 of the Civil Law Mediation Act.

187 Roth and Stegner (n 165) 370. Similarly, the EU Mediation Act does not regulate the mediation process either.

188 *Bundesministerium für Familien und Jugend* '*Richtlinien zur Förderung von Mediation*' GZ: 42 5000/5-V/2/04 (2004) <http://www.netzwerk-mediation.at/fileadmin/pdf/RICHTLINIEN%20Mediation%20BMFJ.pdf> accessed 1 July 2018.

189 Miquel Casals, 'Divorce Mediation in Europe: An Introductory Outline' (2005) 9 (2) Electronic J of Comparative L 21 <https://www.ejcl.org/92/art92-2.pdf> accessed 1 July 2018; Roth and Stegner (n 165) 376. A list of co-mediation teams is published electronically on the website of the Federal Ministry of Economy, Family and Youth.

190 Alexander (n 7) 15; Alexander and Steffek (n 1) 38; Roth and Stegner (n 165) 368.

191 Sections 2(2) and 3 of the Austrian Civil Law Mediation Act

the Act only applies to registered mediators whose names are included in the list of mediators maintained by the Federal Minister of Justice in terms of section 8 of the Act.[192] The requirements for registration in the list of mediators are set out in section 9 and include requirements that an applicant must prove that he or she is over the age of twenty-eight, is professionally qualified, is trustworthy, and has taken out professional liability insurance in accordance with section 19 of the Act. In terms of the Act, 'professionally qualified' means someone who is in possession of relevant knowledge and skills in mediation and is familiar with the basic legal and psychological principles of mediation through appropriate training.[193] Section 29 further sets out that the training should include a theoretical part (consisting of specific training areas);[194] a practical part, (which includes individual self-awareness and practical experience seminars to practise the techniques of mediation through role-plays, simulations and reflections); peer group work; and practice supervision. As mediators hail from different professional backgrounds, the Training Regulation issued in terms of section 29 of the Act defines the training requirements differently for mediators from different professional backgrounds.[195] In this regard, the Act also makes provision for a list of registered training institutions and courses to be maintained by the Federal Minister of Justice.[196] There are currently about fifty registered training institutions in Austria.[197] A mediator should preferably undergo training at a registered institution.[198] If all the requirements for registration in the list of mediators are complied with, an applicant is registered and his or her name is placed on the list for a period of five years.[199] Before the expiry of the registration period, a mediator may apply for an extension of the registration for another ten years[200] by providing proof of further training

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192 *Bundesministerium für Justiz* '*Mediation in Zivilrechtssachen*' <http://mediatorenliste.justiz.gv.at//mediatoren/mediatorenliste.nsf/contentByKey/VSTR-7FPD55-DE-p> accessed 2 July 2018. The list contains the name, date of birth, profession, professional address and academic title of each registered mediator. The list of mediators is published electronically which enables potential participants to search either for a specific mediator (by his or her name), for registered mediators in a specific area, or for all mediators available in one of the Austrian Federal States.

193 Section 10.

194 Namely, an introduction to the history of problems and the development of mediation; procedural development, methods and phases of mediation with special regard to dispute-oriented and solution-oriented approaches; basis of communication, in particular communication, problem and negotiation techniques and the conduct of meetings; conflict analysis; practice areas of mediation; theories of personality and psycho-social forms of intervention; ethical problems in mediation, in particular the position of the mediator; and legal problems in mediation.

195 Section 29(1).

196 Section 23.

197 Roth and Stegner (n 165) 375.

198 Roth and Stegner (n 165) 374.

199 Section 13(1) of the Act.

200 Section 13(2).

of at least fifty hours within a period of five years.[201] Similar registration periods apply to training institutions.[202] Lastly, the Act makes provision for the removal of registered mediators and registered training institutions if they no longer comply with all the requirements for registration or re-registration.[203]

### Beneficial Laws

Various beneficial laws can be found in the Civil Law Mediation Act and also in other pieces of Austrian legislation. In the first place, mediator rights and obligations are set out in sections 15 and 16 of the Civil Law Mediation Act. Only mediators who are included in the Federal Minister of Justice's list of mediators are both entitled and obliged to carry the designation of 'registered mediator.'[204] In addition, mediators may not act in sequential or multiple roles in case this creates a professional conflict;[205] they must explain the nature and consequences of the mediation process to the parties and execute the process in an impartial manner;[206] refer the parties for independent legal assistance if necessary;[207] and keep records of the various stages of the mediation process for a period of at least seven years.[208] Furthermore, section 18 of the Act provides that mediators and their supporting staff must keep any facts which were made known to them in the context of the mediation strictly confidential, as well as any documents prepared or received by them in the course of the mediation. In terms of section 320 of the Austrian Code of Civil Procedure, registered mediators may also not be questioned with respect to what was entrusted to them, or with regard to the facts they learnt in the context of the mediation. In terms of section 31 of the Civil Law Mediation Act, a mediator who breaches his or her duty of confidentiality, and thereby violates the legitimate interests of another person, may be convicted of an offence which is punishable with a fine or a term of imprisonment of up to six months. The EU Mediation Act, which applies to non-registered mediators, also contains a confidentiality provision, which in general terms stipulates an obligation to refuse to give evidence.[209] In addition, the EU Mediation Act places a duty on non-registered mediators to inform parties explicitly of this fact.[210] As far as the parties' rights are concerned, section 22(1) of the Civil Law Mediation Act makes provision for the suspension of time limits in respect of proceedings

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201 Sections 13(3) and 20.
202 Sections 24(3) and 25.
203 Section 14 and s 28 respectively.
204 Section 15(1).
205 Section 16(1).
206 Section 16(2).
207 Section 16(3)
208 Section 17.
209 Section 3.
210 Section 5(2).

