EMPLOYMENT BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by the Department for Employment and Learning in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

2. The Memorandum needs to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause or schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. The Department for Employment and Learning ("the Department"), which has lead responsibility for employment law and employment relations in Northern Ireland, has taken forward a review of employment law guided by better regulation principles, which has sought to identify opportunities to reduce regulatory and administrative burdens on businesses, whilst protecting the rights of individual employees.

4. The review focused in particular on three key themes: early resolution of workplace disputes; efficient and effective employment tribunals; and better regulation measures.

5. As part of its work under the first theme, during 2012 and 2013, the Department engaged with stakeholders to establish whether potential industrial tribunal and Fair Employment Tribunal claims should be routed to the Labour Relations Agency in the first instance, with a view to encouraging parties to explore options for resolving their workplace disputes without the need to go through a formal legal process. The Department also sought feedback on a proposed service to provide parties with a more informed understanding of the potential outcome of a tribunal claim, with a view to informing their choices about how to proceed when a dispute arises.

6. This engagement was taken forward in parallel with work, under the second theme, to develop a draft of substantially revised rules and procedures for industrial tribunals and the Fair Employment Tribunal.

7. Consultation explored a range of issues under the third theme. Consultees were asked to consider the merits of extending the current qualification period for unfair dismissal. In Great Britain the qualification period was extended on 6th April 2012 from one to two years, on the basis that it would increase business confidence, encourage companies to recruit more staff, and potentially reduce the number of tribunal claims. There was significant argument and counter-argument from stakeholders around whether this arrangement should also be introduced in Northern Ireland.

8. Under the third theme, stakeholders were asked for their views on whether it would be appropriate to amend the legislation specifying consultation periods which apply in collective redundancy situations. A change in Great Britain, reducing the relevant period from 90 to 45 days, for consultations involving over 100 employees, meant that the Northern Ireland period (90 days) differed from both that operating in Great Britain (45 days) and that applicable in the Republic of Ireland (30 days).

9. Consultees were also asked about the potential for a new process of 'protected conversations' which, if implemented, would allow an employer to have a conversation with an employee about sensitive issues such as performance, where no employment dispute exists, on the basis that these conversations would not be admissible in an unfair dismissal tribunal hearing.

10. Views were also sought on a review of the legislation governing public interest disclosure.

CONSULTATION

11. In May 2012, the Department published an employment law discussion paper which highlighted relevant employment relations developments in Great Britain and sought the views of Northern Ireland stakeholders on a range of broad policy proposals. Minister for Employment and Learning, Dr Stephen Farry MLA, subsequently made a statement to the Northern Ireland Assembly, on 5th November 2012, in which he highlighted the importance of encouraging and embedding good employment relations practice in the workplace, and set out the actions that he intended to take forward, as well as the policy proposals that he wanted to explore further through public consultation. These intentions were reflected in the Department's response to the discussion paper, issued also in November 2012.

12. Having secured Executive approval to take forward public consultation, in July 2013 the Department issued a document that sought stakeholders' views on a number of distinct areas of employment policy. These areas were: early conciliation; neutral assessment; efforts to assist small and medium enterprises (SMEs); the qualification period for unfair dismissal; the maximum amount that a tribunal may award in respect of an unfair dismissal, and the means for calculating an award; collective redundancy consultation periods; compromise agreements; and public interest disclosure.

13. The consultation invited comment on options in these policy areas which took account of relevant Great Britain and Republic of Ireland reform programmes as well as international systems, but were focused on shaping Northern Ireland's employment law to meet local circumstances.

Further consultation

14. During the passage through Parliament of the Enterprise and Regulatory Reform Act 2013, the UK Government committed to a call for evidence on whistleblowing in order to establish if there was a case for making changes to the existing statutory framework. The responses to the call for evidence included comments on the role of regulators and other bodies who are prescribed as recipients of whistleblowing disclosures ('prescribed persons'). A follow up limited consultation in Northern

Ireland highlighted a lack of consistency in the approach taken by prescribed persons and a lack of communication by them. This consultation also took views on the inclusion of student nurses and student midwives in whistleblowing protections.

OPTIONS CONSIDERED

15. All of the options set out in the consultation took account of the UK Government's and the Republic of Ireland's reform programmes as well as international systems, but on the clear understanding that the key objective was to shape Northern Ireland's employment law system to suit Northern Ireland's particular circumstances. As the options on which the Department consulted were distinct areas of employment policy, separate consideration was given, in relation to each area, as to whether legislation was required or whether matters could be addressed using an alternative non statutory route. At the outset it was decided that no legislative action was required to address efforts to assist small and medium enterprises (SMEs), as this could be better achieved through greater use of existing systems. In addition, it was determined that legislating for compromise agreements would not be appropriate.

16. While the Department considers that there are persuasive arguments and support for reducing collective redundancy consultation periods from 90 to 45 days for consultations involving over 100 employees (in line with the approach taken in Great Britain), it has decided not to take forward legislation on the matter in the present Bill as there is insufficient political consensus.

17. For those areas where a decision has been made to take forward legislation, further detail on the options considered is set out below.

