Law Centre (NI)

Civil & Family Justice Review Draft Report on Civil Justice

Law Centre (NI) response

December 2016

About Law Centre (NI)

1. Law Centre (NI) (LCNI) works to promote social justice and provides specialist legal services to advice organisations and disadvantaged individuals through our advice line and our casework services from our two regional offices in Northern Ireland. The Law Centre provides advice, casework, training, information and policy services to our member organisations in different areas of law: employment, health and social care, social security. We also provide legal support to young victims of human trafficking.

2. The Law Centre's Legal Support Project (LSP) also provides pro bono advice and representation in Social Security Appeals and Industrial Tribunals for those who do not have the means to pay for alternative legal representation. The service is delivered by volunteers trained and supported by Law Centre staff.

Introduction

3. We welcome the opportunity to respond to the preliminary report of the review of civil justice undertaken by Judge Gillen.

4. The greater part of LCNI representation occurs in Tribunals including the Social Security Appeals and Commissioner Office, Mental Health Review Tribunal, Industrial Tribunal and Immigration & Asylum Chamber. However, we also provide assistance to clients on matters, which require proceedings in the higher courts , for example before the High Court in judicial review matters . We have represented in cases of potential strategic impact before the Court of Appeal and where appropriate the former House of Lords and Supreme Court . While we acknowledge that the Tribunal system is outside the scope of this review, our expertise, which stems from Tribunal representation, informs this response.

Our key recommendations

5. The review has many innovative ideas. We would hope that, as far as possible, the review's recommendations are applied broadly across civil justice and will also influence reform of the Tribunal systems.

6. In addition, we would like the review to:
   - Recommend early neutral evaluation is considered in all cases;
   - Recommend that the Department of Justice conducts cost benefit analysis of investment in advice and representation , taking into account the budgetary and resource implications of unrepresented litigants
   - Acknowledge the essential role of early and expert legal advice in the uptake of Alternative dispute resolution.
   - Acknowledge the importance of the Legal Assistance Green Form scheme and the equality dimensions ;

- Consider recommendations made by Prof McKeever in relation to supporting tribunal users.[1]

Chapter 3: Paperless courts

7. LCNI agrees with the proposed staged approach to aspire to the creation of paperless courts but in the short to medium term to adopt a move to "paper light" courts.

8. We note that the majority of NI Committee meetings and many NI Council meetings are conducted with a minimum use of paper. Committee clerks compile an electronic bundle of information for members which may be a useful model for the court service to adopt. [CJ3 & CJ4]

9. In general, LCNI is supportive of the idea of digital justice, as expressed in this review and now echoed in the Programme for Government.[2] However, any digital developments must go hand in hand with an effective programme to improve digital literacy and inclusion and to remove barriers.

10. LCNI supports the idea of a Litigant in Person Focus Group to explore some of these reforms further [CJ7]. This is something that LCNI has proposed in the context of employment law reform where two thirds of claimants to Industrial Tribunals appear unrepresented.[3] There has been limited opportunity to input into review/consultation processes. LCNI wishes to see this remedied and can see a useful role for a Litigant in Person Focus Group. LCNI has extensive experience in providing assistance to unrepresented litigants and would be willing to contribute to this forum. Whilst resource constraints means that LCNI cannot offer representation to all those who use the advice line we provide advice and as a result are well placed to contribute to the discussion. the

11. One issue worth highlighting in the context of the aspiration of a paperless court is as follows. LCNI has provided advice in employment cases where digitisation has created difficulties for certain groups, particularly older people with no expertise or desire to use computers e.g. cases where employers have introduced digital online payslips and have refused to provide paper copies. There is a potential for age discrimination and disability discrimination issues to arise which needs to be considered and addressed from the outset.

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[1] Grainne McKeever, 'Supporting Tribunal Users: access to pre-hearing information, advice and support in NI' and Grainne McKeever & Brian Thompson, 'Redressing Users' Disadvantage: Proposals for Tribunal Reform in NI' (2010)

[2] Executive Office, *Programme for Government*, page 102

[3] 65% of claimants to the Industrial Tribunal and 62% to the Fair Employment Tribunal are unrepresented. 23% of respondents to the IT and 33% to the FET are unrepresented, while 4% of claimants and 44% of respondents do not attend Industrial Tribunals at all. OITFET Annual Report 2012/13 65% of claimants to the Industrial Tribunal and 62% to the Fair Employment Tribunal are unrepresented. 23% of respondents to the IT and 33% to the FET are unrepresented, while 4% of claimants and 44% of respondents do not attend Industrial Tribunals at all. OITFET Annual Report 2012/13 (this is the most recent report available online) (this is the most recent report available online) p 20

Chapter 4: Online Dispute Resolution

1. LCNI has endorsed tribunal/court reform that can deliver a swifter, cheaper and more effective process for resolving disputes. Therefore the proposal of exploring online dispute resolution and introducing a pilot scheme of voluntary ODR for lower value cases is welcomed.