which may be affected by the mediation. Moreover, specific provision is made for family mediation in section 22(2) of the Act. This section provides that not only proceedings which may be affected by the mediation, but also all other claims arising from family law, are automatically suspended when the parties enter into mediation. For other civil law mediations, such a broad suspension of claims will only follow where the parties have explicitly agreed thereto. A last right of parties is contained in section 433a of the Austrian Code of Civil Procedure, which provides that the content of a written agreement resulting from mediation can be recorded in the form of a court settlement in front of any district court and will as such be enforceable.[211]

### Brief Discussion of Current Position Regarding Mediation

It is claimed that mediation is on its way to becoming an accepted alternative to litigation and that the large numbers of registered mediators and training institutions demonstrate that the concept of mediation enjoys great popularity in Austria.[212] Yet, despite the extensive availability of quality legislation relating to mainly standard-setting and beneficial laws, it appears that very little mediation takes place.[213] As a result of the scarcity of legislative triggering laws in Austria, a need therefore still exists to further promote the actual use of mediation by the general public.[214] Pleas are also made for the further development of financial support in the form of legal aid, provided by either the state or insurance companies.[215]

## THE REGULATION OF MEDIATION IN AUSTRALIA

### Background

Australia is known for its progressive approach to the development of ADR in general and mediation in particular.[216] Specifically, with respect to family mediation, Australia is far more advanced than most other foreign jurisdictions. For close to forty years, Australia has had family courts with social components that have increasingly been engaged in integrating ADR methods, especially divorce and family mediation, into the formal divorce process. While it was merely strongly encouraged at first, family dispute

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211 See also Roth and Gherdane (n 161) 253; Roth and Stegner (n 165) 372.
212 Roth and Stegner (n 165) 378.
213 Alexander and Steffek (n 1) 28.
214 Roth and Stegner (n 165) 378.
215 ibid.
216 Meggitt and Somji (n 7) 451.

resolution, which is basically mediation,[217] became mandatory in parenting matters in terms of far-reaching reforms to the Australian Family Law Act[218] in 2006.[219] The rationale for mandating family dispute resolution in children's matters included the documented experience in Australia (and other countries) of low voluntary uptake of mediation in divorce and other family disputes, as well as research findings indicating that mandated mediation is effective in resolving disputes involving children and other family matters.[220] The success of mandatory family mediation served as motivation for the enactment of the Civil Dispute Resolution Act in 2011,[221] in terms of which parties to civil law disputes are now also required to attempt to resolve their disputes through dispute resolution processes prior to litigation.[222]

### Regulatory Approach to Mediation

A formal legislative approach has been adopted in Australia.[223] In addition, there is a clear preference for sector-specific and context-integrated legislation on mediation in Australia, with a vast number of Acts supporting mediation in a variety of sectors, such as family mediation, civil law mediation, farm debt mediation, and franchise mediation.[224] As far as family mediation is concerned, the Family Law Act, the Family Law Rules made under the Act,[225] and the Family Law Regulations[226] regulate all aspects of family mediation and contain extensive triggering laws, procedural laws, standard-setting laws, and beneficial laws. As far as civil law mediation is concerned, the Civil Dispute Resolution Act contains dynamic triggering

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217 Section 10F of the Family Law Act 1975 describes family dispute resolution as a process (other than a judicial process) in which an independent family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other. It has further been described as 'a form' of mediation: Patrick Parkinson, 'The Idea of Family Relationship Centres in Australia' (2013) 51 Family Court Review 205. See further Field and Lynch (n 2) 392, 393, who states that since the 2006 reforms, family mediation has generally been known as family dispute resolution and is, in fact, the key form of family dispute resolution currently being used in Australia under the legislation.

218 Act 59 of 1975.

219 The Family Law Amendment (Shared Parental Responsibility) Act 46 of 2006 inter alia introduced s 60I in the Family Law Act.

220 Joan Kelly, 'Getting it Right for Families in Australia: Commentary on the April 2013 Special Issue on Family Relationship Centres' (2013) 51 Family Court Review 282.

221 Act 17 of 2011.

222 Knox (n 2) 32.

223 Alexander (n 7) 9.

224 ibid 23; Mediation World, 'Mediation Developments from Around the World' <http://www.mediationworld.net/> accessed 10 July 2018.

225 Family Law Rules 2004 <http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_reg/flr2004163/> accessed 10 July 2018.

226 Family Law (Family Dispute Resolution Practitioners) Regulations 2008 <https://www.legislation.gov.au/Details/F2009C00158> accessed 10 July 2018.

laws and some beneficial laws, while industry-led initiatives still play an important role in respect of standard-setting laws.[227]

### Triggering Laws

The Family Law Act contains extensive triggering laws. In terms of section 60I(1), all persons engaged in a dispute involving children must first make a genuine effort to resolve that dispute before approaching a court to resolve the dispute. In terms of section 60I(7), a court is prevented from hearing an application relating to children unless a certificate from a family dispute resolution practitioner (or mediator) is also filed. In essence, this certificate must state whether or not the parties attended mediation and further, whether or not a genuine effort was made to resolve the dispute.[228] If litigation follows, the court may take into account the kind of certificate granted in considering whether to make an order referring the parties back to mediation,[229] and in determining whether to award costs against a party.[230] Consequently, if one party is regarded as failing to make a genuine effort, he or she may become liable to pay all or part of the costs of subsequent legal proceedings.[231] Although there are grounds for exemption under which no certificate needs to be filed in court,[232] the intention is to ensure that, unless there is a good reason, disputes over children should be mediated and kept out of the courts.[233] To help people affected by separation or divorce, there is also an obligation on legal practitioners[234] and court officers[235] to inform parties about the services provided by family dispute resolution practitioners.[236]

