

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

Part One: Union Recognition

11. Schedule A1 of the 1992 Act (inserted by section 1 of, and Schedule 1 to, the 1999 Act) established a statutory procedure for the recognition and derecognition of trade unions for the purposes of collective bargaining on behalf of a particular group of workers.
12. The Government's approach was to create a mechanism which enabled recognition of the union(s) by the employer where the majority of the relevant workforce wanted this. The aim of the mechanism is to encourage the voluntary settlement of claims wherever possible, the statutory procedure therefore acting as a fall-back system.
13. Most of the changes made by Part 1 of this Act are to Schedule A1 (unless otherwise stated). The following paragraphs briefly describe the Schedule.
14. **Part I** of Schedule A1 provides that in certain circumstances a trade union (or trade unions) may make an application to the Central Arbitration Committee (CAC) for a declaration that it should be recognised for the purpose of conducting collective bargaining on behalf of a group or groups of workers employed by an employer in a particular bargaining unit.
15. **Part II** of the Schedule provides that where a voluntary agreement for recognition is made between the parties, after a request for recognition has been made under the Schedule, the employer has to maintain that agreement for three years unless the union ends it before that time. This is known as semi-voluntary recognition. If, following the conclusion of an agreement for recognition, the parties are unable to agree a bargaining procedure, an application may be made to the CAC for it to determine one. Part II is designed to afford protection to unions which withdraw from the statutory process to agree a voluntary deal, and therefore to encourage the voluntary settlement of claims.
16. **Part III** sets out a procedure to be followed by the parties and the CAC where a union has been recognised through the statutory procedures and, as a result of a change in the employer's business, either the union or the employer believes the bargaining unit has changed or has ceased to exist.
17. **Parts IV and V** of the Schedule provide that where recognition results from an earlier declaration by the CAC, it may in certain circumstances, on application from the employer or one or more workers in the bargaining unit, declare a union to be derecognised.
18. **Part VI** provides for workers to be able to invoke the statutory derecognition procedure where an employer has voluntarily recognised a union which does not have a certificate of independence.
19. A significant number of the changes made by Part 1 of the Act relate to Part I of Schedule A1. There are a number of stages in the process contained in Part I of the Schedule, usually with a specific timetable for each.

The procedure for recognition: Part I of Schedule A1

20. **Stage 1 - Trade union writes to the employer seeking recognition.** The process is triggered by the union(s) writing to the employer, requesting recognition, and identifying the bargaining unit of the workers concerned. For a request to be valid, the employer (together with associated employers) must employ 21 or more workers.
21. The employer has a period in which to respond. If the employer agrees voluntarily to recognise the union (or unions), the statutory recognition procedure is regarded as closed. However, the parties can have such an agreement declared an agreement for recognition by the CAC under Part II of the Schedule. This applies to a voluntary agreement at whichever stage in the process it is agreed.
22. Alternatively, if the employer agrees to negotiate, the parties have a time period to conclude discussions. The parties may call on the Advisory, Conciliation and Arbitration Service (Acas) to assist. If the employer refuses to negotiate or does not respond to the union's letter or, if negotiations fail to reach an agreement, the union(s) may make an application for recognition to the CAC.
23. **Stage 2 – Application by trade union to the CAC.** The CAC has a fixed period to decide, against a number of criteria, whether to accept the application. These criteria include a requirement for at least 10% of the workers in the proposed bargaining unit to be members of the union(s), and for the CAC to be satisfied that a majority of the workers in the bargaining unit would be likely to favour recognition.
24. **Stage 3 – Agreement or determination of a bargaining unit.** If the union's application is accepted, the parties have a period to agree a bargaining unit if they have not already done so. If the parties fail to agree a unit, then the CAC will determine it. In doing so, the CAC must take a number of matters into account, in particular the need for the unit to be compatible with effective management. If a bargaining unit agreed between the union and employer or determined by the CAC is different from the unit originally proposed by the union when making its application, then the CAC must reapply the acceptance criteria in respect of the new bargaining unit.
25. **Stage 4 – Determining whether to award recognition.** Once the bargaining unit is established, the CAC must decide whether to declare the union(s) to be automatically recognised or to hold a ballot. If the CAC is satisfied that a majority of the workers in the bargaining unit are union members it must make a declaration of recognition, unless it decides that a ballot should be held for any of the reasons listed in paragraph 22(4) of the Schedule.
26. **Stage 5 – Recognition ballot.** A ballot is held if the union(s) does not have majority membership in the bargaining unit, or if the CAC decides that despite majority membership, a ballot should still be held. Unless during the period immediately following the CAC's notification of the holding of a ballot the union, or the parties jointly, inform the CAC that they do not wish the ballot to be held, the CAC will appoint a Qualified Independent Person (QIP) to conduct the ballot. The CAC must also determine the form of the ballot: workplace, postal, or a combination of these methods. During the ballot the employer has a general duty to co-operate with the ballot.
27. In addition, the employer must allow the union(s) to communicate with the workers in the bargaining unit during the balloting period. A statutory Code of Practice applies. The employer must also supply to the CAC the names and addresses of the workers in the bargaining unit. The costs of the ballot are borne equally by the parties. If the result of the ballot is that the union's application is supported by a majority of all those voting, and at least 40% of those entitled to vote, the CAC must issue a declaration that the union is (or unions are) recognised for the purposes of collective bargaining on behalf of the bargaining unit. Otherwise the union is not recognised.
28. **Stage 6 – Method of collective bargaining.** Following a CAC declaration of recognition, the parties have a period to reach an agreement on the method for

