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Employment Bill

Bill 44 of 2001-02

The *Employment Bill* was presented on 7 November 2001, published on 8 November 2001, and is due for its second reading on 27 November 2001. Amongst other things, it introduces paid paternity leave and paid adoption leave, extends the length of paid maternity leave, and establishes statutory minimum dismissal, disciplinary and grievance procedures which all employers must follow. The Bill applies to Great Britain.

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Summary of main points

The *Employment Bill* presented on 7 November 2001 is a portmanteau Bill covering a number of different employment issues. Many of its provisions have been shaped by the response to consultation papers on *Work & Parents: Competitiveness and Choice* (December 2000), *Routes to Resolution: improving dispute resolution in Britain* (July 2001), *Providing statutory rights for trade union learning representatives* (May 2001) and *Fixed term work* (March 2001).

The Bill itself, or regulations to be made under it, will:

- Introduce Statutory Paternity Pay for two weeks' paternity leave from April 2003
- Introduce Statutory Adoption Pay and adoption leave, equivalent to Statutory Maternity Pay and maternity leave, from April 2003
- Increase the period for which Statutory Maternity Pay and Maternity Allowance are paid from 18 to 26 weeks
- Amend the employment tribunal rules of procedure to deter weak cases and encourage speedier decision-making
- Introduce "three step" minimum dismissal, disciplinary and grievance standards and incorporate them into all contracts of employment as an implied term
- Put Union Learning Representatives on a statutory footing and give them the right to paid time off work to pursue their duties
- Give the Secretary of State power to make regulations providing equal treatment for employees on fixed term contracts with comparable employees on permanent contracts. The regulations will implement the *EC Directive on Fixed Term Work* by July 2002
- Require working age partners of benefit claimants to attend work focused interviews

The DTI has published Explanatory Notes and a series of Partial Regulatory Impact Assessments on the Bill. These, and other relevant documents, can be found on the Internet via the Department's Employment Bill webpage, http://www.dti.gov.uk/er/employ/index.htm

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I Introduction

The *Employment Bill 2001-02* was introduced in the House of Commons on 7 November 2001 and published on 8 November 2001. It is a portmanteau Bill, covering a number of employment issues, and was not signalled in the Queens Speech on 20 June 2001.

Its main provisions are:

- the introduction of paid paternity leave and paid adoption leave and an increase in the length of paid maternity leave;
- the establishment of statutory minimum dismissal and disciplinary and grievance procedures which firms of all sizes will have to follow; and
- changes to employment tribunal procedures designed to reduce the number of cases they have to deal with.

The aim of the Bill is to "deliver a balanced package of support for working parents, at the same time as reducing red tape for employers and making it easier to settle disputes in the workplace".[1]

The Bill received a mixed reaction. Employers and trade unions gave a general welcome to the measures designed to encourage dispute resolution in the workplace and reduce the number of cases going to tribunals. Employers, though, were disappointed that the proposal to charge a fee for taking a case to a tribunal had been dropped and concerned that many of the provisions, particularly those on family leave, whilst laudable in themselves, would add to the regulatory burden already borne by small firms. Some employment lawyers doubt whether the new emphasis on internal procedures will, in practice, make any difference to outcomes or the tribunal workload.[2]

Most of the provisions in the Bill have been the subject of extensive consultation and interested organisations have had the opportunity to comment on the details of the proposals. The final shape of the Bill owes much to these comments. This research paper does not attempt to summarise the arguments deployed during the consultation periods. The Government response documents published on 8 November 2001 (see Part VIII) do this to a certain extent and Part IX contains links to some CBI and TUC responses to various stages of the consultations.

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1 DTI press release, 8 November 2001, *Hewitt outlines plan to modernise world of work*

2 See "Tribunal bill proposes penalties for breaching workplace resolution rules", *Financial Times*, 9 November 2001; and "Small firms fear 'leave from work' Bill", *Daily Telegraph*, 12 November 2001

II Family friendly measures

A. Background

1. Outline of current system

a. Maternity pay

Most women are entitled to up to 18 weeks' Statutory Maternity Pay (SMP), paid by their employer, during maternity leave. To qualify, a woman must:

- be employed by her employer in the 15th week (the qualifying week) before the expected week of childbirth;
- have been continuously employed by her employer for at least 26 weeks in the qualifying week; and
- have average weekly earnings above the lower earnings limit (LEL) for national insurance contributions (currently £72 a week).

SMP is paid at the rate of 90% of earnings for the first 6 weeks followed by up to 12 weeks at a flat rate (currently £62.20). Employers recover 92% of the SMP they pay out by deduction from monthly payments of tax and national insurance contributions to the Inland Revenue. Small employers (who pay £20,000 or less in gross national insurance contributions in a tax year) recover 100% of SMP paid out plus 5% (since April 1999) in compensation for administrative costs.

Women who do not qualify for SMP may qualify for Maternity Allowance (MA) paid by the Benefits Agency. MA is paid to women earning at least £30 a week who have been employed or self-employed in at least 26 weeks of the 66 weeks ending with the week before the expected week of childbirth (the "test period").

Women earning at or above the LEL get the flat rate benefit (currently £62.20). Those earning below the LEL get 90% of their average weekly earnings (subject to a weekly maximum payment of £62.20). Self employed women with a small earnings exception covering at least 26 weeks in the 66 week period receive 90% of £30 (£27) in MA. MA is payable for 18 weeks.

The principal statutory provisions are contained in the *Social Security Contributions and Benefits Act 1992*, as amended by the *Welfare Reform and Pensions Act 1999.* Part XII covers SMP and sections 35 and 35A cover MA.

b. Maternity Leave

All women are entitled to eighteen weeks ordinary maternity leave (OML). In addition, women who have been continuously employed by their employer for at least one year by the

11th week before the expected week of childbirth are entitled to additional maternity leave (AML**).** This lasts from the end of their OML till the end of the 29th week after childbirth, counting from the start of the week in which the baby is born. Maternity leave cannot start earlier than the 11th week before the expected week of childbirth, so the maximum statutory leave period (i.e. OML plus AML) is 40 weeks (11 weeks before and 29 weeks after childbirth). The two weeks immediately following the birth of a child must be taken as compulsory maternity leave (CML).

In order to benefit from the right to maternity leave, the employee must give her employer 21 days' notice of the fact that she is pregnant, the expected date of childbirth and the date on which she intends to start taking her leave (and/or receiving SMP).

The principal statutory provisions are contained in Part VIII of the *Employment Rights Act 1996,* as amended by the *Employment Relations Act 1999,* and the *Maternity and Parental Leave etc Regulations 1999,* SI 1999/3312.

c. Parental Leave

All employees (male and female) who have completed one year's service with their employer have the right to 13 weeks' unpaid parental leave to be taken before the child's fifth birthday (or the fifth anniversary of placement in the case of adoption). Parents of disabled children may use their leave over a longer period, up to the child's 18th birthday. At present, the right only applies to the parents of children born on or after 15 December 1999, but the draft *Maternity and Parental Leave (Amendment) Regulations 2001*, due to come into force on 10 January 2002, will extend the leave to parents of children who were under five on 15 December 1999. These regulations will also increase the amount of parental leave available to the parents of disabled children to 18 weeks.

d. Paternity Pay and Leave

There is no statutory right to paternity pay or leave (although unpaid parental leave or time off for dependants can be used by a father at the time of his child's birth in much the same way as paternity leave). However, many employers, possibly covering as many as half of employed fathers, provide for some paid paternity leave.[3]

e. *Adoption Pay and Leave*

There is no statutory right to paid leave for a parent adopting a child, equivalent to paid maternity leave for natural mothers. Adopting parents can use their right to unpaid parental leave at the time of adoption. About a third of employers offer some support to adoptive parents.[4]

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3 DTI, *Partial Regulatory Impact Assessment: paid paternity and adoption leave*, November 2001

4 Ibid

2. Review of family friendly employment policies

The 1997-2001 Labour Government's flagship employment legislation, the *Employment Relations Act 1999*, contained several family friendly measures. The new rights to 13 weeks' unpaid parental leave and to unpaid time off to deal with crises involving dependants stemmed from the *EC Parental Leave Directive*.[5] The increase in ordinary maternity leave from 14 to 18 weeks and the reduction from two to one years in the qualifying period for unpaid additional maternity leave were designed both to benefit working mothers and to simplify some of the notoriously complex rules governing maternity leave and pay. These changes came into effect on 15 December 1999.[6]

However, these changes were by no means the end of the Labour Government's ambitions for helping parents to combine a job with caring for their families. In his Budget statement on 21 March 2000, Gordon Brown, the Chancellor of the Exchequer, announced that there would be a "review [of] what improvements can be made in maternity pay and parental leave to improve family friendly employment".[7] The formal terms of reference and membership of the review were eventually announced by Stephen Byers, then Secretary of State for Trade and Industry, in reply to a PQ on 22 June 2000:

> The review will consider the steps needed to make sure that parents have choices to help them balance the needs of their work and their children so that they may contribute fully to the competitiveness and productivity of the modern economy.
>
> The review will seek:
>
> > To examine how the economy is changing, particularly in relation to working patterns, and what the needs of the modern economy will be.
> >
> > To identify how competitiveness and productivity in this context can be enhanced through giving families reasonable choices to help them to balance the needs of their children and work.
>
> In doing so, it will take into account:
>
> > The impact of maternity pay and parental leave on business, particularly SMEs, and families including whether it is possible to simplify the implementation of existing legislation.
> >
> > Best practice in business and its impact, including the extent to which employers currently offer additional entitlements or flexible arrangements.
> >
> > Factors affecting women's decisions to return to work after childbirth.

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5 96/34/EC, extended to the UK by 97/75/EC

6 For further details, see Library Research Paper 99/89, 11 November 1999, *Family Leave*

7 HC Deb 21 March 200, c 864

> Factors affecting the take up of parental and paternity leave.
>
> Impact of returning to work part-time, from home or on flexible hours.
>
> Reducing child poverty, including the particular problems faced by the workless and by parents receiving the Working Families Tax Credit.

I will chair a Ministerial Group to help co-ordinate the work of the review. Other members of the group are listed in the table:

Members	
Baroness Jay	Leader of the House of Lords Lord Privy Seal and Minister for Women
Andrew Smith	Chief Secretary to the Treasury
Lord Falconer	Minister of State, Cabinet Office
Tessa Jowell	Minister of State, DfEE
Margaret Hodge	Parliamentary Under-Secretary, DfEE
Baroness Hollis	Parliamentary Under-Secretary, DSS
Alan Johnson	Parliamentary Under-Secretary, DTI
David Irwin	Chief Executive, Small Business Service

There will be extensive consultation and detailed research to back up the review.[8]

The review team held meetings with many interested organisations and individuals and undertook fact-finding visits to the USA, Sweden and the Netherlands. It led to the publication of a Green Paper, *Work and Parents: Competitiveness and Choice*, in December 2000.[9] This explored a wide range of options including extending maternity leave to one year; payment of Statutory Maternity Pay direct by the Government rather than through the employer; introducing paid paternity leave and paid adoption leave; payment for parental leave; and the introduction of a right to return to work on reduced hours after maternity leave. The Government made it clear that not all the options could be pursued and that it was seeking views on priorities.

3. Outcome of the review

Final decisions on the options were announced in stages.

The Budget on 7 March 2001 announced those with financial implications for the State. There would be: [10]

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8 HC Deb 22 June 2000, cc 236-237W

9 Cm 5005

10 DTI press release, 7 March 2001, *Budget boost for working parents, bringing maternity provision up to date*

- An increase in the flat rate of Statutory Maternity Pay (SMP) and Maternity Allowance from £62.20 a week (current rate) to £75 a week from April 2002 and to £100 a week from April 2003.

- An extension of the period of maternity pay at this enhanced rate from 18 weeks to 26 weeks from April 2003. This would involve an extension of the ordinary maternity leave period from 18 to 26 weeks.

- The introduction of a right to two weeks' paid paternity leave for fathers in April 2003. This would be paid at the same rate as SMP (i.e. £100 per week).

- The introduction in April 2003 of paid adoption leave when a child is first placed with a family to allow one of the adoptive parents to take paid leave for the same period and at the same flat rate as SMP.

- An increase in the threshold for Small Employer Relief from £20,000 in national insurance contributions per year, to £40,000. This would allow more employers to claim extra compensation for administering SMP and would come into effect in April 2002.

- An increase in the means tested Sure Start Maternity Grant from £300 to £500 in April 2002.

On 25 April 2001, Stephen Byers announced that the Government would: [11]

- Increase the amount of (unpaid) parental leave for the parents of disabled children from 13 to 18 weeks.

- Extend the right to (unpaid) parental leave to the parents of children who were under five on 15 December 1999, when the right was first introduced. At that time the right only applied to children born on or after 15 December 1999, but this was almost certainly an incorrect implementation of the EC directive on parental leave.[12]

He also announced that parental leave would remain unpaid:

> … parental leave will remain unpaid. Parents gave more priority to other options in the Green Paper, and while paid parental leave was supported by some employee representatives and family groups, employers of all sizes maintained a high level of opposition to its introduction on grounds of cost and the impact of

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11 DTI press release, 25 April 2001, *Byers announces extra help for working parents*

12 TUC press release, 30 April 2001, *Government in 'total climb down' over parental leave*

> absence levels from the workplace. The cost of paying for parental leave would be excessive for both the state and employers. [13]

The changes announced on 25 April 2001 are being made by the draft *Maternity and Parental Leave (Amendment) Regulations 2001*, which are due to come into effect on 10 January 2002.

On 1 May 2001, Stephen Byers issued a consultation document on a simplified *Framework for Maternity Leave and Pay* and announced that the Government would: [14]

- Extend the amount of unpaid (additional) maternity leave by three months so that women would be entitled to a total of one year's maternity leave (six months paid and six months unpaid) from April 2003.

- Align the eligibility criterion for additional maternity leave with the criterion for SMP (i.e. 26 weeks' continuous employment ending with the 15th week before the expected week of childbirth, instead of one year's service by the 11th week). This would take place in April 2003.

- Align the notification requirements for maternity leave with those for SMP from April 2003. The employee will have to notify her employer during the 15th week before the expected week of childbirth of the fact that she is pregnant, the expected date of childbirth and the date on which she intends to start taking her leave.

- Further simplify and align the detailed rules governing maternity leave and pay.

On 8 May 2001, two further consultation documents were issued on "frameworks" for paternity leave and pay and adoption leave.[15] A summary of responses to both the December 2000 White Paper and the three framework documents was published as part of the *Government's Response on Simplification of Maternity Leave, Paternity Leave and Adoption Leave*, which was published on the DTI's website on 8 November 2001.[16] The Government made several amendments to their original proposals in the light of the consultation. The main changes were:

- Retaining the average earnings calculation period as at least 8 weeks for maternity pay and introducing the same period for paternity and adoption pay. The original proposal was that the period should be increased to 26 weeks, but employers were concerned that this would be unduly burdensome.

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13 HC Deb 25 April 2001, c 281W

14 DTI press release, 1 May 2001, *Byers announces radical overhaul of maternity rules*; and DTI, *Framework for Maternity Leave and Pay*, 1 May 2001, http://www.dti.gov.uk/er/simp8.pdf

15 DTI website, http://www.dti.gov.uk/er/adopt.pdf and http://www.dti.gov.uk/er/paternity.pdf

16 DTI website, http://www.dti.gov.uk/er/g_paper/pdfs/response.pdf

- Giving employers 4 weeks in which to respond to a woman's notification of her maternity leave plans. The original proposal was that this should be only one week, but small employers felt that this would be simply unachievable.[17]

- Asking employees to complete a self-certificate to confirm their eligibility for paternity leave and pay. This was proposed by the CBI as a solution to the biggest issue concerning paternity leave: whether fathers should be required to produce documentary evidence of paternity.[18]

- Setting the key date for adoption leave as matching with a child rather than approval for adoption. It became apparent during consultation that this was a more appropriate measuring point.

4. Work and parents taskforce: right to flexible hours

On 30 May 2001, during the General Election campaign, Stephen Byers announced that the Government would:

> provide a right for parents to request to work flexible hours when their child is young. We shall appoint a taskforce to advise on the detailed implementation.[19]

The task force was appointed on 28 June 2001. Patricia Hewitt, the new Secretary of State for Trade and Industry, set out its terms of reference and membership in reply to a PQ:[20]

> The Work and Parents Taskforce will look at how to meet parents' desire for more flexible work patterns in a way which is compatible with business efficiency. It will look at how best to encourage and enable employers to create additional opportunities for parents of young children to work flexibly, for the benefit of employers, employees and their children.
>
> The Taskforce will:
>
> > building on best practice, design a light-touch legislative approach to giving parents of young children a right to make a request to work flexible hours and to have this request considered seriously by the employer;
> >
> > take fully into account the particular needs of small employers in designing such a solution, including whether they should be subject to special conditions;

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17 See, eg, CBI Response to Changes to Maternity and Parental Leave and Introduction of Adoption and Paternity Leave, August 2001

18 Ibid

19 Announced 30 May 2001, Labour Party press release, *Labour's policies to help working parents*.

20 HC Deb 28 June 2001 c 149W

integrate existing best practice and the reasonable operational needs of business;

put the emphasis on resolving requests within the business rather than through applications to employment tribunals;

consider whether other changes to the law are needed to remove any legal or institutional impediments to flexible working;

consider what further support would help employers and employees to make and consider cases for flexible working; and

consider whether extra help with the training and development of people working flexibly is needed.

