



THE BAR OF IRELAND

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Submission of the Council of The Bar of Ireland in relation to the Mediation Bill 2017

July 2017

The Council of The Bar of Ireland, having read and considered the published Mediation Bill 2017 and the accompanying Explanatory and Financial Memorandum, now makes the following submissions regarding the text and content of the said Mediation Bill 2017. The Submissions of the Council of The Bar of Ireland are presented in corresponding order to the Arrangement of Sections provided in the Mediation Bill 2017.

The Submissions made by the Council of The Bar of Ireland are made using the Mediation Bill 2017, the most recent iteration of the Bill available.

Preliminary submission regarding the headnote and schedule

- 0.1 Mediation is utilised in its own right as a standalone means of dispute resolution as well as alongside legal proceedings in being. Currently, mediation does not prevent a litigant from initiating proceedings (as distinct from progressing proceedings) and does not impede a litigant's right of access to the courts. It is submitted that the current state of affairs remains desirable and that nothing in the Mediation Bill or any subsequent Act of the Oireachtas should fetter this important right. Consideration should be given to ensuring that the bill does not change the current status of mediation in its relationship with people's right of access to the courts.
- 0.2 The Council of The Bar of Ireland submits that the specified purpose of the Bill insofar as the proposed Mediation Council of Ireland is concerned, is not explained in the Bill or explanatory documents. It is submitted that the Bill provides (under sections 4 & 9) for the making of regulations by the Minister and for the publication of a Code of Practice for mediators. Provided such regulations and a code of practice are published and given that the Bill contemplates the potential for private redress by way of civil claims against mediators for negligence or misconduct (section 10(2)(e)), it is submitted that the proposed Mediation Council of Ireland does not add any governance value to mediation in general. The Council of the Bar of Ireland submits that further consideration should be given to the necessity of establishing such a body.
- 0.3 The Bill also provides for the promotion of mediation by legal professionals to their clients prior to issuing proceedings. It is submitted that setting up a new body to promote mediation is unnecessary in circumstances where the option of mediation, specific to a client's particular interests and the dispute at issue, will, under the proposed Act, be explained to the client before proceedings issue.
- 0.4 The effect of the establishment of the Mediation Council of Ireland may lead to new fees for practitioners which will become part of the cost of providing the mediation service which will inevitably be passed on the public. The maintaining of a register of mediators who subscribe to the Code of Conduct, by the Mediation Council is also unnecessary as all mediators will be obliged to comply with the legislative code of conduct anyway (and with their own professional codes of conduct). The proposed Mediation Council of Ireland adds a further layer of regulation which can only be based on the regulation already provided for in the Bill and related ministerial Orders.
- 0.5 The Council of The Bar of Ireland submits that it may be desirable for litigants, lawyers and the courts service to recognise which types of cases and which specific cases may be channelled into mediation. It is, therefore, submitted that consideration should be given to the promotion of lawyers' and courts services training through provisions of the Mediation

Bill. The Mediation Bill could provide for imposing obligations and powers on the proposed Mediation Council of Ireland to promote the use of mediation through training.

Section 1. Short title and commencement

1.1 No submission made.

Section 2. Interpretation

2.1 The definition of 'mediator' is widely drafted. The Council of The Bar of Ireland submits that this wide definition should be maintained. It is the parties to a mediation who should decide who their preferred mediator should be.

Section 3. Scope

3.1 The Council of The Bar of Ireland submits that in addition to the exceptions to the bill contained in Section 3(1), disputes which fall to the function of the Residential Tenancies Board should be excluded from the scope of the Bill. This is a mediation type process already and it is submitted that it is unnecessary that further mediation be contemplated.

3.2 The Council of The Bar of Ireland submits that a further exclusion from the scope of the bill should be those matters arising from professional regulatory and disciplinary disputes. It is submitted that these matters are simply not suitable for mediation (outside of such provisions as may be provided for by regulatory authorities).

3.3 The Council of The Bar of Ireland queries as to whether probate disputes are intended to be included in the scope of the Bill and submits that if so, probate matters should be specified as an included subject under the terms of the Bill.

3.4 The Council of The Bar of Ireland submits that the use of the phrase 'the State' in section 3(1)(g) is undefined under the Bill. It is submitted that the Bill should clarify the meaning of 'the State' for the purposes of the Bill.

3.5 The Council of The Bar of Ireland submits that consideration should be given to exclude from the requirements of the Bill, cases in which, a legal professional advising a client has a belief that time is of the essence in the dispute at hand.