2. Key to this proposal is the implementation of an active case management approach undertaken by a registrar. Indeed, this proposal sits squarely with the model that the LCNI has developed in the context of reforming employment law disputes.[4] The LCNI model is attached hereto as an appendix to inform the discussion .

3. Within the model, all disputes are' filtered' by a Tribunal Chair and are directed to the appropriate route of resolution (adjudication or neutral assessment). Adjudication would offer quick resolution for relatively straightforward or low value claims. Crucially, the Adjudicator would adopt an inquisitorial rather than adversarial approach. LCNI suggests that the proposed registrar would take the same inquisitorial approach allowing speedy identification of the issues in dispute and to quickly seek the necessary information and evidence to make a decision. LCNI is of the opinion that that an inquisitorial model would be of particular benefit to unrepresented litigants.

Chapter 6: The Overriding objective of an efficient and timely process

4. LCNI supports the recommendations outlined in chapter 6 which are designed to help achieve a fair resolution as early as possible in the process, and in doing so keep costs and expenses proportionate to the nature of the claim. LCNI is aware that delay causes injustice and increase costs. Constructive engagement early in the process is essential and there is a most important role here for Early Neutral Evaluation. We discuss this further in our comments on Chapter 9.

5. LCNI has consistently argued that expert legal advice is essential and indeed is key to delivering an efficient and timely process.[5] Through our advice line, we regularly see the outcomes of attempts by uninformed litigants who have to try to navigate the legal system. This includes impact on the court /tribunal itself e.g. where perhaps pleadings are poorly drafted; where many procedural errors occur; parties do not understand how to present their cases and may fundamentally misunderstand the law.[6] This leads to needlessly protracted hearings. Crucially, cases fail to resolve at an early stage. Early access to expert advice would ameliorate these difficulties.

[4] We have presented this model to (then) DEL, the Committee for Employment and discussed with other organisations including LRA and CBI and others.
[5] E.g. see Law centre response to the Draft Programme for Government (2016) and Law Centre Response to DEL Employment Law Review. Both available at www.lawcentreni.org
[6] See Grainne McKeever, 'Supporting Tribunal Users' (2011) and Grainne McKeever & Brian Thompson, 'Redressing Users' Disadvantage' (2010)

> Lord Justice Sullivan submission to the the House of Common Justice Committee's review of the impact of LAPSO:
>
> *I would certainly put in a plea for legal advice. It is much cheaper than legal representation. If you can advise people as to the merits of their claim so that they are discouraged from putting in duff claims and encouraged to put in good ones in a sensible way, you can probably leave it in the tribunals world to the expert tribunal to sort it out.*[7]

6. Objective advice serves a similar purpose to Neutral Assessment: it gives the parties a clear indication of their position and likely prospects of success. The earlier in the process that litigants are given this benefit, the better are the prospects for preservation of good employment relations and successful ADR. The objective assessment/evaluation that expert legal advice can give can have a significant impact in the early stages of a dispute where it is impractical to try to bring formal dispute resolution methods to bear. The LCNI advises callers to our advice line when appropriate that their sense of grievance (however acutely felt) does not translate into a meritorious claim. Without such advice, these callers might have proceeded to a Tribunal.

7. Ensuring the provision of accessible advice requires investment. There are different models of advice provision e.g. through Legal Aid, through funded organisations, through insurance, etc. LCNI considers that investment in advice would bring about significant savings namely: in increased uptake of ADR; fewer claims; and, where cases do proceed, they would move through the legal process more quickly. In short, increased advice provision would be beneficial to all stakeholders. Accordingly, we would encourage the review to recommend that cost-benefit analysis research is conducted to inform further policy mating on this point. See our comments on Chapter 12 and Personal Litigants.