Early conciliation

18. The Department has a long-standing objective of making it easier for employees and employers to resolve individual employment disputes without it becoming necessary to escalate the matter to a potentially costly, stressful and time-consuming legal process at an industrial tribunal or the Fair Employment Tribunal. In Great Britain, from 6th May 2014, all potential claimants to an employment tribunal must notify Acas (the Advisory, Conciliation and Arbitration Service) of an intention to lodge an employment tribunal claim, and Acas is required to offer applicants the opportunity to use early conciliation.

19. The Industrial Tribunals (Northern Ireland) Order 1996 ("ITO 1996") and the Fair Employment and Treatment (Northern Ireland) Order 1998 ("FETO 1998") currently provide a discretionary power for the Labour Relations Agency ("LRA"), to provide pre-claim conciliation to parties in an employment dispute that could be the subject of industrial tribunal ("IT") or Fair Employment Tribunal ("FET") proceedings, where either party requests it and where the conciliator believes that there is a reasonable prospect of a settlement being reached. In the main, matters are referred to pre-claim conciliation via the LRA telephone helpline. For example, where the operator believes that a caller has a case that may be amenable to conciliation which, if not settled, is likely to lead to claim to an IT or the FET, that operator can offer the caller the opportunity to go to pre-claim conciliation.

20. It would have been possible to maintain the *status quo* under the existing provisions; however, at present there is no obligation on prospective claimants to contact the LRA or to consider conciliation at any stage. An IT or the FET cannot refuse to accept a claim on the basis that a claimant has not contacted the LRA. In addition, there is no duty on the LRA to provide conciliation before a tribunal claim has been lodged; there is only a discretionary power.

21. The Department decided, in light of the consultation outcome, to introduce legislation so that, in most cases, people will no longer be able to have a claim accepted by either an IT or the FET (unless an exemption applies), without providing evidence that the LRA has offered conciliation as a means of resolving the dispute. This will be known as "LRA early conciliation". To be clear, the individual need only apply to the LRA in order to comply with the process; engagement with conciliation, once offered, is discretionary and there are no consequences for the tribunal process in failing to engage.

22. The routing of potential tribunal claims to the LRA in the first instance is intended to encourage potential claimants to consider the merits of resolving their disputes without the need to go through a formal legal process. The Department will be required to review the operation of the service after one and again after three years following commencement.

Neutral assessment

23. Another option explored by the Department was a proposed LRA service that would offer parties an informed understanding of the potential outcome of a tribunal claim or arbitration. This was envisaged as an entirely voluntary process, allowing parties to explore with an independent assessor appointed by the Agency possibilities for settling a case. No directly comparable measure exists in Great Britain.

24. The essential difference between this service and those already provided by the LRA would be its ability to provide participants with an indication from an employment relations expert of the potential outcome of the case were it to be referred to the Agency's statutory arbitration service or a tribunal. The purpose would be to help parties make better informed decisions as to whether or not legal action is the most appropriate way forward for them.

25. Having taken into account evidence presented to the Employment and Learning Committee and the outcome of additional engagement with the Labour Relations Agency and the tribunal service, the Department has sought to create enabling provisions that will allow for a neutral assessment service to be offered in accordance with regulations which will be the subject of further engagement. The objective is to, increase options to assist parties in dealing with disputes in an informed and proportionate manner.

Qualification period for unfair dismissal

26. In Great Britain, the unfair dismissal qualifying period (the period employees must work before they become entitled to exercise the right to lodge a tribunal claim for unfair dismissal) changed from one year to two years on 6th April 2012.

27. The qualifying period in Northern Ireland currently stands at one year. This means that an employee must have served one year with his/her employer before he/she can make a claim for unfair dismissal. Employees do not have to meet the qualifying period requirement if the reason for dismissal relates to discrimination or assertion of a statutory right.

28. In Northern Ireland, consideration was given to the merits of extending the current qualification period for unfair dismissal. Account was taken of the fact that, in Great Britain, the period was extended on the basis that it would increase business confidence, encourage companies to recruit more staff, and potentially reduce the number of tribunal claims. Options considered included making changes to the qualifying period affecting all employees, and more limited changes applicable, for example, to new start or small employers only.

29. Having taken all views and the available evidence into account, the Department will not be taking action to amend the unfair dismissal qualifying period in Northern Ireland. The unfair dismissal qualifying period will therefore remain at one year. However the Department is making an amendment to the relevant enabling power so that any future changes to the qualifying period will be subject, not to the confirmatory but, to the draft affirmative Assembly procedure. This will mean that future change to the qualifying period will require the prior approval of the Assembly rather than, as at present, the Assembly's confirmation after the fact.

Maximum tribunal award in cases of unfair dismissal

30. As part of the wider consideration of issues relating to unfair dismissal, the Department noted the UK Government's introduction of a cap of 12 months' pay on the compensatory award that a tribunal may make in respect of a finding of unfair dismissal.

31. The Department sought the views of stakeholders on the amount of compensation that can be awarded in respect of a tribunal claim for unfair dismissal, including the maximum amount, and the means for calculating an award.

