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Department for
**Employment
and Learning**
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Disputes in the workplace: a systems review

Policy response



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1 Introduction

- 1.1 **The Department has just completed a fundamental review of the existing systems for resolving workplace disputes in Northern Ireland. The review has been informed by a public consultation process, managed by a steering group representative of the key stakeholder organisations (CBI Northern Ireland, the Federation of Small Businesses, the Northern Ireland Committee of the Irish Congress of Trade Unions, the Equality Commission for Northern Ireland and the Labour Relations Agency).**
- 1.2 At the outset of the review the Minister for Employment and Learning, Sir Reg Empey MLA, directed that all viable delivery options should be explored. The Minister is mindful of a significant body of opinion favouring adoption of the system that is now in place in Great Britain, where the statutory minimum procedures for resolving workplace disputes were replaced in April 2009 by a voluntary compliance model. He is also aware of emerging support for a derivative of the Republic of Ireland's Rights Commissioner Service. However, the Minister has determined that the outcome of the review should be a bespoke dispute resolution model that reflects equitably the respective needs of Northern Ireland citizens and the local business community.
- 1.3 Public consultation ended in September 2009 and the report of the public consultation was published on 16 November 2009.¹ This policy memorandum represents the Department's response to the consultation and is informed not only by the public consultation itself but also by the many engagements with stakeholders, practitioners and the general public which took place throughout the review process. The Department is committed to the implementation of a Northern Ireland employment relations/dispute resolution strategy that delivers on the principles established by the consultation steering group, namely:
- *promotion of good employment relations;*
 - *provision of strong employment rights;*
 - *effective mechanisms to prevent and resolve disputes;*
 - *resolution of disputes close to their point of origin;*
 - *enhanced capability of all involved in the prevention and resolution of disputes;*

¹ *Disputes in the workplace: a systems review – report on the public consultation* (Department for Employment and Learning, November 2009). The report can be downloaded from www.delni.gov.uk/consultation-zone.

- *statutory bodies that provide effective prevention and dispute resolution services to all those involved in workplace disputes;*
- *access to non-adversarial alternatives to the tribunal system;*
- *an efficient and effective tribunal and appeal system.*

1.4 This review has gone much further than a simple appraisal of the current statutory procedures and has sought opinion on a wide range of employment relations/dispute resolution issues. The public consultation posed 36 questions covering each stage of the continuum from the prevention/informal resolution of workplace disputes through to the mechanisms for appealing tribunal decisions. This report is structured around the consultation questions, providing a brief résumé of the views expressed by consultees, followed by the Department's policy response to stakeholder opinion.

EXECUTIVE SUMMARY

1.5 The Department received 38 responses to the public consultation. This report sets out the Department's policy response to that consultation. The following key messages, drawn from the totality of the engagements with stakeholders during the consultation process, establish the framework for the system changes which the Department is proposing to make following on from this policy review:

- *early resolution of disputes should be the prime focus;*
- *alternative dispute resolution (ADR) should not be viewed as a staging post to the tribunal system;*
- *the Labour Relations Agency needs to focus more on pre-claim interventions;*
- *capability is a critical factor;*
- *a joined-up approach to information and advice is essential;*
- *SMEs require support to discharge their employer responsibilities;*
- *all parties involved in employment relations need to improve their practices.*

1.6 The Department's policy response to the consultation process is set out under the relevant headings below. The Department will:

Maintaining good employment relations / informal attempts to resolve disputes at work

- establish an **inter-agency employment relations information forum** to develop a coherent approach to the provision and promotion of information and signposting advice to employers and employees on employment law/dispute resolution mechanisms;
- seek to produce an **agreed memorandum of understanding/code of practice** for all information and advice partners;
- seek to develop a **good practice employment relations model** for large public/private sector employers based on lessons from the Department's employment relations pilot;
- explore options for the development of a **small firms support scheme** on employment relations/dispute resolution to include models of employment relations good practice for the SME sector. This would build on the online support already available through www.nibusinessinfo.co.uk;
- invite the LRA to work with lead employer bodies to target **employment relations awareness training** based on good practice models towards employers in the SME sector;
- develop **accredited continuous professional development programmes** on employment relations/dispute resolution for management grades that are sited within existing professional development frameworks;
- identify opportunities within the existing government accreditation/regulatory systems to **promote the benefits of good employment relations practices to employers**;

Formal processes for resolving disputes at work

- retain **minimum statutory workplace procedures for disciplinary and dismissal** situations together with associated unfair dismissal provisions;
- **repeal the grievance element** of the current statutory procedures;
- ask the LRA to develop a **revised Labour Relations Agency Code of Practice** that underpins the statutory procedures for disciplinary and dismissal situations and establishes the core standards for workplace grievances;

- provide for tribunals to **take account of employers' and employees' adherence to statutory disciplinary and dismissal procedures and the LRA Code of Practice** in reaching a determination in a case;

Alternative dispute resolution

- seek to refocus LRA services, increasing the emphasis on **pre-claim diagnosis and the targeting of ADR interventions** (including conciliation, mediation and arbitration) in response to helpline queries, reflecting the learning from the recent Acas enhanced services pilots;
- work with the LRA and key stakeholders to **raise the profile of the Agency's services**, including its helpline and online presence, and establish the Agency as an employment rights information gateway;
- develop an **expanded LRA arbitration service** that reflects some of the components of the Republic of Ireland's Rights Commissioner Service and which is extended to cover all employment rights jurisdictions;
- seek to ensure that the LRA can offer a **fuller range of ADR services**;
- consult relevant stakeholders about the possibility, value and practicalities of establishing a **professional ADR network** which could be underpinned by a code of ethics, continuous professional development framework and a professional register for appropriately qualified practitioners;
- work with OITFET and stakeholders to **simplify the tribunal forms**, where feasible;
- **repeal the complex provisions extending tribunal time limits** in certain situations;
- facilitate the establishment of a memorandum of understanding about **closer co-operation between the LRA and OITFET** in order to maximise use of ADR where appropriate;
- consider establishing a **judicial mediation pilot** as an alternative to the legal process.

Legal remedy

- seek input from the tribunal Rules Committee and the tribunal users' group on possible **amendments to the Rules of Procedure and administrative processes**;

- **eliminate anomalies with regard to costs orders and consider the appropriateness of the upper limit of the pre-hearing deposit;**
- **provide for determination of certain simple issues without a hearing where both parties have consented to this in writing;**
- **make tribunal awards automatically enforceable through the courts;**
- **explore legislative and non-legislative measures which encourage/require employers to operate equitable pay policies;**
- **empower tribunals to make discretionary orders restricting publicity in sensitive cases;**
- **enable cases involving both industrial and Fair Employment Tribunal jurisdictions to be consolidated and heard together, as part of the same proceedings;**

Appeal

- **consider the legal, practical, financial and regulatory implications of establishing an Employment Appeal Tribunal for Northern Ireland;**
- **work with other Government bodies to monitor the impact of the revised mechanism for bringing an appeal from a tribunal.**

2 Maintaining good employment relations / informal attempts to resolve disputes at work

- 2.1 **A strong employment relations culture supports dispute prevention and, where disputes cannot be prevented, allows for flexible and sensitive approaches to be applied to help resolve the issues informally. Only in cases where these strategies prove unproductive does it become necessary to bring the issues into the more formal arena.**
- 2.2 The consultation document asked key questions around prevention and informal resolution. Although consultation responses have been detailed elsewhere, the questions and brief summaries of the responses are included to provide a context for the Department's proposals. The Department's responses to questions 1 and 8, which deal with the existing statutory procedures, are addressed in [Chapter Error! Reference source not found.](#) of this document.

ADVICE AND GUIDANCE

Q2. *We are proposing an inter-agency approach to the provision of information and advice on employment law/workplace disputes. How might such an approach work most effectively?*

SUMMARY OF RESPONSES

The Department received 23 substantive responses to this question. There was widespread support for a more coherent and co-ordinated approach to advice on employment relations. Consultees believed that this could be best achieved through inter-agency collaboration. There was also support for the provision of more directive advice and support for individual cases.

Department's response

- 2.3 The Department agrees that more can and should be done to strengthen provision of information and advice on employment relations issues. The ability to source the right information at the right time can make a vital difference to how workplace disputes are addressed. It is widely accepted that lack of understanding can lead to rights and responsibilities not being properly observed. As a result, minor disputes can escalate, while other substantive matters may not receive the attention they deserve, creating resentment and damaging employment relations.

