



## Community Law & Mediation

### **A submission by Community Law & Mediation to the Workplace Relations Commission (WRC) on *Remote Hearing and Written Submissions: Dealing with Adjudication Complaints During the Period of Covid19-related Restrictions***

#### **Executive Summary**

Community Law & Mediation is an independent, community based law centre. Our client base includes members of the following groups, *inter alia*, for whom the proposals contained in this Consultation may present difficulties: People who cannot afford to pay for legal representation; people with intellectual disabilities; people with physical disabilities; people for whom English is not a first language; people without an adequate broadband connection

Our submission highlights the potential effects the proposed written procedure and virtual hearings will have on these groups and makes the following recommendations:

1. No party should be required to participate in a written procedure without consent.
2. Disputes under the Equal Status Acts 2000-2018 are not suitable for disposal by way of written procedure.
3. The WRC must consider all factors, including any special assistance required by certain individuals before referring a complaint for assessment by way of written procedure.
4. Applicable time limits must be communicated to parties in an accessible and timely manner.
5. Where the WRC seeks to utilise a written procedure, additional supports should be available to service users, particularly those who are acting without legal representation.
6. Virtual hearings should remain available after the Covid-19 restrictions have lifted, if both parties consent.
7. All cases should be considered for virtual hearings on a case-by-cases basis.
8. The WRC must review its current support systems and consider what additional supports can be provided to ensure maximum participation in virtual hearings.
9. The WRC should continue to explore safe and appropriate ways in which it could conduct face-to face hearings, even after the current period of restrictions.
10. The WRC may wish to consider virtual mediation sessions in addition to virtual hearings.

These recommendations are outlined in further detail in our submission.

**About Community Law & Mediation**

CLM's mission is to provide people in our communities with expert legal, mediation, and education services they would not otherwise have access to and in doing so, to address underlying issues of injustice and exclusion while working for real change.

For ***more information***, contact us at:

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## Who we are

Community Law & Mediation (CLM) is a community based, independent law centre operating in two locations: Dublin and Limerick. It was founded in 1975 and assists more than 3,000 people annually through its services, which include free legal advice and representation; information and education; and mediation and conflict coaching. CLM also campaigns for law reform, and for the safeguarding of rights already enshrined in law.

In response to the increased need for legal information and advice in the context of the Covid-19 pandemic, Community Law & Mediation is running free legal advice clinics over the phone, as well as publishing information on specific areas of law affected by the pandemic in the form of FAQs. We continue to provide advocacy and legal representation in a number of areas of law, including employment and equality. We have also commenced mediation services remotely.

## Background

Community Law & Mediation has seen a strong demand over the years for free legal advice and representation in relation to employment and equality issues. Many people who access our services are low paid workers often in precarious employment, and poverty and precarity has had a detrimental effect on every aspect of their lives. The current crisis has only increased the demand for legal advice, as increasing numbers of people find themselves in precarious situations in relation to their employment and their finances.

Crucially, the pressures flowing from unemployment and from low-income employment have an adverse impact on the ability of individuals to challenge breaches of employment and employment equality legislation, as well as equal status legislation, particularly in the absence of civil legal aid. The Civil Legal Aid Scheme does not currently cover cases taken to the WRC and thus it is vital that the proposed changes to procedure do not adversely affect employees and employers who are not in a financial position to pay for legal representation. The lack of legal aid in the area is exacerbated by the current decrease in the availability of advocacy services usually provided by Citizens Information and other community and voluntary groups.

## CLM's submission

Our submission to the Workplace Relations Commission (WRC) highlights the potential effects the proposed written procedure and virtual hearings will have on vulnerable groups in Irish society. While we recognise the need for the WRC to reconvene its work and welcome the innovation, supports must be put in place to ensure that all groups in Irish society can adequately participate in the WRC process. Our client base includes members of the following groups, *inter alia*, for whom the proposals contained in the Consultation may present difficulties:

- People who cannot afford to pay for legal representation
- People with intellectual disabilities
- People with physical disabilities
- People for whom English is not a first language

- People without an adequate broadband connection

Such difficulties, however, are not insurmountable, once sensible and adequate protections are put in place, as explored in this submission.

