PROPOSED AMENDMENTS TO THE EMPLOYMENT BILL AND OUTSTANDING ISSUES FROM COMMITTEE MEETING ON 13 JANUARY 2016

At the meeting of the Employment and Learning Committee on 13 January, Departmental officials advised that a number of amendments were being prepared for tabling at Consideration Stage of the Employment Bill. Officials undertook to share the proposed amendments with the Committee. The proposals and the rationale for each are detailed below. Where available, the draft text of each amendment is provided.

Officials also undertook to investigate or provide clarification on a number of issues. Responses on these issues are set out following the explanation of proposed amendments.

PRPOSED AMENDMENTS

1. CLAUSES 4 AND 8: NEUTRAL ASSESSMENT

At its most recent meeting officials explained to the Committee that, having reviewed the evidence presented to the Committee and representations made to the Department in particular by the Labour Relations Agency and the tribunal service, the Department is now minded to adapt a revised approach to neutral assessment. The rationale for so doing is to ensure that there is sufficient flexibility to develop the process in a way that is able to respond to the outcomes of forthcoming reviews of the LRA's statutory arbitration scheme, the bedding in of early conciliation and the piloting by the tribunal service of early neutral evaluation as part of case management.

Revised provisions are being drafted to replace clauses 4 and 8 and give the Department power to make regulations conferring on a specified person (who could an LRA arbitrator or an employment judge) power to deliver a specified process of assessment. It is envisaged that the regulations will set out the detail of how the service will be delivered. As officials have noted, this will be a novel service and it is important to ensure that it is carefully designed to complement the full range of services provided by the Labour Relations Agency and the tribunals.

The text of the proposed amendments is being finalised and will be shared with the Committee as soon as possible.

2. CLAUSE 7 AND SCHEDULE 3: UPDATED LEGISLATIVE REFERENCE

Clause 7(1) and Schedule 3, as they presently stand within the Bill, amend Article 46(1) of the Fair Employment and Treatment (Northern Ireland) Order 1998 to include reference to new Article 46B of that Order, itself introduced by clause 7(2). The purpose is to enable the time limit for lodging proceedings with the Fair Employment Tribunal to be paused to allow for early conciliation.

The Department now wishes to amend clause 7(1) and Schedule 3 to remove obsolete references to statutory dispute resolution procedures from current legislation. The dispute resolution procedures in question were repealed by the Employment Act (Northern Ireland) 2011. The amendment that is now proposed will

ensure that Article 46(1) of the 1998 Order no longer includes a reference to this procedures.

It will additionally repeal Article 38(1A) of the Order, which also concerns the repealed procedures.

The repeal of paragraphs 4(1) and (2) of the Employment (Northern Ireland) Order 2003 completes this 'tidying' amendment.

Draft of proposed amendment

Clause 7, Page 7

Leave out line 37 and insert 'for "to Article 46A" substitute "and to Articles 46A and 46B"'

Schedule 3, Page 24, Line 21

At beginning insert in the second column-

'Article 38(1A).

In Article 46(1), the words

from "and to any

regulations" to "2003"'

Schedule 3, Page 24, Line 33

At end insert in the second column-

'In Schedule 5, paragraph 4(1) and (2).'

3. CLAUSE 14: PROVISION FOR REPORTING OF PUBLIC INTEREST DISCLOSURES BY BODIES

Clause 14 establishes regulation making powers requiring a "prescribed person", for the purposes of Article 67F of the Employment Rights (Northern Ireland) Order 1996, to produce an annual report on disclosures.

During consultation one prescribed body, the Northern Ireland Human Rights Commission, wrote to the Department stating that a requirement for it to report to the Assembly, if established in regulations under this provision, could be outside the legislative competence of the Assembly.

The Commission wrote:

> *The Commission is prescribed for the purpose of 'matters which engage human rights'. As you may be aware, similar institutions in England and Wales are not included in the relevant legislation. The position in Northern Ireland is therefore a progressive measure by the Department which the Commission supports and has made use of in practice.*

In accordance with the Northern Ireland Act 1998 and Northern Ireland (Miscellaneous Provisions) Act 2014 the Commission is however 'reserved' and its sponsor department is the Northern Ireland Office. It may therefore be ultra vires *for the Department to attempt to introduce a reporting requirement upon the Commission as currently suggested in the consultation document, since the institution is not within the competence of the Northern Ireland Executive or Legislative Assembly.*

The future application of any proposed reporting requirement upon the Commission would in practice introduce a line of accountability between the Commission and the Northern Ireland Executive that is without precedent. In effect, this may mean that an aspect of the Commission's function would be transferred without the approval of the Westminster Parliament.

