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

Public consultation



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Foreword

Minister for Employment and Learning, Sir Reg Empey

Disputes in the workplace between employees and employers, or indeed between employees and their colleagues, inevitably happen from time to time. They can arise out of a whole range of circumstances, including but not limited to simple misunderstandings or mistakes, poor communication and decision-making, tensions or personal difficulties, breaches of trust or of the law, infringements of personal dignity or human rights, inability or unwillingness to perform allocated work, unacceptable behaviour, and so on. Whatever the individual causes of disputes, the consequences are often detrimental to the employer, the employee or to both.



Whether an employee feels wronged or improperly treated, or whether an employer believes that an employee's performance or behaviour is not meeting the required standard, if a problem is not resolved soon after it has arisen, it can quickly escalate. Employees' self-esteem, morale and productivity can be harmed, as can their longer-term employment prospects. Negative effects on business productivity, reputation, employee motivation and workplace relationships can also be expected. Disputes carry costs in both monetary and psychological terms. They take time to deal with; they disrupt lives and businesses; simply put, they are bad for all concerned.

Disputes, nonetheless, are a fact of life. They will always occur: not all can be prevented or avoided. Government's role therefore has been and must continue to be twofold. Firstly, we must achieve reductions in the numbers of disputes where this can reasonably be done. Secondly, we must set out to mitigate the effects of those disputes which do occur once they have arisen.

The current statutory dispute resolution procedures, which have quickly become a fundamental part of our dispute resolution machinery, have been in place since April 2005 following the introduction of corresponding arrangements in Great Britain in 2004, which themselves changed again from April 2009. Now that the devolved institutions are up and running, and given that employment law is a devolved matter, we have a real opportunity to look to a bespoke solution that better reflects the unique structure of our economy while preserving the rights of all employees.

I believe that the time is right to take a fundamental look at how we deal with disputes in Northern Ireland. During 2008 the Department has conducted a very substantial pre-consultation exercise which has been very helpful in establishing the key issues that need to be more fully explored through a public consultation. In March 2008 I established a consultation steering group comprising representatives of key stakeholder organisations to oversee the consultation process. I want to put on record my thanks to the members of the steering group for the excellent work they have undertaken in producing what I believe to be an informed and focused consultation document.

During the pre-consultation stakeholders have offered a range of views on the systems we have in place for resolving disputes, including the current statutory procedures. Although a definitive view has not been expressed about the current arrangements, some employers and employer organisations have suggested that the statutory procedures are inflexible and create unnecessary administrative burdens. Conversely, some employee representative bodies argue that the statutory procedures offer essential protection against unscrupulous employers.

If the current arrangements are not fully meeting today's challenges, I want to ask some fundamental questions about what systemic changes need to be made. What more can we do to help employers and employees avoid disputes? How can we offer more support to minimise the number of disputes that, once they have arisen, escalate beyond the point at which they can be amicably resolved?

This document asks these questions and seeks your input on where we go from here. What are the positives about our current system? What can be done better? What needs to be changed? What should stay the same?

I believe that it is right for the dispute resolution systems available to the people of Northern Ireland to reflect local needs and priorities. If that means following models that have been adopted in Great Britain, as in the past, then that is what we will do. If it means learning lessons from elsewhere, such as in the Republic of Ireland or further afield, then we will not be hesitant.

This is your opportunity to contribute to what is intended to be a fundamental review of dispute resolution systems in Northern Ireland, and I would very much encourage you to do so. By gathering a wide range of views from the public, we can aim to set in place a dispute resolution system that properly reflects the needs of Northern Ireland in this, an age of global economic challenges and opportunities.

1. Introduction

Executive summary

- 1.1. **This consultation asks some fundamental questions about systems for resolving disputes arising in the workplace. In May 2008 the Minister for Employment and Learning, Sir Reg Empey, established a steering group of key stakeholders (see Annex A: Steering group terms of reference for more information) to oversee the consultation process. The steering group has established the following mission statement for the consultation process.**

Purpose

The purpose of the Northern Ireland employment dispute resolution system is to restore good employment relations through the effective, efficient and fair resolution of employment disputes. The arrangements are designed to provide a system of flexible governance and practice that enjoys the confidence of employers, employees, trades unions and third party stakeholders.

Principles

The key principles applying to the dispute resolution system are:

- promotion of good employment relations
- provision of strong employment rights
- effective mechanisms to prevent and resolve disputes
- resolution of workplace disputes close to their point of origin
- enhanced capability of all involved in the prevention and resolution of workplace disputes
- 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.

- 1.2. Throughout the pre-consultation process the Department, supported by the steering group, has engaged with a wide range of stakeholders to establish the key issues that need to be further explored through the public consultation. The steering group believes that the following needs which it has established provide a meaningful basis for the public consultation.

- *acknowledgement that simple repeal of the statutory procedures¹ is not enough and that there is a need for cultural and systemic change;*
- *a rights-based system that is compatible with the promotion of good employment relations;*
- *best practice models in employment relations;*
- *the public sector to lead in the development of good practice;*
- *consideration of the needs of small businesses;*
- *levers/mechanisms to encourage early resolution of disputes e.g. kitemarking, benefits for accredited employers and sanctions against those going to tribunal who have not taken reasonable steps to resolve their dispute;*
- *an inter-agency approach to provision of information on employment law/workplace dispute resolution mechanisms;*
- *action to enhance the capability of various representatives involved in workplace disputes*
- *greater use of existing and new alternative dispute resolution techniques (conciliation, mediation, arbitration, early neutral evaluation);*
- *a review of the focus of the LRA's work, pre- and post lodging of tribunal proceedings;*
- *action to increase the body of NI research on employment relations matters;*
- *a review of the tribunal rules and processes;*
- *to question whether the IT/FET should be retained or replaced by a single Employment Tribunal;*
- *to ask whether an Employment Appeal Tribunal should be established.*

1.3. In 2008 the Department also commissioned a qualitative research project to elicit the views of the various users of the tribunal system. The main findings of the research (see **Annex B** for a summary) are consistent with the feedback from the other strands of the pre-consultation.

1. Statutory dispute resolution procedures, required to be used by employers and employees in most situations where informal methods fail, were introduced in Northern Ireland in April 2005.

- 1.4. The public consultation is concerned with the various stages of the current arrangements for resolving employment disputes (discussed in detail in **Chapter 6**), namely:
- *informal attempts to resolve disputes at work;*
 - *formal processes for resolving disputes at work;*
 - *alternative dispute resolution post the workplace;*
 - *legal remedy;*
 - *appeal of a legal judgement.*
- 1.5. The substantive chapters of this consultation document explore in some detail each of these stages and ask fundamental questions about how arrangements can be improved using the guiding principles already referred to at **paragraph 2.1** as a reference point.
- 1.6. The aim of the consultation is to gather the views of the public, including but not limited to key users and interest groups, on the future of workplace dispute resolution in Northern Ireland. Depending on the opinions expressed during the consultation, policy proposals will be developed, discussed at Ministerial level, and any necessary legislative changes brought forward in due course.

Impact assessment

- 1.7. The number of potential options outlined in this consultation document is large and, therefore, the impact assessment which is provided in **Chapter 10** is necessarily of a general nature.
- 1.8. As part of your response to the consultation, you should feel free to include any comments you may have on the likely impact of any of the proposed options on business (regulatory impact), equality of opportunity (equality impact), and indeed on any other area (human rights, social need, health, etc. - a full list is provided at **paragraph 10.44**). Your comments should indicate whether you consider the impacts are likely to be positive or negative and, if negative, whether there are ways in which they could be mitigated.

Consultation period

- 1.9. This consultation will run for a period of 13 weeks to take account of Easter. Written responses must be with the Department **no later than 5 p.m. on Friday 4 September 2009**.

2. How to respond

Summary of questions

- 2.1. **This consultation document seeks to gather the views of the public on a range of topics across the subject area of employment dispute resolution. We realise that it is not a short document, nor could it be, given the fundamental and wide-ranging nature of the review which has informed its development. Whilst the Department would hope that consultees will have a chance to read the document in its entirety and respond in full, we do appreciate that many readers are primarily interested in a particular topic or topics and that others simply do not have the time to respond in great detail to a document of this length.**
- 2.2. Set out below, and categorised in line with the different stages of the dispute resolution process described in **Chapter 6**, are the questions asked during the course of the document. You should feel free to answer as many or as few of them as suit your needs. Indeed, you need not answer any of the specific questions. They have been provided as a guide and are not intended to set a rigid template. Please express your views in whichever way you feel best communicates the information you wish to convey.
- 2.3. The questions are as follows.

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

- Q1.** *What impact do the statutory dispute resolution procedures have on the development of strong employment relations?*
- 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?*
- Q3.** *Do you agree that the public sector, as an employer, has a role to play in developing and promoting best practice?*
- 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?*
- 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?*
- 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?*

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

Q8. *What additional measures, statutory or non-statutory, would aid the promulgation of employment relations best practice?*

Formal processes for resolving disputes at work

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.

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

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

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

Alternative dispute resolution (ADR)

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

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

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

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

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

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

- Q19.** *Should there continue to be time limits on the LRA's duty to attempt to resolve disputes post-claim?*
- Q20.** *Would it be beneficial to incorporate within the existing system a process comparable to Rights Commissioner hearings in the Republic of Ireland?*
- 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?*
- Q22.** *Would it be beneficial to allow for pauses in the time limits imposed on tribunal claims while ADR processes are taken forward?*
- Q23.** *Should a subsequent tribunal be empowered to take into account the parties' actions with regard to ADR processes and penalise unreasonable behaviour?*

Legal remedy

- Q24.** *Should legal aid be available in respect of tribunal hearings and, if so, in what circumstances?*
- 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?*
- Q27.** *What, if any, beneficial changes could be made to time limits which apply in relation to the tribunal process?*
- Q28.** *Would it be desirable to provide a 'fast-track' service for more straightforward claims? If so, how should it operate?*
- Q29.** *Is there scope to strengthen the enforcement of tribunal awards?*
- Q30.** *What steps, if any, can be taken to make improvements in how multiple claims are handled?*
- Q31.** *Should tribunals have the ability to make improvement recommendations? How would you envisage such a system working?*
- Q32.** *Should tribunals be given statutory contempt powers?*
- Q33.** *Should the powers of tribunals to restrict reporting be revised, and if so, in what way?*

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.

Appeal

Q35. *Should the current appeal process be restructured?*

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

Responding to the consultation

Closing date

- 2.4. If you wish to provide a response to the consultation, please ensure that it is with the Department **no later than 5 p.m. on Friday 4 September 2009.**

Contact details

- 2.5. Responses may be submitted to the Department by post, e-mail or fax. Contact details are as follows.

Post: Dispute Resolution Review
Employment Relations Policy and Legislation Branch
Room 203
Adelaide House
39-49 Adelaide Street
BELFAST
BT2 8FD

E-mail: employment.rights@delni.gov.uk

Telephone: 028 902 57580

Fax: 028 902 57555

Textphone: 028 902 57458

- 2.6. If you have any specific questions about the detail surrounding any of the issues raised in the consultation, please contact Tom Evans or Alan Scott at the address above or by telephoning 028 9025 7520 or 028 9025 7531.

Consultee information

- 2.7. At **Annex C** on **page 87** you will find the following information:
- *membership of the dispute resolution review steering group;*
 - *stakeholders involved in the pre-consultation;*
 - *recipients of this consultation document.*
- 2.8. If you think that any other organisations or individuals are likely to have an interest in this consultation, please let us know their contact details.
- 2.9. Please indicate in your response whether the views you are expressing are your own individual views or those of the organisation you represent.

Other ways to participate

- 2.10. The Department intends to hold a number of public events during the consultation period at which your participation will be invited. These occasions will afford an opportunity to engage in debate around the issues raised in this document. If you are interested in attending one of these events, please let us know and we will advise you of the details when these are finalised. You can also obtain details of events from our web-site at www.delni.gov.uk/resolvingdisputes.

Alternative formats

- 2.11. This consultation document and other Departmental publications may be made available in alternative formats upon request.

Confidentiality

- 2.12. The Department will publish a summary of responses following completion of the consultation process. Your response, and all other responses to the consultation, may be disclosed on request. The Department can only refuse to disclose information in exceptional circumstances. Any automatic confidentiality disclaimer generated by your IT system will be taken to apply only to information in your response for which confidentiality has been specifically requested. Before you submit your response, please read the paragraphs below on the confidentiality of consultations and they will give you guidance on the legal position about any information given by you in response to this consultation. The Department will handle any personal data you provide appropriately in accordance with the Data Protection Act 1998.

- 2.13. The Freedom of Information Act gives the public a right of access to any information held by a public authority, namely, the Department in this case. This right of access to information includes information provided in response to a consultation. The Department cannot automatically consider as confidential information supplied to it in response to a consultation. However, it does have the responsibility to decide whether any information provided by you in response to this consultation, including information about your identity, should be made public or treated as confidential.
- 2.14. This means that information provided by you in response to the consultation is unlikely to be treated as confidential, except in very particular circumstances. The Lord Chancellor's Code of Practice on the Freedom of Information Act provides that:
- *the Department should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the Department's functions and it would not otherwise be provided;*
 - *the Department should not agree to hold information received from third parties "in confidence" which is not confidential in nature; and*
 - *acceptance by the Department of confidentiality provisions must be for good reasons, capable of being justified to the Information Commissioner.*
- 2.15. For further information about confidentiality of responses please contact the Information Commissioner's Office or see the website at www.informationcommissioner.gov.uk. For further information about this particular consultation please contact the consulting branch as above.

Summary of responses

- 2.16. It is anticipated that a summary of responses to this consultation will be published during the autumn of 2009. The summary will be downloadable from www.delni.gov.uk/resolvingdisputes and will be obtainable from the Department on request.

How responses will be used

- 2.17. Responses to this consultation will be analysed and taken into consideration in preparing a Departmental policy response, which will be published towards the end of 2009 or the beginning of 2010. The response will be published on the Department's web-site at www.delni.gov.uk/resolvingdisputes.

3. Background

Purpose

- 3.1. **Many people know someone who is facing or has had to face a dispute at work. Some individuals have been directly involved themselves while others have had experience at the fringes, for example, though providing advice or support to a colleague, friend or family member.**
- 3.2. Not surprisingly, disputes can be about a vast range of issues, from tea breaks and time-keeping through wages and contracts, holidays, behaviour and performance to bullying, harassment, discrimination and dismissal. With such an array of subject matter as the potential focus for a dispute, a wide range of solutions is available, from the completely informal quiet word to formal grievance or disciplinary procedures, from mediation, conciliation or arbitration to legal determination at a tribunal.
- 3.3. Whatever their subject, disputes are an inevitable feature of the industrial relations landscape. That they will occur is simply a fact of life. Their outcomes, however, are far from pre-ordained. It is important that effective mechanisms are in place to prevent disputes from arising in the first place and, where they do arise, to mitigate their ill-effects.
- 3.4. This consultation is fundamentally about what these mechanisms are or should be and what Government should be doing to facilitate the avoidance or resolution of as many disputes as possible in a way that works better for both businesses and their employees. Already, the Department has heard a clear message from stakeholders that change is needed. This consultation is your opportunity to input into a fundamental review of systems for resolving disputes that it is hoped will deliver the change for the better that is sought.

History

- 3.5. Any meaningful discussion of dispute resolution in Northern Ireland must begin with a short history review to set matters in context. Almost 40 years have passed since the 1968 Royal Commission on Trade Unions and Employers' Associations produced 'the Donovan Report' highlighting the need to "make available to employers and employees a procedure which is easily accessible, informal, speedy and inexpensive, and which gives them the best possible opportunities of arriving at an amicable settlement of their differences".
- 3.6. Certainly, much has changed over the past four decades. The industrial relations landscape which Donovan surveyed looked quite different from our own. Employment relations have shifted away from a broadly collectivist and voluntarist model towards a greater individualisation of the employment relationship, with an emphasis on legal entitlements and responsibilities. With the decline of collectivism, human resource management has developed and grown as a profession as the volume, scope and complexity of employment law has burgeoned.

- 3.7. The reasons for these changes, varied and complex as they are, have formed the subject matter of many a text book in their own right. In brief, they include changing workforce demographics and the refocusing of economic activity away from the old industrial manufacturing base towards the newer knowledge-based and service economies. More women are in full- or part-time employment than was the case four decades ago; more ethnic minorities and migrant workers are taking up positions previously occupied by indigenous groups. Increased labour market mobility has also played its part in the process of change, with the concept of a 'job for life', once a mainstay of economic and cultural life, now a comparative rarity and many employers having to compete to retain the most skilled and experienced individuals. As a recent CBI report acknowledges,

Employers think effective people management and skilled staff are the major factors determining current and future economic competitiveness. This reflects firms' recognition that harnessing employees' skills and abilities is vital to success in business².

- 3.8. Nurturing skills requires staff retention which itself is built on the bedrock of workplace policies that are responsive to the needs and expectations of today's diverse workforce. As well as effective management, training and development, and systems that help employees balance their work and home responsibilities, these policies must be designed to address the potential for disputes and be capable of dealing with them proportionately as and when they arise.
- 3.9. Although four decades of change have had implications for the types of disputes which have arisen and the ways in which they are addressed, it remains difficult to disagree with Donovan's desire for an accessible, informal speedy and inexpensive system that attempts to reach amicable solutions where possible. Such solutions remain in the best interests of both businesses and their workforce. Donovan's is a commonsense statement of intent that is as relevant today as it was 40 years ago.
- 3.10. In April 2005 the Department for Employment and Learning ("the Department") introduced statutory minimum disciplinary/dismissal and grievance procedures mirroring the GB arrangements set in place in October 2004. The aim of these procedures was to encourage employers and employees to talk in a structured way about their disputes as early as possible once informal processes had failed.
- 3.11. Despite the intention behind the statutory procedures, the Department is conscious that the existing systems for resolving disputes have not realised the Donovan vision. To some extent, increasing levels of formality have been inevitable, the result of a growing corpus of complex employment law addressing difficult issues at the Northern Ireland, UK and European levels. Where a case requires a legal adjudication, it is clear that the rigorous testing and application of the law by tribunals must remain an important mainstay of the system.

2. 'Pulling through: employment trends survey 2008' (CBI, 2008).

- 3.12. However, not every dispute is shrouded in legal complexity, nor does it require a carefully balanced judicial determination. Indeed, arguably, most disputes are not, and do not. It is these, the majority of disputes, which may be amenable to less 'drastic' remedies, to solutions which are consistent with the severity of the problem and the complexity of the issues. This document focuses on whether current systems provide proportionate solutions for dealing with employment disputes, and whether refinements or reforms are possible that will lead to a system that creates and maintains a culture of best practice that will reduce the number of disputes which arise and deal with those that do in a more proportionate, expeditious and fairer way.

Developments in Great Britain

- 3.13. In March 2007, the Government published the findings of an independent review group charged with investigating how systems in Great Britain for resolving individual employment rights disputes could be improved. 'Better dispute resolution: a review of employment dispute resolution in Great Britain' (or 'the Gibbons Report') was informed by extensive consultation among stakeholders, including a series of meetings and focus groups. Following publication of the report, public consultation took place on the Gibbons proposals, resulting eventually in legislative changes brought about by the Employment Act 2008.
- 3.14. A key recommendation of the report and a central plank of the subsequent legislation has been the removal, from April 2009, of the statutory workplace dispute resolution procedures that have been in place since October 2004. The procedures, designed for use where informal approaches failed, required most people wishing to pursue a complaint at work (a grievance) to put the matter in writing, hold a meeting with their employer to discuss it, and then hold an appeal meeting if the issue remained unresolved. Penalties could result if the procedures were not followed, in the form of adjustments to a subsequent tribunal award or non-acceptance of a tribunal claim. Comparable procedures were put in place for employers to follow when dealing with disciplinary matters and dismissals, involving putting the matter in writing, holding a meeting with the employee to discuss it and a subsequent appeal meeting where the issue was not resolved. Failure to adhere to the procedures could lead, in subsequent tribunal proceedings, to an automatic finding of unfair dismissal or, in less serious cases, to an adjustment of the award to take account of the failure.
- 3.15. Stakeholders in Great Britain held a majority view that the procedures, whilst well-intended, were proving counter-productive in that they brought an unhelpful level of increased formality and complexity to the dispute resolution system. Rather than assisting in resolving issues, the procedures were believed to encourage employees and employers to think in terms of a potential Employment Tribunal claim from the outset. Stakeholders told the Department for Business, Enterprise and Regulatory Reform (BERR) that less formal systems were needed.

