These notes refer to the Employment Act 2002 (c.22) which received Royal Assent on 8 July 2002

EMPLOYMENT ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Miscellaneous and General

Miscellaneous

Section 42: Equal pay questionnaire

91. A 'questionnaire' procedure is currently available in individuals' disputes over matters of sex, race and disability discrimination, but not in the area of equal pay disputes. The procedure has proved useful in discrimination claims, since it assists applicants to set out their cases with the key facts. The question and answer format can help to identify whether the case is weak or strong. The process is familiar to tribunals, as the procedure has been in place for some time under the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995.

92. The proposal to introduce a questionnaire procedure into the Equal Pay Act 1970 (EqPA) was included in the consultation document "Towards Equal Pay for Women" (December 2000) which set out proposals to speed up and simplify equal pay employment tribunal cases. On 8 May Tessa Jowell, then Minister for Women, announced that the Government planned to legislate in this area.

93. Equal pay claims are dealt with under the EqPA, which effectively implements the Equal Pay Directive. The introduction of an equal pay questionnaire to provide a procedure in equal pay disputes will include: prescribed forms, questions and answers as case evidence, a time period for serving questions, and the manner in which these questions and answers can be served.

94. The objective is to bring the questionnaire procedure currently available in disputes over matters of sex, race and disability discrimination, into the area of equal pay disputes. The questionnaire enables the key facts to be settled early, and can encourage not only the establishment of evidence, but also the settlement of cases before they proceed to tribunal.

95. This section inserts a new section 7B in the EqPA, which brings about the following:

- The Secretary of State is given the power to prescribe forms that may be used both by the claimant or potential claimant and by the respondent or potential respondent.
- The questions and replies can be admitted as evidence in subsequent tribunal proceedings, subject to any other rules relating to evidence before the tribunal. The questions and replies may be admitted in evidence whether or not they are in the form prescribed by the Secretary of State. This is the same as in sex and race discrimination questionnaires, as opposed to disability discrimination questions and replies, which can only be admitted in evidence if they are made in the prescribed form.

- The Secretary of State is provided with the power to prescribe, by order, a time period within which questions must be served in order to be admissible as evidence in tribunal proceedings. This is intended to encourage the applicant to pursue a case swiftly.

- If the tribunal considers that the respondent deliberately, and without reasonable excuse, failed to reply within a period prescribed by order, it can draw any inference it considers just or equitable. The tribunal can also draw such an inference if it considers that the respondent's reply was evasive or equivocal. The existing questionnaire procedures under the other discrimination Acts refer to a response within a 'reasonable time'. By contrast, this section allows the Secretary of State to prescribe a time within which a response should be given, which is intended to provide greater certainty for parties and tribunals. At present the intention is to make this eight weeks, but by providing a power to prescribe the period, it can be changed in the future as appropriate. Where the respondent has failed to reply within the prescribed period, the tribunal is only allowed to draw inferences if that failure was deliberate and without reasonable excuse. The respondent therefore has the opportunity to explain if, in the circumstances, he had a reasonable excuse for failing to reply. This is designed to ensure that the provision does not operate unfairly for respondents.

- The Secretary of State is given the power to prescribe the manner in which any question and reply may be duly served. Consideration may well be given to the option of providing that service electronically.

96. An order under this section is subject to the negative procedure.

Section 43: Union Learning Representatives

97. Union learning representatives (ULRs) are a new type of lay union representative, whose main function is to advise union members about their training, educational and developmental needs. There are currently around 3,000 ULRs in existence. Their advice is usually provided direct to union members at their place of work, sometimes through face-to-face meetings with individuals.

98. Under section 168 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "1992 Act"), officials of an independent trade union which is recognised by their employer for collective bargaining purposes are permitted reasonable time off during working hours to carry out certain trade union duties or to undergo training relevant to carrying out their trade union duties. An employer who permits officials to take such time off must pay them for the time off taken in accordance with section 169 of the 1992 Act. The definition of an "independent union" is provided in section 5 of the 1992 Act.

99. Section 170 of the 1992 Act provides for employees to take reasonable time off during working hours to take part in the activities of their union. This right applies only where the employees belong to an independent union which is recognised by their employer and they form part of the bargaining unit for which the union is recognised. Employers are not required to pay their employees when they permit them to take this time off.

100. Employees may present a claim to an employment tribunal where their employer has failed to provide time off in accordance with sections 168, 169 or 170. Under section 172 of the 1992 Act, the employment tribunal may award compensation to employees where it finds that their complaints are well-founded. Under section 199(2)(a) and (2)(b) of the 1992 Act, the Advisory, Conciliation and Arbitration Service (ACAS) has a duty to provide practical guidance on the time off for trade union duties and activities to be permitted by an employer. In consequence, ACAS has produced a Code of Practice entitled "Time Off for Trade Union Duties and Activities: ACAS code of practice 3". Where relevant, this Code must be taken into account by employment tribunals when determining complaints.

101. There is no current legislation, which specifically governs the activities of ULRs. ULRs do not fall within the definition of the term "official" used in section 168. It is also unclear whether accessing the services of a ULR falls within the definition of "trade union activities" used in section 170. This means that trade union members have no clear statutory entitlement for time off to undertake the duties of a ULR, to be trained as a ULR or to access the services of a ULR. In effect, it is entirely or largely a voluntary matter whether employers permit ULRs to function at their workplaces and, where they do permit them to function, it is a matter for the employer to decide what time off, if any, is allowed.