When the Department sought the consent of the Secretary of State for Northern Ireland to apply the annual duty to report, it was asked for assurances that in the case of a body that is accountable through UK Government Ministers to Parliament, the reporting requirement will not amount to a requirement to report to the Northern Ireland Assembly.

Following consideration and legal advice on this issue, an amendment to the Employment Bill was recommended and has been drafted to the effect that where a report relates to functions of a body in the reserved field, then that report will be sent to the Secretary of State for laying before Parliament rather than being sent to the Department for laying before the Assembly.

Consent from the Secretary of State will be required for this amendment as it touches upon the reserved field. The Department will work to secure this agreement as soon as possible.

Draft of proposed amendment

Clause 14, Page 10, Line 28

After 'Assembly' insert 'or to the Secretary of State for laying before both Houses of Parliament'

4. CLAUSE 17: REQUIREMENT ON THE DEPARTMENT TO MAKE PROVISION IN RESPECT OF CAREERS GUIDANCE

At the Committee meeting on 2 December 2015, the Department was asked to strengthen clause 17 by bringing forward an amendment converting the enabling power to make regulations concerning careers guidance to a duty on the Department to do so.

On 18 December, the Minister responded to the Committee indicating that he was positively disposed to introducing an amendment to address this matter at Consideration Stage.

Having further considered the clause and engaged with the legislative draftsperson, the proposed revised wording is set out below.

Draft of proposed amendment

Clause 17, Page 11

Leave out from line 43 to the end of line 6 on Page 12 and insert-

‘ “(4) The Department must make arrangements under this section for providing careers guidance for such persons as the Department considers appropriate.

(5) The guidance must be-

(a) provided in an impartial manner; and

(b) be in the best interests of the person receiving it.

(5A) The Department may by regulations make such provision concerning arrangements under subsection (4) as the Department considers appropriate, including provision requiring the guidance to be delivered or otherwise provided by a person who has such qualifications as the Department may determine.” ’.

5. CLAUSE 18: APPRENTICESHIPS

The Department is proposing to amend clause 18, which deals with apprenticeships, to include provision also in relation to traineeships. Traineeships will be the new professional and technical training offer for 16-24 year olds as articulated in the recently published Youth Training Strategy (Generating our Success). A completed traineeship will provide an individual with a qualification equivalent to 5 GCSEs at grades A*-C (including in English and Maths).

The purpose of including reference to both within the clause is to recognise that apprenticeships and traineeships, while complementary parts of the new professional and technical training system, are different offerings. Traineeships will be available in professional and technical occupations at skills level 2. Apprenticeships will be available in professional and technical occupations from skills level 3 to level 8.

The clause is also amended to specify that regulations may make provision about the components of apprenticeships or traineeships. Components are the various elements which need to be in place for a particular training programme to be recognised as an apprenticeship or traineeship. The components will ensure that there are clearly defined requirements with respect to both apprenticeships and traineeships and will ensure a high-quality offer and consistency across different occupational areas.

Draft of proposed amendment

Clause 18, Page 12

Leave out line 18 and insert ‘must be made under this section for providing apprenticeships and traineeships’

Clause 18, Page 12, Line 20

At end insert-

‘(8) Regulations under subsection (7) may make provision as to the components of apprenticeships and traineeships.’

For clarity section 1 of the Employment and Training Act (Northern Ireland) 1950, once amended, will include the following provision:

(7) The Department may by regulations provide that arrangements must be made under this section for providing apprenticeships and traineeships for such persons as may be specified in the regulations subject to such conditions as may be so specified.

(8) Regulations under subsection (7) may make provision as to the components of apprenticeships and traineeships.

6. CLAUSE 19: POWER TO SET THE MAXIMUM LEVEL OF CERTAIN EMPLOYMENT RIGHTS PAYMENTS

Clause 19, as currently set out in the Bill, amends Article 33 of the Employment Relations (Northern Ireland) Order 1999. Article 33 already specifies that the maximum amounts of certain awards of industrial tribunals and other amounts payable under employment legislation, which are specified in Article 33(1), are to be increased or decreased by order of the Department under Article 33(2) where the retail prices index (RPI) for September of a year is higher or lower than the RPI for the previous September. Such amounts include the maximum compensatory award for a finding of unfair dismissal and the weekly rate used for calculating statutory redundancy payments.