Section 4. Regulations

4.1 No submission made.

Section 5. Expenses

5.1 No submission made.

Section 6. Mediation

- 6.1 The Council of The Bar of Ireland submits that Section 6 (or in the alternative, Section 16) should include a provision to the effect that the parties to a dispute shall themselves agree on the identity of the mediator. It is further submitted that provision should be included in Section 6 (or Section 16), in the event of the failure of the parties to agree upon the appointment of a mediator, to apply to Court by way of motion on notice grounded on affidavit setting out the identities of the proposed mediators, if any, and the objection(s) to their appointment, if any. Section 6 (or Section 16) should set out circumstances in which a Court may direct the parties to apply, within a specified time limit appropriate to the proceedings, to a professional body with the relevant experience and expertise to appoint a mediator to mediate the dispute at issue.

[In this regard, the appropriate professional body may include, but of course would not be limited to, the Alternative Dispute Resolution Panel being established by the Bar of Ireland. This panel will have a chairperson who will be in a position to appoint a mediator from The Bar of Ireland's panel of mediators.]

- 6.2 The Council of The Bar of Ireland submits that the terms of Section 6(4)(a) may favour a party to a dispute who wishes to engage in delay and the frustration of the resolution of a dispute. While it is desirable for parties to be entitled to withdraw from mediation at any stage, a reluctant party may use the mediation process to engage in delay tactics. Time may elapse in coming to an agreement as to the identity of the mediator, the terms of the mediation, the costs of mediation and the time and location of the mediation. If, after expending time and cost in arranging the mediation, a party then withdraws from the mediation process without explanation, it is submitted that this behaviour should be a consideration which a Court can have regard to in the awarding of costs for or against a party to the dispute (see section 21).
- 6.3 The Council of The Bar of Ireland submits that the provisions of Section 6(6) are inconsistent with the strict confidentiality of mediation. It is inconsistent with this principle of confidentiality that a mediator would provide a record of why the mediation had been brought to an end, whether by the withdrawal of the mediator or by one or more of the parties to the mediation. This unnecessary disclosure of the reason(s) why the mediation has been brought to an end could undermine the parties' trust in the process and in the mediator. While it is practical to confirm the termination of the process in writing, there is, in the submission of the Council of the Bar of Ireland no valid reason for the reasons for the termination to be set out in writing or otherwise disclosed.
- 6.4 It is submitted that, as the mediator is in charge of the mediation process, Section 6(9) should be amended to read, *"it is for the parties, in consultation with the mediator, to determine the outcome of the mediation."*

Section 7. Agreement to Mediate

- 7.1 The Council of The Bar of Ireland submits that section 7 should include, in the information to be contained in the agreement to mediate, the right of parties to attend mediation with non-party participants or advisors who may assist the parties during the process of mediation.
- 7.2 If the suggestion at Paragraph 6.3 above is not taken, it is submitted that Section 7(f) should provide scope for the parties to a mediation to contract out of the requirement for a written notice of the termination of the mediation with reasons for the termination as contained in Section 6(6).

Section 8. Role of mediator

- 8.1 The course of a mediation may be lengthy and may contemplate issues which had not arisen prior to the mediation process. Mediation will, of its nature, often occur at an early stage of a dispute and a party may not be as prepared as he or she would be in advance of a Court hearing. A party to the mediation, whether accompanied by advisors or not, may not be prepared to deal with such issues as they impact on any final terms of agreement. Mediation, being voluntary, should not prevent a party, for want of time, from being properly advised in relation to any concluded terms of agreement.
- 8.2 The Council of The Bar of Ireland submits that a party may feel pressurised in the acceptance and signing of terms of agreement. Therefore, it is submitted that Section 8(2)(d) should include a further requirement for a mediator to advise a party of their right to take such time as is reasonably necessary to obtain independent advice, including legal advice, prior to signing any agreement arising from the process.
- 8.3 It is submitted that the effect of Sections 8(3) and 8(4) could interfere with the flexibility of the mediation process and removes a powerful discretion to move the process along which a mediator might otherwise enjoy. It is submitted that a trained mediator would be in a position to make astute proposals to the parties which may bring about resolution of the issues. It is also submitted and acknowledged that it is not the role of a mediator to suggest a solution but rather to explore areas of conflict and acknowledge common ground. In the context of a given mediation, it may be desirable, without having to obtain consent from the parties, for a mediator to be able to make proposals as to how conflict may be resolved (as opposed to making proposals as to the solution to the issues).
- 8.4 A further point to note following Paragraph 8.3 above is that Section 8(4) as drafted, may provide a party with an avenue to challenge a mediation settlement after the fact, based on an allegation that the mediator proposed the settlement contrary to the Bill as drafted. Permitting a mediator to make proposals to the parties would be an effective barrier to such claims.

