

Introduction

The Society has already made a formal submission to the Minister, a copy of which is attached to this reply as Appendix A. That submission must be read in conjunction with the **Response to this Questionnaire** where the Society's views are comprehensively addressed arising from the questions posed.

1. Resolution of grievances and disputes as close to the workplace as possible and as early as possible after they arise.

Maintaining good employment relations and resolving workplace conflict

Question 1.1 How do you think employers and employees can best be supported in resolving disputes at workplace level?

This is an extremely difficult question to answer. The first point to make is that an atmosphere of mutual respect in the workplace should be encouraged. Once people realise that everybody brings their own valuable contribution to the workplace, the potential for disputes is lessened.

As the vast majority of workplaces in Ireland consist of small and medium enterprises, disputes tend to be extremely personalised. The existence of a dispute resolution service or an expanded conciliation service of the Labour Relations Commission to which parties in dispute could go, would be of considerable advantage. As far as the Society is aware, the conciliation service is generally used for collective union-employer disputes, rather than individual disputes between employers and employees in relation to their employment rights or, more importantly, in relation to grievances which may arise in the workplace. A very substantial number of employment disputes could be dealt with at a very early stage if a grievance could be resolved amicably. The provision of a service to enable such individual disputes to be resolved or to which both parties could refer at an early stage would be of great assistance.

The Society's view is that in any restructure of the system the industrial relations and the conciliation functions of the Labour Relations Commission and the Labour Court under the Industrial Relations Acts must be kept separate and distinct from any adjudicative function relating to employment rights which must be performed by a separate body. The Society in its initial submission suggested that the functions of the EAT, Equality Tribunal, Labour Court etc could be subsumed into one division. However, that suggestion was predicated on the separation of the adjudication function from the industrial relations/conciliation functions.

In relation to support for employers and employees, there should be a source of information that is easily accessible by both to enable them to at least identify their rights. The reform of the adjudicative bodies and the improvement in the IT/internet accessibility of the services will assist in this process. In this regard the Society notes the up-to-date factual information currently available to employers and employees through the National Employment Rights Authority's (NERA) information unit and

available on the NERA website (www.employmentrights.ie). In no circumstances, however, can the person(s) who will ultimately be charged with the task of adjudicating upon disputes that cannot otherwise be resolved, or any person associated with him/her, be party to the provision of advice to either claimants or respondents regarding the merits of their cases.

Question 1.2 Can the provision of timely up-to-date factual information help to facilitate early resolution of grievances claims and stem the flow of formal cases being submitted?

The provision of information, of course, will greatly assist parties in deciding whether or not their rights have been infringed. (See comments in response to Question 1.1 with regard to the up-to-date factual information currently available to employers and employees through the National Employment Rights Authority's (NERA) information unit and available on the NERA website (www.employmentrights.ie))

Unfortunately, most disputes arise because there is a dispute as to whether their rights are infringed, not the existence of those rights. What the State must consider is the difference between information, assistance and advice. Information is telling the parties what their legal rights are. Assistance is enabling them to vindicate those rights, possibly by informing them of the fora to which they can go and providing assistance in completing forms. Advice consists of advising them as to whether, in their particular circumstances, their rights have or have not been infringed.

It would be inappropriate for the adjudicative body and/or its secretariat to provide advice on the issues under adjudication. Therefore, any role of the secretariat must be limited to the provision of information and assistance only. Advice as to both the legislation under which a complaint might be brought and the likelihood of success must, in the view of the Society, only be given by independent third parties. Again, under no circumstances can the person(s) who will ultimately be charged with the task of adjudicating upon disputes or any person associated with him/her, be party to the provision of advice to either claimants or respondents regarding the merits of their cases.

In view of the complexity of many employment cases involving issues of domestic and European law and the importance of the rights at issue, it is the view of the Society that legal advice and representation should be available to employees and employers who cannot afford to access legal services. Advice and representation should be available to parties through a State funded system of legal aid for employment disputes. Currently the scheme of legal aid as set out in the Civil Legal Aid Act 1995 does not provide for representation before administrative tribunals including the EAT, Equality Tribunal or Rights Commissioners. Legal aid is only available to persons involved in civil proceedings and this also excludes many employers who are incorporated as limited companies. The relevant Minister for Justice could "prescribe" the new adjudicative bodies for the purposes of the 1995 Act to allow employees access to representation. Amending legislation would be necessary to enable employers who are incorporated access to the services. Legal aid would only be available to those who satisfy the means test of the scheme.

Question 1.3 When and how should intervention be available from the State?

