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Employment Relations Bill 1998/99

Bill 36

The *Employment Relations Bill 1998/99* was presented on 27 January 1999, published on 28 January 1999 and is due to have its Second Reading Debate on 9 February 1999. It implements the proposals contained in the White Paper, *Fairness at Work*, published in May 1998. Amongst other things it will introduce a statutory procedure for trade union recognition; raise the limits on compensation for unfair dismissal; pave the way for a substantial reform of the law on maternity leave and establish new rights to parental leave and time off for domestic incidents. This paper, which concentrates on the Bill, should be read in conjunction with **Research Paper 98/99** on *Fairness at Work*, dated 17 November 1998, as this describes the background to most of the Bill's provisions. The Bill applies to England, Wales and Scotland, but does not extend to Northern Ireland.

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Summary of main points

The *Employment Relations Bill 1998/99* was published on 28 January 1999 and is due to have its second reading debate in the House of Commons on 9 February 1999. It implements many of the Labour Government's proposals for trade union and employment protection reform outlined in the White Paper, *Fairness at Work,* published in May 1998. The reduction in the qualifying period for unfair dismissal from two years to one year will be achieved separately by Order. The Bill is wide-ranging, but its main provisions are:

- The introduction of a statutory procedure for **trade union recognition** in firms with more than 20 employees. The procedure aims to secure voluntary agreement, but, if this fails, unions will be able to apply to the Central Arbitration Committee (CAC) to decide both the appropriate bargaining unit and whether a majority of the workers in that unit support recognition. If a majority of those voting in a secret ballot and 40% of the workers in the bargaining unit support recognition, the CAC will declare the union recognised.
- The reform of the law on **maternity leave**. The Bill establishes the new structure, but most of the details will be contained in Regulations. Ordinary maternity leave, available to all women, regardless of length of service, will be increased from 14 to 18 weeks. Additional maternity leave (lasting for up to 29 weeks after the birth of the baby) will be available after one year's service, instead of two.
- The introduction of a right to **parental leave**. Again most of the details will be contained in Regulations, but the intention is that all parents should be eligible for three months' leave. It is likely to be unpaid and available in respect of children below school age. People who adopt will also be able to take leave, probably in respect of older children as well. The *EC Parental Leave Directive* requires us to introduce this right by 15 December 1999.
- The introduction of a right to **time off for domestic incidents**. Again the details will be contained in Regulations, but it is probable that the right will cover incidents such as sudden illness, accident or death and domestic crises such as flooding or burglary. It is likely that the right will be to unpaid time off. This, too, must be introduced by 15 December 1999 under the *EC Parental Leave Directive.*
- The introduction of a right to be accompanied by a fellow employee or trade union official in **disciplinary or serious grievance proceedings**.
- The protection of people taking lawfully organised **industrial action** against unfair dismissal during the first eight weeks of a strike.
- The protection of **part-time workers** against discrimination. Again the details will be in Regulations. The *EC Directive on Part-Time Work* requires us to implement this by 7 April 2000.
- The increase in the upper limit on **unfair dismissal compensation** from £12,000 to £50,000.

Explanatory Notes (Bill 36-EN) were published on 4 February and a Regulatory Impact Assessment on 5 February 1999. These estimate the annual compliance cost to industry to be in the region of £60 million.

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I Introduction

The *Fairness at Work* White Paper, published on 21 May 1998, contained the Labour Government's proposals for trade union and employment legislation which were intended to form "an industrial relations settlement for this parliament".[1] The White Paper grouped the proposals under three headings: individual rights, collective rights and family friendly policies.

The main proposals included:

- reducing the qualifying period for claiming unfair dismissal from two years to one year
- abolishing the upper limit on compensation awards in unfair dismissal cases
- introducing a statutory right to trade union recognition "where a majority of the relevant workforce wishes it"
- allowing people dismissed for taking part in lawfully organised industrial action the right to make unfair dismissal claims
- giving employees the right to be accompanied in grievance and disciplinary proceedings
- reducing the qualifying period for extended maternity leave from two years to one year
- increasing the length of basic maternity leave from 14 to 18 weeks
- laying the groundwork for the implementation of the *EC Directive on Parental Leave* which gives all parents (men and women, including those who adopt a child) the right to three months' parental leave and introduces a right to time off for urgent family reasons

The background to the White Paper proposals and the reaction to them are covered in Library Research Paper 98/99 on *Fairness at Work*, dated 17 November 1998, and it is not proposed to repeat them here. This Paper (99/11) only contains background on issues which were not covered in the earlier Paper: blacklists, part-time work, the Central Arbitration Committee and employment agencies.

Following a period of consultation on the White Paper, Peter Mandelson, then Secretary of State for Trade and Industry, announced the Government's decisions "on the key outstanding issues" on 17 December 1998.[2] The main changes from the White Paper were:

- the upper limit on compensation awards in unfair dismissal cases would not be abolished, but raised from £12,000 to £50,000

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1 Cm 3698

2 Letter and note sent to John Monks, General Secretary of the TUC and Adair Turner, Director General of the CBI, on 17 December 1998, and deposited in the House of Commons Library (Dep 98/1540)

- trade unions would not have an unfettered automatic right to recognition if more than 50% of the workers in the agreed bargaining unit were members. Instead, the CAC would have discretion to order a ballot in certain circumstances
- dismissal for taking part in lawfully organised industrial action would be automatically unfair during the first eight weeks of the action
- employees would only have the right to be accompanied in grievance procedures if "serious issues" were involved.

The *Employment Relations Bill 1998/99*, published on 28 January 1999, includes the detailed statutory scheme for trade union recognition and the amendments to the law needed to implement other White Paper proposals in the area of collective rights. These include changes to the law on the dismissal of strikers, discrimination against trade union members, strike ballots, the right to be accompanied in grievance and disciplinary procedures and the abolition of the Trade Union Commissioners. The Bill also implements some of the White Paper proposals on individual rights, in areas such as unfair dismissal compensation awards and fixed term contracts. However, the reduction in the qualifying period for unfair dismissal from two to one years' service will be achieved by using an existing Order-making power to vary this period.[3] It is expected that this change will be made later this year. As far as the family friendly policies are concerned, the Bill gives the Secretary of State wide-ranging powers to make Regulations reforming the law on maternity leave and introducing rights to parental leave and time off for domestic incidents. Draft Regulations will be published for consultation later this year. The rights to parental leave and time off for family reasons should be introduced by 15 December 1999 to comply with the *EC Directive on Parental Leave*.[4]

The Bill also gives the Secretary of State the power to introduce Regulations outlawing discrimination against part-time workers. This is needed to implement the *EC Directive on Part-Time Work* which should be brought into force in the UK by 7 April 2000.[5] It also makes changes to the law on employment agencies so that the Government can strengthen their regulation.

The Government has published detailed Explanatory Notes and a Regulatory Impact Assessment of the Bill. These will be available on the Internet via the DTI's home page.[6]

II Decisions on the White Paper, December 1998

The changes to the White Paper announced on 17 December 1998[7] were generally seen as a victory for employers' lobbying efforts after the publication of the White Paper. Adair

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3 *Employment Rights Act 1996*, section 209 (1) (c) and (5)
4 Council Directive 96/34/EC extended to the UK by Council Directive 97/75/EC
5 Council Directive 97/81/EC extended to the UK by Council Directive 98/23/EC
6 http://www.dti.gov.uk

Turner, director-general of the CBI, was quoted as saying: "We have worked hard to make the legislation as workable as possible and believe we have made considerable progress".[8] And Bill Morris, general secretary of the Transport and General Workers' Union, was reported to have commented: "It is regrettable that the employers' amendments, clearly designed to wreck the principles of fairness and social justice in the workplace, have been accommodated".[9] However, John Monks, the TUC general secretary, said that the forthcoming Bill would still "tilt the balance towards greater fairness in the workplace for the first time in a generation" and TUC sources pointed out that some new safeguards had been added.[10]

The decisions announced on 17 December were:

Qualifying period for unfair dismissal

This would be reduced from two years to one, as proposed in the White Paper, but it would be done by Order not as part of the Bill. [Section 209 (1) (c) and (5) of the *Employment Rights Act 1996* allows the Secretary of State to vary the two year qualifying period for unfair dismissal, which is contained in section 108 (1), by Order. It also allows the two year qualifying period for a written statement of reasons for dismissal, contained in section 92 (3), to be varied by Order.]

Limit on unfair dismissal compensation

This would be raised from £12,000 to £50,000, rather than abolished altogether as proposed in the White Paper:

> The Government has accepted the argument that, compared with the proposed increase, abolishing the limit entirely would benefit only a very few high earners while making it much more difficult to reach 'out of court' settlements in unfair dismissal cases.[11]

Index-linking limits

Limits on the amount of a week's pay for the purpose of tribunal awards and redundancy payments, and on other tribunal awards and guarantee payments would be increased in line with inflation, "as proposed in the White Paper". [The Government did not specify in the White Paper whether increases would be index-linked in line with prices or earnings. The Bill makes it clear that it is the Retail Price Index which will be used.]

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7 Letter and note sent to John Monks, General Secretary of the TUC and Adair Turner, Director General of the CBI, on 17 December 1998, and deposited in the House of Commons Library (Dep 98/1540)

8 "Labour to create fresh obstacles for union seeking recognition", *Financial Times*, 18 December 1998

9 "TUC attacks 'blow' to battle for recognition", *Times*, 18 December 1998

10 "Mandelson accused of retreat on union rights", *Guardian*, 18 December 1998

11 Letter of 17 December 1998, op cit

Additional and special awards

These would be consolidated into a single award. This particular proposal was not made in the White Paper, though views were sought on whether limits on these awards should be retained.

Waivers in fixed term contracts

It would "no longer be possible for employers to ask employees on fixed term contracts of [one] year or more to waive the right to complain of unfair dismissal if the contract is not renewed". The waiver would still be available for redundancy payments. This was the Government's preferred option in the White Paper.

Zero hours contracts

No further measures would be taken to control abuse of zero hours contracts in the Bill. Responses to the White Paper "did not identify any desirable measures beyond those the Government has already taken in the National Minimum Wage Act and Working Time Regulations".

Extension of employment rights

The Government would go ahead with the proposal to take powers to extend employment legislation by regulation to workers not covered at present who are not genuinely in business on their own account, subject to consultation on specific proposals.

Trade union recognition

The Government would go ahead with the procedures for trade union recognition outlined in the White Paper but with a number of "refinements". These included:

- Unions will have to show that they have 10% of the bargaining unit as members and are more likely than not to win a ballot for the Central Arbitration Committee (CAC) to proceed with a recognition application. The White Paper did not mention a specific membership figure as evidence of a reasonable level of support. It said:

> The CAC, having received an eligible application, will first examine whether there is prima facie evidence that the union enjoys a reasonable level of support such as to make it likely that there could be a majority in favour of union recognition in the bargaining unit. Evidence of reasonable support might take the form of membership records or a petition signed by a sufficient number of employees. The employer too may submit evidence. If the CAC is not satisfied that the union has sufficient support, it will not proceed with the application. In

> consultation with interested parties, the Government will draw up guidance for the CAC on how reasonable support should be defined.[12]

The CBI had proposed a threshold of 20% membership over the preceding 12 months.

- The CAC will award recognition where, in a ballot, a majority and at least 40% of those eligible to vote, support it, as proposed in the White Paper. However, there has been some watering down of the White Paper's proposal that there should be automatic recognition, without a ballot, where over 50% of employees in the bargaining unit are union members. This is in response to employers' arguments that many people join a union for reasons other than the desire for collective bargaining and that one particular incident could trigger a successful but short-lived trade union recruiting campaign. The CAC will award recognition automatically without a ballot if the union has 50% plus one membership in the bargaining unit where "it is obvious that there is majority support for recognition". But the CAC should require a ballot "where, in its sole discretion it decides:

  > (a) it is in the interests of good industrial relations for there to be a secret ballot, notwithstanding the fact that a majority of the workers in the relevant [bargaining unit] are already members of the union seeking recognition
  >
  > (b) there is evidence that despite holding union membership, a significant number of the members of the union do not wish the union to represent them for collective bargaining either because they make this clear to the CAC or the CAC concludes there are doubts about this wish from the circumstances of their joining the union, including only where the CAC thinks it relevant, their length of time in union membership."[13]

  The Secretary of State will be able to issue guidance on how the CAC should exercise this discretion.

- Where two or more trade unions seek recognition, they will "need to show that they are able to co-operate effectively and are prepared to undertake single-table bargaining if the employer wishes". Again this is in response to employers' fears that unions might co-operate for the sole purpose of gaining recognition and relapse into competition once they had secured that aim.

- Where the CAC awards recognition and imposes a legally binding collective bargaining procedure because the parties were unable to agree a voluntary procedure, the procedure will not require bargaining on training. This had been left open by the White Paper. However, employers will be placed under a separate duty to inform and consult the recognised union on training matters.

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[12] Cm 3968, Annex 1, para (iii)

[13] Letter, 17 December 1998, op cit

- Employees campaigning for or against recognition will be protected against dismissal or action short of dismissal, and will be able to obtain interim relief in the case of dismissal. The White Paper had said that there would "be protection against discrimination for employees who campaign for or against recognition, including special protection for those who are dismissed simply for asking for recognition".[14]

- The Bill will safeguard the right of employers and employees to reach individual contracts even where a union is recognised for bargaining purposes. However, there will be "similar protection" for employees "from being forced into signing individual contracts where collective agreements exist". On this, the White Paper had said:

> The terms of agreements resulting from collective bargaining are normally incorporated into individual employees' contracts either explicitly or by custom and practice and thus set the minimum terms and conditions for all employees in the bargaining unit. Under the existing law an employer and employee can agree different terms if they wish. Since the current law allows flexibility and works well, the Government sees no reason to change it.[15]

- The White Paper had proposed that any recognition award would last for three years and that after this there would be a "broadly similar" procedure for derecognition. On 17 December 1998, the Government announced that either the employer or a group of employees will be able to apply to the CAC for derecognition after three years. Where recognition was awarded after a ballot, the CAC will order a derecognition ballot if it is satisfied that the applicant is more than likely to win. Where recognition was awarded without a ballot through the automatic procedure, the CAC will order a ballot if union membership has fallen below 50%.