conducting their collective bargaining. If the parties do not agree a method, they can apply to the CAC for assistance. If there is still no agreement, the CAC specifies a bargaining method.

29. A CAC specified method is enforceable as though it were a contract between the parties. If either party believes the other is subsequently not following such a method, it may seek an order of specific performance from the courts.

Determination of appropriate bargaining unit

30. *Sections 1 and 4* clarify how an appropriate bargaining unit is to be determined by the CAC. *Section 2* provides a power for the CAC to reduce the 20-day negotiation period for the parties to agree a bargaining unit. *Section 3* imposes a duty on the employer to supply information to the union(s) to assist with this process.
31. *Section 1* amends paragraphs 11(2) and 12(2) of Schedule A1, under which a union may make an application to the CAC where the employer refuses or fails to respond to a request for recognition (paragraph 11(2)), or where negotiations with the employer fail (paragraph 12(2)).
32. The union(s) may currently ask the CAC to decide whether the union's proposed bargaining unit or some other bargaining unit is appropriate, and whether the union(s) have the support of a majority of the workers in the appropriate bargaining unit. Section 1 clarifies that unions may apply to the CAC to decide only whether the union's proposed bargaining unit is appropriate and whether the union(s) have the support of a majority of the workers in the appropriate bargaining unit. Section 1, together with section 4, ensures that the CAC first considers the union's proposed bargaining unit. Only if it decided that this unit is not appropriate will it move on to decide a unit which is appropriate.
33. *Sections 2 to 4* apply where the CAC accepts a union's application for recognition (under paragraph 11(2) or 12(2)). The next stage is for the parties to try to agree a bargaining unit. Paragraph 18(2) of Schedule A1 provides that the parties, with the CAC's assistance, will have 20 days (or some other longer period specified by the CAC) to try to reach agreement. This is called the "appropriate period".
34. *Section 2* amends paragraph 18.
35. *Subsection (3)* inserts sub-paragraphs (3) to (7) into paragraph 18. Sub-paragraphs (3) and (4) permit the CAC, where it sees no reasonable prospect of the parties reaching an agreement, or on the request of both parties, to shorten the appropriate period.
36. Sub-paragraph (5) allows the CAC to extend the period, where it has previously reduced it at the parties' request under sub-paragraph (4). This allows the parties more time to try to reach an agreement if needed.
37. Sub-paragraphs (6) and (7) oblige the CAC to state the reason(s) respectively why it considers that the parties have no reasonable prospect of reaching an agreement on the bargaining unit and for extending the period under sub-paragraph (5).
38. *Section 3* inserts paragraph 18A into Schedule A1. It requires the employer to supply information to the union and to the CAC about the workers in the union's proposed bargaining unit.
39. Paragraph 18A(2) provides that the information must be supplied to the union and CAC, within 5 working days of the day after the CAC gives notice of its acceptance of the union's application. It makes clear that the information to be supplied by the employer is:
- a list of the categories of worker in the proposed bargaining unit;

