

18th December 2015

Cathie White
Clerk to the Employment and Learning Committee
Room 416, Parliament Buildings
Ballymiscaw
Stormont
BT4 3XX

Dear Cathie,

EMPLOYMENT BILL 2015 (BILL 73/11-16)

Please find attached the Labour Relations Agency's response to the Employment and Learning Committee's call for written evidence in relation to the Committee Stage of the 2015 Employment Bill.

My Board considered and approved the attached response at a Board meeting on 17 December 2015. The Employment Bill, and in particular the provisions dealing with Early Conciliation, Neutral Assessment and confidentiality protections, are central to the Agency's operations. The Agency would appreciate the opportunity to supplement its written submission when the Employment and Learning Committee takes oral evidence in January 2016.

I am happy to provide further detail as required by your Committee.

Yours sincerely,



TOM EVANS
Chief Executive

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EMPLOYMENT BILL 2015 (BILL 73/11-16)

Introduction

1. **The Labour Relations Agency ('the Agency')** welcomes the opportunity to provide written evidence to the Employment and Learning Committee on the provisions contained within the Employment Bill 2015, as introduced to the Assembly on 7 December 2015.
2. The timescale for the submission of written evidence is understandably short given the very compressed time available for the passage of the Bill. This submission therefore focuses exclusively on the clauses within the Bill that relate directly to the statutory role of the Agency.
3. The structure of this submission is as follows:
 - brief explanation of the Agency's role and relevant expertise;
 - some general comments in relation to the strategic importance of the early resolution of workplace disputes and the resource/timing implications of preparing for and implementing the Early Conciliation Service; and
 - specific commentary on relevant clauses as they apply to the work of the Agency, clauses 1, 2, 3, 4, 6, 7, 8 & 20.

The Role of the Agency

4. The Agency is a Non –Departmental Public Body, established in 1976 by the Industrial Relations (Northern Ireland) Order 1992 as amended by the Trade Union and Labour Relations (Northern Ireland) Order 1995. The Agency is required by statute to promote the improvement of employment relations in Northern Ireland.
5. The Agency provides a range of impartial and confidential employment relations services to those engaged in industry, commerce and the public services. The Advisory Services of the Agency offer the following services designed to promote good practice within the workplace;
 - Information and advice through our Helpline, website and a wide range of publications;
 - Assistance for employers through the provision of advisory workshops/seminars, sample documentation and the screening of employment documentation;
 - Assistance for employers to develop and implement best practice employment policies and procedures
6. The Agency's Conciliation and Arbitration Service is responsible for the resolution of workplace disputes through the delivery of individual or collective conciliation, mediation and arbitration. The Conciliation and Arbitration Service would be the primary deliverer of the new Early Conciliation model.
7. Good employment relations are critical for maintaining the effectiveness of organisations and enhancing the quality of working life. The work of the Agency contributes to Northern Ireland's broader economic and social wellbeing.

8. Devolution has shaped employment law and its implementation to suit the particular circumstances of Northern Ireland. As a result, increasingly, Northern Ireland employment law and practice is different from that in GB in a number of major areas. The Agency has a lead role in helping employees and employers to have a clearer understanding of their respective employment rights and responsibilities.