- 3.16. Responding to this majority opinion against the statutory procedures, the Great Britain programme of reform:
- *removes the procedures from the statute book;*
 - *makes consequential changes to unfair dismissal law;*
 - *replaces them with a less prescriptive best practice led approach, including an updated ACAS Code of Practice;*
 - *provides Employment Tribunals with powers to adjust awards where a party has failed to adhere to the ACAS Code;*
- 3.17. The other key element of the GB reform package is its focus on the role of ACAS in promoting the earlier resolution of disputes that cannot be resolved at work. This involves:
- *strengthening ACAS' existing helpline service to the public;*
 - *using the helpline to identify disputes likely to benefit from ACAS conciliation;*
 - *where a caller to the helpline is receptive, involvement of ACAS conciliators in an attempt to broker a conciliated settlement, thereby negating the need for a tribunal claim;*
 - *removal of time limits on ACAS' duty to conciliate once a tribunal claim has been lodged.*
- 3.18. A full account of the changes made in Great Britain can be found in the Government's response to public consultation³.

3. 'Resolving disputes in the workplace consultation: Government response' (BERR, May 2008) - www.berr.gov.uk/files/file46233.pdf

4. Northern Ireland approach - pre-consultation

- 4.1. **Although the framework of employment law in Northern Ireland resembles very closely that in Great Britain, employment law is a devolved matter and, therefore, Northern Ireland is not required to simply follow suit with GB. However, soundings from local stakeholders, both before and during the GB review, made it clear that the possibility of some form of change here would at least need to be considered.**
- 4.2. Devolution has created an energy for regional solutions that reflect the particular needs of the local economy. Given that employment law is a devolved matter, neither the Gibbons review nor the BERR public consultation sought the views of interested parties in Northern Ireland. The Department therefore determined that it was appropriate to undertake its own exploration of the options for improving the existing dispute resolution systems and initiated an extensive pre-consultation process as a proxy for the GB Gibbons review.
- 4.3. The Department has held face-to-face discussions with a selection of key stakeholders having a major interest in the resolution of workplace employment disputes. Between February and April 2008, meetings were held to gather views on whether and to what extent steps ought to be taken to improve current systems for dealing with disputes. The meetings were supplemented in some instances by written submissions.
- 4.4. To provide a focus for the discussions, a pre-consultation document was issued to key stakeholders, providing an outline of existing processes, details of the GB review, examples of alternative dispute resolution methodologies and a short examination of selected dispute resolution systems elsewhere in the world e.g. in the Republic of Ireland, New Zealand and Canada. The document also drew on a combination of statistical and anecdotal evidence to highlight the perceived strengths and weaknesses of the current system and set out a range of possibilities designed to stimulate debate and establish whether a full-scale review of dispute resolution systems was needed. Views were sought on three issues:
- *Is there an appetite for reform of the statutory dispute resolution procedures?*
 - *Should Northern Ireland follow the GB proposals arising from the 2007 Gibbons review?*
 - *Are there international models that could be applied to the Northern Ireland context?*
- 4.5. The pre-consultation document also advocated greater use of alternative dispute resolution (ADR) mechanisms at an early stage of an employment dispute and sought views on how this might be achieved.
- 4.6. The verbal and written responses to the pre-consultation document have indicated a general desire for a reform of the current system although consultees in some cases tended to reserve their position with regard to the retention/repeal of the existing statutory procedures. Respondents also indicated that, although the GB developments merit careful consideration, there is a need to look to a bespoke solution that is more attuned to local circumstances. Although largely supportive of increased use of ADR, there was not a clear consensus on what form this increased use should take.

- 4.7. The Assembly's Employment and Learning Committee has shown a keen interest in the dispute resolution review. At an early stage Departmental officials briefed the Clerk to the Committee on the conduct of the pre-consultation. The Committee also received for consideration copies of the pre-consultation discussion document⁴, the report on the pre-consultation process⁵, and this consultation document prior to their publication. In November 2008 officials provided the Committee with a detailed briefing on the findings of the pre-consultation process and, more recently, a progress update was provided. The Committee continues to hold meetings with key stakeholders about the review.
- 4.8. The Department will continue to engage actively with the Committee during the policy development process and encourages all interested parties to do likewise.
- 4.9. In light of the outcome of the pre-consultation, and given the importance of this policy area, the Minister for Employment and Learning, Sir Reg Empey, agreed to the establishment of a steering group to oversee both the pre-consultation and full public consultation phases of the Northern Ireland dispute resolution review. The steering group consists of representation from employers (CBI NI, the Federation of Small Businesses), the trade union movement (the Northern Ireland Committee of the Irish Congress of Trade Unions), and statutory bodies with differing roles in addressing disputes (the Labour Relations Agency and the Equality Commission for Northern Ireland).
- 4.10. The steering group has been mindful of the need to engage with relevant experts to ensure that the consultation process is informed by best practice and a detailed understanding of the strengths and weaknesses of the current system. The steering group has received presentations from the following speakers with expertise in areas relevant to the review.
- *a human resources consultant commissioned by the Department to conduct qualitative research on the tribunal experiences of a sample of claimants, respondents and trade union/legal representatives;*
 - *a senior official from BERR (the relevant GB Department) involved with the Gibbons review and post-Gibbons implementation;*
 - *the CEO of the Republic of Ireland's Labour Relations Commission and a practising Rights Commissioner;*
 - *senior officials from the LRA and ACAS;*
 - *an academic from Queen's University, Belfast, with detailed knowledge of international best practice in workplace dispute resolution.*

4. 'Resolving workplace disputes: a pre-consultation on possible reform of systems for resolving individual employment rights disputes in Northern Ireland' (Department for Employment and Learning, February 2008.)

5. 'Resolving workplace disputes: report on the outcome of pre-consultation on possible reform of systems for resolving individual employment rights disputes in Northern Ireland' (DEL, October 2008.)

- 4.11. Following the agreement of the CEO of the Labour Relations Commission, some members of the steering group and Departmental officials travelled to Dublin to observe a number of Rights Commissioner hearings. The Republic of Ireland's Rights Commissioner Service provides a non-adversarial problem-solving alternative to the tribunal system for non-discrimination employment disputes. Unlike the Labour Relations Agency in Northern Ireland, the Commission does not offer an individual conciliation service. Commissioners bring the parties together, hear submissions from them, avail of any opportunities there may be to broker a settlement and, where this is not possible, make a decision or recommendation on the case. Over 90% of applications are made under the following legislation:
- *Unfair Dismissal Acts, 1977-2005*
 - *Payment of Wages Act, 1991*
 - *Industrial Relations Acts, 1969-1990*
 - *Organisation of Working Time Act, 1997.*
- 4.12. About 9% of decisions/recommendations made by Rights Commissioners are appealed either to the Employment Appeals Tribunal or the Labour Court, with only 2% of appeals being upheld. There were around 10,000 referrals to the service in 2008.
- 4.13. The steering group has considered the findings from a series of valuable discussions held in the autumn of 2008 between Departmental officials and expert users of dispute resolution systems drawn from the voluntary sector, the trade union movement, the legal profession and HR/personnel practitioners.
- 4.14. The steering group has also had oversight of a piece of qualitative research to measure the attitudes and experiences of the various parties to an employment tribunal. Through semi-structured interviews, a sample of claimants, respondents and representatives shared their attitudes towards and experiences of the tribunal system and the attempts to resolve their dispute prior to the lodging of tribunal proceedings. The key findings from this research, which are consistent with the feedback from the other strands of the pre-consultation process, are as follows.
- *There is a view that procedures do not, in themselves, produce dispute resolution. Rather, what is needed is common sense, the ability to remain solution-focused, strong interpersonal skills and the ability to engage with confidence.*
 - *There is praise for the professionalism of the LRA, but an increase in the Agency's powers to resolve workplace disputes would be welcomed.*
 - *Often, it is the cost in terms of money and effort that is required to bring a claim or defend against one that causes the claim either to be withdrawn or settled. This can be at the expense of dealing with the rights and wrongs of the issues at hand.*

- 4.15. The steering group has been instrumental in providing strategic direction for the consultation process and has agreed that a Northern Ireland dispute resolution system should seek to emulate the following mission statement and guiding principles.

Purpose

The purpose of the Northern Ireland employment dispute resolution system is to restore good employment relations through the effective, efficient and fair resolution of employment disputes. The arrangements are designed to provide a system of flexible governance and practice that enjoys the confidence of employers, employees, trades unions and third party stakeholders.

Principles

The key principles applying to the dispute resolution system are:

- *promotion of good employment relations*
- *provision of strong employment rights*
- *effective mechanisms to prevent and resolve disputes*
- *resolution of workplace disputes close to their point of origin*
- *enhanced capability of all involved in the prevention and resolution of workplace disputes*
- *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.*

- 4.16. Based on the findings from the pre-consultation, the steering group has identified the following list of key issues which it feels provides a meaningful basis for the public consultation:

- *acknowledgement that simple repeal of the statutory procedures is not enough and that there is a need for cultural and systemic change;*
- *a rights-based system that is compatible with the promotion of good employment relations;*

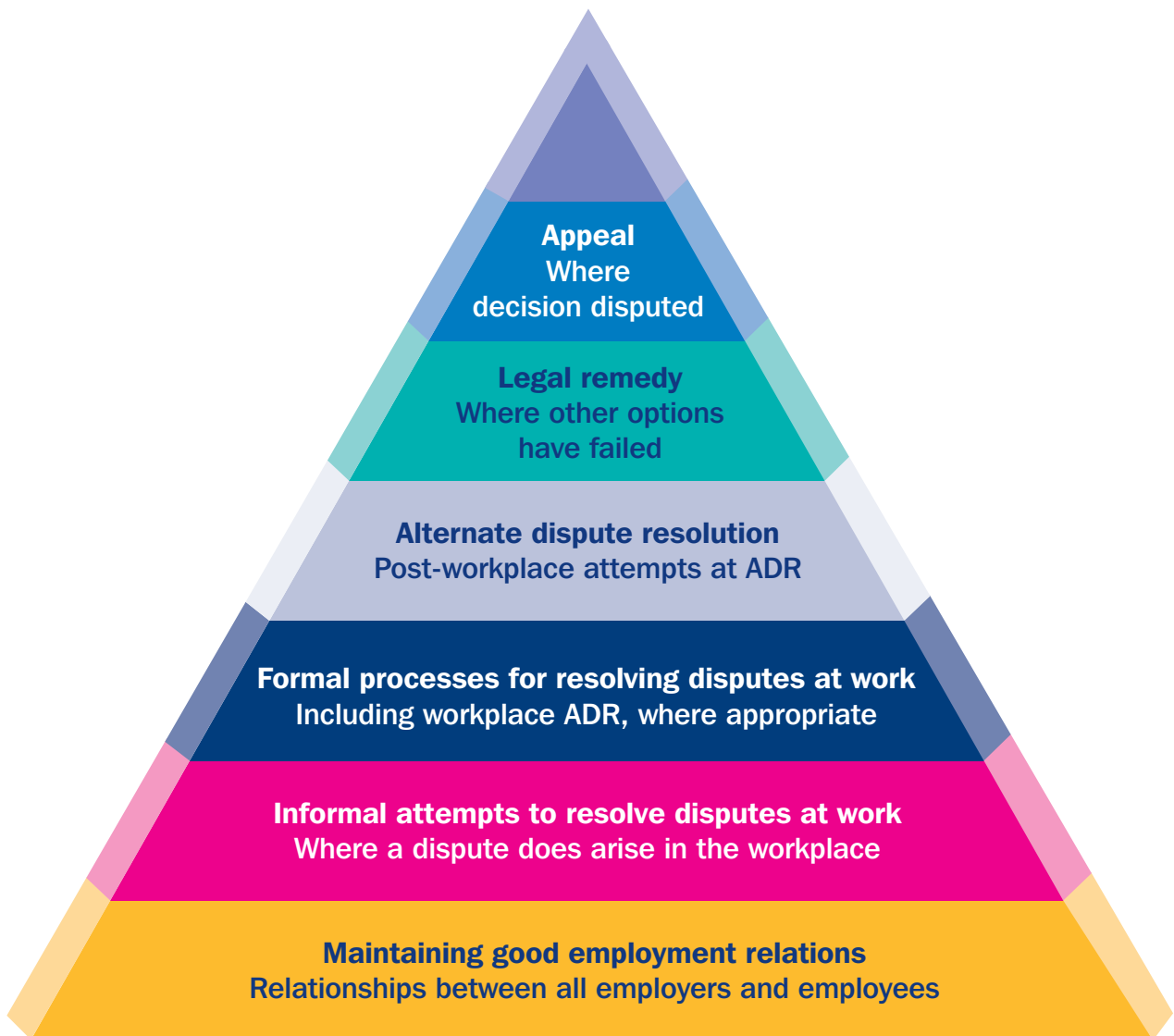
- *best practice models in employment relations;*
- *the public sector to lead in the development of good practice;*
- *consideration of the needs of small businesses;*
- *levers/mechanisms to encourage early resolution of disputes e.g. kitemarking, benefits for accredited employers and sanctions against those going to tribunal who have not taken reasonable steps to resolve their dispute;*
- *an inter-agency approach to provision of information on employment law/workplace dispute resolution mechanisms;*
- *action to enhance the capability of various representatives involved in workplace disputes*
- *greater use of existing and new alternative dispute resolution techniques (conciliation, mediation, arbitration, early neutral evaluation);*
- *a review of the focus of the LRA's work, pre- and post lodging of tribunal proceedings;*
- *action to increase the body of NI research on employment relations matters;*
- *a review of the tribunal rules and processes;*
- *to question whether the IT/FET should be retained or replaced by a single Employment Tribunal;*
- *to ask whether an Employment Appeal Tribunal should be established.*

4.17. The GB consultation process focused primarily on the recommendations of the Gibbons Review. The steering group believes that the pre-consultation process has been successful in identifying the key challenges which, if addressed, will effect the necessary cultural, practice and systemic change here in Northern Ireland. The questions posed in this consultation document are designed to elicit views as to how these key challenges can best be met.

5. Current systems for resolving disputes

- 5.1. Before asking specific questions about the future of dispute resolution in Northern Ireland, it is helpful to take an overview of where the system stands at present. During the pre-consultation the pyramid model at Figure 1 provided a useful visualisation of the various stages of the current Northern Ireland dispute resolution system.

Figure 1: Stages in the dispute resolution process



Maintaining good employment relations

- 5.2. The base of the pyramid represents the totality of all employment relationships in Northern Ireland. The quality of these relationships determines how many disputes arise, their nature and their severity. Sound management practice and good relations between employers and employees, managers and trade union officials can do much to assist in preventing disputes and mitigating their effects if and when they do occur. Of course, good practices will not eliminate disputes; there will always be situations in which grievances or disciplinary matters arise. However, where good employment relationships prevail and sound employment practices are followed, the conditions which give rise to disputes are less likely to be present, and when difficulties do arise, systems, attitudes and the general 'culture' of the workplace will be better attuned to taking proactive, positive steps to address the issues from the outset.

Informal attempts to resolve disputes at work

- 5.3. Where disputes do arise, in most cases it is good practice to attempt to resolve them informally. It may be counter-productive to formalise a complaint where the issue is one that could be worked out in a low key manner by providing reassurance, clarification, making minor changes to workloads, correcting any errors that have been made, and so on.
- 5.4. Workplace disputes can, of course, arise from a huge range of causes, and it is unrealistic to imagine that a single process or technique can be applied across the board to resolve them. Nonetheless, many issues can be addressed at or near their point of origin through informal engagement between those involved. In the early stages, the problem will often not have had time to fester and get out of hand, and a clearing of the air or an adjustment to the way in which an individual or a team works may be sufficient to deal with the problem.

Formal attempts to resolve disputes at work

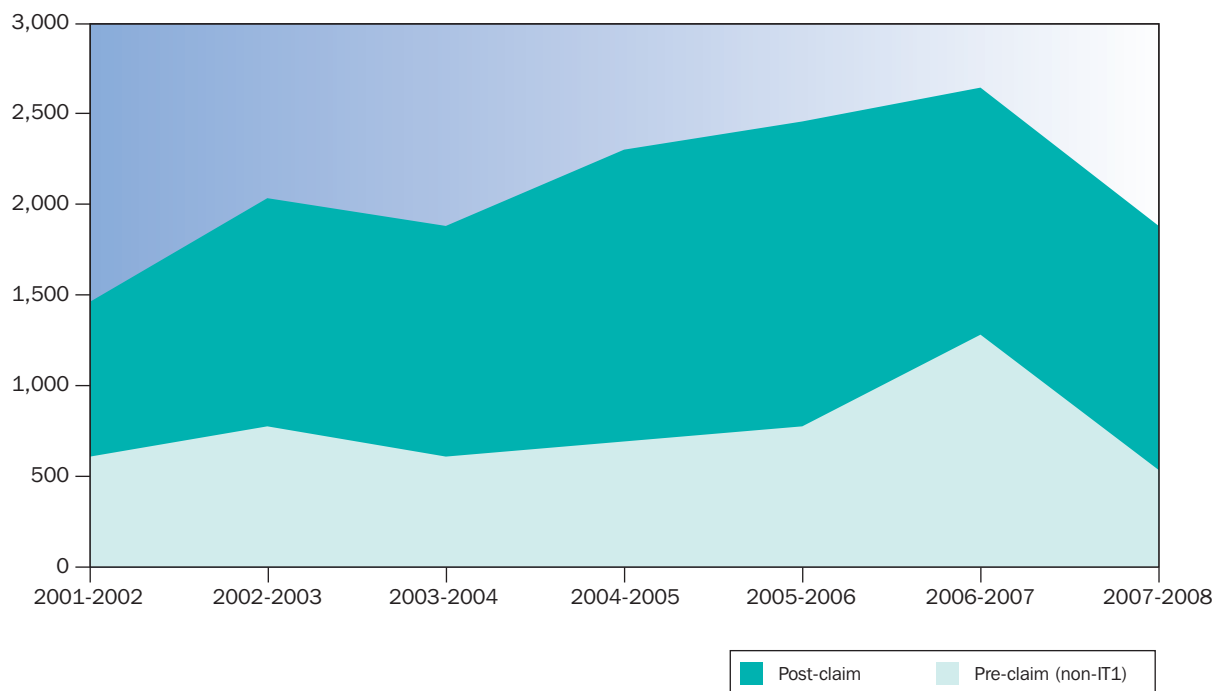
- 5.5. If informal approaches fail or are simply inappropriate in the circumstances, formal processes can be used to try to address the problem. Many businesses operate detailed formal systems including multiple verbal and written communications with varying levels of formality, but even employers who do not operate advanced procedures are required by law to have in place at least three basic steps for use in most grievance or disciplinary situations⁶: initial communication of the problem in writing (step one), a meeting to discuss the issue (step two) and, if necessary, an appeal meeting (step three).
- 5.6. The minimum statutory procedures came into operation in Northern Ireland in April 2005 and mirror the procedures introduced in Great Britain in October 2004. While the statutory procedures have been repealed in Great Britain from April 2009, and we are considering whether to replicate this change in Northern Ireland, formal procedures remain an important part of the process for resolving disputes and any system that is set in place will have to ensure that they are used in a timely and appropriate way.

6. In rare circumstances, such as where an employee is dismissed for gross misconduct, a shorter two-step procedure is the minimum required.

Alternative dispute resolution

- 5.7. Alternative dispute resolution (ADR) is the name given to a range of processes that aim to bring the disputing parties together in a neutral environment to develop a solution to the problem. Some employers operate ADR as an integral part of their systems for dealing with disputes, bringing in an independent third party who will hear both sides of the story and make a recommendation or a decision. At any stage, employers and employees can also agree to call on the LRA for assistance. The LRA is known and respected for its neutrality and its employment relations expertise, and several hundred cases (so-called 'non-IT1s'⁷) are resolved in this way each year (**Figure 2**).
- 5.8. The LRA also plays a significant role in dealing with disputes once a tribunal claim has been lodged with the Office of Industrial Tribunals and the Fair Employment Tribunal (OITFET). OITFET provides the LRA with copies of documentation relating to each case and, where feasible, the Agency attempts to broker a settlement between the parties, using a process known as conciliation, before the case is legally determined at a hearing. OITFET statistics (**Figure 3**) show that a conciliated outcome is achieved in around 20% of cases lodged with the tribunals. 10-20% of cases are also settled at this stage, either with LRA assistance or without, while approximately 40-50% are withdrawn⁸. Only approximately 10% of cases lodged with OITFET are determined at a full legal hearing.

