*These notes refer to the Employment Relations Act 1999 (c.26) which received Royal Assent on 27 July 1999*

# EMPLOYMENT RELATIONS ACT 1999

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Trade unions*

#### *Section 1 and Schedule 1: Collective bargaining: Recognition*

15. Section 1 and Schedule 1 establish new statutory procedures for the recognition and derecognition of trade unions as entitled to conduct collective bargaining on behalf of particular groups of workers, and for the right of workers to take part in these processes without fear of detriment or dismissal. Section 1 inserts a new Schedule A1, as contained in Schedule 1 to the Act, into the 1992 Act. References to paragraphs, sub-paragraphs and Parts in what follows are references to the paragraphs, sub-paragraphs and Parts of the new Schedule A1 to the 1992 Act.

16. The statutory process for recognition of a union to conduct collective bargaining on behalf of a particular group of workers is set out in Part I. The procedure gives the union and employer the opportunity to agree an appropriate group of workers (referred to as the bargaining unit) and whether the union should represent them in collective bargaining, but if no agreement is reached there is a mechanism for the Central Arbitration Committee (CAC) to decide on the appropriate bargaining unit or whether the union should be recognised, or both.

    The *Central Arbitration Committee* is established under sections 259-265 of the 1992 Act. Sections 24-25 of the Act amend the arrangements for the appointment of CAC members and for the proceedings of the CAC in respect of its functions under the new Schedule A1.

17. Part II deals with agreements to recognise a union which are made after a formal application for statutory recognition under Part I. It also contains a procedure for unions or employers to obtain an imposed bargaining method if the agreed method is not honoured. With the exception of Parts II and VI, voluntary recognition is unaffected by the Act.

18. Part III sets out procedures which may be followed if a union is recognised through the statutory process and, as a result of a change in the employer's business, either the union or the employer believes the bargaining unit has changed. It also deals with cases where the bargaining unit has ceased to exist.

19. Part IV deals with the derecognition of a union whose recognition resulted from a declaration by the CAC but which was not recognised "automatically" on the basis that more than 50% of the bargaining unit were union members. The derecognition of "automatically" recognised unions is dealt with in Part V.

20. Part VI provides for workers to be able to invoke the statutory derecognition procedure where an employer has voluntarily recognised a union which does not have a certificate of independence. Part VII sets out the effect of a union recognised through the statutory process losing its certificate of independence.

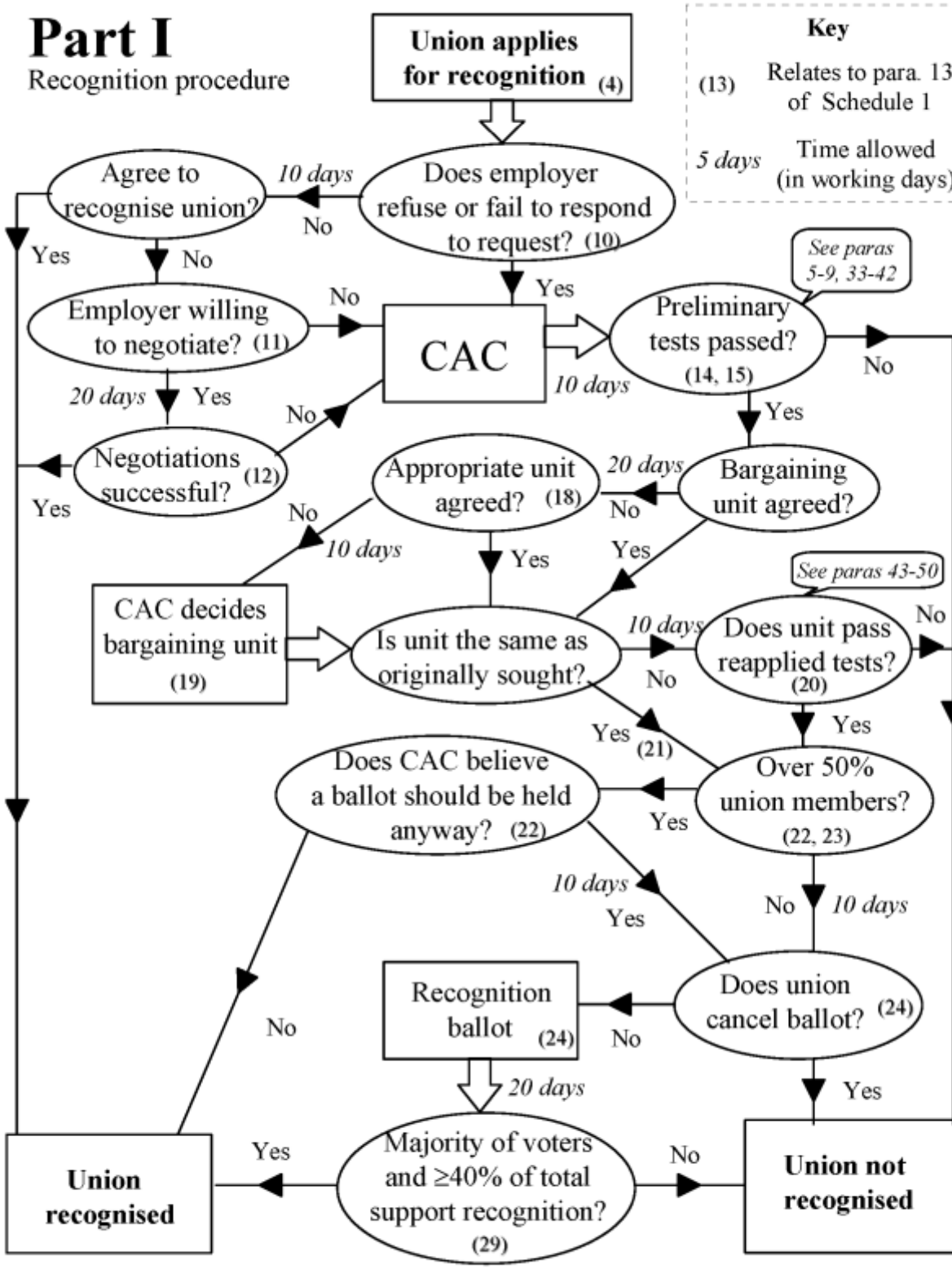
21. Part VIII provides protection for workers against detriment arising from participation or non-participation in activities relating to recognition or derecognition. Part IX contains general provisions and powers for the Secretary of State to issue guidance on or to amend certain procedures.

22. In dealing with cases under the new Schedule A1, the CAC is required by *paragraph 171* to have regard to the object of encouraging and promoting fair and efficient practices in the workplace (so far as is consistent with its other obligations under the Schedule).

23. The following is a paragraph by paragraph index to the new Schedule A1:

## Part I: Recognition

24. Part I sets out procedures for the recognition of an independent trade union to conduct collective bargaining on behalf of a group of workers, referred to as the bargaining unit. It provides a method for agreeing the appropriate bargaining unit, whether the union should be recognised, and how collective bargaining should be conducted. The key steps in the recognition procedure are illustrated in Figure 1; similarly, the key steps in the process for establishing a method of collective bargaining are summarised in Figure 2.




25. *Paragraph 1* provides that an application for recognition may be made by a single union or by two or more unions acting together. For simplicity these notes generally refer to an application by a single union but such references should be read as covering a union or unions.

26. *Paragraph 2* contains definitions for the purposes of the Schedule. Sub-paragraph (2) defines the bargaining unit, the group of workers on whose behalf a union (or unions) would conduct collective bargaining. Sub-paragraph (3) defines the proposed bargaining unit, the group of workers on whose behalf a union requests recognition. (If the employer does not agree that the unit is appropriate, it may be changed in negotiation. If the employer and union fail to agree, the Central Arbitration Committee (CAC) will rule under paragraph 19.) Sub-paragraph (4) defines employer.

27. *Paragraph 3* defines the scope of collective bargaining for the purposes of Part I. Collective bargaining covers pay, hours and holidays plus any matters which the union and employer agree should be included. However, if the CAC determines the method by which collective bargaining should take place under paragraph 31(3), that method will apply only to negotiations over pay, hours and holidays – it will not apply to any other matters the parties agree under sub-paragraph (4). (If the CAC sets a bargaining method, the parties can agree to vary it to include other matters as well.) Sub-paragraph (6), taken with *paragraph 35*, means that recognition under Part I cannot 'overwrite' an existing collective agreement, even if that agreement does not cover pay, hours and holidays, subject to the exceptions given in paragraph 35.

28. *Paragraph 4* deals with requests for recognition. Sub-paragraph (1) has the effect that the recognition process is begun by a formal request from the union seeking recognition.

29. *Paragraphs 5-9* test whether an application is valid.

30. Paragraph 6 provides that the union making an application must have a certificate of independence from the Certification Officer.

    The functions of the *Certification Officer*, including in relation to *certificates of independence*, are dealt with in sections 2-9 of the 1992 Act.

    - A trade union is defined as *independent* by section 5 of the 1992 Act if it (a) is not under the domination or control of an employer or group of employers or one or more employers' associations, and (b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatsoever) tending towards such control.

31. Paragraph 7 provides that a request is not valid if an employer has fewer than 21 workers. The term "employer" includes associated employers, as defined below. The Secretary of State may vary the 21 worker threshold, or make other changes to the provisions of this paragraph, by statutory instrument subject to affirmative resolution.

32. Sub-paragraphs (3) and (4) exclude from the calculation of the number of workers people who work for associated employers incorporated outside Great Britain and who do not ordinarily work in Great Britain. The recognition procedure still applies, however, to employers incorporated outside Great Britain which employ more than 21 workers.

    - Two employers are *associated employers* under section 297 of the 1992 Act if one is a company of which the other (directly or indirectly) has control, or both are companies of which a third person (directly or indirectly) has control.

33. Sub-paragraph (5) provides that workers employed on board UK-registered ships by associated employers are also counted towards the 21 workers threshold, unless (a) the ship is registered as belonging to a port outside Great Britain, (b) the employment is wholly outside Great Britain, or (c) the worker is not ordinarily resident in Great Britain.

34. Paragraphs 8 and 9 make provision for the form and content of requests for recognition, including a power for the Secretary of State to prescribe the form of requests by statutory instrument. Further general provisions on applications are made in paragraphs 33-42.

35. *Paragraph 10* provides that the statutory recognition procedure is to end if the parties agree within ten working days both the appropriate bargaining unit and that the union

should be recognised to conduct collective bargaining on behalf of the workers who make up that unit. If the employer agrees to negotiate, then the parties have 20 working days, plus whatever remains of the initial ten working day period, in which to conduct negotiations. They can extend the period for negotiation by mutual consent.

36. *Paragraph 11* provides that, if the employer does not respond to the request or rejects it before the end of the first (ten working day) period, the union may apply to the CAC to decide the appropriate bargaining unit and whether a majority of workers in that bargaining unit support recognition.

37. *Paragraph 12* provides that if the employer and union fail to reach agreement by the end of the second period, the union may apply to the CAC to decide the appropriate bargaining unit and whether a majority of workers in the bargaining unit support recognition. If the parties agree a bargaining unit but cannot agree that the union should be recognised, the union may apply to the CAC to decide whether a majority of workers in the bargaining unit support recognition. However, in either case the union may not apply to the CAC if it rejected or failed to respond to a proposal by the employer (made within 10 working days of having indicated his willingness to negotiate) that the parties should seek the assistance of ACAS in the negotiations.

38. If a union applies to the CAC under paragraph 11 or 12, the CAC must be satisfied, before the application may proceed, that it is valid and admissible.

39. *Paragraph 14* applies if two or more applications are received by the CAC, and the bargaining units proposed or agreed in respect of the applications overlap, ie at least one worker is a member of all the bargaining units. In this case, each application is the subject of a "ten percent" test to see whether at least 10% of the bargaining unit are union members. If only one application passes the test, it may proceed; if both pass or neither passes, neither application will be accepted.

40. *Paragraph 15* requires any application under paragraph 11 or 12 to be valid in terms of paragraphs 5-9 and admissible in terms of paragraphs 33-42. The CAC has 10 working days (or longer, if it notifies the union and employer of its reason for extending the period) in which to decide whether the application is valid and admissible. In order to proceed, an application must therefore:

- be received by the employer (paragraph 5);
- be made by an independent union (paragraph 6);
- apply to an employer with 21 or more workers (paragraph 7);
- be made in the proper form (paragraphs 8, 9 and 33);
- be copied to the employer, along with any supporting documents (paragraph 34);
- not cover any workers in respect of whom a union is already recognised, unless:
  - — the applicant union is the one which is already recognised, and the existing recognition agreement does not cover pay, hours or holidays (paragraph 35(2)); or
  - — the recognised union has no certificate of independence, was previously recognised in respect of the same (or substantially the same) bargaining unit, and ceased to be recognised within the three years prior to the application (paragraph 35(4));
- satisfy the CAC that at least 10% of the proposed bargaining unit are members of the union and a majority of the workers in the proposed bargaining unit would be likely to favour recognition (paragraph 36);

- (if the application is made by more than one union) show that the unions will co-operate effectively in collective bargaining and, if the employer wishes, conduct single-table bargaining (paragraph 37);
- not cover any workers in respect of whom the CAC has already accepted an application under paragraph 15 or proceeded with an application under paragraph 20, ie the bargaining unit must not overlap with another unit in respect of which the CAC has accepted an application (paragraph 38);
- not be substantially the same as an application which the CAC accepted within the previous 3 years (paragraph 39);
- not be made within 3 years of a declaration by the CAC that the union (or the same group of unions) were not entitled to be recognised in respect of the same (or substantially the same) bargaining unit as in the current application (paragraph 40); and
- not be made within 3 years of the union (or the same group of unions) being derecognised in respect of the same (or substantially the same) bargaining unit as in the current application (paragraph 41).

41. If the employer and union have agreed the bargaining unit, then the application under paragraph 12(4) leads directly to a determination of support. Otherwise, for applications under paragraphs 11(2) or 12(2), the CAC must decide the appropriate bargaining unit before moving on to the question of whether the union has sufficient support for recognition.

42. *Paragraph 16* allows a union to withdraw its application under paragraph 11 or 12 at any time before the CAC awards automatic recognition under paragraph 22(2) or gives notice of its intention to hold a ballot. If the CAC intends to hold a ballot, *paragraph 24* gives the union 10 working days in which to decide whether to cancel it. For example, it may become apparent to the union that its proposed unit is not appropriate. It may wish to withdraw its application and reformulate it, possibly in conjunction with another union. If the union withdraws its application after it has been accepted by the CAC under paragraph 15 or cancels a ballot, *paragraph 39* has the effect of barring it from reapplying for recognition in respect of the same or a substantially similar bargaining unit for 3 years.

43. *Paragraph 17* allows the union and employer to notify the CAC that they wish it to cease work on an application at any time before recognition is granted automatically on the basis of over 50% union membership or a ballot is arranged. Notification of the CAC under this paragraph is necessary if the parties want to make an agreement for recognition (ie to qualify for semi-voluntary recognition under Part II of the schedule) and an application to the CAC under Part I has been made.

44. *Paragraph 18* provides that, where the CAC has been asked to decide on the appropriate bargaining unit, it has 20 working days to help the union and employer to agree an appropriate bargaining unit. The CAC may choose to extend this period. *Paragraph 19* provides that if no agreement on the bargaining unit is reached, the CAC must determine the appropriate bargaining unit within ten working days, taking account of the need for the bargaining unit to be compatible with effective management and, so far as is consistent with this need, the factors listed in sub-paragraph (4). This period can be extended provided the CAC notifies the parties with its reasons for the extension, but in practice the CAC may have gathered enough information in the course of trying to help the parties to reach agreement to be able to decide quickly.

45. *Paragraph 20* requires the CAC to apply several tests if the bargaining unit determined in paragraphs 18 and 19 is different from the union's proposed bargaining unit. These tests are equivalent to those applied by paragraph 15. If all the tests are passed, or if the

bargaining unit has not changed, *paragraph 21* requires the CAC to proceed with the application. The tests are that an application must:

- not cover any workers in respect of whom a union is already recognised, unless:
  - — the applicant union is the one which is already recognised, and the existing recognition agreement does not cover pay, hours or holidays (paragraph 44(2)); or
  - — the recognised union has no certificate of independence, was previously recognised in respect of the same (or substantially the same) bargaining unit, and ceased to be recognised within the three years prior to the application (paragraph 44(4));
- satisfy the CAC that at least 10% of the proposed bargaining unit are members of the union and a majority of the workers in the proposed bargaining unit would be likely to favour recognition (paragraph 45);
- (if the application is made by more than one union) show that the unions will co-operate effectively in collective bargaining and, if the employer wishes, conduct single-table bargaining (paragraph 46);
- not cover any workers in respect of whom the CAC has already accepted an application under paragraph 15 or proceeded with an application under paragraph 20, ie the bargaining unit must not overlap with another unit in respect of which the CAC has accepted an application (paragraph 47);
- not be substantially the same as an application which the CAC accepted within the previous 3 years (paragraph 48);
- not be made within 3 years of a declaration by the CAC that the union (or the same group of unions) were not entitled to be recognised in respect of the same (or substantially the same) bargaining unit as in the current application (paragraph 49); and
- not be made within 3 years of the union (or the same group of unions) being derecognised in respect of the same (or substantially the same) bargaining unit as in the current application (paragraph 50)

46. If the CAC is satisfied that a majority of the workers in the bargaining unit are members of the union making the application, *paragraph 22* provides that the CAC shall issue a declaration of recognition without a ballot, unless one of the conditions in sub-paragraph (4) is met, in which case the CAC must give notice that it intends to hold a secret ballot of members in the bargaining unit. Under *paragraph 23*, the CAC must also give notice that it intends to hold a secret ballot where the union does not show majority membership in the bargaining unit. If the CAC gives notice of a ballot, paragraph 23 gives the union 10 working days in which to request that the ballot should not be held. If it does so, the CAC will take no further action and the union will not be recognised.

47. *Paragraph 166* provides that, where the CAC represents to the Secretary of State that paragraph 22 has an unsatisfactory effect and should be amended, the Secretary of State has power to make amendments by order subject to the affirmative resolution procedure. *Paragraph 167* provides that the Secretary of State may issue guidance to the CAC on the exercise of its functions under paragraph 22. This guidance must be laid before Parliament and published.

48. *Paragraph 25* makes provision for the conduct of recognition ballots. They must be conducted by a qualified independent person appointed by the CAC. Sub-paragraphs (7) and (8) set out the conditions to be met by a qualified independent person, which include meeting criteria specified in – or being himself specified in – an order made by the Secretary of State subject to negative resolution procedure. (This is essentially the same arrangement as for independent scrutineers for trade union elections and industrial

action ballots, where solicitors and accountants and certain bodies such as the Electoral Reform Society are designated as qualified to act as scrutineers.) The ballot is to be conducted within 20 working days of the appointment of the independent person unless the CAC decides to extend the period. This is intended to ensure that the ballot takes place without undue delay, while recognising that organising a large, complex ballot may take longer than 20 working days.

49. Sub-paragraph (4) provides that the ballot may be held at the workplace, by post or, if special factors make it appropriate, by a combination of the two methods, at the CAC's discretion. Sub-paragraph (5) requires the CAC to consider the risk of interference in a workplace ballot, costs and practicality, and any other matters it considers relevant. Sub-paragraph (6) lists 'special factors' which might make a combined postal and workplace ballot appropriate. Sub-paragraph (9) requires the CAC to inform the employer and union of the arrangements for the ballot as soon as reasonably practicable.

50. *Paragraphs 26(1)-(4)* deal with the duties of the employer to cooperate with the ballot, to provide necessary information and to allow the union reasonable access to the workers to campaign for recognition. *Sub-paragraphs (6) and (7)* provide a mechanism for the union to send information to workers via the person conducting the ballot, at the union's expense, without the workers' names and addresses being disclosed to the union. *Sub-paragraph (8)* gives a power for the Secretary of State or ACAS to draw up a statutory code of practice to give practical guidance on 'reasonable access'. Such guidance will need to take account of the different circumstances of different employers' premises and businesses.

