Relate
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Mediation Bill 2017

The option to mediate as an alternative to courtroom litigation has been available in certain areas of legal dispute for some time, as detailed in the section on Alternative Dispute Resolution. The Mediation Bill 2017, once enacted, will put the option to mediate on a statutory footing for "any civil proceedings". The Bill will also place an obligation on legal representatives to advise their clients of the option to mediate.

The Mediation Bill 2017 was published on 13 February 2017. The Bill aims to promote mediation as a viable, effective and efficient alternative to court proceedings. The aim is to reduce legal costs, speed up the resolution of disputes and relieve the stress that often accompanies court proceedings. The new Bill enacts many of the recommendations made by the Law Reform Commission in its 2010 report, Alternative Dispute Resolution: Mediation and Conciliation.

Application

The Bill applies to any civil proceedings, which includes most disputes currently dealt with by the courts. The Bill does not apply to the following types of disputes:

- Criminal proceedings
- Matters under the Arbitration Act 2010
- Employment disputes dealt with by the Workplace Relations Commission
- Tax appeals and related matters
- Judicial review proceedings – where a court is reviewing a decision made by another State body

Provides a copy of any code of practice to which the mediator will adhere (e.g. a code of practice produced by a regulatory body or the Mediation Council of Ireland).

A mediator may withdraw from a mediation at any time by giving written notice to the parties of the withdrawal, for example, if the mediator becomes aware they have a conflict of interest. Where a mediator withdraws from a mediation, they must return any fees paid to them for the time already spent acting as mediator.

The code of practice may include:
- Continuous training requirements for mediators
- Procedures to be followed by mediators during mediation
- Ethical standards to be observed by mediators during mediation
- Confidentiality provisions of mediation
- Procedures to be followed by a party for redress if they are not satisfied with the conduct of the mediation
- Provisions for determining the fees and costs of mediation

Confidentiality

Section 10 of the Mediation Bill 2017 provides that all communications by the mediator with the parties and all records and notes relating to the mediation are confidential and may not be disclosed in any subsequent court proceedings.

Disclosure of confidential information or records may be justified to:
- Implement or enforce a mediation settlement
- Prevent physical or psychological injury to a party
- Prevent or reveal a crime or threat to a party
- Prove or disprove a civil claim concerning any negligence of misconduct of the mediator
- If required otherwise by law

Enforcement of mediation settlements

Section 11 of the Bill provides that the parties will decide if and when a mediated settlement has been reached between them and whether the mediation settlement will be enforceable between them. Any mediation settlement will have the same effect as a contract between the parties except where the parties expressly state that the settlement should have no legal force until it is written down in the form of a legal agreement and signed by the parties. Once a mediated settlement has legal force, either or both parties may apply to a court at any time to have the terms of the settlement enforced.

A court may refuse to enforce the terms of a mediated settlement where the terms of the settlement do not adequately protect the rights and entitlements of either party or their dependents. A court may also refuse to enforce a settlement that is not based on full mutual disclosure of assets, for example, in family law disputes, or where the terms of the settlement are otherwise contrary to public policy or if the court believes one of the parties was unduly influenced by any other party.

Where a mediated settlement relates to a child, the court must consider what is in the best interests of the child and whether those interests are provided for in the mediated settlement, as set down by Section 3 (amended by section 45 of the Children and Family Relationships Act 2015) of the Guardianship of Infants Act 1964.

Mediation and the courts

Under S.I. No 502 of 2010 Rules of the Superior Courts (Mediation and Conciliation) 2010, parties to civil proceedings may apply for, or the court itself may order, an adjournment of the proceedings so the parties can attempt mediation. If a party fails or refuses to engage in such an alternative dispute resolution process without good reason, the court can consider this fact in awarding the costs of the proceedings at the conclusion.

Section 16 of the Mediation Bill 2017 provides that a court may invite parties to consider mediation where the court thinks it is appropriate or where one of the parties asks for mediation to be considered. If the parties begin mediation during civil proceedings, the court may make any order required to facilitate that mediation; for example, adjourning the civil proceedings.

If a mediated settlement is not reached and the parties apply to re-enter the proceedings in court, the mediator will prepare a mediation report for the court. This mediation report will include:
- Reasons why the mediation did not take place if that is the case
- The terms of any mediation settlement made
- If a partial mediation settlement has been made, the agreed terms and the matters still in dispute
- If no mediation settlement is reached, the mediator’s opinion as to whether the parties fully engaged in the mediation

The time taken up during such mediation will not be recognised for the purposes of the Statute of Limitations.