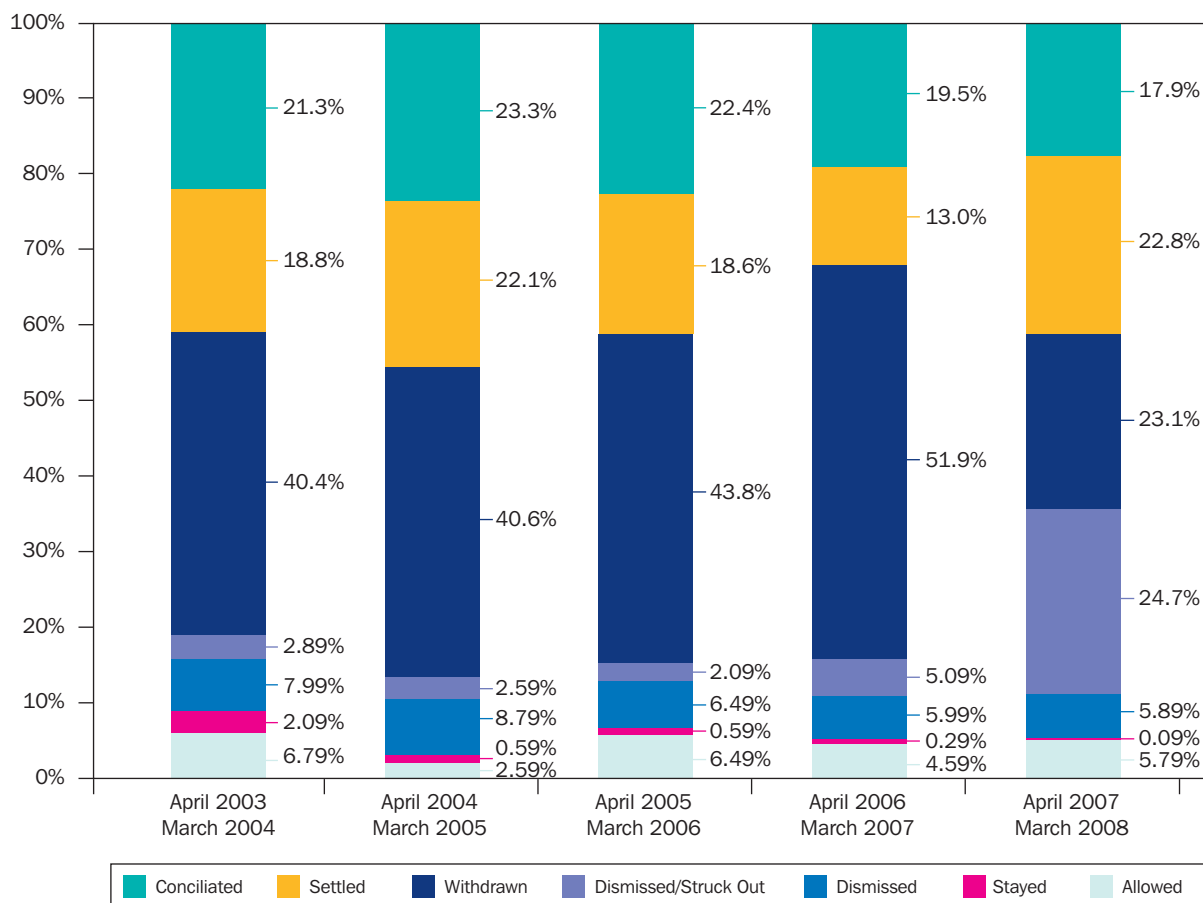
Figure 2: Conciliation by the LRA before and after a tribunal claim



7. The IT1 is the form on which a claim has historically been made to an industrial tribunal. Following a re-design to incorporate Fair Employment Tribunal claims, the form is now known as the ET1.

8. Percentages for 2007/08 are affected by the unusually large number of complaints under the working time regulations that were dismissed/struck out

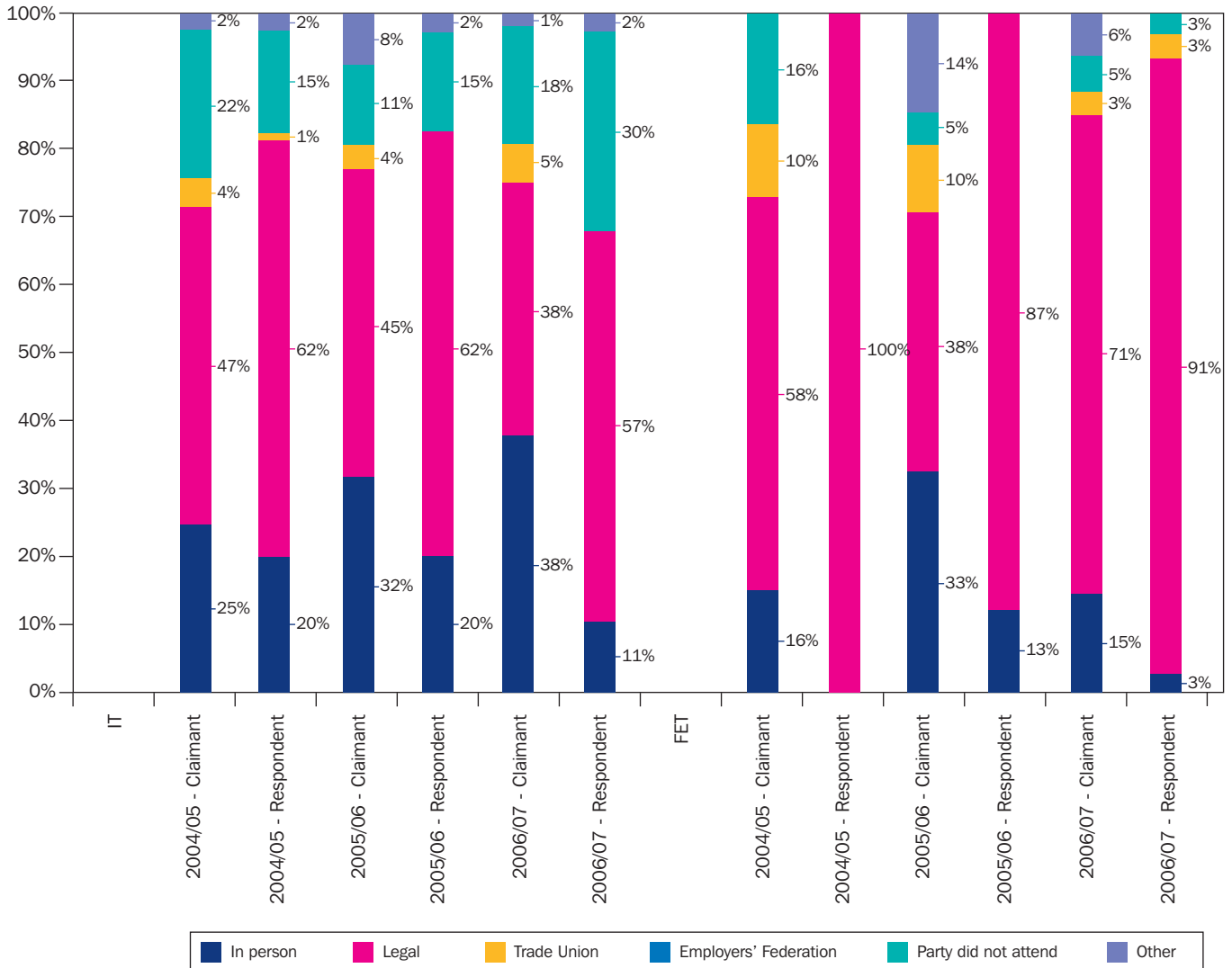
Figure 3: Outcome of tribunal claims



Legal remedy

5.9. Where it has not proven possible to resolve a dispute in another way, or where it is important that the matters are exposed to the full rigour of a judicial process, industrial tribunals and the Fair Employment Tribunal provide a legal means for addressing workplace disputes in over 90 discrete areas ('jurisdictions') of employment law. A tribunal consists of a legally qualified chair and two lay panel members, one from an employer and one from an employee background. Like courts, tribunals have extensive powers to seek evidence and examine witnesses and will reach a legal determination at the end of the proceedings. Claimants and respondents can represent themselves or call upon the services of representatives such as those from the legal profession, the trade union movement or an employers' association. Recent figures for representation are presented in **Figure 4**.

Figure 4: Representation at tribunal in recent years⁹



Appeal

5.10. Generally speaking, it is possible to appeal against a tribunal ruling only on the grounds that the tribunal misapplied the law rather than on factual grounds. An appeal is to the Court of Appeal. Recent years have generated the appeals and outcomes (where known) set out in **Figure 5**.

9. Statistics from the Office of Industrial Tribunals and the Fair Employment Tribunal (OITFET).

Figure 5: Tribunal decisions appealed during 2005/06 - 2006/08¹⁰

	2005/06		2006/07		2007/08	
	IT	FET	IT	FET	IT	FET
Appeal applications						
Received	20	3	27	11	14	9
Case stated by tribunal	13	2	22	11	14	9
Under consideration	0	0	0	0	1	1
Subsequently lodged with Court of Appeal	12	2	19	7	5	3
Appeal withdrawn by Claimant after lodgement	5	1	4	0	1	1
Tribunal decision upheld by Court of Appeal	6	1	9	5	0	1
Tribunal decision varied by Court of Appeal	0	0	1	0	0	0
Tribunal decision overturned by Court of Appeal	1	0	3	2	3	0
Heard by Court of Appeal Awaiting judgement	0	0	2	0	1	1

10. OITFET statistics.

6. Options for change: dealing with disputes at work

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

- 6.1. **The health of an organisation's employment relations 'culture', as has already been noted, has a significant bearing on disputes' frequency and their potential to escalate. An organisational culture built on clearly-defined management practices, a sense of meaningful workforce engagement, a willingness (on all sides) to be flexible and effective systems for addressing problems constructively when they arise can all contribute to good employment relations and, thereby, the prevention of disputes and the early resolution of disputes when they arise.**
- 6.2. It is also worth emphasising that a problem in the workplace does not necessarily equate to a dispute. As part of normal good management practice, a manager may note that an employee is not meeting targets, may then have a quiet word with the employee, identify any issues, and agree an approach to deal with the problem. Likewise, an employee might feel aggrieved about a particular event, talk informally to a manager about the issue, and have the difficulty addressed quickly to his or her satisfaction. Acceptable outcomes can be achieved without significant differences of opinion in many cases.
- 6.3. Discussions with stakeholders prior to this consultation have made clear the importance of the general context in which disputes arise, namely the workplace itself and the conditions which prevail there. Given that events are conditioned by the circumstances in which they arise, it is worth asking whether there are ways in which Government can better support the development of environments more favourable to dispute prevention and the informal resolution of disputes.
- 6.4. Legislative solutions are of course one way in which Government can - and already does - seek to encourage minimum standards of good practice in Northern Ireland's workplaces. By having in place a framework of fundamental employment rights and responsibilities, Government sets out to encourage employers and employees - in this case through a compliance model - to abide (at least) by minimum standards of good conduct at work or face adverse consequences.
- 6.5. While the compliance model protects basic rights and generally ensures that responsibilities are upheld, the encouragement of best (as opposed to acceptable) practice is unlikely to be promoted by regulation alone. The most effective relationships between employers and employees are very often founded not upon statute, but on a spirit of accommodation derived from positive relationships, attitudes and expectations that are established over time by management and employee representatives.
- 6.6. The pre-consultation has identified a number of factors that are common to both dispute prevention and early/informal resolution of disputes which merit further exploration through the public consultation process.

Impact of the statutory dispute resolution procedures

- 6.7. Of course, informal methods are more suited to dealing with some situations than others. Where a line manager has noticed a minor problem with conduct/performance it would be inappropriate for this to escalate to the formal procedures where a quiet word should suffice. By contrast, for example, where a very serious allegation of sexual harassment or threatening behaviour is made, it is very important to adhere to the organisation's formal processes to ensure that the rights and dignities of all involved are fully and appropriately protected.
- 6.8. Clearly, decision-making processes around disputes are not always clear-cut, and an informal approach that may be a perfect fit for one dispute may not be at all helpful in another, ostensibly very similar, situation. However the pre-consultation has revealed that there is concern in some quarters that the introduction of the statutory procedures in 2005 has had the effect of allowing formal processes to overshadow or distort informal approaches to the resolution of workplace disputes. The requirement to follow procedures and the link between this and the tribunal process is said to focus minds even at an early stage on the potential for a legal battle. The concerns expressed about the statutory procedures are consistent with some of the findings of the Gibbons report in GB.

The Regulations have had the effect of formalising disputes that would better have been dealt with informally. The main reason for this is the strong link between the internal procedures and employment tribunal proceedings. As a result parties tend to focus on ensuring all the provisions of the procedure are fulfilled, lest they are penalised later at an employment tribunal, rather than examining ways of resolving the underlying problem. The Regulations create expectations of the case going to tribunal rather than incentives to resolution¹¹.

- 6.9. Rather than generating constructive solutions designed to address the core issues, some stakeholders have told us that managers have become overly concerned with 'ticking the boxes' in order to comply with legislative requirements. **We are interested in your views on whether the statutory dispute resolution procedures have had this kind of effect on informal dispute resolution processes in the workplace and, if so, what can be done to encourage a problem-solving approach.**

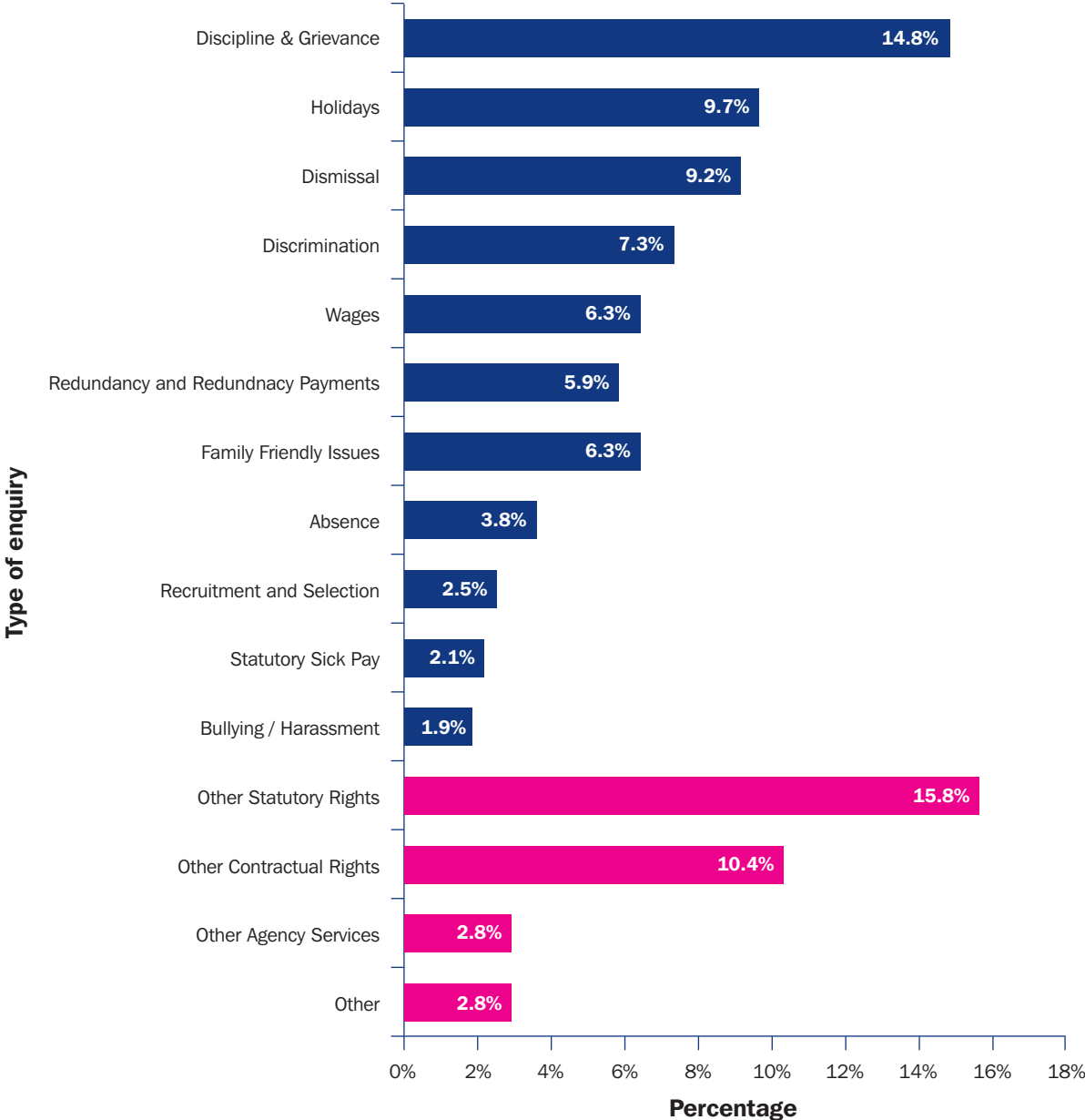
Provision of information and advice

- 6.10. The pre-consultation process has highlighted the availability of information and advice as an issue of real importance. There are some concerns about the efficacy of the existing systems for promoting awareness with employees and employers, and a feeling amongst stakeholders that key messages are diluted because basic information on essentially the same topics is being provided with varying emphases by different agencies.

11. 'Better dispute resolution: a review of employment dispute resolution in Great Britain' (DTI, March 2007), p. 25. Note DTI later became the Department for Business, Enterprise and Regulatory Reform (BERR).

- 6.11. Currently information on employment rights is available from a range of sources - for example the Department for Employment and Learning, the Labour Relations Agency, the nibusinessinfo.co.uk web-site, the nidirect.gov.uk web-site and Citizens Advice, among others. While the various publications tend to be of a high quality, the availability of broadly the same information from different sources, in each case presented slightly differently can, understandably, be a source of confusion. One suggestion, therefore, has been the adoption of a more joined-up approach to the provision of guidance. Jointly branded literature, bearing the logos of a range of organisations and agreed by each, might go some way to addressing the information gap.
- 6.12. Another clear message which has emerged from the pre-consultation is that existing guidance, while in many cases of a high quality, is not reaching a significant percentage of its target audience. Awareness - or lack of it - amongst employees and employers respectively is a real concern.
- 6.13. While it is true that many disputes never proceed beyond the informal stage because resolution is achieved, we have been told that some disputes never go beyond this stage for entirely less satisfactory reasons. A person may be unable or unwilling to go forward with their complaint, or may not raise it in the right way, because they lack sufficient understanding of their employment rights or because they fear adverse consequences if they appear to challenge their employer.
- 6.14. Employers are also said to face difficulties resulting from a lack of knowledge of employment rights and responsibilities. Representatives of small businesses in particular feel that it is very difficult to keep up to date with legislative requirements in the field of employment rights as well as continuing to comply with the range of other Government regulation. It is asserted that if employers had a better understanding of their own role and responsibilities, through the provision of effective information and advice, many disputes could either be avoided or resolved informally.
- 6.15. Advice on employment rights is again available from a range of sources. Citizens Advice received nearly 11,000 queries on terms and conditions of employment alone in 2006/07, and some 22,000 queries on employment rights generally. The Labour Relations Agency, while it does not recommend particular courses of action to callers, does provide an information service via its telephone enquiry point, which during 2006/07 received some 47,000 queries from employees and employers (see **Figure 6**).

Figure 6: Enquiries received by the Labour Relations Agency by subject area, 2006/07¹²



6.16. Depending on the situation, advice may also be available from the Equality Commission for Northern Ireland, trade union officials, employers’ associations, or a number of voluntary sector bodies (Citizens Advice has been mentioned but there are others). Of course, legal advice may also be sought, but during the early stages of a dispute, it is reasonable to assume that this is not a primary recourse.

- 6.17. You are encouraged to give your views on how existing channels for providing information and advice on the resolution of workplace disputes could be improved. In responding, you should bear in mind that providing full guidance on employment law involves communicating some complex concepts. In that light, should detailed guidance be made available for use in complex situations, with more simplified guidance for dealing with more everyday concerns? We would also be interested in any ideas you might have for promoting awareness of employment rights and responsibilities. How would you foresee a more 'joined-up' approach between the various bodies responsible for the provision of information and advice? Is it important, even if a joint strategy is taken forward, for each organisation to produce its own distinctive guidance? Do you face problems in accessing advice and, if so, are there ways in which access could be improved?**

Role of the public sector

- 6.18. Government, through the public sector, is a substantial employer in its own right. The Northern Ireland economy, in particular, is known for its dependence on public sector employment, which accounts for some 29.5% of jobs here, compared to 17.7% in the Republic of Ireland, 19.6% in England, 23.3% in Wales and 23.5% in Scotland¹³. With the public sector accounting for such a significant proportion of workplace disputes, there is an argument that Government itself needs to lead by example on 'culture change', with the lessons learned being used to stimulate the spread of good practice more widely.
- 6.19. The Department for Employment and Learning has already agreed to the establishment of an in-house pilot which will focus on the development of dispute prevention/resolution strategies taking account of the lessons emerging from the pre-consultation process. Initial discussions have identified four potential areas for action - awareness training for all staff, generic training for managers in managing workplace disputes, training of a number of Departmental staff in workplace mediation and ready access to alternative dispute resolution mechanisms for more entrenched disputes. The Department has had positive discussions with trade union officials and will also be consulting the LRA, to establish what more the public sector can do to promote a workplace culture supportive of dispute prevention and early resolution of disputes. The Department will also be consulting with all government departments via meetings arranged through the Central Personnel Group of the Northern Ireland Civil Service. **We would be interested in your views on the role the public sector has to play and the steps that it might take to develop and promote best practice more widely.**

13. www.statistics.gov.uk/elmr/03_07/downloads/Regional_analysis.pdf; www.cso.ie- Employment and Earnings in Public Sector by Type of Public Sector Employment, Quarter and Statistic and Persons aged 15 years and over in employment (Thousand) by Sex, Economic Sector, Region and Quarter. Latest statistics from all jurisdictions that are comparable date from the fourth quarter of 2005. Note that NI figures are for employee jobs and thus differ from the other UK figures, which identify employees.