Clause 19 amends Article 33(2) of the 1999 Order so that future changes to the relevant limits are to be made on 6th April each year rather than (as currently) as soon as practicable. This provides greater certainty about when changes will be applied.

Clause 19 also modifies the rounding calculation set out in Article 33(3) of the 1999 Order so that changes are rounded up or down to the nearest pound. This ensures that changes more accurately track the rate of inflation, as measured by the RPI.

Finally, clause 19 introduces a new paragraph (7) into Article 33, specifying that the Department may at any time make an order increasing or decreasing sums dealt with under Article 33 without reference to the RPI. This gives the Department flexibility to review rates in a more fundamental way, but with any order making such provision having to be laid in draft before, and approved by, the Assembly before becoming operational.

On reflection, the Department has concluded that it is appropriate to provide that if an order is made under newly inserted Article 33(7), the making of that order ought to obviate the requirement to make an order under Article 33(2) (revision of limits in line with movements in the RPI). The rationale is that it would be an inefficient use of resources to require an Article 33(2) order to be made if limits have already been revised for a particular year under Article 33(7). The revision of limits twice in a calendar year would be likely to attract criticism from stakeholders.

Draft of proposed amendment

Clause 19, Page 12, Line 36

After 'Assembly' insert-

'(8) An order under paragraph (7) may exclude the application of paragraph (2) in relation to any sum increased or decreased by the order for such period as may be specified in the order.'

7. CLAUSE 20: CREATION OF AN OFFENCE IN RELATION TO A BREACH OF THE NEW CONFIDENTIALITY PROVISIONS ASSOCIATED WITH THE WORK OF THE LABOUR RELATIONS AGENCY

Clause 20 introduces a new Article 90B into the Industrial Relations (Northern Ireland) Order 1992 prohibiting the disclosure of information relating to a worker, employer or trade union that the Labour Relations Agency holds in connection with performing its functions.

Paragraph (2) of Article 90B specifies the circumstances in which the prohibition does not apply, for example if the disclosure is made for the purposes of a criminal investigation or in a way that means that no-one to whom the information relates can be identified.

Paragraph (4) of the Article makes a breach of the prohibition a criminal offence, punishable by a fine. Paragraph (5) provides that the prosecution of such an offence requires the consent of the Director of Public Prosecutions.

The Department, following discussions with the Public Prosecution Service (PPS), has determined that a minor amendment to wording is necessary to provide the PPS with increased flexibility in taking cases of this kind forward. The change will allow the Director to institute prosecutions, a power that can be and has been delegated.

Draft of proposed amendment

Clause 20, Page 13, Line 31

At end insert 'by or'

For clarity Article 90B of the Industrial Relations (Northern Ireland) Order 1992, as amended in this way, will include the following provision:

(5) Proceedings for an offence under this Article may be instituted only by or with the consent of the Director of Public Prosecutions for Northern Ireland.

ISSUES ON WHICH THE COMMITTEE SOUGHT FURTHER INFORMATION

8. REQUEST FOR REGULATION MAKING POWERS ON TRIBUNAL DEPOSITS TO BE MADE SUBJECT TO THE DRAFT AFFIRMATIVE PROCEDURE

Officials apprised the Minister of the Employment and Learning Committee's view that the regulation making powers set out in clauses 5 and 9 (deposits in industrial

tribunal and the Fair Employment Tribunal proceedings respectively) should be made subject to the draft affirmative rather than the negative resolution procedure in the Assembly.

The Minister has accepted the point that changes to mechanisms concerning tribunal deposits have the potential to be contentious and has agreed to table amendments to the Bill to provide that regulations including such provision will be subject to the draft affirmative procedure.

Draft of proposed amendments to the Industrial Tribunals (Northern Ireland) Order 1996

Clause 5, Page 5, Line 12

At end insert-

'(2) In Article 25 of that Order (regulations and orders)-

(a) in paragraph (1), for "All" substitute "Subject to paragraph (1A), all";

(b) after paragraph (1) insert-

"(1A) Regulations which include provision under Article 11(2)(a) shall not be made unless a draft of the regulations has been laid before, and approved by resolution of, the Assembly.".'