- 2.4 The Department also recognises that there is a demand for two discrete forms of assistance. The first is of a neutral and non-partisan character, explaining rights and responsibilities and setting out objectively the options that are open to the parties. The second form of assistance involves the provision of tailored advice and support that seeks to achieve a specific outcome.
- 2.5 It is clear that there is some confusion around the respective roles of the Labour Relations Agency (LRA) and other citizen advocacy bodies. For example, the Department has learned of the disappointment that can be experienced when an individual learns that the LRA's advisory service is limited to a factual discussion of the party's options rather than directive advice on particular courses of action.
- 2.6 The Department believes that there is scope for the various bodies involved in provision of advice and information to work more collectively to the mutual benefit of employees and employers. The Department is therefore supportive of the proposal to establish an inter-agency information and advice forum, and also sees merit in the development of a memorandum of understanding or code of practice for all information and advice partners.
- 2.7 The Department would envisage the forum working corporately to deliver jointly branded signposting guidance. Terms of reference for the forum, clarifying roles and responsibilities, would be agreed by the participating organisations. The signposting guidance would set out easy to follow steps focusing on the prevention/early resolution of disputes. It would also provide employers and employees with contact information for support organisations, including details of the services they do and do not provide. This guidance could then be promoted by all of the key stakeholder organisations as well as being marketed through the new citizen and business communication channels (www.nidirect.gov.uk and www.nibusinessinfo.co.uk).
- 2.8 The Department recognises and welcomes the fact that individual bodies will continue to produce their own specialist guidance. Each body has a particular focus or remit in employment relations issues, and entirely appropriately has built up its own expertise and approaches. The jointly branded signposting guidance would complement rather than supplant the more detailed information offered by individual advice organisations.
- 2.9 The Department is in agreement that the LRA's services should remain neutral in character; the resounding message from the consultation is that the Agency's independence and integrity would be compromised if it were to adopt a more directive approach. LRA advisers will continue to use their experience to promote all available options with the Agency's helpline being used as a 'gateway' to the full range of support services.

- 2.10 The Department commends the work of all the statutory and independent organisations in providing directive advice to employees and employers but is not persuaded that Government should make available any additional funding to the sector at this juncture. Instead the Department's focus will be to put in place enhanced ADR systems that provide credible alternatives to the tribunal system. This will allow the existing citizen advocacy bodies to concentrate on those residual cases that are not amenable to early resolution, and which require a legal determination.
- 2.11 In taking forward the steps described above, the Department believes that statutory agencies and other advice partners, working in partnership, will provide a more joined-up, comprehensive and accessible service.

ROLE OF THE PUBLIC SECTOR

Q3. *Do you agree that the public sector, as an employer, has a role to play in developing and promoting best practice?*

SUMMARY OF RESPONSES

The Department received 21 responses. A majority believed that the public sector should take a lead in promoting models of good practice in employment relations. However some consultees suggested that public sector practice will not easily transfer to the other sectors.

Department's response

- 2.12 The Department acknowledges and appreciates the concerns voiced by some consultees that practices within the public sector may not transfer readily to private sector employers or, more particularly, to SMEs. However, the Department, as the branch of government responsible for employment law and the development of an employment rights framework, believes there is merit in the public sector taking a lead in the development and promotion of good practice.
- 2.13 The Department, in partnership with the Northern Ireland Public Service Alliance (NIPSA) and the LRA, has recently established an internal employment relations good practice pilot. The purpose of the pilot is to build upon the largely positive working environment in the Department by exploring if there are any additional approaches and to put in place practical arrangements that will embed a culture that facilitates prevention and the early diagnosis/informal resolution of disputes.
- 2.14 NICS Corporate HR will monitor the pilot with a view to disseminating outcomes across all Government Departments. A number of other employers, from both public and private sectors, have also expressed

interest in the pilot. The Department hopes that the lessons from the pilot will provide a template for a cross-section of employers to develop their own good practice arrangements, supported by the LRA.

SKILLS DEVELOPMENT

Q4. *Would enhancing the capability of managers through training in dispute prevention/resolution techniques encourage the development of employee relations best practice? If so, what type of training should be developed?*

SUMMARY OF RESPONSES

The Department received 20 responses. There was universal acceptance that managers and employees need training and development in employment relations matters.

Consultees contended that there is a requirement to differentiate between the needs of specialists who deal with disputes on a regular basis (HR managers and trade union officials), those with an active role in an individual dispute (line managers and employees) and those taking a leadership position within the workplace (senior management). All have differing roles to play and it is appropriate to ensure that varied training is available to cater for the full spectrum of needs.

Department's response

- 2.15 The Department is supportive of the view that training in employment relations matters should be a high priority. The Department agrees, in taking forward this skills agenda, that the differentiated needs of the various stakeholders need to be taken into account. As noted above, these stakeholders include specialists (HR managers, trade union officials and other employee representatives), line managers/employees and those in a leadership position within the workplace.
- 2.16 The Department leads on the Northern Ireland Skills Strategy and has recently appointed the NI Skills Advisor to the UK Commission for Education and Skills. The Department plans to consult with the NI Skills Advisor and other government/non-government partners about the development of employment relations training programmes that could be sited within existing professional development frameworks.

SUPPORT FOR SMALL EMPLOYERS

Q5. *How can small businesses be supported to establish and maintain an employment relations culture supportive of dispute prevention/informal resolution of workplace disputes? What role*

should Government/the Labour Relations Agency/the Federation of Small Businesses and similar organisations play?

SUMMARY OF RESPONSES

The Department received 15 responses. There was near universal agreement that SMEs need to be better supported to establish and maintain good employment relations.

Department's response

- 2.17 The Department is sympathetic to the challenges faced by small firms and concurs with the opinion expressed by the vast majority of consultees that SMEs would benefit from additional support to establish and maintain good employment relations. Larger employers will often have dedicated HR staff who have time to absorb relevant guidance and undertake necessary training. The situation in smaller firms is often very different, with a single senior manager or owner-manager having responsibility for a range of employment, health and safety, tax and accounting issues, as well as the general day-to-day business of the firm. This understandably can create situations where disputes and the processes associated with them are very often only considered when a problem arises.
- 2.18 The Department is committed to working with other Government agencies and employer representative bodies to explore what cost-effective measures can be put in place to enhance the support currently available to SMEs. The Department would see the proposed inter-agency information and advice forum having an important role in this regard. The following actions, which have been suggested by consultees, are viewed by the Department as a useful starting point:
- *targeted information dealing with employee rights and employer obligations;*
 - *signposting to sources of further advice and information;*
 - *model documentation, such as templates for developing terms and conditions of employment;*
 - *case studies highlighting the benefits of good practice;*
 - *a hard copy or online 'pack' of such material specifically tailored to meet the needs of small employers, with content agreed by key organisations, possibly supplemented by an online service where SMEs could share information or seek advice;*
 - *targeted training in employment relations possibly delivered by the LRA;*

- awareness-raising by organisations such as the Department, the LRA and the wider employment relations network;
- practical help and advice, through face-to-face workplace visits e.g. to assist with drawing up documentation.

ACCREDITATION

Q6. *Should some form of company accreditation associated with employment relations best practice be introduced? Should it be a new standard or should it form part of an established accreditation scheme? How could businesses be encouraged to become accredited?*

SUMMARY OF RESPONSES

The Department received 20 responses. The majority of consultees were either opposed or indifferent to the proposal to introduce some form of accreditation for employers in the area of dispute resolution. However, some saw merit in creating accreditation opportunities for individuals through recognised qualification frameworks.

Department's response

- 2.19 The Department concurs with the view that a company accreditation scheme should not be introduced.
- 2.20 However, the Department does acknowledge that there is interest in individual accreditation by way of recognised qualifications in particular aspects of workplace disputes. The Department is aware of collaborative work being undertaken by Queen's University Belfast, the Labour Relations Commission and IBEC in the Republic of Ireland in developing professional development opportunities specific to employment relations. The Department sees merit in the individual accreditation proposal and will explore potential options for utilising existing qualification frameworks as part of the discussions around capability.

INSPECTION/ENFORCEMENT

Q7. *Is there a need for inspection/enforcement machinery to produce more legally compliant workplaces?*

SUMMARY OF RESPONSES

The Department received 20 responses. The majority of consultees either opposed the proposal or believed that the matter would require further exploration before any definitive decision could be taken.

Opposition came mainly from employers, while support came particularly from citizen advocacy groups.