Developing best practice models

- 6.20. Expectations of best practice, of course, must not ultimately be confined to the public sector. Exemplar employers in the private and voluntary sectors are already doing much to create a more dispute-resistant culture by encouraging positive employee engagement and organisational transparency. There is much that can be learned from the experiences and knowledge gained ‘at the coalface’ within these organisations, and we believe that forward-looking employers, as well as experienced trade union officials and those from more theoretical or academic backgrounds, can do a great deal to inform and enrich debate on the development of best practice models.
- 6.21. Contributions to this consultation from across the spectrum on best practice, what it is and how it is to be encouraged, would very much be welcomed. We are therefore seeking views on how best practice models could be developed and used to assist employers across the board in strengthening their capacity to prevent disputes.**

Targeted support for small employers

- 6.22. Northern Ireland’s is a small business economy. Whereas in the UK as a whole, Small and Medium sized Enterprises (SMEs)¹⁴ account for 58.7% of employment, the figure for Northern Ireland sits at 81%¹⁵. Likewise, large firms in Northern Ireland account for only 19% of employment, compared to 41% for the UK as a whole.
- 6.23. If best practice models are to be made available and adherence to them encouraged, it has been argued that small firms may need specifically tailored help. Such employers often lack a specific personnel or HR function and, in ‘micro’ businesses, many or all management functions may fall to a single individual, with all of the requirements that entails in terms of understanding and applying sometimes complex legislative requirements. **If you agree that more help is indeed needed for small firms, the question arises as to what form this should take and how it can best be targeted to ensure that key messages are understood.**
- 6.24. Is there more that the LRA, in conjunction with organisations such as the Federation of Small Businesses (FSB), could do to support small employers? Should Government be doing more to encourage small employers to embed good employment practices? How? Would web-based facilities like the Department for Business, Enterprise and Regulatory Reform’s Business Link (www.businesslink.gov.uk or indeed the local equivalent, nibusinessinfo.co.uk) offer a way forward?**

14. Defined as any business with zero to 249 employees.

15. ‘Northern Ireland Economic Bulletin 2007’, pp 82, 11.

Capability

- 6.25. The pre-consultation has identified that there are issues around the capability and general mindset of managers regarding the management of employee relations and the handling of disputes. There is a feeling that many managers, while fully competent and capable in other aspects of their job, do not possess the 'softer' skills that are required to ensure that minor problems do not become formal disputes.
- 6.26. The application of one approach to resolving an issue in preference to another will often come down to a fine judgement by the first line manager directly involved at the early stages. It is therefore vital that managers have the appropriate knowledge and skills to make informed, context-sensitive and just decisions. As individual line managers are usually the first point of contact between employee and employer in relation to a dispute, they are the key determinant in the effectiveness of efforts to resolve these issues.
- 6.27. In your experience, do managers know how to approach difficult situations and bring to bear appropriate learning? Do they possess the necessary listening and negotiating skills, and the sensitivity that is sometimes needed to prevent a small issue from escalating into something much more serious? If you believe that there is a managerial skills shortage in dealing sensitively and proportionately with disputes, what skills and knowledge are currently lacking, and what steps can be taken, by employers or by Government, to address any deficiencies?**

Accreditation

- 6.28. Many employers do good work in adhering to, or even establishing, best practice in employment relations. However, there is no accepted 'gold standard' in this area, comparable to accreditation such as that provided by Investors in People. One approach could be to introduce some form of standards-based accreditation for employers in the area of dispute resolution.
- 6.29. Accreditation is obviously beneficial for its own sake, in that to obtain it an organisation must demonstrate that its internal processes and standards are compliant with accepted good practice. However, accreditation also carries certain advantages from the outward-facing perspective, in that it explicitly and publicly demonstrates that a business is run in accordance with accepted standards; it can convey a positive corporate impression that may assist firms in recruiting and retaining staff and may help convince customers that they are dealing with a professional, well-run and efficient organisation. For all of these reasons, accreditation according to an accepted standard can be a powerful positive force for business.
- 6.30. It is perhaps somewhat surprising that no publicly verifiable mark of excellence currently exists in the area of dispute resolution. That is not to say that best practice standards do not exist to which businesses are advised to adhere, such as the LRA's Code of Practice on Disciplinary and Grievance Procedures.

- 6.31. Clearly, if some standard were to be introduced, it would have to be both credible and desirable, and so would need the backing and confidence of key stakeholders such as employer organisations and the trade union movement. It would also have to be clear, transparent and associated with a verification regime that minimised administration. **Your views on the practicability and desirability of some form of accreditation are sought; further, if you do favour accreditation, how might it operate? Should it be a new standard with a specific focus on dispute prevention/resolution, or should it be integrated with an existing accreditation scheme?**

Inspection and enforcement

- 6.32. There are those who argue that, in addition to an educational ‘carrot’, the Government should wield an enforcement ‘stick’. An inspectorate with enforcement powers, comparable to systems for enforcing the National Minimum Wage or employment agency standards, is seen by some as a potentially powerful means of ensuring that employers comply with their legal obligations to their employees.
- 6.33. Such machinery would involve checks on the systems of employers by officials with significant rights of entry and inspection. These need not be confrontational events, and indeed the officials could use a knowledge and experience of employment issues (which might be a prerequisite for the post) to offer help and advice to assist the employer set in place better employment relations practices. Ultimately, however, inspectors would have to have power to issue recommendations listing changes they feel the employer ought to make, with failure resulting in a penalty of some kind, perhaps a fine. There would, of course, have to be a facility to appeal an inspector’s recommendations and any resulting fine, perhaps to a tribunal.
- 6.34. Proponents of inspection and enforcement believe that an approach incorporating these elements would do much to reduce the causes of disputes and promote the development of healthier employment relations. The relevant functions could perhaps be subsumed within a wider employment rights body providing a range of services, from advice and education to inspection and enforcement, along similar lines to the recently-established National Employment Rights Authority (NERA) in the Republic of Ireland,
- 6.35. While the Department does see merit in doing more to assist employers to understand and implement their responsibilities in accordance with the law and with best practice, it is not persuaded that such significant and potentially costly interventionism is the right approach. In specific problem areas, such as enforcement of the National Minimum Wage, the Government has set in place mechanisms to ensure that non-compliance is dealt with vigorously. However, while this approach is suited to specific problem areas, we do not believe that it is appropriate across the board. Provision of improved information and advice services as well as the development of employment relations best practice offer a more positive alternative to enforcement. The current voluntarist model ensures that complaints can be brought and dealt with where employment rights are not being upheld, and the Department - which is committed to reducing rather than increasing regulation - believes that this remains the right approach.

- 6.36. In this section we have asked some specific questions; however **we would also welcome any more general views you may have on how workplace disputes can be prevented/resolved whether by way of statutory or non-statutory measures.**

Questions

- Q1.** *What impact do the statutory dispute resolution procedures have on the development of strong employment relations?*
- 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?*
- Q3.** *Do you agree that the public sector, as an employer, has a role to play in developing and promoting best practice?*
- 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?*
- 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?*
- 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?*
- Q7.** *Is there a need for inspection/enforcement machinery to produce more legally compliant workplaces?*
- Q8.** *What additional measures, statutory or non-statutory, would aid the promulgation of employment relations best practice?*

Formal processes for resolving disputes at work

- 6.37. Inevitably attempts to resolve disputes informally will fail from time to time or will simply not be appropriate in the circumstances. In these situations, formal procedures set in place by the employer should normally be used by employees to raise a grievance or by the employer to begin disciplinary action.

- 6.38. The specifics of disciplinary and grievance procedures tend to vary from one employer to another but since 2005, all employers have been required to have in place procedures which generally, as a minimum, allow the matter to be put in writing and considered, a meeting to be held about the issue, and an appeal meeting to be held where the matter has not been resolved.
- 6.39. Of course, businesses often have in place more elaborate procedures than the statutory minimum, involving multiple meetings at various levels, potentially involving personnel from different parts of the organisation or even independent ADR practitioners. The LRA's Code of Practice on Disciplinary and Grievance Procedures builds on the foundation of the minimum procedures and sets in place a best practice model that employers can incorporate within their own procedures. However, whatever systems employers choose to operate, the current basic statutory requirements that they must all have in place are summarised below.

Standard (three-step) grievance procedure

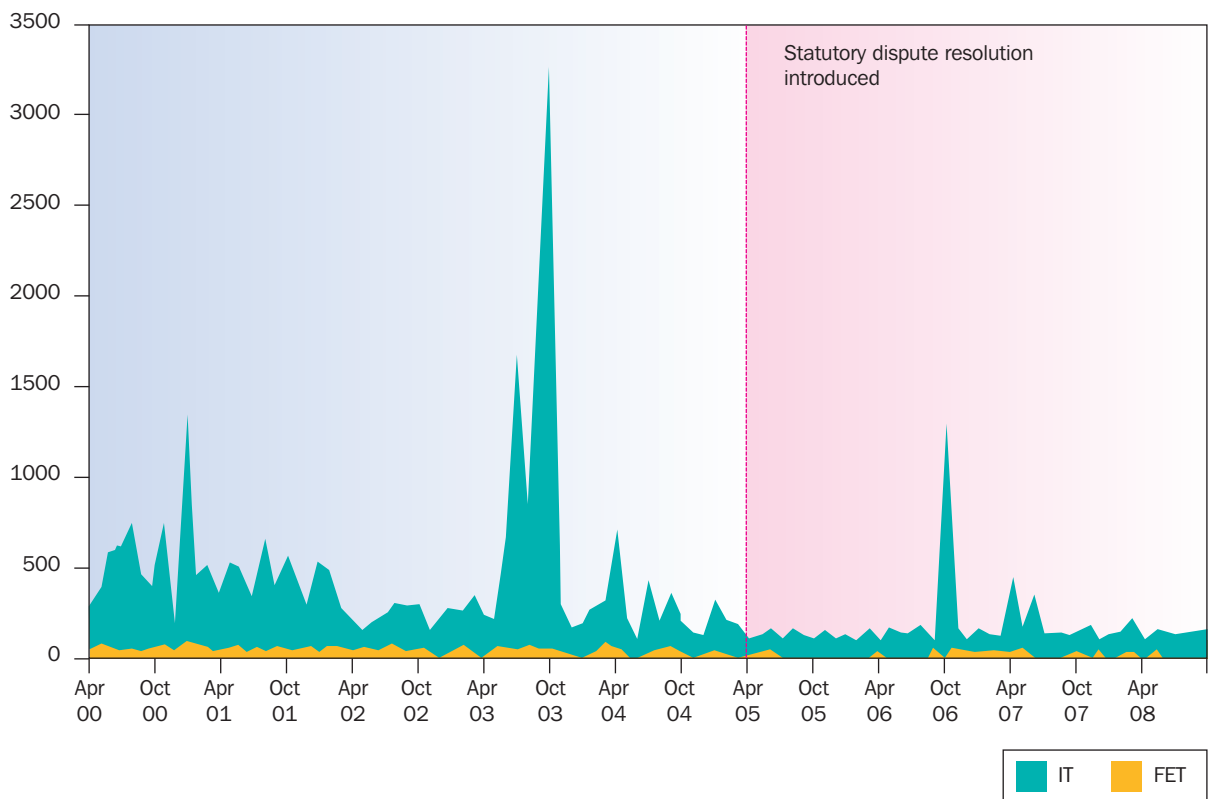
1. The employee must set down in writing the nature of the alleged grievance and send the written complaint to the employer.
2. The employer must invite the employee to at least one meeting at a reasonable time and place at which the alleged grievance can be discussed. The employee must inform the employer what the basis for the grievance is. The employee must take all reasonable steps to attend. After the meeting, the employer must inform the employee about any decision, and offer the employee the right of appeal.
3. If the employee considers that the grievance has not been satisfactorily resolved, he or she must inform the employer that he wishes to appeal against the employer's decision or failure to make a decision. Where possible, a more senior manager should attend the appeal meeting. After the meeting, the employer's final decision must be communicated to the employee.

Standard (three-step) dismissal and disciplinary procedure

1. The employer sets down in writing the nature of the employee's conduct, capability or other circumstances which have led to dismissal or disciplinary action being considered, and sends a copy of this statement to the employee. The employer must inform the employee of the basis for his or her complaint.
2. The employer should invite the employee to a meeting to discuss the issue. The employee should take all reasonable steps to attend. After the meeting, the employer must inform the employee about any decision and offer the employee the right of appeal.
3. If the employee wishes to appeal, he or she must inform the employer. The employer should invite the employee to attend a further meeting to discuss the appeal. The final decision must be communicated to the employee.

- 6.40. There is also a modified two-step procedure for use in specific circumstances where the employment relationship has ended.
- 6.41. A key question that must be asked as part of this public consultation is: have the dispute resolution procedures achieved their aim of resolving more disputes in the workplace? The evidence is inconclusive. As shown in **Figure 7**¹⁶, the number of disputes reaching a tribunal (and therefore demonstrably not resolved at work) has fallen since statutory dispute resolution took effect on 3 April 2005. For the first time in some years, Department for Employment and Learning estimates suggest that the number of claims registered as a proportion of employees has fallen below that in Great Britain, as shown in **Figure 8**.

Figure 7: IT and FET claims registered April 2003 - September 2007¹⁷



16. The peaks evident in the graph presented point to the lodgement of claims by a large number of individuals relating to the same issue ('multiple claims'). According to OITFET statistics, multiple claims have accounted for between 9% and 51% of IT claims and 3% and 18% of FET claims yearly in the period 2004-2006.

17. Spikes in the graph generally indicate the receipt of multiple cases e.g. 6,250 and 1,062 claims in 2003 and 2006 respectively.

Figure 8: IT and FET claims in NI as percentage of NI employees taken as proportion of claims in GB as percentage of GB employees¹⁸



18. Note that published figures prior to 2003/04 relate to the total numbers of jurisdictions rather than the total number of claims (a claim can be composed of one or more jurisdictions). The graph should therefore be considered with some caution. Again, the receipt of multiple cases dealing with the same issue (in GB or NI) can distort figures.

- 6.42. It might be thought that a proportion of the drop in claims registered reflects a tendency towards more disputes being resolved at work. Such an outcome, if proven, would be welcome and consistent with the statutory procedures' original aim. However, given the short time that the procedures have been in operation and the consequent lack of any long-term analysis, it is not possible to support this contention with substantive evidence.
- 6.43. What is clear is that part of the reduction in claims following their introduction can be attributed to the fact that the bar for acceptance of claims by OITFET has been raised. Since April 2005 a claim, in order to be accepted, must set out as a minimum certain basic information including whether the claimant has satisfied the statutory dispute resolution requirements. OITFET has recorded that, from April 2005, significant numbers of claims have been rejected either in full or in part (**Figure 9**) precisely because they have failed to include this information or have otherwise failed to meet the procedural requirements.

Figure 9: Rejection of claims by OITFET since the introduction of the statutory procedures¹⁹

	2005/06		2006/07		2007/08	
Part rejected	233	13%	248	8%	291	12%
Fully rejected	238	13%	212	7%	194	8%

- 6.44. Of course, it can take new requirements time to be fully understood, and it may be that the numbers of claims that are rejected will reduce over time as people become familiar with the procedures. Again, however, it is impossible to be sure.
- 6.45. Whilst it would be preferable to conduct a more measured evaluation of the statutory procedures the Department cannot ignore persistent anecdotal accounts that speak in negative terms of the procedures' effects. In Great Britain, similar criticisms led Government to ask Michael Gibbons to conduct an independent review of dispute resolution, beginning a process that has culminated in the repeal of the statutory procedures from April 2009.
- 6.46. Stakeholders' views on the procedures have likewise been a significant contributory factor in taking the decision to conduct a Northern Ireland review, with initial pre-consultation beginning in February 2008. As part of that pre-consultation, a key question was posed about the effectiveness of the current procedures and it is important to reflect on the various strands of opinion that have been offered by stakeholders.
- 6.47. Positive views of the procedures were expressed during the pre-consultation and may be grouped under a number of broad themes, as set out below:
- *the procedures' statutory nature means that employers are obliged to respond to grievances and treat them seriously, or face consequences;*

19. OITFET figures.

- *they act as a ‘safety valve’: by identifying workplace problems at an early stage, employees and management are empowered to discuss issues in a comparatively calm environment, before passions become inflamed and views become entrenched;*
- *they can assist people in clarifying issues relating to their complaint and treatment, enabling them to make an informed decision as to whether to take the matter forward;*
- *by requiring all employers to adopt a process of some sort, where none may previously have been in place, the disciplinary and dismissal procedures have afforded protection to employers (SMEs in particular) who may not have the time or expertise to design sophisticated procedures of their own. This leads to greater consistency between employers and protection from the consequences of unwittingly treating employees unfairly.*

6.48. Although strong support for the procedures is evident in some quarters, it must be said that the negative anecdotal criticisms identified prior to the review were expanded upon during the pre-consultation process. The pre-consultation has unquestionably revealed many more reservations than positive comments concerning the current arrangements. Very much in line with the findings of the Gibbons review, criticisms of the statutory procedures focus on the system’s perceived complexity and on the view that it over-formalises dispute resolution processes from the outset. The criticisms may be grouped as follows:

- *the procedures create an “elevation of process over substance”, encouraging some parties to ‘go through the motions’ rather than to seek genuine resolution;*
- *they are complex and overly legalistic, and a lack of understanding of the processes can lead to delays and mounting costs;*
- *this complexity is difficult for small firms to grasp; often, a single manager deals with a wide range of workplace issues and lacks the expertise necessary to tease out the niceties of complex situations which can arise under the dispute resolution provisions;*
- *the fact that adherence to the procedures has a bearing on later access to a tribunal encourages parties to think of the process in legal terms from the outset, perhaps spending time and money on obtaining legal advice,*
- *the focus on statutory requirements likewise causes parties to begin thinking in legal terms very early on in the process, which adversely affects the ability or willingness of parties to address problems in the workplace;*
- *uncertainty over what constitutes a grievance under the legislation causes problems for employees (e.g. it is not obvious to the untrained legal eye that the initial questionnaire procedure to elicit information from an employer about a potential discrimination complaint is not to be seen as a grievance letter);*

- *uncertainty about what constitutes a grievance is also problematic from the employer perspective, in that it places pressure on employers to scrutinise very carefully every written communication and to react formally if there is the slightest possibility that it might be seen as a ‘stage one’ grievance letter;*
- *in order to ensure that a potential tribunal claim arising out of an unresolved grievance will be accepted by a tribunal, a claimant is required to make an initial judgement at a very early stage about whether or not to use the statutory procedures and, if taking a claim, will later have to account for that decision on the tribunal claim form. It is considered unreasonable that this difficult early decision can determine whether a tribunal claim arising out of the grievance will be allowed to proceed. Further, in applying to a tribunal, a claimant is also asked to declare on the claim form whether or not they have the legal status of ‘employee’, which in itself is a very fraught legal question on which claimants are unlikely to possess the necessary expertise;*
- *parties find it difficult to understand how the extension of time available under the statutory procedures, where the procedures are being followed, meshes with the normal (usually three month) time limit for lodging a tribunal claim.*
- *although the procedures can in some instances work well for simple issues such as wages claims, they are less effective in dealing with more complex cases such as discrimination, placing procedural hurdles in the way of legitimate complaints.*

6.49. The Department recognises that there are strong views on both sides of the debate on the future of the statutory procedures, yet arguments for and against have rarely been clear cut. Supporters of the statutory procedures, or aspects of them, have consistently argued that there is a need for simplification. Even some critics acknowledge that the procedures are well-intentioned and have brought about some genuine gains; however, they contend that any benefits are far outweighed by the adverse impact of the current arrangements.

6.50. Taking all of these views into account, there are three broad options which consultees are asked to consider.

- (i). Retain the procedures without modification.
- (ii). Modify the procedures, retaining them in part but preserving a process mandated by statute.
- (iii). Repeal the procedures in full and replace them with a voluntary compliance model.

