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High Hopes – What Lies Ahead for Mediation in Ireland in 2012?

Sabine Walsh (Sabine Walsh Mediation) · Thursday, January 5th, 2012

As we head into a new year of mediation and managing conflict in the world it strikes me that, at least in this little corner of Europe, the discipline of mediation itself is at a crossroads. A combination of political and socio-economic circumstances and potential legal developments could lead to mediation taking a greater part in dispute resolution in Ireland than ever before. This month I have decided to look at just a few of these possible developments, and would be very interested to hear whether and how similar changes have occurred and have impacted upon mediation in other countries.

The Mediation and Conciliation Bill 2010

The potentially most significant change scheduled for 2012 is the publication (and hopefully enactment!) of the a comprehensive Mediation Law. A “first draft” of such a law was the Mediation and Conciliation Bill, 2010, published in November 2010 as an appendix to the Law Reform Commission’s seminal Report on Alternative Dispute Resolution. It not only proposed to implement the EU Directive on Mediation, but completely revised the law on mediation and conciliation in Ireland in one piece of legislation. It set out general principles applicable to mediation and conciliation, and also provided for mediation in specific instances, including family law, personal injuries and medical negligence, among others.

Due in part to the change in government early this year, it was decided to re-visit the draft legislation thoroughly before publishing a version that will be put before the houses of parliament. As a result, the EU Directive was implemented by means of a statutory instrument in May 2011, and we mediators anxiously await the publication of the substantive legislation, promised for this year. Whether this retains the form drafted by the Law Reform Commission, is completely re-drafted or somewhere in between, the potential for development of the field cannot be underestimated, and fortunately appears also to be recognised by the Irish Minister for Justice, himself a trained mediator. If the indicated publication date of Quarter 2 of 2012 is accurate, watch this space for a full report on the Bill’s provisions...

Integration of the Civil Legal Aid Board and the State Family Mediation Service

One initiative that is already being implemented is the integration of the state-funded Family Mediation Service (FMS) with the Civil Legal Aid Board. Previously, FMS was administered by the Family Support Agency which operated under the aegis of the Department of Community,

Equality and Gaeltacht Affairs. The Legal Aid Board, which provides legal aid in particular to couples in the process of separating, operates under the Department of Justice. It was widely agreed that greater co-ordination between these two services was required in order to increase the uptake of mediation in family matters. The Minister therefore passed the law transferring the FMS to the Legal Aid Board on 1st November 2011 in order to “drive reform and modernisation in this critical area and to put in place a process and structure which facilitates a coherent and integrated approach to resolving certain family law disputes”. This development builds on a previous initiative to co-locate a branch of the FMS with the offices of the Legal Aid Board and Courts Service in Dolphin House in Dublin, in order to provide a “one stop shop” for family law clients who are eligible for legal aid.

What is now required, in my opinion, is an extension of this integration and co-location of services to all other areas of the country, in the first instance, and then also to privately funded family disputes and non-family-law disputes. While it would be foolish to hope that the heavily indebted Irish state would extend funding for mediation any further than those services that are already funded, and one might well have justifiable concern about the continued funding for such services, even making information on mediation and lists of private mediators available through the Courts Service and at court houses and court offices would go some way towards increasing the visibility of mediation for those in dispute. It would also, I would submit, make it easier for judges to refer cases to mediation, either under the various legal provisions which exist or by virtue of the discretion they have to do so. Perhaps even a duty roster of mediators being available to offer free information sessions, such as that envisaged by draft German mediation legislation, might be put in place without too much difficulty.

Co-ordination of training and accreditation of mediators

As both a mediator and a mediation trainer, this is one area that I feel is desperately in need of reform. In Ireland as, I understand, in many other countries, there is no one central authority responsible for “quality control” of mediators. Any person, technically, can call themselves a mediator. A number of agencies and organisations offer some form of accreditation, based on a provision in the Civil Liability and Courts Act 2004 nominating 6 bodies who can appoint a “chairperson of a mediation conference”. The same legislation also permits solicitors or barristers of 5 years standing to act as mediators though does not require specialised training for such practitioners. There are no generally recognised or enforced standards of training or requirements for continuing professional development.

One of the professional bodies for mediators, the Mediator’s Institute of Ireland, is endeavouring to set up such training and quality control standards but can only impose these on their members. Other agencies and training providers then have other standards. What is even more disappointing is that the Law Reform Commission, somewhat surprisingly, in my opinion, recommended NOT to create a statutory scheme of training and accreditation, recommending this only be done when mediation is fully developed in Ireland. I would submit that in order for mediation to develop as a credible alternative to litigation the quality of such services, particularly where they deal with vulnerable people, must be guaranteed and the standards of the profession must be universal, transparent and enforceable.

What we are left with for the moment are provisions contained in the current draft of the legislation to draw up a statutory Code of Conduct to which all mediators must then adhere. Let’s hope that reflection and debate on this aspect of the proposed legislation might encourage the legislature to take quality control and mediation standards a bit further.

New areas in mediation

A final word on some of the areas I think Irish mediators will be working in in 2012. One trend that will no doubt carry on well into 2012 is that of debt related mediation. While anecdotally this is going on informally between banks and the indebted Irish public every day, I think an increasing number of borrowers, and hopefully lenders, will resort to structured mediation to manage debts of all sizes. This is particularly relevant now as traditional enforcement measures are no longer solving the problems associated with debt, particularly mortgage debt. More creative solutions are necessary and can often be found through mediation.

From a purely selfish perspective, I am hoping, and indeed anticipating, that cross border mediation will also increase, this being my special area of interest, as the EU Directive is fully implemented, and Ireland continues to come to terms with its relatively new multi-culturalism. In this context, and in view of the number of multi-national companies now situated in Ireland, I think Online Dispute Resolution will also become increasingly interesting for Irish practitioners.

Also interesting to see will be how much use, if any, the mediation provisions of the Multi-Unit Developments Act, 2011, known as the MUDS Act, get, about which I blogged in September 2011. At the recent annual conference of the Mediators Institute of Ireland, mediators from all disciplines and backgrounds seemed to be united in their condemnation of and consternation about these provisions. There was talk of “anti-MUDS clauses” in Agreements to Mediate and about mediators refusing to take on such cases. Furthermore, if the Mediation and Conciliation Bill 2010 is enacted in its current version, creativity will be required in addressing the likely conflicts between it, the MUDS Act and some other provisions with which it will likely clash.

In any event, as both a mediator and a trainer, I look forward to 2012 with substantially more optimism than pessimism, and think that the only way is up for mediation in Ireland. And sure if things do not progress quite as I would like to see them do, it will keep me in blogging material for some time to come!

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