

SUBMISSION TO THE RULES BOARD

ON THE

DRAFT MEDIATION RULES

Submitted by:

The Dispute Settlement Accreditation Council (“DiSAC”)

And the following members of DiSAC:

Africa Centre for Dispute Settlement, University of Stellenbosch Business School

Mandela Institute

Tokiso Dispute Settlement (Pty) Ltd

Equillore Group Limited

Association of Arbitrators, Southern Africa

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And

By

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31 October 2011

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INTRODUCTION

1. Thank you for the opportunity to comment on the Draft Mediation Rules. These views arise from our cumulative experience of training, coaching, assessing and managing mediators and administering and conducting dispute resolution processes, and from practice in the field of mediation. We trust that our contribution will enrich the process of deliberation about the Rules.
2. The Dispute Settlement Accreditation Council ['DiSAC'] is a voluntary body that aims to provide a uniform system of dispute resolution practitioner accreditation. DiSAC was officially launched on 5 March 2010.

PRINCIPLES FOR CONSIDERATION

The Training and Appointment of Mediators

3. Much work has been done by DiSAC to establish cooperation within the industry and to set accreditation standards for mediators, trainers, coaches, assessors and dispute resolution administrators. It is recommended that the work done by this body be drawn upon to guide the establishment of accreditation standards. We attach the latest version of the standards that have been agreed to by DiSAC as "Annexure A". These have been based on international best practice. It is recommended that standards and qualifications for accreditation and panel membership be set in consultation with the ADR industry, as represented by DiSAC.
4. DiSAC believes that Court aligned mediation should commence on the right footing. One of the primary requirements for effective mediation is the provision of properly trained mediators. Mediation, like any other profession, is premised on a specialist skill requiring formal training and experience. Several matters that we would regard as critical to the proper functioning of the system require attention. These are -
 - 4.1. The training and accreditation of mediators in Court aligned mediation. This should include standards for accredited training systems, standards for mediator accreditation including competence, independence, impartiality and compliance with a code of professional conduct.
 - 4.2. The selection and accreditation criteria for mediator trainers, coaches and assessors.

5. When referring a matter to mediation, delineation needs to be made between the complexity and type of dispute and the level of skill and type of expertise of the mediator. This will require scales of mediation expertise which will need to be professionally allocated by a dispute resolution administrator. There also needs to be due regard for current legislation that provides for mediation (it is our understanding that currently 42 pieces of legislation provide for mediation).
6. In the appointment of a panel, regard needs to be had to the representative nature of the panel.

Dispute Resolution Administrators

7. There needs to be clarity on the accreditation criteria for dispute resolution administrators and how they are to be appointed. It is recommended that due to the complexity of administering mediation, external providers be appointed. It is further recommended that more than one accredited administrator be appointed from which parties can choose. There also needs to be clarity about how these administrators will be required to ensure quality control of their service, perhaps through the provision of guidelines or principles according to which dispute resolution administrators are to administer the mediations.

Separation of Powers & Independence of the Mediation System

8. The Draft Rules provide that the Minister of Justice will regulate the Court aligned mediation system and not the Office of the Chief Justice. This may raise constitutional issues concerning the separation of powers and the independence of the judiciary. This will be particularly important in a case when the State is a party to a dispute, and the impartiality of the system and those dispensing the service may be called into question.

Role of Private Mediation

9. The proposed system does not appear to develop a synergy between private and Court aligned mediation. In our opinion disputing parties should be allowed to agree to use appropriately accredited private mediators as an alternative to court aligned mediators. For this reason, we recommend that when parties have used an

appropriately accredited private mediator, that should satisfy the mediation requirement of the rules. Recognition of private mediation will also be in harmony with section 166 of the Companies Act.

Costs of Mediation

10. If the parties are channelled into a statutory system of mediation where the Rules provide no discretion but to mediate, the obligation of parties to pay for the mediation may be challenged. If there is discretion to choose mediation, then a burden of payment can be passed to the parties. An alternative option is to provide that the applicant bears the costs of the mediation. Careful thought needs to be given to how this initiative is to be funded to prevent any challenges to the Rules.

Fees for Mediators and Dispute Resolution Administrators

11. Clarity is required on the fees of prescribed dispute resolution administrator and mediators. It is recommended that fees be determined on a sliding scale depending on the skill required, level of mediator and value and magnitude of the matter. The system also needs to make provision for how payment is made to the mediators and whether this will be through the dispute resolution administrator or directly to the mediator.

Legal Representation in Mediation

12. It is the practice internationally that legal representatives are present and participate in the mediation process in commercial matters. Legal representatives often play a valuable role in providing guidance and support to their clients during mediation. For this reason, we recommend that legal representatives be allowed to participate in the mediation process, with the proviso that they do not obstruct or delay the proceedings of the mediation and the resolution of the dispute.

Sanctions Relating to Non-Compliance

13. There needs to be a general Rule which provides that a failure to comply with these Rules will lead to a sanction to be determined by the court, usually in the form of an adverse costs order.

SPECIFIC COMMENTS ON THE RULES

Rule	Summary of proposal/consideration
Definitions	<p>It is recommended that the following amendments and additions are made to the definitions –</p> <ol style="list-style-type: none"> 1. 'application' be defined. 2. The definition of 'alternative dispute resolution' should be redrawn to refer to an '<i>...independent and impartial person...</i>' rather than a '<i>...neutral person...</i>'. 3. The definition of 'dispute resolution administrator' should include an entity. It is further recommended that administrators be accredited bodies that meet particular requirements. 4. The definition of a 'mediator' refers to a person selected from a panel. '<i>Panel</i>' should be defined as '<i>a list of mediators who are accredited by the [Chief Justice] in consultation with the ADR industry.</i>'
2	<p>The object of the Rules should include the object to facilitate participation by litigants in the process and facilitate their ability to influence outcomes and make informed decisions. In addition, the object of the Rules should include the object to enhance access to justice.</p>
3	<p>Parties who are able to show that they have undertaken private mediation through an accredited dispute resolution administrator and/or by an accredited mediator should not be compelled to partake in the court aligned mediation. This will likely be a duplication of process and wasted costs.</p> <p>Consideration should be given to refer a matter to mediation after the close of pleadings.</p>
4(2)	<p>This rule should be amended to read 'Any party to litigation may at any stage before the commencement of a trial or the hearing <i>or any stage before judgment</i> of an opposed application apply...'</p>
5	<p>This Rule should put a positive obligation on the court to provide a venue facility for indigent parties participating in mediation.</p>
5(2)	<p>This Rule should read as follows: 'The dispute resolution administrator <i>after consultation with the parties</i> must appoint a mediator to mediate the dispute</p>

	between the parties, fix a <i>date and venue</i> for mediation and inform the parties of the date of <i>and venue</i> at which the mediation will be held.
5(3)	This Rule should read as follows: 'The dispute resolution administrator must <i>after</i> [not "in"] consultation with the parties....'. The Rule should provide that the mediation must take place within 30 calendar days from the date of the referral to the dispute resolution administrator to ensure that there are no delays.
5(4)	This Rule should provide the defence with an option of providing the mediator with a provisional written submission to give the mediator an idea of its defence.
5(5)	This Rule should end ' <i>...or to make it an order of court in terms of Rule 9</i> '.
5(6)	This Rule should include ' <i>...refer the matter back to the clerk or registrar of the court by filing a copy of the report to enable the matter to proceed...</i> '
6(2)	The dispute resolution administrator must explain <i>in writing</i> to the party or parties refusing mediation of the consequences of refusal.
6(4)	This Rule should allow the dispute resolution administrator to sign the memorandum in the absence of a party signing such a memorandum. This is to prevent delay tactics by a party. The Rule should also place the onus on the party who refuses to participate in mediation to demonstrate reasonableness in this refusal.
6(6)	Delete the section of this sentence that reads ' <i>...and that mediation may have resulted in substantially the same finding as the court...</i> ' The range of solutions provided through mediation is not bound by legal principles alone and therefore it is often unlikely that the outcome in mediation would have been the same as the finding of the court.
7	The last clause in the sentence ' <i>...outcome of the mediation process</i> ' should be replaced with ' <i>submission of the mediator's report in terms of Rule 8(5)</i> '
8(1)	This Rule should provide for matters to be settled in whole or in part, and place an onus on the parties, if settlement is reached in part, to narrow the issues in