The Taskforce will report in November 2001. It will be chaired by Professor Sir George Bain. Other members of the Work and Parents Taskforce will be:

Members

Fiona Cannon	Equal Opportunities Commission
Kay Carberry	Trades Union Congress
John Cridland	Confederation of British Industry
Martin Gayle	Martin Gayle at Aveda
Mike Griffin	King's College Hospital Trust
Anne Minto OBE	Smiths Industries
Sue Monk	Parents at Work, Chief Executive
Maureen Rooney	Trades Union Congress
Simon Topman	J. E. Hudson & Co. (ACME Whistles)

B. The Bill

1. Paternity leave and pay

Clause 1 of the Bill inserts a new Chapter 3 into Part VIII of the *Employment Rights Act 1996* (ERA), as amended by the *Employment Relations Act 1999*. The new chapter requires the Secretary of State to make regulations entitling an employee who satisfies specified conditions "to be absent from work on leave … for the purpose of caring for the child or supporting the mother". The entitlement will be to "a single period of leave of at least two weeks" and must be taken "before the end of a period of at least 56 days beginning with the date of the child's birth". The Secretary of State is also required to make similar regulations entitling an employee who satisfies specified conditions "as to relationship with a child placed, or expected to be placed for adoption…" to be absent on "paternity" leave. Most of the detailed provisions will be in the regulations.

Clause 2 inserts a new Part 12ZA into the *Social Security Contributions and Benefits Act 1992*. This gives employees who satisfy certain conditions the right to Statutory Paternity Pay (SPP). Some of the conditions (eg that he has been employed with his employer for 26 weeks ending with the week immediately preceding the 14th week before the expected week of the child's birth) are contained in the primary legislation. Others will be specified in regulations.

The *Government's Response on Simplification of Maternity Leave, Paternity Leave and Adoption Leave* describes how the new scheme will work:

> **Leave and pay periods**
>
> 33. Employees will be entitled to two weeks paternity leave. Leave must be taken in a single block within the first 8 weeks after the child is born. The employee may choose whether to take a single block of one week' s leave or two week' s leave.
>
> 34. The earliest point at which paternity leave can start is the birth of the child. This balances the employer' s need for certainty about when paternity leave will be taken with the employee' s desire for flexibility.
>
> 35. Paternity leave and pay will operate on a rolling week basis. If an employee starts their paternity leave on, for example, a Tuesday, both the leave and pay weeks will run Tuesday to Monday.
>
> **Payment rate**
>
> 36. In 2003, Statutory Paternity Pay will be the lesser of £100 per week or 90% of the employee' s average weekly earnings.
>
> **Qualifying conditions**
>
> 37. Leave and pay will be available to those who will be parenting the child.
>
> 38. Employees must have 26 weeks continuous service into the 15th week before the week the baby is due to qualify for paternity leave. To qualify for Statutory Paternity Pay the employee must also earn on average at least the Lower Earnings Limit for National Insurance.
>
> 39. This brings eligibility for paternity pay and leave into line with eligibility for Statutory Maternity Pay and additional maternity leave.
>
> **Notification requirements**
>
> 40. Employees planning to take paternity leave will notify their employer in the 15th week before the week the baby is expected to be born. Employees will complete a self-certificate setting out the date the baby is due and when the employee wishes to take paternity leave.
>
> 41. This timing of the notification mirrors the new requirements for maternity leave. The use of a self-certificate balances the need for a light-touch procedure with the desire employers have expressed for some form of evidence to justify their payment of Statutory Paternity Pay.

42. Where an employee has notified they wish to take their paternity leave from the birth of the child they will be able to do so whether or not the child is born on the expected date. Employees who have given a fixed start date, however, and later wish to change the date of their paternity leave must give their employer 28 days notice.

43. This reflects the new notification requirements for maternity leave.

Payment mechanism

44. The payment mechanism will mirror that already in use for Statutory Maternity Pay wherever possible. Statutory Paternity Pay will be paid in the same way and at the same time as the employee' s wages or salary are usually paid.

45. Employers will be able to recover the money paid out in Statutory Paternity Pay in the same way as they currently claim back money paid in Statutory Maternity Pay. Both the mechanism for claiming back money paid in Statutory Paternity Pay and the rate at which they are reimbursed will mirror the arrangements already in place for Statutory Maternity Pay.

46. Generally employers will be able to claim back 92% but those eligible for Small Employers' Relief 10 will be able to claim back 100% plus an element of compensation (currently 5%). In Budget 2001, the Chancellor announced that the threshold for Small Employers' Relief would be raised from 2002 from £20,000 to £40,000. This will mean that around 60% of employers will qualify for the higher rate of reimbursement.

47. Additionally, the Government is seeking to further support employers who need to make payments by enabling them to request payment in advance from the Inland Revenue. Employers will be able to request payment from the Inland Revenue in advance (or in arrears) if the amount they are due to pay out in Statutory Paternity Pay, along with other amounts they have to pay out (for example Statutory Maternity Pay and Statutory Sick Pay) is more than the total amount they will be able to recover from the payments of tax, NI contributions and other payments they are due to make to the IR Accounts Office.

48. Many employers are already familiar with the existing mechanism for Statutory Maternity Pay. It will help to simplify their administration if the same mechanism is used for Statutory Paternity Pay.

Employment protection

49. Employees will be protected from suffering detriment or unfair dismissal for reasons related to taking or seeking to take paternity leave, or the benefits of paternity leave.

Paternity leave and parental leave

50. The right to parental leave will not be affected by the new right to paternity leave. If they fulfil the conditions for each right, employees will be able to take a combination of paternity and parental leave following the birth of a child.

Adoptive parents

51. Where a couple adopts a child, one parent will be able to take adoption leave (see p 14). Their partner will be able to take paternity leave (if they meet the eligibility criteria).

52. For adoptive parents, paternity leave must be taken within the first 8 weeks following the child' s placement for adoption. The earliest date on which the leave can begin will be the date of placement for adoption.

2. Adoption leave and pay

Clause 3 inserts a new Chapter 1A into Part VIII of the ERA, as amended. This gives an employee who satisfies prescribed conditions the right to be absent on leave during an ordinary adoption leave period and an additional adoption leave period.

Clause 4 inserts a new Part 12ZB into the *Social Security Contributions and Benefits Act 1992* which gives an employee who satisfies certain conditions the right to Statutory Adoption Pay (SAP).

Again, some of the conditions are contained in the primary legislation and others will be contained in regulations. The *Government's Response on Simplification of Maternity Leave, Paternity Leave and Adoption Leave* describes how the new scheme will work. As with paternity leave and pay, the Government has attempted to align the rules with those on maternity leave and pay as far as possible:

54. The system has been drawn up to reflect the correct procedures potential adopters should follow, whether they are adopting from within the UK or overseas. Adopters will need to adopt via an approved adoption agency and those adopting from overseas will need a certificate of approval from the Secretary of State for Health.

55. For practical reasons, there will be some minor differences in the way the scheme operates for domestic and overseas adopters.

Date of matching and matching certificate

56. Eligibility for adoption leave and Statutory Adoption Pay will be based on the date the employee is matched with a child. (…)

59. When an approved match has been made, the adoption agency will issue a matching certificate, similar to the MATB1 issued to expectant mothers. This will be used as evidence that the employee will be having a child placed with them.

Adoption leave and pay periods

60. Adoptive parents will be able to take 26 weeks ordinary adoption leave to be followed immediately by 26 weeks additional adoption leave, giving a total of one year's leave. Statutory Adoption Pay will be for 26 weeks. This reflects the periods for maternity leave and pay.

61. The earliest date on which adoption leave can begin is 14 days before the expected date of placement. The latest date on which leave can begin is the date on which the child is placed for adoption.

62. Adoption leave and pay will operate on a rolling week basis. If an adoptive parent starts their adoption leave on, for example, a Tuesday, both the leave and pay weeks will run Tuesday to Monday for the entire 26 week period.

Payment rate

63. In 2003, Statutory Adoption Pay will be the lesser of £100 per week or 90% of the employee' s average weekly earnings.

Qualifying conditions

64. To be eligible for adoption leave the adoptive parent must have completed 26 weeks' service with their employer by the time they are matched with a child. To be eligible for adoption pay, they must also earn on average at least the Lower Earnings Limit for National Insurance. (…)

Notification requirements

66. The adoptive parent will have a duty to notify the employer of their intention to take adoption leave when they are matched with a child. The matching certificate must be passed to the employer within 1 week of issue.

67. It will be best practice for the adoptive parent to let their employer know informally that they will be taking adoption leave when they are approved for adoption.

68. This reflects the requirement for mothers to notify their intention to take maternity leave in the 15th week before the baby is due and the best practice that they informally let their employer know as soon as possible that they are pregnant in order to ensure their health and safety and employment protection and rights to time off for ante-natal care.

69. Wherever possible, the parent should let their employer know when they want to start their adoption leave, based on the expected date of placement, at the time they notify their employer they will be taking the leave.

70. The adoptive parent must give their employer 28 days notice of when they wish their adoption leave to start, unless this is not reasonably practicable. If it is not reasonably practicable to give 28 days notice, leave will start on the date the child is placed for adoption.

71. This reflects the notice requirements for maternity leave.

Payment mechanism

72. The payment mechanism will mirror that already in use for Statutory Maternity Pay wherever possible. Statutory Adoption Pay will be paid in the same way and at the same time as the parent' s wages would normally be paid.

73. Employers will be able to recover the money paid out in Statutory Adoption Pay in the same way as they currently claim back money paid in Statutory Maternity Pay. Both the mechanism for claiming back money paid in Statutory Adoption Pay and the rate at which they are reimbursed will mirror the arrangements already in place for Statutory Maternity Pay. (…)

Choice of which parent will take adoption leave

77. Where a married couple adopts, they will be able to choose which of them will take adoption leave. Where an individual adopts they will be the parent eligible for adoption leave.

78. The other member of an adopting couple, or the partner of a single adopter, will be able to take paternity leave, providing they meet the eligibility criteria for paternity leave.

Employment protection

79. Adoptive parents will be protected from suffering detriment or unfair dismissal for reasons connected with taking or seeking to take adoption leave or the benefits of adoption leave. This protection will begin when the parent is approved for adoption. This reflects the position in respect of maternity leave.

3. Administration and enforcement

Clauses 5-16 of the Bill amend existing statutes and introduce new regulation-making powers which extend the same administrative and enforcement provisions to SPP and SAP as exist at present for SMP. Employers will administer SSP and SAP and recover a percentage of what they pay out. In most cases this will 92%, with small employers who are entitled to Small Employers' Relief (in 2002/3, those with NICs due in a year of £40,000 or less) able to claim 100% and an added payment (in 2001/2 of 5% for SMP) to

compensate for employers' share of National Insurance Contributions payable on SPP and SAP.

Clause 7 provides for a new power to make regulations to enable employers to ask for funding, if necessary in advance, from the Inland Revenue where the amount of SPP or SAP they have to pay their employees exceeds the tax and NICs that they are due to pay to the Inland Revenue. In certain circumstances where an employer fails to pay SPP or SAP, the Inland Revenue will become responsible for the payment. Liability will also fall on the Inland Revenue from the first week in which an employer becomes insolvent. Clause 21 extends these new provisions to SMP as well.

To ensure compliance, the clauses provide for:

- Employers to keep appropriate records and to make periodic returns to the Inland Revenue
- Employers to produce those records for inspection by the Inland Revenue
- Employers to provide information about entitlement to their employees
- The Inland Revenue to be able to obtain information from both employers and applicants for SPP and SAP
- The Inland Revenue to impose penalties where there is refusal or repeated failure to comply
- The Inland Revenue to make decisions on entitlement in the event of dispute
- Appeals against decisions made and penalties awarded to be heard by the Independent Tax Commissioners.[21]

4. Maternity leave and pay

Most of the changes to maternity leave which have been announced will be made by amendments to the *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312. These include:

- increasing the length of ordinary maternity leave (to which all women are entitled) from 18 to 26 weeks;
- changing the qualifying period for additional maternity leave to 26 weeks continuous service into the 15th week before the expected week of childbirth; and
- changing the length of additional maternity leave to 26 weeks after the end of ordinary maternity leave.

However, some changes to primary legislation are necessary to ensure that the provisions on rights to return during and after maternity leave can be adjusted to take account of the

[21] Explanatory Notes, Bill 44 - EN

extension of maternity leave. Clause 17 amends Chapter 1 of part VIII of the ERA to allow the necessary changes to be made by regulation.

Clauses 18 -21 and 46 amend the *Social Security Contributions and Benefits Act 1992* to:

- Extend the payment period of SMP and Maternity Allowance (MA) from 18 to 26 weeks (clause 18).
- Allow for an increase in the standard rate of MA and SMP to £100 a week, or 90% of weekly earnings if this is less than £100. In the case of SMP a woman will receive 90% of her average weekly earnings for the first 6 weeks for which SMP is payable (as now) (clause 19).
- Increase the minimum period of notice that must be given to employers for SMP from 21 days to 28 days (clause 20).
- Safeguard an employee's entitlement to SMP from the 15th week before the EWC on her satisfying the employment and earnings tests and giving notice where appropriate. This will be the case even if should happen that, *for whatever reason*, her employment ends after this point (clause 20).[22]
- Allow an employer to offset his SMP payments against any payments due to be made to the Inland Revenue as may be prescribed in regulations. Regulations may also provide for employers to apply for advance funding if the amount they are due to pay in SMP will exceed the tax, national insurance and other allowable payments due to be made to the Inland Revenue (clause 21). This clause also amends the equivalent Northern Ireland legislation - the *Social Security Contributions and Benefits (Northern Ireland) Act 1992* - in the same way, and provides that the relevant regulations should be made by the Secretary of State.[23]

The *Government's Response on Simplification of Maternity Leave, Paternity Leave and Adoption Leave* outlines the new system of maternity pay and leave which will operate from April 2003:

> **Length of leave and pay periods**
>
> 19. All pregnant employees will be entitled to 26 weeks ordinary maternity leave. The payment period for Statutory Maternity Pay and Maternity Allowance will also be extended to 26 weeks.
>
> 20. For women with 26 weeks qualifying service with their employer, this will be followed immediately by 26 weeks additional maternity leave, giving a total of one year' s maternity leave.

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22 This is necessary to reverse a decision of a Social Security Commissioner in 2000 that a woman who left her employment after the15th week before the expected week of childbirth for reasons which had nothing to do with her pregnancy could not qualify for SMP.

23 Explanatory Notes, Bill 44 - EN

21. This removes much of the uncertainty of the current system. The fixed leave period will allow employers and employees to know from the outset how much leave the woman is entitled to and the date she is expected to return to work.

Qualifying service

22. Women with 26 weeks continuous service into the 15thweek before their expected week of childbirth will qualify for additional maternity leave.

23. This brings the qualifying service for additional maternity leave into line with the existing qualifying service for Statutory Maternity Pay, greatly simplifying the current system which relies on separate lengths of service and different points at which they are measured.

Notification requirements

24. A woman will inform her employer of her pregnancy and the date on which she intends to start her maternity leave during the 15th week before her expected week of childbirth.

25. Her employer will respond to her within 28 days of her notification. The response will set out her right to leave, her expected return date and her responsibilities for notifying him of any changes to her plans.

26. A woman who wishes to change the date on which she will start her maternity leave must give her employer 28 days notice of the new date. Similarly, a woman who wishes to return to work before her expected return date will have to give her employer 28 days notice.

27. The notice period attached to Statutory Maternity Pay will also be increased from 21 to 28 days to harmonise with the notice requirement for leave.

28. Currently a woman does not have to let her employer know she is pregnant or her plans for maternity leave until 21 days before she wants to start her maternity leave. The 28-day notice requirement increases the amount of notice employers will get by at least one third. The new notification process will increase certainty for employers and allow them more time to plan how to manage the absence.

Sickness trigger

29. If a woman is absent from work for a pregnancy-related reason during the 28 days before the start of her expected week of childbirth her maternity leave can be started from the first day of her absence.

30. This reduces the period of sickness trigger from the current 6 weeks to 4 weeks, removing some of the uncertainty this measure can bring into the process. It also helps to harmonise the periods used throughout the system.

Average earnings calculation

31. The period used to calculate a woman' s average earnings for Statutory Maternity Pay purposes will remain at eight weeks.