Retaining the procedures

- 6.51. This is the most straightforward option, which should not require further explanation. It has the merit of being the established position that should, by now, be reasonably well understood. However, as noted above there are issues around the complexity of the current procedures, and for that reason **we would ask that consultees supporting retention suggest improvements, for example in the areas of guidance or support, which might ensure that the system is better understood.**

Modifying the procedures

- 6.52. Modifying the procedures could mean adopting any one of a myriad of possible approaches, but in broad terms, three are possible.
- 6.53. The first is to retain the disciplinary/dismissal procedures and repeal the statutory grievance procedures. Arguments for this position are that disciplinary matters are less likely than grievances to be resolved by informal processes, that grievances are best approached more informally than the procedures allow, and that any return to informality in relation to disciplinary matters would be detrimental to employers, who might unwittingly open themselves to charges of procedural unfairness, and to employees, who would be faced with the consequences of this unfairness.
- 6.54. A second approach is to retain the grievance procedures in a simplified form whilst repealing the disciplinary/dismissal procedures. This option builds on the view that the very existence of a formal statutory grievance process forces employers to treat complaints seriously. It also takes into account opposition to the disciplinary/dismissal procedures on the basis that these have provided employers with a procedurally straightforward and over-used method of dismissing employees.
- 6.55. A third approach is to retain the disciplinary/dismissal and the grievance procedures in a simplified form. The Department has heard a consistent message that difficulties are faced, particularly but not exclusively by employees and small employers, in understanding requirements which vary depending on issues as diverse as the legal jurisdiction into which the grievance might fall, whether or not a dismissal is perceived as being about a person's conduct or capability, the legal definition of 'employee', what constitutes a grievance letter, the actions to take if a grievance and a disciplinary process relating to the same issue are ongoing, and so on.
- 6.56. Naturally, the simplification agenda is equally valid no matter which option is preferred and it is doubtful that anyone would oppose such a nebulous but appealing concept. **Therefore, if you favour retaining the procedures, in whatever form, your views would be welcomed on how this can be achieved and what specific measures should be taken to make systems easier to understand and operate.**

Repealing the procedures

- 6.57. On the face of it this is a fairly straightforward option - remove the statutory minimum dispute resolution procedures from the statute book altogether and revert to the situation as it stood prior to April 2005. However, repeal is by no means as straightforward as it might first appear.
- 6.58. Firstly, if the procedures are repealed, a number of changes will be required to unfair dismissal law, since currently a failure to adhere to the disciplinary/dismissal procedures can render a dismissal automatically unfair. As this is a consequence of repeal which has been foreseen, it could be dealt with legislatively if it is decided to remove the procedures from the statute book. **However, are there any additional consequences of repeal (or modification) of the procedures which are unintended or unforeseen and would need to be remedied?**
- 6.59. More fundamentally, it should be remembered that the statutory procedures were introduced because it was felt that insufficient efforts were being made to resolve disputes in the workplace, with the result that increasing numbers needlessly ended up in an industrial tribunal or the Fair Employment Tribunal. Situations arose where the first time an employer or manager would learn about a grievance was when the tribunal claim form arrived on his or her desk. Research showed that employers themselves sometimes had no procedures in place for dealing with disciplinary or grievance situations.²⁰ By removing the procedures and doing nothing else, Northern Ireland would effectively revert to a position that, at the time, was concerning enough to give rise to the introduction of the statutory procedures.
- 6.60. In Great Britain, where a decision has been taken to repeal the procedures in full, the same concerns prevailed prior to their introduction in 2004 and steps have therefore been taken to try to ensure that there is not a return to the status quo ante. These steps include revision of the ACAS Code of Practice on Disciplinary and Grievance Procedures, supplementing of the Code with comprehensive guidance, and linking failure to comply with the Code to tribunal outcomes. If a tribunal finds that an employee has unreasonably failed to adhere to the Code in attempting to resolve a dispute, it may apply a reduction of up to 25% in any award it makes to the employee. On the other side of the coin, it may increase an employee's award by up to 25% where it is the employer who has unreasonably failed to abide by the good practice set out in the Code.
- 6.61. This approach is certainly a possibility in Northern Ireland, where the LRA's Code of Practice fulfils essentially the same role as that of ACAS in Great Britain. Even if the statutory procedures remain unaltered, there may be scope to modify the Code to make it more transparent and easily understood. If the procedures do change or are repealed, of course, then a more fundamental look at the Code will be necessary, as it currently reflects the legal requirements around the statutory procedures.

20. 'Employment Relations Survey 2004-2005: comparison of employee and employer responses to research into workplace attitudes and practices' (Department for Employment and Learning, September 2006).

- 6.62. There is also scope in Northern Ireland to provide for a continued link between adherence to the Code and tribunal outcomes. Already, unreasonable failure to adhere to the Code can lead to a reduction or increase in a tribunal award of up to 50%, and there is no reason why this link (or a modified version of it) could not be retained in statute. Indeed, this would be consistent with the accepted view that mechanisms are needed to ensure that employees and employers do their best to attempt to resolve issues at work, and that good practice guidance with ‘teeth’ is a necessary part of the system.
- 6.63. As a respected neutral body with expertise in dispute resolution, the LRA is the appropriate body to continue to produce such guidance, whether in the form of a Code of Practice or in some other form. Retention of good practice of this kind will ensure that failure to make reasonable efforts to resolve disputes at work will result in negative consequences.
- 6.64. The Department seeks your views on the retention in full or part or the repeal of the current statutory procedures.

Questions

- 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.
- Q10.** *Should any additional measures, statutory or otherwise, be introduced to improve formal systems for resolving workplace disputes?*
- Q11.** *Would there be any unintended consequences of the repeal of the statutory procedures (or part of them) that would need to be considered?*
- Q12.** *If the procedures or parts of them are to be repealed, what should replace them and how would compliance be encouraged?*

7. Options for change: alternative dispute resolution

- 7.1. Where disputes escalate, and attempts to deal with them within a workplace context start to break down, tensions invariably grow and the employment relationship begins to fray. All too readily it may be assumed that this is the point at which a tribunal hearing becomes inevitable, but this is not so. A range of options remain available to the parties, even at this stage, and these will be explored during the course of this chapter. Even where claims are lodged with OITFET, only approximately 12% of these reach a full hearing, the great majority being either conciliated, settled or withdrawn.²¹ Although there are situations where a legal ruling is undoubtedly the most appropriate outcome, the Department is convinced that it may not always be the best way of addressing issues when traditional workplace methods fail.**
- 7.2. For an individual taking forward a tribunal claim, the experience of undergoing cross-examination and reliving unpleasant memories in what can be a confrontational environment can prove stressful; and those who choose to be legally represented are faced with associated fees. Such individuals can also face negative longer-term employment prospects. Indeed, nearly two-thirds of tribunal claimants interviewed during the course of research in Great Britain were working for a different employer than the one against whom their claim had been made by the time of that interview; almost a quarter were out of work; nearly two-thirds reported stress; and over a third referred to damaged employment prospects.²²
- 7.3. Employers face similar costs. Whereas the cost of dealing with 'old style' collective disputes may have been counted, in basic terms, in days lost due to strikes, the cost of contemporary industrial unrest is less obvious. Research published in 2007 in Great Britain²³ estimated that the average annual costs associated with tribunal claims come to almost £20,000 per respondent organisation (this figure may differ in Northern Ireland however, due to the different breakdown of companies by size). The same research estimates that organisations receive on average 3.1 tribunal claims a year and typically spend 15 days in management, HR and in-house employment lawyers' time preparing for an employment tribunal hearing. Prolonged disputes can have a detrimental impact not only on the working relationship with the claimant, but also with the wider workforce. This can have negative consequences in respect of employee motivation and absenteeism, ultimately impacting on the company's productivity and performance. Companies may additionally face negative publicity as a result of a case.
- 7.4. In his report, Michael Gibbons pointed out that as many as 76% of individuals leave employment before submitting an employment tribunal claim in Great Britain, and a further 17% end their employment after submitting one²⁴. In these situations, where the employment relationship has broken down to the point of the claimant resigning or being dismissed, the employer faces recruitment costs.

21. OITFET statistics.

22. Findings from the 1998 Survey of Tribunal Applications (surveys of applicants and employers) (DTI, 2004) pp 59-61.

23. Published in February 2007, the Chartered Institute of Personnel and Development survey *Managing Conflict at Work* analysed responses from 798 organisations in GB employing more than 2.2 million employees in total.

24. 'Better dispute resolution: a review of employment dispute resolution in Great Britain' (Department of Trade and Industry, March 2007), p 15.

- 7.5. Finally, where employers find themselves involved in prolonged workplace disputes of any kind, there is a cumulative detrimental impact on the wider economy; competitiveness may suffer, as may the ability of businesses to maintain and enhance the level of secure employment available in Northern Ireland. These factors are of particular concern during these difficult economic times.
- 7.6. It should not be surprising, then, that the Department would like to see the majority of disputes resolved in the workplace or, where this is not achievable, by way of alternative methods that may repair the employment relationship or at least minimise the damage done to the parties and the wider workplace environment. This chapter asks what steps can be taken when workplace efforts fail to avert potentially lengthy, costly and psychologically damaging legal proceedings.
- 7.7. Systems for resolving disputes outside the normal workplace procedures can take a range of forms that can broadly be referred to as alternative dispute resolution (ADR). ADR essentially involves bringing into the dispute resolution process a third party who has had no prior role in events and who, if he or she is to be successful, must enjoy the confidence and trust of both parties. Beyond that broad definition, the third party can fulfil specific roles ranging, on the one hand, from acting as a neutral facilitator between the parties, through more active direction and advice, to, at the other end of the scale, a pseudo-judicial role in determining a remedy.
- 7.8. There is some confusion around the terminology used to discuss ADR. For the purposes of this discussion, the following meanings are understood.

ADR definitions

Conciliation is an approach involving a neutral third party whose role is to help the employer and employee resolve their differences. The conciliator does not attempt to direct the outcome; rather, his or her role is that of facilitator. The LRA already provides a free and confidential conciliation service which is available both before and after a tribunal claim has been lodged.

Mediation, whilst similar to conciliation, is a more interventionist approach. Although the neutral third party or mediator has no direct authority in deciding the outcome of the process, he or she may have a role in proposing and suggesting solutions.

Arbitration involves both parties agreeing to their case being heard and determined by a neutral third party. The LRA already has a statutory arbitration role, giving parties who agree a non-legalistic alternative to an industrial tribunal hearing in unfair dismissal and flexible working cases. Hearings are quick and confidential, the remedies available to the parties are the same as at an industrial tribunal, and (a key element of arbitration) the arbitrator's decision is binding.

Early neutral evaluation provides for a third party, who is often an expert in the subject area, independently to assess at an early stage the likely outcome of a case. The process is designed to help both parties better understand their position and the prospects of their case from the outset.

- 7.9. These definitions apply to some of the more widely used ADR techniques, but there are many variations on these including the appropriately named med-arb (mediation leading to arbitration) and expert determination (where an expert in the field hears the parties and reaches a decision, perhaps on technical aspects of a complex dispute). Less important than the differing emphases between these models is the overall rationale of ADR - to provide quick and effective non-legalistic solutions to workplace problems that are less daunting than, and do not carry the cost or formality of, a tribunal or court.

ADR in the workplace

- 7.10. At present, where workplace resolution fails, the parties can agree to a range of approaches in an attempt to address their difficulties. Some employers, as a component of their workplace dispute resolution procedures, provide the option of what is often referred to generically as third party mediation. Although a brief definition is provided above, mediation can a difficult term to define, not least because there is not a single accepted view of the process and practice can vary significantly from person to person and organisation to organisation. However, broadly speaking, the role of a mediator is to listen to the parties' accounts of what has happened, probe for ways through the impasse, and try to encourage agreement on a way forward. Though a mediator may have a role in proposing and suggesting solutions, he or she normally has no direct authority in deciding the outcome of the process.
- 7.11. Unfortunately, reliable statistics on the availability and success of in-house mediation are not available. However, it is generally acknowledged that the probability of agreement is dependent on the mediator's capability/perceived independence and the parties' buy-in to the process. As a number of discussions held at the pre-consultation stage have made clear, however, if the employer is perceived to wield undue influence because the mediator is his or her employee, or is contracted by the employer, a belief may develop that the mediator will propose a resolution consistent first and foremost with the employer's interests. Scepticism on the part of employees who (correctly or not) already feel wronged is understandable, and it is therefore vital that processes are fair and transparent enough to gain the confidence of all those involved.
- 7.12. Whilst not wishing to minimise this challenge, the Department believes that more can be done to promote effective in-house ADR. Firstly, we are suggesting the development of best practice standards which employers and employees could use as a template to refine their in-house procedures. These will only be of use if they command widespread confidence, and so the Department intends to work with a number of public sector bodies and trade unions to pilot best practice in-house ADR schemes. The aim will be to learn lessons that will inform the development of better advice and guidance, which we hope to develop in conjunction with employers' organisations, trade unions and other bodies such as the LRA and the Equality Commission.
- 7.13. Secondly, the Department believes that there is a need to explore the development and delivery of training in ADR techniques leading to a recognised accreditation/qualification. Official recognition of mediators' skills would, we believe, increase confidence in the capability and independence of mediators and hence raise the profile of workplace

mediation. This is an approach which is being actively considered in Great Britain. Over the coming months, the Department intends to work with the LRA to explore this proposal further.

- 7.14. In the interim, **we would be very interested in your views on how in-house ADR can be strengthened, on the merits of accredited training and the dissemination of good practice.**

Pre-claim conciliation

- 7.15. Although the Department aims to widen the use of effective in-house mediation, it remains a fact that the LRA will continue to be the lead organisation dealing non-legalistically with disputes that cannot be resolved by normal workplace procedures.
- 7.16. The Agency makes its services available both before and after a tribunal claim has been lodged. This section focuses on the Agency's pre-claim role, which is more significant than is sometimes understood. Indeed, some 11% of cases dealt with by the LRA annually (on average about 900 cases a year²⁵) are successful 'non-IT1' or pre-claim conciliations i.e. cases in which a settlement is reached without a tribunal claim being made.
- 7.17. An employment relationship tends to deteriorate as a dispute deepens and will often have ended by the time a claim is lodged. There is a view that the earlier conciliation can be instigated, the more likely it is that it will be successful in preserving the employment relationship. Greater activity by the LRA prior to a claim is therefore thought to be desirable, but this does raise the question of how the Agency can more effectively respond to situations when it has had no formal notification of a dispute and no request for assistance.
- 7.18. The LRA is automatically notified once a tribunal claim has been lodged with the Office of the Industrial Tribunals and the Fair Employment Tribunal (OITFET) and can then instigate contact with the parties. However the Agency is unlikely to be made aware of an individual dispute before a claim is lodged.
- 7.19. Of course, the LRA can become aware of a significant number of disputes at an early stage through its telephone enquiry point. This service, which is in high demand from employees and employers alike, allows the public to seek information on employment rights and responsibilities. Although the enquiry point is not specifically designed to identify disputes, staff can often highlight disputes which could be amenable to resolution through ADR.

25. Averaged over the years 2005/06 to 2007/08.

- 7.20. In Great Britain, where the LRA's sister body ACAS provides a similar helpline service, a pre-claim conciliation pilot has been established. Additional training is being provided to equip ACAS helpline staff to identify disputes which would be suitable for pre-claim conciliation and to encourage those callers to avail of ACAS services. In the same way the LRA's enquiry point could be used as a dispute early warning system. A query from an employee or an employer may highlight to the LRA's experienced staff an underlying problem that, in their view, may be amenable to conciliation. It therefore makes sense to explore what can be done to exploit more fully the helpline's potential to act as a trigger for assistance.

Information and advice

- 7.21. This leads to a broader question around the provision of advice. Clearly the advice that a person receives at this point in the process is critical. It could mean the difference between settling the case and a long drawn out legal process where the employment relationship has ended. Although there is acknowledgement of and praise for the advisory work done by Citizens Advice and similar bodies, discussions at the pre-consultation stage revealed a degree of disappointment in some quarters that the LRA does not provide advice specific to individual queries, but rather generic information on rights and responsibilities.
- 7.22. The LRA view is that provision of more directive forms of advice, recommending a particular course of action to a caller, would be counter-productive. Firstly, a caller may (despite best intentions) provide a very incomplete account of his or her circumstances, with the result that a specific recommendation could well be flawed from the outset and have little value. Secondly, it is argued that the making of specific recommendations could undermine the Agency's well-established reputation for neutrality and independence, which must be maintained if the Agency is to continue to enjoy the confidence of the community and perform effectively in its role of promoting good workplace relations.
- 7.23. In spite of these reservations, there are those who contend that a more proactive advisory service is required, whether provided by the Agency or other organisations. Rather than just providing information (such as an account of the relevant employment rights and the options open to the caller), this service would offer suggestions on next steps based on the caller's account of the situation and the adviser's expertise. Such a service would not be a substitute for a face-to-face consultation with an employment lawyer, HR professional or trade union official, but - with proper disclaimers - may enable individuals to get a better 'feel' for their situation.
- 7.24. The Department is interested in your views on whether it is appropriate for the LRA to offer more specific advice, with proper disclaimers, in addition to its current information service. Would doing so be likely to compromise the Agency's neutrality? Given that any advice offered could be indicative only, how would we guard against the consequences of providing incorrect advice?**

Early neutral evaluation

- 7.25. Some suggest that even an expanded advice service is not in itself sufficient to address concerns with the existing system. Given the difficulties faced particularly by many individual employees and small employers in understanding employment rights and responsibilities, it is felt that there is a need to provide some form of early neutral evaluation - a formal preliminary expert assessment of the potential merits of a case, the best way of dealing with it, and the likely outcome if the legal stage is reached. The process could perhaps be enhanced by the drawing up of a schedule of loss, so that parties understand the value of their case, and are given realistic expectations of potential tribunal outcomes, including the amount of any award or settlement. It is argued by some consultees that, following receipt of such an evaluation, parties would be much better placed to make an informed decision on whether and how to proceed.
- 7.26. Such a service, depending on uptake, is likely to be resource-intensive so it is important to establish whether it would have the intended effect of giving parties a more realistic appreciation of their prospects thus freeing up tribunals to deal with those cases that most clearly require a legal determination. **If you favour its introduction, how could uptake be encouraged? Who would conduct the early neutral evaluations? Should there be a link to subsequent tribunal proceedings, so that a tribunal could take into consideration the evaluation a party had received and his or her actions in relation to it? Should the process be mandatory (triggered by a tribunal claim), or should it be voluntary but carry a requirement to explain to a subsequent tribunal why it had not been utilised?**

Arbitration

- 7.27. The LRA's statutory arbitration service is designed to offer a quicker, less formal, less stressful and cheaper alternative to a tribunal hearing which can come into play where the Agency is unable to secure an agreed resolution through conciliation or mediation. If the parties agree, their dispute can be referred to an independent arbitrator drawn from a panel of LRA appointees having experience of employment relations issues. After a short hearing lasting approximately half-a-day, during which both sides have an opportunity to put forward their understanding of events, the arbitrator will make a decision. The arbitrator has available all of the remedies that a tribunal could award and the arbitrator's decision is binding, with appeal possible only on points of law.
- 7.28. The current arbitration arrangements have had their problems. It is known that uptake of the two statutory arbitration schemes has been disappointingly low and the suggestion is that this may be due to the very small number of cases to which arbitration can be statutorily applied, namely those cases only concerned with unfair dismissal or flexible working. A hearing dealing with a single jurisdiction is today unusual; for instance, an unfair dismissal or flexible working claim might also include allegations of sex discrimination. The fact that statutory arbitration is unable to deal with the other element or elements of a claim effectively rules out this option in most situations. A further factor which is thought to reduce the attractiveness of arbitration is its very limited scope for appeal.

- 7.29. A possible solution may be to revise the statutory arrangements so that they permit LRA-appointed arbitrators to deal with a wider range of jurisdictions. There is already legislative power to allow for arbitration in disputes relating to discrimination on the grounds of religious belief or political opinion, although no relevant scheme is currently in place. It may be that expanding the reach of arbitration and adding some form of appeals mechanism, perhaps an Employment Appeal Tribunal (were one to be established) could revive arbitration as an attractive alternative to a tribunal hearing. **We would welcome your views on this option.**

Mediation

- 7.30. Mediation, another form of ADR considered during the pre-consultation, elicited significant interest from stakeholders. Although a mediator cannot make a decision determining the outcome of a case in the way that an arbitrator can, the mediator's role is more directive than the facilitative remit of a conciliation officer. It is normal for a mediator to play a part in proposing and suggesting solutions, and this is an attractive proposition for stakeholders who believe that, in order for ADR to be most effective, it is sometimes necessary for the mediator to use judicious levels of persuasion. This could be effective, for example, in situations where the mediator judges that parties need a 'reality check' or 'wake-up call' on the relative strengths and weaknesses of their case. Whether or not to follow the mediator's advice would, of course, remain entirely a matter for the parties.
- 7.31. Although mediation is viewed favourably by most stakeholders, for some the process is regarded as being more appropriate for 'softer' grievance type issues than for circumstances where there are allegations to be investigated and facts or legal questions to be determined. Mediation's more directive approach is thought to be helpful in advancing situations where there has been a breakdown in workplace relationships and where the parties need guidance to assist them towards resolving the issue. Since mediation requires a significant time investment by the parties, it is also considered to be relatively unsuited to simpler cases such as payment of wages/holiday pay as it could expend a disproportionate investment of time.
- 7.32. If more mediation is desirable, a key question arises as to how and by whom it would be carried out. The most obvious option would be to enable the LRA, with its recognised expertise in ADR, to expand its mediation activities. To address any fears that a directive role could compromise the perceived neutrality of the Agency, the LRA could perhaps draw on the skills of a pool of accredited mediators or, if using its own staff, could make very clear to the parties from the outset the directive nature of the mediation process.
- 7.33. Another possibility might be to allow mediation to be undertaken by specially trained tribunal judiciary (who, naturally, would take no further part in the case were it to proceed). A pilot study using judicial mediators has already been carried out in Great Britain and publication of its findings is awaited. Judicial mediation certainly has its attractions, in that a process facilitated by a legally qualified and experienced tribunal chair would undoubtedly carry considerable weight with many parties and, in situations where the chair believed settlement possible, would encourage the parties very seriously to consider his or her suggestions.

