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Framing a Project to Engage the ADR
Community in Developing a Public Policy
Framework for Mediation in the Republic of
Ireland

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## Abstract

As a process, mediation has evolved in the Republic of Ireland as an increasingly significant part of the work of alternative dispute resolution agencies and services funded by the State. This evolution has occurred without any overarching policy framework being in place.  Yet the lack of an policy framework means that there is no  integrated understanding of what is being done, by whom and to what return on the State's investment.  This 2020 project , funded by the Irish Research Council New Foundations programme, sets out to bring together all those ADR agencies and services currently involved in mediation provision in the Republic of Ireland, who are funded by the Irish State.  There is limited research to date on mediation provision and impact in Ireland and a growing interest in developing a systematic evidence base in relation to mediation. The project will enable shared understanding of current mediation provision, the development of a draft public policy framework and a basis for engaged research into the future.

## 1.  Introduction

Ireland has a history of mediation evolution during the 20<sup>th</sup> century.  Peace centres were established in the north of Ireland in response to the Irish "troubles" from 1965. Peace workers in the Glencree Peace and Reconciliation Centre have engaged in practical peace-building and reconciliation in Ireland, north and south, since 1974. (Corrymeela, 2013; Glencree, 2013).

Alternative dispute resolution has evolved as the State recognised the need to have alternatives available to the court system.   Mediation, as a dispute resolution process for separating couples, has been funded in the Republic of Ireland since 1984.   The first community mediation service was established in the Republic of Ireland in 1990; the Tallaght Mediation Service. Since that time community services have been established in many centres in Ireland with the support of Community Law and Mediation's service, a community mediation service which was founded in Dublin in 2004 to address the need for free mediation at community level. Community mediators generally work with conflict between neighbours, noise complaints, housing disputes, harassment, conflict within families, and some workplace disputes. Following a report in 1998 by the National Crime Forum, restorative practices began to be incorporated into the justice system in Ireland.  In line with this development, restorative practice and mediation has also developed in schools, workplaces, faith communities, and deeply-entrenched political violence with the objective of building positive relationships and a sense of community (Casey et al., 2013).  Mediation services have also developed in conjunction with restorative justice in the community as in the case of the Traveller Mediation Service.

Other State funded agencies began providing mediation from 2001 (e.g. Equality Tribunal Mediation Service).   Various agencies and services have developed since then in which mediation has been provided along with a range of other dispute resolution processes from legal advice, to conciliation, to adjudication.  There do not appear, however, to be links between legislative frameworks, ministerial oversight, or sharing and learning from experiences across the various agencies and services.  In the absence of systematic research, the observation made is that State-funded mediation provision, across the Republic of

Ireland, appears to have been more reactive and siloed, rather than a planned, strategic response of the Irish government to the one dispute resolution process that puts citizens at the centre of finding workable solutions to disputes they have with one another as individuals, groups or organisations.

Since 1992, the Mediators' Institute of Ireland (MII) has been developing as an organisation. – and, as part of that development, mediation has been developing as a profession. During that time, mediation has increasingly been offered by qualified mediators working in the private sector. In September 2020, the MII has 663 members, operating across a range of areas including: family - separating couples, elder, international child abduction; workplaces; commercial; farming; and community. Many of those are privately contracting mediation services. Others are employed in organisations, funded by the State, who provide mediation as part of the suite of ADR processes mentioned earlier.

A significant development with, impact on practice, is the legislative framework that has been enacted in the Republic of Ireland. In particular, the Mediation Act 2017 came into force on 1 January 2018. Good quality research is essential to understanding what is happening, how and why it is happening to inform future decision – from individuals, groups and across larger cohorts. This is important in measuring contributions and challenges for government policy and regulation, and development of the profession of mediator and mediation standards. It is also key to better informing decisions about the use of mediation within the alternative dispute resolution suite of conflict management choices available to the State.