32. The Department has not been in receipt of persuasive arguments favouring significant change to the present upper limit for an award. There is no clear consensus on the proposal to place a limit on the maximum amount of an unfair dismissal award equal to 12 months' salary, or on any other option.

33. The Department has, however, accepted that there is a need to modify the formula, linked to annual changes in the retail prices index ("RPI"), which allows the maximum amount of an unfair dismissal award (and other employment rights related payments, such as the weekly rate for the purposes of calculating a statutory redundancy payment) to be revised to more accurately reflect movements in the RPI.

34. Legislative change in this area is confined to amending the formula for calculating annual RPI based changes to employment rights related payments, including the maximum award for unfair dismissal. Provision is made to allow for future adjustment to such payments, without reference to the RPI, if approved in advance by the Assembly.

Public interest disclosure

35. A legislative framework was established by the Public Interest Disclosure (Northern Ireland) Order 1998 ("the 1998 Order") to protect individuals who make certain disclosures of information in the public interest ("whistleblowing"), to allow such individuals to bring action in respect of victimisation.

36. A worker who blows the whistle, by making a 'protected disclosure' in accordance with the criteria set out in Part VA, Articles 67A to 67L of the Employment Rights (Northern Ireland) Order 1996 ("ERO 1996"), has the right not to be unfairly dismissed or suffer a detriment as a result of having made that disclosure.

37. For a disclosure to be protected by the provisions, the worker must make sure it is either made internally to his/her employer or another responsible person, or to various external bodies including: a legal advisor, a Minister of the Crown or a 'prescribed person' listed on the Public Interest Disclosure (Prescribed Persons) Order (Northern Ireland Order 1999.

38. A review of the legislation governing public interest disclosure is required as a legal loophole, created by the 2002 GB Employment Appeal Tribunal decision of *Parkins -v- Sodexho*, currently exists within whistleblowing legislation. This decision means an individual can rely on the employment protections afforded, where the matter relates to his/her own personal work contract. The intention of the legislation, as the title of the 1998 Order suggests, is to normally only afford protection where disclosures are made in the public interest.

39. The public interest disclosure element of the employment law review consultation sought views on five main elements: whether to amend the law to clarify that disclosures must be in the public interest, thereby closing the loophole identified in *Parkins -v- Sodexho*; whether to amend the law so that disclosures may be protected, even if they are not made in good faith; amending the definition of 'worker' to include people who may have been inadvertently omitted from the protections under the law; whether the definition of worker could be amended in future by subordinate legislation; whether to make employers vicariously liable for detriment experienced by a whistleblower at the hands of colleagues; and general comments on the effectiveness of the public interest disclosure regime in Northern Ireland.

40. The Department, having considered responses to the public consultation and to the limited subsequent consultation, seeks to amend the law to clarify that disclosures must be in the public interest, thereby closing the loophole identified in *Parkins -v- Sodexho*. As workers should feel able to report allegations of wrongdoing, regardless as to whether the disclosure is made in good faith, the Department is legislating to alter the effect of the 'good faith' requirement; the issue of good faith will now be considered by a tribunal in relation to remedy, rather than liability. The Department has also decided to empower industrial tribunals, at their discretion, to reduce a compensatory award by up to 25% in the event that a tribunal finds that a disclosure has not been made in good faith. The Department intends to include student nurses and student midwives in the scope of whistleblowing protections and, in addition, create a power to make future definitional changes by subordinate legislation. The Department is also legislating for employers to be vicariously liable if an employee who makes a protected disclosure subsequently experiences detriment from

colleagues. The Department is additionally establishing a power to make regulations requiring prescribed persons for the purposes of Article 67F of the ERO 1996 to produce an annual report on disclosures of information made to the person by workers.

41. The Department considers that the Public Interest Disclosure (Northern Ireland) Order 1998, with amendments made, supported by improved guidance, negates the need for a Statutory Code of Practice at this time.

OVERVIEW

The Bill:

- provides that, in most cases, a prospective claimant must first have submitted the details of their claim to the Labour Relations Agency before they can lodge the claim at an industrial tribunal or the Fair Employment Tribunal;

- requires the operation of the service to be reviewed;

- extends confidentiality provisions to ensure that the full range of LRA dispute resolution services is appropriately protected;

- contains enabling provisions that allow for a neutral assessment service to be established in accordance with regulations;

- converts the Department's power to amend the qualifying period, for the right to claim unfair dismissal, from confirmatory to draft affirmative procedure;

- provides for more accurate rounding when annual changes, in line with inflation, are applied to the maximum amount of an unfair dismissal award and other employment rights related payments; and empowers the Department to modify these sums if a draft order is approved by the Assembly;

- alters the effect of the good faith test; the issue of good faith will now be considered by a tribunal in relation to remedy, rather than liability;

- introduces a test to close the loophole in public interest disclosure legislation;

- introduces a power to allow the Department to make regulations requiring regulators and other bodies prescribed for the purposes of Article 67F of ERO 1996 (as recipients of whistleblowing disclosures) to report annually on disclosures of information made by workers;

- includes public interest disclosure protections for student nurses and student midwives;

- introduces a power to amend, by subordinate legislation, the definition of worker in public interest disclosure legislation;

- legislates for employers to be vicariously liable if an employee who makes a protected disclosure subsequently experiences detriment from colleagues;

- amends enabling powers to allow for procedural changes to be made to regulations concerning ITs and the FET;

- requires the Department to provide impartial 'best interests' careers guidance to appropriate groups, and provides power to make relevant regulations;

- empowers the Department, by regulations, to deal with the provision of apprenticeships and traineeships.