Chapter 8: Modernising the court procedures incl. use of social media

8. LCNI agrees with the approach outlined in Chapter 8 designed to modernise court procedures and to embrace social media. Publishing summaries of cases and judgements on Twitter [CJ33] is a good idea, as is the proposal to use YouTube to circulate explanatory videos [CJ34], that NICTS drafts a social media strategy [CJ35] to ensure that developments are coordinated and that damages should be transferred electronically [CJ36].

9. LCNI agrees that children should be referred to as children or young people rather than as "being under a disability" [CJ38]. To avoid any confusion, these definitions need to be reflected in legislation, guidance, etc. On the contrary, we disagree that persons with mental illness should be referred to as "protected persons" [CJ39] as this language could increase stigma.

[7] Lord Justice Sullivan Senior President of Tribunals, Oral Evidence to House of Commons Justice Committee 1 December 2014 HC311: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/oral/16072.pdf

Chapter 9 Alternative Dispute Resolution and Mediation

10. The review notes that ADR has increased in popularity and encourages alternative forms of dispute resolution including mediation. LCNI has consistently advocated for alternative means of resolving disputes, recognising that a shift in mind-set is required to ensure that ADR is considered throughout the lifespan of proceedings and that this will involve a range of stakeholders. However, there are some specific actions that this review could recommend, that would assist.

11. First, LCNI welcomes the proposal to introduce rules that require the court to consider ADR at every stage in the proceedings. [CJ46] Where appropriate, the judge should recommend that parties explore a particular service (including arbitration). This could include arbitration as well as mediation. Essentially LCNI suggests that the review's proposal of introducing legislation to require solicitors and barriers to consider mediation is extended to cover ADR more generally and that it also applies to the judiciary [CJ52].

12. Second, LCNI recommends that all judges provide early neutral evaluation in each case with rules amended to introduce this requirement, which would apply at an early case management review hearing. The assessment would include a preliminary analysis of the issues to be determined, the strengths of the arguments and evidence proposed by both parties; and crucially, the opportunities that may exist for parties to resolve the matters through ADR.

13. Third, LCNI considers it is important to recognise that the starting point for ADR is expert legal advice. We note that referrals to mediation in Great Britain dropped significantly with the introduction of LAPSO. This perhaps seems counter intuitive: given the reduced access to lawyers due to reduced legal aid, one might think that more parties would opt for mediation. In actual fact, lawyers play a key role in encouraging parties to enter ADR processes.[8] Parties are much more receptive and amenable to try ADR when advised to do so by a trusted and partial representative. LCNI recommends that the final review should reflect the link between advice and uptake of ADR.

14. The review recommends compulsory mediation for pilot low value cases of £5,000 [CJ43] but otherwise optional [CJ44]. To date, our position has been that it is not practical or desirable to make conciliation or mediation compulsory. We have previously warned that it could be very difficult to decide whether parties have sufficiently engaged in such processes and that arguments about this could undermine the process itself and thereby hinder resolution.[9] That said, we commend the review for its willingness to explore new approaches. Therefore, LCNI cautiously welcomes the recommendation of piloting compulsory mediation provided that: a) the pilot is closely monitored; b) that there is a full consultation before any expansion of the scheme.

[8] Written Evidence from the Legal Action Group on impact of changes to civil legal aid under LAPSO. Accessible here: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/written/8580.html#_edn18

[9] Law Centre response to DEL Consultation Reforming Employment disputes (2009)

15. The LCNI is well placed to to contribute to discussions about setting up a pro bono mediation service to be set up for those unable to afford mediators. [CJ51] There is an interesting project in Dublin of an independent community-based organisation providing a mix of free legal advice, education and mediation services.[10] Such experience may be valuable to discussions in this jurisdiction.

16. Likewise, LCNI sees merit in the idea of a frontline advice body apprising people of the contents/benefits of mediation before referral to the appropriate mediator (para (9.74).LCNI, for example, refers people to the LRA mediation service.

Chapter 11: Experts

17. The view of LCNI is that experts play a fundamental role in assisting the court and that their evidence often has a tangible impact on the outcome of the hearing. The following text box is an extract from our response to the Scope of Civil Legal Aid consultation (2015)[11] about the value of experts.

