



Relate

Contents

Page No.

1. **Mediation Act 2017**
3. **Domestic violence**
6. **Victims of crime**
7. **Data Protection Act 2018**

The journal of developments in social services, policy and legislation in Ireland

Legislation update

Mediation Act 2017

The Mediation Act 2017 came into force on 1 January 2018 and gives mediation a statutory footing for civil proceedings. The Act establishes mediation as a viable, effective and efficient alternative to court proceedings. Its aims are to reduce legal costs, speed up the resolution of disputes and relieve the stress that often accompanies court proceedings. The Act places an obligation on legal representatives to inform their clients of the option of mediation.

The Act applies to civil proceedings, which include most disputes currently dealt with by the courts, such as contract disputes, personal injury claims, separation and divorce.

What is not covered by the Act

The Mediation Act 2017 does not apply to:

- Criminal proceedings
- Matters under the Arbitration Act 2010
- Employment disputes dealt with by the Workplace Relations Commission
- Tax appeals and related matters
- Judicial review proceedings – where a court is reviewing a decision made by another State body
- Proceedings against the State regarding alleged breaches of fundamental rights and freedoms

INSIDE: Role of the mediator p2, Enforcement of mediation settlements p2, Mediation Council of Ireland p3, Domestic violence court orders p3, Domestic Violence Act 2018 p5, Emergency barring orders p5, Court hearings p5, Information on support services p5, Coercive control p5, Aggravating circumstances p6, Forced marriage and underage marriage p6, Victim's right to information p6, Victim assessment p7, Data Protection Commission p7, Data and children p8

- Proceedings under the Domestic Violence Acts 1996 to 2011
- Proceedings under the Child Care Acts 1991 to 2015

Mediation

Mediation is defined in the Act as a voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve a dispute. Participation in mediation is voluntary. Parties may attempt mediation at any time before the dispute is decided by court proceedings.

Each party may be accompanied and assisted during mediation by another person, including a legal adviser. They may also obtain independent legal advice at any time during the mediation and may withdraw from mediation at any time. The mediator and the parties must make every reasonable effort to conclude the mediation efficiently to minimise costs.

In court proceedings, the party who loses a case often has to pay the legal fees of the other party. However, in mediation, payment of the fees and costs is not dependent on the outcome but is instead decided before mediation begins. Payment is outlined in a document known as the Agreement to Mediate, which is signed by the parties and the mediator before the start of mediation. The Agreement to Mediate also includes the following details:

- Appointment of the mediator
- How the mediation will be conducted
- How the mediator's fees and the costs of the mediation will be paid
- The place and time the mediation will be held
- The fact that the mediation is confidential
- The right of each party to seek legal advice
- How the mediation can be terminated

Role of the mediator

The mediator is the person appointed under the Agreement to Mediate to assist the parties reach a resolution. Before their appointment, the mediator must:

- Ensure that they have no conflict of interest
- Provide the parties with details of their qualifications, training and experience
- Provide a copy of any code of practice to which the mediator will adhere

The mediator's role is not to make proposals on solving the dispute. Instead, the outcome of the mediation must be determined by the parties themselves. However, the

mediator can make proposals at the parties' request (although the parties do not have to accept them).

Code of practice

The Minister for Justice and Equality may publish or approve a code of practice, to set out standards for the conduct of mediations and mediators.

The code of practice may include:

- Continuous training requirements for mediators
- Procedures to be followed by mediators during mediation
- Ethical standards to be observed by mediators during mediation
- Confidentiality provisions of mediation
- Procedures to be followed by a party for redress if they are not satisfied with the conduct of the mediation
- Provisions for determining the fees and costs of mediation

Confidentiality

All communications by the mediator with the parties and all records and notes relating to the mediation are confidential and may not be disclosed in any subsequent court proceedings (with some exceptions).