- If an employer voluntarily recognises a non-independent union (a so-called "sweetheart" union), the employees will be able to ask the CAC to hold a ballot. If the union loses the ballot, it will be derecognised and a different, independent union would be able to seek recognition. This was not covered by the White Paper.

Dismissal of strikers

It would be automatically unfair to dismiss those taking part in lawfully organised industrial action for eight weeks (if the reason, or principal reason, for the dismissal was that they took part in the industrial action). Thereafter, dismissal would be fair if the employer had taken all reasonable procedural steps to try to resolve the dispute.

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14 Cm 3968, para 4.19
15 Cm 3968, Annex 1, para (viii)

Discrimination by omission on grounds of trade union membership, non-membership or activities

The Government would go ahead with the proposal in the White Paper to reverse the House of Lords ruling in *Wilson and Palmer* so that discrimination by omission on grounds of union membership or non-membership would be unlawful.

Prohibit blacklisting of trade unionists

The Government would go ahead with its proposal to prohibit the "blacklisting" of people aimed at preventing them from finding work because of their trade union membership or activities.

Strike Ballots

The Government intended to go ahead with changes to the law to ensure that unions would no longer have to give employers lists of names of those they intended to ballot on industrial action.

The consultation on measures to simplify the law on industrial action ballots had yielded at least one proposal the Government intended to adopt:

> At present, a union must begin industrial action within 28 days of the ballot or else the validity of the ballot lapses. This sometimes means a union must choose between starting industrial action and continuing talks but running the risk of having to hold a fresh ballot. So a union may sometimes feel it has to start industrial action even though it would prefer to continue negotiations. In order to remove this perverse effect of the last Government's legislation, the Government intends to allow the 28 day period to be extended provided both employer and union agree.[16]

Right to be accompanied in disciplinary and grievance procedures

The White Paper proposed to create a legal right for employees to be accompanied by a fellow employee or trade union representative of their choice during grievance and disciplinary procedures. The Government was going ahead with this, but, in response to employers' argument that many grievances were very minor, would restrict the right in grievance cases to those about "serious issues". There would be a Code of Practice to give guidance on how the right should be applied in practice.

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[16] Letter of 17 December 1998, op cit

Abolition of Commissioners for the Rights of Trade Union Members and Protection Against Unlawful Industrial Action and extension of the Certification Officer's powers

The Government would go ahead with the proposals in the White Paper.

Partnership Fund

The White Paper had announced the Government's intention of making "funds available to contribute to the training of managers and employee representatives in order to assist and develop partnerships at work".[17] The Government would go ahead with the establishment of such a fund.

Family Friendly Policies

The Government would go ahead with the proposals in the White Paper. The Note to the TUC and CBI did not, however, elaborate any further on these proposals. It added that it would "provide powers to implement the EU Part-Time Work Directive and ensure equal pay for part-time workers".

ACAS

The Bill would also include provisions to amend the terms of ACAS (the Advisory, Conciliation and Arbitration Service) "to assist the possibility of some re-balancing of ACAS' work:

> At present most of ACAS's effort is devoted to helping resolve individual disputes. The Government is looking at the possibility of increasing ACAS's proactive, advisory work to help improve employment practices and prevent disputes from arising."[18]

This proposal was not discussed in the White Paper.

Employment Agencies

The Government had decided that it may need some minor changes to existing powers to regulate employment agencies. The White Paper had mentioned that the rules governing the conduct of employment agencies were under review, but made no specific proposals.[19]

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17 Cm 3968, para 2.7
18 Letter of 17 December 1998, op cit
19 Cm 3968, para 3.18

III The Bill

A DTI press release announcing the Bill's publication on 28 January 1999, described it as "an historic package of measures which will benefit millions of workers, including part-time workers, mothers-to-be and parents, including adoptive parents".[20] It went on:

> The proposals in the Employment Relations Bill deliver the Government's manifesto commitments to provide, for the first time, all employees with decent minimum standards, and to promote a new climate of co-operation between workers and employers.
>
> Mr Byers said:
>
> "This Bill will promote the best of modern employment relationships in all our companies, encouraging a culture of fairness and trust in the workplace which is so important to the competitiveness of our economy.
>
> "It will help those millions of parents who give their all, day in and day out at home and at work. For the first time people will be able to care for a sick child or an ailing relative without running the risk of losing their job".
>
> The key proposals in the package are:
>
> Measures to help parents combine home and work responsibilities:
>
> - increasing maternity leave for all employees to 18 weeks, benefiting 85,000 women;
> - 40 weeks' maternity leave after one year, rather than two, covering an extra 50,000 mothers;
> - three months unpaid parental leave, including for adoptive parents;
> - the right to take time off for domestic emergencies;
> - tackling discrimination against part-time workers.
>
> Minimum standards for all individuals at work:
>
> - raising the limit on compensatory awards for unfair dismissal to £50,000;
> - extending protection against dismissal for those taking lawfully organised industrial action;
> - prohibiting unfair dismissal waivers in fixed term contracts;
> - the right for workers to be accompanied at disciplinary or grievance hearings;
> - prohibiting "blacklisting" or other discrimination because of union membership;
> - a statutory procedure for individuals to obtain recognition for trade unions, where there is clear support for this.

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[20] DTI press release, *Foundations laid for new culture of fairness at work. Stephen Byers publishes Employment Relations Bill,* 28 January 1999

> Legislation to improve the regulation of employment agencies, and to better protect the interests of those using them.
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> Announcing the publication of the Bill, Mr Byers said:
>
> "The measures proposed in the Bill are already widely applied in many of our top performing companies, who are reaping the benefits in terms of greater employee commitment and co-operation, reduced staff turnover and increased productivity. There is a clear business case for this legislation.
>
> "By underpinning modern employment policies in law, the proposals will help to spread best practice to all areas of the economy and promote effective partnerships at work.
>
> "The measures in the Bill also play a major role in the Government-wide agenda of supporting families. Strengthening parental and maternity leave provisions will help employees to achieve a better balance between their home and working lives - with clear benefits to the organisations they work for."
>
> Ian McCartney, DTI Minister of State, said:
>
> "We are on the threshold of a renaissance in employment relations. Employers, employees and their trade unions are realising that partnerships in the workplace are a genuine win/win situation for all concerned, and that their advantages for competitiveness and job creation must be exploited to the full.
>
> "The Government is committed to assisting this process. In addition to the statutory measures in the Bill, the Partnership Fund announced in the Fairness at Work White Paper is a unique and innovative way of assisting partnership at work, which will help ensure better relations between employers and employees."

A. Initial reaction

The immediate response of the unions was to welcome the Bill as a "historic" step forward in workplace rights.[21] John Monks, general secretary of the TUC said:

> This is the biggest advance in employee rights for a very long time.
>
> It gives everyone at work important new rights to family friendly employment. There is new protection against over-mighty employers. And unions are given new rights to stick up for their members at work when they are in trouble or have a grievance.

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[21] "Unions welcome 'historic' Bill of workplace rights", *Guardian*, 29 January 1999

> No longer will employers be able to resist the democratic right of a workforce that wants a union to represent them.
>
> But far from this leading to more conflict or difficulties in the workplace, as the Bill's critics will say, the new law will provide a big boost to partnership at work. Companies that treat their staff well, consult them and recognise their right to have a say will always do better than those who won't. Macho-management now looks as dated as flared trousers and flower power.
>
> It does not go as far as unions would like, but no-one can deny that today marks a milestone in bringing some balance back to Britain's workplaces.[22]

Employers were less welcoming. John Cridland, Human Resources Director of the CBI, was quoted as saying most of the industrial relations proposals were now "workable, if not wholly welcome", but as being concerned at the potential impact of unpaid parental and domestic leave.[23] Ruth Lea, director of the Institute of Directors, feared the bill would "sap the competitiveness of British firms" and predicted that raising the ceiling on unfair dismissal compensation awards would increase employment tribunal cases.[24]

There is a general expectation that the Bill will "signal the start of a significant expansion in litigation by aggrieved workers and trade unions".[25] The Employment Lawyers' Association has warned of the opening of the floodgates with a big rise in the work of the employment tribunals.[26] Organisations campaigning for families are disappointed that there is no indication that the parental leave will be paid. Sandra Howard of the National Childbirth Trust is reported as saying the time off measures might prove an "empty gesture" as many families could not do without income for three months.[27]

B. Trade union recognition

An account of previous statutory recognition regimes in the 1970s and the evolution of the recognition proposals contained in this Bill can be found in pages 31-41 of Research Paper 98/99.

Clause 1 and Schedule 1 of the Bill insert a new Schedule A1 into the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA) which makes extremely detailed provision for the new statutory recognition and derecognition procedures. The Schedule takes up 26 pages - more than one-third of the Bill - and contains 88 paragraphs. The provisions are designed to encourage unions and employers to reach voluntary agreement

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22 TUC press release, *Monks welcomes Employment Relations Bill*, 28 January 1999
23 "Unions welcome 'historic' Bill of workplace rights", *Guardian*, 29 January 1999
24 Ibid
25 "Employment bill may move union recognition battle into the courtroom", *Financial Times*, 29 January 1999
26 Ibid
27 "Firms to foot £50m cost of 'family leave'", *Evening Standard*, 28 January 1999

on recognition or derecognition wherever possible, but ultimately, the Central Arbitration Committee (CAC) will be able to impose recognition or derecognition if this is what a majority of the relevant workforce wants. The CAC was set up under the *Employment Protection Act 1975* (EPA) as a standing national arbitration body. It was given the power to determine a number of industrial relations questions and was active in the late 1970s. During the 1980s, its powers were gradually removed, so that it now deals only with a handful of disclosure of information cases every year. Further details are given in Section O of this Paper.

The *Explanatory Notes* on the Bill describe the recognition procedure in detail and include helpful flowcharts which are reproduced as an Annex to this Paper. What follows is a simplified account of the main elements of the process.

Recognition

Part I of the Schedule sets out the statutory recognition procedure.

The process starts with a union (or unions) making a formal request to the employer for recognition to be entitled to conduct collective bargaining on behalf of a group of workers [para 3].[28] The union must be an independent union [para 4] and the employer must employ at least 21 workers [para 5]. This threshold can be varied by Order subject to the affirmative procedure [para 5 (5)-(7)].

The employer has ten days in which to decide whether to accept the request, reject it or enter negotiations [para 8]. If he rejects it, or fails to respond to the request, the union can apply to the CAC to decide whether the proposed bargaining unit is appropriate and/or whether the union has the support of a majority of the workers in the appropriate bargaining unit [para 9]. If he enters negotiations, 28 days (or more if mutually agreed) are allowed [para 8(7)]. If no agreement has been reached by the end of this period, the union can apply to the CAC to decide the same points (as long as the union has not rejected a proposal that ACAS should assist negotiations) [para 10]. The CAC may not consider applications from unions where a union is already recognised for bargaining purposes in respect of any workers in the proposed bargaining unit [para 25]. If unions apply jointly, the CAC must be satisfied that the unions will "co-operate with each other in a manner likely to secure and maintain stable and effective collective bargaining arrangements" and that, if the employer wishes, they will agree to single table bargaining [para 27].

The CAC can only proceed with an application if it decides that at least 10% of the workers in the proposed bargaining unit are members of the union and that there is "prima facie evidence that a majority of the workers… would be likely to favour recognition" [para 26]. It then has 28 days (or more if it chooses) to persuade the union and employer

[28] Unions may make a joint application, but, for simplicity's sake, this account will refer to a single union.

to agree an appropriate bargaining unit [para 11]. If it fails, it must decide the appropriate unit within 10 days [para 12]. In so doing, it must take into account "the need for the unit to be compatible with effective management", and, in so far as they do not conflict with this:

> (a) the views of the employer;
> (b) existing national and local bargaining arrangements;
> (c) the desirability of avoiding small fragmented bargaining units within an undertaking;
> (d) the characteristics of workers falling within the proposed bargaining unit and of any other employees of the employer whom CAC considers relevant;
> (e) the location of workers.

Once the appropriate bargaining unit has been decided, the CAC must decide whether there is majority support for recognition within that unit. If the union can show that a majority of the workers in the unit are members of the union, the CAC must issue a declaration that the union is recognised [para 14 (2)]. This is "automatic recognition". However, even if the union does show that more than 50% of the workers are members, the CAC can decide not to issue an automatic declaration, but to hold a secret ballot, if:

> (a) [it] is satisfied that a ballot should be held in the interests of good industrial relations; or
> (b) a significant number of the union members within the bargaining unit inform the CAC that they do not want the union… to conduct collective bargaining on their behalf; or
> (c) membership evidence is produced which leads the CAC to conclude that there are doubts whether a significant number of the union members… want the union… to conduct collective bargaining on their behalf [para 14 (4)].

There is a provision for the Secretary of State to amend these provisions on automatic recognition by affirmative Order, if the CAC finds they have an "unsatisfactory effect" [para 84]. The Secretary of State can also issue guidance to the CAC on the exercise of its discretion on the matter of automatic recognition. The guidance must be laid before Parliament [para 85].

If there is no automatic recognition, the CAC must organise a secret ballot conducted by a qualified independent person. The qualifications required will be specified in an Order, subject to the negative procedure, made by the Secretary of State [para 16]. This is essentially the same arrangement as for independent scrutineers for trade union elections and industrial action ballots where solicitors and accountants and bodies such as the Electoral Reform Society are designated to act as scrutineers. The ballot must be held within 20 days of the appointment of the independent person [para 16 (3)]. There are detailed provisions about the conduct of the ballot [paras 17-19].

If a majority of the workers voting and at least 40% of the workers constituting the bargaining unit vote in favour of recognition, the CAC must issue a declaration that the union is recognised [para 20 (3)]. The Secretary of State has the power to specify a different degree of support by affirmative Order [para 20 (5)].