	dispute.
8(1)(a)	This Rule should refer to the 30 calendar day period provided for the mediation in terms of the recommended change to Rule 5(3).
8(1)(c)	This Rule should include the additional sentence ' <i>The mediator may however, at the request of the parties, make recommendations to parties that in his/her opinion will facilitate settlement.</i> '
8(1)(e)	Provision should be made in this Rule that neither the parties nor the mediator may be called to testify before a court or tribunal about the mediation proceedings or the discussions held during the mediation. This is for purposes of protecting the confidentiality of the mediation and allowing for frank disclosure by the parties in order to facilitate settlement.
8(2)	This Rule should provide that mediation encourages the informal exchange of information and documents where it will promote the resolution the dispute.
9	This Rule should include the following as part of the Rule – ' <i>...must be made an order of court of the court in which the litigation commenced if one or both the parties so choose.</i> ' It should not be an unnecessary burden on the court to make a settlement agreement an order of court unless the parties request it.
10	This Rule should provide for mediator and dispute resolution administrator fees that are regulated on a scale of fees to provide for a wide range of disputes of varying complexity requiring a wide range of mediation expertise.
10	This Rule should include provision that the costs of the mediation may be recoverable as part of the cost of litigation.
10	This Rule should provide a means to give financial support to indigent litigants and respondents if the Rule is to provide that the parties, or alternatively the applicant, is to pay for the mediation.
11(2)	Legal representatives often have a valuable role to play in mediation and it is common practice in mediation internationally that legal representatives

	participate in the process. This Rule should be redrawn to state that legal representatives must not delay or obstruct the continuity or conclusion of mediation proceedings.
11(3)	This Rule should not be limited to the State, an organ of state or any Provincial or Local Government, but should extend to any legal entity. This Rule should provide for a sanction in the event that there is non-compliance with this Rule.
12(1)	This Rule should provide that the Chief Justice should determine the qualification and standards for mediators to ensure the independence of the mediation system. In addition, the qualifications and standards of fitness of mediators should be determined in consultation with the ADR industry. The Chief Justice should also determine the requirements of the dispute resolution administrators in consultation with the ADR industry. It is recommended that more than one dispute resolution administrator be appointed from which parties can choose their preferred service provider.

CONCLUSION

We trust that these submissions will encourage a fruitful engagement with the authorities on the issues set out herein. It is our belief that if properly formulated and implemented, the Rules will certainly have the intended object of relieving the burden on the court system.



DISPUTE SETTLEMENT ACCREDITATION COUNCIL

['DISAC']

MEDIATION ACCREDITATION STANDARDS

**DRAFT (VERSION 3)
OCTOBER 2011**

PREPARED BY DISAC

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1 The need for standards & accreditation

1.1 The debate

There is considerable debate locally and internationally over accreditation standards for mediators and arbitrators (referred to here as 'dispute settlement practitioners' or "practitioners").

At its most basic level accreditation involves the formal recognition of individuals, organisations or programmes in a particular profession, in terms of specified objective standards relating to qualifications, competence, ethics and performance.

While there is a diversity of views in relation to accreditation, the weight of opinion and practice is towards the view that there should be a uniform system of practitioner accreditation. Examples of this can be found in the United Kingdom, Australia, Canada, and many other jurisdictions.

A national uniform system of practitioner accreditation would usually have the following objectives:

- the improvement of practitioner knowledge, skills and ethical standards;
- the promotion of standards and quality in mediation and arbitration practice;
- the protection of the needs of consumers of mediation and arbitration services and the provision for accountability where they are not met;
- the conferring of external recognition on practitioners for their skills and expertise;
- the development of consistency and mutual recognition of practitioner training, assessment and accreditation;
- and a broadening of the credibility and public acceptance of dispute settlement services and practitioners, here and abroad.

In most jurisdictions the need for a uniform national standard became pressing as soon as the use of mediation or arbitration was institutionalised through government initiative. One example of this is the National Mediation Helpline in the United Kingdom. The UK government has prescribed that, in order to participate in the scheme, mediation organisations must be accredited by the Civil Mediation Council.

1.2 South Africa

There is a widely held belief that the above objectives are also important in the South Africa context, and that some form of uniform practitioner accreditation is also appropriate for South Africa.

This belief is based on the view that self-regulation is important, and that the industry has a responsibility to ensure this.

In South Africa this debate has occurred in the absence of any national mandatory system of accreditation for dispute settlement practitioners. A number of organisations (statutory ones such as the CCMA, or commercial enterprises such as Tokiso Dispute Settlement, or voluntary associations such as the Arbitration Association of SA) have formulated criteria for admitting practitioners to their 'panels'.

Outside of these organisations, the actual appointment of practitioners is often based on reputation or word-of-mouth recommendation, regardless of their formally recognised competence in dispute settlement processes and techniques.

The *Mediation Accreditation Standards* presented here by the Dispute Settlement Accreditation Council is a major step towards establishing national professional accreditation standards in South Africa for dispute settlement practitioners.

1.3 Voluntary system

The system of standards and accreditation provided by DiSAC is a voluntary, 'opt-in' system. It is not a licensing system. This implies that no practitioner can be forced to apply for accreditation, and that accreditation is not a requirement for practicing as a dispute settlement practitioner.

This approach accords with that followed in other jurisdictions. History has however shown though, that the voluntary standards adopted by the industry can become the de facto standard. This happens when users of these services begin adopting these standards (see for instance the example of the UK mediation helpline quoted above).

There is already demand for mediation standards and accreditation in South Africa, particularly in respect of the implementation of mediation in civil disputes in our High Courts and Magistrates Courts.

2 Background to DiSAC

2.1 History

The Dispute Settlement Accreditation Council [‘DiSAC’] was officially launched on 5 March 2010.

The launch was preceded by an initiative to gather support and momentum in the industry for a uniform system of practitioner accreditation. Individuals from a wide range of organisations were consulted.

The general view of those consulted was that:

- The time is ripe for such an initiative. It is common knowledge that serious consideration is being given by the South African Justice Department to introduce some form of compulsory mediation in the South Africa courts. In this context it is important that the dispute settlement industry takes the initiative in setting uniform standards.
- The Africa Centre for Dispute Settlement was an appropriate vehicle for hosting such an initiative. The Centre has purely public service goals and is not a mediation or arbitration service-provider. It does not compete with any arbitrator or mediator or service-provider (though it does provide training). Its role is to promote knowledge, excellence and thought leadership through research - and to inspire the use of arbitration and mediation in all forms.

The Africa Centre therefore established a working committee to promote this project. The members of the working committee were Barney Jordaan, John Brand, Tanya Venter, Paul Pretorius, Fergus Blackie, Laurence Boule and Hendrik Kotze. Although these persons were members of different organisations, that is the Africa Centre, Tokiso, AFSA, Equillore, Association of Arbitrators of Southern Africa, Wits University and Conflict Dynamics, they did not participate in any representative capacity. The activities of the working committee were exploratory in nature, and none of the outcomes as yet carry the official sanction of any of these organisations.

The working committee drafted an operational framework for the Council, which was formally presented for consideration to interested members of the dispute resolution industry at the launch conference that was held on 5 March 2010. The outcome was unanimous support for the establishment of the Council.

A copy of the Operational Framework of the Council is attached as Annexure A.

2.2 The objectives of the Council are to:

- a) Define and publish affiliation requirements for membership to the Council.
- b) Define and publish national accreditation standards for dispute settlement practitioners (mediators and arbitrators), as well as trainers, programmes and assessors, all aimed at developing skills in these fields.
- c) Maintain and publish a national register of accredited service-providers, accredited dispute settlement practitioners, trainers, programmes and assessors.
- d) Actively promote transformation and racial and gender equity in the dispute settlement industry.
- e) Internationalisation of mediation and arbitration as practiced in South Africa.
- f) Actively engage with all stake holders involved with or affected by the dispute settlement industry on matters of mutual interest.
- g) Monitor adherence to the affiliation requirements by all member organisations.

2.3 Participation and support

A number of organisations were identified to be invited as founding members of the Council. These are The Africa Centre for Dispute Settlement (ex officio), Tokiso Dispute Settlement, Equillore, the Association of Arbitrators of Southern Africa, the Arbitration Foundation of SA, Conflict Dynamics, Accord, Centre for Conflict Resolution, the Law Society of SA, the Legal Education and Development (Law Society), Justice College (Department of Justice), the CCMA, Black Lawyers Association, NADEL, Advocates for Transformation, the General Council of Bars, the Faculty of Law (University of Pretoria), and the Faculty of Law (University of Witwatersrand).

Of these, the following have already accepted membership, and nominated a delegate to the executive committee of the Council: the Arbitration Association of South Africa, Tokiso Dispute Settlement, Equillore, Conflict Dynamics and the Africa Centre for Dispute Settlement.

In addition a number of other organisations have participated in the discussions, and given their in principle support for the initiative. These include the Department of Justice and Constitutional Development, the Law Society of SA, the Mandela Institute (University of Witwatersrand), the National Democratic Lawyers Association and Advocates for Transformation.

The other invitees and parties with an interest remain welcome to participate.

2.4 Administration

The Council is housed by the Africa Centre for Dispute Settlement at the University of Stellenbosch Business School.

The Executive Council currently consists of Laurence Boule (Chair) (co-opted), Hendrik Kotze (Registrar, ACDS), Tanya Venter (Tokiso), Khanya Motshabi (Equillore), John Brand (Conflict Dynamics), Fergus Blackie and Zurina Kellerman (Association of Arbitrators) and Charles Cohen (Law Society of South Africa, co-opted).