COMMENTARY ON CLAUSES

INDUSTRIAL TRIBUNALS

Clause 1: Conciliation before and after institution of proceedings

This clause inserts new Articles 20A, 20B and 20C into the ITO 1996.

Article 20A provides that, other than in certain circumstances (paragraph (7)), a prospective claimant must first have submitted the details of their claim to the LRA before they can lodge the claim at an industrial tribunal. The kinds of proceedings to which this requirement applies are set out in Article 20(1) of the ITO 1996, and are referred to as "relevant proceedings" (see the amendment made by paragraph 3(3) of Schedule 1 to the Bill).

Under paragraph (3) of Article 20A, an LRA conciliation officer will be required to try to achieve a settlement to the dispute, within a prescribed period, so that industrial tribunal proceedings can be avoided. Paragraph (4) of Article 20A provides that if, during that time, the conciliation officer concludes that a settlement is not possible, or the period expires with no settlement having been reached, the officer must issue a certificate to the prospective claimant and a claimant will not be able to lodge a claim with an industrial tribunal without such a certificate (paragraph (8)). The conciliation officer will, however, be able to continue to try to achieve a settlement to the dispute after the prescribed period has expired.

Paragraph (9) of Article 20A provides that, where prospective claimants are no longer employed by the employer, the conciliation officer may attempt to promote either the reinstatement or re-engagement of the individual or, if the individual does not want to be reinstated or re-engaged, or this is not practicable, attempt to achieve an agreement between the parties on the level of compensation to be paid by the employer.

Paragraphs (11) and (12) of Article 20A give the Department the power to make any industrial tribunal procedure regulations which are necessary for the operation of the early conciliation process.

Article 20B places an additional duty on the LRA to promote settlement in certain cases in which the duty under Article 20A does not apply. Paragraph (3) of Article 20B requires an LRA conciliation officer to try to achieve a settlement in a dispute where a person contacts the LRA requesting the services of a conciliation officer in a matter that might otherwise result in industrial tribunal proceedings against them even though the prospective claimant has not contacted the LRA. Paragraph (2) of Article 20B requires the conciliation officer to

try to achieve a settlement in a dispute where the prospective claimant contacts them, even where that person is exempted by virtue of Article 20A(7) from the requirement to provide information to the LRA.

Currently, Article 20(3) of the ITO 1996 provides a discretionary power for the LRA to provide pre-claim conciliation to parties in an employment dispute, which could be the subject of tribunal proceedings, where either party requests it and where the conciliator believes that there is a reasonable prospect of a settlement being reached.

Article 20C places a further duty on the LRA to seek to promote settlement in certain cases where proceedings have already been instituted. This ensures that even where cases have progressed to industrial tribunal, the LRA conciliation officer may continue to offer support to the parties to enable them to reach an agreed settlement.

Clause 2: Extension of limitation periods to allow conciliation

This clause gives effect to Schedule 2, which sets out how the relevant time limits for bringing a claim to an industrial tribunal will be extended where necessary to provide sufficient time for early conciliation to take place and to ensure that the claimant is not disadvantaged.

Clause 3: Extended power to define "relevant proceedings" for conciliation purposes

This clause amends Article 20 of the ITO 1996 to provide that orders made by the Department may add to or remove proceedings from the list in Article 20(1) of the ITO 1996.

Orders which add proceedings to the list may also amend the applicable time limit in any relevant statutory provision.

Where the order removes proceedings from the list, consequential changes can be made to any extension to the time limit which is provided in any relevant statutory provision.

Clause 4: Power to require party to proceedings to pay deposit

This clause amends Article 11 of the ITO 1996 to provide the Department with the power to prescribe by regulations requirements, in addition to those already in statute, which parties may be required to meet as a condition of continuing to participate in particular IT proceedings.

IT procedure regulations currently require a party to pay a deposit where their case is considered to have little reasonable prospect of success. These regulations are under review, and the enabling power will allow the Department to legislate in response to the relevant public consultation, once concluded.

Subsection (2) of the clause amends Article 25 of ITO 1996 so that regulations which make use of the enabling power are to be subject to the draft affirmative Assembly procedure.

FAIR EMPLOYMENT TRIBUNAL

Clause 5: Conciliation before and after complaint to Fair Employment Tribunal

This clause inserts new Articles 88ZA and 88ZB into the FETO 1998. Its provisions are comparable to those in clause 1.