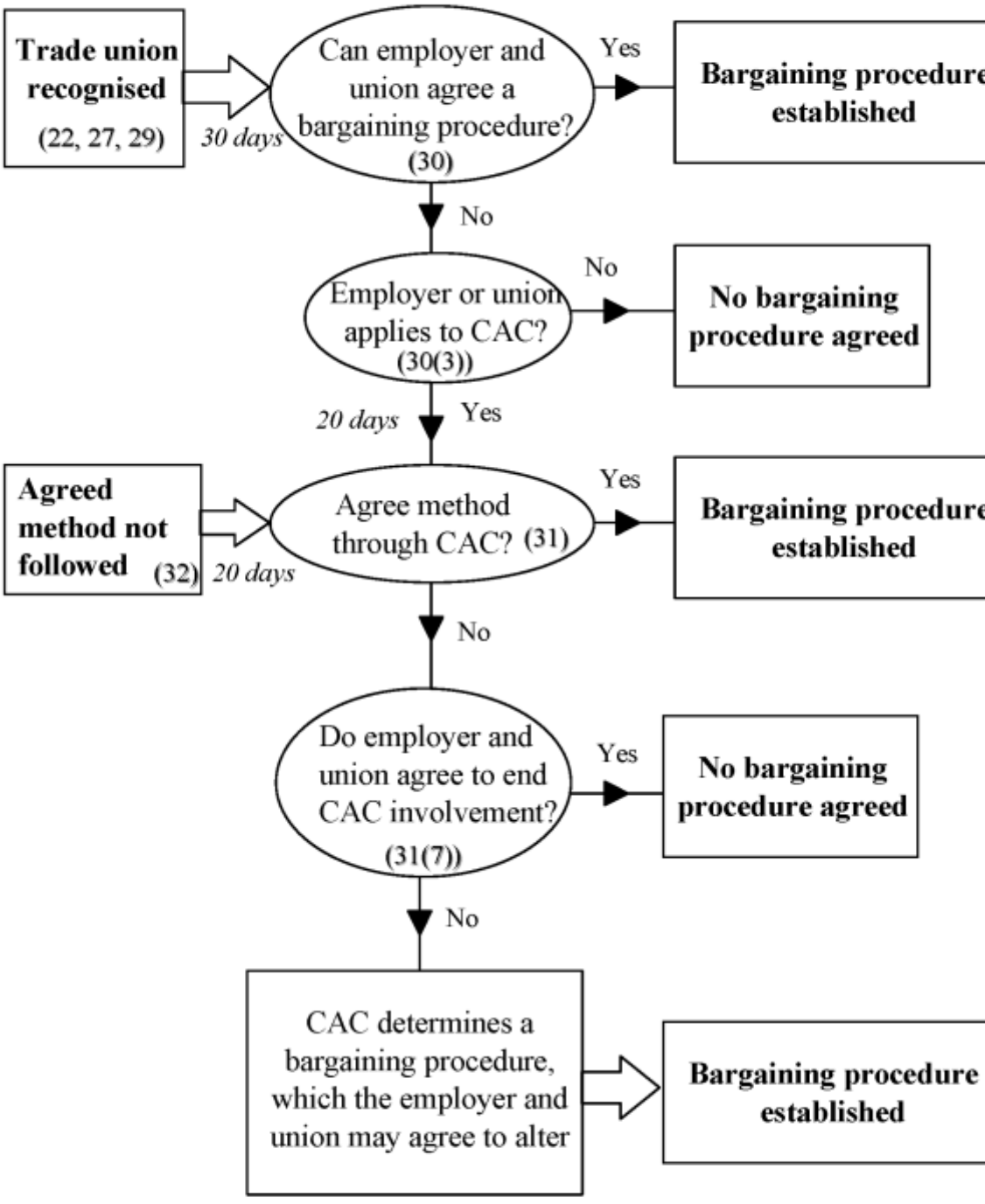
51. *Paragraph 27* makes provision for action by the CAC in the event that the employer does not fulfil his duties under paragraph 26. The CAC may order the employer to take specific steps to remedy his failure to cooperate. If the employer does not comply, the CAC may declare the union recognised and cancel the ballot.

52. *Paragraph 28* provides for half the costs of recognition ballots to be borne by the employer and half by the union or unions making the application. These costs include:

- the full cost of running the ballot incurred by the scrutineer (including any fee the scrutineer may charge for his services); and
- any other costs which the employer and union agree should be shared

Costs which are not shared include the cost of providing information to workers incurred by a union or the employer.

53. *Paragraph 29* requires the CAC to inform the employer and union of the result as soon as possible after the ballot. If recognition is supported by a majority of those who vote and at least 40% of the workers constituting the bargaining unit, the CAC must declare the union to be recognised; otherwise, it must declare that the union is not recognised. The conditions for recognition under this paragraph may be altered by the Secretary of State by order subject to affirmative resolution procedure.




54. *Paragraph 30* provides that, if a union is recognised by means of a declaration of the CAC and the employer and unions cannot agree a method for conducting collective bargaining, either party can ask the CAC for assistance. This process is illustrated in Figure 2. As elsewhere, the Act provides for a period of negotiation, in this instance

of 30 working days, for the employer and union to try to reach a voluntary agreement before the CAC intervenes.

55. *Paragraph 31* provides that, if the employer and union are still unable after the 30 working day negotiation period to agree on the method for conducting collective bargaining, the CAC will actively try to help them reach an agreement. The period allowed for this stage is 20 working days, or longer if all involved agree. If that attempt is unsuccessful, then the CAC must specify the method for collective bargaining unless the parties jointly request it not to do so. The imposed method will have effect as if it were a legally binding contract between the employer and union. If one party believes the other is failing to respect the method, the first party may apply to the court for an order for specific performance, ordering the other party to comply with the method. Failure to comply with such an order could constitute contempt of court. Sub-paragraph (5) has the effect that, once the CAC has imposed a method, the parties can vary it, including the fact that it is legally binding, by agreement provided that they do so in writing.

56. *Paragraph 32* allows the employer or union to apply to the CAC if an agreed method has not been followed. The CAC will help to broker another agreement or, if the parties cannot agree, will impose a bargaining procedure.

57. Under *paragraph 168*, the Secretary of State may, after consulting ACAS and by order subject to the negative resolution procedure, specify a model method for collective bargaining which the CAC must take into account but may vary if necessary in particular circumstances.

58. *Paragraph 37* provides that if two or more unions apply jointly under paragraph 10 or 11 the CAC must be satisfied they will be able to cooperate effectively on collective bargaining in order to proceed with the application.

59. The purpose of *paragraphs 39*, *40*, *41 and 42* is to give effect to the principle that once an application for recognition has been decided that decision should not be re-opened for at least three years.

60. *Paragraph 51* applies if, once an application is accepted, another application is made for recognition in a bargaining unit which includes at least one worker in the original application's bargaining unit. *Paragraph 38* provides that the new application will always be rejected and paragraph 51 provides that, if the union making the new application has at least 10% membership in the relevant bargaining unit and no bargaining unit has been decided for the original application, the CAC must cease work on the original application and treat it as if it had never been admissible.

## Part II: Voluntary Recognition

61. Part II deals with recognition agreements made in consequence of an application under Part I without there being any formal CAC declaration that the union is recognised ("agreements for recognition"). An employer is required to maintain an agreement for recognition for three years. If either party does not follow an agreed bargaining method, the union or the employer may apply to the CAC to impose a bargaining method, as in paragraph 31. Entirely voluntary agreements are not affected by Part II.

62. *Paragraph 52* provides that an agreement is an agreement for recognition if:

- the agreement was made in consequence of an application for recognition under paragraph 4 that is valid in terms of paragraphs 5-9;
- the agreement is an agreement to recognise the union to conduct collective bargaining on behalf of a particular bargaining unit;
- the union's application under paragraph 4 and any subsequent application to the CAC under paragraph 11 or 12 have not been withdrawn, rejected or cancelled; and

- if the union applied to the CAC under paragraph 11 or 12:
  - — the parties have given notice to the CAC under paragraph 17 to cease consideration of the application; and
  - — the CAC has not declared automatic recognition under paragraph 22 nor been required to arrange for a ballot under paragraph 24.

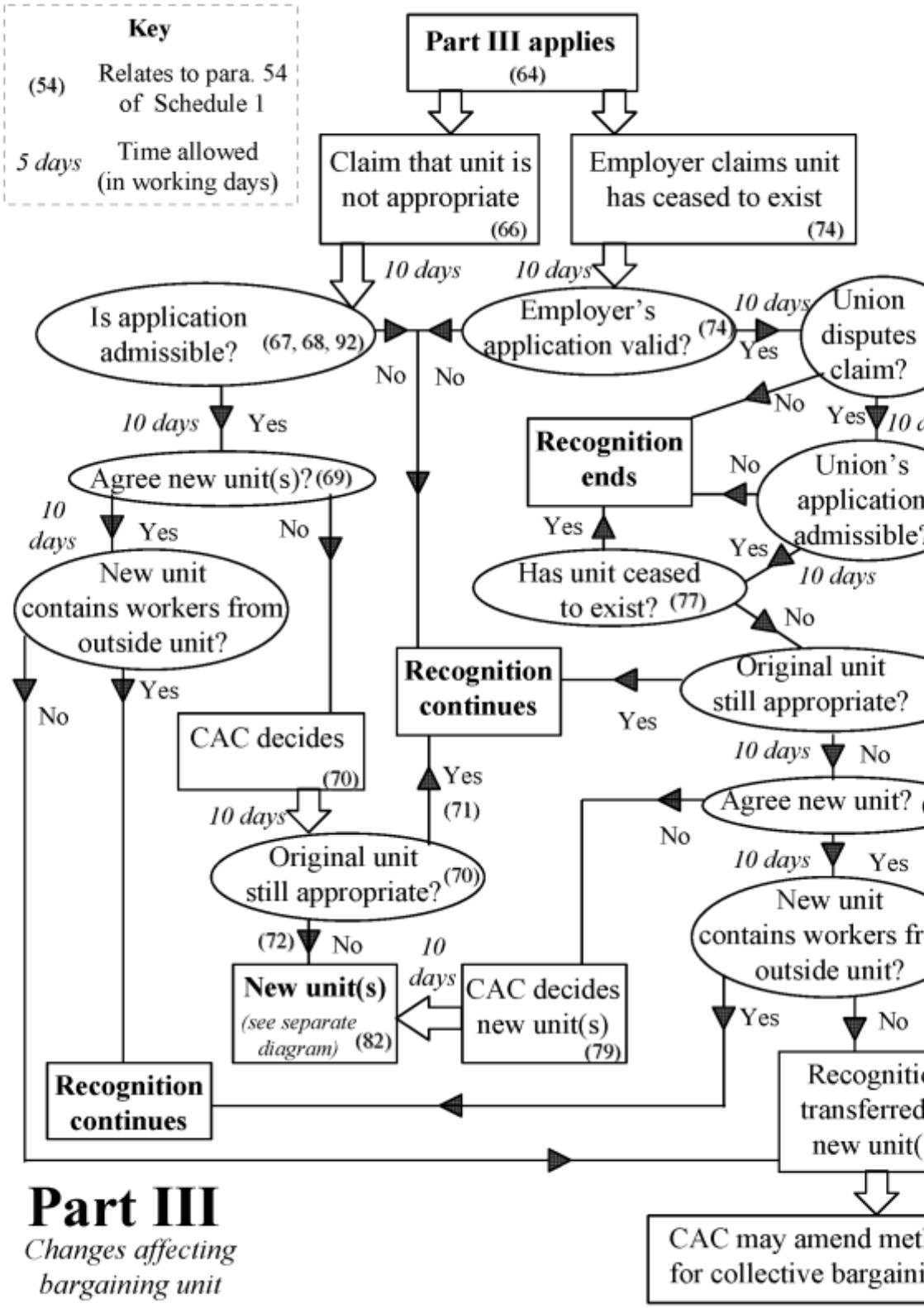
63. *Paragraphs 53 and 54* contain definitions, including a definition of collective bargaining as negotiations on matters the parties agree to bargain about, except for the purposes of a bargaining method imposed by the CAC. As in Part I, an imposed bargaining method will cover pay, hours and holidays.

64. *Paragraph 55* allows a party to apply to the CAC for a decision on whether an agreement is an agreement for recognition. *Paragraph 56* bars an employer from ending an agreement for recognition within 3 years of it being made; a union may end the agreement at any time, subject to the terms of the agreement. *Paragraph 57* provides that if the agreement for recognition is terminated, the bargaining method, whether imposed or not, also ceases to have effect.

65. *Paragraph 58* provides that, if the union and employer make an agreement for recognition, they have 30 working days in which to negotiate with a view to agreeing a bargaining method. If the employer and union do not agree a method for collective bargaining or an agreed method is not followed, either may apply to the CAC for assistance under paragraph 58 or *59*. *Paragraph 60* ensures the employer has at least 21 workers and *paragraph 61* gives other requirements for the application. If the CAC decides under *paragraph 62* to accept the application, *paragraph 63* gives it 20 working days in which it must help the union and employer try to agree a bargaining method. If no agreement is reached, the CAC must specify the method for collective bargaining unless the parties jointly request otherwise. This is the same procedure as that under paragraph 31 in respect of collective bargaining following an award of recognition under the statutory procedure and - as with the paragraph 31 procedure - the Secretary of State may specify a model collective bargaining method under paragraph 168.

## Part III: Changes affecting bargaining unit

66. If an employer's business changes in structure or scope, or if it changes significantly in size, it may be appropriate for collective bargaining arrangements to alter to reflect the change in the business. In the case of voluntary agreements, including agreements for recognition, this is a matter for negotiation between parties. Where recognition has been imposed by the procedure in Part I, Part III provides a procedure for altering the recognition arrangements. Figure 3 illustrates the application procedure. In this Part of the Schedule, it is possible for the original unit to split into one or more new units. References in these notes on Part III to the new unit should generally be taken to mean the new unit or units, except where noted. In some places, it is necessary for the Schedule to distinguish between the cases of one new unit and more than one new unit; these notes make it clear where this happens.




67. *Paragraph 66* allows the employer or the union to apply to the CAC for a decision as to whether the original bargaining unit is no longer appropriate. For the CAC to accept the application, *paragraph 67* means there must be evidence to that effect because the

organisation, structure, nature or size of the business has changed. Sub-paragraph (2) defines the matters which may lead to the bargaining unit being declared inappropriate.

68. *Paragraph 68* provides that the CAC must reject an application unless:

- there is evidence that the original unit is no longer appropriate (paragraph 67);
- it is made in the proper form (*paragraph 92(1)*); and
- a copy of the application, with its supporting documents, is given to the union if an employer applies or to the employer if a union applies (*paragraphs 92(2) and 92(3)*)

69. *Paragraph 69* gives 10 working days in which the employer and union may attempt to agree a new bargaining unit or units. If they do so, the CAC must decide whether the new unit contains (or any of the new units contain) workers covered by a collective agreement with another union. If so, the CAC will take no further action on the application. If not, the CAC must declare the union recognised for the new unit, and the method of collective bargaining for the original unit will apply to the new unit, with any modifications the CAC thinks necessary to take account of the change of unit. If the union and employer do not agree, *paragraphs 70(2) and 70(7)* give the CAC 10 working days in which to decide:

- whether the original unit remains appropriate, using the same criteria as in paragraph 67; and
- if the original unit is not appropriate, what other unit is appropriate.

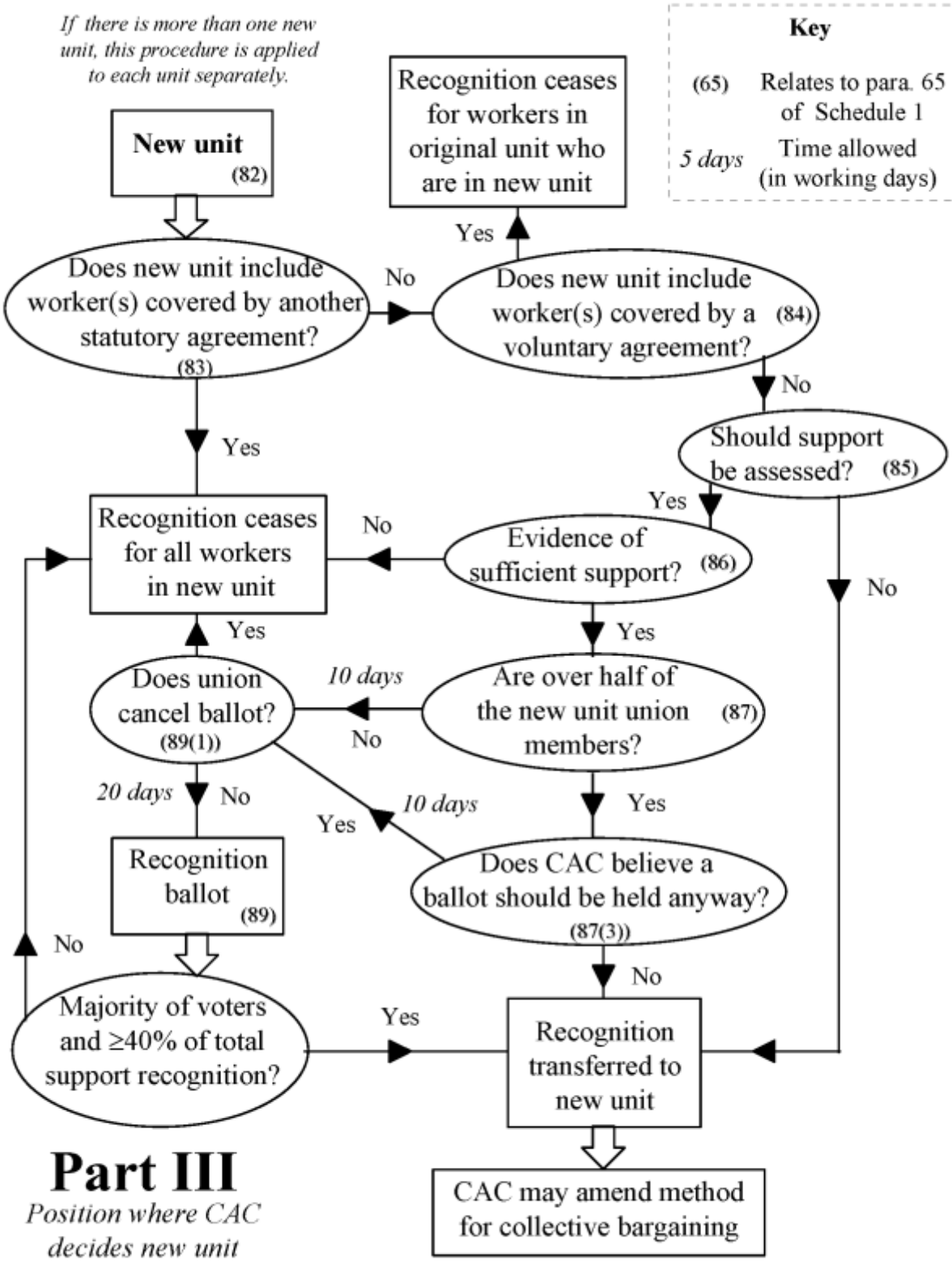
70. If the CAC decides that the original unit remains appropriate, it will take no further action. If the CAC decides that the original unit is not appropriate, it will decide the appropriate unit, taking into account the factors in *paragraphs 70(4), (5) and (6)*. These are the same criteria used for applications under Part I, plus a requirement that if there is more than one new unit then the new units must not overlap. Once the appropriate unit is determined, the CAC must decide under paragraphs 82-89 whether the union should be recognised for that unit. If there are any workers in the original unit who do not fall into a new unit, *paragraph 73* provides that the union will cease to be recognised to represent them in collective bargaining.

71. The employer may also seek to end recognition if he believes the bargaining unit for which the union is recognised has ceased to exist. *Paragraph 74* gives details of how the employer must notify the union of such a claim. The CAC must decide whether the notice is valid. *Paragraph 75* allows the union 10 working days from the receipt of a valid application to apply to the CAC to decide whether the original unit has ceased to exist or is no longer appropriate. If the union does not apply to the CAC, recognition will end. *Paragraph 76* requires the CAC to check that the union's application is admissible, in terms of paragraph 92. If it is not, the CAC must reject it.

72. If the CAC accepts an application, *paragraph 77* requires it to give both parties an opportunity to give evidence. If the CAC decides the original unit remains appropriate, the employer's notice has no effect. If there is evidence that the original bargaining unit is no longer appropriate, the CAC must give notice to that effect. In that event, *paragraph 78* applies and the parties have 10 working days to agree a new bargaining unit. If they do so, the CAC must declare the union recognised for the new unit, and the method of collective bargaining for the original unit shall apply to the new unit, as in paragraph 69. If the union and employer do not agree, *paragraph 79* gives the CAC has 10 working days in which to decide:

- whether the original unit is appropriate, using the same criteria as in paragraph 67; and
- if the original unit is not appropriate, what other unit is appropriate.

73. The procedure the CAC follows is similar to the one in paragraphs 70-73: the CAC will decide the appropriate unit, taking into account the factors in *paragraphs 79(3), 79(4) and 79(5)*, and must then decide under paragraph 82 whether the union should be recognised for that unit.



74. *Paragraph 82* applies if the CAC decides one or more new bargaining units under paragraph 70 or 79. The procedure is illustrated in Figure 4. If there is more than one new unit, the procedure in paragraphs 83-89 is applied separately to each of them. *Paragraph 83* deals with a new unit which overlaps with a statutory outside bargaining unit (ie contains at least one worker who is part of another bargaining unit for which a union is recognised under Part I or Part III following a declaration by the CAC). In this case, the collective bargaining arrangements shall cease in respect of workers in the new unit who were in the original unit or were in a statutory outside unit. The CAC will take no further action, but it would be possible for a union (or unions) to request recognition under Part I of the Schedule for the new unit.