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(c.24) which received Royal Assent on 16 September 2004*

- a list of the workplaces at which the workers in the proposed bargaining unit work; and
 - the number of workers the employer reasonably believes to be in each category at each workplace in the proposed bargaining unit.
40. Paragraph 18A(3) obliges the employer to ensure that the information supplied is as accurate as reasonably practicable, given the information he possesses at the time. Paragraph 18A(4) requires that the lists supplied to the union(s) and the CAC are the same.
41. *Section 4* replaces paragraph 19 of Schedule A1. The new provisions set out the way in which the CAC will determine the appropriate bargaining unit where the parties have failed to reach agreement. It clarifies that the CAC, when deciding the bargaining unit, must first consider the bargaining unit proposed by the union (the “proposed” bargaining unit). If the CAC does not consider the unit proposed by the union to be appropriate, it must decide a unit which is appropriate. The CAC has 10 days (or an extended period) to make this determination.
42. The new paragraph 19 applies if:
- the CAC has accepted a union’s application;
 - the parties have not yet agreed an appropriate bargaining unit; and
 - either no request has been made under paragraph 19A by the union or, if that request has been made, the CAC is not of the opinion that the employer has failed to comply with the duty imposed by paragraph 18A.
43. Paragraph 18A, as explained above, requires the employer to supply the CAC and the union with information about the workers in the union’s proposed bargaining unit. If the new paragraph 19 applies, then the CAC must decide, within the decision period, whether the union’s proposed bargaining unit is appropriate. In deciding whether the proposed bargaining unit is appropriate, the CAC must take into account the factors listed in paragraphs 19B(2), (3) and (4). Paragraphs 19B(3)(a) and 19B(4) make clear that the views of the employer must be considered and set out how these views will be taken into account. It provides that the CAC, in deciding whether the union’s proposed bargaining unit is appropriate, must take into account any view the employer expresses about an alternative unit(s).
44. Additionally, new paragraph 19A permits the CAC, where so requested by the union(s), to move to decide the bargaining unit before the expiration of the 20-day negotiation period, if the employer fails to provide the information required under the new paragraph 18A inserted by section 3. Thus, where an employer fails to provide information that may assist agreement on the bargaining unit, the union(s) may request a move to the determination of the bargaining unit and prevent unnecessary delay to the process. New sub-paragraphs 19A(2) to (4) mirror the provisions of paragraph 19 setting out the order of the CAC’s decision-making and the period within which it must decide.

Union communications with workers after acceptance of application

45. *Section 5* inserts paragraphs 19C to 19F after paragraph 19B (which is inserted by section 4). At present, a union(s) may only formally communicate with workers during the period for a CAC ordered ballot. Section 5 provides a right for the union(s) to communicate with the workers in the bargaining unit from the point of the CAC’s acceptance of the union’s application. This communication takes place via a suitable independent person.