Given the replies to 1.1 and 1.2 above, intervention should be available as early as possible.

Question 1.4 How do you think access by employers and employees to a just, fair and efficient adjudication process can be ensured?

The Society believes that the reforms set out in its submission and in these responses will ensure that the process will be just, fair and efficient. In relation to access, it is obviously essential that the initial point of contact for either party be seen to be user-friendly, and indeed friendly. Assistance should be given in completing forms and these forms should be both capable of being accessed on the web and sent to the relevant body dealing with the complaint by email.

A very substantial number of employers do not have the resources to fund immediate access to either legal or representational advice and providing a forum where they could go when complaints are made, in order to seek information as to their legal responsibilities would be a very considerable service in resolving a substantial number of disputes.

However, in respect of assistance given to both the employer and the employee, such assistance should be limited to the provision of information as opposed to advice with regards to the merits of the case. Again, under no circumstances can the person(s) who will ultimately be charged with the task of adjudicating upon disputes that cannot otherwise be resolved, or any person associated with him/her, be party to the provision of advice to either claimants or respondents regarding the merits of their cases.

2 A simple and efficient institutional structure and a high quality customer service with a single authoritative source of information, a single entry point and minimum scope for forum shopping

Integrated structure

Question 2.1 Do you agree that the integrated two-tier models should be adopted as a guiding principle?

The Society, in its submission, and in these responses, has indicated that this is the preferred option, with the right of appeal to the Courts.

Question 2.2 Do you agree that differentiation of processing channels should be minimised to optimise the benefits of the proposed reform and to avoid re-introduction of institutional and procedural rigidities?

The Society reiterates that there should be a one-stop shop for all employment rights issues (again subject to the proviso that the industrial relations and the conciliation functions of the Labour Relations Commission and the Labour Court under the Industrial Relations Acts must be kept separate and distinct from any adjudicative function relating to employment rights which must be performed by a separate body –

see response to Question 1.1). We recognise the need for stream-lining of the system and the need to avoid separate hearings of a multiplicity of claims arising from the same events. It should be possible to have a single point of entry form for employment rights complainants. A reasonable and minimum level of detail should be obligatory, in order that the parties to the litigation have some idea of the case they are expected to meet. In this regard the system currently in operation in Northern Ireland should be looked at as a template. However, unless there is new legislation substantively amending the primary employment legislation to provide for the manner in which complaints could be made to the new body on one form, dealing with time limits and the issue of the determination of the nature of the complaint at an early case management hearing, identifying core issues and the substance of the dispute, the Society believes that it will be impossible to make the new system work.

Question 2.3 Should all claims in respect of employment related complaints, including employment related equality matters, be submitted and dealt with by one body of first instance?

The Society, in its submission, indicates that it believes that this is the proper procedure.

Question 2.4 Should employment rights cases only go to the body of second instance on appeal (i.e. should the right of either side to object to the body of first instance hearing a case be removed)?

Yes. The body at first instance should always conduct the initial hearing of the case, subject to any alternative dispute mechanisms in place. Many employment rights cases contain extremely complex issues and the persons hearing them must have the requisite knowledge and experience to deal with these issues and manage the cases in an efficient and timely manner. The Society believes that the adjudicators must have specialist knowledge and legal training both in the substantive law and the conduct of hearings to carry out these functions.

Question 2.5 If minimal differentiation within a two-tier structure is to be pursued, what would the optimum streams/chambers be within both the first instance and the appeals entity? For example, is there a need to retain some organisational distance/separation between the distinctive roles of

- ***The inspectorate function (i.e. NERA's role in inspection, enforcement and where appropriate prosecution);***
- ***the conciliation and mediation processes dealing with collective disputes;***
- ***the advisory/mediation/investigative procedure dealing with individual industrial relations and employment rights claims;***
- ***any subsequent formal adjudication on such individual cases.***

How might a satisfactory segregation of these distinctive functions be best achieved?

In relation to the inspectorate functions, these should be left to NERA or that portion of NERA that joins in the new body. If there are investigations into alleged breaches of statute, obviously they should go to NERA. If they are investigations under the

formal process involved in a breach of employment law rights, they should be handed to the adjudicative section of the new body.

In relation to enforcement procedures carried out by NERA in enforcing orders made under the Industrial Relations Acts, it should be noted that there is grave doubt as to whether these enforcement procedures - leading as they do to criminal sanctions - are constitutional. It is the Society's view that, if enforcement of an individual's rights is undertaken by a statutory body, any order upon which the enforcement procedures are commenced should be enforced as a civil debt due to the individual worker and collected in the same manner as a civil debt. This would greatly assist those whose rights have been infringed as, at the moment, the only sanction for recalcitrant employers is a fine or subsequent imprisonment.