> The Law Centre recently represented in a complex asylum case involving a Sudanese appellant. A key matter in dispute was whether our client was a member of a particular tribe. We sought an expert opinion. The Judge held:[12]
>
> *[…] in reading the [expert's] report overall in the context of the expert's experience , the other professionals he consulted, the reference materials and his interview methods, I am satisfied that I can attach significant weight to [the expert's] report.*
>
> *[…]In light of my findings above, I am satisfied that the appellant is at risk of persecution in Sudan as a result of his ethnic origin. […]I have allowed the appeal under the Refugee Convention.*
>
> It is clear that the expert's evidence was persuasive in the outcome of this case. Without this evidence, the appeal may have been dismissed and the appellant (and his family) could have been sent back to Sudan to face persecution.

18. LCNI is not opposed to a system of expert accreditation although we would stress that any process needs to be able to respond quickly to 'new' experts who have been asked to provide evidence. We tend to consult some experts fairly regularly and therefore it is reasonable that such experts could be accredited with the court. However, we also instruct experts to comment on a very specific point - e.g. to comment on the sufficiency of protection for asylum applicants of a particular ethnicity in a particular region of a country – and such experts may never have given evidence before in this jurisdiction and may never do so again. It would be important to ensure that an accreditation scheme would be flexible and not be a barrier to such persons sharing their expertise with the courts.

Chapter 12 – Personal litigants

[10] http://www.communitylawandmediation.ie/
[11] Law Centre response to DOJ consultation on Civil Legal Aid (2015)
[12] There was no anonymity direction made in relation to this case and therefore we would be able to provide a copy of the determination if that would be helpful.

19. LCNI commends the review's approach to Personal Litigants and the acknowledgement that the principle of access to justice applies equally to personal litigants and those who are represented. The review is correct to note that a 'properly funded legal aid system cannot be underestimated in considering the matter [of personal litigants]'.
20. LCNI agrees that cases are "needlessly brought to court because of a failure to obtain proper early advice". We would stress that it is the absence of accessible expert advice that is the crux of the problem – not the willingness of the applicant to avail of it. As we highlighted above, we see from our advice line that free advice *can* deter unmerited cases entering the court system.

21. We would ask the review to acknowledge the importance of the Green Form scheme. The scheme is particularly useful in areas of law where representation is not available through Legal Aid. Not only does it provide a way for solicitors to provide free advice at a preliminary stage, from equality perspective, Green Form is absolutely crucial. This is because the Green Form scheme pays for interpreters for those with limited English and medical reports for those with disabilities and/or poor health who require medical reports to support their claim.

22. The review recommends introducing a power to allow the court to direct that proceedings be conducted by way of an inquisitorial form of process where at least one party is a litigant in person [CJ69]. LCNI strongly support this recommendation. As highlighted above, we believe an inquisitorial approach can be beneficial to PLs.

23. LCNI recognises the importance of continuing to develop a culture of pro bono work as <u>one</u> aspect of promoting access to justice. To this end, it continues to work closely with the Bar Council, the Law Society and others through its Legal Support Project.

24. LCNI supports the proposal to build on the research currently being carried out into Personal Litigants and to obtain accurate background statistical evidence on PLs in the civil justice system [CJ75]. It would be useful to know which parties are likely to be PLs and in which courts they litigate in and on which issues.[13] Ideally this research should also apply to Tribunals, where many litigants are unrepresented. Collecting feedback from PLs through a questionnaire is a good idea [CJ77]. This echoes a recommendation proposed by Prof. McKeever whereby research could be conducted with a representative sample of tribunal users to understand the experiences of tribunal uses in Northern Ireland.[14] Indeed, we invite the review to consider all the recommendations proposed by Prof. McKeever as many are particularly relevant for PLs.[15]

25. In addition to conducting research into the PLs' experience of the court system, LCNI considers that it would also be beneficial to conduct research of the *courts'* experience of managing PLs. The review notes that PLs are associated with longer running cases and notes that the "time and expense taken by PLs in the court often outweighs the saving achieved by limited legal aid to the most impoverished people only" (see para. 12.36). A cost-benefit analysis research would be extremely useful to

[13] For example, we note that two thirds of claimants in the Industrial Tribunal and one quarter of respondents fall into this category. http://www.employmenttribunalsni.co.uk/oitfet_annual_report_2013.pdf p 20
[14] Grainne McKeever, 'Supporting Tribunal Users: access to pre-hearing information, advice and support in NI' Recommendation 13, pg. 10
[15] Grainne McKeever, 'Supporting Tribunal Users: access to pre-hearing information, advice and support in NI' and Grainne McKeever & Brian Thompson, 'Redressing Users' Disadvantage: Proposals for Tribunal Reform in NI' (2010)

inform further policy making on this point and we would ask the review to recommend this.

