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

EMPLOYMENT RELATIONS ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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.