C. Costs and numbers

Partial Regulatory Impact Assessments (RIAs), published on the DTI website on 8 November 2001, estimate the number of people who will benefit from these family friendly policies and the costs for both the Exchequer and employers:

a. Paid paternity leave

There are estimated to be 450,000 employed fathers each year who will be eligible for paternity leave. It is assumed that 70% will take up their two-week entitlement. The Exchequer cost in 2003-04 is estimated at £63 million. Employers who are already providing paid paternity leave will benefit, as they will be able to recover some or all of their costs from the Exchequer. Large employers who do not already provide paid paternity leave will have to bear 8% of the cost. Small employers will be able to recover all their costs because of the Small Employers Relief scheme. Recurring costs arising from coverage for absent employees are put at £25-42 million and from administration of the scheme at £21-32 million. One-off introduction costs are put at about £10 million.[24]

b. Paid adoption leave

There are around 2,700 domestic adoptions each year by strangers (i.e. excluding cases where a child is adopted by a family member, step-parent or foster parent - these adoptions will not give rise to entitlement to adoption leave). There are also about 300 inter-country adoptions each year. The RIA assumes that the number of domestic adoptions will increase in future years by about 32% in line with Government objectives. This means that in 2003, some 3,850 adoptions might give rise to entitlement. 100% take-up is assumed. The cost to the Exchequer in 2003-04 would be £10 million. Recurring costs to employers arising from covering for absences are estimated at £2-3 million a year, and additional administration costs at below £1 million. There are unlikely to be noticeable set-up costs as the scheme is the same as for SMP.[25]

c. Maternity pay and leave

There are about 1.5 million employers in Great Britain of whom around 5% (70,000) make SMP payments in any year. Around 305,000 pregnant women receive SMP each year. It is assumed that 85% of SMP recipients will make use of the addition to the

[24] DTI, *Partial regulatory impact assessment: paid paternity and adoption leave*, Nov 2001
[25] DTI, *Partial regulatory impact assessment: paid paternity and adoption leave*, Nov 2001

period of pay. The total increase in SMP payments as a result of the increase in the rate and the payment period is estimated at £325 million a year, of which £305 million would be paid by the Exchequer and £20 million by employers.[26]

The extra cost to employers of covering for longer absences on maternity leave is put at £51-95 million a year and the one-off implementation costs of implementing the new arrangements are put at £10-23 million.[27]

D. Reaction

Organisations representing parents and workers have welcomed the family friendly measures, although they have pressed the Government to go further. The Equal Opportunities Commission, for example, said:

> Improved maternity pay and leave and the introduction of paternity leave should mean more parents have choices about how they combine their work and their family responsibilities. This represents a recognition of the changing roles of women and men at home and at work, finally bringing policy closer to the reality of people's lives today.
>
> We would also like to see the Government strengthen the link between women's previous earnings and maternity pay, so that more women will be able to afford to take the leave to which they are entitled. An extended parental leave scheme giving fathers an independent right to time off during the first year of a child's life would increase the range of choices available to parents. [28]

And the National Association of Citizens Advice Bureaux (NACAB) reacted:

> Plans to give women more time off work and more maternity pay when they have a baby, and to introduce paid paternity leave and adoption leave, are a major step forward in improving the rights of working parents. But unless they are backed up by a stronger enforcement regime, many working parents will fail to benefit (…) It said a Fair Employment Commission, modelled on the successful National Minimum Wage enforcement agency, was needed to ensure rights on paper become a reality in every workplace. [29]

Employers, while not exactly opposed to the provisions, are concerned that they will increase the regulatory burden on small firms: The Federation of Small Businesses (FSB) described the Bill as:

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26 DTI, *Partial regulatory impact assessment: improvements to statutory maternity pay*, Nov 2001

27 DTI, *Government Response on Simplification of Maternity Leave, Paternity Leave and Adoption Leave*, Annex A, *Partial Regulatory Impact Assessment*, November 2001

28 EOC press release, 8 November 2001, *Fairness at work will be boosted by Employment Bill, says EOC*

29 NACAB press release, 12 November 2001, *Enforcement is missing element of Employment Bill*

> a 'raft of employment legislation too far' and called for a commitment from the Government that this will be the last of its kind for the remainder of this Parliament.
>
> FSB Employment Spokesman, Bill Knox said, "this Employment Bill has got to be the final word. Small Businesses cannot take any more without their ability to hold on to or create new jobs being affected."
>
> Whilst Mr Knox recognises that the provision for employers to claim back paternal leave payments before the leave is taken will benefit small firms, he questions the claim that the Bill will reduce red tape. "Small Business Owners are still waiting for the Government to deliver on their promises to limit the bureaucracy involved in administering sick leave and maternity leave," he said.
>
> Bill Knox added, "our members broadly support family-friendly policies but there is no doubt that parental leave is generous to employees and hard on employers which can only harm productivity. We are also concerned that over-prescriptive regulations soon become outdated and damage relationships in small firms where most proprietors do their utmost to help in times of emergency." [30]

And John Cridland of the CBI conceded that:

> the government had tried to strike a balance between extra support for working parents and the resulting burdens on business.
>
> "The overall business verdict will be mixed," he said. "Larger firms should be able to accommodate the changes. But smaller firms have fewer resources and some will struggle to cope with the increase in the absence of key staff." [31]

III Employment tribunals and dispute resolution

A. Background

There has been a seemingly inexorable growth in the workload of employment tribunals in recent years. There were 29,304 registered tribunal applications in Great Britain in 1988/89. By 2000/01, this had grown to 130,408.[32]

Governments, both Conservative and Labour, have sought to address this by making changes to tribunal procedures and encouraging the use of alternative approaches to

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30 Federation of Small Businesses press release, 8 November 2001, *FSB says 'enough is enough' on employment legislation*

31 CBI press release, 8 November 2001, *Government gets CBI praise for tribunal reform*

32 For details, see Appendix 1

dispute resolution. The changes contained in the present Bill are part of a many-pronged approach which can be a little confusing.

1. Employment Rights (Dispute Resolution) Act 1998: ACAS scheme

In December 1994, the Conservative government published a Green Paper, *Resolving Employment Rights Disputes: Options for Reform*.[33] This described the background to the review in terms which would be familiar today:

> Concern has grown that the industrial tribunals have departed from their original objectives – to provide a readily accessible and cost effective means of redress with a minimum of formality and delay. The caseloads of the tribunals have increased markedly in recent years, reflecting partly increased labour turnover in the economy but also the tribunals' extending jurisdiction and a growing propensity to litigation in defence of employment rights. At the same time, the developing case law in both domestic and European courts has added to the complexity of the deliberations of the tribunals. These developments have placed considerable pressures on the tribunals, leading - despite the injection of increased resources - to unreasonably long delays in many locations and the seemingly inexorable growth of 'legalism' in their proceedings.[34]

The Green Paper proposals, with some modifications, eventually became law in the *Employment Rights (Dispute Resolution) Act 1998*.[35] One proposal dropped by the Conservatives was the imposition of a statutory requirement on employees to try to resolve disputes through internal procedures before taking them to tribunals.[36] Measures introduced by this Act included:

- providing an alternative means of resolving disputes about unfair dismissal by voluntary referral to arbitration under a scheme to be drawn up by the Advisory, Conciliation and Arbitration Service (ACAS)
- encouraging the use of in-house appeal procedures by allowing a reduction in compensation awards for a failure to make use of available procedures
- permitting tribunals to determine cases without a hearing or full hearing in certain circumstances
- extending the jurisdictions in which a chairman may sit alone
- making provision for hearings by the chairman and one other member
- enabling 'legal officers' to be appointed to the tribunals to relieve chairmen of some of their more straightforward duties.

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33 Cm 2707

34 Cm 2707, para 1.2

35 For a fuller account of the background, see Library Research Paper 98/13, 16 January 1998, *Employment Rights (Dispute Resolution) Bill [HL] 1997/98*

36 HC Deb 20 November 1995, c 20W

The ACAS scheme did not come into operation until 21 May 2001.[37] It applies only to unfair dismissal cases and requires both parties to agree to be bound by the arbitrator's decision and to waive their right to take a case to an employment tribunal. Details of how the scheme works are contained in the Schedule to the *ACAS Arbitration Scheme (England and Wales) Order 2001*, SI 2001/1185. The introduction says:

> 3 Resolution of disputes under the Scheme is intended to be confidential, informal, relatively fast and cost efficient. Procedures under the Scheme are non-legalistic, and far more flexible than the traditional model of the employment tribunal and the courts. For example (as explained in more detail below), the Scheme avoids the use of formal pleadings and formal witness and documentary procedures. Strict rules of evidence will not apply, and, as far as possible, instead of applying strict law or legal precedent, general principles of fairness and good conduct will be taken into account (including, for example, principles referred to in any relevant ACAS "Disciplinary and Grievance Procedures" Code of Practice or "Discipline at Work" Handbook). Arbitral decisions ("awards") will be final, with very limited opportunities for parties to appeal or otherwise challenge the result.[38]

It is too early to assess what impact the scheme will have on the number of cases going to tribunals.

2. Changes to employment tribunal rules, July 2001

Many employers believe that the continuing growth in claims can be explained by changes to employment law, which have contributed to a "compensation culture". They cite not only the increase in workers' rights (for example to a minimum wage and equal treatment for part-timers), but particularly the reduction in the qualifying period for unfair dismissal claims and the significant increase in the upper limit on compensation. These, they argue, encourage disgruntled employees to take cases to tribunals in the hope of a cash windfall.[39] A brief summary of employment law changes since May 1997 is included in Appendix 2.

Trade unions contest this view and argue that claims have risen partly because of the increase in the number of small firms which do not have fair procedures for dealing with staff and partly because of the inability of tribunals to hear test cases. This means, for example, that the 2000/01 figures include 9,000 identical claims by retained (part-time) firefighters, claiming discrimination compared to full time firefighters.[40]

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37 *ACAS Arbitration Scheme (England and Wales) Order 2001*, SI 2001/1185

38 Ibid

39 See, eg, CBI press release 5 May 2000, *CBI pushes for reform of employment tribunals to curb "compensation culture"*

40 TUC press release, 10 September 2001, *TUC blasts 'compensation culture' myths*, http://www.tuc.org.uk/congress/tuc-3693-f0.cfm

In response to business concerns at the rising cost of tribunal cases, Stephen Byers, then Secretary of State for Trade and Industry, announced further "proposals to strengthen and improve the employment tribunal system" on 27 November 2000.[41] The main aim was to deter people from bringing claims which had little chance of success:

> There will be tougher penalties on both sides if they are bringing an unreasonable case and there will be greater deterrents for those people looking to bring an action which has little or no chance of success.
>
> I am concerned that there are too many weak cases in the system causing significant delays for those with genuine claims. They also place unacceptable burdens on businesses and the taxpayer.
>
> Bringing a case is a serious step. People pursuing a claim with no reasonable prospect of success, or who indulge in time-wasting tactics, must be prepared to face heavy financial penalties.[42]

These changes were made by the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001*, SI 2001 No 1171, which replaced the existing rules contained in the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993*, SI No 2687, as amended.[43] The 2001 rules were originally due to come into force on 18 April 2001, but their implementation was deferred until 16 July 2001 "to allow more time for users to understand the changes".[44]

The DTI's website describes the changes made by the Regulations. It lists those changes designed to improve case management and to deter and weed out unmeritorious cases as follows:

> The Regulations re-enact the 1993 Regulations with amendments. They apply to all proceedings to which they relate, irrespective of when they were commenced. The main changes are given below.
>
> **(a) Case management/measures to deter and weed out unmeritorious cases**
>
> - New Regulation 10 inserts an overriding objective into the rules of procedure to enable tribunals to deal with cases justly. Dealing with cases justly includes, so far as practicable: ensuring the parties are dealt with equally,

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41 DTI press release, *Byers announces new employment tribunal proposals*, 27 November 2000

42 Ibid

43 In Scotland, the same changes were made by the *Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2001*, SI 2001/1170

44 http://www.dti.gov.uk/er/individual/tribunal.htm. The deferral was made by the *Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2001*, SI No 1459 and the *Employment Tribunals (Constitution and Rules of Procedure) (Scotland) (Amendment) Regulations 2001*, SI No 1460

saving expense, acting in proportion with the complexity of the case, and dealing with cases fairly and expeditiously. The parties have a duty to assist the tribunal in furthering the overriding objective.

- Case management powers are set out in rule 4 of Schedule 1 which is a consolidation and simplification of rules 4 and 16 of Schedule 1 to the 1993 Regulations. Paragraph (3) is new and provides that directions may relate in particular to evidence, including witness statements. Failure to comply with a direction may result in an award of costs under rule 14(1)(a) or the striking out of the whole or part of an application or notice of appearance, and, where appropriate, a respondent being debarred from defending altogether.

- In rule 7(4) of Schedule 1 (prehearing review), the maximum amount of the deposit which may be imposed following a pre-hearing review has been increased from £150 to £500.

- Rule 14(1) of Schedule 1 (costs) is amended to make it clear that the unreasonable behaviour of a party's representative may be taken into account when awarding costs against that party.

- The tribunal is also now under a duty to consider an award of costs in the circumstances described in rule 14(1), including where proceedings which have no reasonable prospect of success have been pursued.

- Rule 14(3) increases from £500 to £10,000 the maximum amount of costs which a tribunal may award without an assessment of costs.

- In rule 15(2) of Schedule 1 (miscellaneous powers), the term "frivolous" has been replaced with "misconceived" (defined in Regulation 2(2)) and "unreasonable" in sub-paragraphs (c) and (d) respectively. Those paragraphs permit the tribunals to strike out applications or notices of appearance in certain circumstances.[45]

Regulation 2(2) of the 2001 Regulations defines the word "misconceived**"** to include "having no reasonable prospect of success".

Probably the most controversial change was the increase from £500 to £10,000 in the limit on costs which can be awarded. Costs can only be awarded in cases where a party has behaved unreasonably, though the regulations do, by replacing the term "frivolous" with the term "misconceived" make it slightly more likely that costs could be awarded. It is, though, worth noting that in 2000/2001, costs were only awarded in 247 cases out of a total of 130,408 applications to employment tribunals.[46]

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45 http://www.dti.gov.uk/er/individual/et.htm

46 Employment Tribunals Service annual report 2000/2001, Table 8

3. *Routes to Resolution*, July 2001

On 22 June 2001, Alan Johnson, the DTI Minister responsible for employment relations, announced a review of the whole process of employment dispute resolution.

> The Government will look at:
>
> - why there has been a rise in tribunal applications – evidence suggests that recently introduced employment rights such as working time regulations and the reduction in the unfair dismissal qualifying period do not explain the increase;
>
> - how to foster workplace solutions to resolve disputes – many tribunal claims result from escalation of misunderstandings which could have been settled at an early stage.
>
> Applications to employment tribunals have been rising steadily since the early 1990s. In 1990/91 there were 43,000 applications compared with over 130,000 in 2000/1 - a threefold increase.
>
> Meantime, the cost to employers of defending a tribunal claim and replacing an employee can exceed £5000, while employees going through tribunal proceedings often move to a lower paid, lower status job -or even end up unemployed.
>
> Alan Johnson said:
>
> "The rapid increase in employment tribunal cases is bad news both for business and for employees. It is far better for all concerned if disputes can be prevented or resolved satisfactorily in the workplace, avoiding the stress and costs of litigation.
>
> "The Government will review the steps we can take to promote conciliation, not litigation.
>
> "Litigation is costly for business, while the price an employee pays is stress and uncertainty and possibly damage to their employment prospects, when many disputes could perhaps have been resolved satisfactorily in the workplace at an early stage."[47]

The review was asked to make recommendations on:

1. Ways to promote good employment practice in the workplace;
2. How to promote the amicable settlement of individual grievances and ways of resolving them without recourse to litigation;

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[47] DTI press release, *Government to promote dispute resolution: workplace conciliation will be pursued as an alternative to tribunals*, 22 June 2001

> 3. Whether reform of the tribunal system would enable cases to be resolved more efficiently in ways which are fair to both sides.
>
> The Government will consider legislative options as well as non-statutory means of achieving its objectives. The role of ACAS will be considered as well as that of the employment tribunals. The review is not intended to amend employment rights but is considering changes to the way in which those rights are exercised and to the law on dispute resolution procedures. It is not considering the law on collective dispute resolution.[48]

A factual background paper on employment dispute resolution was published on the DTI website,[49] and a consultation document promised.

This consultation paper, *Routes to Resolution*, was published on 20 July 2001. It contained proposals to "radically reform employment tribunals", which were "designed to promote conciliation in the workplace rather than litigation and reduce the strain on the employment tribunal system and its users". [50]

The press notice announcing the publication of the consultation document highlighted its key proposals as:

> organisations which do not have dispute resolution procedures in place - or do not use them when workplace disagreements arise - to have arrangements for managing such disagreements; and
>
> a new, modest charging regime for use of the employment tribunal system to reduce the cost burden on the taxpayer. Exemptions would apply to those on benefits and in cases of genuine need.[51]

The consultation paper summarised the proposals as follows:

> **Resolving disputes at work**
>
> - Only allowing applications to tribunals once workplace disciplinary or grievance procedures have been completed
>
> - Increasing or reducing awards where the employer or the employee had unreasonably failed to take a set minimum of procedural actions in respect of a disciplinary or grievance issue

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48 Ibid
49 http://www.dti.gov.uk/er/individual/dispute.pdf
50 DTI press release, 20 July 2001, *Government unveils reform package for tribunals*
51 Ibid

- Awarding additional compensation to an employee to reflect the absence of a written statement [of terms and conditions]

- Removing the current 20 employee threshold for including details of disciplinary or grievance procedures in the written statement

- Allowing tribunals to disregard procedural mistakes beyond a set of minimal procedural actions if they made no difference to the outcome of the case.

Promoting conciliation

- Removing ACAS' duty to conciliate in cases, such as disputes over pay, breach of contract and redundancy payments

- Introducing a fixed period for conciliation

- Broadening the scope of compromise agreements to match ACAS-conciliated settlements

- Enabling other organisations to provide conciliation services alongside ACAS

Modernising employment tribunals

- Introducing charging for applications to employment tribunals and when a case is listed for hearing

- Including in awards of costs compensation for the time a party has spent in dealing with the claim in awards of costs

- Changing the presumption on awarding costs in weak cases, so that tribunals will have to give reasons why costs are not awarded

- Enabling tribunals to make orders for wasted costs directly against representatives who charge for their services

- Making the application form to employment tribunals (IT1) mandatory

- Enabling Presidents of Employment Tribunals to issue practice directions on procedural and interlocutory issues

- Introducing a fast track for certain jurisdictions with either no or a short fixed period for conciliation. This could include a written determination if both parties agree

- Registering applications publicly only once the claim has gone through the conciliation period and is going to a hearing.

Comments on the proposals were requested by 8 October 2001. A summary of the comments received is included in the *Government Response to Routes to resolution: Improving Dispute Resolution in Britain*, published on the DTI's website on 8 November 2001.