102. The section amends the 1992 Act and provides paid time off rights to ULRs to carry out their functions and undergo training which are broadly equivalent to the current rights enjoyed by trade union officials under section 168. The section amends section 170 to make it clear that the right to unpaid time off under that section applies to union members accessing the services of a ULR. The section also gives powers to ACAS and the Secretary of State to issue a Code of Practice providing practical guidance on the application of these entitlements to reasonable time off.

103. Subsections (2) And Paragraphs 18, 19 and 20 of Schedule 6

- Subsection (2) inserts a new section 168A into the 1992 Act which specifies the rights to time off for ULRs. This new section has a similar structure to the existing s168 and, in some places, common wording is used.

104. New Section 168A

- Subsection (1) of new section 168A sets out the general requirement for an employer to allow time off to a ULR. It limits the requirement to ULRs who are members of an independent union recognised by that employer for collective bargaining purposes.

- Subsection (2) defines the activities of a ULR for which time off must be allowed. Together with *subsection (10)*, it limits the time off requirement to activities undertaken on behalf of fellow employees who are members of the ULR's union and for whom the ULR has the function of acting as a ULR. These employees are categorised as "qualifying members of the trade union". ULRs are therefore not entitled to time off to provide similar services on behalf of non-union members or members of other unions.

- Subsection (3) states that in order for an employee to be entitled to time off, the union must have first notified the employer in writing that the employee is a ULR and has met the training condition.

- Subsection (4) defines the training condition. It requires the employee to be sufficiently trained to carry out his duties either at the time he begins functioning as a ULR or within 6 months of that date. In the latter case, the union must notify the employer in writing or by other means when the employee has received the required training within the six month period. This arrangement allows an insufficiently trained person to function as a ULR for what amounts in effect to a maximum six month probationary period until he receives the required training. If, however, the person does not receive the required training within the six month period, his entitlement to time off ends.

- Subsection (5) prevents the union avoiding this consequence by the device of issuing further notices to the employer, which would in effect establish a new six month probationary period.

- Subsection (6) provides for any relevant Code of Practice issued by ACAS or the Secretary of State to be taken into account in determining what constitutes sufficient training.

- Subsection (7) provides ULRs with a right to time off for training relevant to their functions.

- Subsection (8*)* restricts a ULR's time off to that which is reasonable in the circumstances, having regard to any relevant Code of Practice issued by ACAS or the Secretary of State. This therefore enables employers to deny a ULR's request for time off where they have good grounds for doing so, provided they act in accordance with any relevant Code.

- Subsection (9) defines that complaints about alleged breaches of a ULR's time off rights are to be determined by employment tribunals. Paragraph 18 of Schedule 6 has the effect (by amendment of section 171 of the 1992 Act) that such complaints must be made within three months of the failure occurring or at an appropriate later date where the employment tribunal is satisfied that a complaint could not have been made within 3 months. Paragraph 19 of Schedule 6 has the effect (by amendment of section 172 of the 1992 Act) that an employment tribunal may make a declaration and award compensation where the employer failed to permit paid time off in accordance with the new section 168A. Paragraph 21 of Schedule 6 has the effect (by amendment of section 18(1)(b) of the Employment Tribunals Act 1996) of providing for ACAS conciliation in any complaints to employment tribunals under this new jurisdiction.

- Subsection (11*)* provides that a person is a ULR of a trade union for the purposes of the new section if he is appointed or elected as such in accordance with its rules.

- *Subsection (3)* has the effect (by amendment of section 169 of the 1992 Act) of providing for ULRs to be paid for time off taken in accordance with the new section 168A.

- *Subsections (4) and (5)* provide for certain union members to have reasonable time off without pay to access the services of any ULR whose function is to carry out ULR activities in relation to them. This right only applies where the ULR is himself entitled to time off under new section 168A to provide services to such members. It achieves this by amending section 170 of the 1992 Act. This right is enforceable via the employment tribunals.

- *Subsection (6) and Paragraph 20 of Schedule 6* - Section 173 of the 1992 Act currently contains interpretative and supplementary provisions relating to the rights to time off for trade union duties and activities. *Paragraph 20 of Schedule 6* applies the same provisions to new section 168A. *Subsection (6)* inserts new subsections into s173 which make provision for the Secretary of State to amend Section 168A by a statutory instrument under the affirmative resolution procedure changing the purposes for which ULRs are entitled to take time off.

- *Subsection (7)* enables ACAS and the Secretary of State to issue Codes of Practice containing practical guidance on the application of the new statutory entitlements relating to ULRs. ACAS could provide such guidance by amending its current Code of Practice on time off for trade union duties and activities. *Subsection (8)* ensures any draft ACAS Code in this area is approved by each House of Parliament by the affirmative resolution procedures.

- *Paragraph 30 of Schedule 6* amends Section 104 of the Employment Rights Act 1996 to make the dismissal of an employee unfair if the reason for it was that he brought proceedings to enforce a right to time off under the new section 168A or alleged that his employer had infringed such a right.

Section 44: Dismissal Procedures Agreement

105. Section 110 of the Employment Rights Act 1996 allows the Secretary of State to designate certain agreements as Dismissal Procedures Agreements (DPAs). This has the

effect of replacing the statutory right to claim unfair dismissal before an employment tribunal under Part 10 of the Employment Rights Act with access to the procedures of the DPA for employees who are covered by the agreement.