### **Key recommendations**

CLM has considered the Consultation Paper and makes the following recommendations:

1. No party should be required to participate in a written procedure without consent.
2. Disputes under the Equal Status Acts 2000-2018 are not suitable for disposal by way of written procedure.
3. The WRC must consider all factors, including any special assistance required by certain individuals (e.g. interpreters, support for those with physical and intellectual disabilities, capacity issues etc.) before referring a complaint for assessment by way of written procedure.
4. Applicable time limits must be communicated to parties in an accessible and timely manner.
5. Where the WRC seeks to utilise a written procedure, additional supports should be available to service users, particularly those who are acting without legal representation.
6. Virtual hearings should remain available after the Covid-19 restrictions have lifted, if both parties consent.
7. All cases should be considered for virtual hearings on a case-by-cases basis.
8. The WRC must review its current support systems and consider what additional supports can be provided to ensure maximum participation in virtual hearings.
9. The WRC should continue to explore safe and appropriate ways in which it could conduct face-to face hearings, even after the current period of restrictions.
10. The WRC may wish to consider virtual mediation sessions in addition to virtual hearings.

### **Access to justice and inequality of arms**

The right of access to justice is accepted as a constitutional principle and a right under the European Convention on Human Rights. Without it, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. It is a basic tenet of a functioning, democratic society. The WRC plays a key role in ensuring that justice is done in the employment and equality context.

While the intention when establishing the WRC was to remove the need for lawyers from the workplace disputes process, it is our experience that, in practice, employers tend to attend with legal representation. This is currently a real cause for concern from the point of view of equality of arms and natural justice.

Changes to the WRC procedure may disadvantage those who cannot afford legal representation or advice to guide them through the process. This is particularly so because the current Covid-19 restrictions have curtailed the services of many organisations who would

normally assist those without legal representation. In the absence of a State Civil Legal Aid Scheme covering employment law matters, the WRC must ensure that those without legal representation, both employees and employers, are adequately protected and supported to participate in the WRC's new procedures.

### **Hearings by way of written procedure**

The right to be heard is a fundamental right and a key principle of natural justice. No party should be required to waive this right.

CLM recognises that there is a statutory basis for the disposal of many complaints by way of written submissions. Further, in some circumstances, a paper assessment may be an efficient way to deal with straightforward employment disputes. This is particularly the case where both parties consent and are legally represented. However, many cases will not fit these criteria.

### **Complaints under the Equal Status Acts 2000-2018 should not be considered for disposal by way of written procedure**

CLM agrees that cases taken under the Employment Equality Acts 1998-2015, the Unfair Dismissals Acts 1977-2015 and the Protected Disclosures Act 2014 are unsuitable for disposal by way of the written procedure. We further submit that complaints made under the Equal Status Acts 2000-2018 are also inappropriate for this procedure.

Cases involving the Equal Status Acts 2000-2018 invariably involve material disputes of fact which require the hearing of evidence. Further, the option to appeal a decision made under this Act to the Circuit Court incurs the risk of costs, which is not a readily accessible appeal for many people.

### **A number of factors must be considered before referring a complaint for assessment by way of written procedure**

CLM's position is that no party should be required to have their case disposed of by way of written submission without their consent. In order to avoid delays, the parties should be given an opportunity at an early stage to indicate their consent. This could be provided for in the WRC online complaint form.

Notwithstanding the above, before proceeding with a written procedure, the WRC must consider not only the nature of the legislation under which the complaint is made, but also the nature of the complaint and the capacity of the parties to engage in the written procedure.

Many of the acts referred to in the WRC's Consultation Paper e.g. the Organisation of Working Time Act 1997 or the Payment of Wages Act 1991 present complex legal issues. In cases where one party is not legally represented, or where one party has language or literacy difficulties, a paper assessment may lead to an inequality of arms. As such, the capacity of the

parties should be taken into account in any preliminary screening. Again, such capacity issues could be noted on the WRC online complaint form.