Legal advisors

Section 14 of the Bill provides that a practising solicitor must advise their client about mediation, if appropriate, as a means of attempting to resolve disputes before beginning court proceedings. As part of this advice, the solicitor must explain the benefits of mediation to the client and provide the client with the names and contact information of mediation services. If proceedings are issued, the solicitor will have to provide the court with a statutory declaration stating that the client has been advised about mediation.

Where a practising barrister may act for a client who is not represented by a solicitor, the barrister must also advise the client about mediation.
Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) offers an alternative to court proceedings. The aims of ADR include reducing legal costs, allowing parties to have more control and input into the settlement outcome, avoiding the delays associated with the court system, and increasing the efficiency of access to the Irish justice system.

There is no statutory definition of ADR. The Law Reform Commission has recommended that ADR should be considered as comprising a broad spectrum of binding and non-binding processes, which does not include court litigation. ADR processes may involve the assistance of a neutral third party, such as a mediator or conciliator. Each form of ADR has unique procedures and may apply to specific areas of dispute only, for example, family disputes, workplace disputes or personal injuries.

Family disputes

Mediation and conciliation

Family mediation services help couples who have decided to separate or divorce, or who have already separated, to negotiate their own terms of agreement. Conciliation involves the parties’ legal representatives throughout the process. The conciliator takes a more active role in the process. The conciliator is not a party to the dispute or an expert on family disputes, and neither does the conciliator bring their own ideas, nor will they be a party to any court proceedings. The conciliator is trained to help the parties come to a mutually acceptable agreement.

The Family Mediation Service encourages separating or divorcing couples to work together to reach an agreement. The conciliator can help the parties to talk about their feelings, needs and expectations, to find out what they both want and eventually to agree to a settlement.

Advantages of family mediation

There are many advantages to family mediation. These include:

- The Family Mediation Service is confidential
- Each mediated agreement deals with the particular needs of the people involved
- A balanced agreement that is acceptable to both parties is reached
- Parents are helped to remain as partners in co-parenting by developing parenting plans that are personal to each family
- The Family Mediation Service is free

Contacting the Family Mediation Service

The Family Mediation Service is provided by the Legal Aid Board. You can find a list of Family Mediation Service offices, as well as information on the Family Mediation Service, on the Legal Aid Board’s website, legalaidboard.ie.

Collaborative practice

Collaborative practice is a different form of ADR for family disputes. It has a number of core elements that make it different from mediation or conciliation. These include:

- Face-to-face negotiations between the parties in dispute and their lawyers
- A commitment by the parties to engage in collaborative practice
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- A commitment by the parties in dispute to be honest and open with each other
- A commitment by the parties in dispute to try and reach an agreement that is fair to everyone

Both parties work with specially trained collaborative lawyers. The parties receive legal advice and guidance, and together with their lawyers, discuss and resolve issues through face-to-face meetings. If the process breaks down, neither of the lawyers can act for the parties in any contested court proceedings. If you are in receipt of legal aid, the Legal Aid Board will arrange alternative legal representation for you if the collaborative process breaks down.

Advantages of collaborative practice

There are advantages to collaborative practice. These include:

- The process is faster and less stressful than court proceedings
- Parties set their own agenda according to what matters most to them and their family
- Parties will have a greater degree of control over the process
- Parties do not risk key decisions being made by a third party such as a judge

Contacting collaborative practitioners

A list of lawyers providing collaborative practice services is available from the Association of Collaborative Practitioners website, acp.ie, or your local Legal Aid Board office.

Workplace disputes

Workplace Relations Commission

The Workplace Relations Commission (WRC) is responsible for the promotion and oversight of workplace relations in Ireland. Complaints in relation to contraventions of, and disputes as to entitlements under, employment, equality and equal status legislation may be referred to the Director of the WRC.

In dealing with complaints the WRC offers a number of ADR services:

WRC Advisory Service

The advisory service provides advice and assistance on industrial relations in the workplace to employers, employees and their representatives. It helps employers and employees to develop positive working relationships and mechanisms to solve problems. One of its services is preventative mediation, advising on grievance procedures and structural change. The WRC has also published codes of practice including grievance and disciplinary procedures and procedures for addressing bullying in the workplace.