106. Such an agreement must meet a number of specific criteria. Among these are:

- a joint application is made to the Secretary of State by all parties to the agreement, and
- the scheme offers remedies that are on the whole as beneficial (but not necessarily identical with) those provided in respect of unfair dismissal at an employment tribunal.

107. This section gives the Secretary of State the power to add to these criteria. This is intended to give scope to bring in requirements aimed at ensuring that DPAs comply with the Human Rights Act 1998.

108. This is brought about by giving the Secretary of State power by order to add to the requirements in section 110(3) Employment Rights Act 1996.

Section 45: Fixed term work

109. At the time of publication, fixed term employees are protected by statutory employment rights in the same way as permanent employees, with a few exceptions. However, whereas part-time workers are now protected by legislation preventing them from being less favourably treated than comparable full-time workers, no such provision currently exists in respect of fixed term employees. There are also no restrictions on the use of successive fixed term employment contracts in UK law at the time of publication.

110. Directive 1999/70/EC concerning the framework agreement on fixed term work was agreed on 28 June 1999 and is due to be implemented in the UK in 2002. The purpose of the framework agreement is to apply the principle of non-discrimination to those in fixed term employment and to establish a framework to prevent abuse arising from the use of successive fixed term employment contracts or relationships. The Government takes the view that, on account of its legal base, this directive does not apply to pay and pensions. However, a public consultation on Fixed Term Work (May 2001) revealed that significant pay disparities exist between fixed term and permanent employees and the Government intends to prevent pay and pensions discrimination against fixed term employees, in addition to implementing directive 1999/70/EC.

111. This section introduces a power that places a duty on the Secretary of State to make regulations preventing less favourable treatment of fixed term employees and preventing abuse arising from the use of successive periods of fixed term employment.

112. The section places a duty on the Secretary of State to make regulations in respect of fixed term employees. These regulations will implement directive 1999/70/EC and prevent pay and pensions discrimination against fixed term employees. A transposition note setting out how the Government will transpose the main elements of this Directive into UK law is available on the DTI website.

113. In particular, these regulations may:

- Prevent less favourable treatment of fixed term employees as compared to permanent employees
- Specify circumstances in which fixed term employment is to have effect as permanent employment
- Specify circumstances in which fixed term contracts are to be taken to be successive
- Specify classes of person taken to be fixed term and permanent employees

- Specify circumstances in which fixed term employees are taken to be, or not to be, treated less favourably than permanent employees
- Amend provisions in specified enactments of primary legislation that allow for some or all fixed term employees to be treated less favourably than permanent employees.

114. The affirmative resolution procedure applies to the making of regulations under this section.

Section 46: Fixed-term work: Northern Ireland

115. This section is similar to section 45 in that it introduces a power requiring the Department for Employment and Learning in Northern Ireland to make regulations preventing less favourable treatment of fixed term employees and preventing abuse arising from the use of successive periods of fixed term employment.

116. The section requires the Department for Employment and Learning to make regulations in respect of fixed term employees. These regulations will implement directive 1999/70/EC and prevent pay and pensions discrimination against those in fixed term employment. In particular, these regulations may:

- Prevent less favourable treatment of fixed term employees as compared to permanent employees
- Specify circumstances in which fixed term employment is to have effect as permanent employment
- Specify circumstances in which fixed term contracts are to be taken to be successive
- Specify classes of person taken to be fixed term and permanent employees
- Specify circumstances in which fixed term employees are taken to be, or not to be, treated less favourably than permanent employees
- Amend provisions in specified enactments of primary legislation that allow for some or all fixed term employees to be treated less favourably than permanent employees.

117. This power is taken at the request of the Minister for Employment and Learning in Northern Ireland, and with the agreement of the Northern Ireland Executive. Although employment law is a transferred matter under the Northern Ireland Act 1998, an enabling section could not be included in a corresponding Northern Ireland Assembly Act, as Fixed Term Work Regulations are required to be made in Northern Ireland by 2002, and this leaves insufficient time for the passage of a Northern Ireland Employment Act with its own enabling section.

Section 47 and Schedule 7: Flexible working

118. Flexible working was the single biggest issue raised by consultees during the consultation for the 'Work and Parents: Competitiveness and Choice' Green Paper of December 2000. Responding to this, in June 2001, the Secretary of State for Trade and Industry set up the independent Work and Parents Taskforce to examine how to meet parents' desire for more flexible work patterns in a way that is compatible with business efficiency. This section therefore gives parents the right to apply for flexible working. It lays out:

- The eligibility criteria which must be met in order for an employee to apply for a flexible working pattern;
- A clearly defined framework for a procedure to be followed by employees and employers when making and considering requests for flexible working;

- The employer's duties in relation to an application under the new provisions;
- The right for an employee to take their case to an employment tribunal; and
- What happens if a tribunal finds that an application has not been dealt with correctly.

119. The new provisions will be inserted into the Employment Rights Act 1996.

80F Statutory right to request contract variation

120. Section 80F sets out the criteria that must be satisfied in order for an employee to be eligible to make a request for a flexible working pattern. It is intended to ensure that requests are not made on the spur of the moment and as such the employee will have to make a formal application containing specified information.

121. Subsection (1) identifies the kind of variations of the terms and conditions a qualifying employee may apply to his employer for under this part of the Act. It is intended that the changes are limited to the hours the employee is required to work, the times he is required to work, and where he is required to work. The intention is that this will cover work patterns such as compressed hours; flexitime; home working; job-sharing; teleworking; term-time working; shift working; staggered hours; annualised hours; self-rostering. By regulations, the Secretary of State may also specify further criteria if it is found at a later date that the list is not exhaustive enough to cover all the changes that may be needed.