3 Accreditation of mediators

3.1 National standard for accreditation of mediators¹

In order to qualify for accreditation as a mediator with the Council, a candidate must:

- a) Undergo training under an accredited mediator training programme and be assessed and certified as competent by accredited assessors
 - or
 - (where other training was successfully completed) apply for recognition of their prior learning, and then be assessed and certified as competent by an accredited assessor
 - or
 - (in the case of experience only) apply for recognition of their prior experience, and then be assessed and certified as competent by the Council.
- b) Supply testimonials of his/her good character from two persons with whom the candidate has a professional relationship.
- c) Be affiliated with one or more Accredited Service Providers ('ASP').
- d) Under oath, and in writing, confirm that he / she:
 - i) Has not been convicted of any criminal offence involving dishonesty.
 - ii) Was never withdrawn from or refused membership of any other panel (or if he/she was, provide details).
 - iii) Subjects himself / herself to the Code of Professional Conduct, and the complaints and disciplinary procedures, of the ASP with which he / she is affiliated.
- e) Pay the annual Council accreditation fee.

3.2 Recognition of prior learning

Where a mediator was trained under a training programme that is not accredited by the Council, the mediator may obtain accreditation through one of the following ways:

- a) Undergo training under an accredited training programme ;
- b) Apply to an ASP for recognition of prior learning.
 - i) Each such application must be accompanied with full details of training and experience.
 - ii) The ASP will nominate an accredited assessor to assess the applicant
 - iii) The assessment will consist of :
 - (1) a written component that tests the applicant's understanding of mediation theory, practice and law; and
 - (2) an assessment of the applicant's skills as a mediator in an actual mediation or an applicable role play.

¹ Additional requirements may be imposed for areas of specialization – such as labour or community mediation. Please note that different accreditation standards already exist for family mediators under the National Accreditation Board for Family Mediators, NABFAM.

- (3) When assessing an applicant, the assessor must certify a trainee as being of competent standard, or if this is not the case, recommend additional training and practice and re-assessment at a later date.

Each such application will be considered on its own merits. Any decision that an applicant is required to undergo additional training in order to qualify for accreditation shall be final.

3.3 Recognition of prior experience

In exceptional circumstances, experienced mediators who are acknowledged by their peers as such, may be accredited on the basis of their experience in mediation practice without having to first complete an accredited training programme.

A person wishing to qualify on this basis shall apply to an accredited service-provider for recognition of prior experience.

- a) Each such application must be accompanied by full details of experience.
- b) The ASP will consider the application, and if satisfied of the applicant's competency, recommend to the Council that the person be accredited.
- c) The Council will consider such application and recommendation and must then assess and certify the applicant as being competent, or if not of this opinion, recommend what additional training and practice needs to be undertaken to acquire accreditation.

Each such application will be considered on its own merits. Any decision that an applicant is required to undergo additional training in order to qualify for accreditation shall be final.

4 Continued accreditation of mediators

4.1 Lapsing of accreditation

A mediator's accreditation with the Council, shall automatically lapse after 24 months from the date of accreditation, and he /she will be required to apply for continued accreditation.

4.2 Requirements

In order to qualify for continued accreditation as mediator an applicant must provide the following:

- a) A letter of good standing from the ASP with which he /she is affiliated.
- b) Proof that he /she performed a minimum number of four mediations or an equivalent in skills maintenance activity.
- c) Proof that he / she participated in one or more continuing professional development programme on mediation registered with the Council once every 24 months, and received a minimum of CPD points.

4.3 Continuing Professional Development (CPD)

- a) In order to qualify for CPD points:
 - i) All conferences, seminars and group discussions must be registered with the Council. The registration must note the following details:
 - (1) Date, time, place and duration of the event
 - (2) Name of the presenter(s) / chair
 - (3) Full details of the subject-matter of the event
 - ii) All the seminars and programmes must be accredited by the Council.

5 Process for accreditation of mediators

- a) Applicants wishing to be accredited as a mediator must apply for affiliation² to an accredited service provider ['ASP']. Each such application must be accompanied with full details of having met the requirements set out in section 3.1 above.
- b) The ASP will consider the application and:
 - i) If the applicant underwent training under an accredited mediator training programme and was assessed and certified as competent, the ASP may grant him / her affiliation;
 - ii) ASPs are entitled to introduce additional requirements (such as experience requirements) for affiliation. Any applicant will have to satisfy all those requirements prior to obtaining affiliation.
- c) In all cases where an applicant has met the accreditation requirements and has been granted affiliation the ASP must:
 - i) Provide a written statement to that effect to the Council, and request that the applicant be accredited as a mediator with the Council.
 - ii) Pay the candidate's annual Council registration fee to the Council.
- d) Upon receipt of such a request the Council must accredit the applicant as a mediator, and issue an accreditation certificate to the mediator, provided that the Council may request the ASP to provide further details or proof that the applicant has met all of the requirements before it so accredits the applicant.
- e) The same process shall apply for continued accreditation of mediators.
- f) Once a mediator is accredited his/ her details will be enrolled in the Council's Accreditation Register, and the applicant will be allowed to use the Council logo, and the words '*DiSAC Accredited Mediator*'.

² "Affiliation" means membership of the accredited service-provider's panels.

6 Accreditation of training programmes for mediators

In order to qualify for accreditation a training programme for mediators must include the following:

6.1 Programme presentation & content

- a) The programme must be conducted by a training team of at least two accredited trainers for every 18 trainees.
- b) The programme duration must be a minimum of 40 hours (which may be completed in more than one mediation workshop provided that no more than nine months have passed between workshops), excluding any written assessment.
- c) The programme must contain the following components:
 - i) Mediation theory (the Council will from time to time prescribe subject matters that are to be covered)
 - ii) Practice sessions that allow trainees to practise and develop skills:
 - Each programme participant must be involved in at least nine simulated mediation sessions and act as a mediator in at least three thereof.
 - The instructor must provide written coaching feedback in respect of at least one simulated mediation.

6.2 Assessment of trainees

- a) Assessment must include:
 - i) A written assessment that tests understanding of the theory and law of mediation.
 - ii) An assessment of the trainee's competence as a mediator (in an actual mediation, or in an applicable role play). Annexure C contains assessment guidelines that should be applied during assessment.
- b) During the assessment phase of the training, the ratio of qualified assessors to programme participants is to be no less than 1:4
- c) Each trainee must be assessed:
 - i) At least twice, and by different assessors.
 - ii) Each such assessment is to be contained in a written report (Annexure C contains guidelines in this regard).
- d) When assessing a trainee, the assessor must certify a trainee as being of a competent standard, or if this is not the case recommend additional training and practice, and re-assessment at a later date, or fail the candidate.

7 Accreditation of trainers and assessors

7.1 Trainers

- a) In order to obtain accreditation as a trainer, an applicant will be required to provide proof of the following:
- i) That he / she is an accredited mediator;
 - ii) That he / she has the necessary qualifications to provide the proposed training. An applicant will be required to:
 - (1) Stipulate the field(s) in which he /she wants to be accredited as a trainer;
 - (2) Provide proof of relevant academic qualifications in that field(s).
 - iii) That he / she has the necessary training and professional experience to qualify as a trainer. An applicant will be required to provide proof of:

	<i>Senior trainer</i>	<i>Co-trainer</i>
Professional mediation experience	<i>5 years</i>	<i>2 years</i>
Training experience	<i>3 co-training sessions other relevant experience</i>	<i>No experience required</i>

- b) The Council retains the right to attend and assess any training provided by an applicant trainer or an accredited trainer, and on the basis of that training review his / her accreditation as trainer.
- c) Accredited trainers are encouraged to organise and attend trainer meetings (that is discussion groups for trainers), and will receive CPD points for this.

7.2 Assessors

In order to obtain accreditation as an assessor, a person will be required to provide proof that:

- a) He / she is an accredited senior trainer, and
- b) He / she is familiar with and can apply the assessment guidelines in Annexure C.

8 Process for accreditation of training programmes, trainers and assessors

- a) All applications for accreditation of training programmes, trainers and assessors must be submitted to the Council. Any such application must provide all the detail set out in the application form, and be accompanied by the prescribed assessment fee.
- b) Upon receipt of an application for accreditation of a training programme, trainer or assessor a sub-committee authorised by the Council will review the application. The sub-committee may:
 - i) Approve the application.
 - ii) Refer the application back to the applicant with guidance for improvement or amplification.
 - iii) After re-submission of the application, approve or refuse accreditation, subject to providing reasons if it is refused. The assessment fee shall not be refunded.
- c) Once a training programme, trainer or assessor is accredited their details will be enrolled in the Council's Accreditation Register, and the applicant will be allowed to use the Council logo, and the words '*DiSAC Accredited training programme/trainer/assessor*'.
- d) Where accreditation is refused, the applicant may within 30 days appeal to the Council.

9 Code of Professional Conduct for Mediators

In order to ensure alliance with international standards, the Council has decided to adopt the code of professional conduct as prescribed by the International Mediation Institute.