### **Applicable time limits should be communicated to parties in an accessible and timely manner**

As outlined in the WRC's Consultation Paper, different statutes provide for different time limits to object to a written procedure. Notwithstanding the points made above, where the WRC selects a case for the written procedure, this decision must be communicated immediately to the parties and must be communicated in a clear and accessible manner.

In our experience, where decisions are made and then communicated by letter, significant periods of time can be lost due to delays with postage. As such, CLM recommends that where a case is selected for written procedure, this decision should be communicated directly to the parties either by telephone or by email on the date that this decision is made. Parties should be permitted to express confirmation or objection by telephone or by email.

### **The Workplace Relations Commission must provide additional supports**

The procedure outlined in the WRC's Consultation is complex and many complainants and respondents will require support to navigate such a new system and in particular to prepare written submissions.

Many services, such as the independent law centres, Citizens Information Centres (CIC) and Money Advice and Budgeting Service (MABS) that had traditionally provided advice and assistance to those seeking to realise their rights are operating under restrictions also. As such, there is a significant risk that vulnerable groups may be left unsupported in this new system.

Where the WRC seeks to introduce a new system that is more heavily reliant on written procedures, steps should be taken by the WRC to ensure that parties have adequate support. Such steps should include at a minimum:

1. Formal assistance via the WRC phone line on completing the WRC complaint form and on the written procedure.
2. The provision of up to date and clear explanatory materials with practical examples demonstrating the application of employment law.
3. Template and sample written submissions.
4. A review and amendment of the WRC complaint form.

### **Virtual hearings**

CLM welcomes the possibility of virtual hearings, which can be of great benefit for those who cannot readily attend a physical hearing. We submit that, subject to a successful pilot period, virtual hearings should remain available in certain cases particularly where parties have mobility issues and would not otherwise be able to attend a hearing without hardship.

**All employment disputes should be considered for virtual hearings subject to assessment**

While it is accepted that certain employment disputes may not be suitable for a virtual hearing, there should be no fixed policy, which would eliminate a virtual hearing for certain types of cases.

CLM submits that all cases should be considered for virtual hearings subject to a number of factors which must be considered before proceeding. These factors could include:

1. Urgency of the dispute
2. Consent of the parties
3. Nature of the case
4. Capacity of the parties to engage in the procedure
5. Availability of IT and broadband services

Access to virtual hearings should be available, subject to consent, for all disputes and all applicants including those who are not legally represented. The WRC should ensure that appropriate supports are put in place to ensure that all service users can access this service if they wish.

**Supports will be required to ensure that service users can participate properly in a virtual hearing**

The use of virtual hearings will be a new departure for all involved but those who are not legally represented and who may have other vulnerabilities will feel particularly exposed. The WRC should provide training and support on the use of any remote conferencing system and on the procedures that will apply in any virtual hearing.

**Dealing with adjudication complaints during the period of Covid19-related restrictions**

As above, CLM welcomes the introduction of virtual hearings. However, there will be cases where these processes are not possible or are simply not suitable. There are many people in Ireland, who do not have appropriate broadband services which would allow for a remote hearing. Those with literacy difficulties or who are not IT literate cannot appropriately access this service.

Given the uncertainty as to how long Irish society will need to live under restrictions, we welcome the WRC's considerations on how it will run in-person hearings in a safe manner for all involved.

**Virtual mediation sessions**

Pending a successful pilot of the virtual hearings, the WRC may wish to consider a similar service for mediations where appropriate. CLM is trialling its own virtual mediation clinics for appropriate cases and subject to consent. Overall, the feedback has been very positive.

**Conclusion**

CLM welcomes the proposals of the WRC, which we hope will progress many of its current pending cases. It is really encouraging to see such innovation and willingness to engage in consultation in reaching solutions in the uncharted territory we find ourselves in. However, we call on the WRC to ensure that all necessary supports are provided to ensure that anyone who wishes to participate in the new procedures can do so effectively. We accept that extra resources may be required to provide such supports. Finally, we would welcome the opportunity to provide further information or to discuss any elements of this submission.

**Community Law & Mediation  
30<sup>th</sup> April 2020**