26. LCNI agrees that online information [CJ78] as well as court paperwork and processes should be designed with the layperson in mind [CJ79]. Given that the phenomenon of PLs is likely to continue to rise, it makes sense to design the process for PLs; lawyers can then amend this information for their represented clients, where appropriate. At present, we think that PLs are often perceived as an 'additional' or 'exceptional' category rather than as an (increasingly) intrinsic feature of the legal system. For this reason, we agree that the presence of PLs in the court system should be considered by all decision makers [CJ40] and by all future NICTS reforms. We also like the idea of court staff, lawyers and judges receiving regular training for dealing with PLs and for NICTS to consider training and delegating one staff member in each civil court office to deal with such issues [CJ89]. Likewise, we think that the idea of a Bar & Law Society joint protocol governing the approach to be adopted to PLs is a good idea, so as to ensure a consistent approach to lay people [CJ87].

27. Our experience is that the process is particularly difficult for PLs with additional barriers such as poor language skills, illiteracy, mental disabilities; indeed, such barriers may well be at the heart of the issue being litigated due to discrimination, etc. Therefore, LCNI agrees that there should be much more active signposting to appropriate services – especially for vulnerable court users –within the court service including to advice agencies and pro bono representation [CJ85], [CJ80]

28. The court service must adopt a more interactive approach to the provision of information [CJ82]. To offer an example, LCNI is currently working on an information video that guides claimants through the Personal Independence Payment appeal process. We plan to distribute the video through social media including through YouTube. We are confident that this video will have broad appeal and will be a useful tool for claimants preparing for an appeal. .

29. The review suggests that a contract could be put in place with a voluntary sector provider, such as the Citizens Advice Bureau, to have an office in the Royal Courts of Justice (RCJ) - as occurs in RCJ in London - with a lawyer in it. This is worth exploring and the Law Centre would be interested in being involved in discussions especially if this were to extend to Tribunals. Any such service should be available as early as possible i.e. at the first case management hearing. Adequate funding for such a service would be crucial to its success.

30. The review recommends the implementation in Northern Ireland of the equivalent to s. 194 of *The Legal Services Act 2007* which allows pro bono cost orders to be made where a client represented pro bono wins their case. These costs are then paid to the Access to Justice Foundation which uses the money to support pro bono initiatives. The Bar, Law Society, Public Interest Litigation Strategy Project and LCNI are already on record as supporting such an initiative and have been jointly pressing government to ensure move ahead without delay to implement a comparative provision in Northern Ireland.

Chapter 13: McKenzie Friends

31. Through our Law Centre Network partners and other contacts, LCNI is aware of the role of McKenzie friends in GB, especially in relation to immigration and asylum

cases. We are of the opinion that a McKenzie friend can play an important role especially in cases where there is no legal representative for whatever reason (although our preference would of course that there should always be adequate representation). That McKenzie friends should have rights of audience and be paid for their work, however, would appear to go against the ethos of the OISC, which seeks to ensure that any person practicing in immigration is appropriately qualified and regulated. Therefore, LCNI does not support this recommendation, at least in the context of immigration.