Once a union has been recognised under this procedure, there is a 42-day period for negotiation of a method by which collective bargaining will be conducted [para 21]. If no agreement is reached, either union or employer can apply to the CAC for help. The CAC has 28 days in which to help them agree a method [para 22]. If there is still no agreement, the CAC must specify the method by which they are to conduct collective bargaining [para 22 (3)]. This imposed method will "have effect as if it were contained in a legally enforceable agreement made by the parties" [para 22(4)]. This means that if one party believes the other is failing to abide by the imposed method, it can apply to the court for an order for specific performance. Failure to comply with such an order could constitute contempt of court. The Secretary of State has the power, after consulting ACAS, to specify a method for conducting collective bargaining by an Order subject to the negative procedure [para 86]. The CAC must take this into account.

Once the CAC has decided a recognition issue, it cannot re-examine it for at least three years [paras 30 and 31].

Voluntary recognition

The Bill is not generally concerned with voluntary recognition, other than to encourage it in preference to imposed solutions. However, to cater for the possibility that an employer might agree to recognise a union voluntarily in order to avoid statutory recognition and then fail to honour the terms of the agreement, Part II of the Schedule (paras 33-37) allows a union (or, indeed, an employer) to apply to the CAC to specify a method for conducting collective bargaining in much the same way as it would do in statutory recognition cases.

Derecognition

Part III of the Schedule makes provision for a statutory derecognition procedure in cases where the CAC has made a declaration of recognition under Part I or a union has had a collective bargaining method specified by the CAC under Part I or Part II. It closely mirrors the statutory recognition procedures. Derecognition procedures cannot start until three years have elapsed since the CAC decision [para 41].

An employer can notify a union that it will be derecognised if the number of employees has fallen below 21 [para 43]. The union can apply to the CAC for a ruling if it disputes this.

In other cases, an employer can make a formal request to the union to end the bargaining arrangements. If the union fails to reply or rejects the request within 10 days, the employer can apply to the CAC [para 47]. If the union agrees to negotiate, there is a further 28-day period before application can be made to the CAC [para 46]. The CAC then follows steps similar to those involved in statutory recognition. If a majority of those who vote and at least 40% of the workers in the bargaining unit support the ending

of the bargaining arrangements in a secret ballot, the CAC must declare that the bargaining arrangements are to cease from a specified date [para 57].

There are also provisions allowing a worker, or group of workers, in the bargaining unit to make a request for an end to the bargaining arrangements [paras 51-52].

A different procedure applies, under Part IV of the Schedule, if the union was originally recognised "automatically" without a ballot. In these cases, an employer can request the union to end the bargaining arrangements on the ground that membership has fallen below 50% [para 62]. If no agreement is reached within the specified period, the employer can apply to the CAC to hold a secret ballot to decide whether the union should be derecognised [para 63(2)]. The CAC must be satisfied that fewer than 50% of the bargaining unit are union members before going ahead with the ballot [para 65]. The ballot would then follow the same lines as if there had been a ballot on recognition. If a majority of those who vote and at least 40% of the workers in the bargaining unit support the ending of the bargaining arrangements in a secret ballot, the CAC must declare that the bargaining arrangements are to cease from a specified date [para 66].

Derecognition of "sweetheart unions"

Part V allows workers to apply to the CAC for the derecognition of a union which does not have a certificate of independence and which has been voluntarily recognised by the employer. If various steps designed to secure agreement fail, the CAC must hold a derecognition ballot. If a majority of those who vote and 40% of the workers in the bargaining unit support derecognition, the CAC must declare that the bargaining arrangements must cease from a specified date [para 73]. This gives an independent union a chance to make an application for recognition.

Detriment

Part VI of the Schedule gives workers the right not to suffer detriment for engaging in activities connected with recognition or derecognition under the Schedule. There is a right of complaint to an employment tribunal and the possibility of compensation of such amount as the tribunal considers "just and equitable in all the circumstances" [paras 74-78]. A dismissal for any of these activities would be automatically unfair [para 79].

Clause 7 of the *Employment Relations Bill* allows an employee complaining of unfair dismissal in these circumstances to claim interim relief.[29] The effect is that, pending the hearing of the case, the employer must re-employ the worker on terms at least as favourable as before they were dismissed. Hence the worker continues to be paid.

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[29] The statutory authority for interim relief is contained in sections 128-132 of the *Employment Rights Act 1996*

C. Consultation on training

The Government had always intended that when a union was recognised under the statutory procedure, it should, as a general rule, be recognised for the purpose of collective bargaining on the issues listed in section 178 (2) of TULRCA. These are:

> (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
> (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
> (c) allocation of work or the duties of employment between workers or groups of workers;
> (d) matters of discipline;
> (e) a worker's membership or non-membership of a trade union;
> (f) facilities for officials of trade unions;
> (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

This is achieved by paragraph 2 (6) of the new Schedule A1.

Training is not included in this list, but the White Paper sought views on whether statutory recognition should confer a right to bargain on training as well.[30] In the event, the Government decided not to include training but to place employers under a separate duty to inform and consult the recognised union on training matters.[31]

Clause 6 of the Bill provides that where the CAC has imposed a method of collective bargaining, the employer must invite representatives of the union to six monthly consultation meetings on their training plans. Relevant information must be disclosed to the unions two weeks before the meeting. The Secretary of State will be able to amend the provisions on timing and disclosure of information by affirmative order. Trade unions will be able to complain to an employment tribunal if employers fail to comply with these provisions. If the complaint is upheld, compensation of up to two weeks' pay can be awarded to each member of the bargaining unit.

D. Discrimination against trade union members

The background to these provisions is described in pages 44-46 of Research Paper 98/99.

Clause 2 and Schedule 2 of the Bill amend TULRCA so as to overturn the decision of the House of Lords in *Wilson and Palmer* and ensure that employees are protected against

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30 Cm 3968, para 4.18
31 Letter, 17 December 1998, op cit

discrimination by omission on grounds of trade union membership, non-membership or activities. Both *Wilson* and *Palmer* were denied pay rises when they refused to give up collective bargaining and sign personal contracts. The House of Lords found that because the existing law only gave protection against "action", it did not cover cases of failure to act. The Bill, essentially, replaces the words "action" or "act" with the words "act, or any deliberate failure to act".

Clause 16 gives the Secretary of State the power to make Regulations protecting workers who refuse to enter into an individual contract which would replace a collective agreement which would otherwise apply against detriment or dismissal. Any such Regulations would be subject to the affirmative procedure. This implements a commitment in the letter of 17 December 1998 that the current protection for individuals choosing personal contracts would be balanced by protection for those who choose to remain with collective bargaining.

E. Blacklists

Background

The blacklisting of trade union activists was a major issue in the late 1980s and early 1990s. The activities of the Economic League came in for a good deal of criticism. The League provided member companies with a system for checking potential recruits "to see whether they are known to the League as active members or supporters of one of the revolutionary groups of the far Right or far Left".[32] It was alleged that the League maintained a card index of names obtained from sources such as press articles about demonstrations or industrial action.[33] Many of these people would have been active trade unionists. A report from the Employment Select Committee in 1991 recommended that, "with the exception of previous employers providing references, all organisations supplying information about potential employees should be subject to licensing and to a code of practice".[34]

Before the Select Committee Report there had been several attempts in Parliament to outlaw or control employment blacklisting, particularly in relation to trade unionists. The present Prime Minister moved an amendment to the *Employment Bill 1989/90* which was intended to ban "blacklists of people who seek employment but are refused as a result of information received about their trade union activities".[35] Listed below are some of the occasions on which the Economic League and employment blacklisting were debated in Parliament:

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[32] Letter from Michael Noar, Director General of the Economic League, to the Clerk of the Employment Committee, 20 December 1988

[33] Mark Hollingsworth and Charles Tremayne, *The Economic League: the Silent McCarthyism*, National Council for Civil Liberties, 1989

[34] Employment Committee, *Recruitment Practices*, 23 January 1991, HC 176-I, 1990-91, para 47

[35] SC Deb (D), 13 February 1990, c 54

- HC Deb 12 April 1988, cc 24-29, Debate on Ten Minute Rule Bill introduced by Maria Fyfe "to give persons a right of access to any information held by any organisation for the purpose of blacklisting"

- HC Deb 22 December 1988, cc 631-638, Adjournment Debate on the vetting of employees introduced by Greville Janner

- HC Deb 17 May 1989, cc 411-426, Debate on New Clause at Report Stage of *Employment Bill 1988/89* introduced by Maria Fyfe and designed to outlaw the use of blacklisting agencies

- SC Deb (D) 13 February, 15 February and 20 February 1990, cc 54-114, Committee Stage Debates on amendments to the *Employment Bill 1989/90*, related to blacklisting

- HC Deb 17 May 1990, cc 1075-1098, Debate at Report Stage of the *Employment Bill 1989/90* on amendments related to blacklisting

- HC Deb 25 July 1990, c 504, Presentation of *Personal Records (Employment) Bill* by Emma Nicholson, then a Conservative MP. The Bill would have allowed individuals access to records kept by blacklisting organisations and given them the right to correct inaccuracies

- HL Deb 10 July 1990, cc 162-169, Debate in Committee on the *Employment Bill 1989/90*, on amendments introduced by Baroness Turner of Camden designed to outlaw blacklisting on grounds of trade union activity

- HL Deb 23 July 1990, cc 1231-1238, Debate on Report on the *Employment Bill 1989/90*, on a new clause introduced by Baroness Turner of Camden designed to require blacklisting organisations to supply individuals with copies of their records if they are supplied to employers

There has been little Parliamentary activity on this issue since 1990. This may be partly because the *Employment Act 1990* did, in any case, make it unlawful to refuse a person employment on the ground that he was a trade union member. It may also be because publicity about the Economic League persuaded many companies to stop subscribing to it, leading eventually to it being wound up.

The Bill

Clause 3 of the present Bill gives the Secretary of State power to make Regulations, subject to the affirmative procedure, prohibiting the compilation or use of lists which:

> (a) contain details of members of trade unions or persons who have taken part in the activities of trade unions, and

(b) are compiled with a view to being used by employers or employment agencies for the purposes of recruitment

The Government intends to consult on Draft Regulations before they are made.

F. Strike ballots

Clause 4 amends TULRCA so that trade unions cannot be required to disclose the names of the members they intend to ballot or call out on industrial action. Clause 5 amends the law to allow unions and employers to extend the validity of a strike ballot beyond four weeks to a maximum of eight weeks.

The background to these provisions is described in pages 47-49 of Research Paper 98/99.

G. Maternity leave

The background to the provisions on maternity leave is described in pages 61-65 of Research Paper 98/99.

Clause 8 and Part I of Schedule 3 of the Bill replace the current provisions on maternity rights contained in Part VIII (sections 71-85) of the *Employment Rights Act 1996*, with a new Part VIII which will cover both maternity leave (in Chapter 1) and parental leave (in Chapter 2). The new Chapter 1 will confer the basic entitlement to maternity leave but many details of such matters as eligibility, duration, continuing contractual terms and notification requirements will be left to Regulations. The Regulations will be subject to the negative procedure under section 236 of the *Employment Rights Act 1996*. The aim is to introduce a more coherent set of rules. There will be consultation on Draft Regulations.[36]

Under the new Chapter 1, there will be three types of maternity leave:

- ordinary maternity leave, which will replace the present 14 weeks' statutory maternity leave to which all women are entitled as a result of the implementation of the *EC Directive on the protection at work of pregnant women or women who have recently given birth*.[37] This will have to be at least 18 weeks' long [new section 71 (2)];

- compulsory maternity leave, which will be part of ordinary maternity leave and will replace the two weeks' compulsory leave which women must take around the birth under the *Maternity (Compulsory Leave) Regulations 1994, SI No 2479*;[38] and

[36] Explanatory Notes, para 117
[37] Council Directive 92/85/EC
[38] These implemented health and safety requirements of the *EC Pregnant Workers Directive*

- additional maternity leave, which will replace the current right which women with two years' continuous service have to return to work within 29 weeks of the baby's birth. This is usually referred to as maternity absence.[39]

It is worth noting that the right to maternity leave applies to "employees" rather than to the more broadly defined "workers" who are eligible for protection under the Labour Government's legislation on working time and a national minimum wage. The term "worker" covers many people who might otherwise be classed as self-employed such as many agency workers, contract workers and commission workers. The current rights to maternity leave only apply to "employees". The new rights to parental leave and time off for domestic incidents are, similarly, confined to "employees".

Ordinary maternity leave

New section 71 (1) gives an employee the right to be absent from work during an ordinary maternity leave period, provided she satisfies prescribed conditions.

New section 71 gives a woman on ordinary maternity leave the "right to return from leave to the job in which she was employed before her absence" and to benefit from the terms and conditions of employment (except terms and conditions about remuneration) which would have applied had she not been absent. This repeats the current provisions. The woman will also be bound by any obligations (such as confidentiality conditions) arising from her terms and conditions (except the obligation to go to work). On returning to work, the woman's "seniority, pension rights and similar rights" will be as they would have been had she not been absent.