Disclosure of confidential information or records may occur if required by law. Disclosure may also take place if it is justified in order to:

- Implement or enforce a mediation settlement
- Prevent physical or psychological injury to a party
- Prevent or reveal a crime or threat to a party
- Prove or disprove a civil claim concerning any negligence of misconduct of the mediator

Enforcement of mediation settlements

The parties will decide if and when a mediated settlement has been reached and whether the mediation settlement will be enforceable between them. Any mediation settlement has the same effect as a contract between the parties, except where the parties expressly state that the settlement should have no legal force until it is written down in the form of a legal agreement and signed by the parties. Once a mediated settlement has legal force, either or both parties may apply to a court at any time to have the settlement enforced.

A court may refuse to enforce the terms of a mediated settlement where:

- Its terms do not adequately protect the rights and

- entitlements of either party or their dependants
- It is not based on full mutual disclosure of assets (for example, in family law disputes)
- Its terms are contrary to public policy
- The court believes one of the parties was unduly influenced

Where a mediated settlement relates to a child, the court must consider what is in the best interests of the child and whether those interests are provided for in the settlement.

Mediation and the courts

During court proceedings, the parties may apply for mediation or a court may order an adjournment so the parties can attempt mediation. If a party fails or refuses to engage in mediation without good reason, the court can consider this fact in awarding the costs of the proceedings.

If a mediated settlement is not reached and the parties apply to re-enter the proceedings in court, the mediator will prepare a mediation report for the court.

This mediation report includes:

- Reasons the mediation did not take place, if that is the case
- The terms of any mediation settlement made
- The agreed terms and the matters still in dispute, if a partial mediation settlement has been made
- The mediator's opinion as to whether the parties fully engaged in the mediation, if no mediation settlement is reached

The time taken up during mediation will not be recognised for the purposes of the Statute of Limitations.

Legal advisers

Solicitors must inform their clients about mediation, if appropriate, as a means of attempting to resolve disputes before beginning court proceedings. They must explain the benefits of mediation to the client and provide them with names and contact information of mediation services. If proceedings are issued, the solicitor must complete a statutory declaration stating that the client has been advised about mediation. This declaration must be sent to the other party with the document which begins the proceedings.

Mediation Council of Ireland

The Minister may establish or recognise an independent body to be known as the Mediation Council of Ireland but this provision has not yet been commenced. Its functions will include:

- Promoting public awareness of the mediation process
- Maintaining and developing standards for the provision of mediation services
- Preparing codes of practice for mediators and overseeing the implementation of any such code
- Maintaining a register of mediators
- Advising the Minister on a scheme for the delivery of mediation information sessions
- Preparing annual reports for the Minister on its performance and activities during the previous year.

Domestic violence

The Domestic Violence Acts 1996 to 2011 regulate this area at present. This legislation will be updated (by the repeal of the Domestic Violence Act 1996 and the Domestic Violence (Amendment) Act 2002) when the Domestic Violence Act 2018 is commenced (see below).

Domestic violence is defined as the physical, sexual, emotional or mental abuse of one partner by the other in a relationship that may or may not be one of marriage or cohabitation. Domestic violence also includes the abuse of one family member by another.

Examples of domestic violence include: the destruction of property; isolation; threats to others, including children; stalking; and control over access to money, food, telephones or other items. Victims of domestic violence can apply for a number of court orders, depending on their specific circumstances.

Domestic violence court orders

Safety orders

A safety order is a court order prohibiting a violent person from:

- Using, or threatening to use, violence against the applicant or a dependant
- Molesting or frightening the applicant or a dependant
- Watching a place where the applicant or a dependant lives

A safety order does not oblige the violent person to leave the property if that person lives with the applicant.