Article 88ZA provides that, other than in certain circumstances (paragraph (7)), a prospective claimant must first have submitted the details of their claim to the LRA before they can lodge the claim at the FET. Under paragraph (3) of Article 88ZA, an LRA conciliation officer will be required to try to achieve a settlement to the dispute, within a prescribed period, so that FET proceedings can be avoided. Paragraph (4) of Article 88ZA provides that, if during that time the conciliation officer concludes that a settlement is not possible, or the period expires with no settlement having been reached, the officer must issue a certificate to the prospective claimant and a claimant will not be able to lodge a claim with the FET without such a certificate (paragraph (8)). The conciliation officer will, however, be able to continue to try to achieve a settlement of the dispute after the prescribed period has expired.

Paragraphs (10) and (11) of Article 88ZA give the Department the power to make any FET procedure regulations which are necessary for the operation of the early conciliation process.

Article 88ZB places an additional duty on the LRA to promote settlement in certain cases in which the duty under Article 88ZA does not apply. Paragraph (3) of Article 88ZB requires an LRA conciliation officer to try to achieve a settlement in a dispute where a person contacts the LRA requesting the services of a conciliation officer in a matter that might otherwise result in FET proceedings against them even though the prospective claimant has not contacted the LRA. Paragraph (2) of Article 88ZB requires the conciliation officer to seek to promote a settlement in a dispute where the prospective claimant contacts the Agency, even where that person is exempted by virtue of Article 88ZA (7) from the requirement to provide information to the LRA.

Currently, Article 88(3) of the FETO 1998 provides a discretionary power for the LRA to provide pre-claim conciliation to parties in an employment dispute, which could be the subject of tribunal proceedings, where either party requests it and where the conciliator believes that there is a reasonable prospect of a settlement being reached.

Article 88ZC places a further duty on the LRA to seek to promote settlement in certain cases where proceedings have already been instituted. This ensures that even where cases have progressed to the FET, the LRA conciliation officer may continue to offer support to the parties to enable them to reach an agreed settlement.

Clause 6: Extension of time limit to allow conciliation

This clause inserts Article 46B into the FETO 1998. This sets out how the relevant time limits for bringing a claim before the FET will be extended where necessary to provide sufficient time for early conciliation to take place and to ensure that the claimant is not disadvantaged.

Comparable provisions extending time limits in respect of industrial tribunal matters are contained within Schedule 2.

Clause 7: Power to require party to proceedings to pay deposit

This clause, which is comparable to clause 5, amends Article 84B of the FETO 1998 to provide the Department with the power to prescribe by regulations other requirements in addition to those already in statute, which parties may be required to meet as a condition of continuing to participate in particular FET proceedings.

FET procedure regulations currently require a party to pay a deposit where their case is considered to have little reasonable prospect of success. These regulations are under review, and the enabling power will allow the Department to legislate in response to the relevant public consultation, once concluded.

Subsection (2) of the clause amends Article 104 of FETO 1998 so that regulations which make use of the enabling power are to be subject to the draft affirmative Assembly procedure.

ASSESSMENT OF MATTERS RELATING TO TRIBUNAL PROCEEDINGS

Clause 8: Assessment of matters relating to tribunal proceedings

Clause 8 empowers the Department to make regulations which allow parties to be given an assessment concerning industrial tribunal or Fair Employment Tribunal proceedings which have been or could be instituted. The regulations may make provision about who will deliver the service, to whom it may be delivered and the matters which may be considered.

The objective is to enable those facing an employment dispute to receive a non-legally binding indication of where they stand in relation to the dispute, to assist them in arriving at a better informed decision about how to proceed.

Clause 9: Review of early conciliation

Clause 9, incorporated at the Bill's Consideration Stage and slightly amended at Further Consideration Stage, places a requirement on the Department to review the operation of Articles 20 to 20C of ITO 1996 and Articles 46B and 88ZA to 88ZC of FETO 1998, as well as related legislative amendments. These provisions relate to the conciliation service, including the new early conciliation service, operated by the LRA. The review must be carried out at the end of one year and then again at the end of three years following the provision's commencement.

The Department is also required to consult with relevant stakeholders including employers and to lay the findings of the review in the form of a report to the Assembly. The report must include a synopsis of consultation responses, an assessment of the provisions' effectiveness, data concerning cases and related savings.

Clause 9A: Review of section 8: Assessment of matters relating to tribunal proceedings

Clause 9A, incorporated at the Bill's Further Consideration Stage, places a requirement on the Department to review the operation of provisions set out in clause 8, which concern an assessment being given in relation to actual or prospective proceedings before an employment tribunal. The review must be carried out at the end of one year and then again at the end of three years following the commencement of those provisions.

The Department is also required to consult with relevant stakeholders including employers and to lay the findings of the review in the form of a report to the Assembly. The report must include a synopsis of consultation responses, an assessment of the provisions' effectiveness, data concerning cases and related savings.

EMPLOYMENT JUDGES

Clause 10: Employment judges: industrial tribunals

Clause 10 inserts paragraph (3) into Article 3 of the ITO 1996. This permits the Department to make regulations which provide that the members of the panel of chairmen of industrial tribunals as well as the President and the Vice-President of Industrial Tribunals and the Fair Employment Tribunal may be referred to as employment judges.

