Northern Ireland
Assembly

COMMITTEE FOR EMPLOYMENT AND LEARNING

OFFICIAL REPORT (Hansard)

Employment (No. 2) Bill

10 November 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mrs Dolores Kelly (Chairperson)
Mr Jonathan Bell (Deputy Chairperson)
Mr Sydney Anderson
Mr Paul Butler
Rev Dr Robert Coulter
Mr Chris Lyttle
Mr David McClarty
Mrs Claire McGill
Mr Pat Ramsey
Mr Peter Weir

Witnesses:

Ms Penny Holloway	)	
Mr Jim McCusker	)	Labour Relations Agency
Mr Gordon Parkes	)	
Mr Bill Patterson	)	
Mr Tom Evans	)	
Ms June Ingram	)	Department for Employment and Learning
Mr Alan Scott	)	

The Chairperson (Mrs D Kelly):

You are very welcome to the Committee meeting, and we look forward to hearing what you have to say. The normal format is that you should give us an overview of your briefing, which members have received in advance, for about five or 10 minutes, and then make yourselves available to take questions or offer any points of clarification raised by members. Departmental staff will also be in attendance, and they will follow your contribution. Thank you for coming along.

Mr Jim McCusker (Labour Relations Agency):

Thank you very much. We are happy that you have given us the opportunity to speak to you this morning. I will say a few things by way of background to the Labour Relations Agency (LRA) and what we do, and then deal with some of the points arising from the review of dispute resolution.

As many of you know, the general duty of the agency as laid down in statute is to promote the improvement of employment relations. We do that in two ways: prevention and cure. On the prevention side, we run a helpline, which took over 30,000 calls last year, leading to 50,000 inquiries. We also run seminars and workshops that are very popular with microbusinesses, which seem to be very appreciative of the services that we provide.

On the cure side, we have the tribunal cases. Last year, there were 16,000 such cases, 9,000 of which were Civil Service equal pay and sex discrimination cases. Apart from those, the underlying figure was around 7,000 cases, which was an increase from the figure of around 5,000 from the previous year. Almost half of the cases are settled by conciliation. Another 40% are withdrawn during the conciliation process. In the last financial year, only 14% of cases went to tribunals. In that year, we also had around 40 arbitration cases of a non-statutory nature, which were mainly in the public sector, and around 27 collective disputes.

We welcome most of the aspects of the review, but we have five areas of concern, which we have detailed in the written submission. If you will forgive me, I will concentrate on those five areas. That does not necessarily mean that we are unhappy about the general outcome of the review; it just so happens that there are difficulties in those areas.

The first area of concern is around clauses 8 and 12. As members are probably aware, we

currently have a duty to conciliate even if no claim has been lodged. However, a claim could be lodged on the basis of the alleged infringement of right, and the proposal in the Bill is to change that duty to conciliate to a power to conciliate. We have four reasons for that concern. First, we believe that it sends out the wrong signal; it is generally agreed that we want to promote more pre-claim conciliation, and that clause seems to reduce its importance. Secondly, there is a resource implication. If there is no statutory duty, the argument is that it does not necessarily figure very highly in taking account of the allocation of resources. The third reason is that the agency already has a degree of discretion in that our general duty to promote employment relations cannot be prejudiced by specific statutory responsibilities. That is a judgement of the board of the agency. The fourth area of concern is that the provision could easily be circumvented. If there was a situation pre-claim, and we were to refuse conciliation, the obvious thing to do, if the parties want conciliation, is to put in a claim, which would mean that we are back where we started.

Our second area of concern is that we think that there should be an appeal against statutory arbitration. Currently, statutory arbitration is limited to unfair dismissal and flexible working. We welcome the proposal to extend the jurisdiction for statutory arbitration to all jurisdictions but, under the present scheme if someone chooses the arbitration route they give up the right of appeal. Indications are that that is not something that people are prepared to do. For example, over the past four years, there were 1,300 cases that were eligible for the statutory arbitration route, which was chosen once, in 2006-07. We are concerned that the area of statutory arbitration may be expanded, but it could become a dead letter. In support of that, the Department's public consultation document talked about drawing on the lessons of the Rights Commissioner system in the Irish Republic. One of the lessons we drew from that is that there is a right of appeal, and that makes the scheme more attractive.

The third area of concern is the primacy of alternative dispute resolution (ADR). We all agree that there is a need to take up alternative dispute resolution, but we are concerned that it should be actively encouraged. Our suggestion is that, at the stage at which a case comes before the tribunal for a case-management discussion immediately prior to a tribunal hearing, the tribunal should ask whether alternative dispute resolution has been used and, if not, why not.

The fourth area of concern is the question of confidentiality. That is essential if you are going to engage in mediation. There is currently a provision in the legislation that covers conciliation

and gives protection to the staff of the agency who are engaged in conciliation. The two areas of concern are whether that term covers mediation, and more precisely, what in modern parlance is called relational mediation. It is a difficult concept. If, for example, the chief executive and the head of HR in a firm fall out, there is no dispute, so there is no statutory right at issue, but there could be an employment relations situation that needs to be attended to. That type of situation does not appear to be covered by the protection in the legislation. We are in ongoing discussions with the Department on that area at the moment.

The fifth area of concern, members will not be surprised to learn, is that of resources. The bulk of our resources are used on our helpline and our conciliation service. In the half-year to the end of September, our helpline was losing 30% of its calls because people did not get through. Fortunately, for September and October, we have been able to reduce that figure to about 15% or 16%, which is much better than our earlier performance. It is a very demand-intensive and popular service.