The most controversial proposal was that which would impose a charge on applicants to employment tribunals. This was welcomed by the CBI who considered it "not unreasonable", especially as "charges are already quite normal in other areas of the court system".[52] The Minister, Alan Johnson, defended the proposal as a way of raising money to improve the service:

> Charging a modest amount would bring a faster and more customer-focused service and also raise funding for improvements in the tribunal and conciliation process.
>
> At least a quarter of all tribunal applications which come from those who are on benefits or in genuine need will be exempt from any charges. These people will still have access to justice.[53]

However, trade unions, and many other commentators were appalled by the idea which they considered "against every tradition of justice in Britain" and probably contrary to the Human Rights Act.[54] An EDM (No 260 of 2001-02) opposing the charging regime, as well as the costs proposals, had attracted signatures from 49 Labour MPs by 13 November 2001. Press reports suggesting that the Government had dropped the proposal started appearing in September 2001,[55] but there was no formal announcement before the Bill was published on 8 November, when:

> The Government also announced that, having listened to concerns expressed during consultation, it would not be taking forward proposals to charge applicants for bringing a claim to an employment tribunal.[56]

Interestingly, the Conservative Government made a similar proposal in the May 1986 White Paper, *Building Businesses…Not Barriers*:

> 7.4. The main problem employers have encountered with employment protection legislation is the cost and management effort required to deal with ill-founded claims to industrial tribunals which also result in considerable public expenditure though they may cost the applicant little or nothing. The Government are

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52 CBI press release, *CBI welcomes tribunal system reform ideas*, 20 July 2001
53 Ibid
54 See, eg, TUC press notice, *'Good and bad' in tribunal proposals as small businesses revealed as bad employers*, 20 July 2001
55 See, eg, "Blair relents on tribunal fees", *Guardian*, 5 September 2001
56 DTI press release, 8 November 2001, *Hewitt outlines plan to modernise the world of work*

> therefore considering introducing a requirement for applicants to pay a fee, perhaps £25, when making an application to an industrial tribunal. Such a fee would be refundable if the applicant won the case at the tribunal or subsequent appeal, or if the claim were withdrawn before the date for a full tribunal hearing was fixed. The Government will be seeking comments on this suggestion.[57]

This proposal was also dropped in the face of similar arguments: a *Consultation Paper on Industrial Tribunals*, issued by the Department of Employment in May 1988, reported:

> The weight of opinion, including that of employers' organisations, was overwhelmingly against the idea. It was argued that an application fee would be seen as a tax on justice; that it would not bite on applicants with weak cases, but on those who were short of money; and that it would deter settlements shortly before the hearing, which are common, and might even lead to employers defending more cases rather than less.[58]

In its place, the then Government proposed that either party should be able to apply to the tribunal chairman at the pre-hearing stage for an order requiring the other party to make a deposit of up to £150 as a condition of proceeding further. The tribunal chairman would base his decision on whether the case had a reasonable prospect of success and whether pursuit of it would be "frivolous, vexatious or otherwise unreasonable". Deposits would be returned if the case did not go to a full hearing or if the party who made the deposit won the case. If he lost, and had an order for costs made against him, the deposit would go towards the costs.

These provisions for deposits were introduced by the *Employment Act 1989* and the limit was increased to £500 in July 2001.[59]

4. Consultation on Leggatt review of tribunals, August 2001

Quite separately from the discussions about changes to employment tribunals, the Lord Chancellor's Department is consulting on some fundamental changes to the whole tribunal "system", proposed by Sir Andrew Leggatt in his report, *Tribunals for Users. One System, One Service*. This report, published in March 2001, recommended that an independent Tribunals Service, under the Lord Chancellors Department should be established to administer all tribunals, including employment tribunals. The review received more responses about employment tribunals than any other type of tribunal. It was anxious to restore their informality and accessibility and considered the absence of fees essential to this:

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57 Cmnd 9794, para 7.4

58 Department of Employment Consultation Paper on Industrial Tribunals, May 1988

59 see above

> 10 Employment Tribunals are party and party tribunals, which for some time past have been acquiring the complexity and formality of Labour Courts, and losing their original user-friendliness. It is a trend that must be reversed; and the eligibility for legal aid, to which, if they were courts, users would become entitled, would increase the involvement of lawyers and the formality they bring with them. What has rendered them successful has been the composition of the tribunal, the absence of fees and the proximity of ACAS. So Employment Tribunals, like other tribunals, should be administered by the Tribunals Service. But because they are not true administrative tribunals, and some of their practices are importantly different, it might detract from the coherence of the Tribunals System if Employment Tribunals were to be administered in the same way as all the rest. They and other party and party tribunals should therefore be administered by a separate section of the Tribunals Service with its own head.[60]

The Lord Chancellor's Department issued a consultation paper on the Leggatt Report in August 2001, and responses are requested by 30 November 2001.[61]

5. Employment tribunal system task force, October 2001

On 23 October 2001, Patricia Hewitt, Secretary of State for Trade and Industry, announced the establishment of an Employment Tribunal System Taskforce to advise on implementation of reforms to the employment tribunal system. Its terms of reference are:

> (i) The Employment Tribunal System Taskforce will make recommendations to the Secretary of State for Trade & Industry and the Lord Chancellor on how services can be made more efficient and cost effective for users, against a background of rising caseloads.
>
> (ii) The Taskforce's overall objective is to ensure that the Employment Tribunal system reflects the needs of its users and the changing environment in which it operates. Building on best practice, the Taskforce will:
>
> -identify ways of improving operational efficiency and the scope for improving services including through electronic business;
>
> -advise on the need for new investment to meet any revised service objectives and performance measures;
>
> -consider how to improve liaison between all those involved in the system, including the judiciary and the administration;
>
> -examine possible improvements to the management of caseflow, and of case-management.

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60 Leggatt Report, Overview, Para 10, http://www.tribunals-review.org.uk/leggatthtm/leg-ov.htm

61 http://www.lcd.gov.uk/consult/leggatt/leggatt.htm#part1

(iii) In coming to its conclusions, it will take fully into account the needs of users (in particular individual applicants and small businesses), and the views of the judiciary and the staff.

(iv) The remit of the Taskforce does not cover the primary legislative framework in which the Employment Tribunal system operates or the employment rights they enforce. But the Taskforce may wish to consider the operational aspects of implementing proposals set out in the 'Routes to Resolution' consultation paper, including operational aspects which could be implemented by secondary legislation. The Taskforce will pay due regard to judicial independence and devolved responsibilities.

(v) The Taskforce will finish its work and report in spring 2002.[62]

B. The Bill

The Government announced its decisions following consultation on *Routes to Resolution* in a response published shortly after the Bill.[63] Not all the decisions require primary legislation, but the Government summary of all the actions it proposes to take is reproduced below:

Resolving Disputes at Work

- Introduce new minimum procedural standards for handling disputes in the workplace and place obligations on both employers and employees to use these standards

- Incorporate such minimum procedural standards into all contracts of employment as an implied term

- Use the tribunal system to reinforce the importance of these minimum procedural standards through adjusting the amount of awards where parties have not met their obligations

- Provide that tribunals will not admit certain claims where the complaint has not been raised in the workplace, unless it would have been unreasonable to do so

- Extend time limits for lodging a tribunal claim where dispute resolution procedures are underway in the workplace

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62 DTI press release, 26 October 2001, *Hewitt announces new taskforce to advise on modernisation of employment tribunals system*

63 http://www.dti.gov.uk/er/individual/etresponse.pdf

- Improve compliance with the requirement that employees are given a statement of their employment terms within 2 months of starting work

- Remove exemptions on the smallest businesses so that information about workplace procedures is included in all written statements of employment terms

- Change the way unfair dismissals are judged, so that certain procedural shortcomings can be disregarded, provided the minimum procedural standards are met

- Set a sympathetic implementation timetable for these changes so that employers and employees have enough time to understand them. Support these changes with comprehensive information and guidance

Promoting Conciliation

- Promote amicable and timely settlement of employment tribunal claims by introducing a fixed period of conciliation

- Broaden the scope of compromise agreements

- Promote the use of alternative dispute resolution procedures

Modernising Employment Tribunals

- Introduce a fast track for straightforward claims in tribunals

- Provide for greater consistency in the way tribunals process claims by enabling the Presidents of the employment tribunals to issue practice directions

- Provide clear guidance on the costs regime

- Make changes to the costs regime to allow tribunals to include, in the calculation of cost awards against unreasonable behaviour, a contribution towards the time the applicant or respondent has spent in preparing the case; to provide for cost awards to be made against representatives who charge for their services; and to consider further whether to strengthen the presumption that tribunals make cost awards against applicants or respondents who submit a weak case, or otherwise behave unreasonably in bringing or conducting their claim

- Make it easier for tribunals to strike out weak claims or responses at a pre-hearing review

- Bring the Employment Appeal Tribunal (EAT) costs regime into line with employment tribunals

- Introduce mandatory application and response forms for claims, and make changes to the system of public registration of applications

- Establish a Taskforce to advise on whether and how the employment tribunal system can be made more efficient, cost effective, and user-focussed, to meet the demands it faces

Some proposals discussed in the consultation paper were not taken forward. These included:

- introducing fees for applications and tribunal hearings
- removing ACAS conciliation from fast track claims
- allowing organisations other than ACAS to conciliate
- including further details of claims on the public register

1. Tribunal procedures

Part 2 of the Bill amends the *Employment Tribunals Act 1996* so that the Secretary of State will be able to use his regulation-making powers to introduce the desired changes to employment tribunal rules:

a. Costs and expenses

The award of costs (known as expenses in Scotland) is relatively rare in employment tribunal cases. Under the current regulations, they can only be awarded where the tribunal considers that a party or his representative has acted vexatiously, abusively, disruptively or otherwise unreasonably, or where the case has no reasonable prospect of success. This last provision only came into force on 16 July 2001.

Clause 22 amends the *Employment Tribunals Act 1996* so that the employment tribunal procedure regulations can be amended:

- to authorise tribunals to make awards of costs directly against a party's representative because of the way he has conducted proceedings. It is intended that the regulations will include safeguards to allow the representative an opportunity to put his case on a proposed award. They will also be able to define "representative" so as to exclude those who do not charge for their services.[64] This would mean that costs could be awarded against solicitors, barristers, in-house lawyers and employment advisers acting in a commercial capacity, but not against trade unions, Citizens' Advice Bureaux and law centres.

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[64] Explanatory Notes, Bill 44 - EN

- to authorise tribunals to order that one party make a payment to another to compensate them for the time they have wasted in preparing for a case. This would only apply in cases where costs can be awarded (i.e. where there has been unreasonable behaviour or the case is misconceived). It is not intended that parties should have to estimate how much time they have spent preparing for a case. Rather, the tribunal would make an assessment based on guidelines set out in the employment tribunal rules of procedure.[65]

Clause 23 amends section 34 of the *Employment Tribunals Act 1996* to align cost rules in the Employment Appeal Tribunal (EAT) with those in employment tribunals. This will, amongst other things, enable the EAT to make wasted costs orders directly against representatives.

b. Fixed period of conciliation

At present, the Advisory Conciliation and Arbitration Service (ACAS) has a statutory duty to promote settlements of most complaints about employment rights which have been or could be made to a tribunal. There is no time limit on this conciliation procedure which can mean that ACAS-brokered settlements are not reached until the last minute, just before the case comes before a tribunal. However, three-quarters of claims are settled or withdrawn before a hearing takes place.[66] The Government argues that settlements could often be reached more quickly, saving time and money and that a limit on the time for conciliation would concentrate the mind in much the same way as the arrival of the hearing date.

Clause 24 amends the *Employment Tribunals Act 1999* to allow for regulations to be made which will set out the length of the conciliation period and allow for an extension only in case where the conciliator considers that a settlement is very close.

c. Application forms

At present the employment tribunal procedure regulations state that applications and notices of appearance must be in writing. The Employment Tribunals service produces two forms (IT1 and IT3) which are widely used, but they have no particular status under the rules.

Clause 25 amends the *Employment Tribunals Act 1996* to allow the rules to delegate to the Secretary of State the authority to prescribe a form which is required to be used to initiate proceedings before a tribunal. The Government believes this will speed up proceedings, as more information will be revealed at an early stage.

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65 Explanatory Notes, Bill 44 - EN

66 DTI, *Routes to resolution: improving dispute resolution in Britain. Government Response*, November 2001

d. Other matters

Clause 26 will allow for cases to be determined on the basis of written submissions alone, where both parties have given their consent. Clause 27 will allow Tribunal Presidents to issue practice directions designed to achieve more consistency between tribunals in exercising their discretionary powers (eg over the extension of time limits). Clause 28 will allow tribunals to strike out weak claims at a pre-hearing review. At present, tribunals can order a deposit of up to £500 to be paid at this preliminary hearing, but they can only strike out the case if the applicant refuses to pay the deposit.

2. Statutory dispute resolution procedures

At present there is no statutory requirement for employers to establish their own internal grievance and disciplinary procedures, although around 90% of larger employers do have procedures in place.

ACAS has issued a statutory *Code of Practice on Disciplinary and Grievance Procedures* under section 199 of the *Trade Union and Labour Relations (Consolidation) Act 1992*. The current code came into effect on 4 September 2000 and incorporates guidance on the new right to be accompanied in grievance and disciplinary hearings introduced by the *Employment Relations Act 1999*.[67] A failure to observe the Code of Practice does not of itself render anyone liable to proceedings, but it can be taken into account by a tribunal.

Section 3 of the *Employment Rights Act 1996* (ERA) requires employers with 20 or more employees to include a note specifying any disciplinary rules they may have with the statement of employment particulars which must be issued within two months of the start of employment.

Section 127A of the ERA (which was added by the *Employment Rights (Dispute Resolution) Act 1998*) gives tribunals the power to increase awards in unfair dismissal cases by up to two weeks' pay if an employer has prevented an employee from using internal procedures. Conversely, they can reduce awards by the same amount if an employee has failed to make use of any internal procedures.

Many respondents to the *Routes to Resolution* consultation paper argued that the number of cases going to employment tribunals could be reduced if more emphasis was placed on attempting to resolve disputes in the workplace. The TUC, for example, said:

> 1.5 People at work must have effective legal protection in order to ensure that they are treated fairly by employers. They must also be able to enforce their rights as effectively and quickly as possible. The TUC believes that a principal reason for cases going to litigation is the continuing failure of significant numbers of employers to abide by or to have in place proper internal dispute resolution

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[67] The Code can be seen on ACAS' website, http://www.acas.org.uk/publications/pdf/cop.pdf

> procedures. Many of these claims emanate from the small business sector where, as the consultation paper notes, there are most likely to be no proper internal procedures.[68]

The CBI, in a submission to the Government in May 2000, said:

> Responsibility for limiting the potential for litigation lies, primarily, with employers themselves. Fostering a good employee relations climate with high employee satisfaction and commitment, supported by robust, up-to-date systems, procedures, and training, will reduce the likelihood of claims arising.[69]

Some commentators have argued, however, that external support from the legal system is exactly what many claimants are seeking:

> The government's aim is to encourage employees to attempt to pursue their grievances in the workplace, rather than by referring them to an employment tribunal. In proposing this, however, it seems to have misunderstood the nature of claims taken to tribunals. In general individuals do not perceive their claims as 'grievances' for the employer to adjudicate upon, but as statutory rights which the law has a duty to protect, regardless of the employer's attitude towards the right in question.[70]

Following consultations on *Routes to Resolution* the Government decided to introduce a statutory requirement that all employers should have minimum internal procedures for dealing with individual disputes in the workplace:

> 15. The Government wants to encourage the resolution of disputes where they arise - in the workplace. It therefore proposes to legislate to introduce minimum disciplinary and grievance procedural standards, as shown in the box below, and that such minimum procedural standards should be incorporated into all contracts of employment as an implied term. The implementation timetable for new legislation in this area will be set to ensure that employers and employees have sufficient time to come to terms with these changes before they are introduced.[71]

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68 *TUC response to Government Consultations, Routes to Resolution: Improving Dispute Resolution in Britain*, 3 October 2001, http://www.tuc.org.uk/law/tuc-3802-f0.cfm

69 CBI, *Managing a compensation culture: improving case management in the employment tribunal system*, May 2000

70 Sonia Kay, "Shifting the focus from tribunals to the workplace", *Industrial Law Journal*, Vol 30, No 3, September 2001

71 Government response on Routes to Resolution, November 2001, http://www.dti.gov.uk/er/individual/etresponse.pdf

Minimum Dismissal and Disciplinary Procedural Standard

Step 1 – The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which led him to contemplate dismissing or taking disciplinary action against the employee. The employer must send a copy to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2 – The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension. The employee must take all reasonable steps to attend the hearing. After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3 – If the employee does wish to appeal, he must inform the employer. If he does so, the employer must invite him to attend a further meeting. The employee must take all reasonable steps to attend the meeting. The appeal meeting need not take place before the dismissal or disciplinary action takes effect. After the appeal meeting, the employer must inform the employee of his final decision.

Modified standard in cases of gross misconduct justifying summary dismissal without notice

Step 1 – The employer must set out in writing the former employee's alleged misconduct which has led to the dismissal and the former employee's right to appeal against dismissal, and send a copy of the statement to the former employee.

Step 2 – If the former employee does wish to appeal, he must inform the employer. If he does so, the employer must invite him to attend a meeting. The employee must take all reasonable steps to attend the meeting. After the appeal meeting, the employer must inform the employee of his final decision.

Minimum Formal Grievance Procedural Standard

Step 1 – The employee must set out the grievance in writing and send a copy of the grievance to the employer.

Step 2 – The employer must invite the employee to at least one meeting to discuss the grievance. The employee must take all reasonable steps to attend the meeting. After the meeting, the employer must inform the employee of his decision as to his response to the grievance, and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3 – If the employee does wish to appeal, he must inform the employer. If he does so, the employer must invite him to attend a further meeting. The employee must take all reasonable steps to attend the meeting. After the appeal meeting, the employer must inform the employee of his final decision.

