



Department of
Justice

An Roinn Dlí agus Cirt

Männystrie O tha Laa

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Post Consultation Report: Legal Aid for Mediation in Non Family
Civil Cases

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Enabling Access to Justice Division
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Introduction

- 1.1 The Department of Justice (The Department) issued a Consultation which ran from 4 May to 29 June 2021 regarding proposals to allow for legal aid for mediation in intra-litigation non-family civil cases under a General Authority. The Consultation proposed the protocols and arrangements for funding mediation in legally aided cases and considered:
 - The remuneration and the hours to be allowed under a General Authority without prior approval;
 - Controls as to when the General Authority may be deployed;
 - Protocols as to when the legal representative for the legally aided party should apply for prior authority for mediation from the Legal Services Agency (LSA); and
 - The accreditation of the service providers.

- 1.2 The proposals in the Consultation sought to implement the requirements resulting from the Edmunds judgement (2019) which ruled that legal aid for mediation is within the scope of a legal aid certificate in non-family cases. They also reflect the benefits which mediation can bring to parties at dispute, which has been highlighted in a number of reports, including two Access to Justice Reports commissioned by the Department.

Consultees

2.1 This was a general consultation published on the Department of Justice internet site. Prior to launching the consultation officials met with key stakeholders including representatives from the legal profession and mediation service providers to discuss the proposals. We are grateful to those we met for their constructive input into the meetings and to respondents for their constructive responses.

Responses

3.1 Substantive responses were received from:

- The Bar of Northern Ireland;
- The Law Society
- Mediation NI;
- Juris;
- Association of Personal Injury Lawyers
- Limavady Solicitors Association; and
- Alva Brangam QC/mediator.

Summary of Consultation Responses

4.1 The overall proposal to outline arrangements and protocols whereby mediation could be funded by legal aid in non-family civil cases and the promotion of mediation within the justice system was welcomed by all respondents both in their official responses and also in pre consultation meetings held with key stakeholders.

Rates Payable Under the General Authority

4.2 The Department asked:

Q.1 Do you agree with the proposed rates payable to mediators.

4.3 There was a mixed response to the proposed rates allowed under the general authority. Of the 6 responses to this question, the Law Society and Mediation NI agreed with the rates payable, while the Bar Council, Juris, Limavady Solicitors Association and an individual QC/mediator considered the rates to be too low. The

Limavady Solicitors Association suggested that the rate should be £100 per hour rather than £80 per hour. The other respondents who thought they were too low did not propose any different rates but claimed that the fees fell short of the market rate and suggested there would be a risk that legally aided parties would not have access to the most effective and appropriate mediators. Some responses noted the higher market rates which are currently paid in privately funded cases, particularly, in high value commercial and chancery cases.

4.4 The Law Society suggested that having the non-legally aided party make up any shortfall if a more expensive mediator is used may lead to the non-legally aided party rejecting mediation entirely.

4.5 The Law Society suggested that travel expenses should be payable as well as travel time.

4.6 The Department asked:

Q.2 Do you agree that prior authority should be sought for the fee for mediation cases where the value exceeds £250,000 and are there additional criteria which should be considered in determining the fee?

4.7 There was a consensus that prior authority should be sought for the fee in mediation cases where the value exceeds £250,000. Respondents noted that such cases tend to be more complex, it may require the mediation team to consider expert advice and the LSA should take into account the complexity of the case and the amount at dispute, in assessing mediation fees in high value cases. The Bar of NI suggested that the requirement for prior authority could delay mediation if a court has directed it to conclude within a specified period of time.

Hours Allowed under the General Authority

4.8 The Department asked:

Q3. Do you agree that the number of hours proposed is set at the right level to capture the majority of routine cases which require mediation? If not please explain why and quantify the number of hours which you consider would capture routine cases; and Q4.

Do you agree with the criteria in determining the higher amount of hours to be allowed under a prior authority?

4.9 Five of the six respondents who provided an answer agreed that this was the right level to capture the majority of routine cases. Only Mediation NI made representation for a higher number of hours indicating that 14 hours would be more appropriate. Two responses suggested allowing a half day to a full day mediation as an alternative.

The Circumstances in which Mediation Will be Allowed under the General Authority and When Prior Authority Must be Sought

4.10 The Department asked:

Q5. Do you agree that mediation should only be allowed without prior authority in intra-litigation proceedings where a full certificate for lower or higher representation has been issued? and;

Q.6 In which case types and circumstances might mediation help resolve a dispute outside of intra-litigation proceedings or where a full certificate is not in place.

4.11 Most respondents agreed that mediation should only be allowed without prior authority in intra-litigation proceedings. Three out of the four respondents answered this question. The Bar of NI, Mediation NI and Limavady Solicitors Association agreed, however, the Law Society suggested there are merits in providing for mediation prior to proceedings issuing, including, a greater incentive for clients and the other party to participate in mediation and benefits to the public purse and the Bar of NI suggested mediation should be allowed where a limited certificate is in place.