The document here provided is based on the IMI Code of Professional Conduct, subject to necessary amendments to the definitions, and to section 1, to make it applicable to South African circumstances.

ASP's are entitled to adopt their own code of professional conduct, but every such code must be fundamentally compatible with the provisions as set out herein.

All mediators who apply for accreditation with the Council agree to also subject themselves to the provisions of this Code of Professional Conduct

Definitions

For the purposes of this Code:

Mediation is a form of dispute resolution in which an independent mediator aims to assist two (or more) disputants in reaching an agreement. Whether an agreement results or not, and the content of that agreement (if any), is determined by the parties themselves, rather than it being imposed by the mediator.

An *Accredited Mediator* (also called a *Mediator* in this Code) is one whose competency in the practice of mediation has been accredited by the Council, and whose name is entered into the Register as an accredited mediator.

An *Accredited Service Provider ('ASP')* is a mediation service provider which/who has been accredited by the Council as such.

The *Council* is the Dispute Settlement Accreditation Council ('DiSAC').

1. Mediator appointment

1.1 Entitlement to use the title '*Accredited Mediator*' and the Council logo

In the event that an Accredited Mediator fails to maintain the Council's requirements for accreditation, or no longer qualifies as an Accredited Mediator, use of the title *Accredited Mediator* and use of the Council's name and logo will terminate, and the mediator's profile will no longer be included on the Council Register.

1.2 Promotion of mediators' services

Subject to applicable laws and to regulations governing professional practice, mediators will present and promote their practice in a truthful way. They may quote freely from, and link to, the Council web portal.

1.3 Appointment

Before the mediation begins, mediators will advise the parties (in the mediation agreement or otherwise in writing):

- about their relevant qualifications
- under the auspices of which ASP the service is being conducted, and whose code of professional conduct the mediator will observe
- which process will apply in the event of a party believing the mediator has not met the standards of the stated code of professional conduct

- that at the end of the mediation they will be invited to offer written feedback on the process and on the mediator's role, and
- whether they hold a current professional indemnity liability insurance policy covering their practice as a mediator.

2. Diligence, independence, neutrality, impartiality

2.1 Diligence

Mediators may accept an assignment to act as mediator in any situation where they feel competent to serve in that capacity.

2.2 Independence and Impartiality

2.2.1 Mediators will not accept an appointment without first disclosing anything within their knowledge that may, or may be seen to, materially affect their independence or impartiality. This duty to disclose is a continuing obligation throughout the mediation process.

2.2.2 The existence of circumstances potentially affecting, or appearing to affect, a Mediator's independence or impartiality will not automatically imply unfitness to act as a Mediator provided these circumstances have been fully disclosed and addressed to the satisfaction of the parties and the Mediator.

2.2.3 Mediators will always act in an independent and impartial way. They shall act in an unbiased manner, treating all parties with fairness, quality and respect. If at any time a Mediator feels unable to conduct the process in an independent and impartial manner, (s)he will express that concern and will offer to withdraw from the mediation. Such circumstances include:

- financial or personal interests in the outcome of the mediation
- existing past or future financial, business or professional relationship with any of the parties or their representatives about which the Mediator is aware
- other potential sources of bias or prejudice concerning a person or institution which may affect that Mediator's independence or impartiality or reasonably create an appearance of partiality or bias.

2.3 Conflicts of Interest

2.3.1 Mediators will conduct reasonable inquiries to determine if any conflicts of interests may exist. They will have a continuing duty to disclose any conflicts of interests that may become apparent during the mediation process.

2.3.2 Following any such disclosures, a Mediator will decline to participate as a Mediator in a particular case if any of the parties raises an objection, unless a contract or applicable law or court order nevertheless requires the Mediator's participation. Even then, if a Mediator personally believes that the matters disclosed would inhibit their actual impartiality, the Mediator should withdraw as the Mediator.

2.3.3 After accepting appointment, and until the mediation process ends, mediators will not enter into financial, business, professional, family or social relationships or acquire financial or personal interests that are likely to create, or might reasonably create the appearance of, conflict of interest, partiality or bias, without making a prior disclosure to all the parties and gaining their consent.

2.3.4 For a period of 12 months following the end of a mediation, Mediators will not represent in an advisory capacity any party to a mediation in the same or a substantially related matter, unless all parties to the mediation expressly consent to that representation after full disclosure. Acting as a neutral in other dispute resolution

proceedings (for example as a mediator or arbitrator) that may involve some or all of the parties will not be considered a *representation in an advisory capacity* for the purposes of this clause.

3. Mediation Process

3.1 Procedure

Mediators will satisfy themselves that the parties to the mediation and their advisers understand the characteristics of the mediation process, their roles as parties and advisers, and the role of a mediator. The mediator will ensure that before the mediation begins, the parties have understood and agreed the terms and conditions which will govern the mediation including, those relating to obligations of confidentiality on the mediator and on the parties. It is best practice for those terms to be contained in a written mediation agreement unless the parties or the circumstances dictate otherwise.

3.2 Fairness and Integrity of the process

3.2.1 Mediators will ensure that, if there are to be any pre-mediation private communications with the mediator, all parties are aware they will have equal opportunity to raise issues.

3.2.2 Mediators will explain the mediation process to the parties and their advisers, and be satisfied that that they consent to the process being used and to the mediator selected (unless applicable law, court rules, contract or court directive require use of a particular process and/or mediator).

3.2.3 Mediators will conduct the process with fairness to all parties and will take particular care to ensure that all parties have adequate opportunities to be heard, to be involved in the process and to have the opportunity to seek and obtain legal or other counsel before finalising any resolution.

3.2.4 Mediators will take reasonable steps to prevent any misconduct that might invalidate an agreement reached at mediation or create or aggravate a hostile environment. Mediators will also be satisfied that the parties have reached agreement of their own volition and knowingly consent to any resolution.

3.3 Termination of the process

3.3.1 The Mediator will ensure the parties understand that they may withdraw from the mediation at any time by informing the mediator and all other parties without being required to give any justification for doing so.

3.3.2 Mediators shall withdraw from a mediation if a negotiation among the parties assumes a character that to the Mediator appears unconscionable or illegal.

3.4 Feedback

Parties engaged in a mediation must be informed that they are welcome to provide feedback or complaints regarding the mediator's conduct to the ASP under whose auspices the mediation took place, in order to assist in the continued evaluation of professional conduct.

3.5 Fees

Parties to a mediation must, prior to the start of the mediation, be aware of how the fees and expenses for the mediation will be calculated, and how they will be paid by the parties (and if shared between the parties, in what proportions.)

4. Confidentiality

4.1.1 Mediators will keep confidential all information acquired in the course of serving as a mediator in a mediation, including the fact of mediation being held, unless:

- compelled to make a disclosure by law, or by a court of law

- required under paragraph 5.1, in which event the recipients of the confidential information shall themselves be bound to maintain the confidentiality, or
 - the specific information comes into the public domain (otherwise than as a result of a disclosure by the mediator), or
 - the parties release the mediator from the confidentiality restriction, or
 - necessary to defend the mediator from any proceedings or charges for which (s)he risks incurring any liability.
- 4.1.2 The mediator may, however, disclose having previously served as a mediator in a mediation involving one or more of the parties, provided none of the details of that case are disclosed.
- 4.2 Mediators will discuss confidentiality with the parties before or at the beginning of the mediation and obtain their consent to any communication or practice by the mediator that involves the disclosure of confidential information.
- 4.3 Mediators may use or disclose confidential information obtained during a mediation when, and to the extent that, they believe it to be necessary to prevent death or serious physical harm or physical damage from arising or believe an illegal act may realistically arise. Before using or disclosing such information, if not otherwise required to be disclosed by law, mediators must, if they consider it appropriate, make a good faith effort to persuade the party and/or the party's counsel or other advisers, to act in such a way that would remedy the situation.
- 4.4 At no time will mediators adduce evidence or testify on behalf of one of the parties in making or defending a claim against another party to the same mediation where they have acquired confidential information from the other party, unless all that information is no longer confidential or unless the party protected by the confidentiality gives consent, or is so ordered by a court.

5. Professional conduct issues and complaints

- 5.1 An accredited mediator may consult his/her ASP about any professional or ethical dilemmas.
- 5.2 Where an accredited mediator is subject to this Code, a party to a mediation who believes there has been a lack of compliance with the Code may activate the *complaints and disciplinary process* of the ASP under whose auspices the mediation took place.

10 Complaints and disciplinary procedure

- 1) Any person, body, or organisation (including a member of the Council) may make a complaint about an accredited mediator's service or conduct.
- 2) A complaint must be made in writing and signed by (or on behalf of) the complainant.
- 3) Any complaint must be referred to the Accredited Service Provider(s) ('ASP') with whom the mediator is affiliated, and under whose auspices the process was conducted.
- 4) If the ASP is satisfied that there is a complaint to be considered, but that it is a minor or technical breach, he/she shall see if the mediator can correct the alleged default.
- 5) If the matter proceeds then the ASP will require the mediator to provide a formal written response to the complaint.
- 6) The ASP must deal with the complaint in accordance with its internal complaints procedure, subject to the rules of natural justice.
- 7) After dealing with the complaint the ASP shall forward details of the complaint and the outcome to the Council. There shall be no right of appeal to the Council against the decision of an ASP.
- 8) Upon consideration of the report from the ASP the Council shall take such steps as it deems necessary, provided that the details of the report shall be published by the Council.