WRC Conciliation Service

The conciliation service helps employers and their employees to resolve disputes when they have failed to reach agreement during their previous negotiations. An Industrial Relations Officer of the Commission acts as chairperson during meetings to negotiate an agreement. The majority of the cases referred to conciliation are settled. If no agreement is reached then, if the parties wish, the dispute may be referred to the Labour Court.

WRC Mediation Service

The WRC provides a mediation service, which aims to resolve workplace disputes and disagreements, particularly between individuals or small groups. This is a confidential service provided by officers of the WRC conciliation and advisory services. It gives employees and employers who are in dispute an opportunity to work with a mediator to find a mutually agreed solution to their problems. WRC mediation is a voluntary process.

The type of situations that are dealt with by the WRC mediation service include:

- Where there are personal differences or people have problems working together
- Where a working relationship has broken down
- Where issues have arisen from a grievance and disciplinary procedure
- Where there are industrial relations issues that have not been referred through statutory dispute resolution processes

Workplace mediation allows a dispute to be resolved informally. The resolution of the dispute is in the control of the participants. Where the parties are committed to
a mutually agreed solution it is likely to be more effective and last longer. According to the Workplace Relations Commission’s most recent annual report, almost two thirds of employment rights disputes were resolved at mediation. Where a complaint/dispute is not resolved, it will be referred to adjudication.

The WRC mediation service operates according to the following principles:

- It is a voluntary process
- Anyone who wishes to withdraw from it may do so at any stage
- The whole process is confidential unless the parties agree otherwise
- It is fast and starts as soon as everyone is available
- The mediator is impartial
- Its focus is to find a solution to the dispute that is agreeable to all parties and that will work
- It is a flexible process that may involve joint meetings or meetings with the mediator alone, depending on the particular situation

If parties are willing to engage in mediation, in certain cases, they may be offered the early resolution service (ERS), which is part of the WRC mediation service. If both parties are agreeable, the ERS will contact both parties by phone in order to resolve the dispute through mediation.

It is best if both parties apply jointly for WRC mediation. If one party does not agree, the WRC mediation service will work to get both parties to attend but participation cannot be forced. Applications should be made in writing to the WRC mediation service using the online mediation referral form on the Workplace Relations Commission website, workplacerelations.ie, or by post.

WRC Adjudication Service

A WRC Adjudication Officer’s role is to hold a hearing where both parties are given an opportunity to be heard and to present any evidence relevant to the complaint. Adjudication hearings are held in private. Complaints may, in certain instances, be disposed of by means of written procedure, without hearing. The Adjudication Officer will not attempt to mediate or conciliate the case. Parties may be accompanied and represented at hearings by a trade union official; a practicing barrister or practicing solicitor; or a union official; an official of a body that, in the opinion of the Adjudication Officer, will then decide the matter and give a written decision in relation to the complaint. The decision is communicated to both parties and published on the WRC website.

Consumer disputes

There is a range of organisations that assist with the enforcement of consumer rights in Ireland and the EU within the realm of ADR. Whether you choose to avail of these organisations is a personal choice. You have the right to take a claim to court if you so wish. However, if the outcome of your ADR is legally binding, then your decision may not be able to take the case to court.

The advantages of ADR organisations for consumers include:

- They are flexible and deal with disputes from both consumers and businesses
- They are impartial and make all information about the organisation readily available to consumers
- They ensure the effectiveness of the process and encourage both sides to co-operate, yet make them aware that it is within their rights to withdraw at any time

Ombudsmen

An Ombudsman is an official appointed to investigate individuals’ complaints about public administration or service, especially that of public authorities.

There are several Ombudsmen offices in Ireland:

- The Office of the Ombudsman investigates complaints made by members of the public who feel that they have been unfairly treated by certain public bodies
- The Ombudsman for Children looks at complaints made by children
- The European Ombudsman investigates complaints involving any of the EU Institutions
- The European Ombudsman does not deal with complaints about national, regional, or local administrations, even when the complaints concern EU matters
- SOLVIT can help you if a public authority in a particular EU member state is not doing what is required by EU law. See solvitireland.ie for more
- The Financial Ombudsman deals with complaints about financial institutions or insurance companies
- The Pensions Ombudsman investigates and decides complaints and disputes involving occupational pension schemes and Personal Retirement Savings Accounts

Generaly, ombudsmen take on a case only when a person has exhausted the organisation’s internal complaints mechanism without resolution.

Regulators

Regulators are agencies established by law to oversee specific parts of industry to ensure that they comply with the law. Examples of regulators in Ireland include ComReg, which regulates telecommunications and postal services, and the Commission for Energy Regulation, which regulates electricity, gas and water services.

