Kluwer Mediation Blog

Hot off the press – the Draft Mediation Bill 2012

Sabine Walsh (Sabine Walsh Mediation) · Monday, March 5th, 2012

As I sat down at my desk the other day to think about what to blog about this month, e- mails and text messages suddenly started pinging into my inbox giving me the rather exciting news that the Minister for Justice had just published the draft Mediation Bill, promised in the Programme for Government set out by the new Irish administration this time last year and scheduled, actually, for somewhat later this year (Quarter 2, 2012!). I have to admit to being pleasantly surprised, as I had been somewhat sceptical about the timeframe, being generally used to things on the legislative front happening a lot later than promised.

Anyway, having had 24 hours to give it some cursory consideration, I decided to share a brief overview of its some of its provisions, and my thoughts on them, with you.

You might recall from my January posting that the context for this draft legislation was the publication in November 2010 by the Law Reform Commission of their Report on Alternative Dispute Resolution, which had appended to it a draft Mediation and Conciliation Bill. This report and draft legislation arose partly from the need to consider how the EU Mediation Directive of 2008 should be implemented in Ireland. With the deadline for transposing of the Directive into national law running out (and an understandable reluctance on the part of the Irish government to further irritate the EU) the Directive was transposed by means of a Statutory Instrument in May 2011 and the full legislation left for consideration in due course. The draft now published, in the words of the Minister for Justice, “builds on” the Bill appended to the LRC Report.

At first reading, the text of the draft bill strikes me as somewhat more succinct and therefore more easily implemented than that attached to the Law Reform Commission Report. While it retains most of its core principles, and the key recommendations made by the Law Reform Commission, it avoids the unnecessary confusions of addressing conciliation in almost every section as well, and the rather nebulous difference in definition of the two processes. The draft legislation contains a definition of mediation: ““mediation” means a facilitative and confidential process in which a mediator assists parties to a dispute to attempt by themselves, on a voluntary basis, to reach a mutually acceptable and voluntary agreement to resolve their dispute” but interestingly also contains a number of alternative definitions, including that contained in the EU Directive.

Its scope is relatively broad, though excludes certain disputes that already go to other alternative dispute resolution mechanisms, and is not intended to replace any mediation provisions in existing legislation. This latter clause might prove interesting in practice, as some of the existing mediation provisions, notably the mediation provisions in the Multi-Unit Developments Act, 2011, which I

wrote about in September 2011, are fundamentally at odds in their definitions, content and intention with much of the draft legislation.

The key clauses of this draft bill seem however to centre around re-directing disputes into mediation, at all stages of the dispute. Heads 4 and 5 of the Bill place a duty on solicitors, and, interestingly, barristers, to advise clients of the possibility of using mediation to resolve the dispute and, in the case of solicitors, to provide the clients with information on mediation and mediators. Clients must certify that such advice and information has been given before proceedings can be issued. An interesting duty that is also placed on the solicitor is to, as far as possible, estimate the potential costs of litigating a dispute, the costs the clients may be liable for if unsuccessful in court and estimating the likely duration of court proceedings. I would think that this information will be the most pertinent in encouraging clients to opt for mediation. In my experience, at present, accurate information on potential costs and duration of proceedings are often only given when it is too late for alternative processes.

If proceedings are issued, and litigation is commenced, a court can still intervene to encourage mediation. Under Head 12 of the Bill, a court can, either of its own motion or on application of the parties, invite the parties to consider using mediation as an alternative, direct them to attend a mediation information session, or draw their attention to the fact that court proceedings can be stayed to facilitate the use of mediation. By stopping short of directing mediation, these provisions try to keep the delicate balance between encouraging and facilitating mediation, but retaining the voluntary nature of the process. (A task the Multi Unit Developments Act 2011 referred to earlier failed at spectacularly!) If the parties agree to try mediation, the court can make whatever orders are necessary to facilitate this. Head 12(5) also gives the court some guidance in deciding when it is appropriate to issue such an invitation.

If Head 12 of the Bill takes the “carrot” approach, Head 17 represents the “stick”. These sections permit the court, in awarding costs, to have regard to any “unreasonable refusal to consider using mediation” or “unjustified refusal to attend an information session”, subject to certain exceptions. This latter aspect of the provisions takes the costs penalty somewhat further than the recommendation of the Law Reform Commission, but could prove to be a useful addition to the courts “mediation promotion toolbox”, depending on how is it applied. As with all such legislation in a common law jurisdiction, much of the success of this legislation, if enacted in its current form, will depend on the enthusiasm and pragmatism of the judiciary in applying its provisions.

As I am running out of space, I will just briefly point out some other aspects of the draft legislation. It contains provisions on confidentiality and the mediator’s duty to report to court, which are broadly in line with the EU Directive and the Law Reform Commission’s recommendations. The duty to report, restricted to a neutral summary of the outcome of a mediation, again, will be substantially out of sync with some of the more eclectic reporting provisions of other legislation (the MUDS Act strikes again) and it would occur to me that it is a shame that the legislation does not propose bringing these other provisions at least broadly in line with what should, once enacted, be the seminal law on mediation.

One disappointment is, I feel, the provisions in relation to mediators themselves and their qualifications. The only duty placed upon a mediator is to furnish potential clients with full details of their qualifications and further training, if any, but it then leaves it up to the client to accept or reject that mediator. No attempt whatsoever is made at regulating the profession, the training of mediators, the administration of the profession or any other method of quality control of the

mediator's profession. It is particularly surprising that there is no reference to minimum training requirements or standards even in the case of family disputes, where the same legislation contains a broadly drafted provision facilitating and encouraging the participation of children in mediation. As a family mediator and trainer of family mediators I can only plead with the legislators to reconsider this. Certain minimum standards of training and supervision are essential for anyone working with families and children. Head 9 does allow the Minister to draw up or approve an existing Code of Conduct which can cover such issues as training and supervision but again I would submit that this is inadequate. While adhering to a statutory Code of Conduct is important, the profession is in need of some more robust regulation if it is to get the "buy-in" of both the legal profession and its users, the general public. Nothing devalues a profession in the eyes of its consumers as quickly as knowing that anyone can nail a sign to a wall and call themselves a mediator. The approach taken by the draftsmen in this regard is broadly in line with that of the Law Reform Commission, though does not follow its recommendation in relation to specialist training for family mediators. The LRC felt that at this stage in its development the profession is best self-regulated. One would be inclined to wonder however, whether given the controversy and uproar surrounding the dismantling of the self-regulation of the legal profession in Ireland at present this is a wise approach to take.

I have not (yet) addressed many of the other, broadly sound provisions of the Bill, but this can wait until it has made its way through the Houses of Parliament, or at least through the Joint Oireachtas Committee on Justice, Defence and Equality, which is due to report back to the Minister on it by 1st June. For anyone interested in reading the Bill, or more about it, it is available on www.justice.ie

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