The challenge at this point in time, is to change the national focus from mediation as simply a process used, to mediation as a strategy. This led me to ask the question of how the field of mediation has developed in relation to work done by State-funded agencies and services. A number of agencies and services now incorporate the option of mediation in their policies and procedures for addressing disputes. Although substantial development has occurred in relation to mediation, to date the only systematic review of mediation has been conducted in relation to workplace mediation in Ireland (Kenny, 2014, 2018).

If the State and its ADR agencies are going to be in a position to meet growing demand for mediation, then there is a strong likelihood that demand will be met through contracting out of mediation in addition to the employment of mediators. In that instance the needs must be understood, the standards coherent and consistent, reporting integrated to allow the State to measure return on investment in ADR agencies and services.  Currently there are a number of agencies and services, operating under various legislative instruments, reporting to various government departments.   That means a lack of a coherent national strategy for the continued development and funding of mediation.   It means that decisions made are piecemeal; development of the agencies and their standards are siloed; learning is not transferring within the system.

## 2.  Alternative Dispute Resolution (ADR)

As a number of the agencies and services who now provide mediation are classed as ADR bodies, it is important to understand this term.  ADR has been used for centuries and in various circumstances. ADR spread around the world, first through common-law countries such as the United States, Canada, the UK, Ireland, Australia and New Zealand.  It is now an international trend.   ADR programmes initially emerged in the United States following political and civil upheaval during the civil rights movement of the 1960s. Alternative dispute resolution focuses more, but not exclusively, on interest-based approaches in individual and collective conflict so that the parties can find mutually acceptable ways of advancing their interests rather than power or rights-based approaches where possible. This interest-based focus refers to recognised and unrecognised stakes that are affected by the interaction of the parties concerned (Ury et al., 1988; Brown, 1999; Steadman, 2003; Boulle, 2005; Menkel-Meadow, 2010;).

From the latter part of the 20th century, ADR was used predominantly, particularly in the US, for the dual purposes of reducing litigation and resolving conflict. A seminal event in 1976 was the Pound Conference held in Harvard Law School where the US Supreme Court's Chief Justice, Warren Burger, called for the development of informal dispute resolution procedures that would "unclog the crowded dockets of the courts" (Waldman, 1997: 703).   ADR innovations look to minimise conflict, and provide quicker, collaborative and more effective

processes for resolving conflict as it arises.  The emphasis is on putting into practice, mediation, conciliation, and arbitration for reaching settlements to disputes.

## 2.1    ADR and the Republic of Ireland

The Law Reform Commission in Ireland has defined ADR as "... a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes" (2010: 13).  While ADR practices modify conventional dispute resolution practices, primarily by prioritising interest-based over rights-based solutions, they are reportedly provided by specialist and neutral practitioners with no current vested interest in the outcomes of the conflict. The view has also emerged of ADR as an institutional field (Purdy & Gray, 2009: 356): "an array of organisations that are joined by a common interest or service". This is where a public policy framework becomes key.

## 2.2    Mediation

Mediation comes from the Latin root "mediare" to halve, while the translation for the Greek word to mediate means to stand between. This duality of meaning is a pattern that is apparent in the mosaic of general mediation practice.  Mediation is described as a conflict intervention practice that aims to influence conflict behaviour and outcomes in a positive fashion, and/or an alternative to the experience of a court judgement. It is practised in a multitude of different settings internationally - and in Ireland. The practice, philosophy and understanding of mediation has developed more fully in the US following work by pioneers in conflict resolution such as Mary Parker Follett (1918). The US American Jewish community set up a mediation forum in 1920; offered family mediation in 1939, and the US Civil Rights Act of 1965 created a service designed to mediate community and civil rights disputes. Mediation began in England in the late 1970s with family mediation and then, in 1984, community mediation and victim/offender services were set up following training from American Quakers (Moore, 2003).

There is no universally agreed definition of mediation generally. The definition of the Law Reform Commission, Ireland (2010:22) is that mediation is:

> A facilitative and confidential structured process in which the parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute with the assistance of an independent third party, called a mediator.