75. *Paragraph 84* deals with a new unit which overlaps with a voluntary outside bargaining unit (ie contains at least one worker who was part of another bargaining unit for which a union was recognised voluntarily, including by an agreement for recognition under Part II) but not with any statutory bargaining unit. In this case, the collective bargaining arrangements must cease in respect of workers in the new unit who were in the original unit. Those in the outside unit will not be affected. The CAC will take no further action.

76. If the new unit contains no workers covered by other collective agreements, *paragraph 85* requires the CAC to decide whether the difference between the new unit and the original unit is such that support for recognition needs to be reassessed. If support does not need to be assessed (ie the changes to the bargaining unit are sufficiently minor), the CAC must declare the union recognised for the new unit, and the original method for collective bargaining will apply, with any modifications the CAC decides are necessary as a result of the change in bargaining unit. If support does need to be assessed, then the tests parallel those in Part I: *paragraph 86* requires the CAC to decide whether the union has 10% membership in the new unit, and recognition is likely to have majority support. If the test is failed, then the union ceases to be recognised. If not, then automatic recognition may be granted to unions with over 50% membership of the bargaining unit under *paragraph 87*, or a ballot will be held under *paragraph 88*.

77. *Paragraph 89* allows the union and employer to agree to cancel the ballot. If they do not, the ballot will be run in the same way as in Part I, paragraphs 25-29. If the ballot is not in favour of recognition, then the union is derecognised. *Paragraph 90* means the union ceases to be recognised in respect of any workers in the original unit who fall outside the new unit (or all of the new units). *Paragraph 91* removes workers who are in the new unit from any statutory outside bargaining unit, and allows the CAC, where a statutory method of collective bargaining applies to that unit, to modify it to take account of the change of unit.

78. *Paragraph 93* ensures that applications to the CAC cannot be withdrawn after the CAC makes a decision or declaration that recognition should continue or should cease, or after a recognition ballot is cancelled by the union under paragraph 89(1). *Paragraph 94* defines collective bargaining for the purpose of Part III and provides that the union and employer can agree to alter the scope of collective bargaining. *Paragraph 95* allows the union and employer to vary a statutory bargaining method by agreement.

## Part IV: Derecognition: General

79. The statutory derecognition process set out in Part IV applies only where a declaration of recognition has been made by the CAC under Part I or III. Applications for derecognition may only be accepted three or more years after the CAC's original decision. In other circumstances, Part IV does not apply, but if a voluntarily-recognised union is derecognised it may then apply for recognition under Part I.

80. *Paragraph 96* provides that the derecognition procedure applies to a union recognised through a CAC declaration. *Paragraph 97* provides that derecognition may not take place until three or more years after a CAC declaration was made.

81. The statutory recognition procedure in Part I does not apply to an employer with fewer than 21 workers. If, at least three years after a CAC decision, an employer has fewer than 21 workers, it can notify the union that it will therefore be derecognised. The union may appeal to the CAC under *paragraph 101* if it believes the request is unfounded.

82. *Paragraph 99* provides that if the employer employs an average of fewer than 21 workers (using the same definition as in paragraph 7) over a period of thirteen weeks, he may at the end of that period give notice to the union of the fact and state that the existing bargaining arrangements will not apply from a given date, which must be at least 35 working days after the union is notified.

83. *Paragraph 100* gives the CAC 10 working days from the date it receives an application from an employer under paragraph 99 in which to decide on its validity. If it finds that the employer's notification was not valid, the collective bargaining arrangements will remain in place; otherwise the CAC must notify the union and employer that the notification is valid and, under *paragraph 101*, the union then has 10 working days in which to make an application to the CAC disputing the employer's claim. If the notice is not challenged, or if the challenge is unsuccessful, the notice will take effect and the collective bargaining arrangements will end on the date specified in the notice. If the CAC rules under *paragraph 102* that the employer's application is not correct, recognition continues.

84. Paragraphs 104-111 apply if the employer requests the union to end the bargaining arrangements. (These paragraphs are broadly similar to paragraphs 10-12 and 15, which deal with a request for recognition.) If the union was recognised voluntarily, and the CAC did not impose a method for collective bargaining, then this procedure does not apply and the employer may derecognise at any time without going through the statutory procedure in this Part.

85. *Paragraph 104* has the effect that a request to end the bargaining arrangements may be made under this Part only once three or more years have passed since the union was recognised.

86. *Paragraph 105* provides that the derecognition procedure is to end if the parties agree to end the bargaining arrangements within ten working days of the request. If the union agrees to negotiate, then the parties have 20 working days, plus whatever remains of the initial ten working day period, to reach agreement. They can extend the period for negotiation by mutual consent. If the parties agree that the union should remain recognised, it is sufficient for them to take no further action. The CAC would not be asked to make a decision under paragraphs 106 or 107, and the bargaining arrangements would remain in force. Paragraph 105(5) is for the avoidance of doubt; there is no requirement to involve ACAS.

87. *Paragraph 106* provides that if the union either does not respond to or rejects the request before the end of the first (ten working day) period, the employer may apply to the CAC to hold a secret ballot to decide whether a majority of workers support derecognition.

88. *Paragraph 107* provides that if the employer and union fail to reach agreement by the end of the second period, the employer may apply to the CAC to hold a secret ballot to decide whether a majority of workers support derecognition. *Paragraph 108* contains general procedural requirements for applications to the CAC. *Paragraph 109* means the application must be rejected if the CAC accepted another application for derecognition under Part IV or V in the previous 3 years.

89. *Paragraph 110* provides that, if the CAC is to decide whether a union should be derecognised, it must first be satisfied that derecognition is likely to have sufficient support in the bargaining unit to make proceeding with the application worthwhile. The test for this is that at least 10% of the bargaining unit favour an end to the collective bargaining arrangements and a majority of the workers in the bargaining unit would be

likely to do so. This is essentially the same test as in paragraph 20 or 36 for recognition applications.

90. Paragraphs 112-116 apply to applications for derecognition by workers. The provisions apply equally if one or many workers in the bargaining unit formally request an end to collective bargaining arrangements. For simplicity these notes refer to applications by a single worker but such references should be read as covering applications by a group of workers as well.

91. *Paragraph 112* provides that three or more years after recognition, a worker may apply to the CAC to end the collective bargaining arrangements. *Paragraph 113* means the application must be rejected if the CAC accepted another application for derecognition under Part IV or V in the previous 3 years. *Paragraph 114* provides that the CAC may not proceed with an application unless at least 10% of the bargaining unit favour an end to the collective bargaining arrangements and a majority of the bargaining unit are likely to do so. (This is essentially the same test as in paragraph 110).

92. *Paragraph 116* requires the CAC to help the employer, union and worker with a view either to the employer's and union's agreeing to end the bargaining arrangements or the worker's withdrawing the application in the 20 working days after the application is accepted. If an agreement is reached or the application is withdrawn, the CAC will take no further action. Otherwise, it must hold a ballot under the provisions of paragraphs 117-121.

93. *Paragraphs 117-121* make provision for the holding of ballots on applications for derecognition, mirroring the procedures for recognition ballots under paragraphs 25-29. Paragraph 121 provides that if the ending of bargaining arrangements is supported by a majority of those who vote and at least 40% of the workers constituting the bargaining unit, the CAC must declare that the bargaining arrangements will cease to have effect from a specified date; otherwise, the application must be refused and the union will remain recognised. The degree of support needed for derecognition may, like that needed for recognition, be altered by the Secretary of State by order subject to the affirmative resolution procedure.

## Part V: Derecognition where recognition automatic

94. Part V provides for a different derecognition process to apply in cases where unions have been 'automatically' recognised on the grounds of having greater than 50% membership of the bargaining unit (*i.e.* without a ballot). Applications for derecognition of an automatically-recognised union may be accepted only three or more years after recognition.

95. *Paragraphs 122-124* provide that the derecognition procedure applies to unions recognised as the result of a CAC declaration under paragraph 22 or 87 whether the method for collective bargaining is voluntarily agreed, imposed by the CAC or agreed as a variation on a CAC imposed method.

96. *Paragraph 125* provides that derecognition may not take place until three or more years after a CAC declaration of recognition was made.

97. Paragraphs 127-133 provide for an employer to request a union to end bargaining arrangements on the grounds that fewer than half of the workers constituting the bargaining unit are members of the union. (These paragraphs are similar to paragraphs 104-111, which deal with a standard request for derecognition.)

98. *Paragraphs 127 and 129* contain general procedural requirements for applications to the CAC under this Part.

99. *Paragraph 128* provides that the derecognition procedure is to end if the parties agree to end the bargaining arrangements within ten working days of the request. If the union agrees to negotiate, then the parties can extend the ten working day negotiation period

by mutual consent. If the parties agree that the union should remain recognised, it is sufficient for them to take no further action. The CAC would not be asked to hold a ballot under paragraph 106 or 107 (which are applied by reference), and the bargaining arrangements would remain in force. If the union either does not respond to or rejects the request before the end of the negotiation period, the employer may apply to the CAC to hold a secret ballot to decide whether the union should be derecognised.

100. *Paragraphs 130 and 131* provide that, if the CAC is to hold a ballot to decide whether a union should be derecognised, it must first be satisfied that a majority of the workers who make up the bargaining unit are not members of the recognised union, and that it had accepted no application for derecognition under Part IV or V in the previous 3 years. If a majority of the workers are union members, the automatic recognition will remain in force and the CAC will take no further action. The CAC has 10 working days in which to decide.

101. *Paragraph 133* provides that if a ballot is to be held on derecognition the same derecognition ballot procedure as in Part IV should be followed.

## Part VI: Derecognition where union not independent

102. Part VI provides that workers will be able 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 an employer.

103. These provisions apply equally if one or many workers in the bargaining unit request an end to collective bargaining arrangements.

104. *Paragraphs 134 and 138* restrict the scope of this Part to unions which do not have a certificate of independence.

105. *Paragraph 137* provides that at any time after a non-independent union is recognised, a worker (or workers) may apply to the CAC to end the collective bargaining arrangements. *Paragraph 139* provides that an application is not admissible unless at least 10% of the bargaining unit favour an end to the collective bargaining arrangements and a majority of the bargaining unit are likely to do so. (This is essentially the same test as in paragraph 110). *Paragraphs 135 and 136* provide definitions for this Part of the Schedule.

106. *Paragraph 140* makes an application for derecognition under Part VI inadmissible if the union has applied for a certificate of independence under section 6 of the 1992 Act. *Paragraph 141* requires the CAC to decide whether an application is admissible in terms of paragraphs 137-140, taking evidence from the employer, union and workers.

107. *Paragraph 142(1)* mirrors paragraph 116(1), and requires the CAC, during a 20 working day negotiation period, to help the employer, union and workers negotiate with the aim that either they agree to end the bargaining arrangements or the worker withdraws the application. If an agreement is reached or the application is withdrawn, the CAC will take no further action. Otherwise, it must hold a ballot under paragraph 147.

108. If during the negotiation period in paragraph 142 the CAC becomes aware that the union applied for a certificate of independence before the application for derecognition was made, *paragraph 143* requires it to suspend work on the workers' application for derecognition. If the Certification Officer (CO) decides that the union is independent, *paragraph 144* has the effect of ending the application, and the union remains recognised. If the CO decides that the union is not independent, the application resumes, and a new 20 working day negotiation period begins. If the employer and union agree to end recognition or if the workers withdraw their application, the CAC will take no further action. If they cannot agree, it must hold a ballot under *paragraph 147*. If at any time before the CAC is informed of a ballot result under Part VI the union is awarded a certificate of independence – for example, as a result of an appeal against the CO – then

*paragraph 146* requires the CAC to ignore the workers' application for derecognition and the union remains recognised.

109. *Paragraph 148* deals with the situation where an application for derecognition under this Part has been successful but the employer has re-recognised the non-independent union for substantially the same bargaining unit. In this case, paragraph 35 allows an independent union to apply for statutory recognition under Part I within 3 years of the derecognition. If the independent union is declared to be recognised by the CAC then paragraph 148 provides that the non-independent union shall be derecognised. In this case statutory recognition under Part I replaces the voluntary recognition of the recently-derecognised non-independent union.

## Part VII: Loss of independence

110. The provisions for statutory recognition in Part I apply only to unions with a certificate of independence. Part VII of the schedule deals with the possibility that an independent union recognised under Part I might lose its certificate of independence. If this were to happen, the union would be treated as voluntarily recognised by the employer, but the statutory support for the bargaining arrangements would cease. Part VII also deals with unions which have made an agreement for recognition and for which a bargaining method is imposed via Part II; again, if such a union were to lose its certificate of independence the statutory support for the bargaining arrangements would cease.

111. *Paragraphs 149 and 150* provide that Part VII applies to unions recognised by a declaration of the CAC (under Part I or Part III) or which obtain a legally-binding bargaining procedure under Part II. *Paragraph 152* means that the bargaining arrangements cease if the Certification Officer withdraws a certificate of independence from the union or, if more than one union is jointly recognised, from all the unions. *Paragraph 153* provides for the bargaining arrangements to be restored if a union successfully appeals against the Certification Officer's decision to withdraw the certificate of independence.

112. *Paragraph 154* means that if the bargaining arrangements cease to have effect under this Part, then the employer can derecognise the union without having to go through the procedure in Part IV or Part V, or negotiate to change the bargaining unit without following the procedure in Part III. If the union appeals successfully against the loss of certificate, the original arrangements will come into force again.

113. *Paragraph 155* concerns the requirement to consult on training (section 5 of the Act). If the requirement lapses because a union loses its certificate of independence, but then resumes because the union appeals successfully, the first consultation meeting must be held within 6 months of the day on which the bargaining arrangements take effect again.

## Part VIII: Detriment

114. Detriment is action short of dismissal taken by an employer which is damaging to the worker. *Paragraphs 156-160* set out provisions prohibiting such detriment in respect of a worker on the grounds relating to recognition or derecognition of a union listed in paragraph 156(2). Under section 146 of the 1992 Act, an employee currently has the right not to suffer detriment on grounds of membership, non-membership or taking part in the activities of a trade union. The Act extends this right so as to prohibit detriment in respect of the paragraph 156(2) grounds and gives employees the right to complain in respect of such detriment to an employment tribunal. Paragraphs 157-160 make provision for time limits and other procedural matters and in relation to the calculation of awards.

115. *Paragraph 161* provides that an employee's dismissal is unfair if it is on the grounds related to recognition or derecognition listed in paragraph 161(2); these are the same grounds as in paragraph 156(2). *Paragraph 162* makes similar provision in respect of selection for redundancy. *Paragraph 163* has the effect that dismissal which would be

unfair under paragraphs 161 or 162 will still be unfair even if the dismissal consists of the expiry of a fixed term contract and the employee has waived the right to claim unfair dismissal on that expiry as permitted by section 197(1) of the 1996 Act. This provision is transitional in nature since such waivers will be prohibited by section 18 of the Act when it is brought into force.

116. *Paragraph 164* has the effect that dismissal on the grounds listed in paragraph 161(2) is unfair even if the employee has not completed the qualifying period normally required for claiming unfair dismissal or has passed the upper age limit normally required for making a claim.

- The *qualifying period for unfair dismissal* is currently one year, as set out in section 108 of the 1996 Act (as amended by SI 1436/1999).
- The *upper age limit* is dealt with in section 109 of the 1996 Act.

## Part IX: General

117. *Paragraph 166* provides that if the CAC represents to the Secretary of State that the automatic recognition procedure in paragraphs 22 or 87 has an unsatisfactory effect, the Secretary of State may amend it. The amendment need not be one proposed by the CAC, and must be made by statutory instrument subject to the affirmative resolution procedure. *Paragraph 167* allows the Secretary of State to issue guidance to the CAC on how to exercise its functions under paragraphs 22 and 87, ie how to decide the three qualifying questions in paragraphs 22(4) and 87(4). The guidance is required to be laid before both Houses of Parliament and published

118. *Paragraph 168* provides that the Secretary of State may by order specify a method for conducting collective bargaining to be taken into account by the CAC when imposing a collective bargaining method under paragraphs 31(3) and 63(2). The Secretary of State must consult ACAS before providing the guidance, which is made by order subject to negative resolution procedure. The CAC must take the specified method into account in imposing a bargaining method, but may depart from it as circumstances require.

119. *Paragraph 169* allows the Secretary of State to make rules for how the CAC should treat competing applications for derecognition.

## *Section 2 and Schedule 2: Detriment related to trade union membership*

120. Existing law protects employees against positive acts to prevent or deter trade union membership, non-membership or activities but not against omissions on the same grounds. In other words, if an employer takes action which gives a benefit to non union members but omits to confer the same benefit to union members, the omission does not constitute action short of dismissal on grounds related to trade union membership under section 146 of the 1992 Act. This aspect of the law was brought to light in the cases *Associated Newspapers v Wilson* and *Associated British Ports v Palmer [HL 1995] ICR 406***,** where the House of Lords held that the word "action" in section 146 did not extend to omissions to act.

121. *Section 2* gives effect to Schedule 2, which amends section 146 so as to prohibit this form of detriment by omission and makes consequential amendments to other related sections of the 1992 Act; section 147 on the time limit for applications to be made to employment tribunals; section 148 on the consideration of a complaint by tribunals; section 149 on the remedies which tribunals can award; and section 150 on awards against third parties.

122. *Paragraph 2* of Schedule 2 replaces references in sections 146(1), (3) and (4) of the 1992 Act to action short of dismissal on grounds related to trade union membership, non-membership or activities with references to a right not to be subjected to any detriment as an individual by an act or deliberate failure to act on the part of the employer for one of the prohibited purposes. Section 146(5), which sets out the

ground on which an employee may present a complaint to an employment tribunal as action taken against him, is amended accordingly. Similarly, *paragraphs 3 to 6* make consequential amendments to sections 147, 148, 149 and 150 of the 1992 Act, which deal respectively with the time limits for bringing complaints before an employment tribunal, the criteria to be applied by the tribunal in determining the purpose of an employer's action, the remedies available in the event that the tribunal find a complaint is well-founded and proceedings against third parties.

### *Section 3* : *Blacklists*

123. Under sections 137 and 138 of the 1992 Act, refusal of employment or (in the case of employment agencies) refusal of service on grounds of trade union membership is unlawful. In the past, organisations have compiled and disseminated blacklists of supposed trade union activists. People on such lists could have difficulty finding work. Inclusion could be defamatory and unjustified but it was often impossible in practice to obtain a remedy. Although there is no evidence that blacklisting is widespread, the practice of blacklisting in the UK has been repeatedly criticised by the International Labour Organisation and in *Fairness at Work* the Government proposed to prohibit blacklisting of trade union members.

124. *Section 3(1)* gives the Secretary of State the power to make regulations, subject to affirmative resolution (under section 42), to prohibit the compilation of lists containing information about individuals' trade union membership or activities with a view to their being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers already employed. *Subsection (2)* provides that the prohibition may extend to the use, sale or supply of such lists. *Subsection (3)* sets out particular provisions which may be included in Regulations made under subsection (1). They include provision:

- conferring jurisdiction on employment tribunals and the Employment Appeal Tribunal;
- empowering the courts and tribunals to grant and enforce specified remedies;
- for awarding compensation to individuals included on blacklists;
- relating to cases where an employee is dismissed or selected for dismissal because he is included on a blacklist;
- permitting trade unions to bring proceedings on behalf of their members;
- creating criminal offences, which may in specific circumstances extend to another person, for example to an accomplice or agent of the person who commits the offence, or to their employee or employer; and
- specifying obligations or offences which will not apply in specified circumstances.

The regulations may also include supplemental, incidental, consequential and transitional provisions, including provision amending Acts of Parliament, and may make different provisions in differing cases and circumstances. The Government intends to consult on draft regulations before they are made.

125. *Subsection (4)* limits the penalties for criminal offences which might be created by regulations made under subsection 3. Subsection (4)(a) provides that offences may not be punishable by imprisonment. Subsections (4)(b)and (c) set out the maximum fines that can be imposed by the courts. Such fines may not exceed level 5 on the standard scale (£5,000) for an offence that is triable only summarily, or the statutory maximum for a summary conviction for a case triable either way. The penalties are based on analogous criminal sanctions in the Data Protection Act 1998.

126. *Subsection (5)* is interpretative. It provides a wide definition for the type of list which can be prohibited by regulation. In particular, it is designed to cover information that

may be stored and circulated electronically, and to cope with the future development of information technologies. It also provides that the term "worker" (which appears in subsection (1)(b)) has the wide definition given in section 13 of the Act, and so includes agency workers, homeworkers, persons in Crown employment and Parliamentary staff as well as those included in the definition of "worker" in section 230(3) of the 1996 Act.

127. *Subsection (6)* provides that expressions used in section 3 (except for "worker" and "list") have the same meanings as in the 1992 Act.

### *Section 4 and Schedule 3: Ballots and Notices*

128. Sections 226 to 235 of the 1992 Act specify the law relating to industrial action ballots and notices. These provisions are complex. The Government invited suggestions in *Fairness at Work* to clarify and simplify the law in this area. A large number of responses to this invitation were received, especially from trade unions and legal bodies. *Section 4* gives effect to Schedule 3, which draws on some of these suggestions and amends the law in the following areas.

