



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

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- Proceedings against the State regarding alleged infringements of fundamental rights and freedoms
- Proceedings under the Domestic Violence Acts 1996 to 2011
- Proceedings under the Child Care Acts 1991 to 2015

Mediation

“Mediation” is defined in the Bill as a facilitative voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve a dispute. The parties’ participation in mediation is voluntary. Parties may attempt mediation at any time before the dispute is determined by the court proceedings.

A party may be accompanied and assisted during mediation by another person, including a legal advisor. A party may also obtain independent legal advice at any time during the mediation. A party may withdraw from mediation at any time. The mediator and the parties must make every reasonable effort to conclude the mediation efficiently to minimise costs.

In court proceedings, the party who loses a case often has to pay the legal fees of the other party; however, in mediation, payment of the fees and costs are not dependent on the outcome but are instead decided before mediation begins. This is one detail outlined in a document known as the Agreement to Mediate, which is signed by the parties and the proposed mediator before the start of mediation. This document also includes the following details:

- Appointment of the mediator
- How the mediation will be conducted
- How the mediator’s fees and the costs of the mediation will be paid
- The place and time the mediation will be held
- The fact that the mediation is confidential
- The right of each party to seek legal advice
- How the mediation can be terminated

Role of the mediator

The mediator is the person appointed under the Agreement to Mediate to assist the parties in reaching a resolution. Prior to appointment, the mediator must do the following:

- Make appropriate enquiry to ensure that he or she has no conflict of interest and decline to act as mediator if a conflict of interest exists
- Supply the parties with details of their qualifications, training and experience

- Provide a copy of any code of practice to which the mediator will adhere (eg a code of practice produced by a regulatory body or the Mediation Council of Ireland)

The mediator should not make any proposals to the parties as to how they might solve their dispute. Instead, the outcome of the mediation must be determined by the parties themselves. If the parties request the mediator to make proposals, the mediator can do so, but the parties do not have to accept those proposals.

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.

Codes of practice

Section 9 of the Mediation Bill 2017 provides that the Minister for Justice and Equality may publish or approve a code of practice, which sets out standards for the conduct of mediations.

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 or 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 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 practicing barrister may act for a client who is not represented by a solicitor, the barrister must also advise the client about mediation.

Mediation Council of Ireland

Under the Mediation Bill 2017, the Minister may establish or recognise one body to be known as the Mediation Council of Ireland. The functions of this body will include:

- Promoting public awareness of and providing information to the public about the mediation process
- Maintaining and developing standards for the provision of mediation services
- Preparing codes of practice for mediators for Ministerial approval and overseeing the implementation of any such code
- Establishing and maintaining a register of mediators
- Advising the Minister on family mediation particulars

The Council will be an independent body. The Council will be made up of at least 11 members of whom five will represent bodies that promote mediation services and six will represent the public interest. The Council will prepare annual reports for the Minister on its performance and activities during the previous year.

Enactment

In June 2017, the Bill passed the third (committee) stage. The Bill must pass the fourth (report) stage and fifth (final) stage before being signed into law.

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 and 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 procedure than a mediator and may suggest settlement proposals at any time, which the parties may accept or reject.

The Family Mediation Service

The Family Mediation Service encourages separating couples to co-operate with each other in working out mutually acceptable arrangements on all or any of the following:

- Parenting the children
- Financial support
- Family home and property
- Other problems related to the separation

A professionally trained family mediator assists the couple to reach their own agreement. The role of the family mediator is to:

- See a couple together and help them settle their differences

- Create a climate in which neither party dominates but in which both parties participate fully in good faith
- Create and maintain an atmosphere of co-operation and responsibility
- Help couples deal with difficult emotional issues that can prevent them reaching agreement
- Help couples reach agreement that they believe to be fair, equitable and workable

Both parties must attend the mediation sessions. These sessions are confidential. The mediator does not take sides. Between two and six sessions are usually needed to reach a final resolution. Each session takes one hour.

Most mediations end with a written document that sets out all the details of the party's agreement. This document can then be taken to solicitors to be drawn into a legal Deed of Separation or Decree of Divorce. It may also be ruled by a court so that it becomes an enforceable court order.

When a couple with children has reached an agreement, the couple can invite their children to a session to discuss their new family arrangements.

Advantages of family mediation

There are many advantages to family mediation. These include:

- The Family Mediation Service is a confidential service
- 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 childrearing 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, legallaidboard.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 in dispute and their lawyers that they will not go to court or threaten to go to court unless it is to formally approve an agreement
- A commitment by the parties in dispute to be honest and open with each other
- A commitment by the parties in dispute and their lawyers 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 own 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 Relation 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; an official of a body that, in the opinion of the Adjudication Officer, represents the interests of employers; a practicing barrister or practicing solicitor; or any other person, if the Adjudication Officer so permits. 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 on either party, you may not then 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 their settlement procedure 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 bad 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 or on behalf of children against certain public bodies, schools and hospitals
- 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

Generally, 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.

- Minor damage to your property
- Non-return of a rent deposit for certain kinds of rented 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. Guideline 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.

Procedure

When PIAB receives your application for compensation, it will issue a receipt for the fee and an application number. It will then inform the person you hold responsible for your injury (the respondent) about your claim. The respondent has 90 days to consent to the Board assessing your claim. If the respondent agrees to this, they must pay a fee. If the respondent ignores this request for consent they will be deemed to have consented. If the respondent refuses their consent, the Board will issue you with an Authorisation. This is a legal document allowing you to proceed with your claim through the courts.

When the Board makes its assessment, you, as the claimant, have 28 days to accept or reject the award. If you accept it, you must acknowledge this in writing to PIAB. If you don't reply within 28 days, it is deemed that you have rejected the assessment. The respondent has 21 days to accept or reject the assessment. If the respondent does not reply within this time limit, it will be deemed they have accepted the assessment.

If both parties accept the assessment, the Board will issue an Order to Pay to the respondent. If either you or the respondent rejects the assessment, the Board will issue you with an Authorisation allowing you to take your claim to court.

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