Mediation is a very specific ADR practice. Mediation is also a relatively new profession (Greenwood et al., 2002; Raines et al., 2013), with a slowly growing knowledge base. Research in the field has tended to focus on the functional and outcome elements of the process. In 1989 it was concluded that "research in mediation has developed in tandem with this emerging field of practice". However, by 2006, the observation was that the "use of mediation in its myriad forms far outstrips systematic research on the process.". This suggests that while there was a point in time when significant research took place, particularly into labour relations mediation, there is less evidence that research has kept up with practice in more recent times (Kressel & Pruitt, 1989: 2; Kressel, 2006: 728; Wall & Dunne, 2012). It is only since 2013 that research has begun to be undertaken in the area of mediation in the Republic of Ireland and that has, in the main, been specific PhD research in child-inclusive mediation; employment litigation and dispute resolution; intuition; separating couples; workplace mediation; child welfare mediation; peer mediation; restorative practice in organisations; and international child abduction mediation. Some research has also been conducted in partnership with the Mediators' Institute of Ireland, or in pracademic (Susskind, 2013) alliances between the Financial Services and Pensions Ombudsman, and the Kennedy Institute Research Group based in Maynooth University (Curran et al., 2016a, 2016b, 2017).

The theory of dispute system design proposes an integrated view of dispute resolution methods (Lynch, 2001). A system is defined as "a complex whole the functioning of which depends on its parts and the interaction of those parts" (Jackson, 2003: 9). There is no general theory of mediation although there are calls for the development of a generic "mega-theory" and a more integrated vision that provides a holistic view of mediation and its complexity (Zariski, 2010). The theoretical framework through which mediation is considered often varies – from legal, to industrial relations to general mediation – depending on what specifically is

being researched.  The theoretical framework for this research project is institutional.  A simple model for initial institutional understanding can be seen in Figure 1 below.

**Figure 1:  Variations in Mediation Provision (based on Wade, 2004)**

| Voluntarist system | ⟷ | Regulated system |
| Individualised | ⟷ | Collective |
| Tax Payer Funds | ⟷ | Users Fund Mediation |
| Mediators Employed | ⟷ | Mediators contracted |
| Voluntary Mediation | ⟷ | Mandatory Mediation |
| Voluntary Agreements | ⟷ | Legally Binding Agreements |
| Confidential | ⟷ | Reports to Court |

2.3     Evolution of the Profession of Mediator

In 1992 the Mediators' Institute of Ireland (MII) was established by a number of those actively involved in mediation at that time (Corry, 2011; Ballymun Community Law Centre, 2014).  The MII, a registered charity, is the professional association of mediators on the island of Ireland and acts as a self-regulating body for the profession. This organisation of mediators was primarily an affiliation of family and community mediators until the early part of the 2000s. In the early 2000s, a 'grand-parenting' system was used by the professional cohort of mainly family mediators to develop workplace mediators who had undertaken training programmes in University College Dublin.  The MII introduced its 60 hour training programme with skills-based competency test in 2007. In 2016, there were 35 accredited mediation training programmes running in Ireland. Since 2007, all members of the MII have also been bound by a Code of Ethics & Practice. An evaluation of practice applied by the International Mediation Institute (IMI) was also made available to members in 2011 and ten MII members passed that assessment.  From 2007-2020, there was a growth in MII overall membership from 169 to 668.

## 3. ADR Agencies and Services in the Republic of Ireland

Mediation is more likely to take place when institutions of the State advocate for mediation when disputes have been referred to them. Based on what is in the public domain, we currently know who the various agencies and services are that provide mediation to the people of Ireland as part of their dispute resolution work (see Figure 2). Some of the detail of the evolution of these agencies and services is available through Annual Reports.