Trade associations or professional bodies

Trade associations or professional bodies represent their industry. Some professional bodies and trade associations, such as the Advertising Standards Association for Ireland, have codes of practice that they enforce.

Commissions and commissioners

Commissions and commissioners are generally statutory bodies and are set up to promote and monitor rights according to particular laws. For example, the Data Protection Commissioner implements the Data Protection Acts and the Information Commissioner is responsible for overseeing Ireland’s Freedom of Information laws.

Small claims procedure

The small claims procedure provides an inexpensive, fast and easy way for consumers and businesses to resolve disputes. It is an alternative method of commencing and dealing with a civil proceeding in respect of a small claim and is provided for under the District Court (Small Claims Procedure) Rules 1997 & 1999, as amended by Statutory Instrument No. 519 of 2009, Order 53A. The procedure is a service provided by District Court offices and is designed to handle consumer claims and business claims cheaply without involving a solicitor.

Both parties must be living or based in Ireland. If either party lives or is based in another EU member state, the European Small Claims Procedure can be used. The following types of consumer claims can be dealt with under the small claims procedure:

- Consumer claims such as for faulty goods or bad workmanship. You must have bought the goods or service for private use from someone selling them in the course of business.
- Debt or liquidated damages
- Breaches of leasing agreements
- Minor damage to your property
- Non-return of a rent deposit for certain kinds of rental properties, such as a holiday home or a flat in a premises where the landlord also lives

Consumer claims cannot be made through the small claims procedure for debts, personal injuries or breach of leasing or hire purchase agreements. Businesses can make claims against other businesses in relation to contracts for goods or services purchased. It does not apply to claims in relation to:

- Agreements to which the Consumer Credit Act 1995 applies
- Breaches of leasing agreements
- Debt or liquidated damages

The claim cannot exceed €2,000. The current fee for making a claim through the small claims procedure is €25.

Generally, the respondent can either admit the claim or defend it. If the claim is defended, the Court Registrar will hear the complaint and defence and try to settle the claim. If no settlement can be reached the matter can be heard by a judge in the District Court.

Injury disputes

All personal injury claims in Ireland (except for cases involving medical negligence) must be submitted to the Personal Injuries Assessment Board (PIAB). The Board is a mandatory alternative to court proceedings. It provides independent assessment of personal injury claims for compensation following road traffic, workplace or public liability accidents. Under the Civil Liabilities and Courts Act 2004, you must make your claim for compensation within two years from the date of the accident. There are some exceptions to this rule.

Independent assessment

Claims are assessed using the medical evidence you provide from your doctor and, if necessary, a report provided by an independent doctor appointed by PIAB. The assessment of the damages due is made having regarded the particular injuries you sustained and your circumstances. Guidance amounts for compensation for particular injuries are set out in the Book of Quantum. An online version known as the Estimator is available on the Board’s website. If the respondent does not agree to an assessment by PIAB or if either side rejects the Board’s award, the matter can then be referred to the courts.
The Citizens Information Board provides independent information, advice and advocacy on public and social services through citizensinformation.ie, the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities.

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Under Section 17 of the 2003 Act, if your injury consists wholly or in part of psychological damage, for example, post-traumatic shock disorder (PTSD) or depression, which would be difficult to assess by means of the Board’s assessment procedures, the Board may give you permission to pursue your claim through the courts without an assessment of your claim.

Since August 2014, under the Recovery of Certain Benefits and Assistance Scheme, the Department of Social Protection can recover the value of certain illness-related social welfare payments from compensation awards. The benefits are recovered from the compensator and not from the injured person.

Benefits of PIAB process

There are many benefits to the PIAB process. Claims are assessed on average within seven months of the respondent consenting, whereas personal injury claims through litigation can take up to three years. Claimants can apply themselves directly to PIAB without having to incur legal fees.

Claimants are charged €45 to make an application to PIAB for compensation for a personal injury. For respondents, if a claim has been made against you and you agree to allow assessment by PIAB you must pay a fee of €600. If your insurance company has agreed to handle the claim on your behalf, it will pay this fee.

To apply, a claimant must complete an Application Form (Form A) and his or her doctor must complete a Medical Assessment Form (Form B). These two documents, available on the website, must be submitted to PIAB, along with any relevant receipts.

The information in Relate is intended as a general guide only and is not a legal interpretation.