Likewise, the Civil Dispute Resolution Act requires parties to take genuine steps to resolve disputes before instituting other civil proceedings in court;[237] imposes a duty on lawyers to advise clients of this requirement

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227 Alexander and Steffek (n 1) 30; Meggitt and Somji (n 7) 452.
228 Section 60I(8).
229 Section 13C(1)*(b)*.
230 Section 13D and s 117. See also item 1(3) of Part 2 of sch 1 of the Family Law Rules 2014.
231 Hilary Astor, 'Genuine Effort in Family Dispute Resolution' (2010) 84 Family Matters 61.
232 In terms of s 60I(9) of the Family Law Act 1975, no certificate needs to be filed in court where all parties consent to the order sought; where there has been child abuse or family violence or a risk of such abuse or violence; where the application is being brought for contravention of an order that is less than twelve months old and the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order; where the application is made in circumstances of urgency; or where one or more of the parties to the proceedings are unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason).
233 Field and Lynch (n 2) 393; Sue Pidgeon, 'From Policy to Implementation – How Family Relationship Centres Became a Reality' (2013) 51 Family Court Review 231.
234 Section 12E.
235 Section 12F.
236 Section 12B(2)*(b)*.
237 Section 3.

and assist them to comply with it;[238] and gives the court discretion to penalise parties and lawyers who fail to comply with this requirement with a cost order.[239]

Besides the legislative triggering laws, the Australian government has established and funded a network of community-based family relationship centres alongside the introduction of mandatory mediation in parenting matters.[240] The object of the centres is to bring about a paradigm shift in the way people set about resolving family disputes and to replace the court system or a lawyer's office as the first port of call for divorcing and separating families.[241] At the family relationship centres, family members can receive information and education, be screened, assessed and, if suitable, undergo mediation.[242] The first joint one-hour mediation session is provided free of charge by well-qualified and accredited mediators and the second and third sessions are charged at a heavily subsidised rate—unless the clients earn less than a certain amount, in which case these sessions are also provided free of charge.[243]

### Procedural Laws

What constitutes a genuine effort is not defined in the Family Law Act.[244] However, the Family Law Rules describe the way a genuine effort should be made and as such provide various prescriptions as to how the mediation process should be conducted. In terms of the rules dealing with pre-action procedures in parenting cases,[245] a genuine effort entails exchanging a notice of intention to claim, exploring options for settlement by correspondence and complying, as far as is practicable, with the duty of disclosure.[246] The objects of these pre-action procedures include encouraging early and full disclosure by the exchange of information and documents about the prospective cases, as well as providing parties with a procedure to avoid legal action and to resolve the case quickly and inexpensively.[247] Very importantly, during the pre-action negotiations the parties are required, amongst others, to have regard for the best interests of any child, the continuing relationship between a parent and a child, and the benefits that cooperation between

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238 Section 9.
239 Section 12.
240 Kelly (n 220) 284; Parkinson (n 217) 195 (Abstract), 197, 208; Knox (n 2) 44.
241 Kelly (n 220) 282; Parkinson (n 217) 197, 208; Lawrie Moloney, 'From Helping Court to Community-Based Services: The 30-Year Evolution of Australia's Family Relationship Centres' (2013) 51 Family Court Review 214; Knox (n 2) 44–45.
242 Kelly (n 220) 282; Parkinson (n 217) 195; Moloney (n 241) 214; Pidgeon (n 233) 225, 227.
243 Parkinson (n 217) 196, 204.
244 Astor (n 231) 62.
245 Part 2 of sch 1 of the Family Law Rules.
246 Item 1(1).
247 Item 1(5).

parents brings a child.[248] Parties are also barred from using the pre-action procedures for improper purposes, for example, to cause unnecessary costs or delays.[249]

Similarly, the Civil Dispute Resolution Act sets out examples of genuine steps that could be taken by a person to resolve a dispute. These include notifying the other person of the issues that are, or may be, in dispute; offering to discuss said issues with the view of resolving the dispute; and providing relevant information and documents to the other person to enable him or her to understand the issues involved and how the dispute might be resolved.[250]

In addition, the obligations of family dispute resolution practitioners in the Family Law (Family Dispute Resolution Practitioners) Regulations include some general rules regarding the process, such as that the process must be terminated if so requested by a party, or if the family dispute resolution practitioner is no longer satisfied that the mediation is appropriate.[251]

Lastly, there seems to be a definite awareness in Australia that in order to prevent unsafe outcomes of mediation for vulnerable parties, specific steps, intentional strategies and safeguards need to be built into the mediation process. In this regard, a specialised model of mediation, which includes measures to support the hearing of parties' voices where there is a history of family violence, has been piloted in various locations around Australia.[252] The model, known as Coordinated Family Dispute Resolution, provides a multidisciplinary approach through a team of professionals, consisting inter alia of a specialist mediator, lawyers for each of the parties, and domestic violence workers, and focuses on enabling the empowerment and self-determination principles of mediation.[253] In this regard, the recent Issues Paper of the Australian Law Reform Commission on the review of the family law system also mentions legally assisted family dispute resolution, which typically involves a collaborative partnership approach between the mediator and the parties' legal representatives to ensure that each party is both legally represented and supported during the process. It also mentions the Family Group Conference process, also known as Family Led Decision-Making, as appropriate processes to be used for family law cases involving family violence or power imbalances.[254]

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248 Item 1(6).
249 Item 1(7).
250 Section 4(1).
251 Regulation 29*(c)*.
252 Field and Lynch (n 2) 396.
253 ibid.
254 Australian Law Reform Commission, 'Review of the Family Law System – Issues Paper' (IP 48 March 2018) paras 186, 224 <https://www.alrc.gov.au/publications/family-law-system-ip> accessed 14 July 2018.