Modified grievance standard (where person raising grievance is a former employee)

Step 1 – The employee must set out the grievance in writing and send a copy of the grievance to the employer;

Step 2 – The employer must set out the response in writing and send a copy to the employee.

General requirements for minimum disciplinary and grievance procedural standards

Timetable: each step and action under the procedures must be taken without unreasonable delay.

Meetings: the timing and location of meetings must be reasonable, and the employer and the employee must both have an opportunity to put their sides of the case at the meeting. At appeal meetings, a more senior manager than attended the first meeting should as far as is reasonably practicable, represent the employer. This last requirement does not apply where the most senior manager attended the first hearing, for example in certain cases involving small and medium sized enterprises.

Clause 29 and Schedule 2 of the Bill lay down the minimum procedures set out in the boxes above. The Secretary of State is given the power to amend the provisions by order, after consulting ACAS.

Clause 30 makes it an implied term of every contract of employment that these statutory minimum procedures apply in circumstances to be specified by the Secretary of State in regulations.

Clause 31 provides for employment tribunals to reduce or increase awards by between 10 and 50% if the statutory procedures have not been followed, unless there are exceptional circumstances. This will replace the existing power to vary awards where internal procedures have not been used contained in Section 127A of the ERA. It gives the Secretary of State power to make regulations about how the statutory procedures apply. For example, they could cover matters such as when the procedure should be regarded as complete and when someone may be deemed to have complied with the requirements, even if they have not.

Schedule 3 lists the jurisdictions to which clause 31 applies. It covers the vast majority of matters on which claims are taken to tribunals including unfair dismissal; redundancy payments; sex, race and disability discrimination; equal pay equality clauses; detriment in relation to trade union activities, the National Minimum Wage and tax credits; and breach of the *Working Time Regulations 1998*. The Secretary of State can amend the list by order.

Clause 32 allows the Secretary of State to amend the time limits for submitting claims covered by the statutory dispute resolution procedures by regulations. At present most claims, including those for unfair dismissal, must be submitted within three months. Many of those commenting on *Routes to Resolution* pointed out that a requirement to pursue internal procedures before submitting a claim to a tribunal could prevent

applicants from getting their claims in within the limit. The Government has recognised this and announced in its response:

> Time limits for applying to tribunal will be extended by three months where a claim has been submitted, or where procedures have started but not been completed, within the existing time limits for filing claims. There can be further extensions of up to two months if both parties want this. Extending time limits in this way will allow time for a dialogue in the workplace to take place, without prolonging the determination of claims unduly.[72]

Clause 33 gives the Secretary of State the power to make regulations preventing claims from being made to employment tribunals before the statutory dispute resolution procedures have been followed. Before making such regulations, he must consult ACAS. During the consultation, many respondents argued that the use of internal procedures was not always appropriate. The TUC response sets out some of the difficulties:

> 1.24 We believe that for discrimination cases it may often be inappropriate for a worker to be made to go through an internal procedure, particularly in a small business where the person hearing the case may be the perpetrator of the discrimination and where hurt to feelings are a central issue. A recent report by the EOC showed that a third of women who were victims of sexual harassment named their line manager as the person responsible for the harassment and a third named the director or owner of the organisation. Similarly, where a worker had been bullied by their manager, it would be wholly inappropriate for the worker to have to raise a grievance with that manager. In some cases, for example, unlawful deductions, the employer may have misunderstood the law and will not concede the point until ACAS, or the tribunal has convinced him or her.
>
> 1.25 There would also be a problem with constructive dismissal cases. It is not clear whether the Government is proposing that grievance procedures should be used before resigning. If so, that would amount to a change in long established case law *(Seligman & Latz v McHugh, 1979)*. (…)
>
> 1.26 There are other areas of uncertainty in the proposals, for example, where exceptions to the rule would apply. In addition, we believe that many applicants, particularly unrepresented applicants, would not appreciate the difference between completion of a procedure and a hearing and would not be able to judge whether or not a procedure was an acceptable one. It is not clear how such a proposal would work in jurisdictions where interim relief is available, for example, public interest disclosure, trade union related dismissals and dismissals for asserting the right to be accompanied in a grievance or disciplinary hearing. (…)

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[72] http://www.dti.gov.uk/er/individual/etresponse.pdf

> 1.28 If this proposal were to be adopted applicants should not be required to follow a procedure on an individual grievance in respect of matters which had already been the subject of collective negotiations. Nor should they be required to go through procedures when the employer has already imposed the action, for example, a pay cut. There would have to be strict time limits for completion of procedures to avoid delay to the applicant, who may be unemployed.[73]

The Government response to the consultation addresses some of these concerns:

> 20. The Government will also act to support dialogue in the workplace by requiring employees to raise their concerns with their employers before their claim is admitted by a tribunal. Grievances which have not been raised at all in the workplace will not be admissible as tribunal claims, unless the employee has reasonable grounds for not doing so, for example in cases of serious bullying or intimidation. (…)
>
> 22. In all cases it is expected that either the minimum disciplinary or the minimum grievance procedural standard will be followed (not both). The requirement to follow these standards will not normally apply where the dispute has been handled as a collective grievance. Applicants making a claim for constructive unfair dismissal will be expected to use the minimum grievance procedural standard before resigning (or the modified standard afterwards), unless disciplinary action taken against them by the employer is the reason for their resigning and claiming that they have been constructively dismissed.[74]

Clause 34 amends the provisions on unfair dismissal contained in part X of the ERA. A dismissal will be unfair if the employer has failed to comply with the minimum statutory procedure - unless this failure was a result of circumstances beyond his control.

At present, dismissals are often found to be unfair because the employer has failed to follow his own internal disciplinary procedures. This follows a decision by the House of Lords in 1987 in *Polkey v A E Dayton Services Ltd* that an employer could not justify a failure to follow disciplinary procedures by arguing that to have done so would have made no difference to the outcome. Employers have long complained that this means they lose tribunal cases because of minor procedural failings rather than on the merits of the case. *Route to Resolution* proposed, effectively, that *Polkey* should be reversed, and that tribunals should be able to disregard procedural mistakes beyond those laid down in the statutory scheme, where they make no difference to the outcome. Clause 34 makes this change. There is also provision for a minimum award of four weeks' pay where the statutory procedures have not been followed.

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73 http://www.tuc.org.uk/law/tuc-3802-f0.cfm

74 http://www.dti.gov.uk/er/individual/etresponse.pdf

3. Written statement of employment particulars

Part I of the ERA requires all employers to issue their employees with a written statement of their employment particulars, covering specified matters such as their job title, rate of pay, hours of work, holiday entitlement, notice period and relevant collective agreements. All employers must include the name of a person to whom the employee can take a grievance, and those with 20 or more employees must include details of any disciplinary procedures they have. This written statement must be issued within two months of the employee's starting work.

Despite the law, many employees are not issued with this written statement. *Routes to Resolution* reported that 19% of cases at employment tribunals involve employees who do not have a written statement. Employees who do not have a statement can ask an employment tribunal to determine what their terms and conditions are, but there is no sanction other than this for failure to provide the required statement.

In *Routes to Resolution*, the Government argued that a lack of clarity about rights and responsibilities often prevented disputes from being resolved in the workplace. The written statement should be "the first point of reference when disputes arise". It therefore proposed that tribunals, when awarding compensation, should be able to make an additional award to reflect the absence of a written statement.

As part of the proposal that applications to employment tribunals should only be made once internal procedures had been exhausted, *Routes to Resolution* also proposed removing the exemption of small firms from the requirement to include a statement of disciplinary procedures with the written terms and conditions.

Clauses 35-37 amend Part I of the ERA. Clause 35 expands the definition of the required note about disciplinary procedures to ensure that it covers the statutory dismissal and disciplinary procedures. Clause 36 removes the exemption for small firms. Clause 37 is designed to make it easier for employers to comply with the requirement to provide a written statement by allowing particulars included in a contract of employment or letter of engagement to form, or form part of the written statement.

Clause 38 requires employment tribunals to increase any award made against an employer where the absence, or incompleteness, of a written statement becomes apparent during tribunal proceedings. The increase must be a minimum of 5% (or 1 or 2 weeks' pay if this is greater) and a maximum of 25%. The 1 week minimum applies where the statement is incomplete and the two week minimum applies where it is entirely absent. This power relates to all the jurisdictions listed in Schedule 4. These are the same as those listed in Schedule 3 for variations in awards for failure to follow statutory dispute resolution procedures and cover the majority of cases coming before tribunals. The Secretary of State is given the power to amend the Schedule by order.

4. Compromise agreements

Most of the employment statutes contain a provision making any agreement not to pursue a claim at a tribunal void and unenforceable as an attempt to contract out of statutory rights. Thus section 203 (1) of the ERA, which, amongst other rights, contains the right not to be unfairly dismissed, provides:

> (1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports-
> (a) to exclude or limit the operation of any provision of this Act, or
> (b) to preclude a person from bringing any proceedings under this Act before an industrial tribunal.

However, the legislation also provides two main exceptions to this general rule:

- Agreements reached with the aid of ACAS conciliation – so-called COT3 agreements; and

- Compromise agreements

Compromise agreements must comply with stringent statutory conditions. As far as unfair dismissal is concerned, the conditions are contained in section 203 (3) of the ERA, as amended by the *Employment Rights (Dispute Resolution) Act 1998*:

> (a) the agreement must be in writing,
> (b) the agreement must relate to the particular proceedings,
> (c) the employee or worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an industrial tribunal,
> (d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice,
> (e) the agreement must identify the adviser, and
> (f) the agreement must state that the conditions regulating compromise agreements under this Act are satisfied.

Compromise agreements were first introduced by the *Trade Union and Employment Rights Act 1993* but they are now widely used by employers (and employees) who want to avoid the trouble, expense and uncertainty of tribunal proceedings. However, the provision in subsection (3) (b) that such agreements must relate to "particular proceedings" has led to some uncertainty about how far they can prevent all claims and potential claims to tribunals.[75]

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[75] See, eg, "Shoddy compromises", *People Management*, 17 June 1999

Clause 39, therefore, amends all those Acts which allow for compromise agreements to remove the requirement that they must relate to a particular complaint. This puts compromise agreements on the same footing as ACAS conciliated agreements.

5. Equal pay questionnaire

Clause 42 of the Bill introduces a questionnaire procedure for equal pay disputes. This proposal does not stem from the *Routes to Resolution* consultation, but from a consultation on the operation of the *Equal Pay Act 1970,* published by the DfEE in December 2000 - *Towards equal pay for women: speed and simplicity in tribunal cases and the burden of proof directive.*[76]

This consultation paper contained six proposals designed to speed up and simplify tribunal procedures in relation to equal pay claims. The first of these was "when legislative time permits, to introduce a questionnaire as used in other areas of discrimination with a time limit of say, eight weeks, for the employer to respond". The document explained the reason for the proposal:

> (i) Under the DDA, RRA and SDA [*Disability Discrimination Act, Race Relations Act* and the *Sex Discrimination Act*] there is provision for the Secretary of State to prescribe a form (which has become known as the questionnaire procedure) to assist a prospective claimant to decide whether to instigate proceedings and, if so, to formulate and present the case in the most effective manner. The form includes space for a reply from the respondent and is admissible in evidence in tribunal or court proceedings. There is no requirement for employers to reply but if they deliberately, and without reasonable excuse, do not reply within a reasonable period, or reply in an evasive or ambiguous way, their position may be adversely affected as it can be considered in evidence by the Tribunal who may infer that there has been discrimination.
>
> (ii) The Equal Pay Act does not include provisions for a questionnaire procedure. This is not only anomalous (particularly as a claim taken under the RRA for equal pay would permit the use of its questionnaire procedure) but also means that an opportunity for gathering key information at an early stage is lost.
>
> (iii) An equal pay questionnaire could pave the way for establishing the necessary evidence from both parties, e.g. identify the appropriate comparator and include questions about the duties and responsibilities of both the applicant's and the comparator's jobs. It might also assist women whose employers' policies on confidentiality make it particularly difficult to identify whether a claim exists. In some cases it might lead to settlement or withdrawal of a case. A requirement on the employer to respond to a questionnaire within, say, eight weeks, with the

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[76] This can be seen on the DfES website at: http://www.dfes.gov.uk/consultations/archive/archived_sections.cfm?SECNUMBER=3&CONID=6

> tribunal being able to draw inferences if it was not returned within that time unless there was a good reason, would also assist the process.

Clause 42 inserts a new Section 7B into the *Equal Pay Act 1970* which gives the Secretary of State power to make an order prescribing the forms which may be used by claimant and respondent in the questionnaire procedure. It allows questions and replies to be submitted in evidence in tribunal proceedings. It gives the Secretary of State power to prescribe time limits for serving the questions and for replying. The intention is that the time limit for reply should be eight weeks. The DDA, SDA and RRA only state that the reply must be within a reasonable time. As with the other discrimination legislation, the new section would allow a tribunal to draw any inference it considers just and equitable from evasive or equivocal answers or a total failure to reply. Any orders made under this section would be subject to the negative procedure.

C. Costs and numbers

Partial Regulatory Impact Assessments (RIAs), published on the DTI website on 8 November 2001, attempt to assess the costs and benefits of the adoption of statutory dispute resolution procedures, changes to the law on written particulars of employment, mitigation of awards, the removal of procedural traps, a fixed period for conciliation, wasted costs, and the equal pay questionnaire. However, as the summary RIA published in the Explanatory Notes on the Bill points out, there are strong overlaps between most of the proposals so the total benefits and costs are less than the sum of the individual benefits and costs.

The summary RIA estimates that:

- The proposals for (i) implied term of contract to confer right/obligation to follow "three steps" grievance and disciplinary procedures; (ii) all written statements of terms and conditions to include reference to workplace procedures (removal of small firms exemption); and (iii) tribunals to mitigate awards to reflect whether three steps were followed and whether terms and conditions were provided will reduce the number of applications to employment tribunals by between 30,000 and 40,000 a year, saving employers £60-80 million a year and taxpayers £11-15 million a year. Extra costs for employers arising from the introduction of internal procedures are estimated at £46-86 million and the recurring costs of managing the internal procedures are put at £42-90 million a year.

- Removing procedural traps in unfair dismissal cases may discourage some tribunal applications based purely on procedural error and save employers £6-9 million a year.

- A fixed period for conciliation of six weeks could reduce the number of hearings by 1,700-3,400 a year, with financial benefits to employers of £2-3 million.

- Wasted costs awards could reduce the number of weak applications by 100-500 a year. Applicants are expected to benefit by £0.4-0.5 million a year and respondents by £0.7-1.1 million a year from the costs awarded.

- The introduction of an equal pay questionnaire procedure is expected to lead to a 10% reduction in the number of equal pay tribunal applications. Employers may benefit to the tune of £0.5 million, while incurring costs of £0.2-0.4 million in completing the questionnaires.

D. Reaction

Representatives of both workers and employers have welcomed the proposals on dismissal, disciplinary and grievance procedures, although there are concerns that internal procedures might not be appropriate in all cases and employers regret the dropping of the proposal to charge a fee for tribunal applications.

The Equal Opportunities Commission said:

> We want to see disputes at work resolved in the workplace wherever possible, and we therefore support the proposed requirement for employers to have grievance procedures in place. However, in some cases it might be difficult for someone to use internal procedures because of the sensitivity of their complaint or the role of another person in the procedure. We do not believe that individuals should only be allowed to go to a tribunal once they have been through their workplace's grievance procedures.
>
> The EOC also welcomed the introduction of questionnaires in equal pay cases, which will speed up the processing of equal pay claims.[77]

The TUC commented:

> The government has been right to resist employer whinging about employment tribunals. The growth in tribunal cases in recent years is a direct result of the growth of small businesses who have no proper procedures for resolving problems in the workplace and who don't understand that with the right to employ people goes the responsibility to treat them fairly.
>
> That is why we welcome the requirement for companies to have proper grievance and disciplinary procedures based on the widely respected ACAS code. This will help resolve problems in workplaces rather than in tribunals.
> One concern however is that the new proposals should not disadvantage workers in small companies complaining of difficult issues such as sexual harassment. New procedures should not punish them at tribunal if they have not raised the matter directly with the harasser.

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[77] EOC press release, 8 November 2001, *Fairness at work will be boosted by Employment Bill, says EOC*

> We also have some concerns about the new proposal that 'minor' breaches of the procedures which employers need to follow when dismissing staff will no longer matter. This sends the wrong message to employers, some of whom will inevitably try to exploit this loophole. It's far better to have clear rules that everyone understands. [78]

The CBI said that:

> Companies will be encouraged that the tribunal proposals have reached parliament. Business is deeply concerned about the unnecessary and wasteful cost of the compensation culture.
>
> The most crucial element of the package is the proposal that employees must raise grievances with their employer before going to a tribunal. The government must press ahead with this to ensure we resolve more disputes in the workplace and less by litigation. [79]

The FSB was:

> disappointed that the Government is not taking forward proposals to charge applicants for bringing a claim to an employment tribunal.
>
> The FSB however welcomed the new requirement that internal grievance procedures must first be exhausted before going to Employment Tribunal and recognises that this will go some way to stopping vexatious and spiteful applications. [80]

Small businesses are, though, concerned that they do not have the personnel resources to ensure that minimum procedures are complied with, and some lawyers fear that the emphasis on procedural fairness may lead to more, not fewer cases ending up in tribunals.[81]

IV Time off for trade union learning representatives

A. Background

Since 1998 over 3,000 union learning representatives (ULRs) have been trained. These representatives advise union members on learning needs and opportunities, for example

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78 TUC press release, 8 November 2001, *TUC welcomes Employment Bill plan for grievance and disciplinary procedures*

79 CBI press release, 8 November 2001, *Government gets CBI praise for tribunal reform*

80 Federation of Small Businesses press release, 8 November 2001, *FSB says 'enough is enough' on employment legislation*

81 "The jury is out over tribunal reform plan", *Financial Times*, 15 November 2001

by helping them to access funds for learning, open individual learning accounts, or attend courses.[82] Many of their activities are financed by the Union Learning Fund, established by the Government in 1998. Unions can apply to the Fund for grants for projects which "support … the government's objective of creating a learning society, by influencing the increase in take up of learning in the workplace and boosting union's capacity as learning organisations".[83] The Fund has a total of £27 million over the period 2001 – 2004. Details of projects supported by the Fund, and the bidding procedure, are available on the DfEE website.[84]

In a White Paper on Enterprise, Skills and Innovation, published in February 2001, the Government praised the role of these representatives in raising skill levels, particularly amongst those who had not done any education or training since leaving school.[85] It announced that it would consult on how to give statutory backing to the network of union learning representatives.