122. Subsection (1) also makes clear that these changes can only be made for the purpose of caring for a child. The right to apply will be available to a qualifying employee who has a relationship with the child, which will be specified in regulations. It is intended that this will cover anyone who has responsibility as a parent of an eligible child. For example, biological parents, adoptive parents, and new partners of parents where they share the responsibility of caring for the child. It is not the intention that the ability to apply for flexible working should extend as far as anyone who lives in the same house as the child but does not have responsibility for caring for the child e.g. grandparents, aunts, uncles (unless they specifically have parental responsibility).

123. Subsection (2) sets out what must be included in an application. Qualifying employees will have to explain why they are eligible for making a request i.e. self-certify. The effect of an application being accepted will result in a variation of the terms and conditions of an employee's contract of employment. This means that should an employer subsequently discover that their employee has lied and never intended to use the flexible working pattern for the purposes of caring for the child then they may take disciplinary action.

124. Subsection (3) specifies the age limits of the child. The ability to request flexible working will be open to those employees who care for children under six years of age so as to cover two periods when the levels of requests are expected to be high; that is, the time following the child's birth and when the child starts school. Regulations will allow for the possibility of changing the age limit in the light of experience (subsection (6)). Parents of disabled children face greater challenges in raising their children and they will be able to make requests up until their child is 18 years of age. It is not the intention of the Government that it will use this power in the short-term. The Government will first review the right three years after it comes into force.

125. Subsection (4) deals with the frequency of applications. It limits the number of requests an employee may make to one per year, from the date the application is made, because of the costs of dealing with an application. The latest an employee will be able to make an application is 14 days before their child reaches either age limit. Once this time period is reached, the employee will no longer have the right to apply to change their working pattern and their existing working pattern will continue. The Work and Parents

Taskforce did not find a willingness amongst employers and employees for undoing the original changes made to implementing a flexible working pattern when either of the limits is reached.

126. Subsection (5) provides for regulations allowing changes to how an application should be made**.**

127. Subsection (7) provides that the reference to a disabled child for the purposes of this section is to a child claiming disability living allowance within the meaning of Section 71 of the Social Security Contributions and Benefits Act 1992.

128. Subsection (8) provides the power to establish the criteria under which a person will be classed as an employee for the purposes of making an application. It is intended that the requirement as to duration of employment will be continuous service with the same employer for at least 26 weeks. Agency workers who are employees will not be eligible to make a request. This is for practical reasons. The agency will not have a detailed knowledge of the business of the company with which the agency worker is placed to be in a position deal with an application. On the other hand the company with which the agency worker is placed will have approached the agency to provide a specific service without an expectation of having to adjust their working patterns to the individual's circumstances.

80G Employers' duties in relation to applications under section 80F

129. Regulations will be made concerning an employer's duties in relation to dealing with applications for flexible working.

130. When an employer receives a request it will be their duty to accept it or to establish the business case for rejecting it and they will need to follow a prescribed procedure to ensure and demonstrate that the request has been properly dealt with. The aim is to encourage dialogue between the employer and employee in the workplace about changing work patterns and how to meet both parties' needs.

131. There will be occasions where an employer believes that they are unable to accept a request. In order to reject an application they must, in their opinion, have specific business grounds for doing so. Subsection (1) (b) specifies what each of these are:

- The burden of additional costs;
- Detrimental effect on ability to meet customer demand;
- Inability to re-organise work among existing staff;
- Inability to recruit additional staff;
- Detrimental impact on quality;
- Detrimental impact on performance;
- Insufficiency of work during the periods the employee proposes to work; and,
- Planned structural changes.

132. There is a power to make regulations to add to these grounds if the Secretary of State becomes aware of other grounds that should be included. The section contains all those identified by the Taskforce. Employers will not be able to simply tick a box saying one or more grounds exist but will have to provide sufficient explanation to the employee of why, in their opinion, the ground applies to their business and why it results in the refusal of the application.

133. Subsection (2) identifies regulations that are intended to outline the procedure for dealing with an application for flexible working. In practice, the intended procedure will work as follows:

- A request is received specifying the desired working pattern, the date from which it is proposed it should apply, and explaining what effect the employee thinks the change will have on the employer and how it might be accommodated. The employee will have to explain why they are eligible under the right to make an application.
- The employer arranges a meeting within 28 days of receiving the application to discuss the request. The employee is able to bring a representative if they wish.
- The employer writes to the employee within 14 days of the meeting either (i) agreeing the new working pattern, any action on which it is dependent, and a start date; or (ii) confirming any compromise suggested and the start date; or (iii) setting out the business reasons and an explanation of why the request cannot be met, together with details of how to appeal if the employee is not content with the decision.
- An employee has 14 days following the notification of their employer's decision to appeal.
- Within 14 days of being informed that the employee wishes to appeal the employer should arrange a further meeting to hear the appeal. The employee may be accompanied by a representative if they wish.
- The employer must provide a decision within 14 days of hearing the appeal.