#### Informing employers of the ballot result

129. Section 231A of the 1992 Act requires unions to inform employers about the result of an industrial action ballot which involves their employees. In cases where a union ballots its members employed by different employers, the union must supply the information to each of the employers concerned. Under existing law, a failure to inform some, but not all, of the employers can make it unlawful for the union to induce any of its balloted members to take action. *Paragraph 2(3)* of Schedule 3 makes it lawful in these circumstances for a union to call on its members to take action where they are employed by an employer who was informed of the result. It will remain unlawful, however, for a union to induce its members to take action if their employer was not informed of the result.

#### Notices to employers of industrial action ballots and the taking of industrial action

130. If a trade union decides to call on its members to take or continue industrial action, it has no immunity from legal liability unless it holds a properly conducted secret ballot in advance of the proposed action. Unions are required under the 1992 Act to give to the employers concerned advance notice in writing both of the ballot and of any official industrial action which may result. The ballot notice must describe, so that their employer can readily ascertain them, the employees who it is reasonable for the union to believe will be entitled to vote. Likewise, the notice of official industrial action must describe, so that their employer can readily ascertain them, the employees the union intends should take part in the action. The current law has been interpreted by the courts (most notably, in the case *Blackpool and the Fylde College v National Association of Teachers in Further and Higher Education [1994] ICR, 648 Court of Appeal and 982 House of Lords*) as requiring the union in certain circumstances to give to the employer the names of those employees which it is balloting or calling upon to take industrial action.

131. *Paragraph 3* amends the provisions of the 1992 Act which provide for a notice to be issued in advance of the ballot. It amends section 226A(2) to redefine the purpose for which the notice is required as being to enable the employer to make plans to deal with the consequences of any industrial action and to provide information to those employees who are being balloted. Sub-paragraph (3) inserts a new section 226A(3A) which sets out the type of information which is to be included in the notice in order to satisfy the new section 226A(2). It has the effect that a union is required to provide only information in its possession and that it is not required to name the employees concerned.

132. *Paragraphs 11(1) to 11(3)* amend section 234A of the 1992 Act, which provides for a notice to be issued in advance of official industrial action, in similar terms.

### Requirement to send sample voting papers to employers

133. Section 226A(1) of the 1992 Act provides that a union proposing to conduct an industrial action ballot must ensure that a sample voting paper is received by every person who it is reasonable for the union to believe will be the employer of a person or persons who will be entitled to vote in the ballot. The sample voting paper must be received not later than the third day before the opening of the ballot. Section 226A(3) has the effect that where more than one employer is involved and different forms of voting paper are used, samples of all the different forms of the voting paper must be sent to every employer.

134. *Paragraph 3(3)* inserts a new section 226A(3B) amending the requirement on unions so that they must ensure only that each employer receives the sample voting paper (or papers, where more than one form exists) which are to be sent to persons employed by that employer. In other words, unions are no longer required to ensure that an employer receives sample forms which are to be sent only to the employees of other employers.

### Inducing members to take industrial action

135. Section 227(1) of the 1992 Act provides that entitlement to vote in an industrial action ballot must be accorded equally to all union members who it is reasonable at the time of the ballot for the union to believe will be induced to take part in the industrial action. No other members are entitled to vote. Section 227(2) provides that these requirements are not satisfied if "any person" who was a member at the time of the ballot and who was denied an entitlement to vote is subsequently induced by the union to take part in the action.

136. The effect of these provisions is that unions are free to induce new members who joined the union after the ballot to take industrial action. However, they cannot induce any members to take action if they were members at the time of the ballot but were denied an entitlement to vote. This includes cases where members changed their job after the ballot and became employed within the group of workers which the union is proposing should take industrial action.

137. *Paragraph 4* repeals section 227(2). *Paragraph 8* inserts a new section 232A into the 1992 Act which defines circumstances where a union which induces a member to take industrial action who was denied an entitlement to vote in the ballot loses its protection from liability in tort. The effect of the new section is to maintain that protection for unions which induce members to take action where they were not balloted, unless it was reasonable at the time of the ballot for the union to believe that those members would be induced to take part. This will enable unions to induce members who changed job after the ballot to take action. *Paragraph 2(2)* makes a consequential change to section 226 of the 1992 Act, which defines the circumstances where industrial action can be regarded as having the support of a ballot.

### Separate Workplace Ballots

138. Section 228 of the 1992 Act defines the circumstances where unions can hold an aggregate ballot across two or more separate workplaces. *Paragraph 5* replaces this section with new sections 228 and 228A.

139. New section 228 requires a union, when balloting its members at two or more workplaces, to hold separate ballots at each workplace unless one or more of the following circumstances (listed in new section 228A) obtain, in which case the union may hold an aggregate ballot if it wishes:

- new section 228A(2) provides for an aggregate ballot to take place at those workplaces where at least one of a union's members is affected by the dispute. (New subsection (5) specifies which members of a union can be categorised as being "affected by a dispute" by reference to the definition of a "trade dispute" in section 244 of the 1992 Act.) ;

- new section 228A(3) provides for an aggregate ballot to take place where a union reasonably believes that it is balloting all its members in a particular occupational category (or categories) who are employed by one or more of the employers with whom the union is in dispute; and

- new section 228A(4) provides for an aggregate ballot to take place where a union reasonably believes that it is balloting all its members who are employed by one or more of the employers with whom the union is in dispute.

New section 228(4) provides the definition of a "workplace" for the purposes of these new provisions.

## Overtime and call-out bans

140. Section 229(2) of the 1992 Act provides that the voting paper in an industrial action ballot must contain either or both of two questions asking whether the voter is prepared to take part in a "strike" or in "industrial action short of a strike". In some cases, it has been unclear whether overtime bans and call-out bans were strikes or industrial action short of a strike, and court action has ensued. Recent authority has concluded that an overtime ban is strike action. *Paragraph 6(2)* reverses this decision and clarifies the status of call-out bans by defining both these forms of industrial action as "industrial action short of a strike" for the purposes of section 229(2). *Paragraph 6(4)* ensures that the definition of a "strike" as "a concerted stoppage of work", which is given in section 246 of the 1992 Act, does not apply to overtime bans and call-out bans for the purposes of the law on voting papers.

## The statement on voting papers

141. Section 229(4) of the 1992 Act requires the following statement to appear on all ballot voting papers: "If you take part in a strike or other industrial action, you may be in breach of your contract of employment". *Paragraph 6(3)* of the Schedule amends this statement by adding words which describe the main features of the new protections against the unfair dismissal of workers taking industrial action contained in Schedule 5 to the Act.

## Conduct of Ballot : Merchant Seamen

142. Sections 230(2A) and 230(2B) of the 1992 Act provide for the situation where a union is conducting an industrial action ballot among its members who are merchant seamen. Merchant seamen are often away from home for long periods and it can be difficult for them to participate in a ballot if voting papers are sent to their home addresses. Sections 230(2A) and 230(2B) therefore require the union to ballot such members on board a ship, or at a port where the ship is, as long as the merchant seamen are at sea, or at a foreign port where their ship is, for the entire period of the ballot. *Paragraph 7* replaces these sections with new sections 230(2A) and 230(2B), which in effect extend these requirements to cater for the case where the merchant seamen are at sea or at a foreign port for just a part of the balloting period. These new provisions require a union, if it is reasonably practicable, to ballot a member on board ship, or at a port where the ship is, if:

- the member will be at sea, or at a foreign port where the ship is, for all or part of the balloting period ; and

- it will be convenient for the member to receive the ballot paper and to vote in this way.

## Disregard of certain minor and accidental failures

143. The organisation of an industrial action ballot is often a complicated task and can sometimes involve many thousands of people spread around the country and, occasionally, abroad. However, a whole ballot can be invalidated if a union commits small errors in determining who is eligible to vote or if a union fails to a small extent to send ballot papers to all those entitled to vote and to nobody else. In order to provide greater scope for such errors to be disregarded, provided they are accidental and on a scale which is unlikely to affect the outcome of a ballot, *paragraph 9* introduces a new section 232B into the 1992 Act defining where failures to meet the requirements of section 227(1) (entitlement to vote in a ballot) and parts of section 230 (conduct of a ballot) can be disregarded.

## Ballots for industrial action : period of effectiveness

144. Section 233 of the 1992 Act provides that industrial action does not have the support of a ballot unless it is called by a "specified person" and meets certain other conditions. One of these is that action to which the call relates must take place before the ballot ceases to be effective in accordance with section 234 of the 1992 Act. Section 234(1) provides that, in ordinary cases, ballots cease to be effective at the end of the period of four weeks beginning with the date of the ballot. Section 246 of the 1992 Act provides that where votes are cast on more than one day the "date of ballot" is the last of those days.

145. *Paragraph 10* provides for this period to be lengthened by up to a maximum of four more weeks if both the union and the employer agree to an extension. The purpose of the amendment is to avoid circumstances where a union feels obliged to organise industrial action within the four week period before a ballot becomes ineffective, even though the parties consider a settlement might be achieved by further negotiation.

146. Where the ballot has included the workers of two or more employers, the option of agreeing an extension is to operate separately in relation to each employer. So, if a ballot involves the workers of two employers (employer A and employer B) and employer A agrees an extension but employer B does not, the extension would apply only in respect of A's workers and not B's.

147. Subsections (2) to (6) of section 234, which deal with the particular case where a court has lifted an injunction prohibiting a union from calling industrial action, are unaffected.

## Suspension of industrial action

148. Section 234A of the 1992 Act provides for a trade union to send a notice to a person's employer informing him that the union intends to call upon all or some of his employees to take industrial action. The notice must be received at least seven days in advance of the commencement of the action. The notice must specify if action is continuous or discontinuous.

149. Subsection 234A(7) deals with the position where continuous industrial action which has been authorised or endorsed by the union ceases to be so authorised or endorsed and is later authorised and endorsed again. It has the effect that the notice issued before the action ceased to be authorised or endorsed does not usually cover any action pursuant to the later authorisation or endorsement. This arrangement discourages unions from suspending industrial action to negotiate a settlement of the dispute because, if the negotiations fail, action cannot resume promptly because a fresh notice has to be issued at least seven days in advance.

150. *Paragraph 11(5)* inserts a new subsection (7A) into section 234A which defines the circumstances where, following a specified period in which the industrial action has been suspended by joint agreement between the union and the employer, the action can be resumed without the need to issue a fresh notice. The specified period of the suspension can be extended by joint agreement. It does not change the existing exemption whereby a union may resume industrial action which it suspended in order to comply with a court order or undertaking.

### *Section 5: Training*

151. *Section 5* inserts new sections 70B and 70C into Chapter VA of Part I of the 1992 Act. (Chapter VA is itself inserted into the 1992 Act by section 1 of the Act.) Under new section 70B, if a union is recognised under the procedure set out in Part I of Schedule A1 to the 1992 Act as inserted by Schedule 1 to this Act and the CAC has specified a method for collective bargaining under paragraph 31(3) of Schedule A1 which the employer and union have not agreed should not be legally binding under paragraph 31(5) of the Schedule, the employer must invite representatives of the union to a meeting to:

- consult on the employer's policy on training;
- consult on the employer's plans for training in the next six months or, if the employer sets a date for the next meeting, in the period before the next meeting; and
- report on the training undertaken since the previous meeting.

152. This duty applies only in respect of workers within the bargaining unit. The first such meeting must be held within six months of the CAC imposing a method for collective bargaining, and further meetings must be held within six months of the previous meetings. The employer will be obliged to give to the union any information without which it would be impeded in participating in the meeting and which it is in line with good industrial relations practice to provide. This is subject to certain exceptions, such as information which would disclose the identity of individuals without their consent. The information must be provided at least two weeks before the meeting. After the meeting, the union has four weeks in which to make written representations (comments, suggestions or requests) on the training matters discussed at the meeting, which the employer must take into account.

153. New section 70C provides that a union may complain to an employment tribunal that an employer has failed to fulfil the obligations under new section 70B. This failure could, for example, consist of a failure to hold meetings or to provide sufficient information to the union in advance of a meeting. As is usual for employment tribunals, a complaint should be made within three months of the alleged failure. If the tribunal upholds the complaint, it may award compensation to each member of the bargaining unit, up to a maximum of two weeks' pay. This award is payable to the individual workers, and the union may not take legal action to enforce payment: a worker may take such legal action if necessary.

### *Section 6: Unfair dismissal connected with recognition: interim relief*

154. This section allows an employee complaining of unfair dismissal under paragraph 161 of Schedule 1 to the Act (dismissal connected with union recognition or derecognition) to claim interim relief.

*Interim relief* is dealt with in sections 128-132 of the 1996 Act. It may be awarded by an employment tribunal if it is applied for within seven days of the employee being dismissed and the tribunal considers it is likely to find the dismissal unfair. The effect of interim relief is that the employer must re-employ the worker on terms at least as favourable as before the dismissal, and hence the employee will continue to be paid. The amount paid under interim relief is offset against the compensation finally awarded

by the tribunal. If the employer fails to re-employ the worker, the tribunal may order the employer to pay compensation.

### *Leave for family reasons*

### *Section 7 and Part I of Schedule 4: Maternity and parental leave*

155. *Section 7* gives effect to Part I of Schedule 4, which provides for basic rights and regulation-making powers relating to maternity and parental leave, replacing the existing maternity provisions in Part VIII of the 1996 Act. References to new sections and subsections in what follows are to the new sections, subsections and chapters inserted in the 1996 Act by Part I of Schedule 4 and references to sections etc. or to original provisions are to the sections or provisions of that Act before the new provisions come into force.

156. The new provisions provide a package of maternity and parental leave rights, which extends the existing maternity leave rights for women and introduces a new right to parental leave for men and women. Employees will be protected from detriment or dismissal for exercising these rights, which will be mainly enforceable through the employment tribunals.

157. Part I of Schedule 4 sets out the basis for the maternity leave scheme which replaces the maternity provisions contained in Part VIII of the 1996 Act. The Act aims to simplify the scheme by providing a basic framework in primary legislation with details in a single set of regulations. Some of the provisions are or will be replaced (either in the new sections inserted in the 1996 Act or in regulations made under the new powers which the Act inserts in that Act) in amended form to remove some of the complexities, while others are re-enacted without any substantive difference.

158. The new provisions were developed in informal consultation with organisations which have a particular interest in this area and then published for public consultation in *Fairness at Work*. These notes set out some of the details of what the Government currently intends to include in the regulations to be made under powers in these new provisions. However, some of these details could change as a result of the further consultation the Government is conducting.

159. The new Chapter I of the new Part VIII of the 1996 Act sets out the amended rights to maternity leave. It provides for three periods of leave:

- ordinary maternity leave of not less than 18 weeks (which replaces current rights for all pregnant employees to 14 weeks leave);
- at least two weeks compulsory maternity leave; and
- additional maternity leave (which replaces the current right to return to work within 29 weeks of the baby's birth for women who qualify).

In each case, the legislation provides the basic right or duty together with powers for the Secretary of State to make regulations setting out detailed provisions.

### New section 71: Ordinary maternity leave

160. New section 71 re-enacts the general right (in the original section 71 of the 1996 Act) of all pregnant employees, regardless of their length of service with an employer, to a period of maternity leave. It also replaces provisions in sections 72 to 76 with powers which will enable similar provisions to be made in regulations. The new provisions, like those they replace, will implement requirements of the Pregnant Workers Directive (Council Directive 92/85/EEC).

161. To distinguish it from other maternity leave periods provided for, the period of leave provided for in this new section is called the "ordinary maternity leave" period. As

under the original provisions of the 1996 Act, during ordinary maternity leave the employee will be able to continue to receive the normal contractual and related benefits (including seniority and pension rights) due to her when she is working, other than her remuneration (new subsections (4) and (5)). She will also continue to be bound by contractual obligations such as confidentiality conditions (new subsection (4)(b)).

162. The Secretary of State is given powers to make regulations:

- under *new subsection (1)*, read with new section 75(2), prescribing conditions for qualifying for this right. As for the original right to 14 weeks' leave under the 1996 Act, it is intended that the right will apply to all employees regardless of length of service;
- under *new subsections (2) and (3)(a)*, for the length of ordinary maternity leave, which must be not less than 18 weeks. The new entitlement will be to 18 weeks' leave, increased from the entitlement of 14 weeks under the previous provisions, in line with the 18-week period for Statutory Maternity Pay (which is dealt with in social security legislation);
- under *new subsection (3)(b)*, which may allow employees to choose (as under the original provisions) when they want to start maternity leave, subject to restrictions the regulations may set. Parameters similar to those having effect under the original provisions are likely to be set: women can choose to start maternity leave any time from the eleventh week before the expected week of the birth; and maternity leave starts automatically if a woman is absent from work with pregnancy related illness in the six weeks prior to the birth, and at the latest when the baby is born; and
- under *new subsection (6)*, specifying what counts as remuneration. It is intended that the regulations should provide that remuneration is the monetary element of a woman's salary or wages.

## New section 72: Compulsory maternity leave

163. This new section and the regulations for which it provides replace the Maternity (Compulsory Leave) Regulations 1994 (SI 1994/2479), which implement the health and safety requirement in the Pregnant Workers Directive for there to be a minimum period of two weeks around the birth during which a woman must not work. The new provisions are intended to have similar effect to those they replace.

164. The new section gives the Secretary of State powers to prescribe in regulations subject to affirmative resolution procedure the duration (subject to a minimum period of two weeks) and timing (subject to its falling within the ordinary maternity leave period) of the compulsory maternity leave period. It is intended that the period prescribed will be, as now, the two weeks following the baby's birth.

165. The provisions put the onus on the employer not to allow a woman to work during the compulsory leave period and provide that any employer who contravenes this requirement will be guilty of a criminal offence and liable to a fine not exceeding level 2 on the standard scale for fines for summary offences (currently £500).

166. Under the original 1996 Act provisions, giving women a basic right to maternity leave of 14 weeks, it would be possible for a woman starting her maternity leave eleven weeks before her baby is due to run out of leave if the baby was born late. In such a situation the current compulsory maternity leave rule ensures that her maternity leave continues for two weeks following the birth. With the increase in maternity leave entitlement from 14 weeks to 18 weeks, it is more difficult to envisage such a situation occurring, but nevertheless, if it did, the regulations would provide that the ordinary maternity leave period lasted until the end of the compulsory leave period.

## New section 73: Additional maternity leave

167. This new section and the regulations under it will replace sections 79-84 of the 1996 Act (which provide for an extended period of maternity absence for those with two years' service). The new section confers a right to a period of additional maternity leave, as distinct from ordinary maternity leave, for which employees who satisfy certain conditions will qualify. While the provisions this replaces are silent on whether there is a contract of employment during maternity absence, this provision makes it clear that the contract continues by conferring a right to leave rather than a right to return and, under new *subsection (4)*, by providing that terms and conditions of employment (other than those relating to remuneration, as for ordinary maternity leave) continue to apply to any extent set out in the regulations. The Government's current intention is that the conditions of employment which are always appropriate during an employment relationship, whether or not the individual is actually working, should continue to apply – such as conditions of confidentiality and mutual trust and confidence. Under new *subsection (7)* the Government intends to ensure that employees' rights relating to seniority etc. will be suspended during the leave and not lost (subject to the provisions of the Social Security Act 1989 which provide for pension rights to continue during any paid maternity leave). Under the provisions in Chapter I of Part XIV of the 1996 Act, the period of leave will count as continuous service for the purposes of determining eligibility for rights under that Act. However, the intention is that in general employers will be free to decide whether or not other terms and conditions will continue during the period of leave.

168. New subsections (4)(c) and (7) provide for regulations to determine the kind of job to which a woman is entitled to return and the rights she will have and the terms and conditions to which she will be subject when she returns. The intention is to include the flexibility provided under the original 1996 Act provisions for employers to offer suitable alternative work where it is not reasonably practicable to take the woman back in her old job.

- Section 235 of the 1996 Act defines *job*, in relation to an employee, as the nature of the work which he is employed to do in accordance with his contract and the capacity and place in which he is so employed

169. As well as the terms which are to apply during this leave, the new section 73 gives the Secretary of State powers to prescribe in regulations:

- under new *subsection (1)*, taken with new *section 75(2)*, who qualifies for this additional right. It is intended that employees with one year's service with their employer will qualify for additional maternity leave, in contrast to the two years' service required for the previous right to maternity absence; and

- under new *subsections (2) and (3)*, the duration and timing of additional maternity leave. The additional maternity leave period is intended to be the period which follows on immediately after the end of the 18 weeks ordinary maternity leave period and which ends twenty-nine weeks after the birth of the baby. Effectively, this period mirrors the maternity absence period in the previous provisions. As under those provisions, women entitled to additional maternity leave will be able to take a total of about 40 weeks' maternity leave, but more women will benefit from this entitlement because of the shorter qualifying period.

