

Response to Department of Justice's consultation on the future administration and structure of tribunals in Northern Ireland

April 2013

1 Executive summary

1.1 In summary:

- We recommend that Industrial Tribunals and the Fair Employment Tribunal (IT/FET) are not brought within the new integrated structure. We consider that cases brought before the IT/FET are fundamentally different in nature to cases currently within the remit of the Department. We have consistently called for the creation of a separate equality tribunal dealing with all equality grounds.
- We support greater sharing of services, such as accommodation, within the tribunal structure; including in circumstances where IT/FET are not brought within the integrated structure.
- We agree with the proposal to establish a new advisory body to keep the tribunal system under review.
- We consider that it would rarely be appropriate, as regards employment discrimination cases, for a legal expert to hear the case alone.
- We emphasise that it is important for the Department to ensure that any restructuring and amalgamation does not diminish the advantages and specialism gained through the current structure.
- In relation to judicial deployment, as regards SENDIST discrimination cases in Northern Ireland, whilst we recognise the particular legal expertise of Tribunal Chairs, we also recognise the contribution that lay members. Whilst it is clear that the proposal has the potential to save costs to the taxpayer; costs savings

should be balanced with the benefits that lay members can bring to the SENDIST process.

- As regards pre-hearing advice and representation, we welcome the Department's commitment to develop a mixed model for the delivery of advice and assistance. We support the recommendation arising out of the Access to Justice Review that further research is undertaken into the assessment of the legal needs of children and young people; with particular attention to accessibility of advice and assistance, the way in which it is delivered and their experience of the justice system as it affects them.
- We welcome the Department's recommendation that there is **flexibility** as regards the format of the hearing of cases. This is particularly important as regards SENDIST cases.

2 Context

- 2.1 The Equality Commission for Northern Ireland welcomes the opportunity to respond to this consultation. Further details on the scope of the Commission's remit, duties and expertise is contained in Annex 1.
- 2.2 Clearly the consultation raises a wide range of significant issues which have implications in terms of access to justice for tribunal users. Due to the Commission's remit, our views focus on the impact of the reform proposals on Special Educational Needs and Disability Tribunal (SENDIST) and the Fair Employment Tribunal and Industrial Tribunals to the extent to which they deal with discrimination complaints.

3 Comments

- 3.1 The Department has sought views on its proposal to establish a new "**Appeal Tribunal**". We note from the consultation paper that the proposal is to amalgamate the tribunals currently sponsored by the Department; which includes SENDIST. It also indicates that it is anticipated that other jurisdictions may be merged into the new structure in the future including newly created appeal rights, existing tribunal jurisdictions sponsored by other departments and tribunal jurisdictions not yet devolved. We further note that the

Department recognises that it may be preferable for certain categories of cases to remain outside the amalgamated structure.

- 3.2 The Equality Commission recommends that Industrial Tribunals and the Fair Employment Tribunal (IT/FET) are not brought within the new integrated structure. We consider that cases brought before the IT/FET are fundamentally different in nature to cases currently within the remit of the Department.
- 3.3 In particular, they primarily involve employment cases concerning disputes between private individuals. In contrast, issues brought before tribunals currently within the remit of the Department primarily concern individuals challenging state actions or decisions.
- 3.4 Whilst we recognise that some employment cases brought to IT/FET can raise issues as to how a government department or public body has acted as an employer, in general, they do not involve challenging how a public body has carried out its public functions.
- 3.5 We note that in Great Britain, the employment tribunals and the employment appeal tribunal are excluded from the integrated tribunal structure. We understand that employment tribunals and the employment tribunal appeal were excluded 'because of the nature of cases that came before them which involved one party against another, unlike most other tribunals which hear appeals from citizens against decisions of the state.'
- 3.6 In addition, the consultation document has outlined six reasons why the current tribunal system is in need of reform. Whilst we recognise that further improvement in relation to processes and procedures can be made to the current system which operates in relation to IT/FET, substantial progress has already been made to reform these processes. For example, tribunal procedures relating to IT/FET have been improved and are subject to continuous improvement.
- 3.7 Further, whilst we recognise the benefits of having a degree of consistency as regards tribunal rules and procedures, a number of the rules and procedures do not, and should not, apply across all tribunals. For example, the lodging of deposits, pre-hearing

reviews and certain interlocutory orders, are suitable in employment tribunals but not, for example, SENDIST.