134. The practical details of the procedure for both employees and employers will be specified in regulations. This is to ensure that all the details can be kept together. It is the intention that these will define how the meetings are to be arranged and the arrangements for postponement in circumstances where one of the parties is unable to attend. The regulations will explain who can accompany the employee. It is the intention, as the Taskforce recommended, that this will be a fellow employee, friend or appropriate recognised trade union representative. The Taskforce did not want unduly to limit the people who could accompany the parent making the request and preferred a wider formula that would encompass all expertise in this area. The Government intends to consult widely on this issue. The regulations will also detail the points that will need to be covered when informing the employee of the employer's decision. Where an employer rejects an application the intention is that the employer should set out their business reasons (which will have to be from the list shown above) backed up with an explanation of the reason why, in their opinion, it applies. This is to help the employee understand why the employer has arrived at his decision and to help demonstrate that the request has been considered seriously. It is envisaged that a couple of paragraphs will usually be sufficient. The intention is that the guidance to accompany the right will include a variety of differing examples for each of the business reasons. One illustrative explanation might be:

""I am sorry that I cannot grant your request to leave at 3:30pm each day as this will severely effect our ability to meet customer demand and I am unable to cover your absence. You are currently the only certified forklift truck driver that works at the end of the day and it is essential that we are able to load the lorries for over-night delivery. Due to the fact that we supply perishable goods it is not possible to load the delivery lorries any earlier in the day. I have spoken with our other two forklift truck drivers, and they are presently unable to change their hours. I also advertised in the local paper when Sam left and notified the Job Centre of the vacancy but could not find anyone to cover his job. As that was only two months ago it is not appropriate to go through the process again now."

135. The regulations will also cover the appeal process. The intention is that the employee will have to set out the grounds for their appeal. These grounds may include, but need not be confined, to the following: concern that the procedure has not been properly followed, that the business reasons for rejecting the request have not been sufficiently

explained, or that a fact in the explanation of the business reasons is incorrect. The intention is that the appeal should be held with a more senior manager than the initial meeting where possible. This will not always be possible especially for small businesses. The regulations will also explain the points that the employer should cover when informing the employee of the outcome of the appeal. The intention is that the employer should give a sufficient explanation, building on the earlier communication where appropriate. Where the procedure has been followed correctly (either up until the appeal stage or through the appeal stage itself) then it is the Government's intention that the employee should not be able to claim a grievance against the employer when informed of the outcome just because they do not like it. It is intended to make use of the regulations elsewhere in the Employment Act to disapply the three-step grievance procedure in these circumstances. It is also the intention that the regulations will allow for the appeal to be heard as part of an employer's established procedure for handling appeals on other issues, as long as the timescales are no less than those for the appeal procedure described above. This is to encourage the employer and employee to use all the avenues open to them to try and find a satisfactory outcome.

136. Subsection (3) enables regulations under subsection (1)(a) to disapply any part of the procedure if an application is agreed or withdrawn; to provide for an application to be treated as withdrawn in specified circumstances; and to provide for a time limit to be extended, for example if the employer and employee agree the extension.

137. Regulations will allow for:

- Changes to the procedure where there is agreement between both parties. For example, the employer may feel able to accept the request immediately and thus a meeting would be inappropriate.
- Changes to the timescales where there is agreement between both parties. This is to cover circumstances where it may be extremely difficult for one party to follow a certain part of the procedure. For example it may be that during the meeting to discuss the request an alternative is identified but further information is needed to ensure that it is workable. It may not always be possible in the circumstances for this information to be obtained within the two weeks the employer has to notify the employee of their decision. It is the intention that the regulations will specify how the agreement to postpone is to be handled and recorded.
- The request to be treated as withdrawn in some circumstances. The intention is that where an employee fails repeatedly to attend the meeting and to answer letters without proper explanation then the employer should be able to conclude that the employee no longer wishes to pursue the request to work flexibly.

138. Subsection (4) allows Subsection (2) to be amended by order. This enables the procedure for making an application to be changed at a later date if it is found necessary to do so.

80H Complaints to employment tribunals

139. Where cases cannot be resolved in the workplace or through other alternative dispute resolution mechanisms (employees will be able to use the Advisory Conciliation and Arbitration Service binding arbitration scheme), an employee will be able to take their case to an employment tribunal.

- Subsection (1) identifies the circumstances under which an employee who has made an application under 80F may present a complaint to an employment tribunal.
- Subsection (2) clarifies that no complaint can be presented to an employment tribunal in respect of an application which has been disposed of by agreement or withdrawn.

- Subsection (3) clarifies that in the case of an application that has not been disposed of by agreement or withdrawn, a complaint cannot be made under this section until either the employer notifies the employee of a decision to reject the application on appeal or commits a breach of regulations under section 80G(1)(a).
- Subsection (4) provides that a complaint cannot be made under this section in respect of a failure to comply with regulations under section 80G(2)(k), (l) or (m). This is because the regulations themselves will include a right to complain to the employment tribunal in such cases.
- Subsections (5) and (6) explain that a complaint cannot be presented to an employment tribunal unless it is made within three months of the date on which the employee is notified of the employers' decision on the appeal, or of the breach of the regulations, unless there is an extension under subsection (3) (b). However, it allows for the cases to be heard after this time limit if the tribunal feels it was not reasonably practicable for the complaint to be made within it.

80I Remedies

140. This new section outlines what will happen if an employment tribunal finds a complaint under section 80H well founded.