The following people can apply for a safety order:

- Spouse or civil partner of the violent person
- Person in an intimate and committed relationship with the violent person (not the spouse or civil partner) for a period of at least six months during the nine months

prior to the application for the safety order (this time constraint is removed in the 2018 Act)

- Parent of the violent person, where the violent person is over 18 years of age and is not dependent on that parent
- Person living with the violent person, where the basis of the relationship is not primarily contractual (for example, siblings)
- Parent of a child whose other parent is the violent person
- Tusla, the Child and Family Agency, on behalf of a child of the violent person

Former partners are also included in the list above, for example, a former spouse.

The court will grant a safety order if there are reasonable grounds for believing the safety or welfare of the applicant (or that of a dependent person) requires it. The court may vary the order as it sees fit. A safety order will be made for a specific time, up to a maximum of five years. A further safety order can be granted during the period of the first safety order; this will come into effect on the day the first order expires.

Protection orders

A protection order may have the same effect as a safety order. It acts as an interim measure before the application for a safety or barring order is decided.

An application for a protection order is usually made at the same time as the application for a safety order or a barring order. However, it may be made at any time between applying for one of these orders and the court hearing.

The court will grant a protection order if there are reasonable grounds for believing that the safety or welfare of the applicant (or of a dependant) is at risk.

A protection order comes into force as soon as the violent person is notified that the order has been made. The hearing of a protection order can take place without the need to notify the violent person beforehand.

A protection order will only last until the determination of a safety or barring order application.

Barring orders

A barring order is a court order that requires the violent person to leave the family home, and stay away from it, for as long as the court orders, up to a maximum of three years. A barring order may also prohibit all of the behaviours that may be prohibited by a safety order.

The following people can apply for a barring order:

- Spouse or civil partner of the violent person
- Person living with the violent person in an intimate and committed relationship (not the spouse or civil partner) for a period of at least six months during the nine months prior to the application for the barring order (this time constraint is removed in the 2018 Act)
- Parent of the violent person, where the violent person is over 18 years of age and is not dependent on that parent
- Tusla on behalf of a child of the violent person

All of the above include former partners, for example, a former spouse.

If the applicant is not the spouse or civil partner of the violent person, the court will not grant a barring order where the applicant's right to the home is less than the right of the violent person, for example, if the violent person owns the property in which both live.

If a child is involved, Tusla may make the court application on behalf of the child. The court will not grant this order unless the court is satisfied that reasonable care will be provided for that child.

If a person left the family home before applying to the court because of the behaviour of the violent person, they will be treated as if they still live in the family home.

Interim barring orders

An interim barring order can have the same effect and prohibit the same behaviours as a barring order and the same people have the right to apply for one (see above).

Applications can be made for an interim order at the same time as a barring order, or at any time when waiting for a decision on the application for a barring order. The court will grant an interim barring order if it believes that there is an immediate risk of significant harm to the applicant or a dependent person and a protection order would not provide sufficient protection.

A person may apply to the court for an interim barring order without telling the violent person first. The court will only grant an interim barring order in these circumstances if it thinks that the order is necessary in the interests of justice.

An interim barring order granted without notifying the violent person will last for up to eight working days. A hearing with the violent person must be held in that time and the court will decide at that hearing whether to make a barring order.

An interim barring order will cease to have effect once the court decides on the application for a barring order, regardless of whether the barring order is granted or not.

Domestic Violence Act 2018

The Domestic Violence Act 2018 was enacted on 8 May 2018 and is due to come into effect by the end of 2018. The Act updates and consolidates the existing law in relation to domestic violence in Ireland and introduces a new prohibition on following or communicating (including electronically) with the applicant or a dependent person, for example, by text or email.

The Domestic Violence Act 1996 and the Domestic Violence (Amendment) Act 2002 will be repealed once the 2018 Act comes into effect.

Emergency barring orders

The 2018 Act introduces a new emergency barring order. An application cannot be made for this order until the Act is commenced. The court will grant an emergency barring order where there are reasonable grounds to believe that there is an immediate risk of significant harm to the applicant or a dependent person.

This order is different from an interim barring order in that the person is not required to have any legal or beneficial right to the property, and any right they do have to the property can be less than the right of the violent person.