## New section 74: Redundancy and dismissal

170. Under this new section the Secretary of State may make provision in regulations about the treatment of an employee at any stage during maternity leave when a redundancy situation occurs. It is intended that the regulations will have the same effect as the provisions in the original sections 77 and 81 of the 1996 Act, under which women on maternity leave or returning to work must be offered alternative employment where the employer has a suitable available vacancy, thus ensuring that protection of women who

are on maternity leave when there is a redundancy situation is not reduced. The general reference to dismissal other than redundancy is needed so that the right to return to work can be disapplied where the woman is dismissed during maternity leave (which will be automatically unfair if this is for reasons relating to pregnancy or maternity - see new section 99 inserted by paragraph 18 of Part III of the Schedule - but could be fair, for example, if it related to conduct occurring prior to maternity leave).

171. New section 74(4) provides power for the regulations to replicate provisions in the original section 96(2) of the 1996 Act, which in effect provide that employers with five or fewer employees do not have to take a woman back after the longer period of maternity absence if it is not reasonably practicable for them to offer her either her old job or a suitable alternative.

### New section 75: Sections 71 to 73: supplemental

172. This new section further prescribes the scope of the powers conferred in the previous new sections for the Secretary of State to make regulations in respect of ordinary maternity leave, compulsory maternity leave and additional maternity leave. *Subsection (1)* provides that the regulations may:

- (paragraph (a)): set out notice and evidential requirements and procedures to be followed. It is intended that an employee will be required to notify the employer of her pregnancy and the week the child is expected to be born, and if requested produce medical confirmation. Under the previous provisions, there are a number of different notification procedures required before maternity leave, after the birth (if required by the employer) and before return to work. This power is intended to be used to rationalise and standardise notice requirements where possible;

- (paragraphs (b) and (c)): set out what happens if the notice requirements or procedures are not followed, or if either the employee or (if any notification requirements were placed on the employer) the employer fail to do what they have notified they will do. Under the original provisions a woman can lose her right to return to work if she fails to meet any of the procedural requirements, even where the employer is clear about the woman's intentions, or if she cannot return to work on a date she has notified, for example because of sickness. Some respondents to *Fairness at Work* argued that losing one's right to return to work was a disproportionate penalty for a technical infringement of the procedures. This provision would allow smaller penalties to be stipulated, for example the start or finishing date for maternity leave could be postponed until the required notice was served. Again, further consultation will inform how this power is to be used;

- (paragraph (d)): set out what happens where the woman has a contractual as well as statutory right to maternity leave. This would enable reintroduction of the provisions in the original sections 78 and 85 of the 1996 Act, which allow the woman to choose whichever of her contractual or statutory rights is better in a particular respect;

- (paragraph (e)): make consequential changes to the provisions which set out how to calculate 'a week's pay' under the 1996 Act for the purposes of redundancy payments and compensation for unfair dismissal. This will enable the regulations to ensure that redundancy payments and compensation are based on an employees' normal pay rather than any pay she received while on maternity leave;

- (paragraph (f)): make consequential amendments; and

- (paragraph (g)): make different provision for different cases or circumstances; this is a normal provision allowing some flexibility, and may be used, for example, to cover the situation where a late birth necessitates the extension of maternity leave (see under new section 72 above).

## Part VIII, Chapter II: Parental Leave

173. Part I of Schedule 4 sets out the basis for the parental leave scheme which will be inserted into the 1996 Act as a new Chapter II of Part VIII, following on from the maternity leave provisions. The new rights to parental leave implement requirements of the Parental Leave Directive (Council Directive 96/34/EC), which was applied to the UK by Council Directive 97/75/EC.

## New section 76: Entitlement to parental leave

174. This new section provides that the Secretary of State must make regulations entitling a parent to a minimum of three months' leave in order to care for a child, providing qualifying conditions as set out in the regulations are satisfied. The new section gives the Secretary of State powers to prescribe in regulations:

- (*subsection (1)(a)*): the qualifying period of employment: it is intended that the regulations will provide for a one year qualifying period for the right to parental leave, the maximum period allowed under the Directive;
- (*subsection (1)(b)*): who qualifies in terms of whether they have or will have responsibility for a child;
- (*subsection (2)(a)*): the extent of an employee's entitlement to parental leave in respect of a child. This will enable the regulations to specify the length of leave, which under subsection (3) must not be less than three months, the minimum period required by the Parental Leave Directive;
- (*subsections (2)(b) and (4)*): when parental leave may be taken. This will enable the regulations to set the maximum age of a child in respect of whom parental leave may be taken (which could be below 8 years, the upper limit specified in the Parental Leave Directive). The regulations will also be able to make appropriate provisions for adoptive parents, who may adopt older children or need leave before formal adoption takes place; and
- (*subsection (5)*): further details, including circumstances in which employers may postpone leave and flexibility to specify time limits and minimum and maximum periods of absence. Factors which might count towards a decision by the employer to postpone the taking of leave by an employee could include a peak business period or a peak absence period, the level of the employee's skill and responsibility, or the difficulty in finding a short term replacement or covering the absence by other means. The regulations could include limits on the number of times or length of time for which leave could be postponed; some of the key options for consideration on timing are whether parental leave should be required to be taken as a single block, or in blocks of minimum or maximum length, or at specified times (e.g. with a proportion to be taken within the child's first year).

## New section 77: Rights during and after parental leave

175. As for additional maternity leave (see under new section 73 above), the employment contract will continue in existence during parental leave and the terms and conditions of employment, other than those relating to remuneration, continue to apply to any extent set out in the regulations. Also, as for additional maternity leave, the Government's current intention is that, while employees will not lose seniority while on parental leave and both they and their employer will continue to be bound by duties of confidentiality and trust etc., employers should be free in general to decide what, if any, other terms and conditions will apply during parental leave.

## New section 78: Special cases

176. This section enables the regulations to make special provision:

- (*subsections (1) and (2)*): about redundancy and dismissal. This will enable the regulations to specify, for example, what happens if the job disappears because of redundancy or the employee is dismissed for reasons not connected with parental leave;
- (*subsections (3) and (4)*): providing for the option of part-time working over a longer period, perhaps limited to particular circumstances;
- (*subsection (5)*): providing for transfer of parental leave in specified circumstances. The Parental Leave Directive says that, in principle, leave should not be transferable from one parent to another. Regulations could however allow for this if there were appropriate exceptional circumstances; and
- (*subsection (7)*): providing for collective or workforce agreements to have effect in place of specified provisions in the regulations. In order to ensure that there is no doubt about which employees have what rights, and that they will be able to enforce their rights, this applies only where the agreements are incorporated into the individual's contract of employment. These provisions will be enforceable through the employment tribunals.

## New section 79: Supplemental

177. This new section makes supplementary provision as to the scope of the Secretary of State's regulation-making powers. Further consultation will inform how these additional provisions will be used, but some possibilities are set out below. They enable the Secretary of State:

- (*subsections (1)(a), (b) and (c)*): to set out procedures to be followed, notices and evidence required, and records to be kept by employers and employees in relation to a period of parental leave. For example, the regulations could specify that employees must:
  - — give notice of a specified length,
  - — give written notice, and
  - — provide evidence of entitlement,

  and that employers must:
  - — respond within a specified time, and
  - — give reasons for postponement or refusal;
- (*subsections (1)(d) and (e)*): to specify the consequences of failure to comply with these provisions;
- (*subsection (1)(f)*): as for maternity leave, to enable employees to choose to exercise contractual rights, where these are better;
- (*subsection (1)(g)*): to make consequential amendments; and
- (*subsection (1)(h)*): to make different provision for different cases or circumstances (additional flexibility, as under the maternity leave provisions - see new section 75(1)(g)). This would enable different provision to be made, for example, in relation to adopted children.

178. *New subsection (2)* is a technical measure enabling (as for maternity leave under new section 75(1)(e)) provisions in the 1996 Act concerned with the calculation of a week's pay to be modified to ensure, for example, that employees' entitlement to redundancy pay is not reduced because they were on parental leave on the calculation date for that payment.

179. *New subsection (3)* provides additional powers to ensure the regulations can make any other provision which may be necessary or expedient to implement the EC Parental Leave Directive or to deal with the UK's obligations under the Directive. This power ensures that a single set of regulations can be made covering all provisions on parental leave.

### New section 80: Complaint to employment tribunal

180. This new section provides for employees to complain to an employment tribunal that their employer has unreasonably postponed their leave or obstructed their taking it (for example, by disputing that they qualify for the right). The remedies - a declaration and compensation - are in line with existing remedies in the 1996 Act (for example, under section 51, in relation to time off for public duties), and the new right to time off for dependants (new section 57B, see below).

### *Section 8 and Part II of Schedule 4: Time off for dependants*

181. This section and Part II of Schedule 4 insert new provisions after section 57 of the 1996 Act giving employees the right to take a reasonable amount of unpaid time off work to deal with specific matters affecting a dependant. This implements the part of the Parental Leave Directive not implemented by the parental leave provisions.

### New section 57A: Right to time off for dependants

182. Under *new section 57A(1)* the employee has the right to time off:

- (paragraphs (a) and (b)) to help when a dependant falls ill, gives birth or is injured (including, under subsection (6), mental illness or injury);
- (paragraph (c)) when a dependant dies;
- (paragraph (d)) to cope when the arrangements for caring for a dependant unexpectedly break down; or
- (paragraph (e)) to deal with an unexpected incident involving a dependent child during school hours, or on a school trip or in other circumstances when the school has responsibility for the child.

183. *Subsection (2)* provides that the right only applies if the employee, as soon as reasonably practicable, tells the employer why he or she is absent and (unless the employee is already back at work) for how long the absence is likely to last.

184. *Subsection (3)* defines 'dependant' as the employee's parent, wife, husband or child, or someone who lives with the employee as part of the family, other than an employee or tenant etc. (This definition is taken from section 62(3)(c) of the Family Law Act 1996 and would include, for example, partners or elderly relatives living with the family). *Subsections (4) and (5)* provide that the dependant can also be someone who relies on the employee in the particular circumstances of an illness, accident or disruption of normal care arrangements.

### New section 57B: Complaint to employment tribunal

185. This new section provides for enforcement through employment tribunals, following the precedent set in existing provisions conferring rights to time off (see, for example, sections 51 and 57 of the 1996 Act: complaints relating to time off for public duties or ante-natal care). As is usual for complaints to employment tribunals, a complaint must normally be made within three months. Where it is well-founded the tribunal is required to make a declaration to that effect, and may award compensation at a level which takes into account both the employer's fault and the employee's loss.

### *Section 9 and Part III of Schedule 4: Consequential amendments*

186. Section 9 gives effect to Part III of Schedule 4, which sets out changes to current legislation resulting from the provisions relating to maternity leave, parental leave and time off to deal with matters concerning dependants. Most of these are technical consequential changes, but the Schedule also confers a right not to suffer detriment for reasons connected with maternity, parental leave or time off and makes dismissal for any such reasons automatically unfair.

187. The latter provisions in part implement requirements of the Parental Leave Directive, and fulfil proposals in *Fairness at Work*; and in part replace the original provisions in the 1996 Act. As with the other family rights, these provisions will be developed in regulations. It is intended that all the rights and protections to be covered together in a single set of regulations. References to paragraphs in the following are to paragraphs of Part III of Schedule 4.

188. *Paragraph 10* inserts a new section 47C into the 1996 Act giving employees the right not to suffer detriment (i.e. unfavourable treatment) for reasons, to be set out in detail in regulations, relating to pregnancy, maternity, parental leave or time off for dependants, including matters connected with collective or workforce agreements on parental leave. While legislation already provides the right not to be dismissed for reasons relating to pregnancy and maternity, under the original 1996 Act provisions there is no explicit right not to suffer detriment for such reasons. In practice, however, unfavourable treatment on these grounds will almost always be unlawful sex discrimination, so including pregnancy and maternity in this provision is to bring the maternity provisions in line with those on parental leave and time off for domestic incidents, rather than to create what is a significant additional right in itself. The new right follows the same lines as existing rights not to suffer detriment in Part V of the 1996 Act.

189. *Paragraph 18* replaces section 99, which makes it automatically unfair to dismiss a women for reasons connected with pregnancy or maternity, with a power to make similar but wider provisions relating also to parental leave, time off for dependants and related collective or workforce agreements.

190. *Paragraph 46* amends the order-making powers in the 1996 Act to provide that the regulations on maternity and parental leave are made under the affirmative procedure, requiring a debate in both Houses of Parliament.

### *Sections 10-15 : Right to be accompanied in disciplinary and grievance hearings*

191. The ACAS Code of Practice No 1 on "Disciplinary Practice and Procedures in Employment" states that disciplinary procedures should "give individuals the right to be accompanied by a trade union representative or by a fellow employee of their choice" at disciplinary interviews. The Code has no legal force but it must be taken into account by Employment Tribunals where it appears to be relevant. In practice, any failure by an employer to allow a worker to be accompanied can count against an employer in tribunal hearings and can result in a ruling that the dismissal was unfair. There is no statutory obligation to put in place disciplinary or grievance procedures although section 3 of the 1996 Act does oblige employers with 20 or more employees to inform their employees of disciplinary rules, the name of a person to whom they can apply for redress of any grievance and the manner in which any such application should be made.

192. Section 10 creates a statutory right for a worker to be accompanied by a fellow worker or trade union official of his choice during grievance and disciplinary procedures. Section 11 provides a remedy for individuals following a failure to comply with the right to accompaniment. Section 12 provides a right not to be subject to any detriment as an individual on the grounds of having sought to exercise the right to accompaniment. Section 13 provides definitions for some of the terms used in sections 10 to 13. Section 14 places restrictions on contracting out of the section 10-13 provisions and provides

for conciliated settlement of tribunal claims. Section 15 excludes national security employees from the rights conferred by sections 10-13.

193. The Act does not place a duty on trade union officials or fellow employees to perform the role as the accompanying individual. Nor does it place any additional requirements on employers to establish disciplinary or grievance procedures where none currently exists.

194. *Section 10(1)* provides that the right applies when a worker is invited by his employer to attend a disciplinary or grievance hearing and makes a reasonable request to be accompanied thereto. *Section 10(2)* states that the right extends to accompaniment by a single individual of the worker's choice who shall have permission to address the hearing and to confer with the worker during the hearing but shall not be permitted to answer questions on behalf of the worker. *Section 10(3)* describes the individuals who may act as the accompanying person:

- a trade union official employed by the union (full time officials will fall into this category);
- a trade union official not employed by the union (eg a lay official) who has been reasonably certified in writing by his or her union as having had experience of acting as an accompanying person or as having received trained in performing this role; or
- a fellow worker currently employed by the same employer.

195. *Sections 10(4) and (5)* provide that a worker may propose an alternative time for the hearing if his chosen companion is unavailable to accompany him at the time of the hearing proposed by the employer. The employer is bound to accept the alternative time provided that it is reasonable and is no more than five working days after the date originally proposed by the employer. *Section 10(6)* provides that an employer must permit a worker time off to accompany a fellow worker and *section 10(7)* has the effect that such time off should be paid. (This entitlement to paid absence is defined by reference to the existing sections of the 1992 Act which specify an employer's obligations to provide paid time off to the officials of recognised trade unions when carrying out their trade union duties.)

196. *Section 11* provides for a right for individuals to apply to an employment tribunal to remedy an employer's failure, or threat to fail, to comply with the right to accompaniment; subsection (2) provides the time limit for bringing such a complaint to a tribunal; and subsection (3) provides a remedy for a successful complaint under the section of compensation up to a maximum of two weeks' pay. Subsection (4) determines the basis for calculation of a "week's pay" in these circumstances. Under subsection (5), the calculation of a week's pay is subject to an upper limit provided for by section 227(1) of the 1996 Act. Under subsection (6), where the claim is part of a claim for unfair dismissal, no compensation will be available for a claim in respect of the right to accompaniment if it is part of a claim for unfair dismissal and the tribunal makes a supplementary award of compensation for the dismissal under section 127A(2) of the 1996 Act because the employer provided a procedure for appealing against dismissal but prevented the complainant from using it.

197. *Section 12(1)* provides that the worker has the right not to be subject to any detriment by any act, or deliberate failure to act by his employer, on the grounds that he sought to exercise the right to be accompanied or sought to accompany a worker in accordance with section 10. It expressly provides that accompanying workers have rights whether or not they share the same employer as the worker seeking accompaniment. The effect of *subsection (2)* is that existing provisions permitting a worker to complain to an employment tribunal that he has been subject to detriment on the grounds defined by sections 44-47 of the 1996 Act are to apply on contravention of subsection (1). This means that the employer will be placed under an obligation to show the ground for which he acted (or failed to act) detrimentally. The effect of *subsection (3)* is that

where a worker is dismissed because he exercised or sought to exercise his rights under section 10, or accompanied another in accordance with that section (or sought to do so), the dismissal will be automatically unfair. *Subsection (4)* provides that subsection (3) is not subject to any age limit or qualifying period. *Subsection (5)* extends the availability of interim relief, provided for by sections 128 to 132 of the 1996 Act, to dismissals for exercising or seeking to exercise the right to be accompanied or to accompany. *Subsection (6)* provides that references to an "employee" in relevant parts of the 1996 Act are to be taken as references to a "worker".

198. *Section 13(1)* defines "worker" for the purposes of these rights. The definition includes agency workers (defined in *subsection (2)*); home workers (defined in *subsection (3)*); persons in Crown employment (except members of the naval, military, air or reserve forces of the Crown); and relevant members of House of Lords or House of Commons staff. In the case of an agency worker, either the agent or the principal is deemed to be the employer. In the case of a home worker, the employer is deemed to be a person who contracts for work from a home worker. *Subsection (4)* defines "disciplinary hearing" for the purposes of section 10 as one which could result either in (a) an employer administering a formal warning to a worker; or (b) an employer taking some other action against him; or (c) the confirmation of a warning issued or other action taken. (This third category is intended to cover appeal hearings where a sanction might be endorsed or removed.) *Subsection (5)* defines a grievance hearing for the purposes of section 10 as a hearing which concerns the performance of a duty by the employer in relation to a worker. *Subsection (6)* sets out the definition of "working day" for the purposes of ascertaining whether workers have suggested an alternative date for a hearing within the time limit of five working days.

199. *Section 14* prohibits individuals from opting out of the provisions or from waiving their right to bring tribunal proceedings under sections 10-13, and makes available conciliation procedures. Section 14(a) applies certain provisions of section 203 of the 1996 Act to sections 10-13. This has the effect that any provision in a contract of employment or other agreement is void to the extent that it would exclude or limit the effect of the rights conferred by sections 10-13 or prevents a worker complaining of a breach of the rights. The only exceptions are settlements of tribunal cases made with the assistance of an ACAS conciliation officer under section 18 of the Employment Tribunals Act 1996 and legally binding compromise agreements to settle tribunal cases which comply with section 203(3). Section 14(b) applies certain provisions of section 18 of the Employment Tribunals Act 1996 to rights under sections 10-13. This provides that ACAS conciliation officers have a duty to attempt to promote a settlement of tribunal cases relating to those rights proceedings

200. *Section 15* exempts members of the Security Service, Secret Intelligence Service and the Government Communications Headquarters from the rights conferred by sections 10-13.

### *Section 16 and Schedule 5: Unfair dismissal of striking workers*

201. Employees who take industrial action are in breach of their contracts of employment and can be lawfully dismissed. However, the law currently specifies the following exceptions to that rule where employees so dismissed have grounds to apply to employment tribunals for unfair dismissal:

- under section 237 of the 1992 Act, an employee has no right to complain of unfair dismissal if at the time of dismissal he is taking part in unofficial industrial action, unless it is shown that the reason or principal reason for dismissal or selection for dismissal was one of those specified in sections 99(1) to (3), 100, 101A(d), 103 or 103A of the 1996 Act (dismissal in maternity, health and safety, employee representative and protected disclosure cases); and

- under section 238 of the 1992 Act, an employee who takes official strike or other industrial action has a right to complain of unfair dismissal if one or more relevant

employees of the same employer have not been dismissed, or if another employee has been offered re-engagement within three months of dismissal and that the complainant has not been offered re-engagement. In other words, an employee has a right to complain of unfair dismissal if the employer dismisses selectively (although such selective dismissal is not in itself a ground for unfair dismissal proceedings).

202. *Section 16* gives effect to Schedule 5, which allows employees who take or have taken industrial action to complain of unfair dismissal in specified, additional circumstances, in line with the Government's proposal in Chapter 4 of *Fairness at Work* to extend the protection of those who take lawfully organised official industrial action. It does this by inserting a new section 238A after section 238 of the 1992 Act. The new provisions do not apply to unofficial industrial action, which is dealt with in section 237 of the 1992 Act.

203. New section 238A has the effect that an employee who takes part in "protected" industrial action, and to whom one of the following circumstances applies, will be regarded as having been unfairly dismissed. The circumstances are:

- if the dismissal takes place within a period of eight weeks beginning with the first day on which any employee involved in the industrial action took such action, whether or nor at the date of dismissal the employee is still engaged in such action;
- if the dismissal takes place after the period of eight weeks has elapsed, but the employee had ceased industrial action before the eight week period ended; or
- if the employee has failed to end the industrial action before the eight week period elapsed and the employer has not followed all reasonable procedural steps to resolve the dispute.