The other major area is the conciliation service, which is very labour intensive. We devote a lot of resources to it. The demand for that service is led by whatever happens in the economy at large. Recessions generally give rise to more complaints about rights. We are concerned about resource implications. To put that in context, our budget is about 0·5% of the Department's budget and about half that of the Equality Commission. We would say that we are not a very expensive organisation.

I hope that those remarks are of help to the Committee. I forgot to introduce my colleagues, who are Bill Patterson, our chief executive, Gordon Parkes, a board member and Penny Holloway, who is our director of conciliation.

The Chairperson:

Thank you very much. Jim, I want to pick up on the call handling problem; you said that you were losing 30% of calls. As a former member of the Policing Board, I am aware that the police had a similar problem. How many of the calls are repeat calls because of the failure to get through? What analysis have you carried out? Is it really a resource issue or is it about the types of call handling contracts or management systems that you have in place?

Mr McCusker:

The short answer is that we do not know. The system that we have does not capture whether people have come back for a second time. All that we can say is that the rate of satisfaction with the helpline seems to be high. We do not receive an awful lot of complaints that people have to call five or six times to get through. We assume that a fair number of the 30% who do not get through do so the second time. It has been reduced to 15% or 16%. That may be as low as we are likely to get it.

Mr Bill Patterson (Labour Relations Agency):

At the moment, we run the service from 9.00 am to 5.00 pm. We are looking at running the service from 8.00 am to 6.00 pm, with much more staff flexibility, using a shift pattern. We will see what happens with that, and whether people will call between 8.00 am and 9.00 am and between 5.00 pm and 6.00 pm. The Advisory, Conciliation and Arbitration Service (ACAS), our colleagues in Great Britain, introduced a helpline that was open on Saturday mornings, but they said that people did not call on Saturdays because it was not in the culture. We are looking to expand the service to between 8.00 am and 6.00 pm. We might even settle at 15% lost calls because, as Mr McCusker said, that might be the natural balance of things. We are trying to get that even lower and provide a more flexible service. We are looking to improve our technology to potentially capture the information that you were talking about.

The Chairperson:

It may be useful to have that information. There are lessons to be learned elsewhere and it would do no harm to speak to people who have carried out that level of analysis and evaluation and have sought to make improvements. Peter Weir was a member of the Policing Board when I was a member, and we talked about the PSNI's call handling service. That is an ongoing issue, but I know that the Policing Board had looked at some examples of good practice, and you might want to ask them for guidance on that issue.

I would certainly welcome a flexible approach, because people are not working from nine to five any more, and it is helpful for people to be able to get through in the evening. I would like to tease out the confidentiality aspect that you spoke about. I know that there is a confidentiality clause in the Bill to protect some people who are more at risk from stereotyping prejudice than other sections of our community — people from the gay and lesbian sector, for example.

Ms Penny Holloway (Labour Relations Agency):

The issue for us is that the current legislation facilitates confidentiality for the process of conciliation so that, when employers or workers go to the tribunal, the work that was undertaken during the conciliation process is confidential and is not explained or put as evidence to the tribunal. That is really important, because it builds trust in the process. If people thought that what they were saying would be presented to a tribunal if they ended up there, they would probably not go through conciliation.

What we have been pressing for is that, if we are going to expand our other dispute-resolution services, for example, mediation, the board believes that that level of confidentiality should also apply to those other dispute-resolution processes. At the moment, the legislation just refers to conciliation, but that is not defined anywhere. We are currently engaged in discussions with the Departments and their solicitors to see how we can best ensure that the services covering dispute resolution, including mediation, fall within that confidentiality process.

The Chairperson:

Thanks for that explanation. The understanding of the Committee is that this is the first bite of the cherry in relation to improving the legislation, and we hope that the Department will bring forward, sooner rather than later, further regulations and legislation to improve it. However, if you have any particular suggested amendments, clauses or guidance, you can send them to the Committee during its consideration of the Bill. If you forward them whenever they are available, we will be happy to have a look at them.

Ms Holloway:

Thank you very much; we welcome that opportunity.

Mr P Ramsey:

Good morning Jim; you are all very welcome. Your organisation does an incredible amount of work — 16,000 cases. You mentioned a figure of 14% of that — just over 2,000. Is that how many cases formally went to tribunal? Was that workload unusual because of the equal-pay claims? Was that a one-off during that transition period? We had a huge debate up here about equal pay. You are not going to suggest that we will have a continuation of those types of appeal during the incoming term?

Mr McCusker:

It so happened that there were 16,000 cases in the last financial year, and 9,000 of those were in the Civil Service. There was an awful lot of work involved in working with the Civil Service to resolve and sign those cases off. What we are trying to get at is the long-term trend. If we take the 9,000 out, there were 7,000 cases, compared to 5,000 cases the year before. The trend seems to be upward. That is consistent with conventional wisdom that people lodge more cases during a recession.

Mr P Ramsey:

I am concerned about the appeal mechanism and having due process. If other places have that in place, I will be interested in any amendments to the Bill on the appeal process. I want to ask a question about your resources. You talked about the resource implication for the organisation overall, and you also spoke about 0·5% of the Department's budget. Will you outline to us what that is, how it is spent, where there are pressures on it, whether there has been an overspend and where it fits into your plans overall?

On the final page of your balance sheet, you talk about capital works of £125,000 for the building. Will you give us a wee bit of information about your budget and about whether there was overspend or underspend on that? Which areas of your work are under pressure?

Mr McCusker:

The overall budget is just over £3 million. As I said, around 70% to 80% of that is spent on staff and staff-related expenditure, such as premises and so on. The element spent on non-staff expenditure is quite small. The pressures are really on the conciliation side, to which Penny referred. Conciliation is very labour intensive and mediation is even more so. Everybody says that we should have more pre-claim conciliation and more mediation, but both are very labour intensive. That is where the pressure is.