It is intended that Regulations will provide that, as now, the right to ordinary maternity leave will apply to all women regardless of length of service and that similar provisions on start dates (now any time from eleven weeks before the expected week of birth) will apply.[40] The Government intends setting the length of this leave at 18 weeks (to coincide with entitlement to Statutory Maternity Pay) rather than the current 14 weeks.[41] Regulations will specify what counts as remuneration (ie as a term which does not have to continue during the ordinary leave period). The Government intends that this should be the monetary element of a woman's salary or wages. At present it can be difficult for an employer to know whether terms such as a mortgage subsidy should continue.[42]

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39 See, eg, DTI leaflet, *Maternity Rights,* PL 958 (REV 4), August 1998
40 Explanatory Notes, para 121
41 Ibid
42 Ibid

Compulsory maternity leave

New section 72 provides that an employer shall not permit an employee who satisfies prescribed conditions to work during her compulsory maternity leave period. Regulations must provide that this period is at least two weeks long and that it falls within the ordinary maternity leave period (which will probably be 18 weeks, beginning any time from 11 weeks before the expected week of birth). The Government intends to use this power to re-enact the current provisions requiring two weeks' leave following the baby's birth.[43]

Additional maternity leave

New section 73 gives employees who satisfy prescribed conditions the right to an additional maternity leave period. While on additional maternity leave, women will be entitled "for such purposes and to such extent as may be prescribed", to the benefit of the terms and conditions of employment (excluding remuneration) which would have applied had they not been absent. Under the present law, it is not clear whether contractual terms continue during maternity absence. The Government's intention is that the terms and conditions which are always appropriate during an employment relationship (such as confidentiality and mutual trust and confidence) should continue, and that rights to seniority etc should be suspended, not lost. In general, though, the intention is that employers will be free to decide whether other terms and conditions should continue.[44]

The new section gives a woman the right to return to a job "of a prescribed kind". The intention is to preserve the current flexibility for employers to offer suitable alternative work where it is not reasonably practical to take a woman back into her old job.[45]

The Government intends to use the regulation-making powers to allow women with one year's continuous service to qualify for additional maternity leave. The current qualifying period is two years. Otherwise, the intention is that additional maternity leave should, like the present maternity absence, start immediately after the end of ordinary maternity leave and end 29 weeks after the birth of the baby.[46]

General

New section 74 will allow the Secretary of State to make Regulations covering redundancy and dismissal of women on maternity leave. The intention is to replicate the current provisions.[47]

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43 Explanatory Notes, para 123
44 Explanatory Notes, para 126
45 Explanatory Notes, para 127
46 Explanatory Notes, para 128
47 Explanatory Notes, para 129

New section 75 gives the Secretary of State the power to make Regulations governing such matters as notification and evidence requirements. It is intended that employees will, as now, be required to notify their employers of their pregnancy and the expected date of birth, and, if required, to supply medical confirmation.[48] However, the Government hopes to simplify and rationalise the current somewhat confusing requirements. The opportunity may be taken to require employers to provide employees with information about maternity procedures to avoid later misunderstandings; or to deal with the current situation whereby a woman can lose her right to return because she fails to meet a technical requirement, even though her employer is quite clear about her intentions.[49]

Clause 10 and Part III of Schedule 3 of the Bill include a provision protecting employees against detriment for reasons to be prescribed connected to pregnancy, childbirth or maternity; ordinary, compulsory or additional maternity leave; parental leave; or time off for domestic incidents [para 10].

H. Parental leave

The background to the provisions on parental leave is described in pages 55-60 of Research Paper 98/99.

Clause 8 and Part I of Schedule 3 replace Part VIII of the *Employment Rights Act 1996* (on Maternity Rights) with a new Part VIII, Chapter 2 of which establishes a new right to parental leave. This is necessary to comply with the EC *Parental Leave Directive*.[50]

New section 76 requires the Secretary of State to make Regulations entitling an employee who satisfies specified conditions to "be absent from work on parental leave for the purpose of caring for a child". Like the maternity leave Regulations, these Regulations will be subject to the negative procedure under section 236 of the *Employment Rights Act 1996*. The regulations must allow a total period of parental leave of at least three months, the minimum allowed by the EC Directive [new section 76 (3)]. The Government intends that parents should have a continuous period of employment of at least one year to qualify for this right.[51] This is the maximum allowed by the EC Directive. They also intend to set the maximum age of a child in respect of whom parental leave may be taken by Regulation. This is "likely to be below 8 years, the upper limit specified in the Parental Leave Directive".[52] Regulations will also make "appropriate provisions for adoptive parents, who may adopt older children or need leave before formal adoption takes

48 Explanatory Notes, para 130
49 Ibid
50 Council Directive 96/34/EC as extended to the UK by Council Directive 97/75/EC
51 Explanatory Notes, para133
52 Explanatory Notes, para 133

place".[53] They will also define who qualifies in terms of whether they have or will have responsibility for a child.

Regulations under new section 76 may also be used to specify the circumstances in which an employer can postpone leave (such as peak business or absence periods, or difficulty in finding a replacement) and to deal with possible limits on the number of times or length of time the leave can be postponed. They may also be used to specify any rules about whether the leave should be taken in a single block or in blocks of a minimum length.[54]

New section 77 provides that the Regulations must ensure that contractual terms and conditions continue during parental leave "to such extent as may be prescribed". The Government's intention is to make the same provisions on contractual terms and the right to return to a similar job for parental leave as it makes for additional maternity leave.[55]

New sections 78 and 79 confer regulation-making powers to deal with a whole range of detailed matters, such as the treatment of redundancy and dismissal during parental leave; the option of part-time working; the notice and evidence which will be required; and any records of leave taken which must be kept.

New section 80 gives employees a right to make a complaint to an employment tribunal if their employer unreasonably postpones or obstructs their leave. The tribunal can award such compensation as it considers "just and equitable".

There is a provision in new section 81 for collective or workforce agreements to have effect in place of the Regulations, in accordance with Regulations. This is a new feature of UK employment law, stemming very much from European practice. The *Parental Leave Directive* allows for qualifying conditions and terms to be set by collective agreements, as well as by legislation.

The Bill and Explanatory Notes add little to what was already known about the detail of the new right to parental leave. The Government will be issuing Draft Regulations for consultation later in the year.

Neither the Bill nor the Explanatory Notes address the question of whether the leave should be paid or not, although the indications are that the Government intends it to be unpaid. Tony Blair, in his foreword to the *Fairness at Work* White Paper, wrote; "… it cannot be right to deny British citizens basic canons of fairness - … rights to unpaid parental leave". A recent article in the *Times* reported that the National Working Life Forum, chaired by Joanna Foster, is calling on the Government to make parental leave

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53 Ibid
54 Ibid
55 Explanatory Notes, para 134

paid.[56] Ms Foster said: "We already know from other countries… that nobody takes it unless it is paid". The article says "there are rumours that the Downing Street Policy Unit is considering making one or two weeks of parental leave paid". Certainly the costings in the Regulatory Impact Appraisal [RIA] assume that it will be unpaid.[57] Although basic terms of the employment contract will continue during parental leave, entitlement to remuneration will cease (as is the case with maternity leave). Any paid parental leave scheme would, presumably have to be similar to the Statutory Maternity Pay scheme and would probably derive from separate, social security legislation.

I. Time off for domestic incidents

The background to the provision for time off for domestic incidents is described in pages 60-61 of Research Paper 98/99.

Clause 9 and Part II of Schedule 3 of the Bill introduce new sections - 57A, 57B and 57C - into the *Employment Rights Act 1996.* They establish a right to time off for domestic incidents, as required by the EC *Parental Leave Directive.*

New section 57A gives an employee the right "to take a reasonable amount of time off during [his] working hours, where it is reasonable for him to do so, in order to deal with a domestic incident". "Domestic incident" is defined as an incident which:

> (a) occurs in the home of the employee, or
> (b) affects a member of the employee's family or a person who relies on the employee for assistance

The Explanatory Notes elaborate:

> The intention is that this right will allow employees to take necessary time off to deal with an urgent problem where it is reasonable in all the circumstances for them to do so. It is also to ensure that the amount of time off which is reasonable is linked to the amount of time necessary to deal with a short-term problem or make longer term arrangements to deal with it, to the needs of the business and the consequences of the employee's absence, and other factors which may be set out in regulations. For time off to be justifiable, the employee's presence or attendance would be crucial to resolving the problem or, where the incident affects someone other than the employee, to the welfare and/or recovery of that person.[58]

They go on to list the type of incidents which are intended to be covered:

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56 "Call for three months' paid paternity leave", *Times*, 11 January 1999
57 RIA, p 2
58 para 141

- dealing with the sudden illness or accident of a member of the employee's family or someone who relies on the employee;
- dealing with a crisis relating to a member of the employee's family requiring the employee's immediate attendance, for example to deal with a fracas at school in which the employee's child has been involved;
- dealing with the death of someone close to the employee, or where the employee is the executor or fully responsible for the funeral and other bereavement related arrangements;
- dealing with a domestic crisis such as unavoidable severe damage or disruption to property, like flooding, fire or burglary; and
- making arrangements for looking after children due to the sudden illness or incapacity of the normal carer (which could be the other parent).[59]

Regulations may specify the factors which determine whether it is reasonable to take time off (this could include the circumstances of the business as well as the employee) and how much time it is reasonable to take off (this could impose a limit on the number of days per incident or period). They may also deal with notification, evidence and procedures. Regulations on time off for domestic incidents, like those on maternity and parental leave, will be subject to the negative procedure under section 236 of the *Employment Rights Act 1996.*

New section 57B allows an employee to complain to an employment tribunal if his employer refuses him reasonable time off under these provisions. The tribunal may award such compensation as it considers "just and equitable".

New section 57C provides that collective or workforce agreements can override the statutory provision, in the same way that they will be able to replace the parental leave provisions.

The Explanatory Notes say that the right is to unpaid time off.[60]

J. Right to be accompanied in disciplinary and grievance hearings

The background to the introduction of a right to be accompanied in disciplinary and grievance hearings is described in pages 49-52 of Research Paper 98/99.

Clause 11 of the Bill requires an employer to allow a worker to be accompanied by a single companion at a disciplinary or grievance hearing if the worker "reasonably requests to be accompanied". The companion must be either a trade union official or another of the employer's workers, chosen by the worker concerned. The companion will be entitled to address the hearing and confer with the worker, but not to answer questions

59 para 142
60 para 141

on the worker's behalf. Any worker accompanying a fellow worker in these circumstances must be allowed paid time off [clause 11 (6) and (7)].

Clause 14 defines the disciplinary or grievance hearings covered by the right. They must be held as part of the employer's existing disciplinary or grievance procedures and must be hearings which:

> (a) in the case of a disciplinary hearing, could result directly in the employer administering a formal warning to a worker or taking some other action in respect of him, or
> (b) in the case of a grievance hearing, concerns the performance of a duty by the employer in relation to a worker.

This definition is designed to exclude trivial complaints.

Clause 12 gives a worker denied the right to accompaniment, a right to make a complaint to an employment tribunal. The tribunal may award compensation of up to two weeks' pay. Clause 13 protects workers exercising their right or accompanying someone exercising their right against detriment or dismissal.

Clause 14 also defines the "workers" covered by this right. The broad definition is used and agency workers, home workers, Crown employees and employees of the House of Lords and House of Commons are explicitly covered.

K. Dismissal of strikers

The background to the provisions on the dismissal of strikers is described in pages 41-43 of Research Paper 98/99.

Clause 15 of the Bill inserts a new section 238A in TULRCA which states that an employee who is dismissed shall be regarded as unfairly dismissed if:

> (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee took part in protected industrial action, and
> (b) subsections (2), (3) or (4) apply to the dismissal.

Subsections (2), (3) and (4) essentially confine unfair dismissals to those which take place during the first eight weeks of the strike. If they take place after eight weeks, they are still unfair if the employee had, in fact, returned to work before eight weeks. They could also still be unfair if the employer had failed to follow "an appropriate procedure for the resolution of the dispute to which the industrial action relates".

"Protected" industrial action is lawfully organised industrial action.

Employees can complain of unfair dismissal under these provisions regardless of length of service or age [clause 15 (2) (b)].

L. Fixed term contracts

The background to this provision is described in pages 24-25 of Research Paper 98/99.

Clause 17 amends section 197 of the *Employment Rights Act 1996* to remove the right of workers on fixed term contracts lasting one year or more to waive their right to claim unfair dismissal arising from failure to renew the contract on its expiry.

M. Part-time work

Clause 18 of the Bill requires the Secretary of State to make regulations preventing discrimination against part-time workers. This will enable the Government to implement the EC *Directive on Part-Time Work*.[61] Although EC Directives can be implemented in this country by means of secondary legislation under the *European Communities Act 1972*, the Government wants to go wider than the Directive (specifically to cover pay), so it needs to take the necessary powers by primary legislation.

Background

The European Commission first issued a draft directive which would have given equal rights to part-timers in 1990.[62] Proposals were always blocked by the UK's Conservative Government, so, in December 1994, the Commission decided to take them forward under the Social Chapter procedures which excluded the UK. One method of legislating under the Social Chapter involves the negotiation of a framework agreement between the European social partners. At present, these are UNICE (private sector employers), CEEP (public sector employers) and ETUC (trade unions). This method was used to negotiate the *Parental Leave Directive* and was used for the part-time work proposals as well.

