



An Bille Idirghabhála, 2017
Mediation Bill 2017

Meabhrán Míitheach agus Airgeadais
Explanatory and Financial Memorandum



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MEDIATION BILL 2017

EXPLANATORY AND FINANCIAL MEMORANDUM

The Mediation Bill 2017 contains proposals for a comprehensive statutory framework to promote the resolution of disputes through mediation as an alternative to court proceedings. The underlying objective is to promote mediation as a viable, effective and efficient alternative to court proceedings, thereby reducing legal costs, speeding up the resolution of disputes and reducing the stress and acrimony which often accompanies court proceedings. In this context, “mediation” means a facilitative voluntary process in which the parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute.

Background

Support for the development of mediation as an alternative to court proceedings has been building in recent years. In its 2010 Report entitled “Alternative Dispute Resolution: Mediation and Conciliation” [LRXC 98 – 2010], the Law Reform Commission reviewed the development and effectiveness of ADR mechanisms and recommended the enactment of legislation to underpin such processes. This Bill incorporates many of the Commission’s recommendations in relation to mediation. Meanwhile, the Rules of the Superior Courts (Mediation and Conciliation) 2010, which facilitate referral by a court of proceedings, or issues in proceedings, to a process of mediation or conciliation, came into operation in November 2010.

Developments at European Union level include Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters – given effect in this jurisdiction in the European Communities (Mediation) Regulations 2011 (S.I. No. 209 of 2011) – and Directive 2013/11/EU on alternative dispute resolution for consumer disputes – given effect in this jurisdiction in the European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015 (S.I. No. 343 of 2015).

The Minister for Justice and Equality obtained Government approval for publication of the General Scheme of the proposed Mediation Bill in March 2012. The contents of the draft Bill were subsequently considered by the Joint Oireachtas Committee on Justice, Equality and Defence and the Committee submitted its report in June 2012. The contents of that report have been taken into account in finalising the content of the Bill.

Content of Bill

Part 1 of the Bill contains preliminary and general provisions.

Section 1 makes provision for the entry into operation of the Bill's provisions. While it is intended that the general provisions on mediation will enter into operation at the earliest opportunity following enactment, the commencement of section 12 (Council), section 13 (Reports of Council), section 15 (Practising barrister and mediation) and section 23 (Mediation information sessions in family law and succession proceedings) will require the making of specific orders in due course.

Section 2 contains definitions for the purposes of the Bill. The definitions of "mediation", "mediator" and "mediation settlement" are particularly important. The definition of "family law proceedings" is relevant for the purposes of section 23 (Mediation information sessions in family law and succession proceedings).

Section 3 provides that the legislation will not apply to certain types of proceedings, e.g. proceedings under the Arbitration Act, disputes arising within an employment context referred to statutory dispute-resolution processes such as those provided by the Workplace Relations Commission; matters under tax and customs legislation; proceedings under the Child Care Acts or the Domestic Violence Acts. Other exclusions include judicial review proceedings and proceedings against the State in respect of alleged infringements of fundamental rights and freedoms. Furthermore, nothing in this legislation is intended to replace a mediation or other dispute resolution process in any other statute or in any contract or agreement.

Section 4 (Regulations) and *Section 5* (Expenses) are standard provisions in legislation of this kind.

Mediation in general

Part 2 contains general provisions in relation to mediation. *Section 6* makes it clear that participation in mediation will be voluntary and that a party may be accompanied by another person (including a legal adviser) who is not a party to the mediation or may withdraw from the mediation at any time. It will be a matter for the parties themselves to determine the outcome of the mediation. Both the mediator and the parties are, however, required to make every reasonable effort to conclude the mediation in an expeditious manner in order to minimise the costs involved.

Section 6 also provides that a mediator may withdraw from the mediation at any time during the mediation by notice in writing to the parties stating the mediator's general reasons for the withdrawal. This could arise, for example, from the emergence of a possible conflict of interests for the mediator during the mediation.

Section 7 will require the proposed mediator and the parties concerned to prepare and sign an "agreement to mediate" before the commencement of the mediation. It will contain relevant details, including the manner in which the mediation will be conducted and the manner in which the fees and costs will be paid. The agreement will also confirm the right of the parties to seek independent legal advice at any stage during the mediation.