"Protected" industrial action refers to action which the employee is induced to commit by his union, provided that the union's action in doing so is protected under section 219 of the Act from liability in proceedings in tort for inducement to break, or interfere, with contracts.

204. New section 238A(6) sets out the following factors which the tribunal should particularly take into account when assessing whether employers have taken reasonable procedural steps to resolve the dispute:

- whether the employer or the union had followed agreed procedures to resolve the dispute;
- whether the employer or the union had offered or agreed to commence or re-open negotiations after action had begun; and
- whether the employer or the union had unreasonably refused to involve a third party (in practice this is likely to be ACAS) in helping resolve the dispute through conciliation or mediation. (Mediators are third parties who make non-binding recommendations to help resolve disputes. In contrast, arbitrators can make binding recommendations. For the purposes of new section 238A, mediators must confine their recommendations to procedural matters only.)

205. New section 238A(7) has the effect that in judging whether an employer had taken such "reasonable steps" the tribunal should not become involved in judging the merits of the dispute.

206. New section 238A(8) deals with circumstances where a union repudiates industrial action during the course of the dispute, thereby changing the status of the industrial action from official to unofficial. It provides that if employees continue to take industrial action beyond the day following the union's repudiation, then they lose their entitlement to bring an action for unfair dismissal under the section. So, for example, if the union repudiated the action on a Monday, the entitlement would be lost if the employees took action on or after the following Wednesday.

207. *Paragraph 4* of the Schedule extends the existing coverage of section 239 of the 1992 Act, which deals with supplementary provisions relating to unfair dismissal, to ensure that the new rights under new section 238A are to be construed as one with Part X of the 1996 Act (unfair dismissals). However, unlike the general position under Part X of that Act, employees are not to be required to satisfy any condition of length of service; nor is there to be any upper age limit in order to qualify for the new right to bring a complaint.

208. Sub-paragraph (5) has the effect that tribunals may consider applications for unfair dismissal under new section 238A while industrial action is still proceeding, but may not consider applications for re-instatement or re-engagement until the end of the dispute. It also allows provision to be made by regulations under section 7 of the Employment Tribunals Act 1996 to require tribunals to carry out pre-hearing reviews in specified circumstances, and to enable or require tribunals to adjourn cases in specified circumstances. It is envisaged that this power will be used to require pre-hearing reviews in all cases where the grounds for the claim fall under new section 238A and to require tribunals to adjourn such proceedings where they become aware that the courts are considering actions brought by the employer or others challenging the legitimacy of the union's organisation of the industrial action in question.

209. *Paragraph 5* makes consequential amendments to section 105 of the 1996 Act, regarding the right not to be unfairly dismissed by means of selective redundancy, to take account of the new rights under new section 238A. The amended section 105 ensures that an employee cannot be fairly dismissed by selective redundancy if he is selected for a reason mentioned in new section 238A(2).

### *Section 17: Collective agreements: detriment and dismissal*

210. This section provides powers for the Secretary of State to make regulations subject to the affirmative resolution procedure to protect workers from detriment and dismissal arising from a refusal to enter into a individual contract which includes terms different from those in a collective agreement which would otherwise apply. *Subsection (4)* limits what is to be taken as constituting a detriment for the purposes of this section. The Government intends to consult on draft regulations before they are made.

- *Collective agreement* is defined in section 178 of the 1992 Act as any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' organisations and relating to one or more of (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 workers' membership or non-membership of a trade union; (f) facilities for officials of trade unions; and (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.

### *Section 18: Agreement to exclude dismissal rights*

211. Section 197(1) of the 1996 Act currently provides that workers on fixed-term contracts lasting one year or more may, by written agreement before their contract expires, waive their rights to claim unfair dismissal arising from a failure to renew the contract (dismissal for these purposes includes failure to renew the contract). This is an exception to the usual position whereby, for their own protection, employees are not able to waive statutory employment rights. Section 197(2) provides that this waiver provision does not prevent a shop or betting worker from claiming unfair dismissal rights where the reason for the dismissal is refusal to work on Sundays. Dismissal for that reason is regarded as automatically unfair under the 1996 Act. *Section 18(1)* repeals

section 197(1) so as to remove the ability of anyone on fixed term contracts to waive unfair dismissal rights, and also repeals section 197(2), which is therefore no longer necessary.

212. *Subsection (2)* makes consequential amendments to provisions in the 1996 Act which deal with employees' rights not to suffer detriment for other specified reasons for which dismissal is also regarded as automatically unfair. Like section 197(2), these provisions provide a remedy where employees are dismissed for these specified reasons but have waived their rights to claim unfair dismissal. Rather than disapplying the waiver as in section 197(2), these provisions enable workers to complain of detriment in these circumstances to an employment tribunal, although detriment otherwise does not include dismissal. Once section 197(1) is repealed, these special provisions will become unnecessary since workers will not be able to waive their right to complain of unfair dismissal, and subsection (2) repeals them.

The reasons for which dismissal is regarded as automatically unfair and to which subsection (2) applies are reasons connected with the worker's actions in relation to health and safety (section 44); as a trustee of an occupational pension scheme (section 46); as an employee representative (section 47); in exercising the right to take time off for study or training (section 47A); or in making a protected disclosure within the meaning of the Public Interest Disclosure Act 1998 (section 47B).

213. *Subsections (3), (4) and (5)* make equivalent consequential amendments to similar provisions on detriment in respect of working time in section 45A of the 1996 Act, in section 23(4) of the National Minimum Wage Act 1998 and in paragraph 1 of Schedule 3 to the Tax Credits Act 1999.

214. *Subsection (6)* provides that unfair dismissal waivers do not deprive employees of a remedy if their fixed term contracts are not renewed on grounds of pregnancy or maternity or because they have asserted a statutory employment right. Dismissal for these reasons is regarded as automatically unfair under the 1996 Act, but employees who are dismissed for them have not previously been provided with a remedy where they are working under fixed term contracts and have agreed to waive unfair dismissal rights. It is intended that subsection (6) should come into force in advance of subsections (1) to (5). Although once subsection (1) comes into force section 197(1) of the 1996 Act will be repealed, and no employee will be able to waive unfair dismissal rights, subsection (6) will ensure that employees whose waivers were agreed before the repeal takes effect will have a remedy if they are dismissed for these reasons.

### *Sections 19-21: Part-time work*

215. *Section 19* requires the Secretary of State to make regulations to ensure that part-time workers receive no less favourable treatment than full-time workers, as provided in the EU Directive on Part-Time Work (Council Directive 97/81/EC). The Directive was brought forward under the Agreement on Social Policy to adopt as Community law a Framework Agreement between the European social partners. (These are three federations consisting of national organisations representing respectively employers, trade unions and companies with public ownership or public interest in each Member State. The CBI and TUC are both members of their appropriate groups.) It aims to remove discrimination against part-timers and improve the quality of part-time work. In Chapter 5 of *Fairness at Work*, the Government welcomed the Directive and said it would implement the Directive before April 2000. This provision gives the Secretary of State the powers to ensure that all aspects of the Directive and the Framework Agreement are fully implemented, together with related matters.

216. This power is necessary because Directives which implement Framework Agreements cannot, by the terms of the Agreement on Social Policy (now incorporated into the Treaty of Amsterdam), cover pay. However, in relation to part-timers, the Government believes pay should be covered at the same time as other employment conditions. The powers under the European Communities Act 1972 which are usually used to

implement EU Directives are not sufficiently wide to go beyond the scope of the Directive in this way, so the section provides powers to do this.

217. The regulations will primarily address less favourable treatment in non-statutory terms and conditions, as statutory employment rights in the UK do not treat part timers less favourably than their full-time equivalents. The powers are widely drawn and the Government intends to consult fully on how they should be used, by discussing with interested parties and publishing draft regulations for comment. Section 42 provides that the regulations will be subject to the affirmative resolution procedure.

218. Section 19(2) provides power to specify in the regulations definitions of part-time and full-time workers. There is currently no standard definition of either in UK law, and it is envisaged that whatever is provided in the regulations in this respect will operate, in effect, as a default provision. This is because appropriate definitions may vary between employers or between different sectors of industry; and under section 19(3)(g) provision may be made whereby employers and workers will be able to reach agreement, for example in a collective or workforce agreement, as to what for them constitutes full and part time employment for the purposes of the regulations.

219. An issue for consultation would be whether there are circumstances which need to be specified under section 19(2)(c) as giving rise to less favourable or equal treatment in order to remove doubt and prevent unnecessary litigation. Section 19(2)(d) provides power to exclude specifically certain classes of worker who would otherwise be covered by the definition. One possibility would be casual workers, which the Directive allows to be excluded in specified circumstances. Again, this would be a matter for consultation.

220. Section 19(3)(a) allows the Secretary of State to specify that any disputes arising out of this legislation may only be heard at employment tribunals, and that appeals will go to the Employment Appeal Tribunal. The Government intends that this will be the normal route for disputes.

221. Sections 19(3)(b) and (3)(c) provide power for the Secretary of State to create criminal offences. If it is exercised, the use of this power, which will be subject to consultation, is likely to be strictly limited. Section 19(5) makes it clear that any offences so created will only be for summary trial, and the penalty will be limited to a fine, of up to level 5 on the standard scale (currently £5,000). An existing example of such an offence is in section 57(4) of the Disability Discrimination Act 1995, which makes it an offence, punishable by a fine, knowingly or recklessly to make a false or misleading statement which causes another person to do something which that Act renders unlawful.

222. Section 19(3)(e) would allow the regulations to set up a procedure which would enable those who consider that they may have suffered less favourable treatment to require information from their employer (for example, written reasons, or other information) in order in particular to enable them to decide whether or not to proceed with a claim.

223. The social partners intended aspects of the Framework Agreement to be adaptable to the specific conditions of sectors of the economy or individual companies. The Government wishes to keep this flexibility in these regulations. Section 19(3)(g) allows the Secretary of State to set out the extent of that flexibility in the regulations, along with the circumstances in which different provision can be agreed. For example, the regulations could provide that different provisions could be agreed through collective or workforce agreements.

224. Section 19(4) gives power to make whatever provision (in addition to those provided for under subsections (2) and (3)) may be necessary to implement the Directive or the Framework Agreement, or to cover other matters (such as pay) in the same way.

225. *Section 20* provides for the Secretary of State to issue Codes of Practice relating to part-time work. This will enable implementation of Clause 5 of the Framework Agreement, which does not impose any legal obligations on Member States or employers, but

provides (amongst other things) for the encouragement of more and better quality part-time jobs by setting out principles which employers should seek to adopt. As with other statutory Codes of Practice, breach of such a Code would not in itself give rise to proceedings but the provisions of such a Code may be taken into account by a tribunal if it considers it to be relevant.

226. A Code of Practice may deal with matters specific to the UK labour market which will help improve opportunities for and treatment of part-timers. For example, it may include factors to be considered in deciding whether a job can be done part-time; examples of ways to encourage part-time work at senior levels in a company; and advice on informing workers of available part-time opportunities. The Government has made a commitment to consult widely on this Code.

227. *Section 21* sets out the procedure by which the Secretary of State can issue or revise a Code. The Secretary of State must consult on any draft Code or revision, and take any responses into account before introducing the Code to Parliament. The draft Code or revision must be laid before both Houses of Parliament, and both Houses must resolve to approve the draft before the Secretary of State can issue the Code.

### *Section 22: National Minimum Wage: Communities*

228. Section 22 will amend the National Minimum Wage Act 1998 to exempt residential members of religious and other similar communities. The exemption will apply to individuals if:

- the community of which they are a member is a charity or is established by a charity (but is not an independent school or a community which provides a course of further or higher education);
- a purpose of the community is to practise or advance a religious or similar belief; and
- all or some of the members live together for that purpose.

The exemption was recommended by the Low Pay Commission in their report *"The National Minimum Wage Accommodation Offset. A Review by the Low Pay Commission"* (Cm 4321, March 1999) and was announced by the Secretary of State in his response to that report on 31 March 1999 (Commons Hansard WA cols 812-813).

### *Section 23: Power to confer rights on individuals*

229. The employment rights legislation has developed piecemeal over a period of many years. While some aspects - such as the right not to have unauthorised deductions made from wages - extend to a relatively broad description of workers, most are currently restricted to employees as narrowly defined, ie to workers engaged under a contract of employment. Whether or not a worker is engaged under such a contract is not always an easy question to answer, however. This is because it is a common law question of mixed fact and law which in the event of a dispute can be definitively determined only by a court or tribunal. No single factor is conclusive; all relevant circumstances must be taken into account.

230. The Government considers it desirable to clarify the coverage of the legislation and to reflect better the considerable diversity of working relationships in the modern labour market. Currently, significant numbers of economically active individuals - including for example many home workers and agency workers - are either uncertain whether they qualify or else clearly fail to qualify, for most if not all employment rights. Some work providers offer jobs on the basis of contracts under which the workers, although acting in a capacity closely analogous to that of employees and not genuinely in business on their own account, are technically self-employed or of indeterminate status according to the established common law criteria, and are thus effectively deprived of the rights in question.

231. Certain descriptions of individuals are explicitly excluded from exercising some or all of the rights, although not on a consistent basis, and others - such as members of the clergy - are incapable of qualifying owing to the nature of their appointment.

232. *Section 23(2)* gives the Secretary of State the power, by order subject to the affirmative resolution procedure (under section 42), to extend to individuals who do not at present enjoy them employment rights under the 1992 and 1996 Acts, this Act and any instrument made under section 2(2) of the European Communities Act 1972. The Government envisages using this new power 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.

## *CAC, ACAS, Commissioners and Certification Officer*

### *Sections 24 and 25: Central Arbitration Committee*

233. The Central Arbitration Committee (CAC) is an independent public body established by the Employment Protection Act 1975. Its constitution is laid down in sections 259-265 of the 1992 Act. The CAC's functions are currently to determine statutory claims from trade unions relating to the disclosure of information for collective bargaining purposes and to provide voluntary arbitration in trade disputes between employers and trade unions. In the three years from 1995 to 1997, the CAC received seventy applications to exercise its functions concerning the disclosure of information for collective bargaining purposes and no requests to arbitrate in trade disputes. The CAC currently has three Deputy Chairmen and eight panel members, representing employer and employee organisations. A new Chairman is expected to be appointed later this year.

234. Section 1 and Schedule 1 to the Act confer new functions on the CAC to administer the statutory trade union recognition and derecognition scheme and determine cases brought under it. The purpose of sections 24 and 25 is to revise some of the statutory provisions relating to the CAC to enable it to carry out these new functions. Section 24 amends the procedures for the appointment of members to the CAC and section 25 provides for amendments to the proceedings of the CAC.

### *Section 24: CAC: members*

235. The appointment of CAC members is covered by section 260 of the 1992 Act. Section 24 contains new provisions to replace the first three subsections of section 260. It gives the Secretary of State the power to appoint all members of the CAC and enables him to appoint one of them as chairman and one or more of them as deputy chairmen. In carrying out these functions, the Secretary of State must consult ACAS, and may consult others as he sees fit. Currently, ACAS nominates all members of the Committee, apart from the chairman.

236. The section also provides that all the persons appointed to the Committee must be experienced in industrial relations and that the Secretary of State must ensure that among the CAC's membership there are both individuals experienced as representatives of employers and as representatives of workers.

### *Section 25: CAC: proceedings*

237. The section sets out the way in which the CAC is to organise its proceedings when carrying out its functions under the recognition and derecognition scheme. It does this by inserting additional provisions into section 263 of the 1992 Act. It leaves unaffected the way in which the CAC organises proceedings in relation to its two current functions.

### *Section 26: ACAS: General duty*

238. The Advisory, Conciliation and Arbitration Service (ACAS) was established under the Employment Protection Act 1975. It is an executive non-departmental public body with about 700 staff. ACAS provides conciliation in collective trade disputes and most categories of dispute about individual employment rights. The Service appoints mediators and arbitrators to make recommendations to resolve disputes. It also provides advice and information in a wide range of ways to improve industrial relations and help prevent disputes from arising.

239. ACAS's general duty is found in section 209 of the 1992 Act as last amended by the Trade Union Reform and Employment Rights Act 1993. Section 26 amends section 209 by removing the particular requirement on ACAS to give priority to its work on dispute resolution leaving it to read: "It is the general duty of ACAS to promote the improvement of industrial relations".

### *Section 27: ACAS: Reports*

240. Section 27 changes the reporting arrangements of ACAS and the CAC. *Subsection (1)* amends section 253(1) of the 1992 Act changing the period covered by ACAS's annual report from a calendar year to a financial year. This change means that the periods covered by ACAS's annual report and its accounts will be the same. *Subsection (2)* makes the corresponding change to section 265(1) of the 1992 Act to ensure that the periods covered by the CAC's report and financial accounts will coincide. A similar provision is made in respect of the annual reports of the Certification Officer in Schedule 6, which is dealt with later in this commentary.

### *Section 28: Abolition of Commissioners*

241. *Subsection (1)* abolishes two public offices: the Commissioner for the Rights of Trade Union Members (CRTUM) and the Commissioner for Protection Against Unlawful Industrial Action (CPAUIA). The CRTUM was established under the Employment Act 1988 and his main function is to provide material assistance to any trade union member who is taking, or contemplating taking, certain legal proceedings against his union or against an official of his union. The CPAUIA was established under the Trade Union Reform and Employment Rights Act 1993 and his main function is to provide material assistance to any individual who is taking, or contemplating taking, legal proceedings against a trade union whose unlawful organisation of industrial action deprives or is likely to deprive the individual of goods and services. For both bodies, assistance usually takes the form of paying for legal advice or meeting legal costs. Both Commissioners are independent of Government and cannot be directed by Ministers to assist, or not to assist, any particular application. The legal provisions establishing both offices have been incorporated into the 1992 Act.

242. Both Commissioners are part-time appointments currently held by the same individual. Since his inception, the CRTUM has assisted, on average, ten applications a year and the CPAUIA has assisted one application to date.

243. *Subsection (2)* repeals the sections of the 1992 Act which set out the duties of the CRTUM and the CPAUIA and which set out administrative provisions by which they operate. *Subsection (3)* removes the reference to the CRTUM from the standard form of words which is required to be included in the financial position statement which trade unions are required to provide to their members each year under section 32A of the 1992 Act.

### *Section 29 and Schedule 6: The Certification Officer*

244. The Certification Officer (CO) is an independent statutory officer established under the Employment Protection Act 1975. His current functions include:

- maintaining lists of trade unions and employers' associations and ensuring that both types of body comply with statutory requirements concerning their membership and accounting records;
- the auditing of accounts;
- annual returns;
- financial affairs;
- political funds; and
- procedures for amalgamations and transfers of engagements.

He also determines whether unions meet the statutory test of independence and deals with complaints by union members concerning alleged breaches by unions of their statutory duties to elect senior officers. In certain of these areas, he has powers to issue declarations or make orders requiring unions to remedy any failure to comply with their statutory obligations.

245. *Section 29* gives effect to Schedule 6, which amends the statutory powers of the Certification Officer, as set out in the 1992 Act. The overall effect is to widen the scope for trade union members to make complaints to the CO of alleged breaches of trade union law or trade union rules, thereby enlarging the CO's role as an alternative to the courts as a means to resolve disputes. It achieves this by giving the CO order-making powers in areas of trade union law where he makes only declarations at present, and by extending his powers to make declarations and orders into areas where he has no competence to hear complaints and issue such orders at present. The CO's powers in respect of employers' associations remain unchanged.

246. Paragraphs 2-5 of the Schedule amend the powers conferred upon the CO and the court by sections 24, 24A, 25 and 26 of the 1992 Act. Section 24 places requirements on unions to compile and maintain a register of the names and addresses of their members. Section 24A requires unions to place a duty of confidentiality on the scrutineers and independent persons they appoint to oversee an election, political fund or merger ballots. This duty requires scrutineers and independent persons not to disclose the names or addresses of members on union registers, except under certain specified circumstances. Sections 25 and 26 specify how individuals can seek a remedy from the CO or the courts respectively for alleged breaches of these requirements.

247. *Paragraph 2* amends section 24 by repealing provisions which allow a complainant to make an application to the court after he has made an application on the same matter to the CO. This closes off a route whereby an applicant could make two parallel applications to the CO and to the court. *Paragraph 3* has the same effect in relation to cases brought to the CO under section 24A.

248. *Paragraph 4* amends section 25 by:

- requiring the CO in all cases to give an opportunity to both the applicant and the trade union to be heard;
- requiring the CO to make an enforcement order (unless he considers it inappropriate to do so) on the union to remedy a declared failure to comply with the law on membership records and/or to abstain from acts which might lead to a future recurrence of same kind of failure;
- enabling the CO's enforcement order to be enforced in the same way as an order of the court;
- enabling any member of the union who was a member at the time of the declared failure to apply to the court to force the union to comply with the CO's order;

- enabling the CO's declaration to be relied upon as if it were a declaration of the court;
- preventing parallel proceedings by an applicant to the CO after he has applied to the courts; and
- requiring the CO, when hearing complaints, to take account of the outcome of such cases as are brought to his attention where the court has already heard a complaint by a different person relating to the same alleged failure by the union.

