

Kluwer Mediation Blog

The Big Irish “What If?”

Sabine Walsh (Sabine Walsh Mediation) · Sunday, January 11th, 2015

A couple of years ago in January I wrote a post on likely developments in Ireland in the New Year which, if I recall correctly, had the expression “High Hopes” in the title. Those hopes related primarily to the publication of a new, comprehensive piece of legislation on mediation and the impact it might have upon the practice and profession of mediation. Two years down the road, Ireland’s mediators can be forgiven for feeling nothing but disappointment and frustration.

The General Scheme of the Mediation Bill was indeed published in 2012 and, pursuant to a changed legislative process, a consultation period and public hearing at the Joint Committee on Justice, Equality and Defence took place to review the many submissions that were made on the draft Bill by various interest groups. The Committee published its report in June 2012. And then? Nothing. Well, not quite nothing....a series of promises by the Minister for Justice to publish the final draft, taking on board the amendments and to get it into the legislative list by...first quarter 2013, last quarter 2013, third quarter 2014...and so on. The aforementioned Minister has since been forced to resign over an unrelated matter and his successor, despite appearing to be genuinely motivated in relation to mediation, particularly in family matters, has failed to make any progress on the Bill. Rumour has it that it has been drafted but no place can be found for it in the crowded legislative schedule, but as it stands, at the time of writing the Bill appears in the “B List” of Bills where heads have been agreed and texts are being drafted and is listed as “expected for publication early 2015”.

(http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/Legislation_Programme_Autumn_2014.pdf) Meanwhile, a general election looms in a year’s time, if not before, and one has cause to be genuinely worried whether the Mediation Bill will ever see the light of day.

So what if the Bill never makes it across the line? Is it downhill from now on for mediation in Ireland? I don’t think so. As so often, development at ground level continues apace irrespective of statutory regulation. A number of pilot projects I mentioned in previous posts, most notably the one in the District Family Court, continue to be enormously successful. The latter has been rolled out to other District Court areas, even outside of Dublin. Testimony from practising mediators gives the impression that courts are making use of existing powers to recommend mediation with increasing frequency and more referrals to mediation are coming from lawyers, who have traditionally been viewed, with good reason, as being reluctant to give away

potentially lucrative litigation files. A number of cases also show that judges are asking why mediation has not been resorted to and are not reluctant to impose costs penalties for failure to consider mediation. (See, for example, *Palaceanne Management Ltd -v- Allied Irish Banks Plc* [2012] IEHC 182)

The area of family law, particularly, is one where mediation is recommended frequently. The state Family Mediation Service has waiting lists in most cities and towns, and from my own experience, even in the absence of the onerous obligations the draft Bill proposes to put on legal professionals to recommend mediation, solicitors are tending to suggest mediation to clients with greater frequency than ever before, in my own experience. Cynics might suggest that this is because the level of fees contested family law cases brought with them in the boom times will never be reached again, and it brings no financial advantage with it to litigate divorces where the only asset being contested is a house which is worth less than the borrowings secured against it, but I'd like to think that it is more related to a change in thinking about family conflict and how it should be resolved. This is also evidenced by the fact that lawyers themselves are increasingly training in mediation, with the Law Society's Diploma in Mediation well subscribed for the second year now. The Irish professional organisation for mediators, the Mediator's Institute of Ireland now boasts a membership of over 700 individuals and organisations.

The State is also showing signs of re-thinking how family justice should be dealt with. Broke and all as it is, it recently acquired a piece of property in Dublin for a new Family Court Building which will house all the existing family court and mediation services. Beyond family mediation, all is not lost on the legislative front either. Context-specific legislation, such as the Legal Services Regulation Bill and the Workplace Relations Bill, both making their way through parliament at the moment, contain mediation provisions. And meanwhile all the other statutory provisions and court rules - random, contradictory and flawed as they are - continue in force and, more importantly, continue to be applied and invoked.

So maybe mediation will actually continue to develop even in the absence of the much hailed Mediation Act. And maybe, if and when it is published and passed, it will be a better piece of legislation for the time that has elapsed and the knowledge the Department of Justice has gained from engagement with groups such as the Mediator's Institute of Ireland other interested groups and parties. The Bill is not by any means without flaws, confusing provisions and potentially onerous but unworkable obligations. The passage of time should at least have allowed some ironing out of these wrinkles, one would think. Furthermore, the legislation is only ever as good as those who will act under it, in this case mainly legal professionals, judges and mediators. And those, as discussed above, are becoming more exposed to mediation and thus gaining a greater understanding of the process, its benefits and pitfalls. After all, in the words of Lyndon B. Johnson, "You do not examine legislation in the light of the benefits it will convey if properly administered, but in the light of the wrongs it would do and the harms it would cause if improperly administered."

We shall not lose faith in what 2015 may bring in terms of significant developments, but we shall also recognise that real progress generally comes in small, undramatic steps that build upon foundations already laid.

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