We have also had problems with our IT system. Our advisers have told us that it is clapped out, and the auditors have raised warning signals about that, and as have others. We are trying to spend a bit of money to bring it up to date, because it is in grave need of remedial action. In the past financial year, we have handed back about £200,000. That was largely because, in the present climate, we felt that we should do only minimal work on our premises even though we had planned to improve them. Nevertheless, we did not end up too badly in the past financial

year.

Mr P Ramsey:

Which heading did the £200,000 underspend come under?

Mr Patterson:

The underspend was in accommodation. We ran a project that found that our present premises facilitated our services in around 1997 or so. We are way past that now. We need a greater degree of flexibility from our accommodation. We have added new accommodation to our suite. However, we needed to internally facilitate more and bigger rooms for workshops and so on, so we went ahead and did the spec for that. It took some time to get the estimate. It came through at the end of the day at £1 million, which was not on. The Department indicated that it would not be on for £500,000, never mind £1 million. We obviously kept money over to spend on accommodation, and we have progressed three small projects at around £18,000 each. However, that is all that we have done; we gave up the rest of the money. We carried money over, but the need for that did not materialise because we did not get approval to continue with the accommodation programme, as we had first envisaged.

Mr P Ramsey:

Therefore, that end of things could not have been used to try to modernise your IT provision?

Mr Patterson:

It is all about timing. It takes quite a period of time to generate a programme to change and to spend.

The Chairperson:

I hope that it is not like e-PIC, which ran £12 million over budget. Do you have flexibility in your budget to move money around? That is what Mr Ramsey is getting at.

Mr McCusker:

We have some flexibility. One of the problems with the IT system is that we would ideally like to integrate that with the tribunal system. However, there have been all sorts of complications. We are getting warning signals that we need to something urgently, so we think that we will have to go ahead and just create our own system. Hopefully, we can link that with the others at a later

date.

Ms Holloway:

We were looking towards ACAS, because it has been developing a system for about eight or nine years, and its system would integrate with the tribunal system. Unfortunately, that has run into an enormous number of problems. An added complication is the fact that the tribunal system is going to be moving into the Department of Justice.

Our system is quite critical. It was a bespoke system. Our suppliers cannot support it any more, and we have a critical need to move into a new system. We would like any new system to be flexible enough to be able to do some work with the tribunals system if the occasion arises in the future, but they are just not at the same place that we are at the moment in having a joint system. It is not a possibility in the near future, and our need is absolutely now.

Mr Bell:

What did you consider to be the fault in the system prior to this legislation?

Mr McCusker:

I think that we are all agreed that we should do more pre-claims and there has been an increasing trend in that. We would like to do more in mediation. The barrier to that is the question of confidentiality. We would also like to encourage more statutory arbitration, and the barrier to that is the lack of an appeal against an arbitrator's award. Those are two of the main barriers in the present arrangements.

Mr Bell:

Have you thought through any specific amendments to the legislation?

Mr McCusker:

No. We are taking legal advice on the confidentiality aspect, as is the Department. There is a complicated question as to what precise form any amendments to the legislation should take. Our view is that there should be an appeal, and that it should be the Industrial Court. There are questions as to whether it is necessary to have legislation to provide for that. I think that it is possible for us to design an appeal mechanism, but I am not sure about the legislation covering the Industrial Court. That legislation is quite ancient; its origins are back in 1919. You would

need to go back through that legislation. We have not formulated any amendments, and we have been in discussion with the Department on the issue.

Mrs McGill:

You are all welcome. Can you take me through the reasons why you want clauses 8 and 12 removed? You started your presentation with that, and I heard what you said, but I just want you to take me through it again. I have the Bill in front of me.

Mr McCusker:

There are really four reasons. First, we think it sends the wrong signal. We are all agreed that we should encourage more pre-claim conciliation and yet, in the pre-claim area, the Bill removes a duty to conciliate and replaces it with a power to conciliate. The second reason is the resource implication. If we are arguing about resources, there is an implication that, perhaps not the Department of Employment and Learning but possibly the Department of Finance and Personnel might say that if something is not a duty, it is not important to resource it. The third area was the fact that we already have some discretion. The legislation states that our general duty is to promote the improvement of employment relations. It goes on to list specific statutory duties, but says that they cannot prejudice the generality of the general duty. There is some discretion there already. The fourth point is, as I said, that it can be circumvented. If we refuse conciliation and it is a statutory right that is at issue, a party can lodge a claim, and then we are back where we started in the duty area again.

Mrs McGill:

Are you saying that if clauses 8 and 12 were to remain in the legislation as currently drafted that the Labour Relations Agency would need more resourcing?

Mr McCusker:

Our view is that clauses 8 and 12 are, to some extent, unnecessary. We do not think that there is a need to change the existing legislation. I think it will also help us in arguing our corner about resources if it remained a duty to conciliate prior to claims being lodged.

Mrs McGill:

Perhaps I do not understand. Let me quote this from your paper:

"The agency is strongly of the view that that Clauses 8 and 12 significantly reduce the grounds on which resources could

be secured to effectively deal with the DEL Policy Proposals on promoting pre-claim conciliation."

At the minute, do you have enough resourcing to deal with what you have to deal with, or do you have to refer fairly regularly to, for example, the Law Centre and other agencies? Is that the case?

The Chairperson:

We have some difficulty understanding this point. Bearing in mind that you have underspent by over £200,000, and there is flexibility within your budget management to move money around, I for one am struggling with the argument that you are under-resourced, as I am sure are other members.