On 6 June 1997, the social partners concluded an agreement and this was annexed to a proposed Council Directive.[63] The main provisions of the framework agreement are:

- The purpose is "to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work" and "to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers" [Clause 1 of the framework agreement]

- It applies to part-time workers who have an employment contract or employment relationship as defined by law, collective agreement or practice [Clause 2.1]

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61 Council Directive 97/81/EC as extended to the UK by Council Directive 98/23/EC

62 EC Doc 8072/90, COM (90) 228

63 *Proposed Council Directive [10230/97] of 28 July 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC*, COM(97) 392

- Member States may, "for objective reasons", and after consultation, exclude part-time workers who work on a casual basis [Clause 2.2]

- Part-time workers are (generally) defined as those whose hours of work are less than the normal hours of work of a comparable full time worker [Clause 3.1]

- The principle of non-discrimination is established: "In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds" [Clause 4.1]

- Where appropriate, the principle of *pro rata temporis* [ie pro rata] shall apply

- Member States may, when justified by objective reasons, "make access to particular conditions of employment subject to a period of service, time worked or earnings qualifications" [Clause 4.4]

- Member States are required to "identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them" [Clause 5.1]

- Refusal to transfer from full to part-time work, or vice versa, should not, in itself, constitute a valid reason for termination of employment [Clause 5.2]

- Employers should give consideration to requests to transfer from full to part-time work and vice versa, and make available information about the availability of part-time and full-time positions in the establishment in order to facilitate transfers [Clause 5.3]

The Directive itself requires Member States to put the agreement into effect within two years of the directive's adoption or three years if necessary to take account of special difficulties or implementation by a collective agreement. It was adopted at the Social Affairs Council on 15 December 1997.[64]

The Directive did not originally cover the UK because it had been made under the Social Chapter. However, when it "signed" the Social Chapter at the Amsterdam summit in June 1997, the Labour Government agreed to be bound by measures adopted under its provisions in the transitional period before the Treaty of Amsterdam comes into force. At the Social Affairs Council on 7 April 1998, an Article 100 Directive applying the Part-Time Work Directive to the UK was adopted.[65] The *Fairness at Work* White Paper announced that the Government would "implement this Directive by April 2000 and

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[64] *Directive concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC* , 97/81/EC

[65] DTI press release, *Ian McCartney speeds part-time work directive through Europe,* 7 April 1998

[would] consult both employers' and employees' bodies and other interested parties before doing so".[66]

An Explanatory Memorandum on the Draft Directive extending the original Directive to the UK was submitted by the DTI on 17 March 1998. It described the impact on UK law as follows:

> 11 Implementation of this Directive will impact on UK employment law and legislation will be required to guarantee the provisions of the framework agreement, which the Directive will apply to the UK. Statutory employment rights are already equal for part-time and full-time employees. In many cases, equal treatment legislation indirectly requires equal treatment of, and equal contractual rights for, part-timers, including equal pay, since providing lower pay or worse conditions or affording less favourable treatment in other respects will often be unlawful on the grounds of indirect sex discrimination (as a far higher proportion of women than men work part-time). However, specific legislation will be needed to prohibit directly less favourable contractual rights for part-time workers. Legislation might also be needed to fulfil the requirements of the Agreement aimed at promoting flexibility and the provision of information about part-time work within a firm.
>
> 12 The proposed Directive does not concern matters relating to statutory social security. The legal base of the Part-Time Work Directive 97/81/EC does not appear to allow it to implement the Framework Agreement as regards pay. The UK recognises the intention of the social partners to cover discrimination in all aspects of working conditions, including pay. The Government is fully committed to the principle of equal pay for part-time workers, and will need to consider how best to give this effect in national legislation. Implementation of the Directive may involve either, or both, primary legislation or regulations under the European Communities Act 1972.

It went on to describe the policy implications:

> 15 The Government is concerned to ensure that any new legislation adopted under the Agreement on Social Policy promotes or contributes to employability, flexibility and competitiveness. The Government is keen to see improvements in working conditions and for these to be agreed in partnership between employers and employees. The broad aims of the framework agreement fulfil these criteria, in particular to promote labour market flexibility while improving employment conditions. The Government therefore fully supports the extension of the Part-Time Work Directive to the UK.
>
> 16 The final text of the Part-Time Work Directive met UK concerns on its content, which were shared by other member states (referred to in paragraph 17 of the Explanatory Memorandum of 21 October 1997).

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[66] Cm 3968, para 5.5

> 17 The Government is keen to encourage fair and flexible working practices, including part-time working, which can be of benefit to both employer and employee. The Government is also committed to ensuring that employees are treated fairly and that they are entitled to decent minimum standards at work. Together, the Part-Time Work Directive and the new Directive will help to ensure that across the whole of the European Community part-time employees are treated fairly and that part-time employment is not seen as second rate employment. Their direct impact is likely to be limited in the UK, which already has a large proportion of part-time employees compared with most other members of the European Community, and where most part-time workers already have employment rights equivalent to those of full-time workers. Nevertheless, implementation in the UK of the framework agreement is likely to help encourage a more positive view of part-time work, improve the quality of part-time jobs and increase access to part-time work. In particular this will help women, as well as men, to combine work and family life.

A Compliance Cost Assessment attached to this Explanatory Memorandum estimated that the Directive should not impose any significant costs on UK employers:

> Nearly all employers in their current practices already meet the requirements of the draft directive. Some differences in the conditions of part-time and full-time workers remain, the most significant being differences in entitlements to leave, but it is expected that the forthcoming legislation to implement the Working Time Directive (by establishing minimum entitlements for all) will largely remove these. Some other differences in non-wage benefits may remain. However it is expected that this will apply to a relatively small number of employers.[67]

The Bill

Clause 18 requires the Secretary of State to "make regulations for the purpose of securing that persons in part-time employment are treated, for such purposes and to such an extent as the regulations may specify, no less favourably than persons in full-time employment". The Regulations would be subject to the affirmative procedure under clause 33 of the Bill.

There are wide-ranging powers to make Regulations covering matters such as the definition of part-time and full-time workers, the circumstances constituting less favourable treatment, any exclusions (for example, of casual workers) and the remedies for less favourable treatment. The Explanatory Notes indicate that the Government intends that the Regulations will draw on current legislation relating to employment rights and non-discrimination.[68] The normal route for disputes would be through employment

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67 Explanatory Memorandum, para 19

68 Explanatory Notes, para 171

tribunals.[69] One possibility is that a questionnaire procedure similar to that established under the *Disability Discrimination Act 1995*, might be used to enable those who consider that they have been discriminated against to require information from their employer to help them to decide whether to proceed with a claim.[70] As with parental leave and time off for domestic incidents, it will be possible for "specified agreements" (which could well be collective or workforce agreements) to have effect in place of the Regulations [clause 18 (3) (g)].

The Government intends to consult fully on Draft Regulations which will be published for comment.[71]

Clause 19 gives the Secretary of State the power to issue Codes of Practice containing guidance for the purpose of:

> (a) eliminating discrimination in the field of employment against part-time workers;
> (b) facilitating the development of opportunities for part-time work;
> (c) facilitating the flexible organisation of working time taking into account the needs of workers and employers;
> (d) any matter dealt with in the framework agreement on part-time work annexed to Council Directive 97/81/EC

Any such Codes would have to be published in draft for consultation, then laid before both Houses of Parliament, where they would, effectively, be subject to the negative procedure [clause 20]. The Codes - like all such Codes - would not be legally binding, but they would be admissible in evidence in proceedings before an employment tribunal [clause 19 (3) and (4)].

N. Extension of employment rights coverage

The background to this provision is contained in pages 27-31 of Research Paper 98/99.

Clause 21 gives the Secretary of State the power to extend the coverage of existing employment protection legislation to individuals of specified descriptions by Order.

The clause applies to "any right conferred upon an individual against an employer (however defined)" by the *Trade Union and Labour Relations (Consolidation) Act 1992*, the *Employment Rights Act 1996*, the *Employment Relations Bill* itself (once it has become law), and any instrument made under section 2(2) of the *European Communities Act 1972* (this would include, for example, the *Working Time Regulations 1998*). It would, therefore, cover the right to claim unfair dismissal, redundancy payments and

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69 Explanatory Notes, para 174
70 Explanatory Notes, para 176
71 Explanatory Notes, para 171

maternity leave. It does not include the *National Minimum Wage Act 1998* or the sex, race and disability discrimination legislation, although the coverage of these Acts is already very extensive.

The Explanatory Notes say:

> The Government envisages using this new power to rationalise and update the coverage of the employment rights legislation. The changes would aim to ensure that all workers other than the genuinely self-employed enjoy the minimum standards of protection that the legislation is intended to provide, and that none are excluded simply because of technicalities relating to the type of contract or other arrangement under which they are engaged. The Government is committed to carrying out full public consultation on the details of any changes before exercising the new power.[72]

O. Central Arbitration Committee

Clauses 22 and 23 amend the law governing the membership and proceedings of the Central Arbitration Committee (CAC) so that it will be able to carry out its new responsibilities for trade union recognition under clause 1 and schedule 1 of this Bill.

Background

The CAC was set up on 1 February 1976 under section 10 of the *Employment Protection Act 1975* [EPA]. It replaced the Industrial Arbitration Board (previously the Industrial Court) as the standing national arbitration body in the field of industrial relations and was given additional powers to make awards in disputed disclosure of information and trade union recognition cases.[73] The CAC was a central industrial relations body in the late 1970s, but the non-interventionist approach of the Conservative Government led to its becoming almost dormant during the 1980s and 1990s. It now deals almost exclusively with trade union complaints that an employer has failed to disclose information necessary for collective bargaining. However, it is due to be restructured and reinforced as a result of the Government's proposals for a statutory procedure for trade union recognition. The CAC will have a crucial role in deciding recognition disputes. The statutory provisions governing the CAC are now consolidated in sections 259-265 of the *Trade Union and Labour Relations (Consolidation) Act 1992* [TULRCA].

The CAC's original functions were:

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72 Explanatory Notes, para 185

73 The first standing national arbitration body was the Industrial Court set up under the *Industrial Courts Act 1919.* This was renamed the Industrial Arbitration Board in 1971 under the *Industrial Relations Act 1971* which, amongst other things, established the short-lived National Industrial Relations Court.

- To act as a permanent, independent body to assist parties seeking adjudication of an industrial dispute. Many industrial procedure agreements incorporated the Industrial Court as the final stage of their dispute procedure and the CAC inherited these responsibilities. ACAS was also given the option of referring disputes for voluntary arbitration by the CAC.[74] This function still exists though it has not been used since 1988.

- To decide unresolved issues under the *Fair Wages Resolution*. This resolution of the House of Commons was passed in 1891 and amended in 1909 and 1946. Its aim was to ensure that those employers who received Government contracts paid fair wages. Fairness was defined by comparison with rates, hours and conditions established by negotiation or arbitration, or, in the absence of such terms, with the general level observed by comparable employers. The *Fair Wages Resolution* was rescinded with effect from 21 September 1983, following a debate in the Commons on 16 December 1982.

- To amend collective agreements or pay structures which were discriminatory. This responsibility had been conferred on the Industrial Court by section 3 of the *Equal Pay Act 1970* and was inherited by the CAC. Section 3 of the *Equal Pay Act* was repealed by the *Sex Discrimination Act 1986*. The Conservative Government argued that as EC legislation meant that discriminatory terms in collective agreements were void, there was no need for an enforcement mechanism of this nature.

- To determine disputes about disclosure of information under the *Employment Protection Act 1975*. Section 19 of this Act gave recognised trade unions the right to complain to the CAC if an employer refused to disclose information necessary for collective bargaining, as required under sections 17 and 18 of the Act. This is information "without which the trade union representatives would be to a material extent impeded in carrying on… collective bargaining" and "which it would be in accordance with good industrial relations practice" to disclose.[75] If the CAC found the complaint well-founded, it could make a declaration about the information which should be disclosed. If the employer persisted in refusing to make the disclosure, the CAC could make an award of terms and conditions to be included in contracts of employment. This provision still remains (in sections 183-185 of TULRCA) and is the main, if not the only, source of work for the CAC at present.

- To impose terms and conditions where ACAS recognition awards were ignored. Section 16 of the *Employment Protection Act 1975* enabled an independent trade union to complain to the CAC that an employer was not complying with an ACAS recommendation to recognise that trade union and to claim improved terms and conditions. If the CAC found the complaint well-founded, it was required to make a

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74 Now under section 212 of TULRCA

75 EPA section 17 (1) and TULRCA section 181 (2)

declaration specifying the workers and matters in relation to which the employer was failing to comply and to make an award determining new terms and conditions of employment. The CAC, in its annual report for 1978, emphasised that it could not impose recognition, merely terms and conditions:

> 2.15 It must therefore be emphasised that cases under section 16 are essentially straightforward arbitrations with the unusual background for arbitration that the parties do not have a friendly relationship. Whereas the Committee, in accordance with its usual practice, will strive to do all it can to encourage good relationships and practices, the imposition of recognition as an item in the terms and conditions of employment is not regarded as appropriate.

The trade union recognition provisions of the EPA were repealed by the *Employment Act 1980*.

- To extend the generally accepted level of terms and conditions throughout an industry under Schedule 11 of the *Employment Protection Act 1975*. The *Terms and Conditions of Employment Act 1959* had permitted the Industrial Court to extend terms of voluntary collective agreements to employers who were not parties to them, by enforcing recognised terms and conditions. Schedule 11 of the EPA transferred this power to the CAC and added the additional power to make an award, when there were no recognised terms to enforce, of terms not less favourable than the "general level" observed "for comparable workers by employers in the trade, industry or section in which the employer in question is engaged in the district in which he is so engaged."[76] Schedule 11 was also repealed by the *Employment Act 1980*.