249. *Paragraph 5* amends section 26 by:

- preventing parallel proceedings by an applicant to the court after he has already applied to the CO;
- repealing the reference to the conduct of parallel proceedings in subsection (2); and
- requiring the court, when hearing complaints, to take account of the outcome of such cases as are brought to the court's attention where the CO has already heard a complaint by a different person relating to the same alleged failure by the union.

250. *Paragraph 6* amends section 31 of the 1992 Act, which specifies the remedy available to a union member if a union fails to provide him with access to the union's accounting records as required in section 30 of that Act. The amendments:

- give powers to the CO to make such enquiries as he sees fit about a union member's complaint and enable the CO to ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time;
- require the CO in all cases to give an opportunity to both the applicant and the trade union to be heard;
- give powers to the CO to issue orders, as appropriate, to ensure the applicant can inspect the records in the company of an accountant and to obtain copies of records;
- specify that the CO's orders may be enforced in the same way as a court order;
- specify that the CO shall determine cases within six months, as far as practicable; and
- prevent the applicant from taking parallel proceedings regarding the same complaint to both the court or the CO.

251. *Paragraph 7* amends section 45C of the 1992 Act, which provides a remedy for a trade union member who alleges that his union has failed to comply with its duty under section 45B 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 disqualification period is for five or ten years, depending on the nature of the offence. Currently, the CO can hear complaints and issue declarations but cannot issue orders. The amendments:

- give powers to the CO to make such enquiries as he sees fit about a union member's complaint and enable the CO to ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time;
- give powers to the CO to issue orders, as appropriate, imposing requirements on the union to remedy a declared failure;
- require the CO in all cases to give an opportunity to both the applicant and the trade union to be heard;

- specify that the CO's orders may be enforced in the same way as a court order;
- enable the CO's declaration to be relied upon as if it were a declaration of the court;
- prevent the applicant from taking parallel proceedings regarding the same complaint to both the court or the CO; and
- ensure that, where the court has heard a case relating to a particular alleged failure, the CO must take the court's judgements and decisions into account when hearing an application by a different person in relation to the same alleged failure. They also ensure that the court must take into account the decisions and observations of the CO in the reverse situation where the CO first heard a case.

252. *Paragraph 8* inserts a new section 45D into the 1992 Act which provides that the parties to a case considered by the CO under sections 25, 31 or 45C of Chapter III of the 1992 Act can appeal to the Employment Appeal Tribunal (EAT) against the CO's decision in that case. The appeal relates to questions of law only, and not to questions of fact. The effect of the change is to make the EAT the body to which appeals can be made against CO decisions in cases relating to a union's duties to maintain accurate membership records; to give access to its accounting records; and to ensure that disqualified individuals do not hold certain senior positions in the union.

253. Paragraphs 9-12 amend powers assigned to the CO and the court under sections 54, 55 and 56 of the 1992 Act to hear complaints about alleged failures by unions to comply with the law on elections for certain senior positions in unions. The law on elections is contained in Chapter IV of the 1992 Act and covers, among other things, elections to a union's principal executive committee and to the positions of general secretary and president where such post holders can vote at meetings of a principal executive committee. Currently, the CO can hear complaints and issue declarations but cannot issue orders.

254. *Paragraph 9* amends section 54 by repealing the provision that the making of an application to the CO does not prevent an individual making an application to the court in relation to the same matter.

255. *Paragraph 10* amends section 55 by:

- requiring the CO in all cases to give an opportunity to both the applicant and the trade union to be heard;
- requiring the CO to make an enforcement order (unless he considers it inappropriate to do so) on the union to remedy a declared failure to comply with the law on elections and/or to abstain from acts which might lead to a future recurrence of the same kind of failure. The CO's order may also require the union to re-run the election under conditions which the CO is empowered to stipulate;
- enabling the CO's enforcement order to be enforced in the same way as an order of the court;
- enabling any member of the union who was a member at the time the order was made or any candidate in the election in question to apply to the courts to force the union to comply with the CO's order;
- enabling the CO's declaration to be relied upon as if it were a declaration of the court;
- preventing parallel proceedings by an applicant to the CO after he has applied to the court; and
- requiring the CO, when hearing complaints, to take account of the outcome of such cases as are brought to his attention where the court has already heard a complaint by a different person relating to the same alleged failure by the union.

256. *Paragraph 11* amends section 56 by:

- preventing parallel proceedings by an applicant in the court after he has applied to the CO; and
- requiring the court, when hearing complaints, to take account of the outcome of such cases as are brought to its attention where the CO has already heard a complaint by a different person relating to the same alleged failure by the union.

257. *Paragraph 12* adds a new section 56A to the 1992 Act which provides that the parties to a case considered by the CO under section 55 can appeal to the EAT against the CO's decision in that case. The appeal relates to questions of law only, and not to questions of fact.

258. *Paragraph 13* gives new powers to the CO to hear complaints by a union member relating to the use of his union's funds for certain political objects where the union does not have a political fund. Section 71 of the 1992 Act makes it unlawful for a union to spend money from its general fund on the political objects set out in section 72. Such expenditure may be financed only from a properly established political fund. Paragraph 13 inserts a new section 72A into the 1992 Act which:

- gives powers to the CO to make such enquiries as he sees fit about a union member's complaint and enable the CO to ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time;
- gives powers to the CO to make or refuse declarations relating to the alleged breach, giving reasons for his decision in writing. If he makes a declaration, the CO must specify which provisions of section 71 have been breached and which sums of money were involved. When considering complaints, the CO may make such enquiries as he thinks fit and he may make written observations about the cases;
- requires the CO, where he is satisfied the union has or will take steps to remedy its failure to comply with the law, to specify in the declaration the steps taken by a union;
- gives powers to the CO to issue orders, as appropriate, imposing requirements on the union to remedy the breach;
- requires the CO to give an opportunity to both the applicant and the trade union to be heard;
- enables any member of the union who was a member at the time when the CO's order was made to apply to the court to force the union to comply with the CO's order;
- provides that the CO's orders may be enforced in the same way as a court order;
- enables the CO's declaration to be relied upon as if it were a declaration of the court;
- provides that the CO shall determine cases within six months, as far as practicable; and
- prevents parallel proceedings by an applicant to the CO after he has applied to the court, and vice versa.

259. Paragraphs 14 and 15 extend the CO's powers under sections 79 and 80 of the 1992 Act when hearing complaints about an alleged failure by a union to comply with the rules relating to political fund ballots. The law requires such ballots in order to establish a political fund. Once a fund is established, further ballots on its retention must be held, at least every ten years. Unions must first seek the approval of the CO for the rules under which it proposes to conduct the ballot. The CO can already make or refuse to make

declarations for alleged failures to comply with these approved rules when holding or planning to hold ballots.

260. *Paragraph 14* amends section 79 by repealing the provision that the making of an application to the CO does not prevent an individual making an application to the court in relation to the same matter.

261. *Paragraph 15* amends section 80 by:

- requiring the CO in all cases to give an opportunity to both the applicant and the trade union to be heard;
- requiring the CO to make an enforcement order on the union to remedy a declared failure to comply with the law on political fund ballots elections and/or to abstain from acts which might lead to a future recurrence of the same kind of failure, unless the CO considers such an order to be inappropriate. The CO's order may also require the union to re-run a ballot;
- enabling the CO's enforcement order to be enforced in the same way as an order of the court;
- enabling any member of the union who was a member at the time of the order was made or any candidate in the election in question to apply to the court to force the union to comply with the CO's order;
- enabling the CO's declaration to be relied upon as if it were a declaration of the court;
- preventing parallel proceedings by an applicant to the CO after he has applied to the court; and
- requiring the CO, when hearing complaints, to take account of the outcome of such cases as are brought to his attention where the court has already heard a complaint by a different person relating to the same alleged failure by the union.

262. *Paragraph 16* amends section 81, which deals with the entitlement to apply to the courts for declarations relating to failures by unions to comply with political ballot rules. The amendment prevents applications to the court by a person who has already made an application to the CO about the same alleged failure. It also requires the court, when hearing complaints, to take account of the outcome of such cases as are brought to its attention where the CO has already heard a complaint by a different person relating to the same alleged failure by the union.

263. *Paragraph 17* amends section 82, which gives powers to the CO to determine complaints by union members about alleged breaches of statute relating to the political funds of unions. The amendments give powers to the CO to make such enquiries as he sees fit about a union member's complaint and enable the CO to ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time.

264. *Paragraph 18* deals with the powers of the CO to hear complaints by union members that unions are in breach of their statute or rules in connection with gaining their members' approval for union amalgamations or transfers of undertakings. The statutory requirements in respect of these union mergers are set out in sections 99 to 103E of the 1992 Act. Section 103 of the 1992 Act gives the CO powers to hear and to make declarations and orders about complaints in this area. Paragraph 18 amends these powers by:

- giving powers to the CO to make such enquiries as he sees fit about a union member's complaint and enable the CO to ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time;

- enabling the CO's declaration to be relied upon as if it were a declaration of the court;
- enabling any member of the union who was a member at the time of the order was made to apply to the courts to force the union to comply with the CO's order; and
- enabling the CO's enforcement order to be enforced in the same way as an order of the courts.

265. *Paragraph 19* adds a new Chapter VIIA to the 1992 Act which establishes an entitlement for trade union members to complain to the CO about certain alleged breaches of the rules of their trade unions. Currently, trade union members can complain to the court about such breaches, and this entitlement will continue. The effect of the paragraph therefore is to establish an alternative to the court as a means for trade union members to seek remedies in relation to certain alleged breaches of union rules. The new Chapter VIIA comprises three new sections: 108A, 108B and 108C.

266. *New section 108A* specifies the circumstances under which a complaint can be made to the CO and gives the CO powers to make declarations after receiving such complaints. New subsection (2) provides that the alleged breach or threatened breach of union rules must relate to certain specified matters if a complaint is to be made to the CO, namely:

- the appointment or election of a person to any office in the union;
- the removal of a person from an office of the union;
- disciplinary proceedings by the union against a member of the union;
- the balloting of union members, other than political fund ballots (new subsection (4)) and industrial action ballots (as defined in new subsection (8));
- the constitution or proceedings of union executive committees and decision-making meetings (as defined in new subsections (9), (10) and (11)); and
- any other matter which the Secretary of State specifies by order subject to affirmative resolution procedure (under new subsection (12)).

267. New subsection (3) restricts applicants to members of the union or individuals who were members at the time of the alleged breach or threatened breach. New subsection (4) provides that the CO cannot hear complaints about a breach of rules in respect of the dismissal or disciplining of any employee of the union. (The new section does not affect the entitlement of individuals employed by unions to make applications to employment tribunals alleging unfair dismissal or an infringement of other individual employment rights.)

268. New subsections (5) and (6) set out the timetable within which applications must be made to the CO. In cases where the internal complaints procedure of a union was not used, applications must be made within six months of the date of the alleged breach or threatened breach. In cases where the internal complaints procedure of a union was used within six months of the alleged breach, applications must be made to the CO within six months of the date on which the consideration of the complaint under the procedure ended or twelve months after the procedure was invoked whichever is the sooner.

269. New subsection (13) prevents a subsequent parallel application to the court by someone who has already applied to the CO about the same alleged breach, but does not affect the right to appeal to the court against a decision of the CO. Similarly, new subsection (14) prevents a parallel application being made to the CO by someone who has already applied to the court in respect of the same alleged breach.

270. *New section 108B(1)* empowers the CO to refuse to accept an application unless the applicant satisfies him that all reasonable steps have been taken to use any internal complaint procedures of the union to resolve the dispute.

271. *New section 108B(2)* gives the CO the power to make, or refuse to make, declarations and requires the CO:

- to give an opportunity to the applicant and the union to be heard;
- to ensure that, as far as reasonably practicable, he determines cases within six months; and
- to give reasons for his decisions in writing.

272. New section 108B(2) also enables the CO to make such enquiries as he sees fit about a union member's complaint, and under *new section 108B(5)* the CO may ask interested parties to supply him with information by specified dates. The CO can nonetheless proceed to determine complaints in cases where information is not supplied on time.

273. *New sections 108B(3) and 108B(4)* give the CO the power to issue enforcement orders imposing requirements on the union to remedy the breach or withdraw the threat of a breach within a specified time period. Such an order may also require the union to take steps to ensure that the breach does not recur in the future.

274. *New section 108B(6)* provides that the CO's declaration may be relied upon as if it were a declaration of the court and *new section 108B(8)* provides that an order by the CO may be enforced in the same way as a court order. *New section 108B(7)* enables any member of the union who was a member at the time when the CO's order was made to apply to the courts to force the union to comply with the CO's order.

275. *New section 108B(9)* empowers the Secretary of State to make provision for declarations and orders of the CO in orders under the new section 108A(2) adding to the matters in respect of which applications may be made to the CO.

276. *New section 108C* provides that the parties to a case considered by the CO under Chapter VIIA may appeal to the EAT against the CO's decision in that case. The appeal relates to questions of law only, and not to questions of fact.

277. *Paragraphs 20 and 21* of Schedule 6 concern employers' associations. They amend sections 132 and 133 of the 1992 Act, which deal with the use of funds for political purposes and the amalgamation of employers' associations, in order to leave unchanged the current arrangements whereby the CO hears complaints of alleged breaches of statute (which would otherwise be altered by the amendments to the provisions on trade unions, to which they currently cross-refer).

278. *Paragraph 22* amends the procedures which the CO is required to follow, as prescribed in section 256 of the 1992 Act. Its effect is to provide that the CO will normally disclose the name of an applicant or complainant, unless there are good grounds for not doing so. (If an individual had made a complaint to the court, his name would always be revealed to the responding union.) The purpose of the amendment is to ensure that, in most cases, the identity of a complainant will be disclosed to the union, irrespective of whether the complaint had been made to the court or to the CO.

279. *Paragraph 23* adds a new section 256A and a new section 256B to the 1992 Act, which concern the CO's handling of applications and complaints by vexatious litigants

280. In line with the changes made in respect of ACAS and the CAC by section 27, *paragraph 24* provides for the CO's annual report to be made on a financial year rather than calendar year basis.

### *Miscellaneous*

### *Section 30: Partnerships at work*

281. This section authorises the Secretary of State to make funding available for training and other activities to assist and to develop partnerships at work and to disseminate

examples of good practice. The Government's intention to make such funds available was set out in Chapter 2 of *Fairness at Work*.

### *Section 31 and Schedule 7: Employment agencies*

282. Section 31 gives effect to Schedule 7 which amends the Employment Agencies Act 1973 ("the 1973 Act"). The effect of the amendments is set out below with deletions shown struck through and new text inserted in bold.

- *Employment agency* is defined in section 13(2) of the 1973 Act.
- *Employment business* is defined in section 13(3) of the 1973 Act.
- *Employment* is defined in section 13(1) of the Act as including employment by way of professional engagement or otherwise under a contract for services, and au pair arrangements.

283. *Paragraph 2* of the Schedule clarifies and extends the power contained in section 5(1) of the 1973 Act for the Secretary of State to make regulations. It does so by amending and extending the list of matters in respect of which such regulations may in particular make provision, and by repealing the proviso at the end of section 5(1) which prevents the regulation of charges to employers.

284. These amendments make it clear that that the Secretary of State may regulate the provision of services covered by the 1973 Act to employers and those who are seeking work generally rather than specifically the persons presently identified in subsections 5(1)(f) and (g) of the 1973 Act. The amendment also provides that regulations may be made restricting the services provided by operators.

285. Examples of matters on which regulations might be made include:

- 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 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 businesses and employment agencies 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.

286. A new section 5(1A) is added to the 1973 Act which makes clear that the services which can be regulated under section 5(1) are not confined to those offered to UK residents seeking employment within the UK.

287. *Paragraph 3* amends section 6(1) of the 1973 Act, which makes it unlawful, except where the Secretary of State prescribes otherwise, for employment agencies or businesses to charge persons seeking work for the service of finding or seeking to find them work. The amendment makes it clear how this prohibition applies to persons carrying on employment businesses. It also makes it clear that the prohibition applies in relation to the provision of information by persons carrying on employment agencies. The amended provisions make clear that the prohibition on employment businesses

charging persons seeking work applies to services provided to those who are already under contract with an employment business (section 6(1)(b)) and to those who will be, once they have agreed to undertake an assignment with a hirer (section 6(1)(c)).

288. Exceptions to the prohibition 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 persons seeking work in publications made available to employers or potential employers; and
- the provision of information about work opportunities to persons seeking work where no other services are offered, and where the charge for such information is within prescribed limits.

289. *Paragraph 4* amends the inspection powers contained in section 9 of the 1973 Act. The range of premises that may be entered is extended by means of an amendment to section 9(1)(a) of the Act to "relevant business premises", as defined by new section 9(1B). In addition to premises that may currently be entered, "relevant business premises" include premises which have been used in connection with the carrying of an employment agency or business; and (if a duly authorised officer has reason to believe records relating to an employment agency or business are kept there) other business premises used by a person who has carried or is carrying on an employment agency or business. New section 9(1)(d) provides that duly authorised officers may take copies of records and documents kept in pursuance of the 1973 Act or regulations made under it.

290. The power of entry contained in the 1973 Act does not permit inspectors to use force to enter; and it is restricted in its exercise to "all reasonable times". The Act does not affect these limitations.

291. New section 9(1A) provides that, if any records, documents or information which an inspector is entitled to inspect are not kept at the premises being inspected, the inspector may require any person on those premises to inform him where and by whom they are held; and to require their production at those premises at a specified time, if reasonably practicable. New section 9(1C) ensures that the term "document" extends to information held other than on paper, and provides that such information is treated as being kept at premises if it is accessible from them.

292. The existing provisions against self incrimination contained in section 9(2) of the 1973 Act are replaced by new provisions (new sections 9(2), 9(2A) and 9(2B)) which take into account the judgement of the European Court of Human Rights in *Saunders v the United Kingdom*. They also provide an additional safeguard, in making it clear that inspectors cannot require production of material subject to legal professional privilege. The range of offences of obstruction and failure without reasonable excuse to comply with a request to furnish information contained in the existing section 9(3) of the Act is extended to include obstruction under the new section 9(1)(d) and failure without reasonable excuse to comply with a requirement under new section 9(1A).

293. Section 9(4)(a)(iv) of the 1973 Act is also amended, in order to allow information obtained using the compulsory powers contained in section 9(1) to be disclosed for the purposes of any criminal proceedings, rather than solely for those in relation to offences under the 1973 Act. Thus, for example, where the Secretary of State's officers discover that a theft may have occurred, it will be possible for them to disclose information obtained using their compulsory powers to other prosecuting authorities for the purposes of criminal proceedings in relation to that offence, or in such proceedings brought by themselves, without committing an offence under section 9(4)(b) of the 1973 Act. This amendment does not, however, permit the Secretary of State's officers to inspect documents other than those required to be kept under the 1973 Act or regulations made under it; or to require production of information other than to ascertain whether

the 1973 Act or such regulations have been complied with or to enable the Secretary of State to discharge his functions under the 1973 Act.

294. *Paragraph 5* inserts new sections 11A and 11B into the 1973 Act. New section 11A increases the time in which an information laid before a Magistrates Court or a Sheriff's Court in Scotland is triable for any offence under the 1973 Act (other than that contained in section 9(3)) from six months to either three years from the date the offence was committed or six months from the date on which the Secretary of State comes to know of evidence sufficient to justify the prosecution, whichever is the earlier. New section 11B provides that where a conviction under the Act is obtained, costs not exceeding the costs of the investigation resulting in the conviction may be awarded to the Secretary of State.

295. *Paragraph 6* replaces the existing section 12(5) and makes regulations under sections 5 and 6 of the 1973 Act subject to the affirmative procedure. Regulations and orders made under sections 13(7)(i) and 14(3) remain subject to annulment.

296. *Paragraph 7* amends the definition of "employment agency" contained in section 13(2) of the 1973 Act. The substitution of the word "persons" for the word "workers" ensures that the definition of employment agency activity includes the supply of services to companies as well as individuals, in line with the definition of "employment business" activity in section 13(3).