11 Accreditation of mediation service providers

11.1 Introduction

- a) Registration as an Accredited Service Provider ('ASP') will be open to any organisation whose principal purpose or objective is the provision of dispute resolution services (mediation, arbitration, conciliation, facilitation) and which meets the requirements of the Council.
- b) ASPs will have the ability to accredit mediators in accordance with the mediation accreditation standards set by the Council. To qualify for accreditation as a service provider an organisation must therefore be able to demonstrate its ability to properly fulfil this function.
- c) Organisations providing only training or ancillary services will not be able to accredit as service providers. They will however be able to obtain accreditation for their training programmes, trainers and assessors.

11.2 Annual registration

- a) Registration will be for a 24-month period: it must be renewed to remain accredited.
- b) Registration and renewal will involve the organisation meeting the registration criteria and lodging with the Council the standard registration application containing all the required registration information, and the registration fee.
- c) Registration will not be automatic following payment of the registration fee. The Council will have the right to decline an application to accredit if the ASP does not appear to meet the registration criteria or fails to lodge or continually to display the Registration Information on its website.
- d) The Council may at any time request:
 - i) confirmation of any of the registration criteria, or
 - ii) to inspect the activities of the ASP to confirm that it complies with the registration criteria.

Failure by the ASP to adhere to such request may result in refusal of its registration, or the lodging of a complaint in accordance with paragraph 11.15 below.

11.3 Details of region of operations and number of mediators

The organisation must list:

- a) The geographic area covered by its panel of mediators;
- b) The types of dispute which it undertakes.

11.4 Mediator management

ASPs are responsible for mediation management. This includes the following:

- a) Published standards that meet the Council's minimum accreditation standards
- b) Transparent accreditation process in line with the Council standards
- c) Expertise to perform assessment of membership applications
- d) Qualifying Continued Professional Development ('CPD') programme, or access to such a programme

- e) Performance monitoring of its panel members
- f) Process for submission of mediator details for registration with the Council

11.5 Standards of conduct

ASPs must:

- a) Subscribe to a **code of professional conduct** that meets Council standards
- b) Subscribe to a complaints system that meets Council standards
- c) Subscribe to a disciplinary process that meets Council standards
- d) Require mediators to subject themselves to these standards of conduct

11.6 Sound governance structures, and appropriate administrative resources

ASPs must demonstrate or produce:

- a) Compliance with all regulatory and statutory requirements for registration and on-going conduct of business
- b) Current tax clearance certificate
- c) Details of ownership and management including particulars of:
 - i) Shareholders and shareholding
 - ii) Directors
 - iii) Executive management
 - iv) Senior staff
 - v) Name of auditors
 - vi) The responsible person who will deal with Council matters
- d) Sufficient details of case management, administrative systems and record-keeping so as to demonstrate competency.
- e) Contact telephone numbers during normal business hours.

11.7 Financial viability and management of 3rd party funds

ASPs are often required to work with members' funds (for example deposits for arbitrators / mediators). For this reason the Council is obliged to consider the on-going viability of ASPs, as well as the measures in place for managing members' party funds. ASPs are therefore required to disclose the following within 6 months of their yearend:

- a) Disclosure of the process in terms of which members' funds are managed. It is required that such funds shall be kept separate from any other funds managed by the ASP.
- b) A statement by the ASP's auditors / bookkeepers that all third party funds were administered in accordance with the ASP's internal processes. If not, full details of any deviation must be supplied.

11.8 Transparent and published details of services and costs

ASPs must publish:

- a) A description of services (including process rules, where appropriate)
- b) Details of fee structures

11.9 Indemnity insurance

ASPs must have a level of professional indemnity insurance for the organisation and its officials to the satisfaction of the Council.

11.10 Publication of registration information

ASPs must display their registration information (see annexure A) on their websites.

11.11 Additional requirements

- a) ASPs may from time to time be required to meet all additional requirements that are published by the users of mediation services (for example the Department of Justice).
- b) ASPs may request the Council to investigate and certify compliance with such requirements.

11.12 The process of registration

- a) The secretariat of the Council (for purposes of this process called the registrar) will be the point of contact for the Council.
- b) The process will operate as follows:
 - i) The registrar will receive the application together with the prescribed fee
 - ii) The payment of the due fee will be checked and the fee banked.
 - iii) The registrar will assess compliance with the accreditation requirements
 - iv) The registrar will then present the application to the Council for approval
 - v) If the Council is also satisfied then the registrar will:
 - (1) notify the applicant
 - (2) send the applicant a high definition version of the Council logo for use on their website;
 - (3) allocate a registration number to the ASP and notify the ASP of that registration number;
 - (4) update the Council website with the organisation's name and link; and
 - (5) ensure that the ASP receives a renewal notice in 22 months time.

11.13 Registration difficulties

- a) If the registrar believes that an applicant has failed to meet the accreditation requirement or display on its website all of the registration information, the registrar shall in the first instance ask the applicant for the required information.
- b) If the applicant still does not in the opinion of the registrar comply then the registrar will notify the chairperson of the Council of the problem. The chairperson will approach the applicant for the required information.
- c) If the required information is not forthcoming within 14 days the chairperson will notify the Council that an application has been declined (with written reasons) and cause the registration fee to be returned in 28 days if there is to be no appeal.
- d) If the applicant wishes to challenge the decision of the chairperson it may appeal to the Council. If the appeal is dismissed the registration fee will be retained by the Council.

11.14 De-registration

- a) Once an organisation is accredited it will only lose registration if
 - i) It fails to renew after 24 months by reason of:
 - (1) its failure to provide the required renewal form; and/or
 - (2) it fails to pay the required fees. In every case the ASP will be sent one electronic notice to renew by the registrar 22 months after the date of its first registration (or its last renewal of registration); and, if necessary, a single reminder by the registrar six weeks later. If the organisation takes no action the Council will serve a notice of de-registration and cause its entry on the Council website to be removed. The notice of deregistration will require the organisation to cease using the Council logo. It will be copied to the Council executive.
 - ii) It comes to the notice of the Council that the organisation has ceased to trade or to operate, is wound up, or dissolved.
 - iii) It comes to the notice of the Council that the organisation has been placed into liquidation or administration, or has otherwise become insolvent.
 - iv) The organisation or its officials, officers, directors or employees in the course of their duties is or are found by a court or tribunal in any country to have or to be engaged in unlawful activities.
 - v) As a result of a finding by the Council under section 15 below that the organisation is no longer fit to be a ASP.

11.15 Complaint as to fitness to remain accredited

- a) A complaint under this heading can only be made on the ground that the organisation fails to comply with one of the requirements set out above for accredited ASPs. This is not a general complaints procedure. Any other complaint, for example about an organisation's service, must be dealt with through that accredited organisation's own complaints procedures
- b) Where an ASP or its officials, officers, directors or employees in the course of their duties is or are found by a court or tribunal in any country to have or to be engaged in unlawful activities, the Council Registrar shall lodge a complaint setting out details of the offence.
- c) Any person, body or organisation (including a member of the Council) may make a complaint to the Council about an ASP's fitness to remain accredited. A complaint about fitness must be made in writing and signed by (or on behalf of) the complainant. It will be addressed to the registrar.
- d) Upon receipt of such a complaint the Council shall deal with the matter in any way it deems appropriate, subject to the rules of natural justice. A complaint shall not be considered by the Council unless the nature of the complaint is likely to raise a real rather than merely fanciful question as to the fitness of the ASP to remain accredited.

Annexures

ANNEXURE A: OPERATIONAL FRAMEWORK OF THE DISPUTE SETTLEMENT ACCREDITATION COUNCIL ESTABLISHED UNDER THE AFRICA CENTRE FOR DISPUTE SETTLEMENT

PREAMBLE

The Dispute Settlement Accreditation Council emerges from the need for a national accrediting body which will promote professional and ethical standards and integrity of dispute settlement practitioners and accredited service providers in South Africa, and that will promote transformation in the industry.