Section 9. Code of Practice

- 9.1 The Council of The Bar of Ireland fully supports the publication, following consultation and submissions from interested parties, of a Code of Practice for Mediators.
- 9.2 It is submitted that any code of practice contemplated in Section 9 should include provisions relating to conflicts of interest and the avoidance of same by mediators. This inclusion should be specified as one of the items listed in Section 9(2).
- 9.3 The Council of The Bar of Ireland submits that the question of whether a breach of the code of practice by a mediator should be actionable in damages and/or by a supervisory body requires further discussion when a draft code of conduct has been made available. The Council of the Bar of Ireland reserves its position in this regard. For the present, the Council of the Bar of Ireland submits that a mediator should be permitted to exclude civil liability for negligence in the terms of the mediation agreement presented to the parties and agreed prior to the mediation.
- 9.4 It is however submitted that the mediation process must remain flexible and a code of practice which impinges on this flexibility and the proper discretion of the mediator may undermine the process. It is important for the Code not to be overly prescriptive and to allow deviation from the Code, in relation to the running of a mediation, with the consent of the parties.

Section 10. Confidentiality of mediation communications

- 10.1 It is submitted that the protection of mediation communications from being subject to discovery in civil proceedings is desirable. It is submitted that the terms of section 10(1) are too narrow in scope, however. The Council of The Bar of Ireland submits that the clause, *“created by any party to the mediation or created for the assistance or use of any party to the mediation,”* should be inserted following the existing clause *“all records and notes relating to the mediation.”*
- 10.2 Following on from the submission made at 6.2 above, a party may wish to adduce *inter partes* correspondence regarding the mediation process as evidence of a party using the process as an exercise in delay and frustration of another party’s right to litigate. It is submitted by the Council of The Bar of Ireland that such correspondence between the parties (and not including such correspondence to or from the mediator) should be admissible in evidence on the occasion of an application for costs after such time as a Court has made Orders in relation to the substantive issues in dispute between the parties.
- 10.3 It is submitted that Section 10 should expressly exclude from the confidentiality of mediation communications, the documentation specified in paragraph 10.2 above in the circumstances contemplated in paragraph 10.2 above.
- 10.4 The Council of The Bar of Ireland submits that the Bill should specify that a deliberate breach of confidentiality as set out in Section 10(1) should be actionable in damages by an aggrieved party.
- 10.5 It is submitted that the exceptions to the confidentiality of the mediation process contained in Section 10(2) are widely drafted and open ended. It is not stated on whose application the

communications might be disclosed, to which body or court such an application would be made, the nature or severity of the injury, crime or threat which would require the disclosure or the identity of the “law” which might require the disclosure of the communications. It is submitted that these exceptions should be revisited and more narrowly focused exceptions set out. The Council of the Bar of Ireland therefore reserves its position in this regard.

Section 11. Enforceability of mediation agreements

- 11.1 The Council of The Bar of Ireland submits that the enforceability of mediations, if so agreed by the parties, would be subject to the same requirement for Court approval of a settlement or tender as currently exists in relation to minors or persons under a disability. This reality should be specified in the bill.
- 11.2 It is submitted that as a corollary of the parties’ right to agree to the enforceability of the terms of agreement, Section 11 should expressly provide for the admissibility of the written, signed terms of agreement in the event of the non-compliance of the terms of agreement by one or more parties to the agreement, provided the parties have agreed that the terms of agreement are to be binding on the parties.
- 11.3 It is submitted that section 11(3) should be subject to the terms set out in section 11(2) of the Bill.
- 11.4 It is submitted that Section 11(2) appears to contemplate circumstances in which a “mediation settlement” might have effect as a contract before it is signed or incorporated into a formal legal agreement. It is submitted that the section should be rearranged to read, “...a mediation settlement shall have effect as a contract between the parties to the settlement once it has been incorporated into a formal legal agreement by or on behalf of the parties or has been signed by the parties.” It is submitted that the part of the section where reference is made to the settlement expressly stating that it has no legal force, is unnecessary.

Section 12. Council

- 12.1 The Council of The Bar of Ireland submits that it is unclear why it may be necessary or desirable to recognise a body as the Mediation Council of Ireland. The Council of The Bar of Ireland refers to the points made in the submission regarding the headnote and the schedule to the Bill. It is submitted that the establishment of a body to rubber stamp the requirements of the proposed Act is unnecessary and not cost effective.
- 12.2 It is submitted that the enactment of a Mediation Bill and related ministerial Orders should provide for a framework within which mediations and mediators will work. The function of the Council as contemplated by the Bill seems to be an unnecessary appendix to the function of the Bill itself.