4.12 The types of cases identified, where mediation may help resolve a dispute outside of intra-litigation or where a full certificate is not in place, are neighbour disputes, landlord/tenant disputes, clinical negligence cases and cases which require preservation of relationships.

Legal Representation during Mediation

4.13 The Department asked:

Q.7 Do you agree that the legal profession should not be present during the mediation process except under the criteria for prior authority?; and

Q.8 Do you agree with the proposed criteria for considering whether it is appropriate to fund the additional legal costs for legal representatives to be present during the mediation process? If not, what criteria would you propose?

4.14 Six respondents opposed the proposal that the legal profession should not be present without the approval of the LSA. Only Mediation NI supported this proposal advising that mediation is based on self-representation, not representation, and the scope of mediation can be hindered by the presence of other persons, including legal representatives. Those opposing the proposal argued that the presence of legal representatives was not counter-productive to the mediation process but rather was beneficial.

4.15 Further arguments made for the legal representation being present included:

- The avoidance of an imbalance of power should the non-legally aided party have legal representation at the mediation;
- That the majority of clients would feel ill at ease without their legal representation present and this may reduce the chance of success of the mediation and also put clients off entering into mediation in the first place.
- Some stakeholders suggested that remote legal representation as outlined in the consultation would not work and that it would not satisfy article 6 of the Human Rights Act.

Accreditation of Mediators

4.16 There was unanimous consensus that all mediators should be fully accredited. In addition to the four bodies named in the consultation, three additional bodies were put forward in responses as meeting the necessary standards - Mediation NI, the Chartered Institute of Arbitrators and the Centre for Effective Dispute Resolution.

Impact Assessments

4.17 Two respondents commented on the impact assessments. The Law Society noted the reference to individual providers who charge much higher rates, usually for mediation in commercial cases and suggested that the nature and complexity of these types of cases may merit charging higher rates. The Bar of NI noted that the Department intends to conduct an evaluation on the impact of the provisions after one year and suggested there should be more detail on the evaluation exercise.

Departmental Response

The Remuneration

5.1 The Department notes those responses that the proposed fees are too low along with representations from two respondents that it may be preferable to have standardised fees for full and half days. However, the Department considers the proposed level of fees provide fair reimbursement for the work to be carried out while safeguarding the public purse. There are plenty of providers of the service at these rates and no supply requirement to increase the rates, although there will be a provision to ask for higher rates for more complex, high value cases, however, the higher rates will need to be justified.

5.2 The Department noted in the Regulatory Impact Assessment that the proposed fees reflect those currently charged by some providers in this jurisdiction and the legal aid rates in other UK jurisdictions. It also noted there are providers in NI who charge much higher rates, usually for mediation in commercial cases and it would generally not be appropriate to pay such rates from public funds. The Department is aware of providers who charge up to £5,000 or £6,000 for a mediation, often in high value commercial cases which are outside of the scope of legal aid, and it would not be appropriate for the public purse to pay such costs. There will be provision for higher costs to be granted under prior authority in complex, high value cases, but the higher costs must be justified and the Agency may require an appropriate procurement process to select a supplier.

5.3 The Department is adjusting the rate payable to £80 per hour, rather than having a variable fee allowed for mediation where there is a monetary value to the dispute.

This adjustment is based on advice that the monetary value to the dispute may not be known at the outset of the case. Therefore, for cases not settled at mediation, and for cases at the High Court which go to taxation, this would prevent the Legal Services Agency being able to accurately assess the value of the case and therefore determine the appropriate payment and prevent interim payments from being made.~

5.4 The Law Society suggested that having the non-legally aided party make up any shortfall if a more expensive mediator is used may lead to the non-legally aided party rejecting mediation entirely. This provision only applies where the non-legally aided party wishes to deploy a more expensive mediator and the legally aided party agrees to the mediator they have selected. Therefore, the extra expense has been incurred due to the selection of the mediator by the non-legally aided party and it is appropriate that they should incur the extra cost.

5.5 The Law Society suggested that travel expenses should be allowed. Travel and mileage will be paid in accordance with the rates under the General Authority. Where necessary, reasonable parking to be vouched on assessment will also be payable.

5.6 The value of the case being limited to up to £250,000 under the general authority will remain in place with any cases where the value is greater needing prior authority.

5.7 The Department notes the representations made regarding the costs of venue hire for the mediation process. It is also proposed that legal aid may pay the legally aided parties share of the cost of the venue for mediation, up to a maximum of £200.