Clause 11: Employment judges: Fair Employment Tribunal

Clause 11 amends Article 82 of the FETO 1998, so that the existing power under Article 81 of that Order can be used by the Department to make regulations to provide that the members of the panel of chairmen of the FET may be referred to as employment judges.

PROTECTED DISCLOSURES

Clause 12: Disclosures not protected unless believed to be made in the public interest

The effect of clause 12 is to insert a specific public interest test into the ERO 1996. This ensures that, in order to benefit from protection, whistleblowing claims must, in the future, satisfy a public interest test and disclosures, which can be characterised as being of a personal rather than public interest, will not be protected.

For example, if a worker does not receive the correct amount of holiday pay (which may be a breach of the terms of his/her contract of employment), this is a matter of personal rather than wider interest.

The worker must also show that the belief that the disclosure was in the public interest was reasonable in the circumstances.

Clause 13: Power to reduce compensation where disclosure not made in good faith

The effect of this clause is to remove the requirement in Articles 67C, 67E, 67F, 67G and 67H of the ERO 1996 that a disclosure be made in good faith in order to be a protected disclosure and benefit from whistleblowing protections. In addition, the clause amends the ERO 1996 to provide industrial tribunals with the power to reduce an award of compensation by up to 25%, where a protected disclosure has not been made in good faith.

"Good faith" is not defined in the ERO 1996, but the courts in Great Britain have held that where the predominant motive of the individual making the disclosure was not directed at remedying one of the wrongs listed in section 43B of the Employment Rights Act 1996, but was instead for some ulterior purpose, the disclosure is unlikely to have been made in good faith (see *Street -v- Derbyshire Unemployed Workers' Centre* [2004] IRLR 687). Article 67B is the corresponding provision in the ERO 1996.

Currently, the requirement for a disclosure to be made in good faith can affect the success of the claim. If an industrial tribunal finds that a disclosure was not made in good faith and instead there was an ulterior motive which was the predominant reason for the disclosure, the claim will fail.

Clause 13 alters the effect of the good faith test; the issue of good faith will now be considered by a tribunal in relation to remedy, rather than liability, so a claim will not fail as a result of an absence of good faith. An industrial tribunal will have the discretion to reduce a compensatory award by up to 25% in the event that it finds the disclosure has not been made in good faith.

Clause 14: Protected disclosures: reporting requirements

This clause introduces a power to enable the Department to make regulations requiring a person prescribed for the purposes of Article 67F of the ERO 1996 to produce an annual report on disclosures of information made to the person by workers. The purpose of the annual reporting requirement is to ensure more systematic processes across all prescribed persons in the way public interest disclosures are handled, thereby working towards a consistent standard of best practice for disclosures. It will also provide greater assurance to the whistleblower that action is being taken by the prescribed person, thereby increasing confidence in their role.

The content of the report is to be prescribed by regulations, which will also determine how the report is published and its timing. Reports may not include content that would reveal the identity of the individual who has made the disclosure or the employer or organisation to which the disclosure relates.

Clause 15: Worker subjected to detriment by co-worker or agent of employer

The effect of this clause is to introduce a vicarious liability provision so that where a worker is subjected to a detriment by a co-worker done on the ground that the worker made a protected disclosure, and this detriment is done in the course of the co-worker's employment with the employer, that detriment is a legal wrong and is actionable against both the employer and the co-worker.

The employer will only be liable for a detriment where it is done by a worker in the course of employment or by an agent of the employer with the employer's authority. In this context, the term "agent" refers to someone who is appointed by the employer to perform duties on their behalf (such as a contractor).

Employers are able to rely on the defence in new paragraph (1D) of Article 70B of the ERO 1996 if they have taken all reasonable steps to prevent the co-worker from subjecting the whistleblower to a detriment. If the defence applies the employer will not be liable for the actions of the co-worker.

Where a whistleblower is bullied or harassed by a co-worker but the employer can use the defence in paragraph (1D), the co-worker will still be liable and the worker could bring a claim against that co-worker.

Clause 16: Extension of meaning of "worker"

This clause amends Article 67K of the ERO 1996 in relation to protected disclosures. Article 67K extends the meaning of "worker" for Part VA of that Order. The effect of the amendment is that student nurses and student midwives who undertake work experience as part of a course of education or training approved by, or under arrangements with, the Nursing and Midwifery Council in accordance with article 15(6)(a) of the Nursing and Midwifery Order 2001 will fall within the extended definition of worker who may make a protected disclosure. A student nurse or student midwife who makes a protected disclosure concerning his/her work experience may bring a claim against the person providing that work experience, which will be determined by industrial tribunal.

In addition, clause 16 introduces a power in Article 67K of the ERO 1996 to permit the Department to amend, by order, the definition of "worker" in that Article. The power can be used to increase the scope of protection. It can, however, only be used to remove categories of individuals where, in the opinion of the Department, no such individuals exist (i.e. the category has become obsolete).