Department's response

- 2.21 The Department, in asking the question about the need for an inspection/enforcement regime, had indicated that this approach may not be a proportionate response to difficulties that do exist.
- 2.22 Whilst noting that a majority of consultation responses concurred with the Department's view, it should be acknowledged that advocates of inspection/enforcement mechanisms have contributed helpfully to the debate. The Department agrees that there is a real need to continue to raise awareness of rights and responsibilities and to ensure that vulnerable workers do not feel constrained from asserting their rights, particularly where unscrupulous employers wilfully seek to avoid their legal responsibilities.
- 2.23 Although there is a recognition that an inspectorate could have an educational and preventative function, the Department is not persuaded that there is a need for such a significant departure from current practice. Rather, in line with the principles of better regulation, the Department believes that the provision of more effective information and advice on employment rights through gateway services will help to eliminate ignorance and poor practices and provide individual employees with the necessary confidence to challenge breaches of employment rights.
- 2.24 The Department has already signalled its intention to develop better information and advice with the expert assistance of the proposed employment relations information and advice forum which would be representative of employers, trade unions and the statutory and voluntary sectors.
- 2.25 Currently there is an enforcement regime in the key areas of employment rights relating to health and safety, the National Minimum Wage, Agricultural Minimum Wage, gangmasters, employment agencies and certain aspects of working time. The Department is not convinced that the costs of widening the existing inspection regime could be justified. There would be an additional financial burden even for the most compliant employers, who would have to find time to facilitate inspections and associated administrative tasks. These costs, in the Department's view, would be disproportionate to the benefits. The Department will therefore not be taking steps to introduce a new, dedicated inspection regime.
- 2.26 However, the Department is currently fostering closer working arrangements among the various enforcement agencies, including the sharing of information on breaches of employment rights. The Department is also minded to work with other government partners to identify opportunities within the existing accreditation/regulatory

frameworks to promote the benefits of good employment practices to employers.

SUMMARY

2.27 The Department will:

- establish an **inter-agency employment relations information forum** to develop a coherent approach to the provision and promotion of information and signposting advice to employers and employees on employment law/dispute resolution mechanisms;
- seek to produce an **agreed memorandum of understanding/code of practice** for all information and advice partners;
- seek to develop a **good practice employment relations model** for large public/private sector employers based on lessons from the Department's employment relations pilot;
- explore options for the development of a **small firms support scheme** on employment relations/dispute resolution to include models of employment relations good practice for the SME sector. This would build on the online support already available through www.nibusinessinfo.co.uk;
- invite the LRA to work with lead employer bodies to target towards employers in the SME sector **employment relations awareness training** based on good practice models;
- develop **accredited continuous professional development programmes** on employment relations/dispute resolution for management grades that are sited within existing professional development frameworks;
- identify opportunities within the existing government accreditation/regulatory systems to **promote the benefits of good employment relations practices to employers.**

3 Formal processes for resolving disputes at work

- 3.1 **In April 2005, the Department introduced statutory minimum grievance and disciplinary/dismissal procedures for resolving disputes in the workplace. Employers are required to use the procedures when taking disciplinary action that could lead to dismissal of an employee, when actually dismissing an employee, or when an employee raises a grievance that, if not resolved, could potentially form part of a claim to an industrial tribunal or the Fair Employment Tribunal for legal determination.**
- 3.2 The rationale for the introduction of the procedures was to enshrine in law the need for employers and employees to make real attempts to address disputes as close as possible to their original source in the workplace. It is widely understood that addressing issues early on, before positions become entrenched, significantly improves the chances of successful resolution.

Q1. *What impact do the statutory dispute resolution procedures have on the development of strong employment relations?*

The Department received 21 responses. 10 have set out a negative view of the statutory procedures and 5 a primarily negative view; 6 respondents have suggested that, broadly speaking, there is a balance of benefits and drawbacks. It is interesting to note that while the existing grievance arrangements have been the subject of heavy criticism, there has not been the same level of hostility towards the procedure for discipline and dismissal.

Q9. *Of the three possible options with regard to the statutory dispute resolution procedures, which is your preferred option and why do you feel this option is the most appropriate?*

1. Retain the procedures without modification.
2. Modify the procedures, retaining them in part but preserving a process mandated by statute.
3. Repeal the procedures in full and replace them with a voluntary compliance model.

The Department received 25 responses. There is no support for retaining the statutory minimum procedures for resolving workplace disputes in their current form, and a majority of consultees (14 of 25) have expressed a preference for complete repeal. However, a significant minority (9) wish to see the procedures retained in a modified form.

Q10. *Should any additional measures, statutory or otherwise, be introduced to improve formal systems for resolving workplace disputes?*

The Department received 17 responses. Consultees offered a range of arguments and ideas concerning the statutory procedures that are relevant elsewhere in this discussion.

Q11. *Would there be any unintended consequences of the repeal of the statutory procedures (or part of them) that would need to be considered?*

The Department received 13 responses. 8 consultees have suggested potential negative consequences of repeal, with 5 contending that any negative consequences would be outweighed by the benefits of repeal. There is support for a return to the law on unfair dismissal established by the *Polkey* case (more information in which is given at [paragraph 3.15](#)).

Q12. *If the procedures or parts of them are to be repealed, what should replace them and how would compliance be encouraged?*

The Department has received 21 responses to this question. Consultees who support repeal or partial repeal of the procedures see a role for a Labour Relations Agency Statutory Code of Practice, with proportionate sanctions to ensure that any new arrangements are effective.

DEPARTMENT'S RESPONSE

Grievances

- 3.3 Responses to the public consultation and engagement throughout the course of the review have made it abundantly clear that the statutory grievance procedures have failed to achieve their original objective, the early resolution of disputes. Although the basic premise of a 3 step procedure is easy to grasp, the multiple permutations under the relevant regulations clearly tax even the most legally agile minds; the grievance procedure, in trying to cater for all circumstances, has led to significant confusion.
- 3.4 Moreover, the procedure has increased formality even at the early stages of a dispute; parties become quickly entrenched in a mindset of legal compliance, particularly when they know that their actions are explicitly linked to subsequent tribunal proceedings. As a result, attention is diverted from the core issue, resolution of the dispute itself. It is clear to the Department that most stakeholders believe that the grievance procedures have substituted legalism for pragmatism and

have undermined informal processes, which are so often key to resolving issues within the workplace.

- 3.5 The Department has concluded on the basis of the evidence received during the review that the statutory grievance procedures have created significant operational difficulties. By general acknowledgement, they are difficult to understand and have had the effect of discouraging informal approaches to disputes. Focus on process over substance is encouraged by the link to subsequent tribunal proceedings. This leads employers to take protective action by formalising even the most innocuous of grievances in order to ensure that, if the case does enter the legal system, they have at least followed the mandated processes.
- 3.6 The not often cited advantages associated with the procedures are their focus on the setting of consistent minimum standards for all employers; the requirement for employers to take seriously employee grievances; and their facilitative role in clarifying at an early stage the issues in dispute. The Department does not believe that these advantages will be lost if the statutory grievance process is repealed, provided that current provisions are replaced by a robust LRA statutory Code of Practice setting out good practice and establishing the minimum standards to which parties are expected to adhere. This approach is comparable to that taken forward in Great Britain, where the Acas statutory code now provides a framework, supplemented by detailed non-statutory guidance, on how grievances should be dealt with.
- 3.7 The Department intends to repeal the statutory grievance procedure. Legislation in Northern Ireland will be recast to provide tribunals with the power to adjust awards if, at later proceedings, it is found that either party has unreasonably failed to comply with the minimum requirements set out in the Code.

DISCIPLINE AND DISMISSAL

- 3.8 Many proponents of a repeal of the statutory procedures argue that the GB voluntary compliance model offers a number of advantages. Unnecessary formality and rigidity would be removed from the system and Northern Ireland would be able to benefit from case law emanating from the GB Employment Appeal Tribunal.
- 3.9 However the Department takes a different view in relation to the statutory disciplinary and dismissal procedures. Although the statutory procedures have been the subject of criticism, the review has shown much less hostility to the disciplinary and dismissal element of the statutory regime and indeed has highlighted clear advantages.
- 3.10 The consultation has generated a significant body of opinion in favour of retention of the statutory disciplinary and dismissal procedures. Some consultees, who ultimately support repeal of the procedures,

have also argued that the current 1-2-3 steps should be an “irreducible minimum” for any process that could result in an employee’s dismissal. Dismissal can have highly detrimental impacts on an individual’s standard of living, psychological sense of self-worth and prospects of future employment; and this is far from an exhaustive list. In these circumstances, the Department does not consider it unreasonable to retain disciplinary and dismissal procedures that are already well understood by employers and which appear to be working.