1) INTERPRETATION

In this document the following terms must be given the meaning here indicated, unless the context otherwise indicates:

- a) 'ACDS' refers to the Africa Centre for Dispute Settlement at the University of Stellenbosch Business School
- b) 'Council' refers to the Dispute Settlement Accreditation Council
- c) 'dispute settlement practitioner' refers to a natural person who performs services as an arbitrator or mediator (or any other variant or hybrid of these processes), and "practitioner" shall have the same meaning
- d) 'dispute settlement services' refers to mediation and arbitration processes (and includes variants and hybrids of these processes), and all ancillary and support services relating to such processes (including management and training)
- e) 'Executive Committee'
- f) Council Secretary
- g) 'member' refers to an Accredited Service Provider ['ASP'] which is a member of the Council, and 'member organisations' shall have the same meaning
- h) 'service provider' refers to an organisation whose principle activity is to offer dispute settlement services

2) NAME AND LEGAL STATUS

- a) The Dispute Settlement Accreditation Council ['the Council' or 'DiSAC'] is for the time being hosted by the Africa Centre for Dispute Settlement at the University of Stellenbosch Business School ['ACDS']. This will continue until 31 December 2012, when the Council will be established as an independent entity.
- b) The Council is not a distinct legal entity, and does not have the power to acquire, to hold and to alienate property of every description whatsoever, nor has it the capacity to acquire rights and obligations.
- c) It is recorded that the Council is formally established as a standing committee of the ACDS. The ACDS forms part of the University of Stellenbosch, and is subject to the governance of a control committee established by the University.

3) OBJECTIVES OF THE COUNCIL

The Council is a representative body that:

- a) Defines and publishes national accreditation standards for practitioners (mediators, arbitrators, facilitators, conciliators), as well as trainers and programmes aimed at developing skills in these fields. These standards should cater for specific requirements in various fields of expertise (for example family disputes, environmental disputes.)
- b) Defines and publishes affiliation requirements for dispute settlement service providers
- c) Maintains and publishes a national register of ASPs, practitioners, trainers and programmes
- d) Actively promotes transformation and equity in the dispute settlement industry;
- e) Actively engages with all stakeholders involved with or affected by the dispute settlement industry on matters of mutual interest.
- f) Monitors adherence to the affiliation requirements by all member organisations;

4) ACCREDITATION STANDARDS AND AFFILIATION REQUIREMENTS

- a) The Council shall from time to time define and publish minimum accreditation standards for each of the following:
 - i) Individual practitioners engaged in dispute settlement. Accreditation standards shall be developed for different areas of skill (for example mediation, arbitration, etc) and different areas of expertise (for example family disputes, environmental disputes, etc)
 - ii) Trainers and programmes aimed at developing mediation, arbitration and other dispute settlement skills and expertise.
- b) The Council shall from time to time define and publish affiliation requirements for service providers.
- c) In defining accreditation standards and affiliation requirements the Council shall be obliged to give due consideration to the following:
 - i) Established South African and international best practice for accreditation of dispute settlement practitioners and organisations;
 - ii) The diversity of cultural, social and religious practices in South Africa;
 - iii) Established indigenous traditions and usage regarding mediation and inclusive dispute resolution;
- d) In defining accreditation standards and affiliation requirements the Council shall be allowed to investigate, develop and establish different categories of accreditation and affiliation, each with specific accreditation criteria and fields of application.
- e) The Council shall by no later than 31 November 2011 adopt and publish its first official national accreditation standard and affiliation requirements.

5) NATIONAL REGISTER

- a) In accordance with one of its primary objectives, the Council shall collate and at all times maintain and publish a national register of:
 - i) Accredited dispute settlement practitioners
 - ii) Accredited training programmes
 - iii) Accredited trainers
 - iv) ASPs

- b) The national register shall accommodate any specific categories of accreditation and affiliation that may from time to time be specified by the Council, and such details of the accredited parties as the Council may from time to time direct.
- c) The details of practitioners, training programmes, trainers and service providers may only be entered into the national register if they meet the accreditation standards defined and published by the Council.

6) ACCREDITATION OF PRACTITIONERS

- a) Any dispute settlement practitioner who meets the accreditation standard may apply for accreditation with the Council. Any such application shall be submitted in a standard format prescribed by the Council, and be accompanied by an application fee, as determined by the Council;
- b) The executive committee of the Council shall consider all such applications in the context of the accreditation standards as approved and published by the Council from time to time, and shall within 30 days either approve the application, or decline the application with reasons;
- c) Where an application is approved:
 - i) The details of the practitioner shall be entered into the register of accredited practitioners; and
 - ii) The practitioner shall be issued with a certificate of accreditation.
- d) Any accreditation shall be valid for a stipulated period that may not exceed 24 months. Thereafter accreditation shall terminate automatically, and the practitioner shall be obliged to apply for renewal of their accreditation. Any such application shall be in the standard format prescribed by the Council, and be accompanied by an application fee, as determined by the Council.
- e) All accredited members shall be liable for an annual accreditation fee, in an amount to be determined by the Council. Non-payment of the fee within 30 days of the due date shall result in automatic suspension of accreditation.
- f) All member organisations will afford dispute settlement practitioners a grace period until 30 November 2012 to meet the national accreditation standard, failing which their recognition (through admission to panels, allocating of briefs, etc) by that organisation must be terminated.

7) ACCREDITATION OF TRAINING PROGRAMMES AND TRAINERS

- a) Any person may apply to the Council to accredit a training programme, or to accredit as a trainer. Any such application must be supported by full particulars of the training programme and/or the trainer.
- b) The Council shall consider any such application in the context of the accreditation standards, and may at its discretion accredit such training programmes and or trainers. Any such accreditation may be made subject to specific conditions or limitations.

8) AFFILIATION OF MEMBER ORGANISATIONS

- a) Any service provider that wishes to affiliate with the Council may apply to the Registrar of the Council. Any organization making such an application shall submit to the Registrar an application setting out the affiliation requirements, as prescribed by the Council from time to time.
- b) The executive committee reserves the right to:
 - i) set and amend minimum requirements for inclusion of an organization as a member;

- ii) refuse an application by any organization that does not meet the affiliation requirements.
- c) Any organisation shall be deemed to be an affiliate member as from the date of receipt of a letter from the registrar accepting the application.
- d) The membership of any organisation:
 - i) Shall be subject to annual renewal. Such renewal application shall be submitted in a format prescribed by the Council from time to time.
 - ii) Shall terminate if:
 - (1) the organisation submits a resignation in writing to the registrar, and the resignation is accepted by the executive committee;
 - (2) the organisation fails to pay any subscription or registration fees for which the member organisation may be liable within three (3) months of the date upon which such subscription or fee becomes due, subject to the provision that the executive committee may, on good cause shown, permit it additional time in which to pay its subscription.
- e) The membership of any organisation may be terminated if:
 - i) the organisation after the grace period referred to continues to recognise practitioners (through admission to panels, allocating of briefs, etc) who do not meet the national accreditation standards;
 - ii) the Executive Committee resolves that such membership be terminated on other reasonable grounds;
 - iii) The membership of a member organisation shall not be terminated on any of these grounds without that organisation being given an opportunity to be heard.

9) TRANSFORMATION AND REPRESENTIVITY

- a) The Council recognises that for historic reasons:
 - i) The dispute settlement industry is not yet representative of South African society in terms of its racial, gender, cultural and religious composition, or in terms of representation of people with disabilities;
 - ii) Dispute settlement practice has not yet assimilated many of the positive aspects of indigenous traditions and usage regarding mediation and inclusive dispute resolution;
 - iii) Dispute settlement practice is not yet organised and active in all geographical areas of South Africa.
- b) In accordance with one of its primary objectives, the Council shall actively promote transformation and representivity in the industry through the following:
 - i) Ensuring wide representivity on the Executive Committee of the Council;
 - ii) Requesting representivity on the governance structures of its member organisations;
 - iii) Encouraging innovative and indigenous forms of dispute settlement practice, also through accreditation standards;
 - iv) Promoting regional member organisations to be established in geographical areas that lack formal organisation.

10) PROFESSIONAL CONDUCT

- a) In accordance with one of its primary objectives, the Council shall facilitate adherence by all its members and all practitioners to professional conduct standards that meet certain recommended minimum requirements:
 - i) The Council shall by no later than 30 April 2010 adopt and publish a recommended code of professional conduct.
 - ii) The Council may from time to time consider and publish minimum service delivery standards to be expected from accredited members.
- b) All member organisations shall be required, with effect from 1 August 2010, to adopt a code of professional conduct that meets the minimum requirements of the recommended code of professional conduct published by the Council.
- c) Where the Council publishes minimum service delivery standards, accredited members shall be required to disclose, as part of their membership (renewal) application, the extent to which they comply with these standards.
- d) All practitioners who apply for accreditation shall be required to be affiliated with one or more ASPs, and to confirm their commitment to the Code of professional conduct and minimum service delivery standards (if any) adopted by those service providers to which they are affiliated.
- e) Any written allegations of improper conduct received by the Council shall:
 - i) Where the person complained of is affiliated with a member organisation, be referred to the relevant member organisation under whose auspices the practitioner provided their services, which shall be obliged to deal with such allegation in accordance with that organisation's code of professional conduct.
 - ii) Where no member organisation was involved, the Council shall deal with the complaint in a manner to be prescribed from time to time.
- f) Should a member organisation fail to deal promptly with a breach of the Code of professional conduct to the satisfaction of the Council, or should it become apparent that a member organisation is unable to ensure its individual members' compliance with the Code of professional conduct, that organisation's membership of the Council may be reviewed by the Executive Committee and appropriate action taken by the committee, including the suspension and or termination of that organisation's membership of the Council.
- g) Member organisations shall on a quarterly basis submit a report to the Council detailing all complaints received against its accredited practitioners, and provide details of steps taken by the member organisation and the outcome of those steps.
- h) Where any breach of the Code of professional conduct by a practitioner or member organisation is reported, the Council shall:
 - i) Consider whether or not to suspend or terminate the accreditation of the relevant practitioner or member organisation;
 - ii) Publish the details of any adverse findings against any such practitioner or member organisation, and of the disciplinary action taken, in the national register.