**Figure 2: State-funded Agencies and Services Providing Mediation**
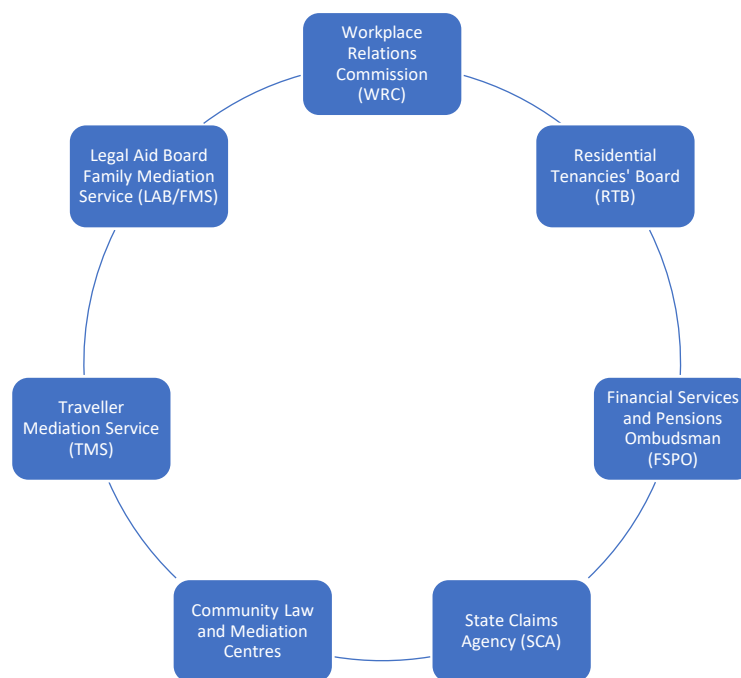


## 4. Working Together to Develop a Public Policy Framework

The research will bring together representatives of each of these agencies and services to share their work with other another and to learn from one another. As a scholar practitioner or pracademic (Susskind 2013; Brannick & Coghlan, 2007), the outcome of research for this researcher has to have both academic credibility and professional relevance. Most importantly this research will be done using co-operative enquiry which is a research method specifically suited to the research of an emerging field by academics and practitioners. It is a form of active research that involves working with other people who share concerns and

interests about a topical area. The purpose of the co-operative enquiry model is to develop new and creative ways of looking at the subject matter and applying that enlightened perspective to enable practice development.
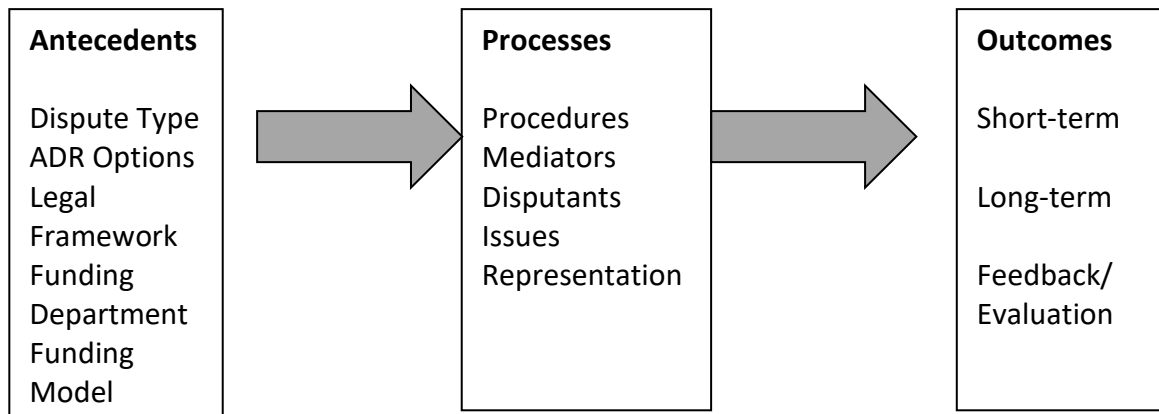
This dialogue-based approach is important within mediation research as the mediation process itself contains those ingredients of storytelling, defining an agenda of issues, exploring options and reality testing valid options in terms of their reliability and sustainability.