- Subsection (1) provides that if a tribunal finds that a complaint is well founded, the tribunal will have the power to order an employer to reconsider a request. It also gives a tribunal the power to consider whether an award of compensation should be made to the employee in such circumstances.
- Subsection (2) enables the tribunal to make the award of compensation at a level they feel to be just and equitable given the specific circumstances of the case. In deciding the amount, the tribunal will take into account the behaviour of the employer (e.g. whether they have lied) and of the employee (e.g. their willingness to consider acceptable alternatives).
- Subsection (3), however, limits any compensation award to a maximum to be specified in regulations. There will be consultation on regulations to specify how many weeks pay should be the maximum.

141. Schedule 7 provides for amendments to other legislation which are consequential on the amendments made by section 47. These include an amendment to the Trade Union and Labour Relations Act (Consolidation) 1992 to allow disputes over flexible working to be settled under the ACAS arbitration scheme and to the Employment Rights Act 1996 to exclude the Armed Forces from these provisions.

Section 48: Rate of maternity allowance

142. This section amends section 35A of the Social Security Contributions and Benefits Act 1992, which sets out the weekly rate of MA by replacing subsections (1) to (3) of section 35(A):

- Subsection (1)(a) inserts a new subsection (1) so that women eligible for MA will be paid the lesser of 90% of their average weekly earnings or the prescribed standard rate, for the duration of the payment period.
- Subsection (1)(b) amends the current subsection (5)(c)(i) to ensure that women who have paid a Class 2 contribution are deemed to have earnings at a level 90% of which will equal the flat rate of SMP, for any week within the specified period. As a result, they will be entitled to £100 per week. This, together with subsection (1)(c) ensures that (as now) a self-employed woman who has paid a Class 2 contribution throughout the specified period will receive standard rate MA.

- Subsection (2) is a transitional provision ensuring that reference may be made to current rates where appropriate after the coming into force of the maternity pay provisions contained in this Act.

Section 49: Work-focused interviews for partners

143. Partners of working age benefit claimants who are themselves of working age will be required to take part in a work-focused interview, in default of which, benefit sanctions will apply. This will provide partners with the opportunity to discuss their skills and experience, the barriers they face in moving closer to the labour market and the help and support that is available to overcome those barriers. The measure will not place any requirement on partners beyond taking part in interviews. (For example, they will not be required to attend training courses or seek work).

Section 2AA: Full entitlement to certain benefits conditional on work-focused interview for partner

144. This section builds on section 2A of the Social Security Administration Act 1992 ("the Administration Act"), which was inserted by section 57 of the Welfare Reform and Pensions Act 1999 and which introduced the requirement for certain benefit claimants (including lone parents) to attend work-focused interviews. The new section 2AA prescribes both the circumstances in which the partner of a benefit claimant may be required to take part a work-focused interview, and the consequences for the benefit claim if the partner does not take part in the interview.

145. The work-focused interview will concentrate on job potential and provide the partner with access to a wide range of help and information on work, benefits and services such as childcare. It is intended to encourage partners to take further steps towards labour market participation. However, any action they may choose to take beyond taking part in the interviews will be entirely voluntary.

146. This section inserts new section 2AA into the Administration Act and allows the Secretary of State to prescribe in regulations that where a higher rate of a specified benefit is payable to a person by reference to his partner, then the claimant's benefit can be reduced by way of a sanction if the partner fails to take part in a work-focused interview, when required to do so.

147. The intention is for the actual proposals to be prescribed in secondary legislation to allow adjustments to be made to the detailed aspects of the scheme in the light of experience of work-focused interviews.

148. The power itself:

- Subsection (1) allows the Secretary of State to make regulations requiring partners of claimants for certain benefits to take part in a work-focused interview, in prescribed circumstances. Once the claimant's entitlement to benefit has been established their partner may be required to take part in a work-focused interview. If partners do not take part in these interviews without good cause when required to do so, a benefit sanction will apply (see *subsection* (4)(f)). As the majority of jobseekers find work within the first six months of a claim it is initially intended that partners will be required to attend an interview at the 6 month stage of a claim, thus focusing resources on those partners who need more help in finding work. The timing of interviews will be considered further in the light of experience of work-focused interviews for benefit claimants.

- Subsection (2) lists the benefits to which the partner work-focused interview requirements will apply. Subsection (3) lists the circumstances in which a higher rate of such a benefit is deemed to be payable to a person by reference to his partner and therefore, the partner is subject to the requirement to take part in an interview.

149. How the power is intended to be used:

- Subsections (4) to (6) identify the main ways in which the regulation-making powers provided under subsection (1) might be used. Where a person is entitled to a number of specified benefits at the same time, it is not intended to ask their partner to take part in separate work-focused interviews for each benefit. They would only be required to take part in one interview. Subsection (4)(a) allows for regulations to achieve this.

- Subsection (4)(b) allows for regulations to prescribe that where a claimant is entitled to benefit for more than one partner (i.e. in the case of a polygamous marriage) each of those partners will be required to take part in a work-focused interview.

- Subsection (4)(c) enables the Secretary of State to prescribe in regulations who will conduct the interviews with partners. This means that work-focused interviews may be conducted by a person acting on behalf of the Secretary of State, by a local authority employee, or by a private/voluntary sector organisation contracted to provide services.

- Regulations under subsection (4)(d) will confer power on those who conduct the interviews with partners to determine where and when an interview will take place. This mirrors section 8 of the Jobseekers Act 1995 and section 2A of the Administration Act. It is intended that the interview will usually be conducted at a range of easily accessible premises. However, where partners cannot reasonably be expected to visit an office, a more suitable location including a home visit may be arranged.