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46. Paragraphs 19C(1) and (2) provide that, following the acceptance of its application by the CAC, the union(s) may request the CAC to appoint a suitable person for the purpose of communicating with the relevant workers.
47. Paragraph 19C(3) makes clear that if the information is to be sent before the bargaining unit is agreed by the parties or determined by the CAC, the relevant workers are the workers in the union's proposed bargaining unit. If the information is to be sent after the bargaining unit has been agreed by the parties or determined by the CAC, the relevant workers are the workers in the unit that has been agreed or determined.
48. Paragraph 19C(4) provides that where an application has been made under paragraph 12(4) (where the parties have already agreed a bargaining unit before the union's application to the CAC) then the relevant workers are the workers in the agreed unit.
49. Paragraph 19C(5) provides that the union's right of communication starts from the day on which the CAC informs the parties of the name of the suitable independent person and ends when the first of the following occurs:
 - the union's application is withdrawn;
 - the CAC declares the application invalid following the agreement or determination of a new bargaining unit which is different from the union's proposed unit;
 - the CAC issues a declaration that the union(s) are recognised without a ballot; or
 - the CAC gives notice to the parties of the appointment of a suitable independent person to conduct the ballot (the union's right of communication continues throughout the ballot period by virtue of the existing provision in paragraph 26(6) of Schedule A1).
50. Paragraph 19C(6) defines the suitable independent person as someone who either satisfies the conditions specified by order for a qualified independent persons (QIPs) to conduct statutory recognition and derecognition ballots or is actually named in that order. To qualify as a suitable independent person, there must also be no reason to doubt that the person in question will conduct their functions competently and independently.
51. Paragraph 19D(1) and (2) set out duties of the employer which apply from the time he is informed by the CAC of the appointment of the suitable independent person. These are to give to the CAC, within 10 working days, the names and home addresses of all the relevant workers and to update this information if the relevant workers change as the result of agreement or decision on the bargaining unit, or if workers join or leave the bargaining unit.
52. Under paragraph 19D(4) the CAC must pass this information to the suitable independent person as soon as possible.
53. Paragraph 19E provides that the suitable independent person must, on the request of the union(s), send to any worker whose name and home address has been passed to him and who is still a relevant worker, any information supplied to him by the union. The suitable independent person's costs (defined in new paragraph 19E(7)) are to be paid by the union(s) on receipt of a demand.
54. Under paragraph 19E(5) if that demand is not paid within 15 working days then in England and Wales it is (subject to any appeal under paragraph 165A of Schedule A1 (see paragraphs 101 to 103)) to be recoverable by execution issued from a county court. Paragraph 19E(6) sets out that execution may be carried out as though the union were a body corporate against any property held in trust for the union which is not protected property. Protected property is defined by section 23 of the 1992 Act as property that:
 - belongs to the trustees in a capacity other than their capacity as trustees of the union;

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- belongs to a member of the union, otherwise than jointly or in common with the other members of that union;
 - belongs to an official of the union who is neither a member nor a trustee;
 - is part of a lawfully constituted political fund; or
 - is part of a beneficial fund.
55. Paragraph 19F sets out the sanction for a failure by the employer to comply with his duties under the new paragraph 19D(2). If the CAC is satisfied that the employer has failed to comply and the union's right of communication has not yet ended, the CAC may order the employer to remedy that failure within a specified time period. If the CAC is satisfied that the employer has failed to comply with that order, it must notify the union(s) and the employer of that failure, drawing their attention to its discretion to award recognition without a ballot if certain conditions hold. These are:
- that the CAC is satisfied that the employer has failed to comply with an order under paragraph 19F(1);
 - that the parties have agreed or the CAC has decided an appropriate bargaining unit;
 - that if the validity tests have been applied under paragraph 20 these have been passed; and
 - that the union's right of communication has not ended.
56. *Subsections (2), (3) and (5)* makes consequential amendments to certain cross-references. *Subsection (4)* provides that where the CAC decides that there must be a ballot, the employer is not required to provide the names and addresses of the relevant workers where he has already done so under the paragraphs inserted by subsection (1) of this section, and that if the QIP appointed to conduct the ballot is not the same person as was appointed under the paragraphs inserted by that subsection, the CAC must pass the relevant information to the new QIP as soon as possible.

Circumstances in which the CAC must arrange a ballot

57. *Section 6* amends paragraphs 22(4) and 87(4) of Schedule A1.
58. *Paragraph 22(4)* currently sets out the three criteria which the CAC must apply when deciding whether it must arrange a recognition ballot under Part I of the Schedule in cases where the union has more than 50% of the workers in the bargaining unit in its membership. The second of these criteria, set out in paragraph 22(4)(b), requires a ballot to be arranged where "a significant number of the union members within the bargaining unit inform the CAC that they do not want the union (or unions) to conduct collective bargaining on their behalf." The CAC thus needs to assess whether it has been so informed, but it is not empowered to assess whether the information it receives reflects the genuine views of the trade union members concerned. Section 6(1) replaces paragraph 22(4)(b) and provides greater discretion to the CAC when deciding whether a significant number of union members do not want the union to bargain on their behalf by empowering the CAC to assess the credibility of the evidence it receives.
- Section 6(2)* makes the same change to paragraph 87(4) of the Schedule which deals with the case where the CAC is deciding whether it must arrange a ballot in respect of a new bargaining unit which has been agreed or determined under Part III of the Schedule, and more than 50% of the workers in that new bargaining unit are members of the union.