- 3.8 In addition, employment tribunals, insofar as they relate to equality law, can involve detailed and complex consideration of a range of issues including detailed domestic equality law, European law, international obligations relating to equality, as well as a considerable body of equality case law. The Commission has concerns that if IT/FET is consumed within an integrated tribunal system, that the current expertise that has been developed within these tribunals will be diminished.
- 3.9 The Equality Commission has consistently called for the creation of a separate equality tribunal dealing with all equality grounds.¹ It is of the view that the existence of a specialist tribunal with expertise in an increasingly complex and frequently changing area of employment law will benefit both complainant and respondents. It also believes that the complex nature and volume of discrimination cases warrants the creation of a specialist tribunal.
- 3.10 We recognise the substantial contribution that the Fair Employment Tribunal (FET) as a specialist tribunal dealing solely with complaints of discrimination on the grounds of religious belief and political opinion, has been made to ensuring effective legal redress for claimants in this area. We believe that a similar tribunal with a wider equality remit is also likely to make a substantial contribution to ensuring that discrimination cases are dealt with quickly and effectively.
- 3.11 The Commission also recognises the experience of the Court of Appeal in the area of discrimination law in hearing cases on appeal from discrimination cases brought to the IT/FET. We have concerns that this level of experience may be diminished if appeal cases were brought to the High Court, particularly if cases are heard by one judge sitting alone; as would be the case if IT/FET cases were brought within the new integrated structure.
- 3.12 As regards making better use of available resources, we can see the merits in **greater sharing of services**, including accommodation, within the tribunal structure; including in

¹ See ECNI response to DEL consultation on disputes in the workplace, 2009 www.equalityni.org

circumstances where IT/FET are not brought within the integrated structure.

- 3.13 The Commission agrees with the proposal to establish a **new advisory body** to keep the tribunal system under review. We believe that there are benefits from having a dedicated expert body that is independent and non-statutory and that is charged with the role of keeping the new tribunal system under review.
- 3.14 The Department has sought views on its proposal that cases on a point of law should normally be heard by a **legal member sitting alone**. Our experience of employment discrimination cases is that cases rarely relate solely to a point of law but are a combination of both points of law and a consideration of facts. It therefore considers that it would rarely be appropriate, as regards employment discrimination cases, for a legal expert to hear the case alone.

4 SENDIST cases

- 4.1 As highlighted above, we note that the proposal is to amalgamate the tribunals currently sponsored by the Department; which includes SENDIST.
- 4.2 As regards the proposal to create a **new office of Presiding Tribunal Judge**, the Department has indicated that this 'may obviate the need to retain the current tribunal leadership structures'.
- 4.3 The Commission is of the view that the current arrangement, whereby there is a specific President of SENDIST who has responsibility not only for hearing SENDIST cases but also an oversight role, has added significant value to the way in which SENDIST operates.
- 4.4 It is therefore important for the Department to ensure that any restructuring and amalgamation does not diminish the advantages and specialism gained through the current structure.
- 4.5 In relation to **judicial deployment**, as regards SENDIST discrimination cases in Northern Ireland, whilst we recognise the particular legal expertise of Tribunal Chairs, we also recognise the contribution that lay members can make in terms of providing a

greater knowledge and insight into the barriers experienced by disabled children and young people and of providing consideration of the child's perspective. Whilst it is clear that the proposal has the potential to save costs to the taxpayer; costs savings should be balanced with the benefits that lay members can bring to the SENDIST process.

- 4.6 As regards **pre-hearing advice and representation**, we welcome the Department's commitment to develop a mixed model for the delivery of advice and assistance.
- 4.7 We note that the Access to Justice Review report has highlighted concerns in relations to SENDIST; in particular, as regards equality of arms. We support the recommendation that further research is undertaken into the assessment of the legal needs of children and young people; with particular attention to accessibility of advice and assistance, the way in which it is delivered and their experience of the justice system as it affects them.
- 4.8 We welcome the Department's recommendation that there is **flexibility** as regards the format of the hearing of cases. This is particularly important as regards SENDIST cases, so as to ensure the best interests of the child are met and the voice of the child is adequately heard in the proceedings. In the Commission's experience of SENDIST cases, children and young people, around which the case centres, are rarely present at hearings, and we recommend greater steps are taken to ensure that the hearings are child friendly and that the views of the child are heard.

Equality Commission
17 April 2013