## Standard-setting Laws

The expanded use of mediation following the introduction of mandatory mediation in parenting matters in 2006 called for increased mediator training and accreditation in Australia.[255] The government responded by funding the development of competency standards, providing national training packages and making regulations.[256] In terms of the Family Law (Family Dispute Resolution Practitioners) Regulations, family dispute resolution practitioners must meet the following criteria for accreditation: they must have appropriate qualifications, such as a vocational graduate diploma in family dispute resolution or a postgraduate award, or competencies, such as those demonstrated by accreditation with a Recognised Mediation Accreditation Body (RMAB) under the National Mediator Approval Standards (NMAS);[257] they must not be prohibited under law from working with children or have been convicted of a sex-related offence or an offence involving violence;[258] they must have access to a suitable complaints mechanism to which persons who use their services may have recourse if they wish to complain about services provided;[259] and they must be suitable to perform the functions and duties of a family dispute resolution practitioner.[260] In addition, an accredited family dispute resolution practitioner must undertake at least twenty-four hours' education, training or professional development in family dispute resolution in each twenty-four-month period after the date of accreditation.[261]

Although there is no legislation governing the training and accreditation of other civil mediators, they may also be accredited under the voluntary industry system, NMAS.[262] In terms hereof, they must be of good character and have completed a mediation training programme taught by RMABs for a minimum of thirty-eight hours with an additional one and a half hours assessment.[263] Re-accreditation is required every two years upon satisfaction of the requirement that they have conducted at least twenty-five hours of mediation within the two-year cycle, and engaged in continuing professional development for a period of at least twenty-five hours.[264]

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255 Knox (n 2) 30.
256 Pidgeon (n 233) 231.
257 Regulation 5.
258 Regulation 6(1)*(a)*, *(b)*, *(e)* and reg 6(2).
259 Regulation 6(1)*(c)*.
260 Regulation 6(1)*(d)*.
261 Regulation 14(1).
262 'National Mediator Accreditation System (NMAS)' (1 July 2015) Part 1 <https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf> accessed 12 July 2018. See also Meggitt and Somji (n 7) 452.
263 'National Mediator Accreditation System (NMAS)' (n 262) clause 2.
264 'National Mediator Accreditation System (NMAS)' (n 262) clause 3.

## Beneficial Laws

Mediators have extensive duties under the Family Law Act and the Family Law (Family Dispute Resolution Practitioners) Regulations. Before commencing mediation, they have an obligation to conduct an intake assessment in order to ensure that family dispute resolution is appropriate.[265] In determining whether family dispute resolution is appropriate, mediators must take into account factors such as family violence, the safety of the parties, unequal bargaining powers, the risk of child abuse, as well as the parties' emotional, psychological and physical health.[266] In this regard, a screening and assessment tool was developed for use in the family relationship centres to address family violence and child abuse in particular.[267] If mediation is appropriate, parties must be given certain information at the outset, such as the qualifications of and the fees charged by mediators; the fact that mediation must be attended before approaching the court; that the mediator has the discretion to issue a certificate regarding the outcome of the mediation; and that the type of certificate issued might be taken into account by the court in referring a matter back to mediation or in awarding costs against a party.[268] Parties also need to be informed of the mediator's confidentiality and disclosure obligations under section 10H of the Family Law Act. In terms hereof, all communications and admissions made in mediation are confidential, except insofar as the mediator has to disclose communications for purposes of complying with the law, or where the disclosure is made with the consent of the parties, for safety reasons or research purposes, or in order to issue a certificate regarding the outcome of the mediation. Likewise, parties need to be informed that in terms of section 10J of the Act, all communications and admissions made in mediation are inadmissible in any court or other proceedings, subject to certain exceptions relating to child safety issues or the issue of a certificate.[269] Once the mediation process commences, mediators have a duty of 'independence' or impartiality from all the parties to the dispute;[270] they must uphold reasonable professional standards;[271] and they must ensure that, as far as possible, the process is suited to the needs of the parties involved.[272] This would include building specific steps and safeguards into the mediation process to ensure that vulnerable parties' voices can be heard safely. Lastly, mediators are responsible for certifying whether or not the parties have made a genuine

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265 Regulation 25(1) of the Family Law (Family Dispute Resolution Practitioners) Regulations.
266 Regulation 25(2) of the Family Law (Family Dispute Resolution Practitioners) Regulations.
267 Parkinson (n 217) 206.
268 Regulation 26*(d)–(h)*.
269 As far as civil mediation is concerned, s 17A of the Civil Dispute Resolution Act confirms existing Australian laws relating to the disclosure of information or the admissibility of evidence.
270 As appears from the definition of 'family dispute resolution' in s 10F of the Family Law Act.
271 Regulation 15 of the Family Law (Family Dispute Resolution Practitioners) Regulations.
272 Regulation 29(a) of the Family Law (Family Dispute Resolution Practitioners) Regulations.

effort,[273] and as such have the duty of assessing the performance of their clients in mediation.[274]

Parties' rights and duties are addressed in the Family Law Act and the Family Law Rules. Besides having a duty to make a genuine effort to resolve parenting disputes,[275] they have a duty to make full and frank disclosure of all relevant information in a timely manner.[276] Interestingly, these duties are extended to outside parties, namely the parties' lawyers, who bear the responsibility of advising their clients, as early as is practicable, of ways of resolving disputes without starting legal action, of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty.[277] Parties' rights include that, if they reach an agreement in the mediation process, they may arrange to have the agreement made binding by filing an application for a consent order.[278]

### Brief Discussion of Current Position Regarding Mediation

From an evaluation of the 2006 family law reforms, it appears as though family dispute resolution works well for many parents and their children.[279] Positive effects of the introduction of mandatory mediation and the establishment of family relationship centres include a sharp decline in the number of applications for parenting orders before the courts and a corresponding growth in the number of family law clients opting for family mediation.[280] The reforms appear to have led to a consistent approach to mediation throughout Australia.[281] It is also apparent that the government's consistent approach to mediation, as well as its willingness to take on the 'common gatekeeper' role, have helped promote the success of the mandatory mediation model.[282] It is also clear, however, that a mandatory mediation model requires extensive screening and assessment protocols before the commencement of the process and, once the process commences, special safeguards need to be built into the process to protect the parties and ensure just outcomes.[283] As regards their new role as assessors—in deciding whether the parties have made a genuine effort to resolve their disputes

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273 In terms of s 60I(7) of the Family Law Act and reg 26 of the Family Law (Family Dispute Resolution Practitioners) Regulations.