At present, the CAC consists of a chairman appointed by the Secretary of State (after consultation with ACAS) and other members appointed by the Secretary of State from persons nominated by ACAS "as experienced in industrial relations, and … include some persons whose experience is as representatives of employers and some whose experience is as representatives of workers".[77] The Secretary of State may, after consultation with ACAS, appoint one or more deputy chairmen in addition to the existing members of the Committee. Appointments are for up to five years, but previous membership does not affect eligibility for re-appointment. Indeed, Sir John Wood, Emeritus Professor of Law at Sheffield University, has been the chairman since the CAC was established. The functions of the Committee are performed on behalf of the Crown, but not so as to make it "subject to directions of any kind from any Minister of the Crown as to the manner in which it is to exercise its functions".[78]

The current members of the CAC are:[79]

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76 EPA, schedule 11, para 2
77 EPA, schedule 1, para 14 (2) and TULRCA, section 260 (2)
78 EPA, schedule 1, para 27 and TULRCA, section 259 (2)
79 CAC Annual Report 1997, updated by CAC, 19 January 1999

Chairman

Professor Sir John Wood CBE	Emeritus Professor of Law, Sheffield University

Deputy Chairmen

Professor R W Rideout	Director of Research Studies, Faculty of Laws, University College, London
Professor Linda Dickens	Professor of Industrial Relations, University of Warwick
Professor J F B Goodman	Professor of Industrial Relations, UMIST

Members with experience as Representatives of Employers

Mr L D Cowan	Former Personnel Director, TSB England & Wales plc
Mr P Moseley	Human Resources Consultant
Mr D A F Staines	Managing Director, Glyced Holdings Limited
Miss D M Whittingham	Director of Personnel, British Red Cross Society

Members with experience as Representatives of Workers

Ms S R Corby	Senior Lecturer in Industrial Relations. Manchester Metropolitan University
Ms B Hillon	National Women's Officer, Union of Shop, Distributive and Allied Workers
Professor A J Pointon	National Adviser, Association of University & College Lecturers
Mr G Wright	Regional Secretary, Transport & General Workers' Union, Wales

ACAS has a statutory responsibility to provide the CAC with staff, accommodation, equipment and facilities.[80]

The CAC described its method of working in chapter 3 of its first annual report, for 1976. The customary form of a Chairman (who could be one of the Deputy Chairmen) flanked by two members has been adopted for hearings. Parties are asked to prepare and exchange written statements before the hearing. The hearing itself is informal and is

[80] EPA schedule 1, para 8 and TULRCA s 259 (3)

aimed at the amplification and explanation of the written evidence. Adjournments are encouraged where it appears that the parties may be able to work towards their own solution, often with the help of ACAS conciliators. The "overriding philosophy" of the Committee was described as follows:

> The Committee is not a court in the traditional sense. Its procedures and hearings are structured so as to achieve complete informality. The aim is to encourage the approach by way of problem solving rather than by emphasising the aspects of conflict and verdict. Above all there is a commitment to the principles of sound industrial relations and workable solutions. Wherever, whether in the interpretation of fact or application of rules, the Committee finds it is left with uncertainty or discretion, it is determined to exercise this discretion within this overriding commitment.[81]

The CAC's annual reports chart a dramatic increase in workload in its early years as the new EPA jurisdictions came into operation, and as the pay policies of the 1970s prevented resolution of pay anomalies by normal collective bargaining. Additional staff were drafted in and branch offices opened up. At the beginning of 1977, there were 4 deputy chairmen and 25 side members: by the end of the year, these figures had risen to 18 and 63 respectively. Once the pay policies ended in 1979 and Schedule 11 had been repealed in 1980, the workload dropped dramatically. References reached a peak of 1,065 in 1978, but dropped to 46 in 1981. In 1997, the last year for which an annual report has been published, they were down to 22 (all on disclosure of information). The CAC now has only two jurisdictions: disclosure of information and voluntary arbitration. A recent article in *People Management*, the journal of the Institute of Personnel Development, describes the Committee as "moribund".[82]

The CAC will be "restructured and reinforced" to act as the final arbiter on various issues connected with the statutory trade union recognition procedures under this Bill. The *Fairness at Work* White Paper said:

> The procedure will encourage the parties to reach voluntary agreements wherever possible. If, exceptionally, this proves impossible, a restructured and reinforced Central Arbitration Committee (CAC) will decide any of the following issues on which the parties are unable to agree:

- whether a trade union has reasonable support among the employees for whom it is seeking recognition. This will rule out frivolous applications;

- what is the appropriate bargaining unit. Where there is disagreement over the bargaining unit proposed by the union, the CAC will apply criteria including the need for effective management, existing bargaining arrangements and the desirability of

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81 CAC Annual Report 1976, para 5.4

82 "Political spotlight falls on dormant recognition body", *People Management*, 14 January 1999

avoiding fragmented units within an undertaking. Employers must and will be free to organise their business in the way they choose;

- whether a sufficient majority of employees support recognition: the CAC will award recognition where a ballot shows that a majority of those voting and at least 40% of those eligible to vote are in favour of recognition. This number will be reviewed after the legislation has been in place for a period of time so that it can be altered if it is shown to be unworkable.

- the procedure to be followed for negotiations between an employer and a trade union. Recognition will cover pay, hours and holidays. The Government invites views on whether it should also cover training. The parties would of course be free to reach voluntary agreements on the issues to be covered.[83]

Originally, trade union recognition had been going to be automatic where over 50% of the workforce were already union members, but the Government bowed to employer pressure on this point and announced on 17 December 1998, that the CAC would not award recognition without a ballot in such cases: "where in its sole discretion it decides

> (a) it is in the interests of good industrial relations for there to be a secret ballot, notwithstanding the fact that a majority of the workers in the relevant union are already members of the union seeking recognition
> (b) there is evidence that despite holding union membership, a significant number of the members of the union do not wish the union to represent them for collective bargaining either because they make this clear to the CAC or the CAC concludes there are doubts about this wish from the circumstances of their joining the union, including only where the CAC think it relevant, their length of time in union membership."[84]

These increased powers for the CAC have revived interest in what has for many years been a very low profile body. The journal *People Management*, commented:

> The composition of the soon-to-be revamped CAC may well, like that of the Low Pay Commission, become a political hot potato, with unions and firms keen to secure sympathetic representatives.
>
> Stephen Byers, the trade and industry secretary, will have the final say on its members (…) Committee members contacted by *People Management* were wary of commenting on the future change to their body. Their tenures are due to end in July.[85]

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83 Cm 3968, para 4.18
84 Letter, 17 December 1998, op cit
85 "Political spotlight falls on dormant recognition body", *People Management*, 14 January 1999

The Bill

Clause 22 amends section 260 of TULRCA so that all members of the CAC will be appointed by the Secretary of State (after consultation with ACAS). At present, all members except the chairman are nominated by ACAS. All members will have to be "experienced in industrial relations", some as "representatives of employers" and some as "representatives of workers". The same requirement currently applies to ACAS nominations.

Clause 23 prescribes the way in which the CAC must proceed when dealing with recognition cases under this Bill. Essentially, cases must be heard by a panel consisting of a chairman (who must be the chairman or one of the deputy chairmen of the CAC), a member with experience of representing employers and a member with experience of representing workers. The panel will be able to sit in private if expedient. If the panel fails to reach a unanimous decision, a majority decision will suffice.

P. Advisory, Conciliation and Arbitration Service (ACAS)

Clause 24 amends the "general duty" of ACAS as set out in section 209 of TULRCA. Until 1993, the general duty of ACAS was "to promote the improvement of industrial relations, and in particular to encourage the extension of collective bargaining and the development and, where necessary, reform of collective bargaining machinery".[86] In 1993, the Conservative Government's *Trade Union Reform and Employment Rights Act 1993* [TURER] amended the duty so that it now reads:

> It is the general duty of ACAS to promote the improvement of industrial relations, in particular, by exercising its functions in relation to the settlement of trade disputes under sections 210-212.

The amendment was made in the light of the contraction in collective bargaining in the 1980s and the Conservative Government's policy of encouraging individual bargaining. ACAS' functions under sections 210-212 concern conciliation and arbitration.

Clause 24 removes the words inserted by TURER, leaving ACAS with a general duty merely "to promote the improvement of industrial relations". The Explanatory Notes say this "in line with the Government's wish to enhance the standing of ACAS's work on dispute prevention".[87]

Q. Abolition of Trade Union Commissioners

The background to this provision is described in pages 52-54 of Research Paper 98/99.

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[86] *Employment Protection Act 1975*, section 1 (2), then section 209 TULRCA

[87] Explanatory Notes, para 193

Clause 25 abolishes the offices of the Commissioners for the Rights of Trade Union Members (CRTUM) and for Protection Against Unlawful Industrial Action (CPAUIA). The CRTUM provides assistance to trade union members taking, or contemplating taking, legal action against their union on specified matters. The CPAUIA provides assistance to individuals taking, or contemplating taking, legal action against a trade union which has unlawfully organised industrial action which will deprive them of goods and services.

R. Certification Officer

Some background to this provision is described in pages 52-54 of Research Paper 98/99.

Clause 26 and schedule 4 make substantial amendments to the powers and duties of the Certification Officer [CO]. This is so that he will be able to hear complaints involving most aspects of the law where the CRTUM is currently able to provide assistance and enable trade union members to secure their rights without having to go to court.

Schedule 4 makes extensive amendments to those sections of TULRCA which deal with the Certification Officer's duties. It also gives him a new power to deal with certain cases involving breach of union rules. Generally, the amendments ensure that the CO has the power to hear complaints that the law has been broken and to issue enforcement orders. Trade union members would still have the right to take the union to court, but could not do both. The CO's decisions would be enforced in the same way as court orders, and courts and the CO would have to take note of each other's decisions on similar cases. Appeals against the CO's decisions on points of law would be to the Employment Appeal Tribunal. The areas concerned are:

- the trade union's duty to maintain a register of members' names and addresses
- the trade union's duty to keep proper accounting records and allow members of the union access to them
- the trade union's duty to ensure that disqualified individuals do not hold certain senior positions in the union if they have been convicted of certain offences relating to the financial affairs of the union
- the trade union's duties in respect of elections to certain senior positions in the union
- the trade union's duties in relation to political funds and political fund ballots
- the trade union's duties relating to ballots on amalgamations or transfers of engagements

These are all areas in which the CRTUM can currently assist a trade union member. The CRTUM can also assist with applications to the court connected with the unlawful use of union property and industrial action ballots.[88]

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[88] TULRCA, section 109 (1)

The new provision inserts a new Chapter VIIA (sections 108A-108C) in Part I of TULRCA [Schedule 4, para 18]. This gives union members the right to complain to the Certification Officer about a breach or threatened breach of union rules relating to:

> (a) the appointment or election of a person to, or the removal of a person from, any office;
> (b) disciplinary proceedings by the union (including expulsion);
> (c) the balloting of members on any issue other than industrial action;
> (d) the constitution or proceedings of any executive committee or any conference or other body;
> (e) such other matters as may be specified in an order made by the Secretary of State.[89]

At present, the CRTUM can assist with legal proceedings for breach of contract in all these cases. He can also help with cases of alleged breach of union rules concerning:

- the authorising or endorsing of industrial action;
- the application of the union's funds or property; and
- the imposition, collection or distribution of any levy for the purposes of industrial action.[90]

The CO will take over none of the duties of the CPAUIA. Individuals will still have the "Citizen's right" to bring proceedings to halt unlawful industrial action which might deprive them of goods and services, but there will be no public body charged with helping them to avail themselves of this right.[91]

S. Partnership Fund

Clause 27 enables the Secretary of State to make funds available "for the purposes of encouraging and helping employers (or their representatives) and employees (or their representatives) to improve the way they work together".

The *Fairness at Work* White Paper stressed the Government's desire to encourage a partnership approach to business and announced that it would make funds available to support this:

> 2.7 Spreading good practice from the best organisations to the rest requires a change in the culture of employment relations. This will take time. But the Government is committed to bringing about such a change because it will benefit employees, business and our national competitiveness. It is therefore helping to spread the message about the achievements of the best companies, whether large

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89 new section 108A (2)
90 TULRCA, section 109 (2)
91 The statutory authority for the right - section 235A of TULRCA - is not repealed

> or small, to explain that change need not be feared and to show there are real opportunities for business growth. To help employers and employees make informed choices the Government already produces guidance material on employment laws. It is now carrying out research into work-based partnership to identify examples of good practice**. In addition, the Government intends to make funds available to contribute to the training of managers and employee representatives in order to assist and develop partnerships at work.**[92]

The Partnership Fund was the aspect of the Bill highlighted by Ian McCartney, Minister of State at the DTI, in his comments when the Bill was published:

> We are on the threshold of a renaissance in employment relations. Employers, employees and their trade unions are realising that partnerships in the workplace are a genuine win/win situation for all concerned, and that their advantages for competitiveness and job creation must be exploited to the full.
>
> The Government is committed to assisting this process. In addition to the statutory measures in the Bill, the Partnership Fund announced in the Fairness at Work White Paper is a unique and innovative way of assisting partnership at work, which will help ensure better relations between employers and employees.[93]

T. Employment agencies

Clause 28 amends the *Employment Agencies Act 1973* to give the Secretary of State more effective regulation-making powers. The Government wants to strengthen the regulation of employment agencies, but does not, at present, have the power to make all the changes it would like to make.

Background

Employment agencies and employment businesses in the UK are regulated by the *Employment Agencies Act 1973.* Employment **agencies**, under the Act, supply workers to work for companies on a permanent basis as employees of that company. The company pays a fee to the agency for supplying the worker and, itself, pays the worker and takes him or her on as its own employee. Employment **businesses** supply workers, usually on a temporary basis, who are employed by the employment business to work in that company. The company using the employment business pays the business and the business, after taking its cut, pays the worker.

Until 3 January 1995, employment agencies and businesses had to be licensed under sections 1-3 of the Act. Licences were issued by officers of the Department of Employment's

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92 Cm 3968, para 2.7

93 DTI press release, *Foundations laid for new culture of fairness at work. Stephen Byers publishes Employment Relations Bill,* 28 January 1999

Employment Agency Licensing Office who had powers to enter premises, inspect records and refuse or revoke licences on the grounds that the applicant or premises were unsuitable or that the business had been improperly conducted. In practice only about four licences were refused or revoked a year. Serious breaches of the minimum standards of conduct laid down in the Act, and the Regulations made under it, occurred despite the licensing system and the Conservative Government decided to repeal the licensing requirement. This was achieved by section 35 and schedule 10 of the *Deregulation and Contracting Out Act 1994*, which replaced the power to refuse or revoke licences with a new power to apply to an industrial tribunal for an order to prohibit people from running an agency or business on grounds of unsuitability or misconduct. The four regional licensing offices were re-named Employment Agency Standards Offices and officials still have the power to enter premises and inspect records.[94] On 19 September 1996, John Taylor, then Corporate and Consumer Affairs minister at the DTI, announced that three of the regional offices - in Watford, Birmingham and Leeds - were being closed and that all complaints would be dealt with centrally in the DTI's headquarters building in 1, Victoria Street, London. A helpline for people with complaints or queries about agencies would allow people to ring at local call rates from anywhere in the country.[95] The Labour Government has issued press notices and leaflets encouraging people to ring this helpline if they feel they have been ill-treated by an employment agency.[96]

The rest of the 1973 Act remains in force and it is this and regulations made under it - the *Conduct of Employment Agencies and Employment Business Regulations 1976 SI No 715* - which contain the present controls over such businesses. Some of the requirements are:

- employment agencies and employment businesses are prohibited from charging **fees** to workers for finding or seeking to find them work [1973 Act, section 6]. There are some exceptions, which relate mainly to the entertainment and fashion industries and to au pairs.[97]

- employment **agencies** must obtain adequate information from employer and worker clients for the purpose of selecting a suitable worker for a vacancy and vice versa. They must ensure that worker and employer are aware of any conditions imposed by law which must be satisfied (eg the need for a work permit in the case of an overseas worker) and that the employment will be legal. [SI 1976/715, reg 2]