The key themes to be explored through this research are:

- The context of regulation and State funded agencies and services at the macro-level, including sector and size.
- Mediator characteristics such as training, background, mediator institutions and practice at the meso-level.
- The beliefs and attitudes which act at the micro-level to the use of mediation, including conflict characteristics such as participation, issues arising.
- Mediator styles and the approach used by mediators in their engagement in mediation and the process of mediation used across the various agencies and services.
- The short and long-term outcomes that arise from mediation, including any interactions on the part of agencies or services that may impact the wider conflict system.

Together the agencies and services will work with the researcher and the MII to form an integrated understanding of their mediation use and its impact in the Republic of Ireland using the conventional social science framework of antecedents, process and outcomes per Figure 3 below.

**Figure 3: Framework of Antecedents, Processes and Outcomes**

| Antecedents | Processes | Outcomes |
|---|---|---|
| Dispute Type<br>ADR Options<br>Legal<br>Framework<br>Funding<br>Department<br>Funding<br>Model | Procedures<br>Mediators<br>Disputants<br>Issues<br>Representation | Short-term<br><br>Long-term<br><br>Feedback/<br>Evaluation |

## 5. Next Steps

The next step is to bring together the representatives from each agency or service. This will begin as online engagement with meetings in person as safe to do so following public health advice. If we are to develop a full picture of State-funded agencies and services offering a key dispute resolution pathway of mediation, then we need to involve the organisations in that conversation. The four key objectives are to:

I.     To build on the micro case studies to enhance the historical understanding of the evolution of each organisation.

II.    To share together and understand the current approaches with a view to identifying similarities and differences.

III.   To  consider the future needs of each organisation.

IV.    To co-create and propose a policy framework for mediation in the Republic of Ireland.

Working together to agree who, from each agency and service might participate in the project team is step one. Then each participant documents and shares their organisation's experience. These are then integrated to develop an overall framework. Future search and design principles are used to discuss together the policy framework needs – consistencies, gaps, etc. A projection for the decade 2021-2031 could then be defined. The group would also work together to identify who needs to be presented with this proposed policy

framework at State level for conversation.

Additional benefits that might accrue include: cooperation rather than potential competition; regular gatherings to share and learn; all boats rising; consistent and coherent messages in relation to mediation; evidence of outcomes.  Professional standards in tandem with MII so that the profession of mediator has a pool of jobs/contracted roles available.

**Conclusion**

In sum, there are diverse areas in which mediation  has evolved in Ireland.  The focus of this research project is on those agencies or organisations funded by the State with a view to co-creating a coherent policy framework.  It can be assumed, in the absence of systematic research, that variations exist in terms of: legal frameworks; purpose of the agencies; funding of same; what prompts mediation being used; who the mediators are; the processes used; the outcomes or impacts achieved; feedback and reporting to inform future State decisions about the use of mediation.  This research is setting out to establish the reality as it is and inform the future decisions made by the State.

# References

Ballymun Community Law Centre (2014). Dublin: www.bclc.

Boulle, L. (2005) *Mediation: principles, process, practice.* 2nd edn. Chatswood, N.S.W.: LexisNexis Butterworths.

Brannick, T. and Coghlan, D. (2007) 'In Defense of being 'Being Native' – the Case for Insider Research. *Organizational Research Methods*, 10(1), pp.59-74.

Brown, H. J. M., A. L. (1999) *ADR principles and practice.* London: Sweet & Maxwell.

Casey, C., McNally, S., Quinn, M. and O'Keeffe, A. (2013) 'Restorative Practices in Action:  Tallaght West - A Case Study', *The Irish Review of Community Economic Development Law and Policy*, 2(1), pp. 63-70.

Corry, G. (2011) 'Origins and Policy Development Issues of the FMS in Ireland 1986-2011' in D. Sweeney and M. Lloyd (eds) Mediation in Focus: A Celebration of the Family Mediation Service in Ireland.  Dublin: Family Mediation Service.

Corrymeela (2013) *The Corrymeela Community*.  Ireland: www.corrymeela.org.