On 2 May 2001, the DfEE published a consultation paper, *Providing statutory rights for union learning representatives*.[86] The closing date for responses was 27 July 2001. The paper proposed that union learning representatives should be given the same rights to paid time off for their initial training and to carry out their duties as those enjoyed by shop stewards and other union representatives at workplaces where a union is recognised for collective bargaining purposes.

The consultation paper set out the background to the proposals and described the growing importance of union learning representatives:

> In recent years, the development of a new role for trade unions in promoting learning at work has had a significant impact on increasing motivation and enthusiasm for learning among employees and employers. In particular, the key role of the union learning representative has been instrumental in raising interest in training and development, especially among the very lowest skilled workers and those with literacy and numeracy problems.
>
> The union learning representative is a new category of union activist. These workers are trained in advising union members on learning needs and opportunities. They have demonstrated that they can complement and add value to employers' efforts to engage workers in learning. They share a level of trust with their members, and can often engage those who would be embarrassed about

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82 "Low skills, low interest", *People Management*, 13 September 2001; the up to date 3,000 figure is contained in TUC press release, 8 November 2001, *TUC welcomes Employment Bill plan for grievance and disciplinary procedures* and on the DfEE website, http://www.dfee.gov.uk/ulf/

83 http://www.dfee.gov.uk/ulf/

84 Ibid

85 *Opportunity for all in a world of change*, Cm 5052, para 2.42

86 The paper is available on the DfES website, http://www.dfes.gov.uk/consultations/archive/archived_sections.cfm?SECNUMBER=1&CONID=71

admitting their learning needs to their employer or those in their management chain.

Their work mostly involves face-to face meetings and other direct contact with their fellow workers. But they also work with employers and training providers to identify the range of learning opportunities that is available. The Government is not proposing that there should be a requirement for employers to consult with union learning representatives, but in practice most employers will wish to ensure that the unions activities support and complement their own workforce development strategies. Where employers do consult union learning representatives, clearly it is appropriate that the representatives should be entitled to paid time off for this. Union learning representatives operate outside the collective bargaining framework, though, in practice, the same people often combine the functions of shop steward and learning representative. These roles are distinct, however, and the Government does not intend to introduce legislation that will assign any bargaining rights over training or learning to union learning representatives.

Sir Claus Moser's report on basic skills concluded that one in five British adults was functionally illiterate, and that this cost the economy in excess of £10 billion per year. Since then, the Government has made tackling basic skills deficiencies a key priority, and in March 2001 it published its basic skills strategy. The role of the union learning representative in helping to identify those with basic skills needs, and in encouraging them to take advantage of the many means on offer to raise their skills levels is key to this strategy.

There are currently around 2,000 union learning representatives. They have so far operated on a largely unofficial basis. They do not share the status and do not currently enjoy the same rights as other workplace representatives. There is evidence that this is creating a barrier to their effective working. An evaluation of the union learning representative role carried out in Summer 2000 concluded,

> "Eight out of ten learning representatives face some form of barrier in carrying out their learning representative activities. The barriers faced are mostly linked to the lack of formal recognition of the learning representative's role. This means that learning representatives lack time to carry out duties and lack support from employers and in some cases from others within the union, which creates difficulties in convincing some colleagues of the legitimacy of learning representative activities".

The same evaluation found that a third of current learning representatives did not get any paid time off to train for their role, and almost a half got no paid time off to carry out their duties. While other surveys show that 80% of union workplace representatives have access to meeting rooms for their work, less than one third of union learning representatives have access to such facilities. It is clear that the lack of formal recognition puts union learning representatives at a disadvantage over their colleagues and that this inhibits their effectiveness and their credibility

> with employers and union members. Furthermore, it is likely that this disadvantage will affect the unions' ability to develop and expand the numbers carrying out this role in the future. [87]

The TUC, not surprisingly, welcomed the proposal. Employers' organisations, though, have strongly opposed the idea that they should be compelled to give the representatives time off work, and fear that this may be the thin end of the wedge leading to a requirement that training be included in collective bargaining. The CBI, for example, in its response to the consultation document, said:

> 2. The CBI agrees that peer promotion of learning can add value but the proposal of a union right to appoint union learning representatives without the employers' agreement is a step in the wrong direction. The CBI believes that there should be partnership on training issues but partnership can only work where all partners are voluntarily engaged in the process.
>
> 3. The CBI believes that:
>
> - union learning representatives can add value to workplace learning when they work in partnership with employers
> - imposing learning representatives would not increase employer commitment to training
> - collective bargaining on training must not be imposed
> - the role of learning representatives should be clarified
> - union learning representatives should have a nationally recognised qualification
> - time off should be 'reasonable' and agreed by union and the employer
> - normal practice and protections for union representatives should apply to learning representatives.[88]

On 26 October 2001, the DfES published a brief summary of responses and announced that the Government would "introduce legislation to place Union Learning Representatives on a statutory footing at the earliest opportunity". [89]

B. The Bill

Clause 43 of the Bill amends Part III of the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA) which deals with rights in relation to trade union membership and activities.

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87 Consultation Document, paras 4-9

88 Response dated July 2001

89 The summary is available on the DfES websirte at: http://www.dfes.gov.uk/consultations/sor/sorsections.cfm?CONID=71&SORSECNUMBER=1

Sections 168 and 169 of TULRCA already provide that officials of an independent trade union that is recognised by their employer for collective bargaining purposes should be permitted reasonable paid time off to train or carry out duties associated with the matters which may be the subject of collective bargaining under section 178(2). These include such things as terms and conditions of employment, allocation of duties, matters of discipline, recruitment, suspension and dismissal, but they do not include advising on learning needs and opportunities. Section 170 allows trade union members a reasonable amount of unpaid time off to take part in union activities, but it is not clear whether making use of ULRs would be covered. ACAS has published a statutory Code of Practice, *Time off for Trade Union Duties and Activities*, which gives guidance on what is reasonable time off and what activities should be covered.[90]

Clause 43 inserts a new section 168A into TULRCA and amends sections 169 and 170 to give ULRs who are members of an independent trade union recognised by the employer for collective bargaining purposes the right to a reasonable amount of paid time off. The amendments define a "learning representative of a trade union" as someone "appointed or elected as such in accordance with its rules". They allow time off for activities connected with:

(i) analysing learning or training needs,
(ii) providing information and advice about learning or training matters,
(iii) arranging training or learning,
(iv) promoting the value of learning or training

The permitted activities must involve "qualifying" members of the trade union - fellow employees who are members of the same union - or consultation with the employer or preparation for either of these.

There are provisions requiring the union to notify the employer of their ULRs and requiring the ULRs to be trained. Qualifying trade union members are given the right to a reasonable amount of paid time off to access the services of ULRs.

ACAS is given the power to amend its Code of Practice to give guidance on the exercise of the right to time off for ULRs.

C. Costs and numbers

A Partial Regulatory Impact Assessment on *Placing Union Learning Representatives on a Statutory Footing*, published on the DTI website on 9 November 2001, estimates that the provision will lead to an extra 19,000 ULRs after eight years. It puts the cost to the

[90] The current code came into effect on 5 February 1998 under *the Employment Protection Code of Practice (Time Off) Order 1998*, SI 1998/46

Exchequer of funding the relevant training and enacting, promoting and enforcing the legislation at £5 million after eight years.

The cost to employers of time off for ULRs is put at £6 million after one year, rising to £23 million after eight years, and administrative costs are put at £1 million, rising to £3 million after eight years. The RIA estimates that increased productivity will benefit employers by £16-33 million after one year, rising to £70-140 million after eight years.

D. Reaction

In press releases on the Bill, the TUC re-iterated its support for these measures and the CBI repeated its doubts:

> The TUC has been pressing the Government for union learning reps to be put on statutory footing on similar lines to health and safety reps. We therefore very much welcome the fact that the legislation will give union learning rights recognition in all recognised workplaces including small companies …[91]

And

> Mr Cridland [of the CBI]said that the proposals on learning representatives could have benefits but forcing companies to have them could cause problems.
>
> "Companies want employees to improve their skills and learning reps can play a valuable role in helping with that. But we worry that unions will be able to insist on reps where working relationships have not matured to a point where they will make a useful contribution." [92]

V Fixed term contracts

A. Background

There has been a growth in the use of fixed term contracts (FTCs) in recent years. It is estimated that the number of people working on FTCs in the UK is between 1.1 and 1.3 million and that the number has increased by approximately 7% between 1994 and 2000.[93] To put this in context, the number of people employed on all types of contract in the UK grew by 14% over the same period.[94] The public sector uses proportionately more FTCs than the private sector and accounts for just under half of the total. The public

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91 TUC press release, 8 November 2001, *TUC welcomes Employment Bill plan for grievance and disciplinary procedures*

92 CBI press release, 8 November 2001, *Government gets CBI praise for tribunal reform*

93 DTI Regulatoy Impact Assessment on *Regulations Concerning the EC Directive on Fixed Term Work*, http://www.dti.gov.uk/er/fixed/ria.pdf

94 National Statistics, *Labour Market Trends*

sector also accounts for over 70% of fixed termers who have been in their jobs for over two years. Long FTCs (over two years) are rare in the private sector.[95]

Often there is a genuine reason why an FTC is sensible: someone is employed to cover a maternity absence, to complete a specific project, or while particular funding is available. However, some people are employed on a succession of FTCs, on inferior terms, where their employment is really no different from that of others employed on open-ended contracts. Employment law provides some protection for such people in that ending an FTC without renewal counts as a dismissal for the purposes of unfair dismissal claims and redundancy payments.[96] But the *Employment Rights Act 1996* (ERA) also allows people employed on an FTC of two years or more to waive their right to redundancy pay.[97] It used to allow those employed on a FTC of one year or more to waive their right to claim unfair dismissal,[98] but this was repealed from 25 October 1999 under section 18 (1) of the *Employment Relations Act 1999*.

In 1999, the European Community adopted a directive on fixed term contracts - *Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed term work concluded by ETUC, UNICE and CEEP*. The Directive gave legal effect to an agreement negotiated between representatives of management and labour at European level – the "social partners".[99] The "Social Chapter" of the Treaty establishing the European Community,[100] introduced a new procedure under which, if the social partners agree, they may negotiate provisions which will be made binding in Member States rather than leaving it to the European Commission to draft legislation.[101]

The directive establishes the principle of non-discrimination between fixed term workers and comparable permanent workers. It requires measures to be taken to prevent the abuse arising from the use of successive fixed term contracts. Member States will have to introduce one or more of the following: a need for objective justification of any renewal of a fixed term contract; a maximum total duration for successive fixed term contracts; or a limit on the number of renewals.

The agreement does not apply to agency workers, but only to people employed directly on fixed term contracts. It defines a fixed term worker as:

> a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or

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95 DTI Regulatoy Impact Assessment on *Regulations Concerning the EC Directive on Fixed Term Work*, http://www.dti.gov.uk/er/fixed/ria.pdf

96 Under section 95 (1) of the ERA for unfair dismissal and section 136 (1) for redundancy payments

97 section 197 (3)

98 section 197 (1), now repealed

99 ETUC, the trade unions; UNICE, the employers; and CEEP, the public service employers

100 now Articles 136-145

101 Articles 138 and 139

> relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.[102]

However, those fixed term contract workers who are covered by the agreement, will eventually gain entitlement to company benefits (such as holiday and sick pay schemes) on the same terms as permanent employees, unless there are objective reasons why they should not.

The Directive should have been implemented in the UK by 10 July 2001, and the Government issued a consultation document and a working draft of regulations in March 2001.[103] The main proposals on which the consultation sought views were:

- Fixed term employees should not be less favourably treated than similar permanent employees in their terms and conditions of employment unless there is an objective reason to justify the less favourable treatment. This part of the Directive does not cover pay and therefore regulations implementing it could not apply to pay. However, we are seeking views on whether primary legislation might be needed to address pay differences between fixed term and permanent employees.

- Fixed term employees should be able to compare their terms and conditions with permanent employees who do the same or similar work for the same employer if they think they are being less favourably treated. We would welcome views on whether fixed term employees should be able to ask their employers for a written statement justifying any less favourable treatment they believe has occurred. We are also seeking views on whether less favourable treatment should be measured with reference to each individual term or condition of employment, or to the overall package of terms and conditions.

- The directive sets out several options for restricting the use of successive fixed term contracts. These are: a maximum number of successive renewals of a fixed term contract; a maximum total duration of a series of fixed term contracts; a requirement for objective justification of any renewal of a fixed term contract; or a combination of more than one of these options. We would particularly welcome views on these options and what their effect might be in practice.

- We propose that the mechanism chosen for restricting the use of successive contracts should be established as a statutory fallback scheme and also allow scope for collective or workplace agreements to operate where agreed.

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[102] Clause 3

[103] DTI, *Fixed Term Work. Public Consultation*, March 2001, http://www.dti.gov.uk/er/fixed/consult.pdf

- 'Successive' fixed term contracts should be defined for the purposes of these regulations as a series of contracts that does not break an employee's continuity of service (as currently defined in law).

- We would welcome views on a proposal that employees on fixed term contracts should no longer be able to waive their rights to statutory redundancy payments that would apply after two years' continuous service.

- The regulations implementing the directive should cover all employees. They should not apply to apprenticeships, some people employed on government-supported training or retraining programmes, employees employed by an employment business to work for a third party employer, or the armed forces.

- Employers should make sure fixed term employees are told about permanent vacancies in their organisation. They will be encouraged to give fixed termers access to training.[104]

As a result of the consultation, the Government decided to make use of a provision in the directive (Article 2) allowing Member States a maximum of one extra year for implementation "to take account of special difficulties". On 5 July 2001, Alan Johnson announced that they would be postponing implementation:

> The fixed term directive is due to be implemented by 10 July 2001, but provides that member states may take up to an extra year to implement if they encounter special difficulties. The public consultation on the implementation of this directive in the UK closed on 31 May and the responses have shown that there are particular difficulties with the implementation of the directive in this country. In particular, the relative lack of existing legal provisions on fixed term contracts in the UK has made it difficult to establish how they are used. We shall therefore be taking extra time to implement the fixed term directive and have notified the European Commission accordingly. Before deciding to take extra time to implement the Directive, we consulted with employer and employee representative bodies, including the CBI and TUC. I am aware that several other member states have indicated they will also be taking extra time to implement the directive. [105]

A Government response to the public consultation will be published early in 2002, to accompany revised draft regulations on fixed term work.[106]

The Government now intends to implement the directive in July 2002, following further consultations:

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[104] DTI, *Summary of Government Proposals on Fixed Term Work*, http://www.dti.gov.uk/er/fixed/sum.htm

[105] HC Deb 5 July 2001, cc 264-265W

[106] DTI website, 9 November 2001, http://www.dti.gov.uk/er/fixed/

> The Fixed Term Work Directive is due to be transposed by 10 July 2002**.** We shall aim to publish draft regulations for comment early in 2002 and publish the final regulations in April. Ample time will be given for employers and employees to prepare for the new regulations.[107]

It has, however, decided that primary legislation is necessary to address pay differences between fixed term and permanent workers, and the necessary clauses are contained in this Bill:

> The Government believes the EU Directive on Fixed Term Work does not cover pay and pensions benefits and therefore primary legislation is needed to do this. Since the public consultation on fixed term work produced evidence of pay and pension discrimination against those on fixed term contracts, we have decided to use primary legislation to prevent such discrimination. A power in the Employment Bill will be used to enable us to make appropriate regulations. This follows the approach adopted by the Part-time Workers (prevention of less favourable treatment) Regulations of 2000. [108]

B. The Bill

Clause 45 of the Bill gives the Secretary of State power to make regulations:

> (a) for the purpose of securing that employees in fixed-term employment are treated, for such purposes and to such extent as the regulations may specify, no less favourably than employees in permanent employment, and
>
> (b) for the purpose of preventing abuse arising from the use of successive periods of fixed-term employment

The regulations will establish the entire regime, and, amongst other things, may specify:

- classes of employee who are or are not to be taken to be in fixed-term employment and permanent employment;
- circumstances in which employees in fixed-term employment are or are not to be taken to be treated less favourably than employees in permanent employment;
- circumstances in which periods of fixed-term employment are or are not to be taken to be successive; and

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[107] DTI website, 9 November 2001, http://www.dti.gov.uk/er/fixed/index.htm
[108] ibid

- circumstances in which fixed-term employment is to have effect as permanent employment.

The regulations will be used to implement Council Directive 99/70/EC, but, as they will be made under this Bill, once it is enacted, rather than under section 2(2) of the *European Communities Act 1972*, they will be able to range more widely. In particular, they will be able to cover pay. The Government believes that EC Directives made under the "Social Chapter" cannot cover pay as this is specifically excluded by Article 137 (6) of the Treaty establishing the European Communities as amended by the Treaty of Amsterdam agreed in June 1997.