A person may apply for an emergency barring order if they have lived in an intimate relationship with the violent person or where they are the parent of the violent person. An emergency barring order will remain in force for a period of not more than eight working days. After the order has expired, no further emergency barring order may be granted until a period of one month has passed from the date the previous order expired, unless the court is satisfied that there are exceptional circumstances.

After an order is made

Any order granted will take effect as soon as it is notified to the violent person. If the violent person is present at the hearing, the order will take effect immediately. A court may direct that an order be served personally by the Garda Síochána if the violent person was not present.

If a violent person breaches an order, they will be guilty of a criminal offence. If a member of the Garda Síochána has reasonable cause for believing there is a breach, they may arrest the violent person without a warrant. The Garda may also enter a place without a warrant to make such an arrest.

Court hearings

All domestic violence orders can be applied for at the local District Court and hearings are held in private.

The 2018 Act allows for either party to be accompanied by one other individual, such as a support worker for victims of domestic violence. The court may ask this person to leave if it sees fit. This is in addition to being accompanied by a legal representative (if any).

The proceedings will be informal. Judges, barristers and solicitors will not wear wigs or gowns. The Act allows for evidence to be given by live television link. Evidence can also be video or audio recorded. The court may refuse this facility if it sees fit.

Section 27 of the 2018 Act allows for the court to seek the views of a child under the age of 18 years when an order is being sought on behalf of that child. The decision to request this evidence will depend on the child's age and maturity. The court may also appoint an expert to establish and express the child's views.

Information on support services

The Act introduces a requirement for the Courts Service to provide information and contact details for domestic violence support services to anyone applying for a domestic violence order.

The court may recommend that a violent person should engage with a programme or service to address any issues including:

- A programme for perpetrators of domestic violence
- An addiction service
- A counselling or psychotherapy service
- A financial planning service

At a subsequent application to the court, for example, to vary an order, the court may consider any effort made by the violent person to engage with such a programme. The court will also consider the views of the victim in relation to the ongoing behaviour of the violent person.

Coercive control

The 2018 Act introduces the criminal offence of coercive control. A person will be guilty of an offence where they engage in behaviour that:

- Is controlling or coercive
- Has a serious effect on a relevant person, and
- A reasonable person would consider likely to have a serious effect on a relevant person

Such behaviour may be found to have a “serious effect” where the victim fears that violence will be used against them or suffers serious distress which has a substantial impact on their day-to-day activities. The parties must be or have been spouses, civil partners or in an intimate relationship.

The punishment for this offence on summary conviction is a class A fine (up to €5,000) or 12 months’ imprisonment, or both. The punishment for conviction on indictment is a fine or imprisonment for a maximum of five years, or both.

Aggravating circumstances

When the 2018 Act comes into effect, if the victim is or was a partner of the offender (spouse, civil partner or person in an intimate relationship) this will be treated as an aggravating factor in sentencing. However, the maximum allowable sentence will not be increased.

Forced marriage and underage marriage

The 2018 Act introduces new criminal offences regarding forced marriage. It is an offence for a person to use violence, threats, undue influence or any form of coercion or duress for the purpose of causing another person to enter into a marriage. It will also be an offence to remove a person from the State with the intention that the person will be forced into marriage abroad.

The punishment for this offence on summary conviction will be a class A fine (up to €5,000) or imprisonment for up to 12 months, or both. The punishment for this offence on indictment will be a fine or a term of imprisonment for up to seven years, or both.

The Family Law Act 1995 states that a marriage where either of the parties is below the age of 18 will not be valid, unless an exemption has been obtained. However, it will not be possible to obtain an exemption when the 2018 Act comes into effect.

Victims of crime

The EU Victims’ Rights Directive came into effect on 16 November 2015. The Directive strengthens the protections for victims of crime, particularly where they may be at risk of retaliation for making a complaint. The Criminal Justice (Victims of Crime) Act 2017, which substantially came into effect on 27 November 2017, incorporates this Directive into Irish law.