Chapter 14 - Disability in the Civil Courts

32. LCNI supports the recommendations suggested by the review to improve access to justice for disabled persons.

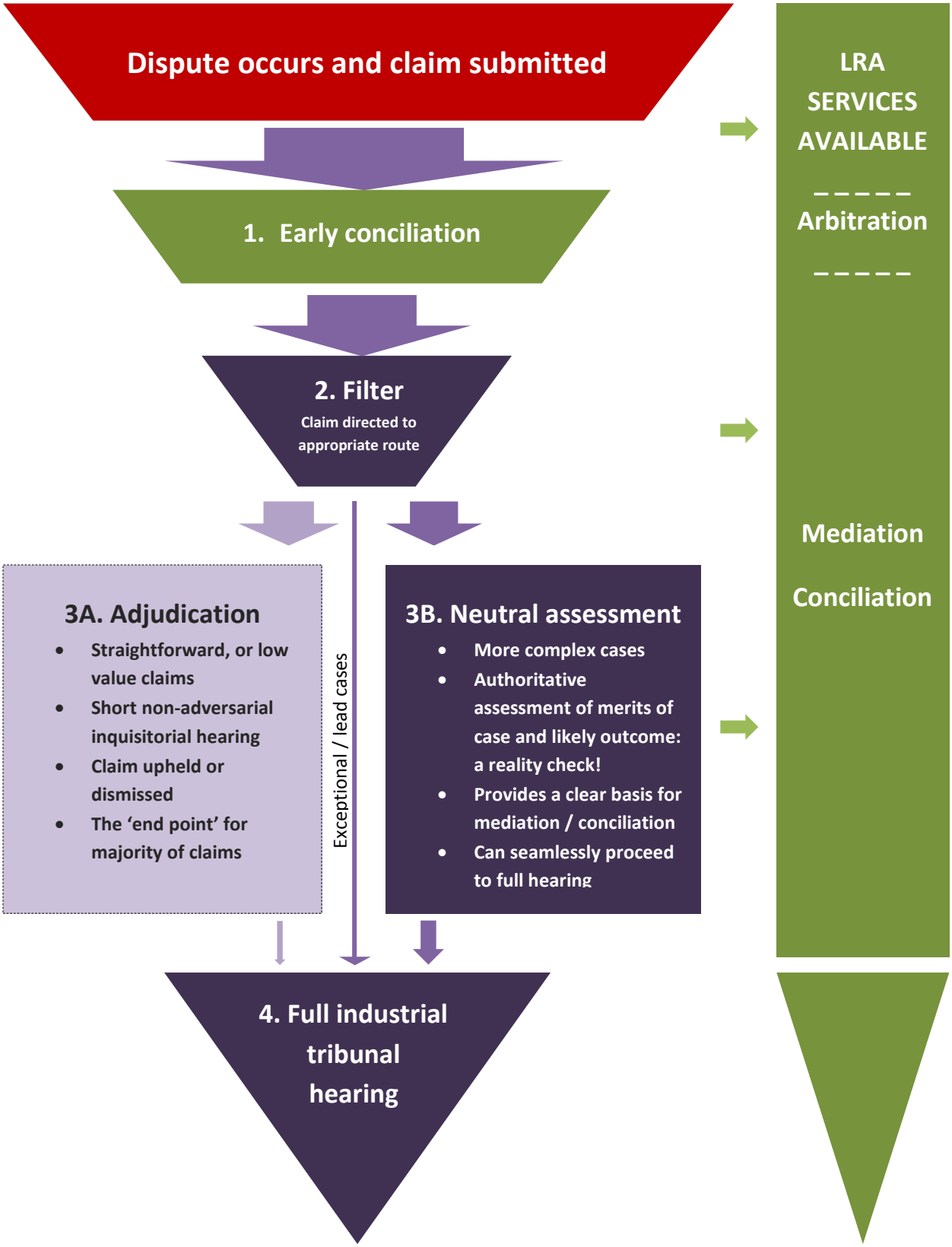
33. We would suggest that all the recommendations in this chapter should apply equally to tribunals, in particular: developing systems to capture information on the number of disabled persons in the justice system [CJ99]; the proposed disability access audit [CJ100]; more training (including harnessing expertise of voluntary support organisations) [CJ105, 107]; ensuring that technology requirements are met [CJ108]; that information is readily available [CJ109] and that the Bar Council and Law Society follow the example of the judiciary and appoint a member in charge of disability issues [CJ110]. Further, the principles set out in Galo v Bombardier should be applied broadly [CJ104].

34. In addition, it may be useful to include provision for a party with a disability to request a judge-led discussion about what reasonable adjustments are required throughout the proceedings. This discussion should take place at the earliest case management hearing and the judge can make directions, is necessary.

Chapter 25: Civil Justice Council

35. The review recommends that a Civil Justice Council to be set up as a matter of high priority. [CJ219]. LCNI agrees and considers that such a council is long over due. Membership should not be restricted to civil servants, judiciary and lawyers and should include voluntary and community sector. LCNI also suggests that the Civil Justice Council would be given powers to set up time-limited working groups to look at particular issues. The Civil Justice Council also needs to be flexible so that it can react promptly to change, trends, etc. It should also encourage innovative thought and should be willing to consider and propose recommendations from its members. LCNI 's experience and expertise places us well to contribute to this initiative.

Appendix 1: LCNI proposal for dispute resolution



1. Early Conciliation

The Law Centre supports the concept of Early Conciliation. We agree that only after Early Conciliation has been duly considered should a claim progress to the Tribunal.

2. Filter

On receipt of the claim, a Tribunal Chair assigns each claim to the most appropriate route so as to maximise the likelihood of resolution.