7.34. The Department would welcome your views on whether there is scope to build on existing arrangements, whether in relation to conciliation, arbitration or mediation.

7.35. Of course, advice and pre-claim activity will not deal with all potential tribunal claims, but by the same token the lodging of a tribunal claim by no means signals the end of hopes for a settlement. The LRA already provides key services at the post-claim stage which will now be explored.

Post-claim conciliation

7.36. When a claim is received by OITFET, a copy is automatically sent to the LRA, which then attempts to broker a conciliated settlement between the parties. Around 18% of cases dealt with annually by the Agency (on average about 1,400) are conciliated after a tribunal claim has been lodged²⁶. The work of the LRA and intensive case management by the tribunals, in some cases including a preliminary hearing and in most cases the issue of a notice of hearing, have further direct influences on the resolution of claims. These processes clarify issues and focus minds, providing information that helps the parties consider other options to include conciliation, the withdrawal of their claim or a private settlement (for example by way of a so-called 'compromise agreement' between the parties).

7.37. Existing conciliation processes are generally commended by those who use them, for providing neutral, non-directive assistance whilst leaving the parties themselves in control. However, this praise does not come without reservations. Some believe, for example, that conciliation is better at resolving more straightforward disputes about e.g. unpaid wages, holiday pay, and so on, and less successful in addressing more complex issues such as those involving discrimination. Conciliation is also thought to be more appropriate to situations where an employment relationship still exists between the parties as opposed to where that relationship has ended, as it often has by the time a claim is lodged. As noted above, it is believed that a redoubling of efforts at the pre-claim stage would be most likely to address this difficulty.

7.38. At the post-claim stage, a question does arise around the time limits which currently apply to the LRA's conciliation activity. These were first introduced alongside the statutory dispute resolution procedures in 2005 and drew inspiration from the observation that conciliated settlements often tended to be reached only as the tribunal hearing became imminent. By providing a short window of either seven or thirteen weeks applicable to most jurisdictions during which the LRA had a duty to conciliate, the aim was to create an urgency that would focus parties on settlement. The urgency was enhanced by the ability this gave tribunals to schedule hearings to begin once the time limits were up.

26. Averaged over the years 2005/06 to 2007/08.

- 7.39. The LRA continues to use the power to conciliate beyond the seven- and thirteen-week time limits, where settlement seems possible. In Great Britain, where corresponding legislative changes were made in 2004, ACAS tended not to use the power to conciliate beyond the time limits. As a result, the Gibbons review heard that parties in Great Britain were still failing to consider settling until later in the process, calling into doubt the whole rationale for the time limits. Indeed, Gibbons concluded that there was “overwhelming and compelling evidence”²⁷ that the time limits should be removed.
- 7.40. Since the LRA has taken a different approach to statute, Gibbons’ judgements are not readily applicable to the situation in Northern Ireland. Arguably, the time limits have helped OITFET to schedule hearings earlier, and even if parties still often settle at the tribunal door, the fact that the processes are becoming less drawn out is advantageous. On the other hand, if the issue is merely about the scheduling of hearings, are there other ways in which the same end could be achieved without placing what at least in Great Britain are perceived as unhelpful restrictions on ADR processes? **Your views are sought on whether the time limits should be retained and, if not, what – if anything – should replace them.**

Incentivised ADR

- 7.41. We would also be interested in your views on the extent to which ADR should be a requirement. Current ADR processes are carried out very much on a voluntary basis. Even arbitration, where the final decision binds the parties, is a process that must be agreed to by both parties in the full knowledge that this is so. Parties are not required to use ADR, and there are no penalties if they do not, other than the costs associated with a missed opportunity to resolve the dispute.
- 7.42. There is an argument that more needs to be done to encourage parties seriously to engage with ADR processes. Indeed there are those who go as far as to suggest that ADR should be compulsory, that parties should be required to attempt it before any tribunal claim can proceed. This approach does have its advocates, but they are in a minority. As critics have pointed out, it carries the danger of turning ADR from a useful process into a procedural obstacle. ADR is meant to resolve problems, not create them.
- 7.43. Therefore a number of stakeholders, while not favouring such a radical departure, have preferred a middle way, where parties have incentives to use ADR but are not required to do so. In the simplest terms, if such a system were adopted, a failure to use ADR would carry potentially adverse consequences for the parties. For example, an unreasonable failure to engage could be taken into account at subsequent tribunal proceedings and could in some way affect the outcome of the case, for example through a reduction in an award. Such a system, whereby awards can be adjusted at the tribunal’s discretion, is already in place in respect of the statutory dispute resolution procedures, and a similar system is to be introduced in GB for failure to abide by the ACAS Code of Practice on Disciplinary and Grievance Procedures.

7.44. In the Department's view, some form of incentivised mediation would appear to be an attractive option, whilst a mandatory approach would have potential human rights implications and in any case would be unduly mechanistic. We are seeking your views on how parties should be encouraged to engage in ADR.

A more radical departure?

7.45. So far, the document has discussed possible revisions to existing arrangements, some of them significant. However, considerably more radical alternative approaches are of course possible, consisting of any one, several or all of a range of elements which have been raised by stakeholders with the Department at various stages during the pre-consultation.

7.46. The Department has attempted to assemble a coherent picture from these thoughts and has developed an outline system that is set out below. Whilst introducing some or all of the elements of this system might require a significant remodelling of existing institutional functions and processes, doing so would signal a very clear shift in emphasis towards ADR, whilst crucially preserving recourse to a tribunal as an absolute right where alternatives fail or are not appropriate. A revised system could operate in line with some or all of the following processes.

- *An individual with a grievance, having failed to resolve it in the workplace, could complete a claim setting out the grievance. This could either be (as now) on a standard claim form or a letter setting out the main issues.*
- *The claim could be directed, in the first instance, not to OITFET but to the LRA, whose staff would have a set time period to determine whether there were reasonable prospects of successfully resolving the dispute by way of ADR. If there were, normal tribunal time limits could be suspended for a 'sanctuary' period to allow the LRA to work with the parties. If the Agency saw no realistic prospect of settlement, case papers could be passed directly to OITFET.*
- *Where ADR is recommended, either party would have the right to object to this course of action and have their case papers passed directly to OITFET. However, the tribunal could be empowered or required, in its own deliberations on the case, to take into consideration whether it was reasonable for the parties to have bypassed LRA processes. Where a tribunal deemed a party's actions in so doing unreasonable, any award made to the party could be adjusted downwards, or any award made to the other party could be revised upwards.*

- *Parties who did not object to ADR would attend a meeting chaired by a person with significant employment relations and ADR experience (either a member of the LRA's staff or a person appointed by the Agency). That individual would attempt to broker a settlement between the parties by drawing upon a range of ADR techniques, including non-directive conciliation, directive mediation and early neutral evaluation. A decision on which techniques to use, and when, would be determined on a case by case basis. Even where prospects of mutual agreement appeared slim, the meeting could still be useful in providing an opportunity for an advisory or early case management discussion with the parties, possibly involving preparation of a schedule of loss where appropriate to quantify the value of the case and establish in the parties' minds whether it was worth pursuing to a tribunal.*
- *If a settlement was not reached through an ADR process the case could be referred for arbitration.*
- *Should either party be dissatisfied with the decision, there would remain an absolute right to take the matter to a tribunal. Where an appeal was lodged, the LRA would pass case papers to OITFET and applicable tribunal time limits would restart.*

7.47. This outline process echoes aspects of the work of the Rights Commissioner Service in the Republic of Ireland but blends these with existing institutional mechanisms here. It proposes that claims be directed to the LRA, potentially in the form of a letter. It sets out a process allowing the Agency, or someone appointed by it, to hear the case and make a recommendation. It preserves the right to go to a tribunal but suggests that a tribunal be empowered to take account of unreasonable failure to engage in this process.

7.48. The outline gives a flavour of what might be possible were existing systems to be significantly recast. Precise details would, of course, have to be worked out, **but we would appreciate your feedback on the model proposed, whether as a whole or in relation to particular parts. What are the advantages and drawbacks of the model? Are there factors not accounted for, and would there be unintended negative consequences? Are some aspects of the model more practicable than others? Which processes should be optional, and should there be any mandatory requirements? Are there jurisdictions to which some or all of the above steps would be particularly unsuited (for example discrimination claims), what are they, and what adaptations would be needed?**

Questions

- Q13.** *What are the strengths and weaknesses of current ADR services provided by the LRA?*
- Q14.** *How can the LRA improve its services?*
- Q15.** *Could the LRA be more involved in conciliation before a tribunal claim is lodged, and if so how?*
- Q16.** *Should the LRA provide advice in addition to information?*
- Q17.** *Is some form of early neutral evaluation desirable and, if so, how should the process work?*
- Q18.** *Should the statutory LRA arbitration scheme be expanded to cover a wider range of jurisdictions?*
- Q19.** *Should there continue to be time limits on the LRA's duty to attempt to resolve disputes post-claim?*
- Q20.** *Would it be beneficial to incorporate within the existing system a process with increased emphasis on ADR, perhaps comparable to Rights Commissioner hearings in the Republic of Ireland?*
- Q21.** *Could a simplified application be used which would enable the LRA to assist the parties to determine how each case should be taken forward?*
- Q22.** *Would it be beneficial to allow for pauses in the time limits imposed on tribunal claims while ADR processes are taken forward?*
- Q23.** *Should a subsequent tribunal be empowered to take into account the parties' actions with regard to ADR processes and penalise unreasonable behaviour?*

8. Options for change: legal remedies and appeals

8.1. Support for greater use of ADR was a constant in many of the Department's discussions in the lead-up to this consultation. Many expressed the view that parties do not necessarily want a tribunal hearing per se; however the importance of being able to air a sense of injustice in a neutral open forum before the perceived wrongdoer cannot be underestimated. The Department concurs with the view that more can and should be done to promote the use of alternative methods of resolving disputes, and we look forward to hearing your views on how this can best be achieved. However, significant numbers of cases will always go, and indeed should continue to go, to a tribunal for legal determination. To that end, this chapter asks some key questions about the structures and processes that are in place for dealing with disputes in a legal context.

Legal remedy

8.2. The core of cases to which legal processes are the most suited are often (though not always) cases where complex legal issues arise, where the nuances of existing case law must be probed or where new case law must be established. The Department believes that the employment tribunal system is best placed to deal with such cases and, during the pre-consultation, there was broad agreement with this view. Given that tribunals provide a vital mechanism for dealing with disputes, it is unsurprising that their role and powers have been discussed at length in the lead-up to this consultation.

8.3. As noted in the report on the pre-consultation, access to the tribunal system has drawn particular attention from organisations generally supportive of employee interests. Some of the same concerns have also emerged from the Department's qualitative research. Cumulatively, these highlight the need to support two groups, the first consisting of individuals whose grievances never formally enter the system and the second composed of those whose disputes do enter the system but are later withdrawn. The factors which may restrict access for these two groups are said to include:

- *lack of knowledge of employment rights, unavailability of directive advice, and inadequacy of information on the tribunal process;*
- *fear of the repercussions of pursuing a dispute;*
- *cost (including the cost of representation if the case goes to tribunal and the fact that parties are generally required to bear their own legal costs whether they win or lose);*
- *complexity e.g. in following the dispute resolution procedures or preparing a bundle of documents for tribunal (deterring some from entering the system and placing those who do but cannot afford a representative at a disadvantage vis à vis respondents who are usually represented);*
- *time investment required to prepare for a case effectively;*
- *tactics adopted by respondents' representatives particularly at the interlocutory stage e.g. threats of costs and delaying action.*

- 8.4. If there are elements of the system which discourage pursuit of legitimate claims, then it is appropriate to explore how these can be remedied.

‘Latent’ claims and meritorious ‘drop-outs’

- 8.5. The Department takes very seriously the view expressed primarily by the voluntary advice/advocacy sector, that costs as well as fear and confusion around taking a case forward significantly reduce numbers of employment rights claims entering the employment tribunal system. We believe that the development of improved guidance and advice, together with possible simplification of current processes, could do much to address these issues. As noted elsewhere, we wish to explore what more Government and its key partners can do to provide better advice and guidance, as well as access to viable alternatives to the tribunal system where attempts to resolve matters at work fail.
- 8.6. The contention that some claims that do enter the system but are then withdrawn for reasons other than merit (such as cost or anxiety) is also a matter for concern, and **the Department would appreciate any insights you may have into this issue and any suggestions you may have for addressing the difficulties you perceive.**

Legal aid

- 8.7. In relation to the costs issue, it has been argued that the complexity of employment law makes legal advice and representation a requirement in some cases. Given that the funding of legal advice is beyond some employees’ means, the contention has been that there is a need to extend legal aid to cover representation at tribunal hearings. Depending on an individual’s financial circumstances, limited funding is already available towards obtaining legal advice and assistance in connection with a claim to a tribunal and the preparation of a case for hearing. However, legal aid is not available for representation at a tribunal hearing (although, in very specific cases, the Equality Commission will provide representation).
- 8.8. In the past, neither the Department nor the Lord Chancellor, who has responsibility for legal aid, have been persuaded by the arguments supporting the introduction of legal aid of this kind, although funding is available for exceptional cases. For policy to change in this area, a compelling case would be required together with an appropriate transfer of funding to the legal aid fund following a legal aid impact assessment. Should devolution of policing and justice occur in the near future, decisions in this area would fall to the devolved institutions. However, even so, there would continue to be a significant funding pressure for the Assembly to consider should it decide on such a course of action.
- 8.9. Tribunals remain bodies of balanced composition as between employee and employer representatives, and have legally qualified and experienced chairmen. They seek to ensure at all times that the principles of the justice system are adhered to in all cases that come before them. Allowances are made for inexperienced individuals who represent themselves, to ensure that the tribunals’ overriding objective, that parties are on an equal footing, is preserved. **Nevertheless, the Department would be interested in ascertaining levels of support for and opposition to the provision of legal aid.**

Costs

- 8.10. Suggestions were also made during the pre-consultation that particular aspects of the tribunal costs regime could be re-examined. For example, the circumstances in which a pre-hearing deposit is required, its level, the circumstances in which costs are awarded and their level are all issues that it is felt should be considered.
- 8.11. By way of summary, at a preliminary hearing known as a pre-hearing review, where the chairman believes a party has little prospect of success a deposit of up to £500 may be required before a case will be allowed to progress to a full hearing. As regards costs, at a hearing a tribunal can order a party to pay costs of up to £10,000 where that party or the party's representative has behaved unreasonably (the legislation uses the phrase "acted vexatiously, abusively, disruptively or otherwise unreasonably"). The party's representative can also be asked to pay costs in certain circumstances.
- 8.12. We would be interested in your views on whether there is a need to adjust these provisions.**

Weak cases

- 8.13. Employer organisations, while supportive of employees' entitlement to have legitimate grievances heard, stressed the need during the pre-consultation for effective controls on 'weak' claims. Reference was made to the financial harm that can be done to businesses by needless litigation where there is no real case to be answered. Such situations have negative impacts for employers in terms of time, money and reputation. These impacts are said to lead some to 'pay off' a claimant, regardless of the facts of the case, because of the potentially greater impact on the firm of pursuing the case 'all the way'.
- 8.14. One suggested solution was that employees should bear costs where they have pursued a weak case contrary to advice. Another suggestion was the introduction of a 'payment into court' type system, where money is paid by or on behalf of a litigant pending resolution of the litigation. Arguably such arrangements could be achieved through adjustments to the existing pre-hearing deposit machinery and **your views on whether and how this should be done would be welcomed.** However, in expressing an opinion, it is worth noting that organisations supportive of employee interests strongly contest the view that there are significant numbers of weak claims, and feel in any event that existing controls are sufficient and that, indeed, if any action is required, it is against weak defences by respondents.

Forms

- 8.15. A further 'access' issue relates to the documentation used by claimants for entry to the tribunal system, namely the ET1 form. The Department has found that there is support for a simplification of the claim form. Some stakeholders, not necessarily opposed to the simplification agenda, think that the ET1 (and the response form, the ET3) should ask for additional information, for example a schedule of loss designed to promote a realistic appreciation of the value of a case.

- 8.16. A more radical alternative to a revision of the forms has already been mooted as part of the system discussed in **paragraphs 8.45 to 8.47**. This approach would involve changes to the actual processes associated with a claim, with an application being directed in the first instance not to OITFET but to the LRA. The claim could either be presented (as now) on a form or, more informally, as a letter, with pertinent information being passed on to OITFET only where the LRA certifies either that its efforts to resolve the matter have failed or that one or other of the parties has not been willing to engage with the Agency in its resolution attempts.
- 8.17. Whichever approach you favour, we would be interested in your thoughts on the future design and content of the document (currently the ET1) that claimants are required to complete, and indeed on the ET3 which is used by respondents to answer a claim.**

Late settlements and withdrawals

- 8.18. It is well known that a significant number of disputes are settled ‘on the tribunal steps’, often on the day of the hearing itself. Conventional wisdom has it that the imminence of legal proceedings can have a powerful effect in encouraging parties to reconsider their options at this juncture and to choose settlement. Late settlements are administratively and economically wasteful given the time, money and stress already invested where agreement might have been achieved earlier.
- 8.19. We have already discussed one strategy that was put in place to try to combat this tendency, the fixed period for LRA conciliation set in place in April 2005 (see **paragraph 8.38**). Case management discussions (CMDs), to which brief reference has also been made, are also said to encourage settlement prior to a hearing. These preliminary hearings are held by tribunals to identify issues that will later be considered at the substantive hearing. By focusing parties on the need to be very specific about the facts and arguments upon which they intend to rely, potential weaknesses in cases can be exposed, leading parties to weigh up the risks of continuing with the case and, in some cases, to choose settlement over more risky, costly or stressful paths.
- 8.20. However, there is the counter-argument that the preparatory work required for CMDs is difficult for claimants to undertake without representation and that reversion to a system whereby issues are raised and dealt with at the substantive hearing would be preferable.
- 8.21. The Department would wish to know what steps you believe are needed to reduce the number of last-minute settlements and withdrawals.**

Time limits

- 8.22. At present a claim must be brought to a tribunal within a period of three months, although a longer period applies under certain jurisdictions. Tribunals also have the power to take into account situations where it was not “reasonably practicable” for the claimant to comply with the time limit or in which it would be “just and equitable” to consider a complaint that would otherwise be out of time.

- 8.23. Currently, the statutory dispute resolution procedures provide for an extension to the normal time limit by a further three months, during which time attempts at resolution are able to continue. However, this provision is thought of as confusing and we have been told that, in spite of it, protective tribunal claims are regularly lodged prematurely, leading to unnecessary work for all concerned even where the claim is subsequently resolved without the need for a tribunal.
- 8.24. The Department believes that it is appropriate, whether or not the procedures remain on the statute book, to provide 'sanctuary time' during which the parties have an opportunity to thrash out their differences and attempt to resolve their issues. **If the procedures are retained, we would welcome your views on how the existing mechanism could be simplified. If they are repealed or significantly revised, we would welcome views on alternative arrangements.** One option might be to introduce some form of certification (perhaps by the LRA or by agreement between the parties) which would confirm that the parties are actively attempting to resolve their dispute and that an extension lasting for a particular limited period (for example three months) is necessary.
- 8.25. A further proposal concerning time limits is that there should be an alignment of the differing time limits for lodging a tribunal claim which are applicable in various jurisdictions. As stated above, the limit in most jurisdictions is three months, but in some a longer period of six months is the norm. This proposal was not taken forward in GB due to significant differences of opinion on what the single time limit should be, and it may be that similar disagreement will be evident locally. **A fundamental review such as this, however, does need to ask the question: should be harmonised and, if so, to what single period?**
- 8.26. Finally on time limits, the Department is aware of criticisms from some quarters that the 28-day period an employer has to respond to a claim is not sufficient. Arguments that have been advanced in the past for a longer response time relate to the apparent difficulties faced by large organisations in ensuring that documentation reaches the responsible person (e.g. in HR or personnel departments) in time for action to be taken. This is said not always to be straightforward as the claimant will on occasion fail to complete these details correctly on the claim form. However a contrary view is that large organisations are in fact well attuned to dealing with tribunal claims, and should have the appropriate machinery in place to ensure that a timely response is provided. **Do you feel that there is a need to revisit the length of this time period, given that it was revised upward from 21 to 28 days as recently as April 2005? Please provide supporting evidence for your point of view.**

Rules of procedure

- 8.27. It has been suggested that there may be a need to re-examine, in general terms, the legislation which governs the way in which tribunal proceedings are conducted, the circumstances in which certain actions may be taken, and so on. This legislation, embodied in the Rules of Procedure, has been modified extensively in the recent past, first in 2004 and then again in 2005 and the Department is not proposing any particular modifications at this time. It would be impractical to do so without knowing first the shape of the overall system in which tribunals will operate. However, the Department does feel

that it is important that the Rules remain responsive to the challenges posed to tribunals by the changing face of employment law, and thus proposes to liaise with the President of Industrial Tribunals and the Fair Employment Tribunal to keep the Rules under review.