Right to information

A victim of crime is any person who has suffered harm, including physical, mental or emotional harm or economic loss, directly caused by a criminal offence. Where a victim has died as a result of a criminal offence, the family of the victim may nominate one family member to exercise the rights of that victim.

On first contact with the Garda Síochána or the Garda Síochána Ombudsman Commission (GSOC), a victim of crime is entitled to the following information (where relevant):

- Victim support services
- The procedure for making a complaint about an offence
- Where the victim’s queries can be directed
- The availability of translation services
- The victim’s role in the criminal justice system
- How to obtain protection, if necessary, and the protection measures available
- Any scheme relating to compensation for injuries suffered as a result of a crime
- The victim’s right to give evidence or make submissions
- The power of the court to award compensation
- The procedures for making a complaint against a State body for any breaches of the Act
- Restorative justice schemes
- Types of cases in which legal advice and legal aid may be available to the victim
- Any entitlement to expenses arising from the victim’s participation in any proceedings relating to the offence

A victim may ask to receive this information in writing or electronically. The information should be provided as soon as possible.

Information about the investigation and prosecution

When an alleged offence is being investigated, the victim will be contacted by the investigating authority and told of their rights to information about the investigation and prosecution processes and how to ask for that information.

A victim of crime is entitled to request information about:

- The arrest or charging of a person
- The releasing on bail or remanding in custody of a person
- A copy of any statement the victim may have made
- Any decision to discontinue an investigation or not to prosecute
- The offences the accused person will be charged with and the date of trial

- Sentencing and any appeal, if the person is convicted of the offence
- Any release or escape of the person from custody or prison
- Any final orders made including sentencing

If a decision is made by the Garda Síochána or the Director of Public Prosecutions not to prosecute a person for an alleged offence, the victim has a right to request a review of that decision within 28 days of receiving that information. This time limit may be extended.

None of the victim's rights to information require the Garda Síochána or other justice authority to disclose information that might interfere with an investigation or put any person at risk. Where information is not provided to a victim, a record of the reasons for that decision must be kept.

Reporting an offence

When contacting the Garda Síochána or GSOC to report an offence, a victim is entitled to be accompanied by another person, such as a friend or a legal representative. This person may be asked to leave the room by the investigator where their presence could interfere with the investigation or where it is not in the best interests of the victim. If this happens, someone else may accompany the victim instead.

When a victim makes a complaint, they will be given a written acknowledgment of that complaint by the investigating authority. This acknowledgement should include the basic facts of the alleged offence, and how the victim can raise any queries about their complaint during the investigation.

If the offence happened in a different country, the Garda Síochána will transmit the details to the relevant authority in that country. If the investigating authority wants to interview a victim, this should be done as soon as practicable after the complaint is made.

Victim assessment

The investigating authority will carry out an assessment of a victim as part of their investigations. This assessment will identify any need the victim has for protection or other special measures. The assessment of a victim will be based on various factors including their age, gender, vulnerability and the nature of the alleged offence.

Protection measures may include:

- Advice about the personal safety of the victim or the protection of property
- Advice about safety orders or barring orders
- Information on making an application to remand the alleged offender in custody
- Information on seeking to have conditions attached to bail (which is particularly relevant if there is a risk of repeat offences against a victim)

Special measures during investigations may include interviews being conducted by a specially trained person and in premises designed for the purpose of conducting interviews.

Special measures in court proceedings may include allowing a victim to give evidence via live television link, through an intermediary, or from behind a screen or other similar device. The court may also exclude members of the public from proceedings and restrict questioning regarding a victim's private life.

A child is presumed to have protection needs and any assessment carried out will consider the best interests of the child. All victims who have suffered harm directly caused by an offence are entitled to make a victim impact statement.