The industrial relations and the conciliation functions of the Labour Relations Commission and the Labour Court under the Industrial Relations Acts must be kept separate and distinct from any adjudicative function. Mediation should be offered in all instances on an 'opt-out' basis and such mediation services should be maintained and provided by the Labour Relations Commission. Persons involved in attempting to mediate a particular dispute must not play any part in adjudicating upon that dispute subsequently (ie, in the event that the mediation fails) in order to preserve the impartiality of the adjudication/litigation process.

If an order is obtained before an employment rights adjudicative body, it should, if it is not complied with, be capable of being enforced in the same manner as a civil order for the payment of money and all other orders as the adjudicative body may decide, should be capable of being enforced through the civil courts.

Question 2.6 What would be the advantages and disadvantages of having statutory redundancy appeals handled on an administrative basis, perhaps through the established social welfare appeals structure, given that statutory redundancy payments are now administered by the Department of Social Protection?

Insofar as it is possible, people should not have to deal with two separate Departments in relation to employment rights issues. However, any determination of employment rights issues (e.g. redundancy) must be dealt with by the new adjudicative bodies.

Appointment, tenure, etc arrangements in new streamlined employment rights bodies

Question 2.7 Should the arrangements where the appointment and tenure of those working in and appointed to the new streamlined employment rights be changed, and if so, what should be the guiding principles?

As indicated in the submission, the Law Society believes that there should be a single point of adjudication for all first instance employment rights complaints. The Society believes that the mediation should be utilised as a first solution to the dispute. Unless one of the parties objects, all cases should go to mediation. If mediation fails, however, the Society believes that, for the system to work properly, the adjudicators hearing and deciding the employment rights issues must have specialist knowledge and legal training, both in relation to the substantive law and the conduct of hearings.

Unless this is remedied, the system will continue to fail its users. Properly qualified and experienced adjudicators as described in the response to Q 2.4, with reasoned determinations at first instance, should reduce the level of appeals. The composition of the independent appellate adjudicative body should comprise a chair (with specialist knowledge and legal training in substantive law and the conduct of hearings) and two lay members with the requisite knowledge and experience nominated for interview from the employer and trade union bodies. All appointees to the adjudicative bodies, whether in first instance or to a tribunal on appeal, must be by public competition carried out by the Public Appointments Service. All appointments must be open and transparent.

Comments in respect of the appellate body are set out at Q3.15 below.

Information and advice

Question 2.8 Should there be one website covering all employment rights and industrial relations matters?

There should be one website with two separate sections along the lines of the website currently provided by NERA (www.employmentrights.ie). The adjudication of employment rights and the resolution of industrial relations issues must be kept separate.

Question 2.9 Do you agree that a more coherent and co-ordinated approach to the provision of advice and information on industrial relations and employment rights issues should form part of the services of the new first instance body?

The Society agrees that there must be a more coherent and co-ordinated approach. However, industrial relations issues must remain with the Labour Relations Commission/Labour Court and employment rights must be dealt with by the new adjudicative bodies.

Question 2.10 What is the best method of providing information and advice?

The best method of providing information is through the website and/or a trained secretariat who can give non-directive information to prospective complainants and respondents and assist them in formulating and completion of the complaint and response forms.

The Society's reservations about the provision of advice by the adjudicative bodies regarding the merits of a claim or defence have already been identified and flagged in the response to Question 1.2 above. In summary, it would be inappropriate for the adjudicative body to also provide advice on the issues under adjudication. Therefore, any role of the secretariat must be limited to the provision of information and assistance only. Advice as to both the legislation under which a complaint might be brought and the likelihood of success must in the view of the Society only be given by independent third parties. Under no circumstances can the person(s) who will ultimately be charged with the task of adjudicating upon disputes that cannot otherwise be resolved, or any person associated with him/her, be party to the

provision of advice to either claimants or respondents regarding the merits of their cases.

Question 2.11 Should non-directive advice be provided to employees and employers and what options may be available to them on the basis of the facts provided and where to go for help if required?

The Society agrees. It is essential at an early stage that the parties receive clear and coherent information that enables them to recognise the issues involved in the complaint and resolve their differences at the earliest point. However (as set out in response to Question 1.2 and 2.10 above) it would be inappropriate for the adjudicative body to also provide advice on the issues under adjudication. Therefore, any role of the secretariat must be limited to the provision of information and assistance only. Advice as to both the legislation under which a complaint might be brought and the likelihood of success must in the view of the Society only be given by independent third parties. In no circumstances can the person(s) who will ultimately be charged with the task of adjudicating upon disputes that cannot otherwise be resolved, or any person associated with him/her, be party to the provision of advice to either claimants or respondents regarding the merits of their cases.