297. *Paragraph 8* replaces the existing section 13(7)(i) so that exemptions from the provisions of the Act can be made with more flexibility and precision than hitherto. The new provision would, for example, enable particular membership societies to be exempted from the Act insofar as they provide services to their members but to remain subject to the legislation in respect of services provided to non-members.

| ***Current text*** | ***Amended text*** |
|---|---|
| ***s.5*** | ***s.5*** |
| ***General regulations*** | ***General regulations*** |
| (1) The Secretary of State may make regulations to secure the proper conduct of employment agencies and employment businesses and to protect the interests of persons availing themselves of the services of such agencies and businesses, and such regulations may in particular make provision–<br>(a) requiring persons carrying on such agencies and businesses to keep records;<br>(b) prescribing the form of such records and the entries to be made in them;<br>(c) prescribing qualifications appropriate for persons carrying on such agencies and businesses; | (1) The Secretary of State may make regulations to secure the proper conduct of employment agencies and employment businesses and to protect the interests of persons availing themselves of the services of such agencies and businesses, and such regulations may in particular make provision–<br>(a) requiring persons carrying on such agencies and businesses to keep records;<br>(b) prescribing the form of such records and the entries to be made in them;<br>(c) prescribing qualifications appropriate for persons carrying on such agencies and businesses; |

| ***Current text*** | ***Amended text*** |
|---|---|
| (d) regulating advertising by persons carrying on such agencies and businesses;<br>(e) safeguarding client's money deposited with or otherwise received by persons carrying on such agencies and businesses;<br>(f) regulating the provision of services by persons carrying on such agencies and businesses in respect of persons who seek employment outside the United Kingdom or of persons normally resident outside the United Kingdom who seek employment in the United Kingdom;<br>(g) regulating the provision of services by persons carrying on such agencies and businesses in respect of persons who are under the age of eighteen years or are undergoing full-time education:<br>Provided that regulations under this section shall not make provision for regulating or restricting the charging of fees to employers by persons carrying on such agencies and businesses.<br>[...] | (d) regulating advertising by persons carrying on such agencies and businesses;<br>(e) safeguarding client's money deposited with or otherwise received by persons carrying on such agencies and businesses;<br>(ea) **restricting the services which may be provided by persons carrying on such agencies and businesses;**<br>(eb) **regulating the way in which and the terms on which services may be provided by persons carrying on such agencies and businesses;**<br>(ec) **restricting or regulating the charging of fees by persons carrying on such agencies and businesses.**<br>(1A) **A reference in subsection (1) (ea) to (ec) of this section to services includes a reference to services in respect of—**<br>(a) **persons seeking employment outside the United Kingdom;**<br>(b) **persons normally resident outside the United Kingdom seeking employment in the United Kingdom.**<br>[...] |
| | |
| ***s.6*** | ***s.6*** |
| ***Restriction on charging persons seeking employment*** | ***Restriction on charging persons seeking employment*** |
| (1) Except in such cases or classes of case as the Secretary of State may prescribe, a person carrying on an employment agency or an employment business shall not demand or directly or indirectly receive from any person any fee for finding him | (1) **Except in such cases or classes of case as the Secretary of State may prescribe—**<br>(a) **a person carrying on an employment agency shall not request or directly or indirectly receive any fee from any** |

| *Current text* | *Amended text* |
|---|---|
| employment or for seeking to find him employment. | **person for providing services (whether by the provision of information or otherwise) for the purpose of finding him employment or seeking to find him employment;**<br>(b) **a person carrying on an employment business shall not request or directly or indirectly receive any fee from an employee for providing services (whether by the provision of information or otherwise) for the purpose of finding or seeking to find another person, with a view to the employee acting for and under the control of that other person;**<br>(c) **a person carrying on an employment business shall not request or directly or indirectly receive any fee from a second person for providing services (whether by the provision of information or otherwise) for the purpose of finding or seeking to find a third person, with a view to the second person becoming employed by the first person and acting for and under the control of the third person.**<br>[...] |
| | |
| ***s.9*** | ***s.9*** |
| ***Inspection*** | ***Inspection*** |
| **1)** Any officer duly authorised in that behalf by the Secretary of State may at all reasonable times | **9** (1) Any officer duly authorised in that behalf by the Secretary of State may at all reasonable times on producing, if so |

| *Current text* | *Amended text* |
|---|---|
| on producing, if so required, written evidence of his authority–<br>(a) enter any premises used or to be used for or in connection with the carrying on of an employment agency or employment business and any other premises which the officer has reasonable cause to believe are used for or in connection with the carrying on of an employment agency or employment business; and<br>(b) inspect those premises and any records or other documents kept in pursuance of this Act or of any regulations made thereunder; and<br>(c) subject to subsection (2) of this section, require any person on those premises to furnish him with such information as he may reasonably require for the purpose of ascertaining whether the provisions of this Act and of any regulations made thereunder are being complied with or of enabling the Secretary of State to exercise his functions under this Act. | required, written evidence of his authority–<br>(a) **enter any relevant business premises;**<br>(b) inspect those premises and any records or other documents kept in pursuance of this Act or of any regulations made thereunder; and<br>(c) subject to subsection (2) of this section, require any person on those premises to furnish him with such Information as he may reasonably require for the purpose of ascertaining whether the provisions of this Act and of any regulations made thereunder are being complied with or of enabling the Secretary of State to exercise his functions under this Act**; and**<br>(d) **take copies of records and other documents inspected under paragraph (b).**<br><br>(1A) **If an officer seeks to inspect or acquire, in accordance with subsection (l)(b) or (c), a record or other document or information which is not kept at the premises being inspected, he may require any person on the premises—**<br>(a) **to inform him where and by whom the record, other document or information is kept, and**<br>(b) **to make arrangements, if it is reasonably practicable for the person to do so, for the record, other document or information to be inspected by. or furnished to the officer at the premises at a** |

| *Current text* | *Amended text* |
|---|---|
| | **time specified by the officer.**<br><br>(1B) **In subsection (1) "relevant business premises" means premises—**<br>(a) **which are used, have been used or are to be used for or in connection with the carrying on of an employment agency or employment business,**<br>(b) **which the officer has reasonable cause to believe are used or have been used for or in connection with the carrying on of an employment agency or employment business, or**<br>(c) **which the officer has reasonable cause to believe are used for the carrying on of a business by a person who also carries on or has carried on an employment agency or employment business, if the officer also has reasonable cause to believe that records or other documents which relate to the employment agency or employment business are kept there.**<br><br>(1C) **For the purposes of subsection (1)—**<br>(a) **"document" includes information recorded in any form, and**<br>(b) **information is kept at premises if it is accessible from them.** |
| (2) A person shall not be required under paragraph (c) of subsection (1) of this section to answer any question tending to incriminate himself or, in the case of a person who is married, his or her wife or husband. | (2) **Nothing in this section shall require a person to produce, provide access to or make arrangements for the production of anything which he could not be compelled to produce in civil proceedings** |

| *Current text* | *Amended text* |
|---|---|
| | **before the High Court or (in Scotland) the Court of Session.**<br><br>(2A) **Subject to subsection (2B), a statement made by a person in compliance with a requirement under this section may be used in evidence against him in criminal proceedings.**<br><br>(2B) **Except in proceedings for an offence under section 5 of the Perjury Act 1911 (false statements made otherwise than on oath), no evidence relating to the statement may be adduced, and no question relating to it may be asked, by or on behalf of the prosecution unless—**<br>(a) **evidence relating to it is adduced, or**<br>(b) **a question relating to it is asked, by or on behalf of the person who made the statement.** |
| (3) Any person who obstructs an officer in the exercise of his powers under paragraph (a) or (b) of subsection (1) of this section shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale and any person who, without reasonable excuse, fails to comply with a requirement under paragraph (c) of that subsection shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale. | (3) Any person who obstructs an officer in the exercise of his powers under paragraph (a)**, (b) or (d)** of subsection (1) of this section shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale and any person who, without reasonable excuse, fails to comply with a requirement under paragraph (c) of that subsection **or under subsection (1A)**shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale. |
| (4) (a) (4)(a) No information obtained in the course of exercising the powers conferred by subsection (1) of this section shall be disclosed except–<br>[...]<br>(iv) with a view to the institution | (4) (a) (4)(a) No information obtained in the course of exercising the powers conferred by subsection (1) of this section shall be disclosed except–<br>[...]<br>(iv) with a view to the institution |

| *Current text* | *Amended text* |
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| of, or otherwise for the purposes of, any criminal proceedings pursuant to or arising out of this Act or for the purposes of any proceedings under section 3A, 3C or 3D of this Act.<br>[...] | of, or otherwise for the purposes of, any criminal proceedings or for the purposes of any proceedings under section 3A, 3C or 3D of this Act.<br>[...] |
| | **11A Offences: extension of time limit**<br>(1) **For the purposes of subsection (2) of this section a relevant offence is an offence under section 3B, 5(2), 6(2), 9(4)(b) or 10(2) of this Act for which proceedings are instituted by the Secretary of State.**<br>(2) **Notwithstanding section 127(1) of the Magistrates' Courts Act 1980 (information to be laid within 6 months of offence) an information relating to a relevant offence which is triable by a magistrates' court in England and Wales may be so tried if it is laid at any time—**<br>(a) **within 3 years after the date of the commission of the offence, and**<br>(b) **within 6 months after the date on which evidence sufficient in the opinion of the Secretary of State to justify the proceedings came to his knowledge.**<br>(3) **Notwithstanding section 136 of the Criminal Procedure (Scotland) Act 1995 (time limit for prosecuting certain statutory offences) in Scotland proceedings in respect of an offence under section 3B, 5(2), 6(2), 9(4)(b) or 10(2) of this** |

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| | **Act may be commenced at any time—**<br>(a) **within 3 years after the date of the commission of the offence, and**<br>(b) **within 6 months after the date on which evidence sufficient in the opinion of the Lord Advocate to justify the proceedings came to his knowledge.**<br><br>(4) **For the purposes of this section a certificate of the Secretary of State or Lord Advocate (as the case may be) as to the date on which evidence came to his knowledge is conclusive evidence.**<br><br>**11B** **The court in which a person is convicted of an offence under this Act may order him to pay to the Secretary of State a sum which appears to the court not to exceed the costs of the investigation which resulted in the conviction.** |
| ***Regulations and orders*** | ***Regulations and orders*** |
| **12**(1) [...]<br><br>(5) A statutory instrument containing regulations under this Act, or an order under section 14(3) of this Act, shall be subject to annulment in pursuance of a resolution of either House of Parliament. | **12**(1) [...]<br><br>(5) **Regulations under section 5(1) or 6(1) of this Act shall not be made unless a draft has been laid before, and approved by resolution of, each House of Parliament.**<br><br>(6) **Regulations under section 13(7)(i) of this Act or an order under section 14(3) shall be subject to annulment in pursuance of a resolution of either House of Parliament.** |
| ***s.13*** | ***s.13*** |
| ***Interpretation*** | ***Interpretation*** |
| (2) For the purposes of this Act "employment agency" means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other | (2) For the purposes of this Act "employment agency" means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other |

| *Current text* | *Amended text* |
|---|---|
| business) of providing services (whether by the provision of information or otherwise) for the purpose of finding workers employment with employers or of supplying employers with workers for employment by them.<br>[...] | business) of providing services (whether by the provision of information or otherwise) for the purpose of finding **persons** employment with employers or of supplying employers with **persons** for employment by them.<br>[...] |
| (7) This Act does not apply to–<br>[...]<br>(i) any business carried on, or any services provided by, such persons or classes of persons as may be prescribed: | (7) This Act does not apply to–<br>[...]<br>(i) **any prescribed business or service, or prescribed class of business or service or business or service carried on or provided by prescribed persons or classes of person.** |

### *Section 32: Employment rights outside Great Britain*

298. Section 32 repeals section 285(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 and section 196 of the Employment Rights Act 1996. These provisions limit the application of certain employment rights, broadly, to those who ordinarily work in Great Britain. The repeal will remove these limitations.

299. The effect of subsection 196(5) of the 1996 Act, which relates to those employed on UK-registered ships, will be retained by means of an amendment to section 199 of that Act. Seafarers will therefore continue to qualify for certain employment rights under the 1996 Act if and only if the ship on which they are employed is registered as belonging to a port in Great Britain, they are ordinarily resident in Great Britain and the work is not wholly outside Great Britain.

300. This section also makes a technical amendment to section 287 of the 1992 Act to provide that where employment rights are extended by Order in Council to those who are employed offshore (primarily on rigs in the North Sea), the Order is subject to Parliamentary control under the negative resolution procedure. Currently, no procedure is specified for making these Orders.

### *Section 33: Unfair dismissal: special and additional awards*

301. When it makes a finding of unfair dismissal an employment tribunal may make a re-employment order. If this is not complied with, the tribunal will award compensation in the normal manner and will also normally make an additional award of 13-26 weeks' pay or, if the dismissal involves discrimination on the grounds of sex, race or disability, 26-52 weeks' pay. In certain types of unfair dismissal a special award is made instead of an additional award and may be awarded even if re-employment is not ordered (provided the employee has asked for an order). The types of unfair dismissal for which a special award may be made are when employees have been dismissed because of their membership or non-membership of a trade union, or because of their trade union activities, or because of certain activities as an employee representative or occupational pension scheme trustee, or because they have taken certain types of action on health and safety grounds. This section simplifies the current arrangements by replacing the special awards with additional awards.

302. *Subsection (1)* repeals the special award provisions contained in sections 117(4)(b), 118(2) and (3) and 125 of the 1996 Act and sections 157 and 158 of the 1992 Act. *Subsection (2)* provides that the additional award will consist of 26-52 weeks' pay.

### *Section 34: Indexation of amounts, &c.*

303. Various payments and employment tribunal awards which fall due under the 1992 Act and the 1996 Act are subject to minimum and/or maximum limits. Currently some of these limits are required to be reviewed each calendar year (for example, the limit on a week's pay used in calculating statutory redundancy payments and the basic and additional awards which may be made when unfair dismissal is found). Other awards and payments are not required to be reviewed annually but may be increased at the Secretary of State's discretion (for example, the compensatory award in unfair dismissal cases). This section provides that limits on these payments and awards will instead be index linked.

304. *Subsection (1)* sets out the awards and payments to be index linked. *Subsection (2)* provides that the limits on these payments and awards will be linked to changes in the retail prices index, using the September index in each year as the reference point, with changes being made by order as soon as is practicable. *Subsection (3)* provides that limits will be rounded up when they are varied as a result of subsection (2). *Subsection (5)* defines the retail prices index for the purposes of the section and makes provision for what should happen in the event of non-publication. *Subsection (6)* sets out the order-making procedure for orders under subsection (2).

305. *Subsection (4)* substitutes a maximum limit of £50,000 (subject to subsection (2)) on the compensatory award for the current limit of £12,000 (section 124(1) of the 1996 Act as amended by the Employment Rights (Increase of Limits) Order 1998 (SI 1998/924)). The great majority of compensatory awards are currently below the £12,000 limit but in a few cases this limit means that individuals cannot be fully compensated for their loss. The raising of the limit will substantially reduce the likelihood of this happening. (In *Fairness at Work*, the Government announced its intention to abolish the limit altogether, but it was subsequently decided not to do this in the light of concerns expressed during the consultation about ill-founded claims, burdens on business and employment prospects.)

*Special awards* are dealt with in sections 118 and 125 of the 1996 Act and sections 157-158 of the 1992 Act; *additional awards* are dealt with in section 117 of the 1996 Act; and *compensatory awards* are dealt with in sections 118, 123-124 and 126-127 of the 1996 Act.

### *Section 35: Guarantee payments*

306. Guarantee payments are made to employees for days they are laid off provided certain conditions are met. The payments are made for up to five days in any three month period (sections 31(2)-(4) of the 1996 Act). These time periods are currently required to be reviewed each calendar year. This section amends section 31(7) of the 1996 Act to provide that the time periods specified in sections 31(2)-(4) may be varied by order subject to negative resolution procedure and will no longer be subject to annual review.

*Guarantee payments* are dealt with in sections 28-35 of the 1996 Act.

### *Section 36: Sections 33-35: consequential*

307. This section repeals the existing powers for increasing certain limits and the current annual review requirement in respect of other limits. It also sets out the position with regard to any increase made under these repealed provisions before the index linking provisions in section 34 come into force.

### *Section 37: Compensatory award etc: removal of limit in certain cases*

308. This section provides that no monetary limit will apply to the compensation payable where an employee is unfairly dismissed or selected for redundancy for reasons connected with health and safety matters (see section 100 of the 1996 Act) or public interest disclosure ('whistleblowing' - see section 103A, inserted in the 1996 Act by section 5 of the Public Interest Disclosure Act 1998, which came into force on 2 July 1999). *Subsection (2)* therefore repeals the power in section 127B of the 1996 Act (inserted by section 8 of the Public Interest Disclosure Act 1998) to provide in regulations for the calculation of compensation in the case of whistleblowing. The regulations made under that power (SI 1999/1548) will therefore fall.

### *Section 38: Transfer of undertakings*

309. This section empowers the Secretary of State to make provision by statutory instrument, subject to the negative resolution procedure, for employees to be given the same or similar treatment in specified circumstances falling outside the scope of the EC Acquired Rights Directive as they are given under the UK's implementing legislation in circumstances falling within the scope of that Directive. The Directive safeguards employees' rights when the business or undertaking, or part of one, in which they work is transferred between employers.

### *Section 39: National Minimum Wage: Information*

310. This section will allow Inland Revenue officers to pass information obtained in respect of tax and national insurance contributions to their National Minimum Wage (NMW) colleagues and others where this will help them in their NMW enforcement work. The Inland Revenue have overall responsibility for enforcement of the NMW. The intention of permitting such exchanges of information is to enable the Inland Revenue's NMW compliance staff to operate more efficiently and to target their visits to business in such as way as to reduce enforcement burdens on business. All other existing Inland Revenue safeguards on the confidentiality and disclosure of information will remain in place.

### *Section 40: Dismissal of school staff*

311. This section brings provisions of the School Standards and Framework Act 1998 into line with the recent reduction of the qualifying period for claiming unfair dismissal. On 1 June 1999, the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999 (SI 1999/1436) came into effect, and reduced from two years to one the length of continuous service an employee requires before being eligible to bring a claim of unfair dismissal.

312. Two provisions of the School Standards and Framework Act 1998 (paragraph 27(3) of Schedule 16 and paragraph 24(4) of Schedule 17) make exceptions to the provisions requiring schools to give staff facing dismissal the right to make representations and the right to appeal. These exceptions, based on the situation before 1 June 1999, are for staff who do not have two years' continuous employment. This section amends them to refer to whatever qualifying period is in force under the 1996 Act at the time, so no further changes to the 1998 Act will be needed if the qualifying period is changed again.

### *Section 41 and Schedule 8: National security*

313. Crown servants (including staff of the security and intelligence agencies) may be excluded by Ministers of the Crown from certain rights conferred by employment legislation on grounds of national security. *Section 41* gives effect to Schedule 8, which will remove some of these powers, allowing - in particular - staff of the security and intelligence agencies to present complaints about breaches of employment legislation to employment tribunals in as similar a way as possible to other employees.

314. *Paragraph 1* amends section 193 of the 1996 Act removing the power of Ministers to exclude certain persons in Crown employment from many of the rights under that Act (with the exception of those rights created by the Public Interest Disclosure Act 1998).

315. *Paragraph 2* repeals section 4(7) of 1996 Act which provides that a Minister of the Crown may direct that the proceedings of an employment tribunal must be heard and determined by the Employment Tribunal President alone.

316. *Paragraph 3* substitutes a new section 10 into the Employment Tribunals Act 1996. The new section retains the national security defence to unfair dismissal complaints and complaints under section 146 of the 1992 Act. However, it removes the power of Ministers to conclusively certify that an act was done on grounds of national security. It also puts in place new safeguards to protect the interests of national security. Employment tribunal procedure regulations may enable Ministers of the Crown to direct, in the interests of national security, that Crown employment proceedings are heard by specially constituted tribunals. Ministers may direct that special procedures (as provided in the regulations) should apply, for example, excluding an applicant or his representative from all or part of proceedings, concealing the identity of a witness, or keeping secret all or parts of the reasons for a decision. Employment tribunals will also generally be able to order that these arrangements apply in cases involving national security where a direction has not been made by a Minister. The procedure regulations may make provision, where an applicant and his representative are excluded, for appointing a special advocate to represent the applicant's interests and for the applicant or his representative to make a statement of his case before they are excluded.

317. New section 10A re-enacts the present section 10(2) and (3) of the Employment Tribunals Act 1996, which allow the tribunal to sit in private in certain circumstances.

318. Where a tribunal has been directed to conceal the identity of a witness or to keep secret all or part of the reasons for its decisions, new section 10B makes it an offence to publish anything likely to lead to the identification of the witness or the secret part of the reasons for its decision and sets out the penalty for such an offence.

319. *Paragraph 4* provides that section 28(5) of the Employment Tribunals Act 1996 (which provides that a Minister of the Crown may direct that proceedings be heard and determined by the Employment Appeal Tribunal President alone) shall cease to have effect. *Paragraph 5* provides (in a way similar to the provision made for employment tribunals), that a Minister of the Crown may direct that appeals in national security cases be heard by a specially constituted Appeal Tribunal and that special procedures are to be used, and for the appointment of a special advocate to represent the interests of an excluded person.

320. *Paragraphs 6 and 7* remove the power of Ministers to issue certificates which are conclusive as to the fact that an act was done on grounds of national security for the purposes of the Race Relations Act 1976 and the Disability Discrimination Act 1995 respectively.

### *General*

321. *Sections 42 to 47* contain various general and consequential provisions.