C. Costs and numbers

A *Partial Regulatory Impact Assessment of legislation to prevent pay and pensions discrimination against fixed term employees* was published on the DTI website on 8 November 2001. It is based on the proposals issued for consultation in March 2001, but looked only at the impact of equal treatment in pay and pensions, not at the other aspects of the directive. It assumes that the formula used to identify a comparable permanent employee would be based on that used in the Part-time workers Regulations: a fixed term employee would be able to compare his terms and conditions with a permanent employee doing similar work for he same employer at the same establishment or, where there is no such employee at the same establishment, at another establishment for the same employer. It also assumes that the comparison is with the whole employment "package" rather than a term by term comparison.

The RIA estimates that there are between 550,000 and 670,000 FTC employees working alongside comparators, of whom not all would have less favourable terms. Even where they do, this may be objectively justifiable. The RIA, therefore estimates that 28-41,000 FTC employees might benefit by £18-26 million from legislation to prevent discrimination in pay and that 55-82,000 might benefit by £33-98 million from access to occupational pension schemes.

Costs to employers are estimated at £19-29 million (pay) and £33-98 million (pensions).

D. Reaction

The main concern of workers' representatives is that the Government does not propose to cover agency and casual workers in the regulations. Employers are concerned about additional regulatory burdens. The Equal Opportunities Commission:

> welcomed the Government's decision to include protection of fixed-term employees' pay and pension rights in the regulations to prevent discrimination against fixed-term employees:
>
> Women account for 55% of temporary workers. Guaranteeing the equal pay and pension rights of temporary workers would therefore help to improve the position

> of women in the labour market, ensuring that more women get a fair deal at work and have the opportunity to build up a decent pension fund. I welcome the Government's intention to prevent pay and pensions discrimination and I urge them to ensure that the regulations do not exclude agency and casual workers, who account for a significant proportion of fixed-term workers.[109]

NACAB was disappointed

> that the government has chosen to limit new provisions to prevent the abuse by employers of fixed term contracts to employees rather than workers. It warns that this will result in whole groups of workers – especially agency and casual workers – being excluded from the protection offered by the new regulations.[110]

For the CBI:

> Mr Cridland added that the proposed new rights for employees on fixed term contracts must be implemented in a way that imposes minimal burdens on business.[111]

VI Work-focused interviews for claimants' partners

A. Background

1. Work-focused interviews

Work-focused interviews are an integral part of the Government's attempts to bring together the delivery of benefits and the delivery of employment advice. The interviews, announced as part of the single work-focused gateway, piloted as part of ONE and in the process of introduction through Jobcentre Plus, are for working age claimants who do not have to meet the labour market conditions for Jobseeker's Allowance.

In its 1998 Green Paper on welfare reform, the Government announced its intention to develop the way benefits are delivered, increasing the role of personal advisers and the focus on work.[112] A subsequent document on the single work-focused gateway, published in October 1998, outlined the principles guiding the Government's proposed reforms:

> Our priority is to forge an entirely new culture which puts work first and is based on a modern, integrated, flexible service for all. This means a fundamental shift in the way we support our clients – away from merely asking *"What money can we pay you?"* to *"How can we help you become more independent?"* In future, we will focus on enabling people to access the wide range of opportunities and

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[109] EOC press release, 8 November 2001, *Fairness at work will be boosted by Employment Bill, says EOC*
[110] NACAB press release, 12 November 2001, *Enforcement is missing element of Employment Bill*
[111] CBI press release, 8 November 2001, *Government gets CBI praise for tribunal reform*
[112] DSS, *New ambitions for our country: a new contract for welfare*, Cm 3805

> support available. (…) The earlier support is given, the more likely people are to focus on the sort of work they could do in the future, and the less likely they are to become resigned to a lifetime on benefit. That is why we believe it makes sense to make it a condition of receiving benefit that people should take part in a discussion about the kinds of support and incentives available to assist with the transition into work. [113]

The document went on to describe the proposals for reform. The Government's long-term intention was that new benefit claimants of working age would be given a personal adviser who would conduct a work-focused interview at an early stage in the claims process. These interviews would "assess the potential for employment and explain the help available in planning a pathway to independence".[114]

The Government proposed a series of pilot schemes, initially with voluntary participation but with compulsion introduced from April 2000. Powers to implement a compulsory scheme were taken by sections 57-58 of the *Welfare Reform and Pensions Act 1998* which added a new section 2A to the *Social Security Administration Act 1992*. These powers enabled the Secretary of State to make regulations requiring new working age claimants of Income Support, Housing Benefit, Council Tax Benefit, bereavement benefits, Incapacity Benefit, Severe Disablement Allowance or Invalid Care Allowance to attend a work-focused interview. Stricter labour market conditions were already applied to claimants of Jobseeker's Allowance.[115] Subsequent Regulations made under the Act defined a work-focused interview as an interview for any or all of the following purposes:

> (a) assessing a person's prospects for existing or future employment (whether paid or voluntary);
> (b) assisting or encouraging a person to enhance his prospects of such employment;
> (c) identifying activities which the person may undertake to strengthen his existing or future prospects of such employment;
> (d) identifying current or future employment or training opportunities suitable to the person's needs; and
> (e) identifying educational opportunities connected with the existing or future employment prospects or needs of the person.[116]

Subsequently, a number of schemes have extended the use of work-focused interviews:

- The ONE service was introduced in 12 pilot areas between June and November 1999.[117] Participation was voluntary for non-JSA claimants until April 2000 and

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[113] DfEE and DSS, *A new contract for welfare: the gateway to work*, Cm 4102

[114] ibid., p.7

[115] For further information see House of Commons Library Research Paper 99/19, *Welfare Reform and Pensions Bill* (section V).

[116] Regulation 3, the *Social Security (Work-focused Interviews) Regulations 2000*, SI 2000/897

compulsory thereafter.[118] The pilots are planned to run until March 2002 after which they will be evaluated to assess their effectiveness in helping people move from welfare to work.[119]

- Lone parents not entitled to Income Support and those claiming Income Support with an eldest child aged 13 or above have been required to attend work-focused interviews since April 2001.[120] Interviews are compulsory on a new claim and annually thereafter. The lower age limit will reduce to 9 from April 2002 and to 5 from April 2003.

- From October 2001, work-focused interviews have been compulsory for specified claimants in areas covered by "pathfinder" Jobcentre Plus offices.[121] The requirements apply to all working age claimants of Income Support, Incapacity Benefit, Invalid Care Allowance, Severe Disablement Allowance and bereavement benefits. Lone parents are required to attend interviews on making a new claim and at least annually thereafter. People claiming on grounds of incapacity for work are required to attend on making a new claim and at least every three years thereafter.[122]

In March this year Tessa Jowell, then Minister of State at the DfEE, explained the relationship between the ONE pilots and the future delivery of Jobcentre Plus (then known as the Working Age Agency):

> The 12 existing ONE pilots are due to run until March 2002, and we are investing considerable resources in a thorough evaluation. Clearly, we do not want to prejudge the results of the full evaluation, but the lessons we are learning from the pilots are helping to inform the development of the service to be delivered by the Working Age Agency, which will bring together the services of the Employment Service and working age-related elements of the Benefits Agency. On 14 March of this year, the Secretary of State for Education and Employment, and the Secretary of State for Social Security, together announced the establishment from October this year of around 50 Pathfinder sites for the Working Age Agency. The Government's commitment to expanding the approach tested in ONE is being taken forward through these Pathfinders, which will deliver a ONE-style service to all working age benefit claimants. This will form

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[117] The pilot areas are Essex South East, Warwickshire, Clyde Coast and Renfrew (these four areas use the basic model of ONE), Lea Roding, Somerset, Buckinghamshire, Gwent Borders (these four areas use additional call centre technology to facilitate initial contacts), Calderdale and Kirklees, Suffolk, North Nottinghamshire, Leeds and North Cheshire (in these four areas the operation of the basic model was tendered to the private and voluntary sectors.

[118] Regulation 4(2), the *Social Security (Work-focused Interviews) Regulations 2000*, SI 2000/897.

[119] Cm 4614, *Social Security Departmental Report: The Government's Expenditure Plans 2000/01-20001/02*, DSS, April 2000

[120] Regulations 1 and 2, the *Social Security (Work-focused Interviews for Lone Parents) Regulations 2000*, SI 2000/1926

[121] 49 pathfinder offices opened in October 2001 covering 15 areas of the country: Aberdeen, Blackburn & Darwen, Bridgend, Calderdale & Kirklees, Derby, East Devon, Essex, Gateshead, Inverclyde, Livingston, Manchester Openshaw, Shropshire, Streatham, Wallasey and Winchester.

[122] The *Social Security (Jobcentre Plus Interviews) Regulations 2001*, SI 2001/3210

> the basis for the service we expect the Working Age Agency to deliver, over time, across the country. [123]

More recently Nick Brown, Minister for Work at the DWP, confirmed the Government's intention to introduce Jobcentre Plus nationally during 2002:

> The first 49 Jobcentre Plus offices opened on 22 October, providing for the first time a fully integrated employment and benefit service. First reactions from both individual customers and employers have been overwhelmingly positive. We plan to extend this integration progressively nationwide, beginning later next year.[124]

Evaluation of ONE has so far covered only the voluntary stage of the pilots.[125] It is difficult to draw comprehensive conclusions at this stage; voluntary participants in the pilots are a self-selecting group who are likely to have a greater focus on work and face fewer barriers to entering employment than those who enter the scheme through compulsion. The main results of the programme of research include:

- While there was a short-term improvement in labour market incomes for lone parents, there was no evidence of medium-term (10-11 months after claiming benefit) improvement for lone parents, people with disabilities or the unemployed.
- Lone parents and people with disabilities reported an improved quality of service from personal advisers (PAs), although many suggested that the adviser service was reactive: providing advice on barriers to work identified by claimants themselves rather than identifying and advising on less obvious barriers.
- PAs were able to increase and improve the job search strategies of claimants who already considered themselves ready for work. Discussions with claimants who considered work an option for the future focused on benefit entitlements and had little effect on claimants' attitudes to employment.
- Staff were generally positive about the pilots and identified strongly with the ONE concept. However, they identified a number of problems, including insufficient or untimely training, a lack of continuity in the PA service, and a lack of experience in defining and responding to the needs of claimants who are not ready to work.

The Bill's provisions extend the concept of compulsory work-focused interviews to working age partners of claimants of specified benefits. The benefits – Income Support; Jobseeker's Allowance (income-based); Incapacity Benefit; Severe Disablement Allowance and Invalid Care Allowance – are earnings replacement benefits where an additional amount can be paid for a claimant's partner. This extension reflects the

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123 HC Deb 20 March 2001 c156w

124 HC Deb 12 November 2001 c567

125 DSS/DWP research reports 140 and 149, *Moving towards work: the short-term impact of ONE, and The medium-term effects of voluntary participation in ONE*; DWP in-house report 84, *Delivering a work-focused service*. Summaries available at http://www.dss.gov.uk/asd/asd5/.

Government's concern over the number of couples where neither partner works and the intransigence of such couples' detachment from the labour market.

2. Workless couples

The problem of workless households – working age households with no-one in employment – was highlighted early in the Government's first-term in office when figures showed that around 1 in 5 working age households had no-one in employment. Around 3.1 million working age households (16%) are workless, a slight decline on the 1997 figure of 3.3 million. The majority of workless households contain only one adult (either a lone parent or a childless single person), but around 800,000 consist of a couple where both partners are of working age and both are out of work.[126] These couples form the target group for the Bill's provisions; DWP data shows that around 700,000 receive benefits where the claim includes an additional amount for a partner.[127] In over 80% of cases the benefit claimant is a man and the Bill's provisions would, therefore, mainly affect women.

In his report on work incentives Martin Taylor, Chief Executive of Barclays Bank, suggested that the Government should consider ways of requiring both partners in a workless couple to make themselves available for work and ways of helping them find work:

> I think the Government should take steps to re-connect partners of the unemployed to the labour market. It is anomalous that the welfare state assumes that only one member of a couple is able to work. Requiring both partners in a couple to make themselves available for work – combined with measures to help them find work – would be a good way to tackle the problem of workless households. In particular, both partners in a childless couple should be required to make themselves available for work. Such a change would not mean that both partners had to work. But it should hasten the return to work of one partner in a couple with neither working, and remove the incentive, in cases where both have been working, for one to give up work shortly after the other has lost their job. Increasing the connection of partners of the unemployed to the labour force should (especially if supported by assistance to find work such as is offered currently to the unemployed) increase the effective labour supply, which should in turn improve aggregate employment. The number of workless households, and the numbers in poverty and welfare dependency, should also fall as a result.[128]

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[126] National Statistics, "Labour Force Survey household data: spring 2000 analyses, in *Labour Market Trends*, January 2001

[127] DWP, *Client group analysis: quarterly bulletin on the population of working age on key benefits – May 2001*. The figures may include some partners above working age and some partners of contribution-based JSA where there is no increase for adult dependants.

[128] HM Treasury, *The modernisation of Britain's Tax and Benefit System No.2: Work incentives, a report by Martin Taylor*, p.27

Research by the Policy Studies Institute for the Employment Service published in June 2001 considered the characteristics of workless couples and the prospects of movements into employment.[129] The research found that the employment statuses of partners were closely interrelated. Thus, when one partner entered work the other was more likely to do so. Entries into employment were concentrated in the first six months of joblessness, with people out of employment far less likely to enter work, particularly where both partners were economically inactive. While recognising the conjectural nature of his assessment, the author concluded by outlining the possible policy implications of his findings:

> It seems clear that there is a high level of dependence between the partners in a couple in terms of both their personal characteristics and their work-related characteristics. The existence of such correlated characteristics suggests problems of worklessness may also be concentrated within a particularly hard-to-reach group of households. Where one partner had significant obstacles to entering the labour market, the other partner is likely to be similarly disadvantaged. Hence, policies that have been ineffective for one partner may be equally ineffective for the other partner. It is conceivable, therefore, that attempts to address the problem of worklessness by simply extending the coverage of existing policies to both partners may be ill-fated.
>
> It is tempting to believe that the converse of this (that policies effective for one partner will also be effective for the other) offers a more positive prospect.. While this may be true to an extent, other factors may combine to outweigh this predicted response. Such factors could include, for example, partners' views on gender roles or partners' resentment at being forced to comply with job-search requirements. Hence, the effect on worklessness of measures to bring dependent partners into the labour force may be questionable.[130]

To date, there have been two developments along the lines suggested by Martin Taylor. Both have focused on the partners of the unemployed (as opposed to the partners of the economically inactive who are claiming benefits on, for example, grounds of incapacity for work).

- The New Deal for Partners of Unemployed People was introduced nationally in April 1999. The voluntary programme offers advice on job search and training for the partners of people who have been on JSA for six months or more.

- Since April 2001, childless couples on income-based Jobseeker's Allowance where one or both partners were born after 19 March 1976 have been required to make a

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[129] Richard Dorsett, *Workless couples: characteristics and labour market transitions*, Employment Service Report ESR79, June 2001

[130] *ibid*. p.44

joint claim.[131] Both partners in a joint-claim couple must now meet the labour market conditions for Jobseeker's Allowance, including the interview requirements. The date of March 1976 is fixed, so the provisions will cover a greater number of couples over time.

The Labour Manifesto for the 2001 General Election promised to extend the interview requirement slightly wider, to incorporate unemployed people with children, stating:

> Partners of unemployed people with children, like those without children, will be asked to interviews to discuss their options.[132]

The Government proceeded to propose a wider measure – incorporating the partners of economically inactive claimants as well as the unemployed – with legislation through a welfare reform bill. Alistair Darling announced:

> Measures in the Welfare Reform Bill will also make work-focused interviews compulsory for partners of working age benefit recipients. Benefit sanctions will be imposed where partners do not demonstrate a good cause for not participating.[133]

Commenting on the measure's subsequent inclusion in the Employment Bill, Mr Darling said that partners "will receive the same tailored personal adviser service as benefit recipients, helping them make the most of the wide-ranging opportunities available to them".[134]

B. The Bill

Clause 47 of the Bill provides the legislative framework to require partners of people claiming specified benefits to attend work-focused interviews as a condition of receiving benefit. Penalties for failing to attend will be set by regulation though the Explanatory Notes to the Bill give some indication of the Government's intention. The Bill does not place any requirements on partners beyond attending interviews, they would not, for example, be required to attend training courses or seek work.[135]

Clause 47 inserts a new section 2AA into the *Social Security Administration Act 1992*. New section 2AA(1) enables the Secretary of State to make regulations requiring partners to take part in interviews, and making attendance at such interviews a condition of

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131 Section 1(4) the *Jobseekers Act 1995*; regulation 3(A), the *Jobseeker's Allowance Regulations 1996*, SI 1996/207, as amended by the *Social Security Amendment (Joint Claims) Regulations 2001*, SI 2001/518

132 *Ambitions for Britain – Labour's General Election Manifesto*, p.26

133 DWP press release, *Benefit claimants encouraged to seek work opportunities*, 25 June 2001

134 DTI press release, *Hewitt outlines plan to modernise world of work*, 8 November 2001

135 Explanatory Notes, para. 115

receiving the full amount of benefit. The wording of the new section largely mirrors that of existing section 2A – which makes provision for requiring claimants themselves to attend interviews. The detail of any scheme will largely be contained in regulations "to allow adjustments to be made to the detailed aspects of the scheme in the light of experience of work-focused interviews".[136] The Government estimates that the introduction of work-focused interviews for partners will cost around £35million per year; any savings from partners taking up work cannot be estimated until the system has been operated and evaluated.[137]

New section 2AA(2) specifies the benefits to which the requirement will apply (and from which any benefit deductions could be made):

- Income Support
- Income-based Jobseeker's Allowance (excluding joint-claim cases)
- Incapacity Benefit
- Severe Disablement Allowance
- Invalid Care Allowance.