(see also responses to Question 1.2 and 2.10)

Single point of Entry/submitting Individual Industrial Relations and Employment Rights Claims

Question 2.12 How can a single point of entry for all individual industrial relations and employment rights complaints/claims best be achieved.

In line with the above proposals (see response to Question 1.1) there should be a separate body dealing with all employment rights claims, in respect of which a single point of entry can be achieved for all employment rights claims. The industrial relations and the conciliation functions of the Labour Relations Commission and the Labour Court under the Industrial Relations Acts must be kept separate and distinct from any adjudicative function.

Question 2.13 Should there be a single application form for all individual first instance industrial relations and employment rights complaints/claims?

It may be possible to have all employment rights issues dealt with using one single point of entry (see Question 2.12 above) using a single application form. Again, the industrial relations and the conciliation functions of the Labour Relations Commission and the Labour Court under the Industrial Relations Acts must be kept separate and distinct from any adjudicative function. In this regard the system currently in operation in Northern Ireland should be looked at as a template. However, new legislation substantively amending the primary employment legislation to provide for the manner in which employment rights complaints could be made to the new body on one form, dealing with time limits and the issue of the determination of the nature of the complaint at an early case management hearing, and identifying core issues and the substance of the dispute, would be required if the new system is to work.

Question 2.14 What measures could be taken to improve information gathering from complainants/applicants at application stage?

A detailed application form in respect of employment rights claims, requiring sufficient detail from the complainant will facilitate the gathering of information at the application stage. In this regard, the form currently used by the Equality Tribunal (see form EE 1 appended) may be instructive. In addition, the forms used by complainants and respondents currently in operation in Northern Ireland should be considered as useful templates (see Form ET 1 & ET 3 appended).

Question 2.15 Should there be a consistent time limit for initiating all complaints/claims/appeals and if so what should it be?

There should be a consistent time limit for all complaints, claims and appeals. New legislation substantively amending the primary employment legislation will be required to provide consistent time limits to initiate claims and appeals. Such amending legislation must also provide consistent criteria under which such time limits may be extended. The Society believes that the current system for most complaints, whereby there is a six month period which may be extended to twelve months in exceptional circumstances, is appropriate. For appeals, there should be a six week period with liberty to extend for a further six weeks in exceptional circumstances.

Question 2.16 Do you agree that more consistent arrangements are required for the representation of claimants so as to enable individuals to nominate a person to represent them at a hearing e.g. trades union official, solicitor, other representatives, etc.?

The Society does not believe that the existing system should be altered in this regard. At this moment in time, all parties are entitled to nominate somebody to represent them and, indeed, persons must be able to choose their representative as they see fit.

Question 2.17 Where the power to present/refer a complaint is currently limited to the claimant, should it be extended to include the claimant's trade union and, where appropriate, the claimant's parent/guardian?

A complainant must be able to choose his or her own representation and to seek assistance from whomsoever they wish in formulating and presenting the complaint. If the complainant lacks legal capacity because of age or disability, the complaint may be submitted by a parent or guardian ad litem (or other appropriate person).

Enforcement

Question 2.18 Should there be a consistent method of enforcing awards of employment rights bodies, and if so what should that be?

Yes. Where an order is made by an adjudicative body it should be enforceable in the same manner as a contract debt through the courts. The current system is cumbersome and expensive and must be simplified.

3 Minimum number of cases presenting for resolution at formal hearings through active case progression and an increased range of interventions.

Facilitating early interventions and alternative dispute resolution methods

Question 3.1 What early interventions should be available prior to a formal hearing or inspection to resolve grievances or non-compliance e.g. telephone contract, informal hearings, more formal mediation, conciliation or arbitration?

As per our earlier comments and for the resolution of employment rights claims, mediation and case management are the appropriate early intervention steps prior to a formal hearing.

Question 3.2 What is the best method of identifying suitable cases for early intervention?

All cases should be dealt with by mediation in the first instance on an opt-out basis.

Question 3.3 At what stage should the intervention take place for example should it be available when the person first seeks information, prior to them lodging a complaint/claim or after a complaint/claim is lodged?

All cases should be dealt with by mediation in the first instance on an opt-out basis.

Question 3.4 Is there scope for harnessing the expertise and capacity of personnel within the existing bodies to decide on straightforward issues where purely factual matters are in dispute?