- 3.11 While over-formalisation of a grievance situation from too early a stage can be damaging in many cases, the same is generally not true of a disciplinary process where the action being taken could ultimately lead to dismissal. The Department is persuaded that a legally mandated requirement will have more influence on employers’ behaviour than a statutory Code of Practice alone, when taking actions that could lead to dismissal. Failure by any party to follow the procedures will normally result in an adjustment of any award upward or downward to reflect the seriousness of the failure and its source.
- 3.12 The Department also proposes to retain the modified two-step procedure, which is used only in the very exceptional circumstance where an employee is dismissed summarily for gross misconduct. It is almost always unfair to dismiss an employee instantly, without first going through some form of procedure; however, tribunals have occasionally found such dismissals to be fair and it is appropriate to make provision for such situations. The Department believes it is reasonable for the existing 2 step procedure to continue. It is not difficult to understand or operate; it simply requires the employer to set down in writing to the employee the nature of the alleged misconduct that has led to the dismissal, the evidence for the decision, and the employee’s right to appeal. The onus is then on the employee to ask for an appeal meeting which, if requested, must be held and the decision communicated to the employee.
- 3.13 Retaining the disciplinary and dismissal element of the statutory procedures, underpinned by the revised LRA Code of Practice, is, in the Department’s judgment, an equitable treatment of the two central themes of the review, namely unfettered access to the justice system and recognition of the needs of the Northern Ireland economy.

AUTOMATIC UNFAIR DISMISSAL

- 3.14 The introduction of the statutory disciplinary and dismissal procedures was accompanied by an additional change in the law which meant that an employer’s failure to follow those procedures will result in a subsequent tribunal automatically reaching a finding of unfair dismissal.
- 3.15 This replaced the earlier position, established by *Polkey vs A E Dayton Services Ltd* [1987] IRLR 503. This case established that an employer’s failure to follow procedures, sufficient to enable the

employer to form a view of the facts and allow the employee a chance to put his or her side of the case, would generally result in a finding of unfair dismissal against the employer, except in exceptional circumstances, where adherence to the procedures would very clearly have made no difference to the outcome. Any compensation to the employee as a result of the employer's failure to follow proper procedures could also be reduced to reflect the likelihood that the dismissal would have gone ahead even if the correct procedure had been followed.

- 3.16 As with the response to similar consultation in Great Britain, a number of consultees in Northern Ireland argued for a return to the position established by the *Polkey* case. However, the Department has reached the view that preserving the direct link between an employer's failure to follow the minimum statutory requirements and a finding of automatic unfair dismissal sends out a strong message that employers must continue to make every effort to follow, at the very least, the minimum statutory process. The relationship between the statutory disciplinary and dismissal procedures and the law on unfair dismissal will therefore remain unchanged.

SUMMARY

3.17 The Department will:

- *retain **minimum statutory workplace procedures for disciplinary and dismissal** situations together with associated unfair dismissal provisions;*
- *repeal the **grievance element** of the current statutory procedures;*
- *ask the LRA to develop a **revised Labour Relations Agency Code of Practice** that underpins the statutory procedures for disciplinary and dismissal situations and establishes the core standards for workplace grievances;*
- *provide for tribunals to **take account of employers' and employees' adherence to statutory disciplinary and dismissal procedures and the LRA Code of Practice** in reaching a determination in a case.*

4 Alternative dispute resolution

- 4.1 **Alternative dispute resolution (ADR) can operate as an integral part of or parallel to well-designed workplace procedures for resolving disputes; alternatively, where workplace procedures prove unsuccessful, it can offer a constructive way of avoiding the stress, time and cost that can be associated with pursuing a matter through the tribunal system. ADR, and the critical role played in its delivery by the LRA, have been a central focus of the review. A summary of consultees' views and the Department's policy response are set out below.**

ROLE OF THE LABOUR RELATIONS AGENCY

Q13. *What are the strengths and weaknesses of current ADR services provided by the LRA?*

Q14. *How can the LRA improve its services?*

SUMMARY OF RESPONSES

The above questions are closely related and are considered together.

The Department received 23 responses to both questions. There was widespread recognition of and appreciation for the impartial and independent services provided by the LRA, although consultees did not hesitate to voice some criticisms highlighting areas in which they saw scope for improvement.

There was no criticism of the Agency's commitment or the quality of its service provision; any concerns were about the focus and reach of its operations. It was suggested that the Agency could be more proactive in promoting and targeting its services, although it was also felt that more resources may be required to enable the Agency to achieve this.

There was not a strong lobby for change as regards the fundamental role and duties of the Agency; rather, there was an evident desire to see the LRA build on existing successes.

Department's response

- 4.2 The Department welcomes and is not surprised by the fact that the LRA is held in such high regard. It concurs with stakeholders that there is no need to engage in a fundamental redesign of systems which already operate effectively in many situations. Rather, the Department intends to work with the LRA to build on its strengths, address any gaps in provision, and to do so as far as possible by refocusing existing resources.

PRE-CLAIM CONCILIATION

Q15. *Could the LRA be more involved in conciliation before a tribunal claim is lodged, and if so how?*

SUMMARY OF RESPONSES

A large majority, 11 of 15 respondents, would welcome increased focus by the Agency on conciliation prior to the lodgement of a tribunal claim, with a view to resolving disputes before legal action is deemed necessary.

Department's response

- 4.3 Currently the LRA's pre-claim activity represents around 10% of applications received by the Agency. The Department is not surprised by the weight of opinion in favour of the LRA having a greater focus on pre-claim conciliation. This is consistent with the feedback throughout this review that there should be more emphasis on prevention/early resolution of disputes. The Department is mindful of recent developments in Great Britain and, in particular, the Acas pre-claim conciliation pilot which sought to identify and resolve disputes which appeared particularly amenable to early intervention. The pilot has been successful and the intention is that pre-claim conciliation will become a mainstream service for Acas.
- 4.4 The Department is committed to measures that focus on early resolution and will now be inviting the LRA to mirror the approach being taken by Acas in relation to pre-claim conciliation. Initially this may involve a pilot programme to allow for a re-orientation of the LRA's helpline service. The Department believes that this will provide an opportunity for the Agency to develop the necessary diagnostic expertise to identify disputes that would be most amenable to early conciliation and other ADR interventions. The Department sees this as an opportunity to promote a range of ADR solutions based on an initial assessment carried out by the Agency's helpline staff. To provide the flexibility that the Agency will need in targeting pre-claim assistance at cases where resolution is most likely, or would be of particular benefit, the Department will convert the Agency's current duty to conciliate at the pre-claim stage upon the parties' request into a power to do so.
- 4.5 Since public awareness of the LRA is a concern for many consultees, steps will also be taken to increase the profile of the Agency and its services. The greater emphasis on pre-claim interventions, delivered through the Agency's helpline, will be helpful in this regard. The proposed inter-agency information and advice forum will also provide a powerful platform for promoting the work of the LRA. The Department will additionally be looking to enhance the LRA's profile through the smarter use of the new citizen and business communication channels (www.nidirect.gov.uk and www.nibusinessinfo.co.uk).

NATURE OF ADVICE

Q16. *Should the LRA be equipped to enable it to provide advice in addition to information?*

SUMMARY OF RESPONSES

Of 22 responses to this question, the largest single body of opinion (10 respondents) took the view that it would be inappropriate for the LRA to provide directive advice; a further 2 had a similar view, preferring signposting advice of the kind offered by Acas. 2 saw both advantages and disadvantages to the Agency taking on such a role, while 1 respondent was happy with the current arrangements. A minority, only 7 of 22, expressed a clear preference for the LRA to provide directive advice.

Opposition to the proposal stemmed from a view that providing directive advice would compromise the LRA's well-established reputation for independence and integrity.

Many consultees, however, asserted that there is considerable value in providing directive advice, even if this is not done through the Agency.

Department's response

- 4.6 The Department is encouraged by the high esteem in which the LRA is held and recognises that the Agency's reputation as the "honest broker" in employment disputes could be compromised if the Agency were to become involved in the provision of directive advice. The Department believes that the LRA should continue, as it does now, to provide non-directive advice to both employers and employees.
- 4.7 However, the Department does recognise that many stakeholders attach value to the availability of advice that is capable of recommending a particular course of action on the basis of the facts provided. Such services already exist and the Department sees value in raising general awareness so that employees and employers will know where to turn when they are seeking advice of this kind. The LRA's helpline service, together with a more joined-up approach to the provision of information and guidance (led by an inter-agency forum), should enable individuals to make informed judgements about where to go for directive help should they need it.

EARLY NEUTRAL EVALUATION

Q17. *Is some form of early neutral evaluation desirable and, if so, how should the process work?*

SUMMARY OF RESPONSES

A majority of respondents supported the introduction of early neutral evaluation arrangements designed to give parties an idea of the possible merits of their case at an early stage. There was no consensus as to who should provide such a service.