11) RIGHTS AND DUTIES OF MEMBERS

- a) Once enrolled, a member organisation:
 - i) Must adhere to and implement the national accreditation standards by at least prescribing these standards as the minimum requirements for admission to its panels;

- ii) Accept and implement a code of professional conduct that is aligned with and does not conflict with the minimum recommended standards of code of professional conduct published with the Council
- iii) Will be bound by this operational framework.
- b) Every member organisation will be liable for an annual subscription fee, in an amount to be determined by the Executive Committee. No refund of any subscription or part thereof shall be made to an organisation ceasing to be a member and it shall in any event remain liable to the Council for any subscription or other debts or obligations due.
- c) Every member organisation shall be entitled:
 - i) to be entered onto the database of member organisations;
 - ii) to be issued with a certificate of affiliation;
 - iii) to refer any dispute between itself and any accredited practitioner to the Council for settlement and or determination. Any such referral shall be dealt with in a manner to be prescribed by the Council from time to time.
 - iv) to receive all notices, circulars, balance sheets, agendas of general meetings and other documents issued to members;
 - v) to take part in any discussion on any matter at any general meeting of members;
 - vi) to attend and participate in all conferences, lectures, workshops, symposia, programmes or other activities organized or sponsored by the Council, subject to such limitations and on such terms and on payment of such fees as the Executive Committee shall determine;
 - vii) to vote on any resolution at any general meeting of members and to vote for candidates for election to the Executive Committee.
 - viii) to nominate a representative/s to stand for election to the Executive Committee or hold any office in the Council.

12) GOVERNANCE AND STRUCTURES

- a) The management of the Council shall be conducted by its Executive Committee. Any power, decision or activity that the Council is authorised to conduct in terms of these rules, may be exercised by the Executive Committee, except insofar as these rules otherwise indicate.
- b) The Executive Committee shall be constituted as follows:
 - i) For a period of two years from the formal inception date of the Council, the Executive Committee shall be constituted as follows:
 - (1) One person to be nominated by each of the founder members. The founder members of the Council shall be ACDS, Tokiso Dispute Settlement, Conflict Dynamics, Equillore, and AOA, provided that the ACDS shall have one person serving on the Executive Committee ex officio for as long as the Council remains a standing committee of the ACDS.
 - (2) Two additional persons to be nominated and elected by the members on an annual basis.
 - (3) Any additional persons co-opted from time to time by the Council. The Council shall give specific attention to co-opting additional members in order to address any issues regarding the representivity of the Executive Committee.

- ii) After a period of two years from the formal inception date of the Council, and at an annual general meeting to be held on or near that date:
 - (1) One half of the members will step down (to be selected by lot or consensus);
 - (2) The members shall elect persons to serve in the vacant seats;
 - (3) Every year thereafter the longer serving half of the Executive Committee shall automatically vacate their seats at the next annual general meeting, and the vacant seats be filled through election by the members. Persons who vacate their seats shall be eligible for re-election.
- c) In nominating persons to serve on the Executive Committee the members shall take into account the need for the Executive Committee to be representative;
- d) There shall be a chairperson, a vice chairperson and an Registrar of the Council who shall be elected at an annual general meeting of the Council to serve for a period of one year;
- e) The Chairperson shall not hold office as such for more than two terms.
- f) The Chairperson shall preside at all meetings of the Council and its Executive Committee.
- g) The Registrar shall:
 - i) Ensure that the operational duties of the Council are carried out, as set out in the Council's operational framework.
 - ii) Keep a record of the proceedings of all meetings of the Council.
 - iii) Issue notices of all meetings.
 - iv) Keep a record of the members of the Council
 - v) Do and prepare such other matters as the Executive Committee may from time to time require.
 - vi) Collate and maintain the register of Mediators and liaise with the member organisations in regard to any matter relating thereto.
- h) The executive committee shall on an annual basis hold a general meeting of member organisations, for purposes of nominating and electing persons to the Executive Committee, and for dealing with any other issues that the Executive Committee may from time to time refer to the general membership. Each member organisation shall be entitled to one vote at such general meeting.

13) FUNDING AND SUPPORT

- a) The ACDS shall support the Council through the following:
 - i) Providing venues for regular Council meetings
 - ii) Facilitating the use of University premises for annual and general meetings of members
 - iii) Provide the use of the name of the ACDS for the hosting of workshops, conferences, and other networking activities
 - iv) Providing publicity to the Council, its activities, and its accredited members and mediators through the ACDS's web site, and where appropriate through the University's publication network
 - v) Provide the use of the name of the ACDS for fund-raising activities to support transformation and other specific projects of the Council

- vi) Subject to specific agreement regarding included duties, the use of the ACDS's administrative assistance.
- b) The ACDS shall not be required to make any direct financial contribution to the Council or any of its activities.
- c) Any membership fees paid by members shall be held in trust by the ACDS and funds shall be allocated to activities of the Council, at the discretion of the Executive Committee
- d) Neither the Council nor any of its members shall be required to make any payments to the ACDS for hosting the Council, or for providing the above support services. Any other services required by the Council shall be provided by the ACDS subject to specific agreement regarding fees and payment thereof.

14) AMENDMENT OF OPERATIONAL FRAMEWORK

- a) The provisions of this operational framework may be amended by the Executive Committee of the Council, provided that any amendment must be approved by no less than two thirds of the members of the Executive Committee. Any persons co-opted onto the Council shall not participate in any vote to amend the operational framework.

15) OFFICIAL LAUNCH

The Council shall be officially launched on 6 March 2010.

ANNEXURE B: ACCREDITATION INFORMATION TO BE PUBLISHED ON WEBSITE OF SERVICE PROVIDER

A. Basic Information

- (1) the full name and business address of the organisation;
- (2) the organisation's email, website and telephone contact details for a personal contact point at the organisation for telephone calls during normal working hours;
- (3) the company/charity registration number of the organisation (if any);
- (4) the name of the person responsible for the registration information;
- (5) the year that the organisation was first accredited by the Council;
- (6) a statement that the organisation and its mediators is covered by professional indemnity insurance to the extent required by the Council from time to time;
- (7) the Region(s) covered by its panel of mediators.

B. Practice Information

- (8) a Code of professional conduct for its mediators that meets the Council recommendation;
- (9) a statement that it has adopted and follows the Council Code of Good Conduct for ASPs;
- (10) details of its internal complaints procedure;
- (11) a statement of the minimum requirements for a person to be one of its panel mediators, which shall be not less than the Council requirement of a minimum of 40 hours training together with a successful assessment;
- (12) a statement of the minimum amount of mediation-specific CPD each panel member is required to undertake, and
- (14) the types of mediation which it undertakes in line with the categories prescribed by the Council from time to time.

ANNEXURE C: GUIDELINES FOR ASSESSMENT OF MEDIATORS

GUIDELINES FOR FACULTY

Generally

1. We have developed these guidelines to ensure that coaching and assessment is given fairly and consistently, and to assist you with the task.
2. Arrive early for the programme so that faculty can have a brief meeting before the day starts.
3. Before the session starts check your faculty rota to see who you are coaching / assessing and introduce yourself to the mediators saying that you will be coaching / assessing them later.
4. Also check whether you remain in the same room for mediator A and B or whether you change rooms or take a break.
5. It is your responsibility to ensure that you are at the right place at the right time.

Coaching day

1. Get to the room where you are coaching a few minutes before the session starts to ensure that the mediators are ready. Ask the mediators whether they would like feedback on any particular skills, behaviours or aspects of the process. Invite the mediators to stop the role-play if they want assistance; if they do ask for assistance make your intervention brief. Reassure the mediators that the session is a coaching one not an assessed one.
2. Ensure that the role-play starts on time; each role-play will be an hour long unless informed otherwise.
3. Explain that role-players will stay in the room throughout the role-play, and that if the mediator is meeting with parties in side session the other party should sit slightly back from the table but continue to listen and not distract the mediator.
4. Explain to the role-players that you will interject from time to time to coach the mediator if you think it will be helpful.
5. Interrupt the role-play no more than 4/5 times to make suggestions about how the mediator might do things differently, to bring things back on course, to highlight an excellent learning point. These interruptions should be brief and should take not more than a minute or two, so as not to detract from the mediator's time.
6. Observe the mediator in relation to the mediator competencies, making notes so as to be able to give comprehensive one-on-one feedback at the conclusion of the role-play
7. Mediator A - end the role-play after 60 minutes. Confirm that you will give the mediator feedback after mediator B has completed their role-play. Handover to mediator B as per the guidelines below.
8. Check your faculty rota to see whether you continue in the same room or move to another room or take a break.
9. Mediator B - start the role-play as per handover instructions below. End the role-play after 55 minutes. Briefly draw the group's attention to one or two learning points. Do not comment on the mediator's performance or allow the role-players to do this.