'Fast track' determination of simple cases

- 8.28. Reference has been made previously to the vital role that tribunals play in dealing with complex cases where difficult legal points, the interpretation of existing case law or the establishment of new case law may be at issue. However tribunal cases are by no means always of the complex variety. Indeed, as the policy review found in Great Britain, simple monetary claims where the facts are not in dispute are often relatively straightforward. As a result, Employment Tribunals in Great Britain have been empowered to deal with certain claims - such as unlawful deductions from wages, breach of contract, redundancy pay, holiday pay and the national minimum wage – by way of a 'fast track' procedure requiring both parties' consent involving an employment judge²⁸ sitting alone and determining the case without a hearing, on the basis of the papers.
- 8.29. At the pre-consultation stage, this proposal received only a lukewarm reception from stakeholders here in Northern Ireland. It has been suggested that such a procedure would be useful primarily where the facts are not in dispute and where only a simple legal determination is required. It would not be useful in situations, which often arise, where the money issue is part of broader, more complex tribunal claim under more than one jurisdiction.
- 8.30. The further issue of the nature of consent, although not raised in Northern Ireland to date, was discussed at length in Parliament during the passage of the relevant legislation in Great Britain²⁹. On reflection, the Government was persuaded that the law should limit determinations without a hearing to situations where express consent in writing has been secured from all the parties. The initial thinking had been that parties could be deemed to consent where they had been given an opportunity to request a hearing of their case but had not done so. As obtaining written consent from the parties may be time-consuming, the ability to operate a 'fast track' service may be affected, but written determination does have the merit of giving certainty around the important decision to waive the right to a hearing.
- 8.31. The Department would welcome your views on whether the procedure described above should be introduced in Northern Ireland. If you favour its introduction, should the parties be required to consent in writing or would their deemed consent be sufficient?**

28. The equivalent position in Northern Ireland is that of tribunal chairman.

29. See, for example, Hansard, vol. 701, part no. 95, col. 1266, 19 May 2008 - <http://www.publications.parliament.uk/pa/ld2007/08/ldhansrd/text/80519-0004.htm>.

Enforcement of awards

- 8.32. A further issue raised during the Great Britain review, and relevant also in Northern Ireland, has been the tribunals' historic inability, in their own right, to enforce payment of an award they have made. Where a tribunal makes an award requiring a party to pay a sum, and that party does not do so, it is necessary for the party who is expecting payment to register the unpaid award with the courts and, if payment is still not forthcoming, to pursue enforcement through the court system. This carries with it associated costs which are high when weighed up against the payments owed to the applicant, with the result that some do not decide to pursue the matter.
- 8.33. This is an issue which concerns the Department, and we will be exploring with the tribunal judiciary and the Northern Ireland Court Service the feasibility of providing for the automatic registration of an unpaid award with the courts. **Do you agree with this approach? Are there additional ways in which the enforcement of awards can be strengthened?** The Citizens Advice Bureau in Great Britain certainly believes so. In a recent report³⁰, it suggested a number of State-led approaches, including the creation of an enforcement team within the tribunal service, the use of existing court mechanisms or employment of commercial debt collection services. **Are any of these appropriate for Northern Ireland? We would welcome your views on the enforcement issue.**

Multiple claims

- 8.34. Multiple claims are claims brought by more than one individual about the same set of facts. These can constitute a large proportion of claims entering the system. Most spectacularly, in 2003/04, over 6,000 claims were lodged in respect of a common complaint against one respondent. Tribunals do have a way of dealing with these claims, the identification of a lead claim, which means that a hearing is usually only necessary in a few cases. Nonetheless, the need for claimants to prepare, respondents to respond to, and the tribunal administration to process large numbers of essentially similar claims can amount to an extremely inefficient use of time and money.
- 8.35. In the past, there has been some consultation on whether an alternative approach should be adopted to dealing with multiple claims, namely the introduction of a facility to bring class/group actions. A class/group action is effectively a single representative claim brought in respect of a group of individuals having the same complaint. The argument in favour of such actions is that they can avoid the time and cost inefficiencies associated with current arrangements. Of course, were such a system to be introduced, a number of key considerations come into play. How would such a provision work in practice? Should it apply to named individuals or unnamed individuals who have some defining characteristic but are not identified? Who should be entitled to bring such an action - trade unions, the Equality Commission, some other body? Does introducing such provision enhance 'litigation culture' by encouraging individuals to join an action where they might not otherwise have considered an individual claim?

30. 'Access denied: the deliberate non-payment of Employment Tribunal awards by rogue employers' (Citizens Advice Bureau, October 2008).

Are there alternatives to group/class actions that would achieve similar efficiency savings? What are the disadvantages of dispensing with existing arrangements? **This consultation, following up on earlier work in Northern Ireland by the Office of the First Minister and deputy First Minister (OFMdfM), is seeking further evidence on these issues.**

Remedies

- 8.36. There has been some discussion in the lead-up to this consultation around the remedies available through tribunals i.e. the courses of action open to a tribunal when it reaches a finding in a case. There is a feeling in some quarters that more ought to be done, where reasonable prospects exist, to assist parties to rebuild and repair employment relationships that have broken down during the course of a dispute, for example through more use of reinstatement or re-engagement, or the introduction of a power to order these remedies. As already noted, the employment relationship is very likely to have broken down by the time a case reaches tribunal, but **we would nonetheless welcome any views you may have on whether tribunals can play a greater role in repairing employment relationships and, if so, how this can be achieved.**
- 8.37. A further suggestion in relation to remedies is to provide tribunals with power to require employers to make changes to policies and practices, to require equality audits, or to issue injunctive relief (requiring a party to take or not to take particular actions) in order to prevent an act of discrimination occurring or being repeated. In the case of breaches of the Equal Pay Act, this could include tribunals having the power to require an employer to carry out a 'gender pay audit' including the provision of relevant information on gender pay within their organisation. Providing public bodies with a power to make recommendations or orders to promote better workplace practice is not an entirely novel approach. The Equality Commission, for example, already has power to issue directions in cases relating to discrimination on the basis of religious belief or political opinion. Likewise health and safety inspectors have power to require an employer to make improvements to remedy identified breaches of health and safety law. **We would welcome your views on the feasibility and desirability of providing tribunals with the kind of powers outlined above.**

Contempt and perjury

- 8.38. There is a suggestion in some quarters that tribunals should be given powers comparable to those of courts in dealing with contempt and perjury. While there is not a suggestion that such practices are widespread, the fact remains that the matters dealt with by tribunals can be of considerable significance and it is important to protect the authority of the tribunal. After all, reputations of individuals or employers, future attitudes, actions and performance can all rest on the tribunal's ability to make a decision with as sound an evidential basis as possible. That being so, while the Department currently has no particular view, **the opinions of consultees are sought on whether tribunals should have powers to deal with contempt and perjury and, if so, the form that such powers should take.**

Restricted reporting

- 8.39. The Department has been aware now for some time of a concern that some claimants feel inhibited in going through with a tribunal case for fear of any attendant publicity the tribunal proceedings may attract in relation to their sexual orientation. Currently, tribunal hearings are generally held in public and restrictions on publicity can only be ordered on grounds of national security or where the case involves allegations of sexual misconduct. There are also legislative powers to restrict publicity in relation to certain disability cases. However there is no specific power for tribunals to restrict publicity in relation to the sexual orientation jurisdiction, and indeed no general power to restrict publicity where the tribunal deems it appropriate, on the balance of the evidence, to do so.
- 8.40. The Department does not see any reason, in principle, why sensible controls on the publicity surrounding sensitive cases should not be put in place, although we recognise that in some situations there may be a perceived tension between the right to privacy (Article 8 of the European Convention on Human Rights) and the right to free expression (Article 10). The Department has not reached a firm view on this issue, but is inclined to believe that a general power for tribunals to restrict reporting, albeit only where there are reasonable concerns about the potential adverse impact of publicity, may be an appropriate way forward. **Do you agree? If so, in what circumstances should a tribunal be empowered to consider a restriction? Are there difficulties with this approach?**

Structure of tribunals

- 8.41. So far, we have touched upon some of the powers and functions of tribunals but the use of the term 'tribunals' in itself hides a significant structural fact. The employment tribunal system in Northern Ireland, unlike that in Great Britain, consists of two separate types of tribunal, namely the Fair Employment Tribunal, which deals with discrimination on political or religious grounds, and industrial tribunals which deal with all other branches of employment rights, including other forms of discrimination.
- 8.42. There is little need to rehearse the particular political circumstances of Northern Ireland in the 1970s. These are well known. However, in broad terms, allegations of discrimination on religious or political grounds were rife, and were seen to be a fundamental cause of discontent and grievance within a significant section of the community. In response to this, the Fair Employment Agency (subsequently the Fair Employment Commission) was established in 1976 with an investigatory/enforcement remit. To this machinery, in 1989, was added a judicial function in the form of the Fair Employment Tribunal. Although the Fair Employment Commission was amalgamated following legislative changes in 1998 into the new Equality Commission, the functions of the Fair Employment Tribunal have remained much the same since its inception 20 years ago - to receive and process claims of religious or political discrimination, where settlement is not possible to explore the evidence at a hearing, and to reach a decision based on the evidence.

- 8.43. The Fair Employment Tribunal, from its inception, was closely modelled on industrial tribunals, which had been in existence since their establishment under the Industrial Training (Northern Ireland) Act 1964. The commonalities between ITs and the FET have only grown since 1989, with revisions to the Rules of Procedure governing each tribunal in 2004 and again in 2005 setting out specifically to harmonise the two tribunals' procedures in as far as possible. Today, both tribunals perform essentially the same functions (with a few exceptions), the same claim form (the ET1) is now used to apply to each, both are staffed in large part by the same individuals and both operate from the same offices and are served by the same Secretariat.
- 8.44. Given that this is so, whilst recognising the historical reasons for the existence of the FET, it is important to ask a fundamental question, which has been asked before as part of the Office of the First Minister and deputy First Minister's consultation on a Single Equality Bill³², as to whether there is a continued need for two separate institutions, particularly in today's climate where it is not unusual for a single claim to include multiple jurisdictions, both IT and FET. The FET can constitute itself as an IT to deal with some jurisdictions, notably the other discrimination grounds and unfair dismissal, but not others, and this has been a source of complaint from those having to prepare separate cases based on the same essential facts for two separate tribunals. There is an argument that processes could be streamlined and savings in time, stress and money could be generated were a single Employment Tribunal or 'Employment and Equality Tribunal', to be established, taking on the same functions currently exercised separately by ITs and the FET.
- 8.45. An alternative solution, rather than merging ITs and the FET, is to recast the Fair Employment Tribunal by reconstituting it as an Equality Tribunal, taking within its remit the remaining discrimination jurisdictions currently the responsibility of industrial tribunals (gender, race, disability, sexual orientation and age). Such an institutional reorganisation has some support, but the Department is not convinced that it is the most appropriate solution, as it would separate discrimination and employment rights issues in a manner which is not reflective of workplace grievances, which are not so readily delineated. It has been argued that an Equality Tribunal would very quickly build up expertise in discrimination law and would be better placed than a more generic employment rights body to deal effectively with discrimination cases. However, this presupposes that expertise could not be built up within a single tribunal, perhaps operating a dedicated division dealing with cases having a discrimination element.
- 8.46. A third option, of course, is to retain the status quo. The Department is aware that there are arguments for retaining the FET on the basis that it and its associated equality institutions have performed well in tackling discrimination, that discrimination on religious and political grounds nonetheless continues, and that the FET is a powerful symbol of a commitment to ensure that it will not be tolerated. The merits of this argument are discussed further in the associated equality impact assessment (see **paragraphs 10.6 to 10.9**).

32. See www.ofmdfmi.gov.uk/single-equality-bill for the consultation document and summaries of the responses. The consultation set out a range of alternative structures. This condition document does not consider issues raised in the OFMdfM consultation around goods, facilities and services cases.

- 8.47. There is a possible fourth option. The Northern Ireland Executive in April 2008 endorsed the continuation of a programme of tribunal reform. While this programme is presently focused on unifying the administration of all tribunals, a second stage may focus on reforming the structure of all tribunals including the FET and IT. A new simple two-tier structure could be created into which all existing tribunals would transfer. The first-tier tribunal would hear all claims and an appeal would lie on a point of law to the second-tier tribunal. Whilst there is no timeframe for bringing forward changes along these lines, an early indication of your views on the proposal would be welcome.
- 8.48. There are certainly merits in all of the options presented. The Department, however, is most persuaded by the vision of a single Employment Tribunal (or 'Employment and Equality Tribunal' if that nomenclature is preferable) which, in reality, would carry all the advantages of the second and third options. There is nothing preventing such a tribunal from building up a core of expertise in discrimination law; nor would its establishment necessarily dilute the message that discrimination in whatever form is unacceptable and can be dealt with by the full rigour of the law. All of this can be achieved whilst making the system more unified, efficient and straightforward from the point of view of its users and practitioners. The Department has not yet formed a view on the fourth option, but sees no reason why an Employment Tribunal (and possible appeals mechanism) could not, with appropriate delineations of responsibility, be integrated into a wider unified tribunal system at a later stage.
- 8.49. The Department would be grateful if you could indicate which option you favour and give reasons for your preference.**
- 8.50. More broadly, in reviewing the content of this section as a whole, we would very much welcome any general thoughts you may have on how the tribunal system can be improved.**

Questions

- Q24.** *Should legal aid be available in respect of tribunal hearings and, if so, in what circumstances?*
- 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?*
- Q27.** *What, if any, beneficial changes could be made to time limits which apply in relation to the tribunal process?*
- Q28.** *Would it be desirable to provide a 'fast-track' service for more straightforward claims? If so, how should it operate?*
- Q29.** *Is there scope to strengthen the enforcement of tribunal awards?*

- Q30.** *What steps, if any, can be taken to make improvements in how multiple claims are handled?*
- Q31.** *Should tribunals have the ability to make improvement recommendations? How would you envisage such a system working?*
- Q32.** *Should tribunals be given statutory contempt powers?*
- Q33.** *Should the powers of tribunals to restrict reporting be revised, and if so, in what way?*
- 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.

Appeal

- 8.51. There is one final element of the dispute resolution system which needs to be explored, namely the mechanisms for appealing a legal determination made by a tribunal. Currently, while a tribunal does have power to review its own decisions, a full appeal can only be made to the Court of Appeal, and only on a point of law.
- 8.52. **Figure 5** on **page 31** would appear, on the surface at least, to suggest that the number of appeals in Northern Ireland is too small to warrant a substantive revision of the system. However, it has been suggested to the Department that the current number of appeals is artificially low, and that this has much to do with the cost and stress associated with taking a case all the way to such a high level of the legal system as the Court of Appeal. It is argued that, were a less radical course of action possible, apprehension about the process would be reduced and hence more appeals would be brought forward. Those who are of this mind refer to the existence in Great Britain of the Employment Appeal Tribunal (EAT), to which decisions of Employment Tribunals can be appealed, again on points of law.

- 8.53. The EAT is a Superior Court of Record dealing mainly with appeals against employment tribunal decisions. Appeals must be on a point of law, i.e. they must identify flaws in the legal reasoning of the original decision. The EAT will not normally re-examine issues of fact. In 2007/08, 1,841 applications were received by the EAT, around 1% of the number of Employment Tribunal claims received during the same year³³. In Northern Ireland, the percentage of appeals is broadly comparable³⁴.
- 8.54. An EAT for Northern Ireland, it is thought, would provide a less daunting alternative to the Court of Appeal and would bring to the surface a number of 'latent' appeals which currently are not brought forward not because there is no case to be answered but because the effort and expense required are deemed too great to make further pursuit of the issues worthwhile.
- 8.55. Establishing an entirely new institution in this way would of course have significant resource implications and arguably could be viewed as a disproportionate response given the lack of clear evidence that the number of appeals would rise significantly. **Might there be some way of restructuring the existing appeals process that would render appeals more accessible? If you believe this cannot be done, should an Employment Appeal Tribunal be established, mirroring the arrangements in Great Britain, or would some other solution better suit Northern Ireland's needs?**

Questions

- Q35.** *Should the current appeal process be restructured?*
- Q36.** *Would the introduction of an Employment Appeal Tribunal be an improvement upon the current structure?*

33. 'Reforming, improving, delivering: annual report and accounts 2007-08' (Tribunals Service, July 2008), p. 100.

34. OITFET statistics.

9. Impact assessment

- 9.1. **The Department is under obligations, both statutory and in terms of good practice, to assess the likely impact of its policy proposals against a range of factors. Since the consultation explores a wide range of potential proposals, some of them mutually exclusive, it would not be practicable at this stage to develop a detailed impact assessment which would cover all the potential policy permutations. It suffices now to carry out a ‘screening’ of likely impacts for the various options, to highlight any significant impacts identified, and to seek consultees’ views on how any adverse impacts can be prevented or mitigated. A full impact assessment on the preferred policy options will be conducted following the public consultation.**
- 9.2. Historically of particular relevance to the policy work of this Department have been regulatory impact assessments (RIAs), which are assessments of the impacts on business, and equality impact assessments (EQIAs), carried out in respect of the statutory duty set out in section 75 of the Northern Ireland Act 1998. However, good policy-making requires an assessment of the wider impact of preferred policy options. This chapter therefore sets out to screen the wider potential impacts of the range of policy proposals explored in the consultation document.

Aims of the policy

- 9.3. To provide a context for the assessment, it is important to restate the purpose and underpinning principles established by the consultation steering group for this review.

Purpose

The purpose of the Northern Ireland employment dispute resolution system is to restore good employment relations through the effective, efficient and fair resolution of employment disputes. The arrangements are designed to provide a system of flexible governance and practice that enjoys the confidence of employers, employees, trades unions and third party stakeholders.

Principles

The key principles applying to the dispute resolution system are:

- *promotion of good employment relations*
- *provision of strong employment rights*
- *effective mechanisms to prevent and resolve disputes*
- *resolution of workplace disputes close to their point of origin*
- *enhanced capability of all involved in the prevention and resolution of workplace disputes*

- *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.*

9.4. The consultation document does not make firm proposals for a new dispute resolution system. Instead, it sets out a range of options for change in the following areas:

- information, guidance, advice and the encouragement of best practice;
- informal and formal mechanisms for resolving disputes at work;
- ADR services providing an alternative to a legal remedy;
- access to effectively structured tribunals for all who need it.

9.5. At this stage it is not possible to assess the proposals as an overall package given that no policy options have been determined. However, the Department has carried out an initial screening exercise to ascertain impacts likely to result from individual proposals. The results are set out below.

Equality

9.6. Following a screening exercise, the Department does not consider that any proposal in this document, if taken forward, would be likely to have an adverse impact on equality of opportunity as regards any of the nine section 75 equality groupings.

9.7. This may seem an unusual statement to make given that one of the proposals could involve the removal of a key equality institution, the Fair Employment Tribunal for Northern Ireland. A decision on the future of the FET has, of course, yet to be made, but it is necessary to ask whether the Tribunal's continued existence as a separate institution is necessary.

9.8. From a functional perspective, there is no reason why the existing legislation prohibiting discrimination on grounds of religious belief or political opinion could not be enforced by a unified Employment Tribunal or 'Employment and Equality Tribunal', by an equality division of such a tribunal, or by a new Equality Tribunal, separate from industrial tribunals, dealing with all discrimination issues. A similar rationalisation resulted in the old Fair Employment Commission (and comparable bodies in other areas of discrimination law) being subsumed within what is now the Equality Commission. The Equality Commission is no less vigorous in championing fair employment than were its predecessor bodies. Industrial tribunals are not ineffective in dealing with discrimination on grounds of gender, disability, race, sexual orientation and age. There is no reason to think that an institution taking on the FET's powers would act any less diligently or competently than has the FET.