General Commentary on the Policy Intent of the Bill

9. Clauses 1,2,3,7 & 8 and Schedule 2 deal with the proposed Early Conciliation Service. The Agency, in its response to the DEL Employment Law Review consultation supported the introduction of an Early Conciliation Service. The Agency has argued consistently that there is a need to rebalance the employment relationship through a 'psychological shift of focus from a claim to a resolution culture'.
10. The Agency also facilitates an Employment Relations Roundtable forum which is representative of the main employer and trade union bodies. The Roundtable forum is supportive of the Early Conciliation proposal.
11. The Agency does not believe that the uptake of early resolution services should be mandatory but instead, as proposed in the Employment Bill, the parties to a workplace dispute will have the opportunity to consider early conciliation as an alternative to formal litigation. This sets a challenge for the Agency in terms of how it promotes Early Conciliation as a very positive and viable alternative to a tribunal process; and then delivers on that commitment.
12. The Agency has a very significant track record in resolving disputes before they escalate to a tribunal and has drawn on those experiences in developing the Early Conciliation model. The Agency also has very positive links with its sister organisation in Great Britain, Acas, where Early Conciliation has been in place since May 2014. The Agency has been able to refine its Early Conciliation model informed by GB experiences.
13. The Agency has also been actively considering the range of implementation issues again informed by GB experiences and our own experiences of delivering major reform programmes in response to changes in employment law over the devolution period. There are a number critical challenges; the recruitment and training of additional staff to resource the new service; there is a six month lead in time before new staff are fully operational; the more general promotion of the service in partnership with DEL, the Tribunal Service and key stakeholder organisations; agreeing the interface arrangements with the Tribunal Service; ensuring that the use of technology to support the Early Conciliation is maximised, the Agency has recently developed a new case management system which will be able to meet the Early Conciliation requirements; and securing the necessary resources to fund the new service, the Agency is in discussions with DEL and will be submitting a business case early in 2016.
14. The Agency believes that these issues need to be given due consideration when DEL is determining the commencement date for the new Early Conciliation Service. The Agency has already had helpful discussions with DEL about the full range of implementation issues. The Agency would also want to draw to the Committee's

attention the operational costs referenced in paragraph 43 of the Bill's Explanatory and Financial Memorandum. These costs were not provided by the Agency; it is our understanding that the impact assessment which informed these estimates was completed at an earlier juncture and was based solely on an extrapolation of some preliminary estimates in respect of Acas in Great Britain. The Agency is in regular dialogue with DEL on all aspects of the Employment Bill as they apply to the Labour Relations Agency and has already flagged up our concern about this assessment. The Agency is currently refining its own resource assessment and will be submitting a detailed business case to DEL early in 2016.

15. Clause 14 creates enabling provisions that would allow the Agency to provide to relevant parties with an assessment of the likely outcome of any proceedings, referred to in the Bill's Explanatory and Financial Memorandum as Neutral Assessment. In response to the DEL 2013 Employment Law Review consultation the Agency has developed an outline framework for a Neutral Assessment Service. However, given that it is only a power to introduce a Neutral Assessment Service and there will be no statutory requirement for employees and employers to use the service, the Agency has not looked at the detailed operational implications. Instead, the Agency has concentrated primarily on preparations for the Early Conciliation Service, which the Agency will be required to deliver if the Employment Bill is passed.
16. The Agency believes that there are a number of emerging factors that need to be considered in relation to the Neutral Assessment Service. Since the DEL 2013 consultation the Tribunal Service has introduced on a pilot basis an Early Case Management System which incorporates Early Neutral Evaluation. The pilot has been well received and the recent DEL consultation on the new draft Tribunal Rules has sought formal feedback on the value of this service being delivered as a mainstream tribunal process.
17. Another consideration is the planned DEL review of the Agency's Statutory Arbitration Scheme. Given that the Neutral Assessment Service would be delivered by the Agency's panel of Arbitrators it may be appropriate to bring the proposed Neutral Assessment Service within the scope of that review. There would also be an opportunity to assess the impact of the Tribunal Service's Early Case Management System.
18. A final issue is the potential for end users, employees and employers, to be confused if the Agency introduces Early Conciliation and Neutral Assessment at the same time as the Tribunal Service introduces Early Case Management.

Commentary on clauses relevant to the Agency's statutory role

Clauses 1 & 6 Conciliation before and after institution of proceedings

19. Under the current governing legislation (Article 20 of the Industrial Tribunals (Northern Ireland) Order 1996) the Agency has a duty to seek to conciliate in respect of any claim lodged at the Office of Industrial tribunals and the Fair Employment Tribunal (OITFET) on specified employment rights. The Agency receives a copy of all claim forms (ET1s) from OITFET and then contacts the parties/ representatives to establish whether either party is willing to engage in the conciliation process in

advance of a Tribunal Hearing. The Agency achieves a high settlement rate in these cases.