10. Ask mediator B and the role-players to leave the room and spend 10 – 15 minutes giving mediator A feedback first, followed by mediator B.
11. Suggest that they use the personal record section of the file to record your feedback.
12. Ensure that your feedback bears a direct relation to the mediator competencies.
13. Start with a headline comment such as 'Overall I feel you have demonstrated many important competencies, there are some specific things I would like to highlight that you did well and others that I think you need to pay attention to before the assessed sessions'.
14. Then give feedback in relation to the three broad areas of competence, making reference to specific competencies as relevant.
15. Give feedback assertively yet sensitively; engage the mediators in this process.

Assessment days

1. Get to the room where you are assessing a few minutes before the session starts to ensure that the mediator is ready.
2. Ensure that the camera is on and that the mediator and their name board are clearly visible on the screen. Do not alter any settings.
3. Ensure that the role-play starts on time; each role-play will be an hour long unless informed otherwise.
4. Explain that role-players will leave the room when the mediator is meeting with parties in side session. Ask the role-player to stay close to the room so that the mediator does not lose time looking for role-players.
5. You do not interrupt the role-play during its course; follow the mediator at all times to observe how they handle the transition between meetings.
6. Observe the mediator in relation to the mediator competencies, making notes so as to be able to give comprehensive one-on-one feedback at the conclusion of the role-play.
7. Mediator A - end the role-play after 60 minutes. Confirm that you will give the mediator feedback after mediator B has completed their role-play. Handover to mediator B as per the guidelines below.
8. Check your faculty rota to see whether you continue in the same room or move to another room or take a break.
9. Mediator B - start the role-play as per handover instructions below. End the role-play after 55 minutes. Briefly draw the group's attention to one or two learning points. Do not comment on the mediator's performance or allow the role-players to do this.
10. Ask mediator B and the role-players to leave the room and spend 10 – 15 minutes giving mediator A feedback first, followed by mediator B.
11. Suggest that they use the personal record section of the file to record your feedback.
12. Ensure that your feedback bears a direct relation to the mediator competencies.
13. Start with a headline comment such as 'Overall I feel you have demonstrated many important competencies, there are some specific things I would like to highlight that you did well and others that I think you need to pay attention to before the assessed sessions'.
14. Then give feedback in relation to the three broad areas of competence, making reference to specific competencies as relevant.

15. Give feedback assertively yet sensitively; engage the mediators in this process.

Handover between mediators

1. Call time when the hour is over.
2. Mediator A will receive feedback after mediator B has completed their role-play, except in the case of mediations that take place immediately before lunch, in which case the feedback to mediator A will take place immediately before the mediator and the coach / assessor take lunch.
3. Mediator B takes over from mediator A and continues as if they are mediator A. They may however wind back a little if they wish to start at a slightly different point, but they do not start the session afresh, they basically continue from where mediator A left off.

Recording your assessment

1. Record your observations in considerable detail, noting examples of words used and particular skills or learning points so that you can give detailed feedback.
2. Refer to the mediator competencies as you observe the mediator.
3. When summarising the mediator's performance on the top-sheet be detailed and again relate your comments to the competencies.
4. Write legibly and in black pen so that if others have to read it they can. Mediators who are not successful will be given copies of the top sheet of your notes in the event that they wish to retake their assessment or challenge their assessment.

When you have a session off

1. You might be off but you are still part of the team...
2. Take the opportunity of the break to complete your assessments.
3. Take responsibility for ensuring that the other coaches / assessors and the role-players start their sessions on time.
4. Stay in the vicinity of the main training room and be there when the role-plays end to ensure that role-players take new briefs, and to answer questions.
5. If you have the last session of the day off then be in the main training room from the time that the role-players start returning. Ask delegates to complete their forms on feedback to coaches / assessors. When most role-players are back start a plenary debrief of the lessons / questions from the role-plays.

MEDIATOR COMPETENCIES

(observable during assessed sessions)

People Management Skills	
Macro - Creates and maintains a safe environment	Micro - Builds and maintains rapport with the parties
<ul style="list-style-type: none"> • Establishes atmosphere in which anger and tension are expressed constructively • Helps parties save face • Sensitive to interpersonal and team dynamics • Sensitive to power dynamics • Balances assertiveness and cooperativeness • Sensitive to impact of own behaviour on parties • Demonstrates impartiality • Works in a non-discriminatory way • Shows respect and empathy • Realistic and frank with parties • Displays positive energy • Gives parties equal attention, body language and eye contact • Appears relaxed and confident • Attentive to parties comfort 	<ul style="list-style-type: none"> • Establishes rapport quickly • Listens actively • Is not argumentative • Paraphrases and summarises facts and feelings fully and accurately • Acknowledges feelings • Asks more open than closed questions • Recognises own and others' perceptions and prejudices • Deals appropriately with the impact of perceptions and stereotypes • Uses reframing techniques to promote understanding and manage conflict • Uses language flexibly • Facilitates communication between the parties • Manages emotions of parties • Manages own emotions • Manages conflict between the parties in joint session
Process Management Skills	
Macro - Manages the process with confidence	Micro - Works through the phases of mediation
<ul style="list-style-type: none"> • Demonstrates confidence as the process manager • Able to be flexible in management of process • Demonstrates sensitivity to the mandating dynamic • Stays in control of the process while maintaining rapport • Respects confidentiality at all stages • Manages the process with fairness and dignity for all • Confidently keeps parties to process roadmap • Manages process without determining content • Handles process challenges while maintaining rapport 	<ul style="list-style-type: none"> • Prepares for the mediation • Makes good use of environment • Opens the mediation well, covering key points • Communicates core principles of mediation to the parties • Manages opening statements well • Takes notes appropriately • Makes sound choices about the order of meetings • Opens and closes side meetings meticulously • Explores issues before moving to generating options • Moves the parties from positional styles of negotiation to interest based styles • Moves parties from a rights focus to an interests focus • Effectively makes use of reality testing and explores BATNA at an appropriate stage in the process • Facilitates the negotiation process • Assists the parties manage the negotiator's dilemma • Manages reactive devaluation • Facilitates the drafting of a settlement agreement • If appropriate, uses the single text process • Adopts an appropriate pace
Problem Management Skills	
Macro - Manages the content of disputes to maximise potential for settlement	Micro - Explores content and options in a creative manner
<ul style="list-style-type: none"> • Allows the parties to manage the content and determine the outcome of the dispute without expressing a view • Confidently works with parties, issues, needs and interests • Demonstrates an understanding of the bigger picture • Generates an atmosphere of creative problem-solving • Contextualizes the problem • Identifies and builds consensus • Builds parties confidence in prospect of agreement • Handles ethical challenges assertively 	<ul style="list-style-type: none"> • Accurately identifies the issues in dispute • Explores positions, needs and interests • Identifies common ground • Assists the parties generate options to meet needs and interests as a basis for settlement • Encourages the generation of mutual gains options • Is able to work on a number of options simultaneously • Assists parties assess options in relation to objective criteria, particularly needs • Uses reality testing and BATNA to encourage parties to assess risk • Encourages parties to source expertise and information if necessary • Consolidates agreement and captures detail in agreement

MEDIATOR ASSESSMENT

NAME OF APPLICANT

NAME OF ASSESSOR

DATE OF ASSESSMENT

ROLE-PLAY

DAY ONE / TWO OF ASSESSMENT

MEDIATOR A / B

People Management Skills							
Macro - Creates and maintains a safe environment				Micro - Builds and maintains rapport with the parties			
O	C	W	NC	O	C	W	NC

Process Management Skills							
Macro - Manages the process with confidence				Micro - Works through the phases of mediation			
O	C	W	NC	O	C	W	NC

Problem Management Skills							
Macro - Manages the content of disputes to maximise potential for settlement				Micro - Explores content and options in a creative manner			
O	C	W	NC	O	C	W	NC

OVERALL SUMMARY

Scoring

To pass, over the two assessed days delegates must:

- Score a majority of O or C grades
- Have a minimum of one C grade in each of the three pairs of competencies
- Have no NC grades
- Have no more than four W grades on any one day
- Achieve at least a W for both the pre- and post- course assignment

Delegates who do not achieve accreditation, but whose scores on one day give a positive indication that the delegate would achieve accreditation if they undertook further skills training, will be offered the opportunity of further assessment.

Keeping notes on the role-play

Write contemporaneous notes as you observe the role-play, assessing the candidate against the competencies. Then 15 minutes before the end of the role-play write up brief summaries on the front page and assign marks. Only put marks on front page after giving feedback so that participant does not see them and also because your marks might change as you discuss the feedback. When giving feedback only give detail on summary front page with examples from notes, **but not actual marks**.

Notes