Mr McCusker:

The £200,000 was earmarked for a purpose that did not materialise, and we could not spend it on the IT system because we were not at the stage in the development of the specifications where we could spend it. There was a time mismatch. As for the resource implications in clauses 8 and 12, pre-claim conciliation is very resource intensive. We are coping at the moment, and we think that if it is made discretionary, some people in certain areas of government will say that we do not need to be resourced to deal with a discretionary issue. I think we should all be agreed that we need more pre-claim conciliation, and we need to be resourced to do that.

The Chairperson:

Will you perhaps answer the query raised by Mrs McGill about referrals to other agencies such as the Law Centre and so on?

Mr Patterson:

The agency does not have the flexibility to vire money from its general budget, if you can call it that, to its staffing budget. That is not allowed under our financial memorandum. We have to have approval from DEL and DFP to make any adjustment to our staffing establishment and budget. At the moment, the overall budget is £3·74 million, of which £2·2 million is for staffing. We do not have the flexibility to transfer that £200,000 into staffing, and in any case, staffing is a long-term commitment.

Secondly, we have not made any reference to the Law Society or any other source whatsoever to facilitate the work that we have. The point about the pre-claim piece is that DEL and the LRA

have yet to start seriously promoting pre-claim. We are not in a position to sit here now and say that we will get 10 extra cases or 1,000 extra cases, but six months or 12 months down the line, if the legislation remains as it is, the agency will argue that it is our duty to deal with the increase in those cases. We cannot simply set some aside and deal with them later; we have to address them there and then. That is why we are saying that the change from a duty to a power dilutes the weight of our argument for additional resources for individual conciliation.

The Chairperson:

Paul is waiting now, so —

Mrs McGill:

I think there are a number of issues that need further exploration.

The Chairperson:

We will be meeting officials after this evidence session.

Mrs McGill:

I just want to make the point specifically about resourcing and the climate that we are in, and will be in, about the need for all of this. I will not go into the business of the explanatory and financial memorandum (EFM) and how the wording of that prompted me to ask about resourcing in the first instance. However, the Department has re-worded the explanatory and financial memorandum; can we ask about that?

The Chairperson:

I am conscious that time is rolling on, but we can send a copy of the wording to the LRA after the Committee meeting.

Mrs McGill:

Given that representatives of the LRA are here, can we share it with them now?

The Chairperson:

I do not see why we cannot share it with them now, but time is moving on very quickly. This session was to take around half an hour; departmental officials are waiting and some members have other meetings to go to. That is the difficulty. We can share it with you, but we may not

want you to comment right away. The best approach is for you to get back to us.

The Committee Clerk:

I flagged up to the LRA the fact that the financial and explanatory memorandum needed to be changed and modified and that members would be seeking to agree that. I have not received any alternative wording; that is the wording that members have effectively agreed to this morning.

The Chairperson:

No doubt they can come back to us. We will move on to Paul Butler in the meantime, because I know that he has another meeting to get to.

Mr Butler:

Thank you for your presentation. I know there are some amendments; you have probably only got them in front of you. In relation to clauses 8 and 10, I am trying to quantify the resources issue, because I am not quite sure. You mentioned a figure of £3·74 million — is that your overall budget? It seems to be about resource implications — *[Interruption.]*

Mr Bell:

Just ignore the dentist next door.

Mr Butler:

Do you have figures for what the resources and the implications of removing clauses 8 and 12 would be?

Mr McCusker:

Our case on clauses 8 and 12 is not just a question of resources. First, it is about what signal we are sending out to people about their claim. Then there is the question of whether they are necessary. We do not think that the existing legislation needs to be amended in that respect to facilitate more pre-claim conciliation. The difficulty is that, if we are going to have more pre-claim conciliation, how and where do we promote it? There is a resource implication of that, which we would have to discuss with the Department.

Mr Butler:

What would be the difference from now? That is what I am trying to get at. If the legislation

does not change, I take it that you are saying that there is a resource implication. There is a resource implication for the budgets of all organisations.

Ms Holloway:

It might be helpful if I talk about how ACAS dealt with it, because it was a change that was made in ACAS. If there is a duty to conciliate, we absolutely must conciliate. If that duty is changed to a power, you have a choice as to whether to conciliate or not, depending on your resources.

The Chairperson:

To get this clear, it does not only depend on your resources. My understanding is that some cases were never going to be conciliated, and it allows them to move more swiftly up the line. That is my interpretation.

Ms Holloway:

Pre-claim conciliation tries to target those disputants who have not yet made a claim, when the dispute is at a much earlier stage. We identify callers to the helpline and ask whether they are interested in pre-claim conciliation. They have not got to the point of considering a formal grievance or going to tribunal. It is picking up the dispute at a much earlier stage. ACAS has found that the helpline has increased their referrals for pre-claim conciliation. To deal with the change from a duty to a power, ACAS has identified a priority list, depending on its resource and whether there is an increase or not. ACAS has seen an increase in pre-conciliation claims, and if it does not have the resource it has a list of priorities, so perhaps it will go for discrimination claims or high-value claims first of all.

Pre-claim conciliation disputes are different to those where the claims have gone in. Once a claim has gone in, there is of course a duty to conciliate, but the pre-claim conciliations try to target those individuals before they reach the point of putting in a claim. It could be a different market. We also do it for redundancies, for example and, in relation to the Civil Service equal-pay claims, we undertook that service for those who were going to benefit from the settlement but had not actually made claims to the tribunal.

The Chairperson:

Are you happy enough, Paul?

Mr Butler:

Yes. We will hear what the Department says later.