In all cases, the provisions would apply only where the claimant receives additional benefit in respect of their partner (new section 2AA(3)).

New sections 2AA(4-6) identify the main ways in which regulations might make provision for requiring partners' attendance at interviews. Regulations will specify the timing, form and location of work-focused interviews. Because the majority of jobseekers find work within six months of making a claim the Government's initial intention is that partners will not be required to attend an interview until 6 months into a claim. The timing of interviews will be reviewed in the light of experience.[138] This sub-section will allow regulations to provide for a benefit reduction where a partner fails to attend an interview without "good cause". The Explanatory Notes describe good cause as "a familiar concept in social security" and go on to give examples such as the partner or their child falling ill on the day of the interview or a failure to understand the requirement to attend an interview because of language or literacy difficulties.[139] It is not clear whether circumstances such as these will automatically be deemed as good cause or whether they will simply be factors which may be taken into account in determining good cause. The regulations made under section 2A of the Act (requiring claimants in ONE pilot areas to attend interviews) simply list a number of factors which should be taken into account:

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[136] Explanatory Notes, para. 119
[137] Explanatory Notes, para. 130
[138] Explanatory Notes, para. 120
[139] Explanatory Notes, para. 121

- misunderstandings due to language or literacy difficulties or due to misleading information;
- a medical or dental appointment for the claimant or a dependant which it would be unreasonable to postpone;
- difficulties with normal mode of transport;
- religious obligations;
- attendance at a job interview;
- self-employed work;
- an accident or sudden illness to the claimant or a dependant;
- the funeral of a close friend or relative;
- difficulties arising from disability.[140]

New section 2AA(5) provides powers to specify how any reduction in benefit will be calculated, and to prescribe circumstances where the amount of the reduction can be restricted. The reduction can only be made from the additional benefit payable in respect of the partner (see Box 1). In addition, the Explanatory Notes state the Government's intention to ensure that claimants retain entitlement to at least a nominal amount of benefit to ensure that a claim does not lapse and that entitlement to passported benefits such as free school meals and NHS prescriptions is retained. Reductions in benefit would be deductible from one or more of the benefits specified in new section 2AA(2). The regulations for claimants in the ONE pilot areas specify a reduction equivalent to 20% of the rate of Income Support for a single person aged 25 or over (equivalent to a reduction of £10.60 per week at current benefit rates). This reduction can be restricted where it would result in the claimant receiving less than 10p per week in any specified benefit.[141]

Box 1
Additional benefit for partners
£pw, from April 2001

Incapacity Benefit	£41.75
Invalid Care Allowance	£24.95
Severe Disablement Allowance	£25.00
Income Support/JSA (income-based)	£30.20

Note: for Income Support/JSA the additional benefit is the difference between the personal allowance for a single person and that for a couple.

New section 2AA(6) enables regulations to prescribe circumstances in which the requirement to attend an interview can be waived or deferred. The Explanatory Notes make clear that there is no intention to prescribe generic waivers or deferrals and that decisions will be made on a case-by-case basis.

Schedule 6 to the Bill makes a number of consequential amendments to the *Social Security Administration Act 1992* and the *Social Security Act 1998*. In particular, paragraph 9 provides that decisions that a partner has failed to attend an interview without good cause can be revised and appealed against.

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[140] Regulation 14, the *Social Security (Work-focused Interview) Regulations 2000*, SI 2000/897
[141] Regulation 12, the *Social Security (Work-focused Interview) Regulations 2000*, SI 2000/897

C. Reaction

There has been very little reaction to the Bill's proposals. The National Association of Citizens Advice Bureaux, however voices fears that:

> plans to cut benefits where partners of benefit claimants fail to attend work focused interviews could put vulnerable couples including disabled people and partners who care for them under undue pressure, and that the proposals had too much unfettered discretion about how these rules will be applied in particular cases.[142]

NACAB's comments echo many made at earlier stages during the expansion of work-focused interviews.[143]

VII Information sharing

A. Background[144]

People on employment and training programmes such as the New Deals have no obligation to inform the Department for Work and Pensions (DWP) of their activities after leaving a programme or ending a benefit claim. This undermines both the Government's evaluation of the long-term effects of employment and training programmes and the progression to paying providers on a performance-related basis.

The Select Committee on Education and Employment has highlighted particular problems in monitoring participants in the New Deal for Young People. The Committee found that the destinations of 30 per cent of those who had left the New Deal for Young People up to the end of November 2000 were unknown.[145] It also found that the proportion of those leaving for unknown destinations had increased since the introduction of the programme. The most recent figures show that the figure is still around 30 per cent (175,000 out of 611,000).[146]

The Committee's report went on to say:

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[142] NACAB press release, *Enforcement is missing element of Employment Bill*, says CAB, 12 November 2001

[143] See, for example, House of Commons Library Research Paper 99/19, *Welfare Reform and Pensions Bill* (pp54-55);

[144] This section contributed by Dominic Webb, Economic Policy and Statistics section.

[145] Education and Employment Committee, *New Deal: An Evaluation*, HC 58, 13 March 2001 para 63.

[146] Department for Work and Pensions Press Release, *New Deal for Young People and Long-term unemployed people aged 25+, Statistics to August 2001,* 25 October 2001. Table 11.

> The fact that the destinations of almost a third of all leavers from NDYP is still unknown is regrettable as it not only undermines any evaluation of New Deal but also compromises the development of future policy. [147]

The Committee welcomed the efforts being made by the Government and the Employment Service to determine the destinations of those who are recorded as leaving for unknown destinations.[148]

B. The Bill

Clause 48 introduces Schedule 5 to the Bill. The Schedule makes a number of amendments to the *Social Security Act 1998* and the *Social Security Administration Act 1992*, in particular it enables the DWP to access and use in the evaluation of employment and training programmes:

- PAYE records (and equivalent information provided by the self-employed) held by Inland Revenue providing information on the employment of former participants in employment and training programmes. The information will be limited to the fact that a person is in employment and details of his/her employer and will not be further disclosed except for civil and criminal proceedings.
- Inland Revenue and Customs & Excise tax records as a safeguard against fraud by providers of and participants in employment and training schemes.
- Data supplied by Inland Revenue from National Insurance contributions records, including details of former participants' employment and pay.

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147 Education and Employment Committee, *New Deal: An Evaluation*, HC 58, 13 March 2001 para 64.
148 ibid

VIII Key documents

a. Employment Bill 2001-02

Employment Bill (Bill 44 of 2001-02), presented 7 November 2001, *http://www.publications.parliament.uk/pa/cm200102/cmbills/044/2002044.htm*

Explanatory Notes on the *Employment Bill 2001-02*, [Bill 44-EN], 7 November 2001, http://www.publications.parliament.uk/pa/cm200102/cmbills/044/en/02044x--.htm

DTI, *Partial Regulatory Impact Assessment, Employment Bill 2001* http://www.dti.gov.uk/er/employ/ria.pdf

b. Family friendly measures

DTI, *Work & Parents. Competitiveness and Choice. Discussion document,* September 2001 (contains factual background, including international comparisons)

DTI, *Work & Parents. Competitiveness and Choice. Research and analysis*, November 2000, http://www.dti.gov.uk/er/research.pdf (contains detailed statistics and survey material on working parents)

DTI, *Work & Parents. Competitiveness and Choice*, December 2000, http://www.dti.gov.uk/er/g_paper/index.htm

DTI, *A simplified framework for maternity leave and pay*, 1 May 2001, http://www.dti.gov.uk/er/simp8.pdf

DTI, *Consultation document on changes to parental leave,* 8 May 2001, http://www.dti.gov.uk/er/parentregs.pdf

DTI, *A framework for adoption leave*, 8 May 2001, http://www.dti.gov.uk/er/adopt.pdf

DTI, *A framework for paternity leave,* 8 May 2001, http://www.dti.gov.uk/er/paternity.pdf

DTI, *Government response to the consultation on changes to the parental leave regulations,* 18 October 2001, http://www.dti.gov.uk/er/parentresp.htm

DTI, *Regulatory impact assessment. Parental leave regulations. Changes to extended entitlement*, 18 October 2001, http://www.dti.gov.uk/er/parentalria.htm

Debate in Second Standing Committee on Delegated Legislation on the *Draft Maternity and Parental leave (Amendment) Regulations 2001*, 7 November 2001

DTI, *Government Response on Simplification of Maternity Leave, Paternity Leave and Adoption Leave*, 8 November 2001, http://www.dti.gov.uk/er/g_paper/pdfs/response.pdf

DTI, *Partial regulatory impact assessment: paid paternity and adoption leave*, November 2001, http://www.dti.gov.uk/er/employ/riapaternity.pdf

DTI, *Partial regulatory impact assessment: improvements to statutory maternity pay*, November 2001, http://www.dti.gov.uk/er/employ/riasmp.pdf

c. Employment tribunals and dispute resolution

DTI, *Routes to resolution: improving dispute resolution in Britain*, July 2001, http://www.dti.gov.uk/er/individual/resolution.pdf

DTI, *Routes to resolution: improving dispute resolution in Britain. Government Response*, 8 November 2001, http://www.dti.gov.uk/er/individual/etresponse.pdf

DTI, *Partial regulatory impact assessment: adoption of procedures, changes to the law on written statement of employment particulars and mitigation of awards*, November 2001, http://www.dti.gov.uk/er/employ/riaprocedures.pdf

DTI, *Partial regulatory impact assessment: fixed period for consultation*, November 2001, http://www.dti.gov.uk/er/employ/riatraps.pdf

DTI, *Partial regulatory impact assessment: removal of procedural traps*, November 2001, http://www.dti.gov.uk/er/employ/riaperiod.pdf

DTI, *Partial regulatory impact assessment: wasted costs*, November 2001, http://www.dti.gov.uk/er/employ/riacosts.pdf

DTI, *Partial regulatory impact assessment: equal pay questionnaire*, November 2001, http://www.dti.gov.uk/er/employ/riaequalpay.pdf

d. *Equal pay questionnaires*

DfEE, *Towards equal pay for women: speed and simplicity in tribunal cases and the burden of proof directive*, December 2000, http://www.dfes.gov.uk/consultations/archive/archive1.cfm?CONID=6

e. Union Learning representatives

DfEE Consultation Paper, *Providing statutory rights for trade union learning representatives*, May 2001, http://www.dfes.gov.uk/consultations/archive/archived_sections.cfm?SECNUMBER=1&CONID=71

DfES, *Consultation Paper-Providing Statutory Rights for Union Learning Representatives - Summary of Responses*, 26 October 2001, http://www.dfes.gov.uk/consultations/sor/sorsections.cfm?CONID=71&SORSECNUMBER=1

DTI, *Partial regulatory impact assessment: placing union representatives (ULRs) on a statutory footing*, November 2001

f. Fixed term contracts

DTI, *Fixed term work: public consultation*, March 2001, http://www.dti.gov.uk/er/fixed/contents.htm

DTI, *Regulatory impact assessment of regulations concerning the EC directive on fixed term work*, March 2001, http://www.dti.gov.uk/er/fixed/riashort.htm, extended version, http://www.dti.gov.uk/er/fixed/ria.pdf

DTI, *Partial regulatory impact assessment of legislation to prevent pay and pensions discrimination against fixed term employees*, November 2001, http://www.dti.gov.uk/er/employ/riafixed.pdf

IX Selected responses to consultations

This is just a very small selection of responses from the TUC and the CBI which are easily accessible on the Internet. Lists of all those who responded to *Routes to resolution* and the framework documents on the simplification of maternity leave, paternity leave and adoption leave are contained in the Government responses to those consultations.

a. Family friendly policies

CBI, *Response to changes to maternity and parental leave and introduction of adoption and paternity leave*, August 2001, http://www.cbi.org.uk/ndbs/PositionDoc.nsf/1f08ec61711f29768025672a0055f7a8/b3483e48a1c75e0780256aab00596f2a/$FILE/CBI_Response_To_Framework_Documents.pdf

TUC, *Submission to work and parents green paper: rights not favours*, 14 March 2001, http://www.tuc.org.uk/work_life/tuc-2849-f0.cfm

b. Employment tribunals and dispute resolution

CBI, *Submission on employment tribunals: managing a compensation culture: improving case management in the employment tribunal system*, May 2000, http://www.cbi.org.uk/ndbs/PositionDoc.nsf/1f08ec61711f29768025672a0055f7a8/378d4d1dbc5d65e28025697c003eb3d3/$FILE/CBISubEmp.pdf

TUC, *Response to Government consultation on Routes to Resolution*, 3 October 2001, http://www.tuc.org.uk/law/tuc-3802-f0.cfm

c. Trade union learning representatives

CBI *Response to the consultation paper, 'Providing statutory rights for union learning representatives'*, July 2001, http://www.cbi.org.uk/ndbs/PositionDoc.nsf/1f08ec61711f29768025672a0055f7a8/7186dcbf7514154080256a8e0054d904/$FILE/Learning_reps_consultation_response.pdf

TUC press release, 15 May 2001, *50,000 in workplace revolution*, http://www.tuc.org.uk/learning/tuc-3168-f0.cfm

d. Fixed term contracts

CBI, *Issue statement on EU directive on fixed term*, updated 22 October 2001, http://www.cbi.org.uk/8025652500531893/2141286a214cfa7b802567450032462c/1f87df5a44601854802565d400520a4a?OpenDocument

TUC press release, 9 September 2001, *Student temps could miss out on equal rights*, http://www.tuc.org.uk/equality/tuc-3821-f0.cfm

Appendix 1: Employment tribunal statistics

Year	Registered Tribunal Applications (Great Britain)
1988/89	29,304
1989/90	34,697
1990/91	43,243
1991/92	67,448
1992/93	71,821
1993/94	71,661
1994/95	88,061
1995/96	108,827
1996/97	88,910
1997/98	80,435
1998/99	91,913
1999/2000	103,935
2000/01	130,408

Sources: Employment Tribunal Service Annual Reports 1997/98 and 2000/01

Nature of claim[149]	1998/99	1999/2000	2000/01
Unfair dismissal	37,034	44,538	43,590
Wages Act	16,689	21,285	22,698
Breach of contract	8,986	9,725	10,187
Sex discrimination[150]	6,203	4,926	17,200
Equal pay	5,018	2,391	6,586
Part Time Worker Regulations	-	-	10,530
Redundancy pay	4,812	5,911	5,408
Working Time Directive	636	2,314	1,828
Disability discrimination	1,430	1,743	2,100
Race discrimination	2,746	3,246	3,429
Written statement of terms and conditions	1,061	676	655
Transfer of undertakings – failure to inform and consult representatives	886	679	1,026
Unfair dismissal – transfer of undertaking	505	771	537
Unfair dismissal – pregnancy	765	648	468
Unfair dismissal – health and safety	313	255	479
National minimum wage	-	357	337
Unfair dismissal – exercise of statutory right	242	386	396
Unfair dismissal – trade union membership	173	132	141
Other	4,414	3,952	2,813
Total[151]	**91,913**	**103,935**	**130,408**

Source: Employment Tribunal Service Annual Report 2000/01

[149] As identified by ETS staff as the principal type of claim when first received. A claim may be brought under more than one jurisdiction or subsequently amended/clarified in the course of the proceedings, but will be counted only once for the purposes of the above table

[150] Includes approximately 12,000 Part-Time Worker Pension cases

[151] Total for 2000/01 reflects growth in all jurisdictions of approximately 20% over the last three years

Appendix 2: Employment law changes since May 1997

NB This list covers only the main changes to individual employment rights, not the changes to collective rights, such as the introduction of statutory procedures for trade union recognition under the *Employment Relations Act 1999*

- The *Working Time Regulations* with new rights to paid annual leave and weekly and daily rest breaks came into force on 1 October 1998.[152]

- The employment provisions of the *Disability Discrimination Act 1995* came into force on 2 December 1996. Originally firms with fewer than 20 employees were exempt but this threshold was reduced to 15 from 1 December 1998.[153]

- The National Minimum Wage came into force on 1 April 1999.[154]

- The qualifying period for unfair dismissal was reduced from two to one years on 1 June 1999.[155]

- Protection against unfair dismissal and victimisation for whistleblowers under the *Public Interest Disclosure Act 1998* came into force on 2 July 1999.[156]

- The upper limit on compensation for unfair dismissal was increased from £12,000 to £50,000 on 25 October 1999.[157] On 1 February 2001, it was increased again to £51,700.[158]

- New rights to parental leave and time off for dependants and more generous maternity leave arrangements came into force on 15 December 1999.[159]

- A new right for part-time workers not to be treated less favourably than comparable full-time workers was introduced on 1 July 2000.[160]

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152 *Working Time Regulations 1998, SI No 1833*

153 The *Disability Discrimination (Exemption for Small Employers) Order 1998*, SI No 2618

154 *National Minimum Wage Regulations 1999, SI No 584*

155 SI 1999/1436, *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999*

156 The *Public Interest Disclosure Act 1998 (Commencement) Order 1999*, SI 1999/1547

157 *Employment Relations Act 1999 (Commencement No 2 and Transitional and Saving Provisions) Order 1999.* SI 1999/2830

158 *Employment Rights (Increase of Limits) Order 2001*, SI 2001/21

159 *Maternity and Parental Leave etc Regulations 1999, SI No 3312*, and the *Employment Relations Act 1999*

160 *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI No 1551*