Department's response

- 4.8 The Department acknowledges the support for this proposal but notes the absence of consensus on how such a system might operate. Early neutral evaluation involves an early judgement on the potential outcome of the case, based on the evaluator's expertise and assessment of the known facts established at that preliminary stage. The evaluator must ultimately take a view on the merits of the case. Given consultees' concerns around the need to preserve the LRA's impartiality, it is clear that early neutral evaluation could not credibly be provided by the Agency.
- 4.9 The process could arguably be carried out by a tribunal chair, provided that the chair takes no subsequent part in the proceedings. However, forming a judgement on the merits of a case, even one that is carefully qualified, is a questionable undertaking in the absence of a full consideration of all of the known facts. Moreover, there are already in place tribunal processes which provide an alternative approach. For discrimination cases, the tribunals operate case management discussions (CMDs), the purpose of which is to try to encourage the parties to engage at an early stage to identify the issues that will form the subject matter for the full hearing. An officer from the LRA will always be available to facilitate conciliation should parties feel disposed to reaching a settlement through ADR at this or any later stage. Moreover, as discussed at [paragraphs 4.32-4.33](#), the Department sees further opportunities for LRA staff to work in closer partnership with their OITFET counterparts to ensure that opportunities for early resolution are maximised.
- 4.10 Non-discrimination claims are already listed for hearing on a fast track basis; a notice of hearing is issued to the parties as soon as the claim has been registered, giving the parties approximately 2 months' notice for the hearing of simpler cases, and 3 months' notice for more complex unfair dismissal claims. Determination of the issue by the tribunal will be relatively swift but again, throughout the process, the parties will be left in no doubt as to the various ADR options that remain open to them through the LRA.
- 4.11 The Department believes that the existing fast track and case management processes, combined with intensified efforts to promote ADR, will encourage parties to pursue settlement without the need for the introduction of an additional layer of complexity within the system. No steps will be taken to introduce early neutral evaluation.

PROVIDING AN ALTERNATIVE TO THE TRIBUNAL SYSTEM

Q18. *Should the statutory LRA arbitration scheme be expanded to cover a wider range of jurisdictions?*

Q20. *Would it be beneficial to incorporate within the existing system a process comparable to Rights Commissioner hearings in the Republic of Ireland?*

SUMMARY OF RESPONSES

It is appropriate to deal with responses to the above questions together, as many overlapping issues emerge.

- *In response to question 18, 5 respondents would welcome an expanded LRA arbitration scheme, 5 were opposed, and 2 favoured the development of alternative arrangements.*
- *In response to question 20, 6 supported the development of a Rights Commissioner type system for Northern Ireland, 6 other respondents would like to see the LRA's arbitration scheme developed to incorporate aspects of the Rights Commissioner system, 5 opposed any such arrangements and 1 would like to see an alternative system put in place*

There was clear majority support for developing new arrangements of some kind that would offer an ADR alternative to a tribunal hearing. An emerging view was that the LRA's arbitration scheme could be expanded to cover a wider range of jurisdictions (it currently covers only unfair dismissal and the right to request flexible working) and incorporate some of the custom and practice of the Rights Commissioner Service in the Republic of Ireland. It was recognised, however, that 'transplanting' the Rights Commissioner model to Northern Ireland would be inappropriate.

Some consultees argued that an expanded arbitration scheme or a derivative of the Rights Commissioner Service will not be successful unless more expansive appeal mechanisms are introduced.

Comments in relation to the above forms of ADR were consistent with the views of some consultees who wanted to see a widening of the 'menu' of ADR services provided by the LRA, possibly through the establishment of a professional ADR network.

Department's response

- 4.12 The Department has listened carefully to the views of stakeholders throughout what has been a very productive and thought-provoking debate and has concluded that it is appropriate to widen the Labour Relations Agency's arbitration scheme so that cases may be heard across the range of jurisdictions that are currently dealt with by the

tribunals. The Labour Relations Agency itself will have the lead role in developing such a scheme, and the Department, which must ultimately approve the scheme, will want the revised scheme to benefit from practical lessons learned from the Rights Commissioner Service. It is important to highlight that no individual conciliation service is available in the Republic of Ireland, which is one reason why the Department is not proposing a wholesale adoption of the Rights Commissioner Service.

- 4.13 The Department has heard and understands consultees' arguments in relation to the appeal mechanism associated with arbitration. However, there is a strong counter-argument that providing for complete reviews of arbitral decisions by a separate body, for example an industrial tribunal or the Industrial Court, could serve only to diminish the status or importance of the arbitration process. Tribunal proceedings will continue to be available to parties following participation in other 'lighter touch' forms of ADR such as conciliation and mediation. However an arbitration process which, in reality, is a non-judicial proxy for the tribunal hearing is a very different and more intense ADR process with an independent expert reaching a decision based on the merits of a case or, where the circumstances are right, encouraging the parties to reach agreement between themselves.
- 4.14 The Department was struck by the feedback from the independent advice sector that many employees, irrespective of the merits of their case, could not cope with the demands of a tribunal process and would appreciate a less formal consideration of their case. The Department is of the view that the existing LRA scheme should be made more accessible through a widening of its jurisdictional remit and that it should not be seen as a 'staging post' on the way to a tribunal hearing.
- 4.15 Arbitration can be a less costly, less stressful, quicker alternative to the legal system and, as such, there are clear incentives for parties to use it. Those incentives would, in the Department's view, be severely eroded if parties believed that arbitration was simply another step on the way to a legal process rather than a genuinely separate and alternative approach. For that reason, the Department intends to maintain the current provisions which allow appeals from arbitration only on points of EC law and matters under the Human Rights Act 1998. Full access to the legal system will be preserved since, as now, parties will need to agree voluntarily that they will not take their case to tribunal before the arbitration process can begin.
- 4.16 With regard to the provision of a wider 'menu' of ADR options, the Department intends to clarify that the LRA can offer a full range of such services and that these are protected by appropriate confidentiality.
- 4.17 The Department believes that there is a need to increase the take-up of ADR and that this can be achieved through more proactive marketing and, perhaps, the establishment of an ADR professional network. The Department intends to engage with stakeholders about the possibility,

value and practicalities of establishing a professional ADR network which could be underpinned by a code of ethics, a continuous professional development framework and, possibly, a register for appropriately qualified practitioners.

POST-CLAIM CONCILIATION

Q19. *Should there continue to be time limits on the LRA’s duty to attempt to resolve disputes post-claim?*

SUMMARY OF RESPONSES

11 of 19 respondents wished to see time limits on the LRA’s duty removed. The other 8 favoured retaining some form of time limit. Those arguing for retention suggested that the presence of a fixed deadline focuses parties’ minds on resolving the dispute; however, opponents contended that arbitrary time limits are harmful to the prospects of successful resolution.

Department’s response

- 4.18 The Department originally introduced the time limits on the LRA’s duty to “offer conciliation” alongside the statutory workplace dispute resolution procedures. The intention was the same as that cited by consultees who now support retention: that the procedures have the effect of focusing the parties’ minds on resolution.
- 4.19 However, feedback from the consultation suggests that the time limits have not had the desired consequences. In practice the LRA has exercised, and indeed continues to exercise, its *power* to conciliate once its *duty* to do so has expired, where its staff believe that realistic prospects of settling the dispute remain. Repealing the time limits, as the Department intends to do, will simply recognise the reality of current practice and acknowledge that, unfortunately, the current provisions have not had their intended effect. The Department will therefore provide in legislation that the LRA’s duty to conciliate will no longer be time limited.

TRIBUNAL FORMS

Q21. *Could a simplified tribunal application be used which would enable the LRA to assist the parties to determine how each case should be taken forward?*

SUMMARY OF RESPONSES

A large majority of respondents (12 of 17) supported simplification of tribunal forms. At the same time, however, some felt that it will be

difficult to identify areas in which the amount of information required could reasonably be reduced.

Department's response

- 4.20 The Department will work with OITFET and key stakeholders to review the present forms, with a view to simplifying their content and reducing their length where possible.
- 4.21 A number of stakeholders suggested that the forms which, under the current system, are sent to OITFET should, under new arrangements, be supplied first of all to the LRA with a view to the Agency focusing its efforts on ADR before the formal tribunal process begins. However, the Department is not persuaded that the significant administrative changes that this approach would require are warranted given that, under the existing processes, all relevant documentation is already copied to the LRA at an early stage. The Agency is, therefore, already equipped to intervene quickly after a claim has been lodged. The Department will not be making a change to the process for lodging claims and responses with the tribunals.

GIVING ADR TIME TO WORK

Q22. *Would it be beneficial to allow for pauses in the time limits imposed on tribunal claims while ADR processes are taken forward?*

SUMMARY OF RESPONSES

7 respondents expressed support for pauses in time limits, with an additional consultee giving qualified support. 3 were happy with existing time limits. 4 respondents proposed alternative models for the submission and processing of claims. On balance, a majority of consultees agreed that reasonable time should be afforded to parties to allow them to attempt to resolve their dispute.