274 Astor (n 231) 61.

275 Section 60I(1) of the Family Law Act.

276 Item 4(1) of Part 2 of sch 1 to the Family Law Rules.

277 Item 6(1) of Part 2 of sch 1 to the Family Law Rules.

278 Item 3(1) of Part 2 of sch 1 to the Family Law Rules.

279 Rae Kaspiew, Matthew Gray, Ruth Weston and others, 'Evaluation of the 2006 Family Law Reforms: Summary Report' (Australian Institute of Family Services December 2009) 8 <http://dro.deakin.edu.au/eserv/DU:30029431/klettke-evaluationsummary-2009.pdf> accessed 15 July 2018; Field and Lynch (n 2) 393.

280 Kaspiew and others (n 279) 17; Kelly (n 220) 283; Parkinson (n 217) 208; Knox (n 2) 44.

281 Knox (n 2) 48.

282 Knox (n 2) 48; Pidgeon (n 233) 231.

283 Knox (n 2) 44, 46; Nussbaum (n 3) 364, 402.

in the mediation process—some mediators argue that it compromises their independence and may change their relationship with the parties.[284] Nonetheless, others are content with this new role and confident that they can use the 'genuine effort' requirements to remind parents of their obligation to take mediation seriously.[285] Lastly, in the light of the success of mandatory mediation in parenting matters, the Australian Law Reform Commission put the question out there whether property and financial matters should not also be the subject of mandatory mediation.[286]

## A BRIEF DISCUSSION OF THE CURRENT POSITION REGARDING MEDIATION IN SOUTH AFRICA

South Africa currently has a proliferation of statutes, regulations and rules dealing with mediation.[287] In addition, various private institutions, such as the National Accreditation Board for Family Mediators (NABFAM)[288] and the Dispute Settlement Accreditation Council (DiSAC),[289] also attempt, respectively, to regulate family and civil mediation conducted by mediators accredited with these institutions' member organisations.[290] It is therefore apparent that South Africa is currently following a mixed regulatory approach to mediation consisting of hard law and softer forms of regulation.

Family mediation in particular has gained significant credibility in addressing family disputes.[291] Triggering laws dealing specifically with family matters are found in legislation. The first example comes from the Mediation in Certain Divorce Matters Act 24 of 1987, which makes

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284 Astor (n 231) 63.

285 ibid.

286 Australian Law Reform Commission (n 254) para 199.

287 Alan Rycroft, 'Settlement and the Law' (2013) 130 South African LJ 197, explains that we have forty-nine statutes and numerous regluations and rules dealing with mediation.

288 NABFAM emerged in 2010 from the need for a national accrediting body which promotes mediation and the ethical standards and integrity of practicing family mediators in South Africa: NABFAM, 'NABFAM Background' <http://nabfam.co.za/> accessed 20 July 2018.

289 DiSAC was officially launched on 5 March 2010 with the initial objective of promoting the introduction of mandatory mediation in the South African Courts: DiSAC, 'Mediation Accreditation Standards' (November 2011) para 2.1 <http://disac.co.za/wp-content/uploads/2014/12/DiSAC-Mediation-Accreditation-Standards-VERSION-1.pdf> accessed 23 July 2018.

290 Such as Tokiso Dispute Settlement, Equillore Dispute Settlement Services, Conflict Dynamics, the Association of Arbitrators of Southern Africa, the Mediation Company, the South African Association of Mediators in Divorce and Family Matters (SAAM), the KwaZulu-Natal Association of Family Mediators (KAFAM) and the Family Mediators Association of the Cape (FAMAC).

291 See eg *FS v JJ* 2011 (3) SA 126 (SCA) para 54, where the Constitutional Court emphasised that mediation in family matters is a useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be the first resort for family disputes. See also Amanda Boniface, 'Family Mediation in South Africa: Developments and Recommendations' (2015) 78 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 397–406; Madelene de Jong, 'International Trends in Family Mediation – Are we Still on Track?' (2008) 71 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 454–472;

provision for limited court-connected mediation by the Office of the Family Advocate in certain children's issues upon or after divorce.[292] The second example comes from the Children's Act 38 of 2005,[293] which expressly mandates mediation in some instances,[294] grants the court the discretion to order mediation in certain other instances,[295] and encourages mediation (or at least a conciliatory approach) in other instances.[296] Nevertheless, there is no over-arching or comprehensive mediation legislation in South Africa dealing with family law disputes.[297] In respect of civil matters in general, mediation triggers can be found in the Uniform Rules of Court, in terms of which mediation is a matter that must be dealt with at a pre-trial conference in High Court matters,[298] as well as the court-annexed mediation rules, which facilitate the voluntary submission of civil disputes in the Magistrates' Courts to mediation.[299]

Procedural laws are found in the court-annexed mediation rules, which make provision for the appointment of a mediator by the clerk of the court if the parties cannot agree on one,[300] and for the fee structure of mediators,[301] which fees are to be shared equally by the parties unless otherwise agreed upon.[302] Interestingly, the definition of mediation includes prescripts for the mediation process in that it stipulates that mediation means the process by which a mediator assists the parties 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

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292 Madelene de Jong, 'Mediation and Other Appropriate Forms of Alternative Dispute Resolution upon Divorce' in Jacqueline Heaton (ed), *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta 2014) 607.