Draft of proposed amendments to the Fair Employment and Treatment (Northern Ireland) Order 1998

Clause 9, Page 8, Line 39

At end insert-

'(2) In Article 104 of that Order (regulations and orders)-

(a) in paragraph (1), after "101(1)" insert "and no regulations which include provision under Article 84B(2)(a)";

(b) in paragraph (2), after "Schedule 1" insert "and regulations which include provision under Article 84B(2)(a)".'

9. PROPOSED AMENDMENT PREVENTING THE INTRODUCTION OF MULTIPLE TRIBUNAL DEPOSITS

Given that the Minister has agreed to make the general power to amend provision concerning tribunal deposits subject to the draft affirmative Assembly procedure, the Department takes the view that it is undesirable to make provision introducing particular restrictions in the absence of detailed consideration of the advantages and disadvantages of such action.

Ultimately a decision as to whether multiple deposits are introduced will be subject, under the amended provision above, to the draft affirmative Assembly procedure and

hence there will be a full opportunity for Members to consider the merits of any proposals that are brought forward in this area.

10. LEGISLATIVE PROVISIONS SPECIFYING THE COMPOSITION OF TRIBUNALS

Officials undertook to clarify where current legislation specifies requirements as to the composition of employment tribunal panels.

For industrial tribunals, the primary enabling provision is Article 6 of the Industrial Tribunals (Northern Ireland) Order 1996. Article 6(1) provides for the three person composition of the tribunal while Article 6(3) specifies particular circumstances in which the tribunal chairman may sit alone. These circumstances include more straightforward cases or cases in which the parties have consented to the arrangement. Per paragraph (6), regulations may also specify circumstances in which a chairman may sit alone, including in uncontested cases, cases where facts are not disputed, or where preliminary issues are to be determined. The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 build upon this framework by setting out details associated with these arrangements.

Provision in respect of the composition of the Fair Employment Tribunal as an institution is in Article 82 of the Fair Employment and Treatment (Northern Ireland) Order 1998 and, in relation to particular cases, in the Fair Employment Tribunal (Rules of Procedure) Regulations 2005. In accordance with those regulations, a chairman sitting alone may hear preliminary matters. A chairman may also sit alone where the parties have consented to that arrangement. Hearings are generally conducted by the full panel of three members of the Tribunal.

11. EXPLANATION OF DATA PRESENTED TO THE COMMITTEE CONCERNING THE ENFORCEMENT OF TRIBUNAL AWARDS

Officials gave an undertaking to clarify for the Committee the meaning of figures provided by the Northern Ireland Courts and Tribunals Service (NICTS) in relation to the enforcement of awards of employment tribunals.

Officials indicated that 0.26% of applications for enforcement through the Enforcement of Judgments Office (EJO) originated from tribunal proceedings or settlements conciliated through the Labour Relations Agency. The composition of all applications for enforcement through the EJO is set out in the following table.

Originating Judgment Type	**Number of cases** (03/04/11 to 06/01/16)
High Court	12,371
County Court	4,893
Recorders Court	3,128
Magistrates Court	25,946
Small Claims Court	5,238
Sherriff's Court	13
European Enforcement Order	17
Charge Certificate	1,644

Originating Judgment Type	Number of cases (03/04/11 to 06/01/16)
European Order for Payment	6
Industrial Tribunal Decision	*136*
Court of Appeal	1
Conciliation Certificate	*4*
Total	**53,397**

The jurisdiction of the EJO is wide and varied. Civil judgments, and other matters interpreted as civil judgments that can be enforced, come is different guises and originate both inside and outside Northern Ireland.

Neither the Department nor NICTS can adduce information as to why IT/FET/LRA applications for enforcement constitute a small percentage of the whole. There is no 'expected' level of applications. EJO relies on the person seeking enforcement to bring matters to the office if there has been non-compliance with a requirement. Further, the person seeking enforcement does not have to explain why enforcement is required; rather, there is a need only to certify the amount owed under the judgment. This means that there is no available data on the reasons which underpin failure to pay.

As the Department indicated in its briefing to the Committee on 13 January, there is an acknowledged gap in the data where individuals who are owed money following a tribunal award do not pursue the matter. There is no established means of collecting information on non-pursuit of enforcement as individuals who opt not to proceed have no further engagement with the system.

The Department did seek views on the non-payment of awards by way of its recent public consultation on developing more efficient and effective tribunals and will appraise policy options later this year when all of the responses have been fully considered.