Department's response

- 4.22 Associated with the existing statutory minimum procedures for resolving disputes at work are legislative provisions allowing for the normal time limit for lodging a claim with a tribunal to be extended by 3 months to allow ongoing workplace processes to run their course. The purpose of the provisions is to give the parties reasonable time to explore internal resolution without the need to begin a legal process.
- 4.23 Under the disciplinary and dismissal procedure, where an employee has reasonable grounds for believing a disciplinary procedure is still ongoing at the point where the tribunal time limit would normally expire, the time limit for lodging a claim is deemed to have been extended by 3 months.

- 4.24 Under the statutory grievance procedure, if an employee lodges a claim within the normal time limit but has not raised the grievance in writing with the employer, the tribunal will decline to register the application but an automatic 3 month extension will be triggered, provided that the employee lodges the written grievance with the employer within 28 days of the expiry of the normal time limit. Under these circumstances, the tribunal will write to the employee explaining what is required. On the other hand, if the employee does raise the written grievance with his or her employer within the normal time limit, an automatic extension of 3 months is triggered.
- 4.25 Stakeholders have made it clear to the Department during the review that these provisions can be confusing. In some circumstances, to avoid this confusion, advisers tell claimants that it is safer to lodge a claim within 3 months as a form of ‘protective’ action to preclude any danger that the claim will be out of time.
- 4.26 The Department believes that this situation is unsatisfactory. The provisions for extending time which were introduced alongside the statutory minimum procedures have produced unwelcome additional litigation around the application and interpretation of legislation and have not had the intended effect of encouraging parties to address disputes in the workplace prior to lodging a tribunal claim.
- 4.27 Instead of retaining the present arrangements, the Department will restore the legal position concerning time limits as it stood prior to the introduction of the minimum statutory procedures. This allowed a tribunal to extend the time for lodging a claim (generally but not exclusively 3 months) where the tribunal considered it was not reasonably practicable for the claim to have been presented within time or, in certain jurisdictions, where the tribunal considered it just and equitable to allow the claim to be presented out of time.
- 4.28 A return to this position does not negate opportunities for parties to resolve disputes between themselves. Rather, the tribunals’ listing policy will continue to make allowances, in setting hearing dates, for the parties to be given appropriate time to attempt to resolve matters between themselves.

INCENTIVES TO USE ADR

Q23. *Should a subsequent tribunal be empowered to take into account the parties’ actions with regard to ADR processes and penalise unreasonable behaviour?*

SUMMARY OF RESPONSES

There were 21 substantive responses to this question. 11 respondents expressed some form of support for penalising unreasonable behaviour in respect of ADR, believing that in order for the process to be taken

seriously, it must have 'teeth'. 10 were opposed to sanctions of this kind, arguing that if ADR is tantamount to a mandatory process, its effectiveness and value will be compromised.

Department's response

- 4.29 This question sought to ascertain whether there is a need to 'incentivise' ADR processes by associating penalties with unreasonable failure to use them. The arguments heard throughout the dispute resolution review have convinced the Department that it would be inappropriate to make ADR a mandatory or pseudo-mandatory process. ADR is intended to offer an alternative to the tribunal system; it is not supposed to be a hurdle on the way to obtaining a legal determination if that is what the parties want.
- 4.30 It is recognised, however, that parties will only be encouraged to turn to ADR if they feel that there are advantages in using it or disadvantages in failing to do so. ADR's advantages are considerable: it is comparatively informal and non-legalistic; it does not carry the same costs or the stress so often associated with a legal process; it is quick and, being a comparatively non-confrontational process, carries with it greater prospects of salvaging damaged employment relationships. The disadvantages associated with failure to use ADR are the converse of these advantages; tribunals can be more costly, time-consuming and stressful than ADR; they are more formal and legalistic; and prospects of repairing employment relationships may be negatively impacted by the rigours of cross-examination in a legal environment.
- 4.31 Tribunal chairs, where they see merit in so doing, will continue to advise parties of their options in respect of ADR, and the Department will be seeking to promote closer working between the tribunal administration and the LRA (see below) to ensure that the LRA's services are more effectively accessed (where the parties wish) from the outset of and throughout the tribunal process. The Department has concluded that the advantages of ADR can be promoted without introducing new penalties which could be interpreted as restricting access to the legal system and could potentially damage the perceived independence and value of the ADR process itself.

PROMOTION OF ADR THROUGHOUT THE TRIBUNAL PROCESS

- 4.32 The Department is aware that, for the ADR proposals outlined in this chapter to work most effectively, there needs to be greater co-operation and coordination between the bodies responsible for the delivery, respectively, of ADR and of the legal process, namely the LRA and OITFET. The start of the tribunal process does not mean the end of genuine opportunities to explore alternatives, and it is important for that message to be communicated to all of the parties involved in a given

case. The Department intends to ensure that there is greater exposure to the LRA's ADR services even after the tribunal process has begun.

- 4.33 To that end, the Department will seek to establish a LRA/OITFET memorandum of understanding which will set out the partnership arrangements between the two organisations. The intention behind this proposal is to identify increased opportunities for joint working and to more effectively target the ADR skills of the LRA.
- 4.34 The Department also recognises that there is now an opportunity to enhance the professional standing of ADR as a credible alternative to legal processes and is aware that other branches of Government are similarly minded. The Scottish Mediation Register serves as one possible model for establishing a professional ADR network; it is an independent register of mediators who are appropriately qualified and demonstrate a commitment to continuous professional development and ethical practice.
- 4.35 Given that the review has identified the need to extend the use of ADR pre- and post-claim, the Department will explore with the Northern Ireland Court Service and other Departments opportunities for raising the profile of ADR and, in particular, will consider the establishment of a professional network of accredited practitioners. This policy review has highlighted the need for greater access to mediation services prior to and post the lodging of a tribunal claim. The Department will explore the value of establishing a judicial mediation pilot comparable to the judicial mediation pilot recently undertaken in Great Britain.

SUMMARY

- 4.36 The Department will:
- *seek to refocus LRA services, increasing the emphasis on **pre-claim diagnosis and the targeting of ADR interventions** (including conciliation, mediation and arbitration) in response to helpline queries, reflecting the learning from the recent Acas enhanced services pilots;*
 - *work with the LRA and key stakeholders to **raise the profile of the Agency's services**, including its helpline and online presence, and establish the Agency as an employment rights information gateway;*
 - *develop an **expanded LRA arbitration service** that reflects some of the components of the Republic of Ireland's Rights Commissioner Service and which is extended to cover all employment rights jurisdictions;*
 - *seek to ensure that the LRA can offer a **fuller range of ADR services**;*

- *consult relevant stakeholders about the possibility, value and practicalities of establishing a **professional ADR network** which could be underpinned by a code of ethics, continuous professional development framework and a professional register for appropriately qualified practitioners;*
- *work with OITFET and stakeholders to **simplify the tribunal forms**, where feasible;*
- ***repeal the complex provisions extending tribunal time limits** in certain situations;*
- *facilitate the establishment of a memorandum of understanding about **closer co-operation between the LRA and OITFET** in order to maximise use of ADR where appropriate;*
- *consider establishing a **judicial mediation pilot** as an alternative to the legal process.*

5 Legal remedy

- 5.1 The Department has acknowledged throughout this review that there will always be disputes which will be subject to a legal process. To that end, questions were asked about whether and how changes could be made to enhance the effectiveness of employment-related tribunals in Northern Ireland.

LEGAL AID

Q24. *Should legal aid be available in respect of tribunal hearings and, if so, in what circumstances?*

SUMMARY OF RESPONSES

A majority of stakeholders either did not favour the introduction of legal aid in respect of representation at tribunal or felt that further discussion is necessary. A minority (6 of 18 respondents) advocated the introduction of legal aid at this time.

Opposition to the introduction of legal aid was associated in particular, though not exclusively, with employers, while support for the proposal came primarily from citizen advocacy organisations.

Department's response

- 5.2 The Department is aware of the arguments put forward by advocates of legal aid that unrepresented claimants can find the legal environment of a tribunal daunting, particularly where the respondent is represented by a trained legal professional who may subject the claimant to challenging cross-examination.
- 5.3 However the Department is committed to putting in place enhanced ADR systems, including a greater focus by the LRA on pre-claim conciliation and an expanded statutory arbitration scheme. It is hoped that, by providing credible alternatives to the tribunal system, the existing citizen advocacy bodies will continue to support those cases that require a legal determination.
- 5.4 Where it is appropriate or necessary for a case to go to tribunal, and a party is unable or unwilling to secure representation, the tribunal judiciary will continue to use its discretion to assist the unrepresented party in understanding what is expected or required at any given stage of the proceedings.
- 5.5 The Department is not minded to extend legal aid arrangements at this time, particularly when the primary finding of this policy review is that there is a need for more early resolution of workplace disputes through a variety of ADR mechanisms and improved information and advice.