- employment **agencies** must obtain satisfactory written testimony that any employment agent used in another country is a suitable person and not prohibited by

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94 Employment Department Press Notice, *Abolition of Employment Agency Licensing*, 16 January 1995

95 The number is 0645 555 105

96 See, eg, DTI press releases, *DTI obtains first prohibition order against employment agency proprietors,* 16 July 1997 and *Using an employment agency? - know your rights: Ian McCartney launches new advice leaflet*, 5 November 1998

97 *Employment Agencies Act 1973 (Charging Fees to Workers) Regulations 1976*, SI 1976/714, and *Employment Agencies Act 1973 (Charging Fees to Au Pairs) Regulations 1981,* SI 1981/1481

law from acting as an agent. They must not arrange employment abroad for an employer who has no business premises in the UK without written testimony that the employment will not be detrimental to the worker. They must not arrange employment for a worker coming to this country for a job or going to a job abroad, if the rate of repayment of any advance of fares is one-eighth or more of the worker's basic weekly pay or the total amount to be repaid is more than three weeks' pay in the job. Except in cases of urgent arrangements for fixed term contracts of less than fourteen days, they must ensure that the worker receives a written statement, in a language he understands, of the terms and conditions of employment before he leaves. [SI 1976/715, reg 6]

- if employment **agencies** receive money on behalf of a worker client, they must pay it directly to the worker within ten days of receipt. [SI 1976/715, reg 7]

- employment **businesses** must give a worker entering their employment full details of their terms and conditions of employment, including rates of pay. They must supply the worker with full details about any hirer for whom they are going to work. [SI 1976/715, reg 9]

- employment **businesses** must not supply workers to a hirer as direct replacements for employees who are in industrial dispute with the hirer [SI 1976/715, reg 9]

- employment **businesses** must not supply to a hirer a worker who within the previous six months was employed directly by the hirer (unless the hirer consents in writing). [SI 1976/715, reg 9]

- employment **businesses** must not supply workers to a hirer abroad who has no business premises in the UK unless satisfactory written testimony has been obtained which states that the work will not be detrimental to the worker's interests. They must not send a worker to a hirer abroad unless they have made arrangements to pay the worker's return fare when the job ends or if it does not commence. If they have obtained an undertaking from the hirer to pay the fares and the hirer defaults, they must pay the return fare themselves. They must supply the worker with details of his terms and conditions of employment before departure. [SI 1976/715, reg 11]

In February 1997, the Conservative Government published a consultation document on *Employment Agency Standards: charging for information provision*.[98] This sought views on whether the prohibition on charging fees should be further relaxed in the light of technological developments such as the Internet and private on-line systems. No action was taken before the General Election of May 1997, and the Labour Government announced that it would be conducting a much wider review of the law on employment agencies. In a debate on employment agencies in March 1998, Ian McCartney made it

[98] DTI consultation document

clear that the Government was reviewing both the employment rights of agency workers and the regulation of the agencies themselves:

> Much of the regulatory framework applying to the industry is now 20 years old. Since coming to office, we have intended to consult on updating that framework. More resources are now being applied to the matter, and we hope shortly to publish a consultation document. I am sure that the views expressed in this debate will be considered in that consultation process.
>
> The employment status of some groups of workers is another specific concern. Some employers have attempted deliberately to make employment status unclear, to avoid employment or other legislation. For some months, my officials have been reviewing employment status issues involving various groups of workers whose position is less than clear, including agency workers. The review is almost complete, and we shall shortly consider what action to take on the issue.[99]

On 25 September 1998, Peter Mandelson, then Secretary of State for Trade and Industry, gave an initial indication of what the proposals would include:

> The Government will introduce new rules governing the conduct of employment bureaux and the rights of workers using them, Peter Mandelson, Secretary of State for Trade and Industry announced today.
>
> The new rules will make clear that under normal circumstances "temps" supplied by employment bureaux have their contractual relationship with the bureau supplying them rather than the host employer.
>
> This will be part of a package of measures to update the current regulations, which will be outlined in a consultation document on employment agencies and businesses to be published later this year. Other issues to be covered will include the:
>
> - need to ensure proper standards on reference checking;
> - rules requiring agencies to pay workers promptly and fully; and
> - obligation on agencies holding clients' money to safeguard it properly.
>
> Mr Mandelson said: "Employment agencies and businesses have a central part to play in the flexible labour market. These new measures will provide a clear framework within which bureaux, hirers and workers will know their rights and responsibilities and can manage their affairs confidently and effectively."
>
> Up to 900,000 people each week find employment through the industry which has more than tripled in size since 1992. The current regulations date largely from the mid 1970s and need to be brought up to date. [100]

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[99] HC Deb 18 March 1998, c 1252

[100] DTI press release, *Peter Mandelson signals new, clear rules for employment agencies and businesses*, 25 September 1998

The consultation document has not yet been issued.

The Bill

Clause 28 amends the *Employment Agencies Act 1973* so that the Government will be able to make changes it thinks necessary. The Explanatory Notes give examples of the matters on which regulations might be made;

- restricting the ability of employment agencies and employment businesses to vary unilaterally the terms of their contracts or other arrangements with workers or hirers;
- restricting the ability of employment agencies and employment businesses to make payment to a worker for work done by him conditional upon his doing other work;
- preventing employment agencies from purporting to enter into contracts on behalf of workers unless they are permitted to charge such workers for finding them work, and have a binding contract with them giving them authority to enter into such contracts; and
- restricting the ability of employment agencies and employment businesses to impose terms on employers which seek to prevent or discourage them from dealing, whether directly or through another employment business or agency, with workers supplied to them; or from referring such workers to other persons who might employ them. Where businesses seek to impose charges in any of these circumstances regulations might limit the size of those charges, time limit their application, or prohibit them altogether.[101]

Exceptions to the prohibition on charging fees might include fees relating to:

- the provision of employment agency services to entertainers, models and certain other limited groups where it is the norm for an agent to be engaged to represent the worker, except where the agent charges the person who hires the worker;
- the inclusion of information about workers in publications made available to employers or potential employers; and
- the provision of information about work opportunities to workers where no other services are offered, and where the charge for such information is within prescribed limits.[102]

U. Unfair dismissal: special and additional awards

The background to this provision is described in pages 18-24 of Research Paper 98/99.

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[101] Explanatory Notes, para 233
[102] Explanatory Notes, para 236

Clause 29 of the Bill abolishes special awards and replaces them with additional awards. Additional awards for ordinary unfair dismissal cases are increased.

Additional awards (paid on top of basic and compensatory awards for unfair dismissal where an employer fails to comply with an order for reinstatement or re-employment) are usually between 13 and 26 weeks' pay (current maximum £5,720) in ordinary unfair dismissal cases and between 26 and 52 weeks' pay (current maximum £11,440) in sex or race discrimination cases. Special awards (paid on top of basic and compensatory awards where people have been dismissed on grounds trade union membership or non-membership or on the grounds of their activities as employee representatives in health and safety, occupational pension or redundancy or transfer cases) are 104, and in some cases 156, weeks' pay. So they could be as much as £34,320.

As a result of this clause, people who would have qualified for special awards will now qualify for additional awards, but additional awards will all be paid at the higher rate (26-52 weeks' pay).

This is principally a simplification measure, but it needs to be seen in the context of the increase in the upper limit on compensatory awards in unfair dismissal cases and the index-linking of the limit on a weeks' pay figure.

V. Indexation of limits on awards

Clause 30 provides for the indexation of limits on various employment protection awards and for the increase from £12,000 to £50,000 in the upper limit on compensatory awards for unfair dismissal.

The background to these provisions is described in pages 15-24 of Research Paper 98/99.

The clause applies to:

- the limit on the daily amount of the guarantee payment for lay offs
- the minimum amount of the basic award for unfair dismissal in employee representative (health and safety, occupational pension and consultation) and trade union membership, non-membership and activity cases
- the limit on the compensatory award for unfair dismissal
- the weekly limit on payments to cover arrears of wages etc in insolvency cases
- the limit on a week's pay used in many calculations
- the limits on compensation for people unjustifiably excluded from joining a union

If the "retail prices index for September of a year is higher or lower than the index for the previous September, the Secretary of State shall as soon as practicable make an order" increasing (or decreasing) these limits by the same percentage.

Clause 30 (4) raises the current limit on compensatory awards for unfair dismissal from £12,000 to £50,000.

W. Guarantee payments

Guarantee payments are made to employees for days they are laid off provided certain conditions are met. They can be made for up to five days in any three month period. Section 31 (7) of the *Employment Rights Act 1996* requires that these time periods have to be reviewed every year. In practice they have not been changed since they were introduced under the *Employment Protection Act 1975*.[103] Clause 31 provides that these time periods may be varied by Order subject to the negative resolution procedure and will no longer be subject to annual review.

IV Numbers, Costs and Benefits

The *Regulatory Impact Assessment* [RIA] on the Bill contains useful estimates of the numbers likely to be affected by the main provisions of the Bill, the possible costs of the measures to employers and the public purse, and the (largely unquantifiable) benefits which might be expected to flow from the measures. The estimates are based on available survey evidence.[104] In some cases (particularly in relation to parental leave) assumptions are also made about the detail of the policy which will eventually be introduced. The assumptions made are detailed in the Annex to the RIA.

A. Numbers

The RIA contains broad indications of the number of workers potentially benefiting from new rights under the legislation:

Trade union recognition - there are 0.7 million trade union members (about 2.8% of employees) in workplaces without recognition.[105] The proportions are particularly high in the education and health sectors.[106] About 1,300 workplaces with 25 or more employees have trade union density over 50% but without recognition.[107]

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[103] although the *Employment Act 1980* did change the three month period from four set quarters to a rolling three months

[104] including Forth, Lissenburgh, Callender and Millward, *Family friendly working arrangements in Britain-1996*, DfEE Research Report 16, 1997; Cully, Woodland, O'Reilly, Dix, Millward, Bryson, Forth, *The 1998 Workplace Employee Relations Survey: First Findings*, DTI, 1998; "Trade union membership and recognition", *Labour Market Trends*, June 1997; "Trade union membership and recognition 1996-97", *Labour Market Trends*, July 1998; New Earnings Survey 1998; Labour Force Survey, Spring 1998

[105] RIA Annex, para 8

[106] RIA Annex, para 9

[107] RIA Annex, para 10

Abolition of CRTUM and CPAUIA - The CRTUM has assisted only 9 cases per year. The CPAUIA has acted in only one case.[108]

Ordinary maternity leave (increase to 18 weeks) - there are 3.7 million women with less than two years' service (2.3 million of whom have less than one year's service). Of these, 2.6 million are aged between 18 and 40 (1.6 million of whom have less than one year's service).[109] Many of these would already be allowed by their employer to take 18 weeks leave.

Additional maternity leave (reduction in qualifying service) - there are 1.4 million women with between one and two years' service. Of these, 1 million are aged 18 to 40.[110] It is estimated that 75% of employees who become pregnant already have the right to additional maternity leave by virtue of two years' service. The change is likely to raise the proportion to 90%.[111]

Parental leave - there are about 3.3 million employees with children under 5 of whom 2.6 million have been with their current employer for more than one year.[112]About 25% of new parents already have some entitlement provided by their employer (eg long maternity leave, paternity leave, career breaks).

Time off for domestic incidents - the whole workforce may need time off for caring responsibilities or domestic emergencies. However, about 70% of employees already work for employers who allow them time off for family or domestic emergencies, and, in establishments with 25 or more employees, only 3% of employees say they would not be able to take time off for such emergencies. In many workplaces, though, people would be expected to make the time up or to take it out of annual leave. 24% of workplaces reported a scheme of special paid leave for family emergencies. [113]

Part-time work - there are 6.6 million part-time employee jobs in Britain (80% of which are held by women). They are concentrated in clerical and secretarial occupations, personal services and selling. However, it is believed that there are very few cases where there is direct discrimination.[114]

Disciplinary and grievance procedures - there may be about 740,000 people employed in workplaces with disciplinary and grievance procedures which do not provide a right to be accompanied.[115] It is estimated that between 3% and 4% of employees are subject to

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[108] RIA Annex, para 30
[109] RIA Annex, para 43
[110] RIA Annex, para 43
[111] RIA Annex, para 60
[112] RIA Annex, para 74
[113] RIA Annex, para 98
[114] RIA Annex, para 112
[115] RIA Annex, para 123

disciplinary proceedings each year and perhaps half this figure might be involved in grievance proceeedings.[116]

Raising the limit on unfair dismissal compensation to £50,000 - each year about 40,000 people make an application to an employment tribunal claiming unfair dismissal. However, only 100 of these result in an award at the limit (currently £12,000).[117]

Consolidating special and additional awards - very few of these awards are made each year. Figures are not available, but in 1996/97, there were fewer than 350 applications under the five jurisdictions which can attract a special award, and only 55 re-employment orders (which could have been followed by additional awards).[118]

Indexation of awards and statutory payments - the main statutory payment concerned is the redundancy payment. About 400,000 people with more than two years service (who are, therefore, eligible for redundancy pay) are made redundant each year. Of these, about half receive payments above the statutory provision under their employers' schemes. Of those who receive only the statutory payment, about 115,000-140,000 are at the current maximum.[119] The limits would probably have been increased anyway under the annual review procedure, so indexation may not make much practical difference to individual recipients.

Abolition of unfair dismissal waiver clause in fixed term contracts - about 298,000 people in Great Britain have fixed term contracts for more than 12 months. About half are in the public sector and a quarter in professional occupations. It is not known how many have waiver clauses or how many have their job terminated in a way which might lead to unfair dismissal claims.

B. Costs

The RIA summarises the main aggregate recurring compliance costs, which come to a total of £59.7 million, as follows:

[116] RIA Annex, para 124
[117] RIA Annex, para 135
[118] RIA Annex, paras 144 and 145
[119] RIA Annex, para 150

Measure	**Estimate (£ million)**
Trade union and collective rights	
Trade union recognition*	5.9
Family friendly policies	
Ordinary Maternity Leave (18 weeks)	1.8
Wider entitlement to Additional Maternity Leave	14.0
Parental leave	28.8
Right to time off for family or domestic emergencies	6.9
Disciplinary and grievance hearings	
Right to be accompanied in dispute or grievance	2.3
TOTAL	**59.7**

All in 1998 prices, all GB

* Based on levels after three years' build up. Note that this is gross cost. Net costs, allowing for displacement of other forms of consultation and wage setting, will be lower.