293 Mohamed Paleker, 'Mediation in South Africa's New Children's Act: A Pyrrhic Victory' (Conference Paper delivered at the Asia-Pacific Mediation Forum Conference, 2008) 1–28 <http://www.asiapacificmediationforum.org/resources/2008/7-Mohamed_Paleker.pdf> accessed 7 December 2018; Madelene de Jong, 'Opportunities for Mediation in the New Children's Act 38 of 2005' 2008 (71) Tydskrif vir Hedendaagse Romeins-Hollandse Reg 630–641.

294 See s 21, which deals with the parental responsibilities and rights of unmarried fathers, and s 33, which deals with parenting plans.

295 See eg ss 49, 70 and 71, which deal with lay-forum hearings, and s 69, which deals with pre-hearing conferences.

296 See eg ss 22(1) and 30(3), which deal with the conferment of parental responsibilities and rights on third parties, s 234(1), which deals with post-adoption agreements, and s 292 read with ss 293 and 295, which deal with surrogate motherhood agreements.

297 South African Law Reform Commission, *Family Dispute Resolution: Care of and Contact with Children* Issue Paper 31, Project 100D (2015) 102, 107 <http://www.justice.gov.za/salrc/ipapers/ip31_prj100d.pdf> accessed 28 July 2018.

298 Rule 37(5) read with rule 37(6)*(d)* of the Uniform Rules of Court.

299 Rules 72 and 75(1) and (2) of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa.

300 Rules 77(4)*(a)*, 78(3) and 79(3).

301 Rule 84(3) and sch 1, entitled 'Mediators' Tariff of Fees', to GG 38163 (31 October 2014).

302 Rule 84(1) and (2).

options in an attempt to resolve the dispute.[303] Additional prescripts for the process—such as adequate and equal opportunities for the parties to be heard, the proportions in which the mediator's fees are to be paid and the termination of the process—are set out in both NABFAM and DiSAC's codes of professional conduct for mediators.[304]

Standard-setting laws are found in the court-annexed mediation rules and the accreditation standards of both NABFAM and DiSAC. In terms of the Rules Regulating the Conduct of Proceedings in the Magistrates' Courts, only mediators who comply with the qualifications, standards and levels determined by the Minister, and whose names are included in the schedule of accredited mediators published by the Minister, may be appointed.[305] In terms of these qualifications and standards, a mediator must have completed a forty-hour mediation training programme consisting of both theoretical and practical training,[306] be certified by and affiliated to a mediation organisation,[307] and be a person of good standing.[308] A distinction is made between a Level 1 mediator, who must have completed high school[309] and possess basic computer literacy skills, and a Level 2 mediator, who must have a university degree[310] and five years' mediation experience.[311] NABFAM sets the following accreditation requirements for family mediators who wish to be certified by and affiliated to one of its member organisations: completion of an accredited mediation training course as well as additional training in law and/or psychology, depending on the mediator's background training; participation in a minimum of three supervised mediation sessions of at least one hour each; payment of a member organisation's membership fees; confirmation that the mediator has not been convicted of any criminal offence against children and any other criminal offence in the past two years; and confirmation that he or she subjects him- or herself to NABFAM's Code of Conduct and Ethics and the relevant member organisation's disciplinary procedures.[312] Accreditation is valid only for one year and accredited mediators must acquire fifteen

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303 Rule 73.

304 NABFAM, 'National Standards for Family Mediation' (March 2018) section E para 3 <http://nabfam.co.za/wp-content/uploads/2018/06/NABFAM-NNS-March-2018.pdf> accessed 23 July 2018; DiSAC (n 289) para 9.3.

305 Rule 86(1)–(2).

306 Item 1.1*(a)–(b)* of sch 2, entitled 'Qualification and Standards for Accreditation of Mediators', to GG 38163 (31 October 2014).

307 Item 2 of sch 2 to GG 38163 (31 October 2014).

308 Item 5 of sch 2 to GG 38163 (31 October 2014).

309 Ie a minimum of an NQF level 4 competence under the provisions of the National Qualifications Framework Act 68 of 2008.

310 Ie an NQF level 7 qualification or higher competency under the provisions of the National Qualifications Framework Act 68 of 2008.

311 Item 3 of sch 2 to GG 38163 (31 October 2014).

312 NABFAM (n 304) s A para 1. DiSAC has similar accreditation requirements for civil mediators. See DiSAC (n 289) para 3.

continuing professional development (CPD) points every year to qualify for re-accreditation.[313]

Numerous beneficial laws are contained in the court-annexed mediation rules. Mediator obligations include the duty to inform parties at the commencement of the mediation process of the purposes and the ground rules of mediation as well as the facilitative and impartial role of the mediator.[314] The mediator must also encourage the parties to make full disclosure, advise them that all discussions and disclosures made during the process are confidential and inadmissible as evidence in any court or other forum, assist them in drafting a settlement agreement if the dispute is resolved, and submit a report to the clerk of the court on the outcome of the mediation.[315] However, it is not for the mediator to determine the credibility of any person participating in the mediation.[316] The NABFAM and DiSAC codes of professional conduct for mediators include most of these obligations of mediators and also specify the mediator's duty to inform the parties of the following: the mediator's relevant education, background and experience; whose code of conduct the mediator observes; and which process would apply in the event of a party believing that the mediator has not met the standards of the stated code of professional conduct.[317] Only currently accredited mediators may use the title of accredited mediator and the relevant board's name and logo. In addition to mediator obligations, the court-annexed mediation rules further set out various rights and obligations of the parties. The parties are obliged to conclude a written mediation agreement with particulars about themselves, the time-frames for the mediation, the confidentiality and privilege attaching to disclosures at the mediation, as well as the consequences of any party failing to abide by the agreement.[318] The parties must attend mediation sessions in person and may be assisted by a legal practitioner.[319] The parties are, however, under no obligation to make disclosures.[320] In addition, all time limits prescribed 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

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313 NABFAM (n 303) s C. Five of the fifteen CPD points per year may be from five-hour *pro bono* sessions.