Number of Hours Allowed under General Authority

5.8 The majority of respondents agreed with the proposal to allow 10 hours for the mediation under the General Authority and this will remain. While the Department notes Mediation NI's representation that 14 hours would be a more reasonable amount for a standard case, the Department considers that the 10 hours for the mediation (which does not include preparation time or travel time for the mediator, which are separate), as stated in the General Authority are sufficient to capture the majority of routine cases. There is an option to request prior authority if it is believed that more than 10 hours is required taking into account the value of the case, if applicable, and the complexity of

the case. There is also the flexibility to exceed the 10 hour limit, if the matter is close to resolution and it would harm the process if the mediation is interrupted to seek an extension of hours. There will be provision for the Agency to be notified promptly after the mediation process has concluded and this will be outlined in the General Authority.

The circumstances in which Mediation will be allowed under the General Authority and when Prior Authority must be sought

A Full Certificate must be in Place

5.9 The General Authority will only allow mediation in cases where a full certificate for lower or higher representation has been issued.

5.10 The Department has considered whether mediation may be allowed under advice and assistance, however, on review, and considering the advice of the Agency, this would not be appropriate. Under advice and assistance, the Agency will not have had the opportunity to consider the merits of the case, and case types may be funded under Advice and Assistance which are not in scope of legal aid for representation lower / representation higher.

Intra-litigation Proceedings

5.11 Most respondents agreed that mediation should only be allowed without prior authority in intra-litigation proceedings. The Department notes the comments of the Law Society suggesting that there are benefits for mediation prior to proceedings issuing, including, a greater incentive for clients and the other party to participate in mediation and benefits to the public purse. Having considered Schedule 2 of the Access to Justice (NI) Order 2003, the Agency can only fund services consisting of representation in proceedings, and would not, therefore, be able to fund mediation prior to the issue of proceedings.

Legal Representation during Mediation

5.12 The Department notes that the majority of respondents argued that the legally aided client should be allowed legal representation or support during the mediation process without the need for prior authority. After considering the responses to the Consultation, the Department has agreed that a sole solicitor for the legally aided party may attend the mediation under the General Authority and be paid in accordance with the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015 for that type of case and court tier, which might include a composite or standard fee in which case the solicitor would not be entitled to extra costs for attending the mediation. The Department considers attendance to be in an advisory capacity only and not in an advocacy role during the mediation and are therefore limiting this to a solicitor rather than a barrister. Any request for legal representation to be present above and beyond a sole solicitor where this will be a cost to the legal aid fund is not covered by the General Authority and will require prior authority from the LSA. The General Authority will be updated to reflect this change.

5.13 An updated summary of the General Authority and the circumstances requiring prior authority as a result of this consultation is set out at **Annex A**.

Accreditation of Mediators

5.14 The Department welcomes the support from all of the respondents for proper accreditation of mediators. The list of accredited mediators is flexible and those who meet the criteria may be added to the list. The Department is considering whether the three bodies who were put forward as meriting accreditation should be added to the list.

Impact Assessments

5.15 The impact assessments will be revised in light of the comments made, and to reflect the changes to the proposals following the consultation.

Next Steps

6.1 The General Authority will be revised in line with the findings in the consultation and issued by the LSA and circulated to the legal profession and mediation bodies.

6.2 The Department will monitor and review the impact of these provisions on an ongoing basis with a formal review after 12 months. The review will consider quantitative data from the Agency and qualitative evidence. The Department will provide a questionnaire for solicitors and mediators to complete to capture the outcome of the mediations. Such questionnaires will protect the confidentiality of the process and will not reflect the conduct of the parties to the mediation, but will inform both the Department and its civil justice partners, on the wider consideration of the use of mediation in civil proceedings. In addition, it will consider any qualitative evidence provided by key stakeholders including the judiciary, the legal profession and mediators.

Annex A: Summary of the Revised Draft General Authority

The General Authority allows solicitors to deploy mediators without prior authority if:

- The mediation is part of intra-litigation proceedings and a full legal aid certificate for representation lower or representation higher is in place;
- The fee/rate charged is within the set limits set;
- The mediation will take 10 hours or less, although that can be exceeded if it becomes apparent that the matter is close to resolution but will exceed the 10 hour limit, and it would harm the process if the mediation is interrupted to seek extension of hours. Three hours is also allowed for preparation;
- Only one solicitor is attending the mediation on behalf of the legally aided party with their costs covered by the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015 depending on case type and court tier.
- The parties are accredited as mediators by the UK College of Mediators, the Mediators' Institute of Ireland, the Law Society NI or the Bar of NI. The Department is considering whether Mediation NI, The Chartered Institute of Arbitrators and the Centre for Effective Dispute Resolution (CEDR) should be added to the list.

Summary of circumstances requiring Prior Authority for Mediation

The circumstances in which the legal representative for the legally aided client will need to request prior authority for mediation are:

- The value of the case at dispute exceeds £250,000;
- The cost of the mediation exceeds £80 per hour;
- The amount of hours required for the mediation exceeds 10 hours; or
- It is proposed that legal representatives other than the legally aided party's solicitor be present during the mediation proceedings at a cost to the legal aid fund.