As those opposed to legal aid have suggested, there is a danger that extending legal aid could further encourage the growth of an unnecessarily litigious culture.

- 5.6 The Department is aware that a more general review of legal aid arrangements is in progress and will liaise with the Northern Ireland Court Service and the Northern Ireland Legal Services Commission where there are any implications for employment-related tribunals.

DEPOSITS AND COSTS

Q25. *Should the amount of the deposit be increased in deposit hearings, and if so, to what amount?*

Q26. *Should the tribunal's powers to award costs be extended, and if so, in what circumstances?*

SUMMARY OF RESPONSES

It is appropriate to deal with both questions together.

- *There were 16 responses to question 25, with only 3 in support of a change to the amount of the pre-hearing deposit.*
- *There were 19 responses to question 26, and again only 3 consultees wished to see an extension of tribunals' powers to award costs.*

In response to both questions, some consultees were concerned that the tribunals do not exercise their powers often enough.

Department's response

- 5.7 The Department has taken note of the very clear feedback from stakeholders that change is not desirable in these areas at the present time and will not be changing the level of costs that a tribunal can award. It will, however, consider legislative change to address anomalies in the system where costs are referred to be assessed in a county court in accordance with county court scales.
- 5.8 The Department is aware that the upper limit of the deposit, currently £500, is perceived in some quarters as insufficient to make some parties seriously consider the merits of continuing with a case where the tribunal requires a deposit before the proceedings can go on. It will explore options for revising the upper limit of the deposit but, in doing so, will take account of an individual party's ability to bear the increased costs.

TIME LIMITS

Q27. *What, if any, beneficial changes could be made to time limits which apply in relation to the tribunal process?*

SUMMARY OF RESPONSES

Of 22 substantive responses, a majority (14) favoured some form of change to existing tribunal time limits. Views differed, however, on the nature of the change that is required.

Citizen advocacy organisations tended to favour an extension of the time limit for lodging a claim with a tribunal, generally 3 months at present. A majority of those supporting an extension of this kind argued for a universal time limit of 6 months.

Employer interests generally did not support any change to existing time limits on claims, but some believed that there is a need to lengthen the period during which an employer is required to provide a response to a claim. The current limit is 28 days.

Department's response

- 5.9 The Department notes that there is no widespread agreement as to the nature and extent of any potential extension to tribunal time limits.
- 5.10 In the absence of clear stakeholder consensus, the Department intends to leave existing time limits as they are. These limits are well understood by advisers and representatives, and (as noted previously) the Department intends to facilitate a more co-ordinated approach to information and advice to ensure that citizens and employers better understand their rights and responsibilities, including in relation to time limits.
- 5.11 The 28-day time limit during which an employer must lodge a response with a tribunal is reasonable, in the Department's view, and indeed was extended upward from 21 days as recently as April 2005. The Department is conscious, however, that the Employment Appeal Tribunal in Great Britain has found fault with the lack of provision for reviewing certain out-of-time responses (*cf. Moroak t/a Blake Envelopes v Cromie*, UKEAT/0093/05/DM, 19 April 2005), and will be exploring with the tribunal Rules Committee this and a range of essentially technical issues with the tribunal Rules of Procedure.

FAST TRACKING SIMPLER CASES

Q28. *Would it be desirable to provide a 'fast-track' service for more straightforward claims? If so, how should it operate?*

SUMMARY OF RESPONSES

A majority of consultees (12 of 19) supported a fast track service for simpler claims. Some connected this concept with early ADR interventions; however, a majority who responded positively to the idea saw it in terms similar to those set out in the consultation document i.e. a procedure whereby, with the parties' agreement, a tribunal chair sitting alone could determine simple monetary disputes on the basis of papers submitted and without the need for a hearing.

Those opposed to such arrangements pointed out that claims are often more complex than they first appear, or are so straightforward that they are withdrawn or settled at an early stage in any case.

Department's response

- 5.12 The Department notes that consultees are generally pleased with developments over recent years as regards the time taken to process tribunal cases. Progress has been such that the previous 'backlog' of cases waiting to be listed for hearing has been eliminated. Improvements to administrative processes have meant that simpler cases can be listed and heard more quickly. Very constructive work has also been carried out with the tribunal user group to agree a timescale for parties to prepare for Case Management Discussions dealing with discrimination issues.
- 5.13 Moving to the more specific proposals for the fast tracking of simple monetary claims without the need for a hearing, the Department notes that, during the passage of the Employment Act 2008, concerns were raised about the mechanism for parties to give their consent. Eventually it was decided that the parties' written consent would have to be obtained before such a process could proceed.
- 5.14 Although critics have suggested that obtaining prior written consent could negate the efficiencies associated with written determination, the Department would be reluctant to proceed with a less robust model than that adopted in Great Britain. Legislation will therefore be prepared corresponding to that taken forward as part of the Employment Act 2008 to allow for the possibility of written determinations without a hearing in certain straightforward cases.

ENFORCEMENT OF TRIBUNAL AWARDS

Q29. *Is there scope to strengthen the enforcement of tribunal awards?*

SUMMARY OF RESPONSES

All 13 respondents were in agreement that there is scope to strengthen enforcement powers in respect of unpaid tribunal awards. Most felt either that there should be some form of automatic registration with the

courts or that the tribunal itself should have enforcement powers. A minority believed that the State should take on full responsibility for pursuing those who do not pay.

The Northern Ireland Committee of the Irish Congress of Trade Unions commented that the level of tribunal awards is too low. Both this organisation and the Equality Commission for Northern Ireland also felt that there is scope to strengthen tribunals' powers to facilitate a reinstatement/re-engagement.

Department's response

- 5.15 The arguments put forward by consultees make a strong case for tribunal awards to be immediately enforceable through the courts, removing an unnecessary layer of paperwork and expense from the process. The Department has held discussions with the Northern Ireland Court Service and has agreed to take forward legislation which will register an unpaid industrial tribunal award automatically with the Enforcement of Judgments Office of the Northern Ireland Court Service as though it were a court order (this is already the position in respect of the Fair Employment Tribunal). Under the arrangement, an individual wishing to enforce an award made by either an industrial tribunal or the Fair Employment Tribunal will be able to do so by going directly to court, without the need for an intermediate process. The Department also intends to explore the possibility of entering unpaid awards in the public register of court judgements.
- 5.16 The Department acknowledges the issues that have been raised in relation to reinstatement and re-engagement. However, this subject has not been a significant focus for most stakeholders, and the Department is not minded to take this matter forward in the absence of a clear mandate for change.

MULTIPLE CLAIMS

Q30. *What steps, if any, can be taken to make improvements in how multiple claims are handled?*

SUMMARY OF RESPONSES

A majority of consultees (10 of 14 who responded) suggested steps which they believe can be taken to improve the handling of multiple claims. Some felt that administrative improvements could be made, while others argued for more fundamental change, including power for certain organisations to bring claims on behalf of groups of complainants. As on a number of other issues, citizens' groups tended to favour some form of change while employer organisations argued for the *status quo*.

Department's response

- 5.17 It is clear to the Department that there is no consensus on this issue but rather a spectrum of opinion ranging from outright opposition to change, through support for administrative improvements, to calls for changes to the legal framework. The Department believes that the best approach is to ask OITFET, in conjunction with the tribunal judiciary and the tribunal user group, to consider whether there are improvements that could be made to existing administrative systems for dealing with multiple claims.

IMPROVEMENT RECOMMENDATIONS

Q31. *Should tribunals have the ability to make improvement recommendations? How would you envisage such a system working?*

SUMMARY OF RESPONSES

Respondents to this question were fairly equally divided on whether or not tribunals should be empowered to make improvement recommendations. Of the 16 responses received, 7 were in favour, 8 against and 1 expressed mixed views.