The Chairperson:

Is it fair to say that there is currently no business case for the pre-conciliation claimant requiring more resources from the LRA?

Mr Patterson:

The point that was made about duty and power is not about practical resources at this time. It is about the position of the agency and the strength of the argument about whether there should be an increase in pre-claims. We hope that there will be an increase once we start promoting them. It is at that time when, if we have only a power to conciliate, DFP and DEL will say that no additional resources will be made available because we are not required to have them. We will be told to prioritise and use other resources for that purpose. If we use those other resources, our small business support side will be hit, which would concern us.

The Chairperson:

It is understandable that there would be speculation at this stage. However, it would be fair to say that for either Department to pick up costs elsewhere in the system would be penny wise and pound foolish.

Mr S Anderson:

Thank you for your presentation. You mentioned small businesses. Are enough resources going into making microbusinesses aware of the legislation in order to prevent proceedings from taking place? I know that you carry out workshops, but I do not know whether you have a database that would indicate how many small businesses know about the legislation. Perhaps that is where a lot of the difficulties arise and create problems for employees. That is when the game gets bigger.

The Chairperson:

Speak with your trade union hat on, Jim.

Mr S Anderson:

Do you think that you are putting enough resources into touching base with, for example, owners

of small shops who employ only two or three people, and who can get into difficulty, especially now, during an economic downturn, when they might have to close the business and say to their employees that they are not required from today. The employee has a lot of rights, and perhaps the employer does not know what those rights are. Are you touching base with those employers so that they know what they have to adhere to?

Mr McCusker:

When it comes to the question of resources we will all say that we need more. I would like to do more. The first point that I would make is that we connect with small and microbusinesses through our seminars and workshops. Something like 80% or 90% of the people that attend those seminars are from small businesses. The anecdotal evidence of our helpline shows that about 60% of our calls are from employees and about 40% are from employers. The anecdotal evidence shows that most of those employers are owners of small businesses, and they are benefiting from that service.

On the conciliation side, the degree and intensity of involvement of a small employer with the agency is much higher than that of larger companies. In that way, we are assisting small businesses. We could always do more. It is a question of balancing resources among the various activities of the agency. We all agree that prevention is better than cure, but prevention is not there in the statutory duties. That is where we have to balance our resources. We think that we are not too far from the mark in how we try to divide up the resources.

Mr Patterson:

At the macro level, government is attempting to expand the private sector. One of the issues in the private sector is the employment of additional people in expanding firms, of bringing in people and taking the fear out of employment. That is what our advisory services do; in part, they take the fear out of employing that extra one person. There are 60,000 to 80,000 microfirms in Northern Ireland. It is about all of them taking on the burden of employing one extra person.

In the 1970s, as Mr McCusker said, there were four individual rights jurisdictions. There are now anything up to 70. A small firm starting in the middle of 1970 had only four cases of unfair dismissal or discrimination. There are now up to 70.

That is the work that the advisory services do. They deal with small firms, first, to help them

to understand what the legislation is all about, because it is very complicated, and, secondly, to hold their hand. The issue with resourcing that side of things is that every small firm wants us do that for them on site. However, we cannot provide that quality of service.

The underlying theme is that the more face-to-face work we do with small firms the better, but we cannot do that. We are providing workshops and are trying to pull those firms in. As the Chairperson said, the resource side of advisory services is infinite; it is supply-led rather than demand-led. Penny's side is demand-led, and the provider's side is supply-led. We can provide more workshops and engage with more small firms. However, that all depends on the weight that is placed on expanding the private sector in Northern Ireland.

The Chairperson:

If you have any further information that you wish to give to the Committee in its consideration of the Bill, we would be happy to receive that. As Claire McGill suggested, we also ask you to provide us with your comments on the latest wording. Thanks very much for your presentation.

We will now hear from departmental officials June Ingram, Tom Evans and Alan Scott, who have also provided a briefing paper. I am sure that they have listened very intently to what others have said and may seek to address some of the concerns raised by the LRA and members. The briefing paper is contained in members' packs, and some additional information will be handed out. It is good to see a familiar face, Tom.

Ms June Ingram (Department for Employment and Learning):

I will make only a few brief opening remarks, as I know that the Committee is pushed for time. We welcome the opportunity to provide further evidence as the Committee gives detailed consideration to the Bill's provisions. We very much appreciate the significant input that it has made to this substantial policy review.

The Bill is part of a wide-ranging package of measures emerging from the review. We are committed to taking forward the other very important non-legislative projects that focus on prevention and early resolution of disputes. The legislation is a fundamental part of a larger programme of change, and the benefits in the round will be seen when there is an improvement in the quality of employment relations across Northern Ireland, using alternative dispute resolution as the norm.

As regards the evidence from other parties, we noted with interest the views of the Law Centre during its recent presentation to the Committee about there being a need to mesh together coherently the various strands of the policy proposals that we are taking forward. We are supportive of that view, and we have taken some steps to ensure that the implementation strategies are informed by the insights of practitioners and stakeholders. In that vein, the Committee is aware of the significant role of our consultation steering group in ensuring that the review canvassed the opinions of all stakeholders. We have just reconstituted that consultation steering group as an implementation advisory group to ensure a joined-up approach to the various implementation projects. The purpose of our attendance today is to respond to the issues raised in evidence by the LRA and the Law Centre. We hope that the briefing paper has been of some help. Tom will now outline our understanding of the issues that have been raised. At the end of the presentation, we will attempt to answer any queries.

The Chairperson:

I remarked that this is very much the Department's first bite at trying to provide clarification. Tom, can you confirm that there is an expectation that amendments or improvements will come forward at a later stage?