Section 8 deals with the role of the mediator. Prior to the commencement of the mediation, it will require the mediator to make reasonable enquiries to determine whether he or she may have any actual or potential conflict of interest; a mediator may not act in the event of such a conflict. The mediator must supply details of qualifications, training, experience and any

code of practice to which he or she adheres and act with impartiality and integrity throughout the mediation.

It will be a matter for the parties themselves to determine the outcome of the mediation and the mediator should not normally make any proposals to the parties to resolve the dispute. However, the mediator may, at the express request of all of the parties, make proposals to resolve the dispute but it will be a matter for the parties themselves to determine whether to accept any such proposals.

Section 9 makes provision for codes of practice which may, inter alia, contain provisions in relation to matters such as continuous professional development requirements for mediators; procedures to be followed during mediation; ethical standards for mediators; confidentiality obligations; and redress procedures in the event of dissatisfaction with the conduct of a mediation. Such codes may be prepared and published by the Minister for Justice and Equality, or the Minister may approve a code of practice prepared by another person or body (e.g. mediation body). The procedures for putting codes of practice in place are outlined in *subsections (3) to (7)*.

Section 10 imposes a general confidentiality obligation on the mediator and parties to a mediation. This does not, however, apply where disclosure is necessary in order to implement or enforce a mediation settlement or is otherwise required by law. Disclosure may also be justified where necessary to prevent physical or psychological injury to a party or to prevent commission or concealment of a crime. These exceptions are set out in *subsection (2)*.

Section 11 deals with the enforceability of mediation settlements. It will be a matter for the parties themselves to determine if and when a mediation settlement has been reached between them and whether it is to be enforceable between them. Where a mediation settlement is reached, it will operate as a contract between the parties to the settlement except where it is expressly stated to have no legal force until incorporated into a formal legal agreement or contract to be signed by the parties. *Subsection (3)* provides that a court may enforce the terms of a mediation settlement subject to certain safeguards. It may, for example, refuse to do so if satisfied that the mediation settlement does not adequately protect the rights and entitlements of the parties, or any dependents, or where a party to the mediation settlement has been unduly influenced any other party in reaching the settlement. Where a mediation settlement relates to a child, the court must have regard to the best interests of the child as the paramount consideration.

Oversight and regulation

Many of those who practice successfully as mediators, e.g. lawyers, barristers, accountants, engineers, etc. are already subject to the regulatory structures of their own professions. The Bill does not, therefore, set out to establish a comprehensive regulatory structure for mediators. Instead, as explained above in the context of *section 9*, it is foreseen that matters relating to the ethical standards, confidentiality, redress procedures etc. applicable to mediators will be set out in codes of practice prepared and published by the Minister or approved by the Minister having been prepared by another person or body. Under *section 8(1)(c)*, a mediator is required to furnish a copy of any code of practice to which he or she adheres to the parties in order to ensure that they are aware of the standards to which the mediator has committed.

Section 12 does, nevertheless, provide for the possible future establishment of a body to be known as the Mediation Council of Ireland. It provides that where the Minister is satisfied that a body complies with the minimum standards set out in the Schedule to the Bill and is, at the same time, sufficiently representative of mediation interests involved in the mediation sector, he or she may make an order declaring that that body will be recognised for the purposes of the legislation as the Mediation Council of Ireland. Such a body would then undertake the functions set out in paragraph 1 of the Schedule, including the promotion of public awareness on the availability and operation of mediation services, and the development of standards in the provision of mediation services. It would also take on the task of preparing codes of practice for approval by the Minister and the establishment of a register of mediators who have subscribed to such a code. It is intended that such a Council would be funded from fees calculated in accordance with its own rules.

The Schedule also provides that the Mediation Council of Ireland would, if established, be independent in the performance of its functions, and would consist of not less than 11 members (5 of whom would be representative of bodies promoting mediation services or representing the interests of mediators and 6 of whom, including the chairperson, would represent the public interest).