- Subsection (4)(e) enables regulations to prescribe the circumstances in which partners are to be treated as either taking part or not taking part in the interview. Since the regulations under this section will impose a general requirement on partners to take part in a work-focused interview, both the partners and those who conduct the interviews need to be clear about the criteria to be used in judging whether a person has actually taken part in the interview. It is intended that the test of whether partners have taken part will be: (a) whether they attend at the time and place specified; and (b) whether they provide information in areas relevant to their employment prospects, such as their level of educational qualifications, their previous work history, and any barriers to work they may face.

- Subsection (4)(f) enables regulations to provide that if a partner is requested to take part in an interview but does not do so then, unless he (or the benefit claimant) can show good cause for that failure within a prescribed period, the claimant's benefit will be reduced.

- Subsection (4)(g) enables regulations to specify what constitutes good cause for not taking part in an interview. *Good cause* is a familiar concept in social security. For example, it is used in relation to work-focused interviews for claimants under section 2A of the Administration Act and in deciding whether people's entitlement to Jobseeker's Allowance should stop where they have not attended as required as a specified time and place (section 8(1)(d) of the Jobseekers Act 1995 and regulations 28 to 30 of the Jobseeker's Allowance Regulations 1996). Examples of good cause might be when the partner had an accident on the day set for the interview or where their child fell ill or where they misunderstood the requirements placed upon them because of any language or literacy difficulties.

- Subsection (5) deals with how any reduction in benefit should be calculated and applied.

- Subsection (5)(a) enables regulations to specify how the reduction will normally be calculated and subsection (5)(b) enables regulations to specify that the amount of the reduction shall be restricted in prescribed circumstances. The power under

subsection (5)(b) will be used where the amount of the reduction would otherwise be greater than the amount of benefit. In addition, it is the intention to ensure that the claimant retains entitlement to a nominal amount, to prevent the claim from lapsing and, where appropriate, to ensure that entitlement to any "passported" benefits (such as free NHS Prescriptions, free school meals) is retained.

- Subsection (5)(c) enables regulations to specify that if a person is claiming more than one benefit, the sanction may be applied to more than one of the benefits; but the total sanction must not exceed the amount calculated in regulations under subsection (5)(a). The regulations will also prioritise the benefits against which the sanction is to be applied. No sanctions will be applied against any benefit not specified in new section 2AA(2).

- Subsection (6) enables regulations to prescribe the circumstances in which the requirement for a partner to take part in a work-focused interview is not to be applied. This is so that the interview can be waived or deferred until a later date if that is necessary or appropriate in any case. There will be certain people for whom a work-focused interview will not be appropriate. There is no intention to set out in regulations the categories of people for whom this would be appropriate. Such decisions will be made on a case-by-case basis, depending on the circumstances of the individual.

- Subsection (6)(a) enables regulations to specify circumstances in which the requirement to take part in a work-focused interview will not apply to a partner: either permanently or until a specified time. It is intended that this power will be used to exempt partners of people who are claiming the benefits listed in subsection (2) but who are required to attend work-focused interviews in their own right.

- Subsection (6)(b) enables the 'designated authority' to decide that the requirement to take part in a work-focused interview is not to apply where it would not be of assistance or appropriate in the particular circumstances of that person. Regulations will not specify which groups should have the requirement waived although one example might be where a terminally ill person is the partner of a benefit claimant.

- Subsection (6)(c) enables the 'designated authority' to decide that the requirement to take part in a work-focused interview should be deferred if it is determined that an interview would not be of assistance, or appropriate, at that particular time. Examples might include a person in the early stages of recovery from a major operation, or a partner who had just given birth. Regulations provided for under subsection (6) may also set out that, where a partner has their interview waived or deferred, they will be treated, as having met the requirement – until such time as it is appropriate for them to attend an interview. Where an interview is either waived or deferred (see subsection (6)(c)), despite the fact that there has been no interview, no change will be made to the amount of benefit payable or in payment.

- Subsection (7) defines terms used throughout the section. A "*work-focused interview*" is the interview that almost all partners of claimants of the benefits listed in subsection (2) will be asked to take part in. The purpose of such an interview is to assist or encourage partners to improve their employment prospects over time, and to identify and take steps to overcome the barriers to work they face through training or specialist support so that, where appropriate, they can move towards education or taking up employment (whether paid or unpaid). To this end, an interview may cover such areas as previous employment record, capacity to undertake work, the in-work financial support which is available and help in areas such as childcare, housing and training.

150. Schedule 7 (Paragraphs 8 to 10, 14 and 49): makes minor and consequential amendments to the Administration Act and to the Social Security Act 1998.

- Paragraph 9 amends section 2B of the Administration Act, which makes further provision as to how the power in section 2A may be used. It ensures that the decisions and appeals procedures in Chapter II of Part I of the Social Security Act 1998 apply in relation to any "relevant decisions" under the new section 2AA. It also provides that any decision that a partner has, without good cause, failed to take part in an interview as required by the new section 2AA may be revised or appealed against. It also sets out in that section what are to be "relevant decisions" under the new section 2AA – namely, decisions that someone has failed, without good cause, to take part in an interview required under that section, and makes a consequential amendment in relation to decisions under section 2A. It ensures that all "relevant decisions" under the new section 2AA are treated as having been made by the Secretary of State – even if the decision maker is not a civil servant, and that such a decision may be revised or superseded by someone other than the original decision maker. The powers in the Social Security Act 1998 to revise or supersede a decision would then apply. It would also allow for information gathered about a person's employability to be passed on to the relevant decision maker.