Curran, D.et al. (2016a) *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators*.  Maynooth: KIWMRG/MII.

Curran, D.et al. (2016b) *Shaping the Agenda 2: Implications for Workplace Mediation Training, Standards and Practice in Ireland*.  Maynooth: KIWMRG/MII.

Curran, D et al (2017) *Balancing Confidentiality and Transparency in an Ombudsman Mediation Service*, Maynooth: www.kiwmrg.ie

Glencree (2013) Evaluation of Glencree Centre for Peace and Reconciliation.  Department of Foreign Affairs and Trade, Ireland, www.dfa.ie.

Greenwood, R., Suddaby, R. and Hinings, C. R. (2002) 'Theorizing Change:  The Role of Professional Associations in the Transformation of Institutionalized Fields', *Academy of Management Journal,* 45(1), pp. 58-80.

Jackson, M.C. (2003) *Systems Thinking: Creative Holism for Managers*. UK: John Wiley & Sons.

Kenny, T. (2014) 'Developing the Conversation about Workplace Mediation. *Journal of Mediation and Applied Conflict Analysis*, 1(1).

Kenny, T. (2018) 'Workplace Mediators in Ireland: A Qualitative and Quantitative Study' (unpublished).  A thesis submitted to University College Dublin, in application for the degree of Doctor in Philosophy.

Kressel, K. (2006) 'Mediation Revisited', in Deutsch, M. (ed.) *The Handbook of Constructive Conflict Resolution: Theory and Practice*. San Francisco: Jossey-Bass.

Kressel, K. and Pruitt, D. G. (1989) *Mediation research: the process and effectiveness of third-party intervention.* 1st ed. edn. San Francisco: Jossey-Bass.

Law Reform Commission (2010) *Report on Alternative Dispute Resolution: Conciliation and Mediation.* Law Reform Commission of Ireland (LRC 98-2010*).*

Lynch, J. F. (2001) 'Beyond ADR: A Systems Approach to Conflict Management', *Negotiation Journal,* 17(3), pp. 207-216.

Menkel-Meadow, C. (2010) 'Empirical Studies of ADR: The Baseline Problem of What ADR is and What it is Compared to', in Cane, P. & Kritzer, H. (eds.) *Oxford Handbook of Empirical Legal Studies*: Oxford University Press.

Moore, C. W. (2003) *The mediation process (3rd edition).* San Francisco: Jossey-Bass.

Purdy, J. M. and Gray, B. (2009) 'Conflicting Logics, Mechanisms of Diffusion, and Multilevel Dynamics in Emerging Institutional Fields', *Academy of Management Journal,* 52(2), pp. 355-380.

Raines, S., Kumar Pokharel, S. and Poitras, J. (2013) 'Mediation as a Profession: Challenges that Professional Mediators Face', *Conflict Resolution Quarterly,* 31(1), pp. 79-97.

Steadman, F. (2003) *Handbook on Alternative Dispute Resolution.* Geneva: International Labour Organization.

Susskind, L. (2013) 'Confessions of a Pracademic: Searching for a Virtuous Cycle of Theory Building, Teaching and Action Research', *Negotiation Journal,* 29(2), pp. 225-237.

Ury, W., Brett, J. M. and Goldberg, S. B. (1988) *Getting disputes resolved : designing systems to cut the costs of conflict. A Joint publication in the Jossey-Bass management series and the Jossey-Bass social and behavioral science series* 1st edn. San Francisco: Jossey-Bass.

Wade, J. (2004) 'Current Trends in Dispute Resolution in Australia', *Bond Dispute Resolution News,* 18, pp. 16-20.

Waldman, E. A. (1997) 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach', *Hastings Law Journal,* 48, pp. 703-769.

Wall, J. A. and Dunne, T. C. (2012) 'Mediation Research: A Current Review', *Negotiation Journal,* 28(2), pp. 217-244.

Zariski, A. (2010) 'A Theory Matrix for Mediation', *Negotiation Journal,* 26(2), pp. 203-235.