Section 13 provides that the Mediation Council of Ireland would be required to make an annual report on its activities to the Minister and copies would then be laid before each House of the Oireachtas. The Council would be free to make other reports to the Minister on the performance of its functions.

Obligations of practising solicitors and barristers as regards mediation

Sections 14 and *15* are key provisions. The former will require practicing solicitors to advise clients to consider mediation as an alternative to court proceedings. For this purpose, they must provide clients with information on mediation services, including details of mediators, information about the advantages and benefits of mediation, and information on confidentiality obligations and the enforceability of mediation settlements. Where court proceedings are instituted on behalf of a client, the application must be accompanied by a statutory declaration made by the solicitor confirming that these obligations have been discharged in relation to the client and the proceedings to which the declaration relates. If the declaration is not submitted, the court will adjourn the proceedings until the solicitor complies with the requirements.

Section 15 makes provision for similar obligations in relation to practising barristers. It would apply in circumstances in which a practising barrister may in future be permitted, under relevant provisions of the Legal Services Regulation Act 2015, to issue proceedings on behalf of a client who is not represented by a practising solicitor.

Role of court in mediation

Part 4 contains a number of sections which deal with mediation in the context of court proceedings, including possible adjournment of court proceedings already under way in order to provide an opportunity for mediation.

Section 16 provides that a court may, on application by a party to proceedings or of its own motion where it considers it appropriate to do

so, invite the parties to the proceedings to consider mediation as a means of attempting to resolve the dispute before the court, and for this purpose may provide the parties with information about the benefits of mediation. Where the parties decide to engage in mediation, the proceedings may be adjourned.

Section 17 provides that where the parties decide to engage in mediation and subsequently apply to the court to re-enter the proceedings, the mediator will be required to make a report to the court outlining the outcome of the mediation.

Section 18 provides that the period of time during which mediation took place will be disregarded for the purpose of a limitation period under the Statute of Limitations.

Section 19 contains provisions which will apply where the parties have entered into an agreement to mediate but one or more of them commences legal proceedings in respect of the dispute to which the agreement applies.

Section 20 deals with fees and costs of mediation. Under *section 7(b)*, the agreement to mediate should specify the manner in which the fees and costs of mediation will be paid. Such fees and costs must be reasonable and proportionate to the importance and complexity of the issues at stake and the amount of work undertaken by the mediator.

As regards costs in court proceedings referred to in *section 16*, under *section 21* a court may, where it considers it just to do so, take into account any unreasonable refusal or failure by a party to consider using mediation, or to attend mediation, when awarding costs in such proceedings.

Section 22 contains an amendment to section 15 of the Civil Liability and Courts Act 2004 which will allow the court of its own motion to direct the parties in a personal injuries action to meet to discuss and attempt to settle the action by means of mediation.

Mediation information sessions

In its 2010 Report, the Law Reform Commission underlined the potential benefits of mediation in family law proceedings as an alternative to adversarial court proceedings and recommended that parties be required to attend information sessions in advance of the commencement of such proceedings during which the benefits and advantages of mediation could be explained.

Section 23 seeks to give effect to this recommendation. It provides that the Minister may, for the purpose of ensuring the availability of such sessions at a reasonable cost and in suitable locations, prepare and publish a scheme for the delivery of such sessions, or approve a scheme for the delivery of such sessions by another person or body. The Legal Aid Board is, for example, already involved in the provision of a free family mediation service, the benefits of which are widely acknowledged, especially in cases in which children are involved. Details of the procedure for adopting such a scheme are set out in *subsections (3) to (7)*.

It is also proposed that mediation information sessions would be compulsory for parties in cases falling under section 117 of the Succession Act 1965, i.e. where it is claimed that a testator has failed in his or her moral duty to make proper provision for the child, and section 67A(c) of the same Act, i.e. where in the case of a surviving civil partner it is claimed that provision should be made for a child out of the deceased's estate.

Financial Implications

It is anticipated that the legislation will have no impact on costs for the Exchequer but will reduce costs for parties involved in civil proceedings.

*An Roinn Dlí agus Cirt agus Comhionannais,
Feabhra, 2017.*

