
Kluwer Mediation Blog

The (Possible) Demise of the Mediation Bill 2012 – Dead End or Clean Slate?

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Over the past months, indeed years, I have been blogging about Ireland's proposed new regulatory regime for mediation contained in the draft Mediation Bill 2012. [2012](#) [2016](#) It was stalled and delayed and, despite promises which started in the Programme for Government back in 2011, and were made as recently as last summer, has not progressed.

Two weeks ago, the general election voted out the government which had put the Bill on the agenda, but failed to produce a new government, as no party has enough of a majority or close enough allegiances to build one. The various parties have now entered into discussions and negotiations which, if they don't result in a coalition agreement, will mean another election later in the year. One has to fear, therefore, that the Mediation Bill may have died with the old government.

This has caused dismay in many quarters, not least in the Mediators Institute of Ireland, the national professional organisation for mediators, which has been lobbying the government for implementation of this Bill since it was first drafted. Mediators and lawyers have repeatedly expressed frustration at the lack of a clear regulatory framework for mediation and legislative measures to filter cases out of busy court lists into mediation.

There has been a lot of expectation laid on the Mediation Bill, particularly as regards its potential for bringing more work to the doors of mediators. In Ireland, like in so many other countries, the number of mediators available for work still exceeds the number of mediations for them to do. The Bill put some relatively onerous obligations on solicitors and barristers to recommend and explain mediation to clients before issuing legal proceedings, and also gave judges powers to suggest mediation and facilitate its taking place even once proceedings are before the court.

But a close look at my own practice, and an interesting conversation with a judge recently would lead me to question the hypothesis that the Bill would have fixed everything. First off, it was far from perfect. Many lawyers would argue that the obligations it put on them, including the requirement to advise clients of the likely length and cost of litigation, would be unworkable. A requirement to attend mediation information sessions or obtain information on mediation other than through a solicitors was omitted, something which all groups involved in the pre-legislative consultation process pointed out.

But more importantly, in the absence of legislation, referrals to mediation have increased, while

not dramatically, steadily, as anecdotal evidence from colleagues would suggest. The vast majority of my referrals now come from legal professionals, without any legislative obligation. Judges are routinely referring cases to mediation, and a body of case law is emerging from the higher courts in relation to the implications of refusal to go to mediation. Judges are also implementing key policy aspects of mediation – the non-compellability of the mediator, confidentiality and enforceability of agreements, on a daily basis, usually on “public policy” grounds, in the absence of a firm regulatory structure.

While regulation is still necessary, the feared death of the 2012 Bill may provide some clear opportunities, including one to draft a new, more considered Bill, incorporating both the information gathered during the original consultation process and the changed situation in legal services and participant needs. In the latter case, for example, a new Bill could fit better with new legislation and processes emerging in relation to debt resolution and workplace relations which did not yet exist when the original Bill was drafted.

Furthermore, the organic development of mediation “on the ground”, and particularly in the courts would likely continue. The member of the bench expressed a certain amount of relief that “we can get on with it now” as regards encouraging as many parties as come before the courts to go to mediation as possible.

Of course a more structured approach will be beneficial to the development of mediation in the long term, and legislation will likely be required to do this, but the possible demise of the 2012 Bill might lead to a new Bill, which should be more up to date and might even reflect actual practice, while also bringing mediation regulation a step forward. This would be a good thing for mediators, parties, and the legal profession. The only thing we need now to move things forward is...a government. Getting to that point looks likely to require some very advanced mediation skills.

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