314 Rule 80(1)*(a)–(d)*. Item 7 of of sch 2 to GG 38163 (31 October 2014) further elaborates on the mediator's duty of impartiality, item 8 imposes a duty on a mediator to disclose any conflict of interest and item 9 contains more detailed obligations of a mediatior during mediation proceedings.

315 Rules 80(1)*(e)–(i)* and (2) and 82(1).

316 Rule 80(1)*(b)*.

317 NABFAM (n 303) s E para 1; DiSAC (n 289) para 9.1.

318 Rule 77(4). Although no mention is made in the rules of what the consequences would be of any party's failure to abide by the agreement to mediate, it appears from Form MED-6 that such party shall be liable for and shall indemnify the non-breaching parties and the mediator for any loss, including all costs, expenses, liability and fees.

319 Rule 85(1) and (4).

320 Rule 80(1)*(g)*.

an agreement to mediate to the conclusion of the mediation proceedings.[321] Lastly, if a settlement is reached at mediation in a dispute which is the subject of litigation, the parties may, by agreement, have the settlement agreement placed before a judicial officer in chambers to make it an order of court.[322]

## VALUABLE LESSONS FOR SOUTH AFRICA FROM THE FOREIGN JURISDICTIONS EXAMINED

Internationally, there seems to be a definite trend towards comprehensive formal legislative regulation of mediation. All the foreign jurisdictions examined have opted for centralised and extensive legislation on the practice and regulation of mediation. Ghana has enacted general ADR legislation, which covers mediation, inter alia; Austria and Singapore have enacted general mediation legislation making special, albeit limited, provision for family matters; and Australia has enacted sector-specific family mediation legislation. Although a blind transfer of regulatory solutions from foreign legal systems runs the risk of failure, there are specific lessons to be learnt from each of the jurisdictions discussed above.

In the first place, it is abundantly clear that South Africa needs extensive mediation legislation to give mediation the formal recognition it deserves. Whether the country needs general mediation legislation making specific provision for family matters, or sector-specific family mediation legislation, is a question that needs to be carefully considered by the South African Law Reform Commission. In considering this question, care should be taken not to contribute to a piecemeal proliferation of mediation statutes. In this regard, Nussbaum points out that

> [w]here legislatures construct different dispute resolution procedures that are all called 'mediation', each with particularized legal rights and responsibilities based on the type of dispute, legislators do a disservice if the public (and the legal community) does not know what to expect from a legally mandated dispute resolution process.[323]

Care should also be taken to prevent a situation, such as that found in Singapore, where there is no uniform set of legal principles governing all the different types of mediation, namely private mediation, court-based mediation, and community-based mediation.

Whichever model is chosen for the mediation legislation (general or sector-specific), it is important not to overlook the Ghanaian experience, where some traditional leaders felt excluded from consultations regarding

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321 Rule 81.
322 Rule 82(4).
323 Nussbaum (n 3) 407.

the enactment of the ADR Act in that country. It is therefore very important to get the buy-in from all stakeholders, including the Congress of Traditional Leaders of South Africa (Contralesa), and to enact legislation that builds on the successes of customary African dispute resolution (AfDR) and infuses modern mediation with the values that underlie AfDR.[324]

To ensure that mediation does indeed take place, that the process is conducted in an appropriate manner by qualified professionals and that all stakeholders' rights are protected, we need legislation that provides for proper triggering laws, procedural laws, standard-setting laws and beneficial laws.

As far as triggering laws are concerned, there are important lessons to be learnt from all the foreign jurisdictions discussed above. First, the experience of Austria, where there are virtually no triggering laws and a very low uptake of mediation, despite the fact that the country has had extensive mediation legislation for almost fifteen years, indicates that mediation legislation should include expansive requirements to mediate before litigating. All the other jurisdictions do in fact make provision for mandatory mediation. In Ghana, mediation is mandatory in the discretion of the court;[325] in Singapore, all divorces where minor children are involved are subject to mandatory court-based mediation;[326] and in Australia, mediation is mandatory in all parenting matters.[327] It is also insightful that the Australian Law Reform Commission is currently investigating the question of whether mediation should not be mandatory in all family matters, including property and financial matters upon divorce.[328] It is therefore my opinion that South African legislation should make mediation mandatory in all family and other civil matters. In addition, as in Singapore,[329] a party's refusal to engage in mediation should result in definite cost sanctions against him or her. However, where mediation is mandatory, the government should make provision for state-subsidised mediation services for parties who earn less than a certain amount, as is the case in Australia (and even Austria, where mediation is not mandatory).[330] In this regard, attention could also be paid to the introduction of community-based mediation centres, such as those already operative in Singapore and Australia[331] (and proposed for Ghana).[332]

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324 See also Boniface (n 54) 379–385 and 391–393, who distinguishes between Western-style mediation and African-style mediation and indicates how the principles of African group-style mediation can be used to positively change the way that divorce and family mediation is practised in South Africa.