Section 13. Reports of Council

- 13.1 No submission made save as to say that in the submission of the Council of The Bar of Ireland, the Mediation Council, under the Mediation Bill, has not been given clearly defined objectives. It is unclear what parts of the Council's functions the reports under Section 13 are envisaged to cover.

Section 14. Practising solicitor and mediation

- 14.1 It is submitted that the specific information contemplated to be provided to a client in section 14(1)(b) should not be required to be provided at this stage. At this stage of the process, there is no agreement to mediate and the provision of names and addresses of mediators to one party to a dispute without involving the other party or parties, could cause confusion.
- 14.2 The Council of The Bar of Ireland submits that section 14(2) should contain a sub-provision specifying that a failure to provide a statutory declaration in the form set out in section 14(2) should not be a bar to issuing proceedings. This submission is made so as to avoid the fettering of access to the courts and to prevent situations arising wherein there is no time to issue the statutory declaration or give the required advice prior to issuing proceedings and, as a consequence, a limitation period impacts negatively on a client's case.

Section 15. Practising barrister and mediation

- 15.1 The Council of The Bar of Ireland notes the provisions of section 15 and will provide a submission if and when a consultation process as envisaged by section 15(4) is commenced.

Section 16. Court inviting parties to consider mediation

- 16.1 No submission made apart from the terms of the suggestion contained in 6.1 above. The Council of The Bar of Ireland submits that this is a good proposal.

Section 17. Mediator report to court

- 17.1 It is submitted that the confidentiality of the mediation process is a crucial aspect of the process and it is on this basis that the process proves attractive to some litigants and potential litigants. It is submitted that unless Court approval is required for the terms of agreement which arise from the mediation process, it is unnecessary and undesirable for a mediator to provide a statement which discloses the terms of agreement to the Court in the report contemplated in Section 17(b). There are also circumstances in which a mediator may not be aware if an agreement has been reached by the parties or the terms of any such agreement.
- 17.2 The Council of The Bar of Ireland submits that if a report by the mediator to Court should be included in the Bill, Section 17(b)(ii) should include a clause, which reads "*and with the*

consent of the parties to the mediation,” prior to “a statement of the terms of the mediation settlement.”

18. Effect of mediation on limitation and prescription periods

- 18.1 The Council of The Bar of Ireland submits that “Statutes of Limitation” should be defined by the Bill. There are many enactments¹ which provide for limitation periods in civil proceedings. It is submitted that enactments providing a limitation period should be specifically included or excluded from the scope of section 18 so as to provide clarity. The Council of the Bar of Ireland are concerned that the effect of this section is unclear and may give rise to litigation.
- 18.2 It is submitted that a general suspension of the relevant limitation period, as submitted at paragraph 2.4 above, should commence on the issuing of correspondence (in the form of a statutory declaration of intention to mediate) to the other party(s) to a dispute in which mediation is proposed. This suspension, it is submitted, should apply to any civil or commercial proceedings to which the Bill applies and should act to suspend any statutory limitation period for the time specified under the Bill.
- 18.3 It is noted that the explanatory note to the corresponding Head 14 of the Draft General Scheme of Mediation Bill referred to section 50 of the Personal Injuries Assessment Board Act, 2003. It is submitted that there is a significant difference in the application of the said section 50 and section 18 of the Mediation Bill. The staying of limitation periods under the Bill is dependent on at least two parties (with all of the attendant potential for delay) in signing an agreement to mediate whereas section 50 comes into operation on the application of a single party, not dependant on the co-operation of another party.
- 18.4 Limitation periods, and the strict adherence to the constraints imposed by those limitation periods, are of the utmost importance to litigants and their legal advisors. The Mediation Bill does identify the importance of providing clarity in relation to the impact of the bill on limitation periods. The Bill does provide clarity as to when time will begin to run after the mediation process ends, however, it is submitted that it should be possible for the Bill to define a date on which the party proposing mediation can of their own volition, stop time running for the purposes of the limitation periods, in order to explore the possibility of mediation.
- 18.5 In the absence of a very clear rule defining the date of referral to mediation, people accessing the justice system may find that their claim has been time barred with their only potential avenue for redress being an action in professional negligence against their own legal advisors. Currently, a significant portion of all professional negligence claims brought against legal professionals are cases in which a claim has become time barred from the courts. Therefore, any lack of clarity, as to when exactly time under limitation periods is suspended by operation of the mediation bill, will cause confusion for litigants and their legal advisors. This will then have a very serious effect for litigants, their legal advisors and insurance costs.
- 18.6 The Council of The Bar of Ireland submits that ascertaining if and when the particular limitation period relevant to a dispute has been suspended is of the utmost importance to