There may be a role for harnessing the expertise and capacity of personnel in the existing bodies. However, the Society's view is that these personnel should be best utilised in conciliation and mediation aspects of claims, rather than in substantive hearings to decide the legal issues involved.

However, again, it would be inappropriate for the adjudicative body to provide advice on the issues under adjudication (see response to Question 1.2 above). Any role of the secretariat must be limited to the provision of information and assistance only. Advice as to both the legislation under which a complaint might be brought and the likelihood of success must in the view of the Society only be given by independent third parties. Under no circumstances can the person(s) who will ultimately be charged with the task of adjudicating upon disputes that cannot otherwise be resolved, or any person associated with him/her, be party to the provision of advice to either claimants or respondents regarding the merits of their cases.

Question 3.5 Is there scope for forging positive connections between the public dispute resolution system and external experts in preventative alternative dispute resolution methods at workplace level?

The Society would require more information as to what exactly is envisaged before it could form a view on this matter.

Question 3.6 Should parties be required to set their case out in writing?

Parties should be required to set out the case in writing and every assistance should be offered to them to do so. Furthermore, some minimum and reasonable level of detail should be obligatory, in order that the parties to the litigation have some idea of the case they are expected to meet. A detailed application form in respect of employment rights claims requiring sufficient detail from the complainant will facilitate the gathering of information at the application stage. In this regard the system currently in operation in Northern Ireland should be looked at as a template. (See also response to Question 2.14 above)

Question 3.7 Should all complaints/claims be examined for potential interventions and should time limits apply to the offers of conciliation or mediation support.

All complaints should be examined for potential interventions. All cases should be dealt with by mediation in the first instance, on an opt-out basis.

Question 3.8 Are there particular kinds of issues, for instance, where mediation is likely to be especially helpful or, alternatively, where it is not likely to be helpful?

Workplace grievances arising from workplace relations are frequently amenable to resolution through mediation. Mediation is most successful as an early intervention tool before positions of the parties become entrenched. The Society's view is that mediation should be an opt-out rather than an opt-in facility. Unless one of the parties objects to mediation, then it should be the first option. Such mediation service should be maintained and provided by the Labour Relations Commission. It also ensures that the persons mediating and adjudicating are separate.

Question 3.9 Would there be merit in having a "preliminary hearing" process and if so how should it operate?

In employment rights cases that have particular issues of law and/or are likely to be complex or lengthy, there should be a case management conference, rather than a "preliminary hearing" process, to identify the areas involved and to see how the case can be shortened. This can only be determined on a case-by-case basis by an adjudicator who has control of the case.

Question 3.10 Should certain cases be dealt with on the basis of written submissions only?

No. While there is clear merit in having comprehensive and detailed application forms, the Society does not believe that cases can be handled on a written submission

only. Parties must always be afforded the right to a hearing and in public (unless the adjudicating officer decides that there are good and substantial reasons to hear the case in private.)

Question 3.11 Should attempts at resolution have any bearing on any subsequent hearing or should the process be confidential and not admissible in any hearing?

Attempts at resolution must be entirely confidential and must in no way be admissible in subsequent proceedings of any kind, including before the civil courts. If the parties know that what they reveal at mediation/conciliation can be used against them later the process is unlikely to succeed or even to be availed of. Persons involved in mediation cannot be involved in any subsequent hearing before an adjudicative body.

Conduct of Proceedings

Question 3.12 Should there be a uniform set of procedures regulating the conduct of hearings in all cases heard at first instance?

It is essential for the smooth working of the system that there is a uniform set of procedures for employment rights cases and a separate but uniform set of procedures for industrial relations matters.

Question 3.13 Should first instance jurisdictions be empowered to dismiss what are adjudged to be frivolous, vexatious or misconceived claims without holding a formal hearing?

No they should not. This would breach the complainant's constitutional rights, the European Convention on Human Rights and the Charter of Fundamental Rights in relation to a right to a fair hearing and particularly where rights derived from EU Law are being adjudicated. However, if, having completed the hearing, or perhaps following a preliminary hearing on this point, the adjudication officer decides that either party has behaved in a manner that is frivolous or vexatious or has brought a claim that is misconceived, he or she should be empowered to exercise discretion to dismiss the claim.

Question 3.14 Should hearings of employment rights disputes/appeals be heard in public or in private?

Hearings should always be held in public unless the adjudicating officer decides that there are good and substantial reasons to hear the case in private.

At the request of the parties the names of the parties may be redacted by the adjudicating officer in any decision handed down.

Question 3.15 Should there be a uniform period for submitting appeals?

Yes.