325 Section 64 of the ADR Act.

326 Section 50(3A)–(3E) of the Women's Charter.

327 Section 60I(7) of the Family Law Act.

328 Australian Law Reform Commission (n 254) 199.

329 See discussion above.

330 See discussions of triggering laws in Austria and Australia above.

331 See discussions of triggering laws in Singapore and Australia above.

332 See discussion of triggering laws in Ghana above.

As regards procedural laws, it appears that all the foreign jurisdictions investigated endeavour, in one way or another, to legislate how the parties should resolve their disputes and/or provide methods of dealing with power imbalances: in Ghana the parties have to present the mediator and the other party or parties with a memorandum setting out their position with regard to the issues which require attention;[333] in Singapore provision is made for mediation sessions to be conducted online by electronic means;[334] in Austria a specific form of mediation, namely co-mediation, is prescribed for family and divorce mediation;[335] and in Australia the parties are required to have regard to the best interests of any child,[336] they are to take genuine steps to resolve a dispute by making a full discovery of relevant information and documents,[337] and specialised methods or models of mediation, such as Coordinated Family Dispute Resolution and the Family Group Conference process, are recommended for family law cases involving family violence or power imbalances.[338] In certain respects, formalising parts of the mediation process adds structure that can help parties engage in more informed and efficient negotiations.[339] It is therefore my opinion that South African legislation on mediation should contain definite prescriptions on how the mediation process is to be conducted so as to neutralise power imbalances and ensure that an informal and private process, like mediation, does not compromise social justice. Such prescriptions should include thorough screening processes to detect power imbalances, domestic violence and abuse; mandatory discovery procedures at the onset of the mediation process; and the use of specialised methods for cases involving power imbalances.

With regard to standard-setting laws, it appears that where the government is responsible for the accreditation of mediators and the maintaining of a list of accredited mediators, the period for which mediators are accredited is much longer than the one-year period currently adhered to in South Africa. In Austria, a mediator's first accreditation lasts for five years and thereafter, he or she can be re-accredited for another period of ten years upon meeting certain requirements.[340] In Australia, accredited mediators have to be re-accredited only every second year.[341] Although legislative solutions to professional certification are usually expensive and require government organisation and financing,[342] an extension of the accreditation

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333 Section 73 of the ADR Act.
334 Section 3(3) of the Mediation Act.
335 *Bundesministerium für Familien und Jugend* (n 188).
336 Item 1(6) of Part 2 of sch 1 to the Family Law Rules.
337 Section 60I(1) of the Family Law Act and item 1(5) of Part 2 of sch 1 to the Family Law Rules.
338 See discussion of procedural laws in Australia above.
339 Nussbaum (n 3) 414.
340 Section 13(1)–(3) of the Civil Law Mediation Act.
341 Regulation 14(1) of the Family Law (Family Dispute Resolution Practitioners) Regulations.
342 Alexander and Steffek (n 1) 30.

period would do much to decrease the administrative burden on the state and/or other private institutions responsible for the accreditation of mediators. It further transpires that differentiation between various levels of accredited mediators should be considered. In both Ghana and Singapore, private mediation organisations make provision for a four-tiered mediation credentialling scheme,[343] whereas in South Africa, mediation organisations currently make no such distinction and the court-annexed mediation rules only make provision for two levels of accredited mediators.[344]

Lastly, although South Africa's court-annexed mediation rules make provision for various beneficial laws, an examination of these laws in the foreign jurisdictions discussed above reveals that there are very important rights and duties for which we currently make no provision. In addition to the myriad of responsibilities that mediators are expected to fulfil, they should be required to conduct a proper intake assessment and to certify whether or not parties are participating in the process in good faith, as mediators in Australia are expected to do.[345] Consideration should also be given to requiring mediators to keep records of the various stages of mediation for a certain period, which is a requirement in Austria.[346] Like Ghana and Austria, mediators in South Africa should be barred from playing sequential or multiple roles in one and the same case.[347] In the light of all their responsibilities, and the scant provision for mediator rights in the court-annexed mediation rules, provision should definitely be made for mediator indemnity for any act or omission in the bona fide discharge of their functions, as is the case in Ghana.[348] Additional party obligations should include the duty to engage in the mediation process and participate in good faith, as is required of participants in Singapore and Australia,[349] and the duty to make full and frank disclosure of all relevant information and documentation in a timely manner, as is required in Australia.[350] Without the imposition of such a duty to discover on participants, the mediation process is very likely to fail. Furthermore, although our court-annexed mediation rules make provision for mediation agreements in disputes that are the subject of litigation to be made an order of court, parties should have the right to have any signed settlement agreement, even in respect of disputes that have never been before the court, recorded as court orders and enforced as such, as is the position in all the foreign jurisdictions examined.[351] As regards outside party duties, consideration should be given to requiring all

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343 See discussions of standard-setting laws in Ghana and Singapore above.
344 Item 3 of sch 2 to GG 38163 (31 October 2014).
345 See discussion of beneficial laws in Australia above.
346 See discussion of beneficial laws in Austria above.
347 See discussions of beneficial laws in Ghana and Austria above.
348 Section 86(2) of the ADR Act.
349 See discussions of beneficial laws in Singapore and Australia above.
350 Item 4(1) of Part 2 of sch 1 to the Family Law Rules.
351 See discussions of beneficial laws in all the foreign jurisdictions above.

legal practitioners to advise and inform clients about all their duties in terms of a mandatory mediation process, as is the case in Australia.[352] Lastly, as regards outside party rights, mediation legislation should expressly protect and mention children's best interests in all matters that affect them, as is the case in Singapore[353] and Australia.[354]

Taking heed of all the above lessons and insights will surely go a long way towards assisting South Africa to enact extensive mediation legislation which would maximise the benefits of mediation, minimise its potential harms, and protect mediators, the parties and also outside parties.

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352 Item 6(1) of Part 2 of sch 1 to the Family Law Rules.
353 Section 12(4) of the Mediation Act.
354 Item 1(6) of Part 2 of sch 1 to the Family Law Rules.