¹ There are many different limitation periods prescribed under various legislation. The Council of the Bar of Ireland does not now submit a list of such legislation although the Appendices to Canny on Limitation of Actions, Roundhall, 2nd Ed. was consulted in the contemplation of these submissions.

parties involved in a dispute and their advisors. The referral of a dispute to mediation, and the co-operative signing of an agreement to mediate, is a collaborative exercise which requires the consent of all parties to the dispute. This collaboration requires correspondence to and from all parties to propose and agree to the referral of the matter to mediation. This correspondence will take time, even in the most efficient of circumstances.

- 18.7 The passing of time in proposing and obtaining the relevant consent to mediation will carry the risk of prejudicing one or more parties to a dispute. Therefore The Council of the Bar of Ireland submits that the Mediation Bill should provide a party proposing mediation with a mechanism of suspending time for the purposes of the relevant limitation period. It is submitted that this suspension of time would begin on the date of the sending of the correspondence making a statutory declaration of an intention to mediate, and would terminate either, (i) in the event of no response from all parties involved in the dispute, 21 days after the date of the proposing correspondence, or (ii) at the date of refusal of consent to refer the matter to mediation or the date 30 days after the mediation process ends, whichever is the soonest.

Section 19. Adjourning court proceedings to facilitate mediation

- 19.1 It is submitted that there may be a conflict between the terms of Section 19(2) and the terms contained in Section 6(4)(a). It is submitted that if parties are free, under the terms of the Mediation Bill to withdraw from the mediation process at any time, a decision by a party to withdraw or not engage in the mediation process should be specified as a “*sufficient reason*” (under Section 19(2)(a)) why the matter should not be dealt with in accordance with a mediation clause. Therefore, it is submitted, to ensure clarity and consistency throughout the Bill, Section 19 should provide that it shall be sufficient reason for a Court not to make an Order staying proceedings if one or more parties to the dispute has withdrawn or given notice of his or her withdrawal or non-engagement with the mediation process.

Section 20. Fees and costs

- 20.1 It is submitted that, in certain circumstances, one or more parties may not have the means to pay an equal share of the costs of the mediation. It is submitted that an allowance should be made in Section 20(1)(b) for parties wishing to engage in mediation with an unequal distribution of the costs of the mediation.
- 20.2 It is submitted that it would be undesirable, save in exceptional circumstances, for a court to overrule an agreement as to the costs of the mediation made as between the parties as is contemplated in Section 20(1).

Section 21. Factors to be considered by court in awarding costs

- 21.1 The Council of The Bar of Ireland submits that Section 20 should include a provision to the effect that nothing in Section 20 or elsewhere in the Bill shall prevent a Court from taking into account the circumstances contemplated and submitted in paragraph 6.2 above in deciding an application regarding the costs of and associated with the mediation process. It is submitted that delay and frustration are to be avoided where possible and the possibility

of a costs Order being made against a litigant engaged in the deliberate delay or frustration of proceedings should be provided for in the Bill.

22. Amendment of Civil Liability and Courts Act 2004

22.1 No submission made

Section 23. Mediation Information Sessions in family law and succession proceedings

23.1 No submission made.

Section 24. Amendment of Guardianship of Infants act 1964

24.1 No submission made.

Section 25. Amendment of Judicial Separation and Family Law Reform Act 1989

25.1 No submission made.

Section 26. Amendment of Family Law (Divorce) Act 1996

26.1 No submission made.

Further Submission A

It is submitted that provision should be made under the terms of the bill specifically providing that nothing in the terms of the bill shall operate so as to prevent a party to a dispute or an anticipated dispute from applying to Court for an order of an interlocutory kind, which is provided for by rules of court or otherwise inherent in the court's general jurisdiction in civil proceedings, and in particular, an order restraining the transfer of assets to a place outside the State for the purpose of defeating the rights of another arising out of the relevant claim or the dissipation of assets for that purpose and an order requiring evidence to be preserved.

Further Submission B

It is submitted that provision should be made under the terms of the bill specifically providing that nothing in the terms of the bill shall operate to prevent, postpone or delay a claimant in a personal injuries matter from making an application pursuant to s.11 of the Personal Injuries Assessment Board Act, 2003, as amended.



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