- 9.9. Arguments for preserving the FET as a separate institution must therefore be derived from an analysis that there is a continuing need to recognise, in institutional form, Northern Ireland's legacy of political and religious discrimination, and that by so doing Government will send out a powerful message that discrimination on these grounds will continue not to be tolerated. However, while this argument is certainly valid, it does not change the Department's assessment that removal of the FET would not produce adverse consequences in equality terms.
- 9.10. On a separate note, the proposals around guidance and advice offer scope for enhancing equality outcomes. This can be achieved by better directing these services towards sectors of the economy disproportionately likely to generate disputes such as manufacturing, construction, hospitality, and transport/communications/utilities.³⁵ Some of these sectors employ significant numbers from particular equality groupings. Women and ethnic minorities are disproportionately found in the hospitality industry, for example, while men and those of differing national origin dominate construction. The provision of guidance and advice targeted at these sectors can be expected to reduce the number of disputes and hence improve equality outcomes for the affected groups.
- 9.11. As regards the future of the statutory workplace dispute resolution procedures, the equality impacts associated with the various options proposed in the consultation are as follows.
- Maintain the status quo: this has the benefit of ensuring that there is a legally supported process allowing employees to raise grievances and requiring employers to follow certain steps in handling those grievances or in disciplining or dismissing an employee. This option mandates a uniformity of treatment that may be less evident if other options are pursued.
 - Retain the grievance procedure: this is associated with some of the benefits described above. However, in removing the disciplinary and dismissal procedure, it will be necessary to guard against the danger of employers following inconsistent, ad hoc and unfair disciplinary processes. If this option is taken forward, a mechanism will need to be in place to ensure that employers continue to operate consistently and fairly. The proposal to revise the LRA's Code of Practice, and link failure to adhere to it to later tribunal outcomes, would help mitigate any negative equality impact. Better guidance, targeted more effectively, would also be of assistance.
 - Retain the disciplinary/dismissal procedure: this would have the advantage of preserving a clear legal requirement for employers to follow particular steps in taking forward disciplinary action or in dismissing an employee. The removal of the grievance procedure would also be likely to reduce the tendency for disputes to be formalised at an early stage. However, removal of the grievance procedure would remove certain requirements from the employer, and create the potential for ad hoc and inconsistent treatment of employees, particularly those from vulnerable groups. Once again, linking a revised LRA Code of Practice to a tribunal outcome and providing better guidance would do much to guard against unintended negative impacts.

35. Hayward, Bruce; Peters, Mark; Rousseau, Nicola; Seeds, Ken, 'Findings from the Survey of Employment Tribunal Applications 2003' (Department of Trade and Industry, Employment Relations Research Series no. 33, August 2004), p. 20. Although the research is from Great Britain, it is reasonable to assume that similar patterns exist in Northern Ireland.

- 9.12. If the statutory procedures are to remain in any form, then simplification clearly would have equality benefits, in that it would make processes more transparent and easy to follow. Quite how this simplification could be achieved in practice remains to be seen, but will be explored following the public consultation, taking account of responses from consultees.
- 9.13. Other key proposals in the document around promoting best practice in the workplace and greater use of ADR do not have negative equality impacts. The Department intends to work with key stakeholders to improve guidance and is seeking ideas on how best to target it so as to ensure maximum compliance. ADR processes are an alternative to the tribunal system but, since the Department does not consider it appropriate for these to be mandatory, employees including those from the nine equality categories will always have the option of seeking a legal remedy.

Human rights and legal aid

- 9.14. The Department has not identified any adverse human rights impacts. The right of an aggrieved person to seek a legal remedy consistent with Article 6 of the European Convention on Human Rights will remain undiluted. While the Department wishes to encourage better employment relations, and believes that disputes can often be resolved without legal recourse, whatever the outcome of the review tribunals will remain an essential and accessible element of Northern Ireland's dispute resolution processes.
- 9.15. One issue that has been of particular concern to some in the past is access to legal aid. As noted in the main discussion of this issue in **paragraphs 9.7 and 9.8**, the Department has not, to date, been persuaded by arguments for funding legal representation at tribunal hearings. Support is already available to individuals in preparing for a hearing, and tribunals are under a duty to do what they can to ensure that represented and unrepresented parties are on an equal footing. However, to ensure that human rights impacts are fully and properly assessed when final policy decisions are made, the Department will consider evidence consultees may wish to advance on this issue.
- 9.16. A separate access to justice issue may arise if there are changes to the ability of a tribunal to require a deposit to be paid as a condition of continuing with a case and to powers relating to the awarding of costs (**paragraphs 9.10 to 9.12**). Although the Department does not have any specific proposals at this stage, the consultation is seeking views on these issues and hence we would welcome any comments you may have on the implications of making adjustments to these systems for access to justice.

Social inclusion

- 9.17. The Department is committed to ensuring that individuals from vulnerable groups understand their employment rights and feel more confident about taking steps to ensure that they are upheld. As noted in the consultation document, voluntary sector bodies who advise individuals on their employment rights have made known to the Department their belief that some claims never go forward as a result of fear or lack of knowledge:

When workers are ignorant of their rights at work, where employers are ignorant of their responsibilities towards their workforce or where workers are flatly denied their employment rights then the existence of employment legislation has little bearing on their experience at work³⁶.

- 9.18. Migrant workers are said to be particularly vulnerable due to language barriers or cultural differences; however, vulnerabilities are more widespread. The Department takes the existence of disputes that are not raised as a result of fear or ignorance - 'latent' disputes - very seriously. Unresolved rights issues at work are psychologically damaging to the individual, bad for productivity, and harm employment relations generally.
- 9.19. The consultation puts forward a number of potential ways in which latent disputes can be addressed, ranging from better information and improved targeting of that information, through enhanced provision of advisory services, to the introduction of a new inspection/enforcement service. As the consultation notes, the Department's preference is for a 'light touch' approach. Given that mechanisms already exist for resolving disputes and enforcing employment rights where necessary, the challenge is to raise awareness of and reduce fears associated with these processes.
- 9.20. During the pre-consultation, it was made clear that many employers, particularly small employers, face significant challenges in keeping themselves up to date with developments in employment law. While we do not seek to minimise the threat posed by rogue employers, we do feel that better publicity and information around employment rights, the development of best practice, provision of accessible advice, and better targeting of information will encourage voluntary compliance. We believe that these measures, if taken forward, will have a positive impact on social inclusion.

Health

- 9.21. It is evident from the research literature, anecdotal accounts, and common-sense analysis, that protracted disputes have negative health impacts. Effects can be immediate, taking the form of stress associated with ongoing conflict, or long-term, with depression being triggered by dismissal, loss of status, failure to find alternative employment, reputational damage and so on.
- 9.22. Many of the proposals set out in the consultation document aim specifically to resolve conflict at an earlier stage and prevent serious escalation of problems. By tackling disputes earlier, the Department envisages that these measures will help avoid some of the negative health impacts outlined above. The health impact of the proposals, therefore, is unambiguously positive.

36. Citizens Advice NI response to the dispute resolution pre-consultation.

Regulatory impact

- 9.23. An attempt has been made here to assess some of the key proposals set out in this consultation in terms of their anticipated impact on business. At this stage, because some of the proposals remain to be fleshed out and can only be properly understood when placed within the context of a revised and more integrated system, specific cost estimates are difficult. Where possible, however, estimates have been provided based on calculations made in respect of the new systems which have been set in place in Great Britain.

Developing and disseminating best practice

- 9.24. The consultation proposes developing, with key employer, trade union, public and voluntary sector bodies, jointly-branded guidance that will enjoy widespread confidence and ‘buy-in’ across the employment field. A further proposal has been to tailor guidance, or its delivery, to meet the needs of specific audiences, whether particular sectors (for example construction) or particular types of business (for instance small employers).
- 9.25. Similar guidance proposals in Great Britain were costed at approximately £0.5m. A pro rata figure for Northern Ireland would be in the region of £12,500; however, this fails to take account of the economies of scale that can be achieved in producing guidance in a large jurisdiction such as Great Britain. Factoring in the need for effective publicity and the targeting of information to meet the needs of particular audiences, including small employers, it is probable that developing and making available effective guidance in Northern Ireland could cost in the region of £100,000-£150,000 in the first year, with much smaller recurring expenditure thereafter. Benefits that would accrue in terms of disputes avoided, or resolved early, are difficult to quantify in the absence, at this time, of a preferred model that will emerge from the review.
- 9.26. The consultation makes clear the Department’s ambition to develop best practice within the public sector, starting with initial pilot exercises. The aim will be to achieve this goal within existing resources; therefore no additional expenditure is foreseen at this point.
- 9.27. The document also raises the possibility of making available more effective training for first line managers in dealing with disputes in a way that seeks to prevent problems from escalating. Reference is made to the needs of small employers, who lack HR/personnel functions of their own, and there is discussion of the potential need for tailored support or assistance. The document also discusses the merits of introducing an accreditation scheme or mark of excellence designed to demonstrate employers’ compliance with best practice standards.
- 9.28. Again, we have not developed specific proposals at this time in relation to the delivery of these best practice options but intend to explore possibilities during the consultation period. It is envisaged that the cost of developing and implementing these measures would be offset by the benefits they would bring in terms of reduced disputes and a consequent fall in associated costs. If the public consultation demonstrates that some or all of these solutions are desirable, practicable and represent good value for money, and it is decided to take them forward, a more detailed regulatory impact assessment will be provided.

- 9.29. The consultation explores the possibility of introducing new inspection/enforcement machinery designed to ensure employers' compliance with their legal responsibilities. The introduction of such a system would carry significant setup and running costs by comparison to the alternative guidance and best practice led approach discussed above. More significantly still, it would impose a substantial new regulatory burden on employers. The Department does not believe that there is sufficient evidence to justify such a significant departure given that there are less costly and less interventionist methods of achieving voluntary compliance.

Statutory dispute resolution procedures

- 9.30. The consultation proposes three options in relation to the statutory dispute resolution procedures: retention, modification and repeal. In proposing modification, it further suggests retaining the grievance procedure only, retaining the disciplinary and dismissal procedure only, and taking steps to simplify the procedures.
- 9.31. Retention of the procedures is expected to carry no additional costs or savings. Estimating the impact of the procedures' repeal is also relatively straightforward if the Great Britain assumptions are applied. Adapting these for Northern Ireland produces a small saving of £25,000 per annum to Government and a much more substantial saving to business of around £3m per annum. It is more difficult to quantify the regulatory impact of modifying the procedures. The Department does not have information indicating the relative proportions of grievances and disciplinary actions taken forward in Northern Ireland's workplaces, so for the purposes of this assessment it is assumed that half of the time taken up by the procedures relates to grievances and half relates to disciplinary or dismissal actions. It is further assumed that simplifying the procedures would generate savings in administration amounting to around 10%. That being so, retention of only one of the procedures and repeal of the other, combined with simplification, would produce a saving to business of around £1.35m per annum³⁷.

Alternative dispute resolution

- 9.32. The Department has brought forward for discussion a wide range of possibilities with regard to ADR. The consultation suggests that there may be a need for greater use of third-party ADR in the workplace, with a recognised standard for mediators to engender confidence in their neutrality, competence and good judgement. Establishing quality standards and encouraging uptake of mediation would carry as yet unquantified costs but is likely to result in the earlier resolution of more disputes at work, saving money and reducing damage to employment relations.

37. The Great Britain assumptions in this sub-section are drawn from 'Success at work: resolving disputes in the workplace - a consultation' (BERR, March 2007). Calculations are on the standard one-fortieth basis that is often used in applying Great Britain estimates to Northern Ireland.

- 9.33. The consultation refers also to the potential for greater use of pre-claim conciliation by the LRA, through referrals from an enhanced advice line as is now the case in Great Britain. Initial feedback from the GB pilots has been very encouraging. If similar steps were to be taken here, we could expect to see the costs and benefits outlined in Figure 10.

Figure 10: Costs and benefits of mirroring ADR changes in Great Britain³⁸

	Year 1	Year 2	Year 3
Expansion of the LRA's advisory role through its helpline			
Exchequer			
Setup costs	£140,000	-	-
Running costs	-	£140,000	£140,000
Benefits - more early resolution	-	£242,500	£242,500
Employers			
Benefits - more early resolution	-	£320,000	£320,000
Employees			
Benefits - more early resolution	-	£132,500	£132,500
Greater use of pre-claim conciliation			
Exchequer			
Setup costs	£10,000	-	-
Running costs	-	£250,000	£250,000
Benefits - more early resolution	-	£95,000	£95,000
Employers			
Benefits - more early resolution	-	£345,000	£345,000
Employees			
Benefits - more early resolution	-	£95,000	£95,000

- 9.34. The Department would, of course, aim to manage down some of these costs by refocusing existing LRA resources.

38. The source material for the GB calculations is 'Employment Bill: impact assessments' (BERR, February 2008). Calculations are again on a one-fortieth basis. Where the GB assessment provides minimum and maximum figures, relevant NI figures have been calculated and an average of these has been taken.

- 9.35. Whether the advice provided should be neutral in tone or, instead, should set out an opinion on the best way forward for the individual raising the query remains a matter for consultees to consider. Clearly, if a more directive approach is preferred, this would have cost implications in respect of the training that would need to be provided to helpline staff, and could potentially carry reputational risks if the neutrality of the LRA was thought to be compromised. On the benefits side, it may be that directive advice would encourage parties to have a more realistic appreciation of their dispute, and would make them less likely to pursue unmeritorious claims or defences all the way to tribunal, thereby saving expense and associated stress. A similar analysis can be made in relation to an early neutral evaluation service.
- 9.36. Further options discussed in the consultation include an expanded arbitration service and a kind of mediation-arbitration ('med-arb') model comparable in some ways to the Rights Commissioner Service in the Republic of Ireland. Any one of these options, and still more a combination of them, would represent a significant departure from existing systems and would undoubtedly carry substantial setup and running costs which it is not possible to estimate at this early stage, where a detailed model has not been developed. If a decision is ultimately made to take any of these options forward, details of the relevant processes as well as associated costings will be worked out as part of a final regulatory impact assessment.

Legal remedy

- 9.37. One of the options set out in the consultation document is a new claims process which could involve claims going, in the first instance, to the LRA, possibly in the form of a relatively informal letter. LRA staff would make a decision on whether the case was suitable for ADR. If not, or if ADR failed or any stay in tribunal time limits to allow for ADR expired without resolution being achieved, the claim would be passed to OITFET (and, if it took the form of a letter, OITFET might require completion of a more detailed pro forma at this point).
- 9.38. Inevitably significant Exchequer costs would attach to this process, costs which would only be mitigated if significantly more disputes were settled by the LRA and the workload of the OITFET Secretariat was consequently reduced. Employers would see a reduction in the costs they would otherwise incur in pursuing a tribunal claim, including preparation time, legal representation, time spent away from core business, and so on. Employees would see similar savings. The regulatory impact of this measure is therefore dependent on the expected effectiveness of earlier intervention by the LRA in reducing the number of disputes going to tribunal.
- 9.39. Amongst the more potentially costly options is the extension of legal aid to cover tribunal hearings. Although the Department has reservations about the proposal, we would welcome views on what the criteria for assistance should be, on the benefits this would bring, and on the likely cost.

- 9.40. Further options for change which might at first glance seem costly relate to the potential replacement of the existing industrial/Fair Employment Tribunal arrangements with one of the following:
- *a single Employment Tribunal, combining the existing functions of industrial tribunals and the Fair Employment Tribunal*
 - *a new Equality Tribunal, taking on the functions of the FET and the discrimination jurisdictions of ITs. This tribunal would operate alongside industrial tribunals shorn of their discrimination remit.*
- 9.41. Clearly maintenance of the status quo would have a neutral effect on Government and business, as it would generate no additional costs or savings. Replacing the FET with an Equality Tribunal and transferring industrial tribunals' equality functions to this new body could also be achieved at fairly minimal cost as the current ITs and FET work from the same premises and are operated by the same Secretariat and (in many cases) judiciary. The other option, an Employment Tribunal (potentially with an equality division, would carry similar, fairly small, setup costs but would lead to the additional benefit of savings in judicial and administrative time arising from the ability to deal with fair employment and all other jurisdictions in the one set of proceedings. From a cost point of view, the establishment of a single Employment Tribunal is the most favourable course of action over the longer term.
- 9.42. Establishing an Employment Appeal Tribunal, by contrast, would increase costs to Government over time as it would require new institutional arrangements including, most significantly, the deployment and training of (albeit modest) additional administrative and judicial personnel. Although the number of appeals is currently small, there could potentially be an increase in appeals if a less daunting legal process was set in place. As with legal aid, the monetary cost of such arrangements must be measured against the potential benefits in terms of access to justice, if it is accepted that the existing appeals figures may be artificially low.
- 9.43. We have not considered here a further option mentioned in the body of the consultation, namely the creation of a two-tier tribunal service dealing with employment law as one aspect of its overall business. This approach would involve cases being heard at a first tier tribunal and appeals at the second. This would require an extensive costing exercise in its own right and would have regulatory implications wider than those discussed here.

Other impacts

- 9.44. Aside from the impacts discussed above in terms of equality, legal aid, human rights, social need, health and impact on business, the Department has screened the proposals in relation to crime, community safety and victims, rural, economic and environmental impact and State Aid Compliance and has identified no issues of significance.
- 9.45. The Department invites comments on the impacts identified in this chapter and on any of the proposals raised in the consultation document which have not been specifically mentioned here.**

10. Annex A: Steering group terms of reference

- *Monitor progress during the pre-consultation phase.*
- *Following the pre-consultation establish a set of guiding principles that will provide a framework for the full consultation process.*
- *Advise on best practice examples and evidence for inclusion in the consultation document.*
- *Work co-operatively to develop policy options and scenarios for inclusion in the document.*
- *Assist in determining how best to target the full public consultation, including suggestions as to how it can be made accessible.*
- *Monitor a qualitative research project to measure the attitudes of a sample of employers, employees, union and legal representatives to existing dispute resolution arrangements.*
- *Quality assure the draft public consultation document prior to release.*
- *Facilitate constructive public debate as part of the consultation process e.g. through consultation events, press releases, etc.*
- *Summarise the main views/themes arising from the consultation process.*

11. Annex B: Research findings

11.1. The Department commissioned a consultant, QCG, “to conduct a research project to measure attitudes towards, and experiences of resolving employment rights disputes in Northern Ireland.” The research consisted of qualitative face-to-face interviews with a small sample of claimants, respondents and representatives who had been to a tribunal in recent years. The findings are summarised briefly below.

- *The statutory dispute resolution procedures, introduced in Northern Ireland on 3 April 2005, are generally not perceived to have helped in resolving workplace disputes.*
- *Employees in the sample tended to feel that internal workplace dispute resolution processes are too slow and are not being used properly. Awareness of formal policy or procedures is generally low. In addition, employees often feel that managers who are responsible for hearing internal grievances are not impartial. Finally, there is a perception that employers sometimes agree to resolution actions but subsequently fail to follow them through.*
- *Claimants who were supported by a third party in taking their complaint forward felt more confident in pursuing the matter and tended to find outcomes more satisfactory.*
- *The Labour Relations Agency is well regarded and there are those who believe that its role and powers should be augmented. However, there is some confusion around the varying roles of the bodies involved in dispute resolution e.g. OITFET, the LRA and the Equality Commission.*
- *Alternative dispute resolution is also well regarded, although there is again confusion as to some of the terminology used, including “mediation” and “conciliation”.*
- *The perceived adversarial nature of tribunals is seen as counter-productive. There is a view that the system does not make it straightforward for employees to bring a tribunal claim or for employers to mount an effective defence. Bad experiences have led some employers to assert that current systems discourage entrepreneurship and job creation.*

11.2. The full report can be found on the Department’s web-site at www.delni.gov.uk/erresearch.

12. Annex C: Pre-consultation

Membership of the dispute resolution review steering group

- *Carolyn Brown, Federation of Small Businesses*
- *Tom Evans, Department for Employment and Learning (Chair)*
- *Eileen Lavery, Equality Commission for Northern Ireland*
- *Eugene McGlone, Northern Ireland Committee, Irish Congress of Trade Unions*
- *Bill Patterson, Labour Relations Agency*
- *Deirdre Stewart, CBI Northern Ireland*

Stakeholders involved in the pre-consultation

- *CBI Northern Ireland*
- *Citizens Advice*
- *Engineering Employers Federation*
- *Equality Commission for Northern Ireland*
- *Law Centre Northern Ireland*
- *Federation of Small Businesses*
- *Labour Relations Agency*
- *Local Government Staff Commission*
- *Northern Ireland Committee, Irish Congress of Trade Unions*
- *Northern Ireland Housing Executive*
- *Office of Industrial Tribunals and the Fair Employment Tribunal*
- *Legal Expert Panel (Rosemary Connolly, Mark McEvoy, Anne McKernan, John O'Neill, Brian Speers)*
- *Trade Union Expert Panel (Brian Campfield, Maurice Cunningham, Kevin Doherty, Lily Kerr, David McMurray, Peter Macklin)*

- *Voluntary/advisory sector Expert Panel (a gathering of representatives from advisory bodies facilitated by Law Centre Northern Ireland and including representation from Citizens Advice, Advice Northern Ireland and the Belfast Unemployed Resource Centre)*
- *Human Resources Expert Panel (HR Directors from the Department for Employment and Learning, Department of Finance and Personnel, the Central Personnel Group and the Establishment Officers forum of the Northern Ireland Civil Service, Bombardier, Invest Northern Ireland and the University of Ulster).*

Recipients of this consultation document

- *A full list of recipients of this consultation can be found on the Departmental website at www.delni.gov.uk/resolvingdisputes.*

Notes

Notes

people:skills:jobs:



Department for
**Employment
and Learning**
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