Mr Tom Evans (Department for Employment and Learning):

Absolutely. We came to the previous session with the Law Centre, and we found it helpful to hear both evidence sessions. Obviously, we do not concur with everything that was said. However, I think that there has been a general warmth around the whole issue, which is quite complex. The Law Centre encouraged the Committee to take a continuing interest in the roll-out of this. This is about continual improvement rather than about switching the lights on and off.

Many of the improvements will be of a non-legislative nature because the practice is often more important than the structures and the rules. There is an implementation advisory group, which the LRA and the Department are key parts of, and we would be happy to keep the Committee apprised as this rolls out, because it will be an ongoing process.

The Chairperson:

Thank you. Claire McGill has a question. Sorry Tom, you were going to give a presentation — you should not pause in this Committee.

Mr Evans:

Sometimes, you like the chalice to be passed on. You could have said it was not required because members have read it.

The Chairperson:

There are some speed readers here.

Mr Evans:

We have prepared a detailed presentation. I will run through it at a rapid pace, but I thought it useful to present it in point form so that members can consider it at a later date. We have tried to deal with the issues raised by the Labour Relations Agency in its submission — although we had not heard their evidence until today — and the Law Centre. I will try and pick up on some of the points that Jim McCusker and Bill Patterson raised.

The first issue was the purpose of clauses 8 and 12. The agency has expressed some concerns and wants those clauses removed. The feedback from the review has shown the need to promote early resolution of disputes. We believe that providing discretion to the agency to carry out pre-claim conciliation is consistent with that. It mirrors the GB arrangement, as Penny Holloway said, whereby the duty was amended to be a power. That has led to a very successful pre-claim conciliation process, which has resulted in an increase in ACAS's pre-claim conciliation business. We have talked to departmental officials, and the priority is to encourage more pre-claim conciliation to hopefully reduce some of the debris that happens in having to launch claims at a tribunal. The policy intent is to offer the LRA complete discretion as to how it operates its pre-claim services.

The review started and continued during a time when there was no recession. The whole focus of the review was about effectiveness and improving systems. In no way was it looking at driving efficiencies and savings. I think we can honestly say that that just was not the case. We see it as an enabling as opposed to a cost-reduction measure, and the Department expects that the LRA's pre-claim work will increase. Year on year, the LRA's pre-claim work has increased. I think it has had 1,500 cases in the past published year. We see that as a positive, and we want this to be supportive to that approach.

Moving to arbitration and the question of whether a wider appeals mechanism is required, the Department has not set its face against appeal just to be difficult about the process. The whole principle of arbitration is that it is a binding decision. When I talk about my review to people independent of this and bore them to death, I ask their views on appeals, and they say that arbitration produces binding decisions because people waive their rights. There is a fundamental principle that I think it is important to remember.

Arbitration is the most intensive form of alternative dispute resolution. It produces a decision. Sometimes the arbitrator may mediate, and that is great. People have talked about the Rights Commissioner Service. We were very keen that some of the practices of the Rights Commissioner be imported into an enhanced scheme. However, as the Rights Commissioner Service has an appeal, the reality is that it is not comparing like with like.

In our situation, the Labour Relations Agency offers an individual conciliation service and mediation, after which someone could go to arbitration. In the Republic of Ireland, someone would go directly to the Rights Commissioner Service. There needs to be some appeal. The access to the justice system, conciliation and mediation is there, but if someone then decides to go to arbitration as an alternative, they waive their rights. Arbitration has not been promoted.

I will not read it out, but I think the guidance from the LRA on its two schemes is worth a read, if the Committee staff will make it available. This is no criticism of the way it has been written; it is factual. It refers to inappropriate cases. The scheme excludes from its scope any kind of claims that are often related to other jurisdictions, so unless the issue is about an unfair dismissal or flexible working, any other part of it has to be considered by a tribunal system. In fact the guidance says that, because of time limits, people may want to go a tribunal first and then go for arbitration.

It is hugely complex, and I think the inherent weaknesses of the scheme have not been highlighted in the evidence that you have heard. That is a significant barrier to using arbitration. We recognise that there have been advocates for wider appeal. Employer organisations have advocated that, but we are concerned that they would not take on mediation unless there was an appeal, and maybe it is only a staging post. We are interested in a culture where alternative dispute resolution is a viable first option for parties.

There was a counter view from the independent advice sector, which was that some people have neither the financial or emotional strength to go to a tribunal, which is an adversarial environment, and that they did not trust the internal appeal mechanisms of their employers, even if they are good mechanisms. They were looking for somebody independent to hear the case and say that they were right, wrong, or partially right and partially wrong.

The point was made about the complexity of employment law. A tribunal setting is a complex environment. We had a concern about putting in an appeal. The Labour Relations Agency talked to the Industrial Court. None of the advocates of appeal to an employment tribunal mentioned that we could potentially add another layer to a complex system, and we were conscious of that. The Department is persuaded of the case for an enhanced scheme covering all discrimination and non-discrimination cases. Many employment disputes in Northern Ireland that escalate to a tribunal have a discrimination element. Some cynical people would say that people are using the legislation to get them into a tribunal, but we are proposing that all jurisdictions be accommodated in a single, enhanced arbitration scheme.

We are saying that we should fix what is broken, which we think are the inherent structural weaknesses of the scheme. The Department will be monitoring the performance and throughput of all parts of the system. If people suddenly come back to the table after two years and say that, even with the enhanced scheme, only a small number decide to go to arbitration, there is no doubt that the Department would have to look at that again.