Data Protection Act 2018

The Data Protection Act 2018 sets out Ireland's national measures which give effect to the principles of the European General Data Protection Regulation (GDPR). In particular, the Act creates a new framework for the enforcement of data protection laws in Ireland. The GDPR is discussed in more detail in the August 2017 issue of *Relate*.

Data Protection Commission

Under the new Act, all of the functions of the Data Protection Commissioner have been transferred to a new supervisory authority, the Data Protection Commission.

The Commission is generally responsible for monitoring the lawfulness of the processing of personal data in Ireland. The main tasks of the Commission are to:

- Monitor and enforce the application of the GDPR
- Promote public awareness of the rules and rights around data processing
- Advise the Government on data protection issues
- Promote awareness among data controllers and processors of their obligations
- Provide information to individuals about their data protection rights
- Maintain a list of processing operations requiring data protection impact assessment

The Citizens Information Board provides independent information, advice and advocacy on public and social services through citizensinformation.ie, the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities

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Dealing with data protection breaches

The Data Protection Commission handles complaints regarding data protection breaches. The types of complaints which can be made are discussed in the August 2017 issue of *Relate*. If an amicable resolution between the parties is likely, the Commission will arrange for this resolution. If the complaint is resolved, it will be deemed withdrawn.

If a resolution cannot be reached, the Commission may:

- Reject or dismiss the complaint
- Provide advice to the person making the complaint
- Serve an enforcement notice on the data controller requiring it to address the issues
- Carry out an inquiry
- Take such other step as it thinks fit

An inquiry may take the form of an inspection, audit, enforcement or investigation, or more than one of these procedures.

The Commission may carry out an inquiry into a suspected breach of data protection law without having received a complaint. It may also do so following a data protection audit of a data controller or processor.

If the Commission is satisfied that a breach of data protection law has occurred, it may exercise its corrective powers or apply an administrative fine, or both.

The Commission has a range of corrective powers which it can apply to data controllers or data processors, including:

- Issuing a warning that intended processing is likely to breach data protection laws
- Issuing a reprimand where a breach has occurred
- Ordering compliance with an individual's data access request
- Ordering the changing of a practice or procedure, to create compliance
- Ordering the notification of a breach to the individuals concerned
- Imposing a ban or restriction on processing
- Ordering the suspension of data transfers to a non-European recipient

The Commission has the authority to impose administrative fines of up to €10 million or 2% of the global turnover of the offending data controller or processor, whichever is greater. A limit of €1 million applies to fines imposed on public bodies.

A data controller or processor may appeal an administrative fine to the Circuit Court (if the fine does not exceed €75,000) or to the High Court, within 28 days of notice of the decision.

Criminal offences

The GDPR leaves it to national law to provide for any criminal offences in relation to breaches of the GDPR. The Act provides for a number of offences, including:

- Non-compliance with orders made by the Commission
- Forced subject access requests
- Disclosure of personal data obtained unlawfully
- Unauthorised disclosure by a data processor or an employee or an agent

Company directors may be held personally liable where an offence was committed by a company with their consent, connivance or approval or as a result of their neglect. These offences will be punishable on summary conviction with a class A fine or 12 months' imprisonment or both, and on indictment with a fine of up to €50,000 or up to five years' imprisonment, or both.

The Act requires the Commission to publish details of any convictions, and any exercise of its powers to impose fines or to order the suspension of data transfers outside Europe.

Data and children

The GDPR left it to member states to specify the age at which an individual would be regarded as a child for the purposes of data protection laws. Section 29 of the 2018 Act defines a child as a person under the age of 18 years.

It is an offence to process the personal data of a child for the purposes of direct marketing, profiling or micro-targeting. A child aged 16 years or over may give their consent to the processing of their personal data in relation to "information society services". These are services normally provided online for payment at the request of the individual recipient of the service, such as online shops, live or on-demand streaming services, and companies providing access to communication networks.

The information in *Relate* is intended as a general guide only and is not a legal interpretation