

MEDIATION –THE ANSWER TO LEGAL COSTS CRITICS?

Mediation could play a valuable role in assisting the Government to dramatically cut its public sector legal spend. Michelle Quinn and Nicola White *don't* cut out the middle man



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It has been estimated that the Government spends approximately €300 million in litigation and associated legal expenses annually. However, Karen Erwin, president of the Mediators Institute of Ireland, in her address to the institute's 2010 annual conference, extrapolated that the true cost of litigation in civil cases could be in the region of €1.2 billion per year, given that approximately 90% of cases settle without going to court and, therefore, without costs officially being claimed.

The legal costs incurred by public bodies were also examined by the group behind the 2009 *McCarthy Report*. The group's mandate was to examine all current exchequer spending across all departments and agencies. It noted the practice of different State organisations pursuing legal cases against one another. As an example, it chose the case of *Aer Rianta v Commissioner for Aviation Regulation*. The group said: "This duplication unnecessarily increases the burden of legal costs borne by the State. The group proposes that there should be compulsory arbitration of legal disputes involving State bodies. Any State body wishing to resolve a legal dispute with another State body would be required to inform the relevant minister, who would then be responsible for mediating a solution or arranging for other forms of independent mediation. Legislative change should be initiated to implement

this proposal if necessary."

The group noted that the revised and updated *Code of Practice for the Governance of State Bodies* provides that, where a legal dispute involves another State body, every effort should be made to mediate, arbitrate or otherwise, before expensive legal costs are incurred. In addition, the Department of Finance should be notified of such legal issues and their costs.

In its report on alternative dispute resolution (ADR), the Law Reform Commission, in acknowledging the role for mediation within the public sector, also recommended that "the Government should commit to the integration and use of ADR processes, such as mediation and conciliation, in resolving disputes, both internally within the public sector and where the State is a party to a civil dispute".

It is evident that mediation should, as in private sector disputes, have a role to play in the resolution of public sector disputes – particularly given the cost effectiveness of the process compared with litigation. But the question remains as to what exactly that role should be.

Integral component

The integration of mediation within the Irish civil justice system has long been promoted – with the result that mediation is fast becoming an integral component in the Irish litigation landscape. In the last 12 months alone, there have been a number of substantial developments in the field. These

include the introduction of the *Rules of the Superior Courts (Mediation and Conciliation) 2010*; the publication of the Law Reform Commission's *Report on Alternative Dispute Resolution: Mediation and Conciliation*, with its draft *Mediation and Conciliation Bill 2010*; and provision for mediation in the *Multi-Unit Developments Act 2011* and the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.

Furthermore, the EU *Directive on Mediation in Certain Civil and Commercial Matters* must be transposed by all member states by May 2011.

These developments represent a cultural shift in terms of how disputes are resolved in this jurisdiction. Slowly, there is an increasing recognition that "the courts of this country should not be the places where resolution of disputes begins – they should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried" (US Supreme Court Justice Sandra Day O'Connor).

The model litigant

If Irish citizens and private entities are expected to attempt mediation prior to the commencement of legal proceedings, the Government must also become the 'model litigant' – leading the way in terms of the promotion and uptake of ADR in resolving disputes to which they are a party. Indeed, the new Government has already committed to promoting the increased use of mediation, stating in its *Programme for Government*: "We will encourage and facilitate use of mediation to resolve commercial, civil and family disputes in order to speed up

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The medium is the message

resolution of disputes, reduce legal costs and ameliorate the stress of contested court proceedings.”

The *National Recovery Plan 2011-2014* also explicitly provides for mediation, stating that it will “provide for a more structured approach to mediation in the legal system and promote further the use of alternative dispute resolution, taking into account recommendations of the Law Reform Commission in its [2010] report on the subject ... and provide for increased use of arbitration and mediation.”

Governments in a number of other jurisdictions have committed to using ADR processes, such as mediation and conciliation, for the resolution of disputes to which they are a party. The choice for Ireland is to either follow a light-touch approach, such as in Britain, where the government has committed to an ADR pledge, or to introduce, like in the United States and Australia, legislation providing for mediation within the public sector.

Cost savings

One of the main catalysts for the Government to integrate mediation into the public sector is based on the cost savings reported in other jurisdictions that have done so. For example, according to the *Annual Pledge Report 2008/09* monitoring the effectiveness of the British government’s commitment to using ADR, the process was used in 314 cases, leading to settlement in 259 (82%), with cost savings estimated at Stg£92 million. It is worth noting that, in *Royal Bank of Scotland v Secretary of State for Defence*, the English High Court refused the Ministry of Defence its costs in a successful defence because it had not adhered to the 2001 pledge to resolve the dispute through ADR.

The cost effectiveness of mediation in the public sector has also been reported by the Department of Justice in the State of Oregon, USA. In 1998, the department introduced a pilot programme to encourage the appropriate use of mediation

(and other collaborative processes) in order to more efficiently and effectively resolve civil cases involving the state.

Studies of the effectiveness of the programme found that cost savings for the state were remarkable. In a typical case, the cost of mediation was \$9,537 – in stark contrast to the \$60,557 required to proceed to a full hearing at trial or other adjudicated procedure.

Using mediation, the ‘Oregon model’ demonstrated savings of up to 85% of litigation costs per case.

A governmental task

It can easily be argued that the public sector legal spend is unsustainable in the current economic climate and, as noted by Chief Justice Murray, the promotion of mediation as an alternative to litigation,

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which is of benefit to society as well as to the parties concerned, is a governmental task.

While mediation must go public in terms of how public bodies resolve their disputes, it cannot be seen as a panacea

for all public-sector disputes. It will only be appropriate in certain cases, and it has its limitations. Power imbalances between the parties and a lack of authority to settle by a State party representative are two considerations that must be addressed when introducing mediation into the public sector. Overcoming these issues should not be difficult, as the success of public sector mediation in other jurisdictions has proven.

The Irish Government must become ‘the model litigant’. There needs to be a more systematic and strategic approach taken by the Government in preventing and managing disputes, and the costs incurred in resolving them. ©