Claims are directed to either adjudication or neutral assessment. Adherence to this direction is compulsory; this mandatory element is key to our model and distinguishes it from existing ADR mechanisms and the current DEL consultation proposals.

When deciding which route is most appropriate, the Chair takes a holistic view of the case and considers any legal or factual complexities, any public interest component as well as the value of any possible award. There may be a small number of cases that are not suitable to either process (e.g. equal pay for equal value cases covering large numbers of employees, public interest disclosures or other lead cases). In such instances, the Chair directs the case through the usual tribunal process.

Regardless of which route the case is referred into, parties remain free to avail of LRA conciliation or mediation outside of the tribunal process.

This filter mechanism chimes with Mr Justice Underhill's recommendation of introducing an 'early paper sift' to ensure that cases are managed more effectively and to ensure that employment judges have an opportunity consider the case earlier in the process.[16]

[16] The Honourable Mr Justice Underhill, 'Fundamental Review of Employment Tribunal Rules' (29 June 2012). The British government accepted the recommendations. See Department for Business Innovation & Skills, 'Government response to Mr Justice Underhill's review of employment tribunal rules of procedure' (March 2013)

3. a) Adjudication

Adjudication is the appropriate route for relatively straightforward or low value cases.

Types of cases suitable for Employment Adjudication:

- Straightforward unfair dismissal or breach of contract
- Failure to pay wages - unauthorized deduction from wages
- Failure to pay a redundancy payment
- Right to receive particulars of contract
- Straightforward breach of Working Time Regulations or Fixed Term Working Directive
- Right to receive an itemized pay statement
- Right to receive written reason for dismissal
- Right to be accompanied at a disciplinary /grievance hearing

What is adjudication?

Through adjudication, an independent and impartial Adjudicator makes an objective decision on a claim therefore either upholding or dismissing a claim.

Adjudication is designed to be the 'end point' for the majority of cases.

Who would provide employment adjudication?

There are different models that could be useful for Employment Adjudication such as the Small Claims court or the Rights Commissioner in the Republic of Ireland. Our proposal draws on many of the components of the existing LRA Arbitration scheme. We propose that the LRA panel of arbitrators are given a dual mandate and also provide adjudication, thus harnessing existing structures and resources.[17] However, unlike arbitration, which stands apart from the tribunal system, our proposed employment adjudication is part of an integrated system.

The adjudicator does not necessarily need to be legally trained, but instead, should have experience of industrial relations.

How does the Adjudicator make a decision?

Parties have an opportunity to provide a statement and any supporting documentation in advance of the hearing to the adjudicator and to the other party.

[17] The LRA Arbitration scheme will continue to be available for claimants who opt for it directly.

The hearing is short, taking less than a day. Parties may have legal representation if they wish and witnesses may attend. The adjudication is open to the public although there would be provision for cases to be held in private.[18] The Adjudicator takes evidence from both parties and adopts an inquisitorial rather than adversarial approach.

What is the outcome of an adjudication?

Following the hearing, the Adjudicator issues a decision in writing. The remedies available to the Adjudicator are the same as those available to a tribunal e.g. awarding costs, financial compensation, reinstatement or re-engagement.

Where the decision is accepted, it is enforceable. However, if the parties do not accept the decision, there would be an appeal right to the Tribunal system.[19]

What are the benefits of adjudication?

Adjudication offers finality and is a much quicker and less legalistic process than a full tribunal. Consequently, this will be a much more attractive option for both parties as it will be significantly cheaper.

We strongly believe that the majority of claimants and respondents will accept a decision issued by an Adjudicator. The case has been heard by an experienced and independent professional and parties are likely to respect and accept the decision. The decision will be definitively worded and, crucially, liability will be clearly set out. In addition, the cost of appealing the case to the tribunal will be a considerable disincentive for parties continuing further. Consequently, employment adjudication will be the endpoint for most cases.

[18] In contrast Arbitration is heard in private. This could help encourage parties to seek to resolve the dispute through Arbitration rather than submitting a claim to the tribunal.

[19] We note that an appeal right is available in the Rights Commissioner model. There is a more limited appeal right available in the Small Claims Court (where there is a mistake in law or a serious irregularity in the proceedings). However, only a small proportion of cases go forward to appeal in either forum, which demonstrates that such a model can offer sufficient finality.

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3. B) Neutral Assessment

The filtering mechanism directs more complex cases to Neutral Assessment.