In our submission we clarified what the confidentiality protections are under article 20 of the Industrial Tribunals (Northern Ireland) Order 1996. We have been working with the Labour Relations Agency on that and have been able to give it assurance that all of the techniques it uses — conciliation, mediation or arbitration, either by LRA staff or agents employed by the LRA — are protected under the existing legislation for those cases that have a jurisdictional nature and that fall under article 20. Therefore, in any case that can be taken to an industrial tribunal, the LRA is protected in all of the activities that it undertakes.

The LRA has identified issues around relational mediation. We checked with our colleagues in GB, and there is no protection in law for ACAS to carry out relational mediation, which is not seen as core business. There are probably a small number of cases each year. We believe that the whole focus of the review was to stem the flow of people who had a jurisdictional dispute going

to a tribunal, and to try to resolve it early, because that reduces the cost of conflict. We have taken advice and have instructed the Office of the Legislative Counsel, which has expressed concerns about providing a universal, catch-all protection, which, in law, parliamentary draftsmen are wary of doing and Parliaments and Assemblies are wary of granting.

The Labour Relations Agency has come back to us again about that issue, and we will go back to it. However, we do not think that that is an issue. The Labour Relations Agency thinks that it will undermine confidence in ADR. However, nobody else has raised that issue. The reality is that we have talked to the tribunal chairs, and we understand that they treat all issues in a sensitive manner. Nevertheless, we will look at whether it is possible to get a viable form of words. I know that the Committee has offered to do that. It is not that we are against that, but if it is not legislatively possible, that is where we are at. We think that the main part of the work is covered fully by the confidentiality protections afforded under article 20.

That takes us to the issue of ADR. Everybody on the review is committed to ensuring that alternative dispute resolution happens as early as possible. The Law Centre and the LRA raised the point that there should be some sort of compulsory element to encourage parties in a dispute to take on ADR. We have also heard separate representations from employers about that. However, the view strongly put across during the wider consultation was that if ADR were made mandatory, it would become a hoop that some people would jump through to get to a tribunal. I think that the Department is more minded to get all of the stakeholders and everybody else together to promote ADR as an economically valid way of resolving disputes.

I point out that the tribunal chairs promote ADR in case management discussions. Those discussions now happen in all discrimination cases, which represent around 40% of our throughput. At appropriate times, tribunal chairs will ask parties whether they have thought about using the services of the Labour Relations Agency, which has duty officers on hand. We will certainly be encouraging all of the parties to promote ADR, even aggressively, because I think that that has value.

The Department believes that there needs to be a culture shift. It has a problem with the term "alternative dispute resolution" because "alternative" suggests that it is for only a few rather than for many. We therefore encourage the Committee to help us to promote dispute resolution as a mainstream activity and not as a peripheral second option; it should be the first option. In the

current economic environment, employers, who people suggested had deep pockets, now realise that they cannot afford to do this and that there needs to be a better way of doing things.

The Law Centre said that it had concerns about whether the review had understood and communicated fully the difference between neutral assistance provided by information providers and the more bespoke, partisan advice and advocacy offered by organisations that represent individual employees or employers. However, the Department and the review do understand the difference.

Information providers play a huge role in signposting employees who have a problem in the workplace so that they can do the right thing and get their first step right. One of the key roles of the implementation advisory group will be to oversee over an inter-agency forum, which will hopefully develop simple structures and templates that all information providers will sign up to, so that if an employee told a provider that he or she had a problem in the workplace, the provider would say: "Have you talked to your employer? Have you raised the issues? You should be thinking about those issues and about early resolution."

Providers who offer advocacy and support in individual cases perform a different role. That role is very much about the presenting the merits of an individual case to the best advantage. I know that the Law Centre does a hugely valuable job in that. Although that role will remain, we hope that the use of first-line advice will help people to get on the right road, through the promotion of ADR or dispute resolution prior to tribunal, so that they go back to their employer to try to resolve the dispute in the workplace. That might then reduce the burden on providers who give bespoke advice. That is our argument. As I say, that will be a challenge for the information forum.

In relation to the resources issue, you have the points in front of you. I do not want to labour those points, but I think that the Department, in everything it has done, has identified dispute resolution as a high priority. We can give an assurance to you that we are not looking to cut the agency's pre-claim activity; in fact we want to increase that, because we think that there is an economic sense to the dispute resolution focus on prevention, area resolution and the general improvement of employment relations. We have spoken about helping the microemployers. There are issues that we have to explore about potential support for them and about embedding good practice in large private and public sector employers. That in itself will reduce the cost of

employment conflict, which will ameliorate some of the issues that have been raised today.

The issue of legal aid have been consistently raised by the Law Centre; we recognise that, and understand why. When we sought views in the consultation there was a very divided opinion on legal aid. In fact, there were more people against it than for it. A review of the access to justice is currently being conducted, and the Department is giving evidence to that review. We have made available our feedback on the consultation, but we are also interested in looking at alternatives to the justice system, wider than employment disputes but also in family law, health litigation and a whole range of other civil matters. We hope that dispute resolution becomes a viable mechanism in those jurisdictions.

The next comprehensive spending review will be very challenging. I think that the budget review committee is still looking at it, so I can honestly say that I do not know what the outcome will be, but I think we are all going to have to be more innovative. I heard Bill and Jim talk about some of their problems; I think that there are innovative solutions that can be used, which do not cost and can help in the situation. We are happy to work with the agency in that regard.

Finally, in relation to wider implementation issues, we have mentioned the Bill, and there will be subordinate legislation, which we will obviously bring to the Committee. We are much more enthused by the non-legislative matters that impact on current practice. We believe that the Bill will produce a package of bespoke measures, and we appreciate the Committee's role in that. There is a significant role for the implementation advisory steering group and, if the Committee wants it, we would be happy for it to have a continuing role.