Department's response

- 5.18 Given the disparity of views on this question, the Department believes that additional regulation is not generally the most appropriate way forward. However, there is one area (equal pay) which the Department, in consultation with the Office of the First Minister and deputy First Minister, has agreed merits further consideration. The limits of the powers of tribunals to require an employer to carry out an equal pay audit following an equal pay finding against that employer limit the impact and effectiveness of such rulings. Steps will therefore be taken to establish if there are viable legislative or non-legislative measures which would encourage/require employers to operate equitable pay policies and take proactive measures including the carrying out of voluntary pay audits.
- 5.19 In other areas, although no new powers will be introduced, tribunals will continue to exercise discretion as to when it is appropriate to offer informal advice on improvements to workplace practices. Such advice would always be based on the evidence of a case and the expertise of the panel members in industrial relations and legal matters. The panel can, if it believes it appropriate, provide suggestions as to how the respondent might take steps to ensure that similar disputes are less likely in future. The tribunal can also propose that parties approach the LRA for assistance or advice in developing internal systems capable of preventing disputes or addressing them before they escalate. It is

entirely a matter for the party whether to respond positively to any informal advice the tribunal may give.

- 5.20 The joint OITFET/LRA memorandum of understanding referred to at [paragraph Error! Reference source not found.](#) will be helpful in this regard by establishing how the LRA can best target its efforts within the tribunal system to ensure that employers are more aware of the assistance that the Agency can provide in supporting improvements to work-based employment relations systems.

CONTEMPT AND PERJURY

Q32. *Should tribunals be given statutory contempt powers?*

SUMMARY OF RESPONSES

A majority of respondents (9 of 14) considered it appropriate for tribunals to have statutory powers to deal with contempt and perjury. It was argued that these would strengthen confidence in the tribunal system.

Department's response

- 5.21 The Department is satisfied that perjury and contempt occur only rarely within the tribunal system and is aware that the tribunal judiciary advise parties of the courses of action open to them in the event of these issues arising during the course of proceedings. The Department does not therefore intend to take forward changes in this area.

RESTRICTED REPORTING

Q33. *Should the powers of tribunals to restrict reporting be revised, and if so, in what way?*

SUMMARY OF RESPONSES

The Department received 12 responses to this question. Opinion was split, with 5 supporting and 6 opposing clear powers for tribunals to restrict publicity surrounding issues of a sensitive nature, such as an individual's sexual orientation, where the prospect of certain details being disclosed could potentially adversely affect access to justice. 1 respondent wanted further discussion of the issue.

Department's response

- 5.22 In addition to the submissions favouring change, case law (see *JR5 v Department of Agriculture and Rural Development* [2007] NICA 19) has further highlighted the absence from the tribunal Rules of Procedure of express powers to protect the identity of individuals. Although the

Court of Appeal has held that rule 59 of the Rules of Procedure can be read in such a way as to allow a tribunal to take such restrictive action as it deems necessary, the Department is of the view that it would be helpful to expressly empower tribunals to make discretionary orders to restrict publicity in sensitive cases. Legislation will be taken forward to this effect.

STRUCTURE OF THE TRIBUNALS

Q34. *Is there a need for a restructuring within the tribunal system in line with any of the following options?*

1. Replacement of industrial tribunals and the Fair Employment Tribunal by a single Employment and Equality Tribunal.
2. Retention of industrial tribunals with a separate Equality Tribunal dealing with all equality cases.
3. Creation of a single Employment Tribunal but with an Equality Division focusing on equality cases.
4. Integration of all employment-related tribunals into a two-tier unified tribunal system.

SUMMARY OF RESPONSES

There were 22 substantive responses to this question. A total of 17 responses favoured either option 1 or 3. Each of these options describes a similar scenario, albeit with a slightly differing emphasis, namely a single tribunal dealing with all employment-related issues. Only 2 respondents preferred option 2, while 3 felt that further exploration of the issues is required. No respondents favoured option 4.

Not specifically listed among the options was a further possibility, the maintenance of the *status quo*. This option was however flagged up in the text of the consultation document, although many respondents did not comment on it specifically. However, it is clear from the Department's engagement with consultees that the difficulties in consolidating certain industrial tribunal proceedings with Fair Employment Tribunal proceedings relating to the same case create real operational difficulties and unnecessary additional administrative burdens for all parties.

Department's response

- 5.23 Analysis of the raw figures presented above would indicate that there is very strong support for the establishment of a single Employment Tribunal (or Employment and Equality Tribunal) dealing with the full range of employment-related issues. That is certainly the view of the

majority of respondents with whom the Department has engaged during the review. However, it has also been very clear from the Department's engagement throughout the review that the support for change is primarily driven by a desire to improve the efficiency and effectiveness of the tribunals' operations as well as facilitating better access to the justice system. There were also a small number of consultees who argued that any decision to remove the Fair Employment Tribunal is a sensitive matter that would require very careful consideration within the context of a single equality bill and the wider tribunal reform programme.

- 5.24 Given that the primary focus of discussions throughout the review has been on improving the effectiveness of the current dispute resolution systems the Department has looked to other options for realising improvements to the existing arrangements. Rather than taking forward potentially controversial structural reforms, the Department is minded to make a technical legislative change which will remove the most significant disadvantage of the current arrangements.
- 5.25 As noted above, it is currently problematic for a fair employment case that also involves certain other jurisdictions to be consolidated and heard by the same tribunal. As a result, additional time, effort and money is expended on two tribunal processes that concern different issues arising out of the same set of facts. The Department will legislate to remove this anomaly so that the fair employment and all other aspects of a case may be heard by the same tribunal as part of the same proceedings. Decisions on consolidation will fall to the President or Vice-President of the tribunals.

SUMMARY

- 5.26 The Department will:
- *seek input from the tribunal judiciary and the tribunal users' group on possible **amendments to the Rules of Procedure and administrative processes**;*
 - ***eliminate anomalies with regard to costs orders and consider the appropriateness of the upper limit of the pre-hearing deposit**;*
 - *provide for **determination of certain simple issues without a hearing** where both parties have consented to this in writing;*
 - *make **tribunal awards automatically enforceable through the courts**;*
 - *explore legislative and non-legislative measures which **encourage/require employers to operate equitable pay policies**;*

- *empower tribunals to make **discretionary orders restricting publicity** in sensitive cases;*
- *enable **cases involving both industrial and Fair Employment Tribunal jurisdictions to be consolidated and heard together**, as part of the same proceedings.*

6 Appeal

- 6.1 The final stage of the dispute resolution system in Northern Ireland is an appeal to the Court of Appeal. A party who is dissatisfied with a decision of a tribunal can appeal on a point of law or require the tribunal to set out the legal issues for determination ('case stated'). At present, a very small number of appeals are brought forward each year. It has been argued that the significant costs associated with the process are a key factor in the very low level of cases that are subject to a Court of Appeal consideration. The Department sought consultees' views on this issue.

Q35. Should the current appeal process be restructured?

Q36. Would the introduction of an Employment Appeal Tribunal be an improvement upon the current structure?

SUMMARY OF RESPONSES

It is appropriate to deal with both of the above questions together, as the answers to them are closely related.

There were 23 responses to both questions, with a large majority of respondents (16) favouring the creation of an Employment Appeal Tribunal (EAT) for Northern Ireland, 3 suggesting that further discussion is needed, and only 4 opposing change. Supporters of the introduction of an EAT consider the current system to be much too daunting and costly for many, with the result that the number of appeals brought is artificially low. The Court of Appeal is thought to be too remote a body to hear first instance appeals, and a system comparable to that operated by the EAT in Great Britain is desired.

Department's response

- 6.2 In light of the strong support for this option, the Department proposes to explore in detail the implications of establishing a Northern Ireland Employment Appeal Tribunal to hear appeals of tribunal decisions on points of law only. The Department will work closely with the office of the Lord Chief Justice and the Northern Ireland Court Service and, subject to further exploration of the legal and practical implications as well as a favourable regulatory impact assessment, will consider the merits of introducing future provisions for the establishment of an Employment Appeal Tribunal.
- 6.3 It is worth stating, however, that appeal need not be the first port of call for an individual dissatisfied with a tribunal's decision. Tribunals are already empowered to review their decisions and have on occasion revised their view as a result of new material pertinent to the case being presented to the review hearing.

- 6.4 Although the establishment of an Employment Appeal Tribunal will have to be considered further, the Department is aware and supportive of ongoing work, following the case of *Rogan v South Eastern Health and Social Care Trust* [2009] NICA 47, that seeks to address identified problems with the current ‘case stated’ process for appealing from industrial tribunals and the Fair Employment Tribunal. A new, more straightforward and streamlined process will allow appeals direct to the Court of Appeal without reference to the tribunals. The Department will work with the Northern Ireland Court Service, the office of the Lord Chief Justice and the tribunal judiciary to monitor the impact of the new process, once set in place, on the number and nature of appeals brought.

SUMMARY

- 6.5 The Department will:
- ***consider the legal, practical and regulatory implications of establishing an Employment Appeal Tribunal for Northern Ireland;***
 - ***work with other Government bodies to monitor the impact of the revised mechanism for bringing an appeal from a tribunal.***

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