20. Under the current legislation the Agency is also empowered to engage in conciliation in circumstances where a complaint could be presented to OITFET but no legal proceedings have commenced. This is available for all jurisdictions in which the Agency has a statutory conciliation role. The Agency facilitates settlements in a significant number of disputes before any legal proceedings are instituted.
21. In April 2011 the Agency introduced a new service called Pre-Claim Conciliation which built upon the service discussed at paragraph 19. The service aims to assist all parties to an employment complaint find an acceptable solution that means that there is no need for the matter to be brought to a tribunal. This followed a DEL consultation which garnered the views of a wide range of stakeholders on the general area of Alternative Dispute Resolution (ADR). The majority of respondents indicated they would welcome an increased focus by the Agency on conciliation prior to tribunal claims being lodged.
22. Currently there is no requirement for any party to agree to engage with any of the Agency's existing dispute resolution services including conciliation service.
23. Article 1 20A of the Employment Bill 2015 will require potential claimants to contact the Agency before instituting proceedings at OITFET. The Tribunal Service will not be permitted to accept a claim unless there is evidence in the form of an Early Conciliation Certificate that the claimant has first approached the Agency under the proposed Early Conciliation Service.
24. This mandatory requirement, to at least consider the offer of the Agency's conciliation services, replaces the voluntarist approach that prevails under the current legislation. The decision to avail of the conciliation service still rests with the parties but before a claim can be made to OITFET, there must be an engagement with the Agency's Early Conciliation Service. This Article further enables conciliation to be continued with the parties after the prescribed period has ended and before they lodge a claim at OITFET. This is in line with current arrangements.
25. Article 1 20B enables the Agency to offer conciliation service in those cases where legal proceedings have not been instituted. This is consistent with the Agency's existing pre-claim conciliation service. Also this provision enables a potential respondent (employer) to use the Early Conciliation Service as is the case under the current legislation. It also permits conciliation for those who may be part of a multiple claim which is referred to in Article 1 20A(7)
26. Article 1 20C also enables the Agency to provide conciliation following lodgement of proceedings at OITFET as is the case under current legislation. However claims can only be lodged provided there is an Early Conciliation Certificate.
27. **THE AGENCY IS CONTENT THAT CLAUSES 1 & 6 MEET THEIR POLICY INTENT.**

Clauses 2 & 7 and Schedule 2 Extension of limitation periods to allow conciliation

- 28. Schedule 2 provides for the extension of time limits to facilitate conciliation. Under current legislation claimants must lodge their claims within time limits set out by employment legislation largely, but not exclusively, in the Employment Rights (Northern Ireland) Order 1996.
- 29. In general these time limits are either three months or six months following the act complained of. This Schedule enables early conciliation to take place without reducing the time limits of three or six months in which the claimant must present the claim to OITFET.
- 30. **THE AGENCY IS CONTENT THAT CLAUSES 2 & 7 AND SCHEDULE 2 MEET THEIR POLICY INTENT**

Clause 3 Extended power to define ‘relevant proceedings’ for conciliation purposes

- 31. This Schedule is a technical provision that provides for the amendment to the list of employment rights and their time limits as set out in the relevant paragraph in the Industrial Tribunals (Northern Ireland) Order 1996.
- 32. **THE AGENCY IS CONTENT THAT CLAUSE 3 MEETS ITS POLICY INTENT**

CLAUSE 4 & 8 Assessment of likely outcome of any proceedings

- 33. As highlighted at paragraph 14 this clause creates an enabling power for the Agency to deliver a Neutral Assessment Service. The clause is explicit in stating that there is no requirement placed on the Agency and that the agreement of both parties to a dispute would be required before the Agency would initiate a neutral assessment process.
- 34. **THE AGENCY IS CONTENT THAT THE CLAUSES 4 & 8 MEET THEIR POLICY INTENT.**

Clause 20 Prohibition on disclosure of information held by the LABOUR relations Agency

- 35. The current confidentiality protections extend only to the Agency’s conciliation services. The Agency has over time extended its Alternative Dispute Resolution Services to address the many changes in the current employment law/dispute resolution system.
- 36. This clause extends the confidentiality provisions to all of the Agency’s dispute resolution services. This is a very important and helpful provision as it will ensure that the people using our services are confident that anything disclosed in the ADR process will remain confidential.
- 37. **THE AGENCY IS CONTENT THAT CLAUSE 20 MEETS ITS POLICY INTENT**