There are also estimates of the number of cases there are likely to be each year and of the average cost of each case. The costs (especially in the case of the family friendly policies) mainly arise from the need to replace absent workers. The RIA points out:

> Even if unpaid, such absences will involve some cost to the employer. Where a worker is absent, either production is maintained, but at extra cost, or output falls and therefore profits are foregone.
>
> Faced with an absence the employer has a variety of options with varying costs. The least costly is to rely on extra effort and unpaid overtime by colleagues (and the individual on return) or to use up stocks - but these are only practical in the short term. Alternatives include leaving the post empty and losing the output, paid overtime, re-scheduling, postponing inessential tasks, using temporary employees, or contracting out. Longer absences may pose bigger problems, but the employer may be able to plan ahead, for instance by bringing forward recruitment in high turnover sectors. If these options are not practical or are too expensive then the employer loses the output and the profit that would have been made.[120]

The RIA makes a set of "stylised assumptions" and costs absence at £10.56 per hour for the family friendly policies.

The main estimates made are summarised below (the references are to the relevant paragraphs of the RIA's Annex):

[120] RIA Annex, paras 37 and 38

Measure	Numbers	Individual costs
trade union recognition	500 requests per year (11) 50 go through all stages of statutory procedure (16)	Average non-recurring cost per workplace: £4,370 (16) Average recurring cost per workplace: £5,656 (19)
ordinary maternity leave extra 4 weeks)	10,000 women likely to take up extra leave each year (46)	£170-£186 per case (50)
reducing qualifying period for additional maternity leave from two to one year	50,000 women with service of between one and two years become pregnant each year. (60) The proportion who do not return to work is likely to fall from 40% to 20% (61)	£423 per mother who would otherwise return earlier (65) £847 per mother who would otherwise not return (67)
parental leave	an extra 61,500 employees take an average of ten weeks leave each year (80 and 84) 250 extra employment tribunal cases a year (87)	average cost of £466 per person (84)
time off for domestic emergencies	560,000 additional people take two days a year (99) 100 extra employment tribunal cases a year (105)	average gross cost of £24.01 per person (103)
right to be accompanied in disciplinary and grievance hearings	26,000 disciplinary or grievance actions per year where new right to be accompanied is taken up (126)	average cost per affected employer: £350 per year (131)

The Bill is expected to have a small effect on public sector finances. Savings are likely from ending the annual consultation on limits for statutory awards (£7,000)[121] and the abolition of the Trade Union Commissioners (£321,000).[122] There will be extra spending on the Certification Officer (not yet decided)[123], on ACAS (up to around £250,000 in a full financial year)[124] and the CAC (a substantial increase in the current running costs of around £94,000 per year).[125] Employment tribunals may experience an extra 350 cases a year in connection with parental leave and time off for domestic incidents, at a public

[121] RIA Annex, para 155
[122] RIA Annex, para 31
[123] RIA Annex, para 34
[124] Explanatory Notes, para 249
[125] Explanatory Notes, para 249

sector resource cost of £140,000.[126] This should be offset, though, by a reduction in employment tribunal cases related to maternity leave (once it has been simplified), part-timers (who will no longer need to plead indirect sex discrimination) and dismissal (if the right to be accompanied reduces the number of disputes coming to tribunals).[127] DSS expenditure may increase if more women claim Statutory Maternity Pay for an extra four weeks and there may be an increased take up of income-related benefits from people on unpaid maternity or parental leave.

About 100 employers who are found to have dismissed someone unfairly are likely to face an increased award as a result of raising the limit from £12,000 to £50,000 each year. Their total cost might be an extra £1.8 million per year.[128]

C. Benefits

The RIA says that the measures in the Bill "are expected to bring widespread benefits to workers and their families, and thus to the economy, society and employers".[129] The main benefits identified are:

For workers and their families:

- direct benefits to individuals exercising new rights, for example, to maternity or parental leave, or to time off to deal with emergencies
- benefits to the families of those exercising these rights
- a greater sense of security across the workforce as a whole, as workers would know they had these protections, even if they did not need to use them
- encouraging people who might be reluctant to re-enter (or remain in) the labour market because of family responsibilities, to do so. In this way the Bill contributes to the Government's Welfare to Work strategy
- supporting family life by enabling more people to combine work with caring responsibilities

For the economy and society:

- helping to establish a framework of minimum standards which will remove disincentives to labour mobility and ease recruitment
- increasing participation rates and effective labour supply
- helping families to give children a better start in life and reducing the risk of family breakdown

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126 RIA Annex, paras 93 and 108
127 Explanatory Notes, para 249
128 RIA Annex, para 141
129 RIA, para 9

For employers:

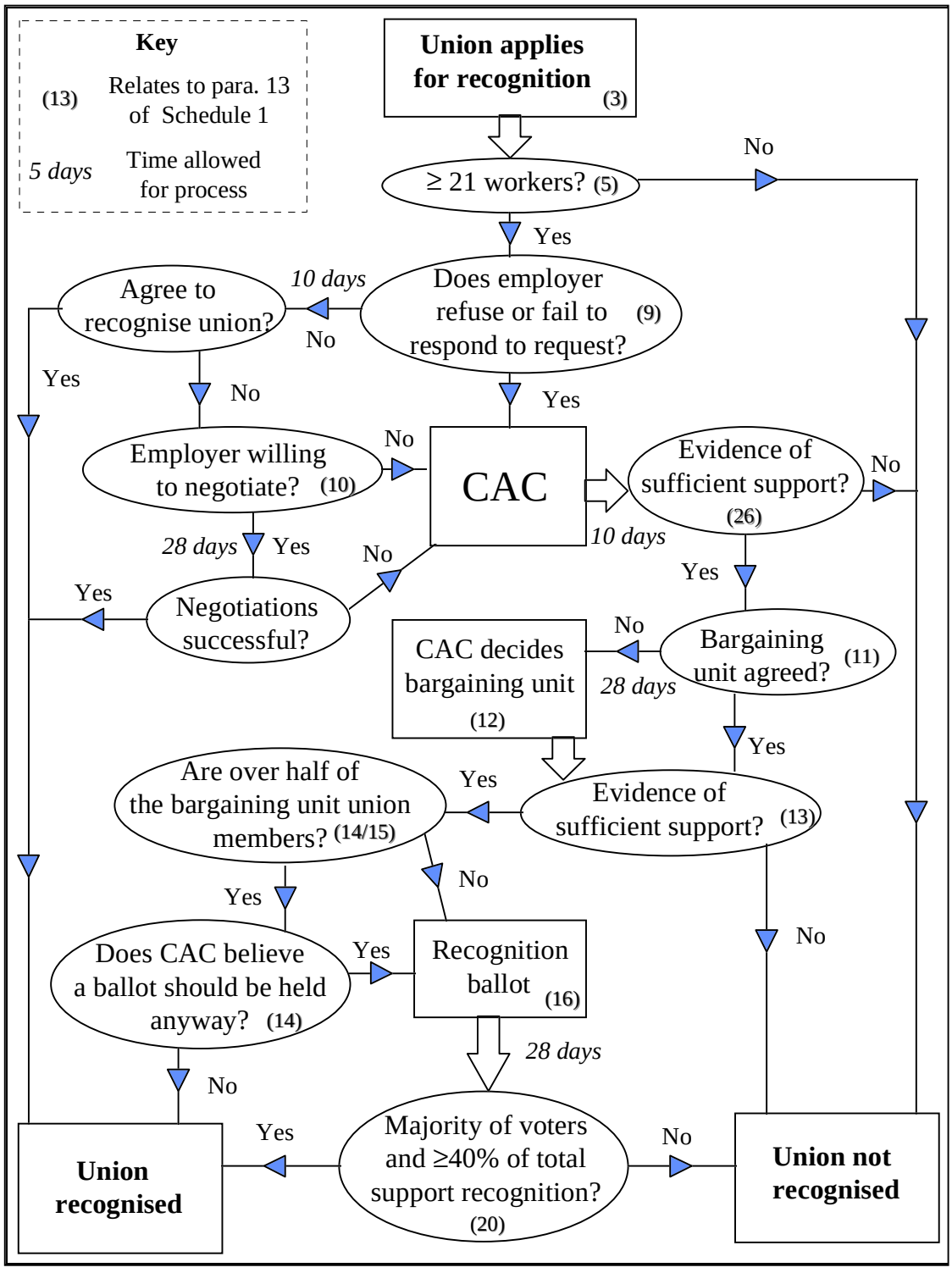
- encouraging a culture of partnership which is a key feature of top performing companies. A greater degree of trust and better communications will make it easier for employers and employees to adapt to change.
- minimum standards will underpin a flexible labour market
- reduced staff turnover and improved commitment leading to improved labour productivity
- an increase in labour supply will ease recruitment.

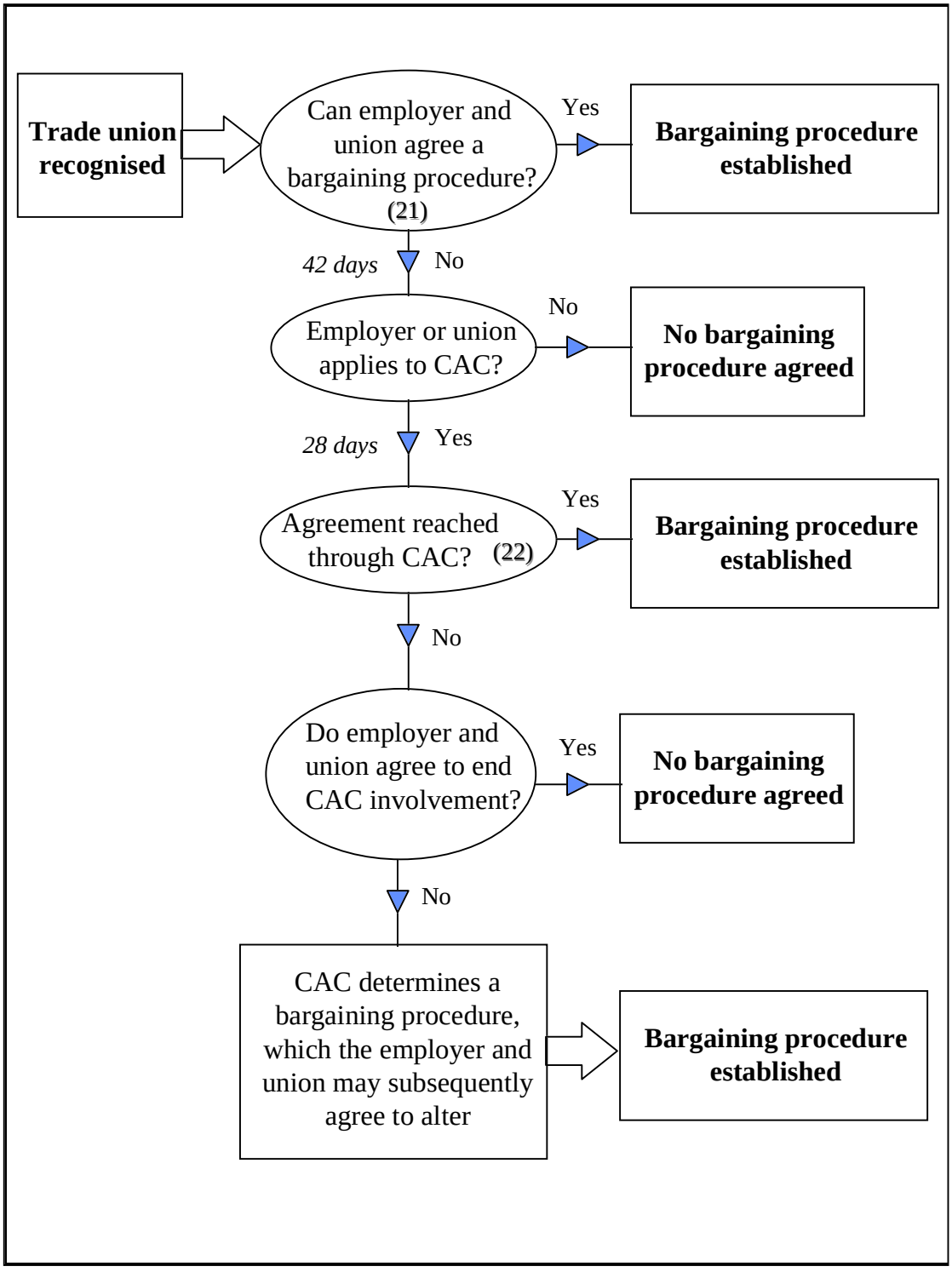
V Glossary

ACAS	Advisory, Conciliation and Arbitration Service
CAC	Central Arbitration Committee
CO	Certification Officer
CPAUIA	Commissioner for Protection Against Unlawful Industrial Action
CRTUM	Commissioner for the Rights of Trade Union Members
EPA	*Employment Protection Act 1975*
RIA	Regulatory Impact Assessment
TULRCA	*Trade Union and Labour Relations (Consolidation) Act 1992*
TURERA	*Trade Union and Employment Rights Act 1993*

VI Annex: Trade union recognition flowcharts

The following charts, illustrating the statutory recognition procedure and the method for establishing a bargaining procedure, are taken from the Explanatory Notes (figures 1 and 2):




Trade union recognised
Can employer and union agree a bargaining procedure? (21)
Yes
Bargaining procedure established
42 days
No
Employer or union applies to CAC?
No
No bargaining procedure agreed
28 days
Yes
Agreement reached through CAC? (22)
Yes
Bargaining procedure established
No
Do employer and union agree to end CAC involvement?
Yes
No bargaining procedure agreed
No
CAC determines a bargaining procedure, which the employer and union may subsequently agree to alter
Bargaining procedure established