- Paragraph 10 amends section 2C of the Administration Act so as to ensure that the powers, which are intended to enable closer working between central and local government in order to make the delivery of social security benefits more customer-focused and better co-ordinated, also apply to the new section 2AA.

- Paragraph 14 amends section 190(1) of the Administration Act so as to require the first set of regulations to be made under the new section 2AA to be passed by the affirmative resolution procedure.

- Paragraph 49 amends the Social Security Act 1998 so as to provide that the right of appeal is against the decision that the partner had failed to take part in an interview, rather than the decision to stop or reduce benefit. It focuses on the one decision that causes a penalty to be imposed (which may potentially be across a number of benefits) and is intended to avoid confusion.

Section 50: Use of information for, or relating to, employment and training

151. This section introduces schedule 6.

152. Government policies in the area of employment and social security have focused on increasing the efforts to help people move away from welfare benefits and into work. However, once a client has left an employment or training programme or has come off benefit, they are under no obligation to inform the Department for Work and Pensions (DWP) of their activities. It is important that DWP know what happens to people afterwards. Many clients do provide DWP with this information. However, a significant minority do not. Attempts to establish the destinations of leavers are costly, time consuming and inconclusive. In addition, once a client has entered work, DWP has no way of assessing their progress in employment, unless they return to benefit. This creates two problems. The first is in evaluating the effectiveness of employment and training initiatives in moving people into sustainable work. The second is in paying and rewarding providers, who are increasingly paid on a performance-related basis. The provisions will also allow DWP to confirm which clients have moved into work and ensure the security of the funding arrangements.

153. Commentary on Schedule 6:

- Paragraph 1 amends section 3 of the Social Security Act 1998 by broadening the range of information covered by the Act, which already covered social security, child support, and war pensions, to also include employment and training. This means that the Secretary of State or the Northern Ireland Department can use the information held by him for the purpose of, or any purpose connected with the exercise of any of those functions. This therefore allows DWP to use any of the

information it holds to perform any of its functions. Following the transfer of war pensions to the Ministry of Defence (MOD), the provision will also enable the supply of information to and from MOD and DWP to enable the supply of social security, child support and employment and training information to MOD for use for war pensions purposes and the supply of war pensions information from MOD to DWP for social security, child support or employment and training purposes. The provision also allows the data pooling of information relating to any of these functions, ie. social security, child support, war pensions and employment and training.

- Paragraph 4 repeals subsection (3) of that section as that is now rendered otiose by the amendments made by paragraphs 2 and 3.

- Paragraphs 2 and 3 amend the existing provisions in sections 122C and 122D which govern the supply of information to and from DWP, the Northern Ireland Department and local authorities in connection with the administration of housing and council tax benefit. These sections are extended to include employment and training information.

- Paragraph 5 amends section 122 of the Administration Act to allow DWP access to tax information held by IR and information held by Customs and Excise for the purposes of preventing fraud against the DWP by those contracted to deliver employment and training programmes and possible fraud by participants in the schemes. The amendment will also enable errors to be checked where no fraud is suspected. Paragraph 7 makes corresponding provision for Northern Ireland.

- Paragraph 6 inserts a new section 122ZA into the Administration Act allowing DWP to access PAYE information held by Revenue as well as information supplied by the self-employed for tax purposes relating to people beginning or terminating employment. The information can be used for the purposes of evaluating the effectiveness of various employment and training programmes (such as the New Deals). This gives DWP access to the information supplied by employers on tax forms P45 and P46, which will allow the Department to ascertain whether leavers from employment or training programmes have taken up employment. The subsection states that such information must not be further disclosed, other than for civil or criminal proceedings. Because such information is based upon employers' annual returns, this information will typically be over 18 months old by the time it reaches DWP. Allowing DWP access to the information on P45 and P46 forms will therefore provide them with more up-to-date information. These forms are completed when an employee starts a new job. The only information that will be supplied from this source will be the fact that the individual has started work and the name and address of his employer. The section will apply to all relevant information held when the provision comes into force as well as relevant information gathered after that date.

- Paragraph 8 makes corresponding provision for Northern Ireland.

- Paragraphs 9 and 10 amend the Tax Credits Act 1999 so as to ensure that information to which the DWP has access relating to tax credits can if necessary be used for employment and training purposes and that employment and training information can be supplied to the Revenue for tax credits purposes.

- Paragraph 11 amends section 121E of the Social Security Administration Act 1992 (the "Administration Act"). This section deals with the supply of contributions, statutory sick pay (SSP) and statutory maternity pay (SMP) and contracting out information held by Inland Revenue. The amendment extends the purposes to which information supplied by the Inland Revenue to the DWP can be put, to include purposes relating to employment or training. It specifies that information supplied relating to employment and training may be supplied on a permissive basis – i.e. that the DWP cannot demand information from IR. This amendment will

enable information supplied to the DWP by Inland Revenue under provisions in the Administration Act to be used for employment and training purposes. This will provide inter alia information on where the individual is employed, how long they have worked for that employer and how much they earn, all of which is helpful in assessing the effectiveness of the various welfare to work initiatives.

- Paragraph 12 makes corresponding provision for Northern Ireland.
- Paragraph 13 makes similar provision with respect to section 121F of the Administration Act. This section deals with the supply of information to the Inland Revenue by DWP (in the person of the Secretary of State) for the purposes of contributions, SMP and SSP and contracting out. Paragraph 14 makes corresponding provision for Northern Ireland.