The Chairperson:

Thank you very much, Tom. I will make my remarks very short, and ask Claire McGill to give way to Paul Butler, because he has to go to another meeting.

Mr Butler:

Thank you very much for your presentation. I asked a question about resources of the LRA, which mentioned it several times in its written submission. The LRA has suggested that clauses 8 and 12 be removed. I take on board that you have some proposed amendments, but the agency is strongly of the view that clauses 8 and 12 will significantly reduce the grounds on which resources can be secured to effectively deal with DEL policies. There are obviously resource

implications to clauses 8 and 12. You have mentioned the comprehensive spending review, and your notes mention a 17% increase in the LRA's budget, and the possibility of a reduction in that figure.

I am trying to get my head around the resource issue. I take on board what you have said — that it mirrors matters in Britain in relation to ACAS — but the LRA seems to have a different view on it. There seems to be a resource issue, and I am trying to get to the nub of it.

Mr Evans:

The LRA has raised it as a resource issue; we have never done so in the review, and we strongly refute the contention that it is about reducing resources. It is absolutely not; it is about giving greater flexibility, increasing the agency's pre-claim activities. It is a priority of the Department that there should be more resolution of disputes before they get to a tribunal, because there are huge implications for the economy. It is not about a resource but about increasing the agency's pre-claim conciliation, because we think that is an absolute priority.

Mr Butler:

Taking on board what it has said, and from what I can see, the LRA wants clauses 8 and 12 removed. We need some dispute resolution on that. However, it has not quite said that that is going to happen.

Mr Evans:

Under the current arrangements, the review demonstrated that when people ring up and ask for pre-claim help, it is available. We are asking the LRA to target and encourage people to think about early resolution as opposed to going to a tribunal system, as has happened in GB. I understand that the LRA and others are nervous about resources, but this has not been a cost-reduction issue.

Mr Butler:

The LRA's paper states that:

> "Resourcing for the Agency will remain a matter of strategic importance."

As I said, all organisations are concerned about this climate in which there will be cuts. The LRA is concerned about what it can deliver through the computer system and its helpline.

Ms Ingram:

As the LRA representatives said, the issue is looking to the future: if there is a duty to conciliate rather than a power, that changes the context. I think that the Chairperson said that if we are looking at short term versus long term, we do not want to save pennies and lose pounds in the long run and, pre-claim, early resolution as opposed to going to tribunal has to remain a priority. That is what we are looking at. The change from a duty to a power enables greater flexibility and discretion as opposed to a blanket duty. The issue is about looking at where the most effective use of resources is, and I think that has to be a good thing.

Mrs McGill:

Paul has raised the points that I was going to raise.

Mr Butler:

Sorry about that, Claire.

Mrs McGill:

Part of the difficulty that we have is in resources. The climate that we are in and that we will be going into, as I said earlier, makes it more difficult for those people who need issues such as resourcing the LRA and other agencies to be resolved.

Tom, you said in response to my party colleague Paul that this was not about resources, but this is where a lot of the discussion started around the explanatory and financial memorandum. I know that you have looked at the wording, but I will quote from it:

"where demand for conciliation exceeds resources available".

That was the original wording in the memorandum so, to some extent, the Department introduced the word "resources" to the discussion. It makes sense to look at resourcing if there will be a bigger demand for services at the pre-claim conciliation stage, and we assume that there will be an increase. That could be done through a rejig of existing resources to target a productive result in a more effective way or to see whether there is a need for further resourcing. However, that is where the word "resourcing" took legs.

You have done good work on the rewording, but the LRA's request remains that clauses 8 and 12 be removed. I think that it was the Chairperson who said that they were unnecessary, but clearly we will look at that. You have made your case.

Mr Evans:

We have not had feedback from any other stakeholders who have concerns about it. I understand that the issue of resourcing is of particular concern to the LRA, but it is with any other organisation, including our Department. As for the recession action plan, the Department has responded proactively over the past couple of years through a range of measures to deal with the fallout of the recession by redirecting staff, and it will continue to do so. There is always the issue of wider resource availability, but pre-claim is a very high priority for the Department.

The Chairperson:

It would be true to say that as far as resources are concerned at this stage, it would be like gazing into a crystal ball. As I said earlier, it is in everyone's interest to resolve disputes at the earliest opportunity. Will you comment on the LRA's inability to have a flexible approach? There is a £200,000 underspend, and there was a need to deal with conciliation with respect to making short-term contracts with some staff in that regard. Would the Department look favourably on that if a business case were put to it? I think that it is true to say that no business case had been put to the Department in relation to that.

Mr Evans:

The LRA is very important to us, and we want to work with it and help it to provide solutions. We need to be careful about being too intrusive, because the LRA has a management team and a board. We are very keen to work with the LRA and help it to be flexible and innovative. There are ways of bringing people into an employment setting, through flexible working and a range of options. With respect to the LRA's physical resources, are there other opportunities that it could use? For instance, it cohabits with the tribunal system, and there may be other opportunities available to it. We are very happy to work in partnership with the LRA.

The Chairperson:

My ears picked up a bit on that with respect to the infrastructure of the building. There are plenty of hotels and venues in the city, as well as places of employment, that would be quite happy to have the custom should it be necessary to book rooms for workshops.

Those are all of the Committee's comments. The Committee will be moving to the formal clause-by-clause scrutiny of the Bill next week, and we will hear what individual Committee

members bring to the table. Thank you very much indeed for your briefing and for your offer to work closely with the Committee during further consideration of the Bill.