Clause 16A: Zero hours workers

Clause 16A, incorporated within the Bill at Further Consideration Stage, inserts new Article 59A into the Employment Rights (Northern Ireland) Order 1996. The inserted Article empowers the Department to make appropriate provision to prevent abuses associated with the use of zero hours contracts, non-contractual zero hours arrangements or worker's contracts of a kind to be specified in regulations. The Article includes a definition of "zero hours contract" and "non-contractual zero hours arrangement". It also specifies when an employer is deemed to make work available and how references to work may be interpreted. Finally, the Article permits regulations (subject, by virtue of clause 21, to the draft affirmative Assembly procedure) to amend or repeal any statutory provision.

Clause 16A: Gender pay gap information

Clause 16A, also incorporated within the Bill at Further Consideration Stage provides that employers must, in accordance with regulations made by the Office of the First Minister and deputy First Minister, publish information showing whether gender pay disparities exist between employees. The information is to be presented by reference to prescribed factors and will give details of the method used to calculate any statistics presented. Where gender pay differences are identified, an employer must publish an action plan to eliminate them and provide a copy to employees and any recognised trade union. The size of employer to which the requirements apply, indicated by the number of employees and workers in the organisation, is to be established by regulations.

The regulations must prescribe descriptions of employee and employer, how to calculate the number of employees that an employer has, a standardised method for calculating pay differentials, descriptions of information, a requirement for the information to include statistics broken down by ethnicity and disability, the time at which it is to be published and the form and manner of its publication.

Employers may not be required to publish information more frequently than annually or less frequently than every three years. Regulations are to establish that non-compliance will be punishable by a fine in respect of every employee; and are to provide for enforcement.

The first regulations must be made by 30 June 2017.

The Office of the First Minister and deputy First Minister is to publish a strategy, including an action plan on eliminating gender pay differences, within 18 months of Royal Assent.

CAREERS GUIDANCE

Clause 17: Careers guidance

The effect of clause 17 is to amend section 1 of the Employment and Training Act (Northern Ireland) 1950 so that the Department is required to make arrangements for providing careers guidance for persons it considers appropriate. The guidance must be provided in an impartial manner and be in the best interests of the person receiving it.

The clause also empowers the Department to make regulations which deal with the delivery of careers guidance. The regulations can, in particular, include a requirement for the guidance to be delivered or provided by a person holding qualifications which the Department determines are appropriate.

APPRENTICESHIPS

Clause 18: Apprenticeships

The effect of clause 18 is to introduce a power in section 1 of the Employment and Training Act (Northern Ireland) 1950 which enables the Department to make regulations requiring arrangements to be made for providing apprenticeships and traineeships. Traineeships will be the new professional and technical training offer for 16- to 24-year-olds, as articulated in the youth training strategy, 'Generating our Success'.

The regulations may specify the target groups to whom and the conditions under which apprenticeships and traineeships are to be made available. They may also provide for the component parts which together constitute an apprenticeship or traineeship.

MISCELLANEOUS

Clause 19: Indexation of amounts: timing and rounding

This clause amends Article 33(2) and (3) of the Employment Relations (Northern Ireland) Order 1999 ("ERO 1999) by setting a time for orders made under that Article to come into operation and amending the calculation which is to be used to increase or decrease the relevant limits.

Article 33(2) of the ERO 1999 provides that, if the Retail Prices Index for September of a year is higher or lower than the RPI for the previous September, the Department is required to make an order to increase or decrease the limits which apply to certain IT awards and other amounts payable under employment legislation.

The list of sums to be increased or decreased as a result of a change in the RPI is set out in Article 33(1) of the ERO 1999. The sums for the relevant payments and awards are revised by order annually under the ERO 1999. Clause 19 amends Article 33(2) 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. All limits remain linked to the RPI.

Clause 19 also changes the rounding calculation set out in Article 33(3) of the ERO 1999 so that all limits are rounded up or down to the nearest pound.

Additionally, a new paragraph (7) is added to Article 33 specifying that the Department may at any time make an order increasing or decreasing sums dealt with under Article 33. Such an order would need to be laid in draft before, and approved by, the Assembly before becoming operational. Provision is made that if such an order is made, it can obviate the need for the normal annual revision of limits in line with the RPI.

Clause 20: Prohibition on disclosure of information held by the Labour Relations Agency

This clause inserts Article 90B into the Industrial Relations (Northern Ireland) Order 1992. The new Article prohibits the LRA, or persons appointed by the LRA, from releasing information relating to a worker, employer of a worker, or a trade union, that they hold in the course of performing their 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. By virtue of paragraph (5), any such proceedings, brought against the person who has breached the prohibition in Northern Ireland, can only be instituted by or with the consent of the Director of Public Prosecutions for Northern Ireland.

Clause 21: Variation in procedures for certain orders and regulations

Clause 21 amends Article 251 of the ERO 1996 so that the Department's powers to amend certain legislative provisions are made subject to the draft affirmative procedure before the Assembly. These include powers relating to the qualifying period for unfair dismissal and certain of the new public interest disclosure provisions inserted into the ERO 1996 by the Bill.

Application of the draft affirmative procedure means that any rules under these powers must be laid in draft and cannot be made unless approved by the Assembly.

The clause also contains technical amendments allowing for more efficient procedural handling of certain regulations containing provisions which are subject to different Assembly procedures.