Types of cases possibly suitable for Neutral Assessment:

- More complex cases involving unfair dismissal, breach of contract, breach of Working Time Regulations, etc.
- Complex health and safety cases
- Failure to pay remuneration under a protective award
- Discrimination cases

Any case deemed complex e.g. where there are many competing interests, several preliminary issues, a novel aspect of law, etc.

What is Neutral Assessment?

Our system adopts many of the features of Neutral Assessment set out in the current consultation. Parties receive an indication from an authoritative and impartial source as to the potential outcome of the case where it to proceed to a full hearing (3.54). This judicial 'steer' will compel parties to take a realistic view of their case and prospects, thus incentivizing parties to reach an agreement.

In contrast to the current DEL proposal, we envisage Neutral Assessment to be compulsory to those assigned to it at the filter stage.

The Neutral Assessment hearing has an investigative and participatory focus (3.63). Flexibility is a key feature of the Neutral Assessment hearing which will allow the Assessor to take an interventionist role e.g. to hone in on a particular aspect of the case, request parties provide particular information, etc.

Who would provide Neutral Assessment?

Unlike the DEL consultation proposals, we believe that the Tribunal should conduct Neutral Assessment rather than the LRA. We set out our rationale for this in response to question 15 of the consultation.

The active case review pilot currently being developed by the Tribunal President and Vice President is a potential model. This appears to be working well and the Tribunal appears to keen to expand this approach: The Tribunal Secretary states that tribunal users can 'expect an increased focus on earlier neutral review of claims/responses'

over the coming year.[20] Thus our proposal sits well with the Tribunal's current priorities and builds on existing expertise.

How does the Assessor make a decision?

Parties have an opportunity to provide a statement and any supporting documentation in advance of the hearing (3.62). The information is provided to the evaluator and to the other party and a hearing or 'assessment session' is a convened.

The hearing is informal, confidential, impartial and brief (3.62). Parties are not required to air their whole case. Instead, the Assessor is tasked with isolating and focusing discussions on the central issues.

What is the outcome of Neutral Assessment?

Having heard the evidence, the Assessor issues an assessment in writing. This is an indication of the potential outcome and includes an assessment of the merits of the case including appropriation of liability and perhaps an estimate of a likely award or an indication of the relevant Vento band. As the outcome is an indication rather than a decision, it is not binding on parties nor legally enforceable (3.55).

The judicial steer afforded by Neutral Assessment will serve as a clear basis on which parties can meaningfully enter a mediation or conciliation process. However, if the parties do not agree to use mediation or conciliation the case will proceed to a full tribunal hearing. A specified timeframe will apply.

If, during a Neutral Assessment hearing, it becomes apparent to the Assessor that a full tribunal hearing is necessary, then the Assessor can set the necessary directions in preparation for the hearing. Where appropriate, the Assessor may even proceed with the case e.g. by conducting a CMD or a deposit hearing or any other preparatory measure. Ensuring that a case can move seamlessly from Neutral Assessment to a Tribunal hearing is an effective use of tribunal resources.

What are the benefits of Neutral Assessment?

We believe that many cases, especially those involving unrepresented parties, currently 'drift' into tribunal hearings partly because parties simply do not have a realistic view of the merits of their case. Our system is designed to change this as it will give users a powerful 'reality check'.

[20] OITFET Annual Report 2012/13, page 3

We anticipate that the majority of cases referred to Neutral Assessment will ultimately be resolved through an LRA service. Thus Neutral Assessment will help encourage uptake of LRA services.

A Neutral Assessment hearing offers a much more flexible forum than a full tribunal hearing. Usual tribunal structures and systems (e.g. producing verbatim records) do not need to be adhered to and Chairs will be free to focus on the core issues of a particular case.

4. Industrial Tribunal

Under our proposed system, far fewer cases will go to a full hearing as the majority of cases will be resolved through Adjudication or other Alternative Dispute Resolution methods.

If the case does proceed to a hearing, it will be heard by a Chair who had no involvement at either the Adjudication or Assessment stage.

What are the benefits of the Law Centre's proposed model?

We believe that our model:

- Builds upon existing structures within the dispute resolution process
- Mandates the use of ADR techniques and incorporates them into an integrated system
- Offers speedier and cheaper resolution for parties
- Is easier for unrepresented parties to navigate
- Helps preserve employer/employee relationships by shifting away from adversarial practices
- Results in savings to the public purse
- Significantly improves access to justice