Clause 22: Statutory shared parental pay: correction of references

Clause 22 corrects a small number of references in the Social Security Contributions and Benefits (Northern Ireland) Act 1992, dealing with statutory shared parental pay, which were introduced by the Work and Families Act (Northern Ireland) 2015.

Clause 23: References to tribunal jurisdictions to which Articles 17 and 27 of the Employment (Northern Ireland) Order 2003 apply

Clause 23 updates legislative references in Schedules 2 and 4 of the Employment (Northern Ireland) Order 2003 ("EO 2003").

Schedule 2 to the EO 2003 lists the range of employment rights in respect of which, if minimum statutory disciplinary and dismissal procedures have not been followed in the workplace, an industrial tribunal may adjust an award.

Schedule 4 to that Order lists the jurisdictions in respect of which industrial tribunals are normally required to make or increase an award if an employer has provided an employee with an incomplete or inaccurate written statement of employment particulars.

SUPPLEMENTARY

Clause 24: Repeals

Clause 24 gives effect to the repeals of statutory provisions set out in Schedule 3.

Clause 25: Interpretation

Clause 25 provides that for the purpose of this Bill any reference to "the Department" means the Department for Employment and Learning.

Clause 26: Commencement

This clause provides that the Department may make commencement orders bringing the provisions of the Act into operation on one or more dates. This is except for those set out in clause 25 (Interpretation), clause 26 (Commencement) and clause 27 (Short title).

FINANCIAL EFFECTS OF THE BILL

42. The majority of the measures in the Bill will not have any financial effect for Government as they amend current processes rather than introduce new obligations.

43. Introduction of early conciliation will have an initial one off set up cost in the region of £50,000 and incur an additional staffing cost of approximately £130,000 annually. This will be offset by an anticipated cost saving of £170,000 in the frontline resource budget of Office of Industrial Tribunals and Fair Employment Tribunal, due to the anticipated reduction in the number of cases.

44. Neutral assessment has the potential to generate net costs to Government in the region of £165,000 *per annum*, but with modest net benefits for employees and employers who avoid tribunal proceedings as a result of settling their case following an assessment.

45. Provision on zero hours arrangements is enabling only and so no impacts are attributable.

46. Provision requiring employers to report on gender pay differences is likely to have as yet unquantified impacts on public sector employers.

HUMAN RIGHTS ISSUES

47. The exercise of powers modified by clauses 5 and 9, concerning the ability to require a deposit in order to continue with industrial tribunal and Fair Employment Tribunal proceedings respectively, has potential implications for access to justice.

48. It should be noted that power to require a deposit in certain circumstances already exists in statute; the intention of clauses 5 and 9 is to allow for possible changes to the circumstances, set out in subordinate legislation, in which this can occur.

49. Before seeking to exercise these powers to amend subordinate legislation, the Department will seek views through public consultation and will give careful consideration to human rights implications. A decision affecting the deposit mechanism will be subject to the draft affirmative resolution procedure before the Assembly.

50. The provisions in the Bill are not otherwise deemed to have implications for human rights.

EQUALITY IMPACT ASSESSMENT

51. The majority of the measures in the Bill will not impact on equality of opportunity or good relations.

52. The proposals for early conciliation and neutral assessment will have modest positive benefits for all of the groupings listed in section 75 of the Northern Ireland Act 1998 in the sense that they will open up opportunities for resolving workplace disputes in a more constructive and efficient manner. However, some of the policy proposals are expected to generate greater benefits for particular groups:

- single parents (predominantly women), who due to family commitments and their less favourable economic position do not have time or resources for lengthy or complex legal processes;
- individuals with disabilities, and in particular mental health disabilities associated with or exacerbated by stress;
- racial, ethnic, national or religious groups employed as migrant workers whose first language is not English; and
- persons bringing a tribunal claim relating to their sexual orientation or to political or religious discrimination.

53. These groups will all benefit from enhanced information and advice, and access to an alternative route to resolving disputes.

54. Whilst impacts in these areas are considered to be positive, they are also considered to be relatively modest.

55. The gender pay provisions have the express intention of reducing and then eliminating gender pay differences. However, an equality impact assessment has not been carried out in relation to the relevant clause in the Bill.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

56. Early conciliation by the LRA will produce new benefits to employers of approximately £1,220,000 *per annum* based on savings on the avoidance of costs that would otherwise be incurred in the tribunal processes. Net benefit to employees of £580,000 *per annum* is expected from earlier resolution of disputes through early conciliation.

57. Neutral assessment is considered to be associated with modest annual benefits to employees of approximately £110,000, and to employers of approximately £280,000.

58. As provisions concerning zero hours arrangements are enabling only, no regulatory impacts arise.

59. No regulatory impact assessment has been carried out in respect of the gender pay clause; however, impacts will be influenced and constrained by the eventual shape of regulations developed under the enabling powers.

LEGISLATIVE COMPETENCE

60. The Minister for Employment and Learning had made the following statement under section 9 of the Northern Ireland Act 1998:

"In my view the Employment Bill would be within the legislative competence of the Northern Ireland Assembly."