Power of the CAC to extend notification period

59. **Section 7** amends paragraph 24 of Schedule A1. Paragraph 24 applies where the CAC gives notice under paragraph 22(3) or 23(2) that it intends to arrange for the holding of a ballot to determine whether the workers in the bargaining unit want the union(s) to be recognised to conduct collective bargaining on their behalf.
60. **Paragraph 24(5)** provides a fixed time period in which the union(s) alone or the union(s) and employer jointly may notify the CAC that they do not wish the CAC to arrange a ballot.
61. **Section 7** replaces the existing paragraph 24(5) with new paragraphs 24(5), (6) and (7) to give the CAC the ability to extend the notification period on the request of both parties to give the parties more time to try to reach a voluntary agreement on recognition.

Postal votes for workers absent from ballot at workplace

62. **Section 8** amends paragraphs 25 and 117 of Schedule A1. Paragraph 25 applies where the CAC arranges to hold a ballot on union recognition. Paragraph 25(4) provides that the ballot must be conducted, depending on the CAC's preference, at a workplace, by post or by a combination of these methods. The CAC's decision on the form of the ballot must take into account:
 - the likelihood of the ballot being affected by unfairness or malpractice if it were conducted at a workplace or workplaces;
 - costs and practicality; and
 - such other matters as the CAC considers appropriate.
63. The CAC may not decide that the ballot is to be conducted by a combination of postal and workplace voting unless special factors make this appropriate. Paragraph 117 mirrors these provisions in the case of ballots on derecognition.
64. **Section 8** amends the provisions of these paragraphs to allow workers who are allotted a vote at the workplace to vote by post if they are unable for reasons specific to them to attend their workplace on the day of the ballot.
65. **Subsection (1)** inserts sub-paragraph (6A) into paragraph 25. Where the CAC decides that the ballot must be conducted (in whole or in part) at the workplace, subparagraph (6A) enables it to require arrangements to be made to allow workers who are unable to vote at the workplace for reasons relating to themselves as individuals (for example illness, leave etc.) to vote by post.
66. **Subsection (2)** inserts sub-paragraph (8A) into paragraph 117, and allows for postal votes in similar circumstances when the CAC decides that a ballot on derecognition must be conducted wholly or in part at the workplace.
67. In combination, the paragraphs inserted by subsections (1) and (2) make clear that a ballot should not be considered to be a combination ballot solely because the CAC makes arrangements, in accordance with the paragraphs, under which a worker or workers voting in a workplace ballot will receive a postal vote.

Additional duties on employers informed of ballots

68. **Section 9** places new duties on employers who have been informed by the CAC under paragraph 25(9) of Schedule A1 that a ballot is required. At present, an employer who is so informed must comply with three duties. The first duty is to co-operate generally, in connection with the ballot, with the union (or unions) and with the person appointed to conduct the ballot. The second duty is to give the union (or unions) such access to the workers in the bargaining unit as is reasonable to enable the union to inform the workers of the purpose of the ballot and to seek their support and their opinions on the issues

involved. The third duty is to supply to the CAC the names and home addresses of the workers in the bargaining unit, and to update that information when workers leave or join the bargaining unit.

69. *Subsection (3)* amends paragraph 26 of Schedule A1 to the 1992 Act by inserting sub-paragraphs (4A) to (4E). Sub-paragraphs (4A) and (4B) introduce two new duties in addition to the three duties mentioned above. Paragraph 26(4A) places a fourth duty on the employer to refrain from making an offer to any or all of the workers in the bargaining unit which has the effect, or is likely to have the effect, of inducing any or all of those workers not to attend a relevant meeting, unless that offer is reasonable in the circumstances. Paragraph 26(4B) places a fifth duty on the employer not to take or threaten to take action against a worker solely or mainly because that worker attended or took part in a relevant meeting or because that worker indicated that he intended to attend or to take part in such a meeting.
70. Paragraph 26(4C) defines a relevant meeting as one which is organised either in accordance with an access agreement reached in relation to the employer's duty to provide reasonable access, or as a result of an order of the CAC under paragraph 27 of the Schedule (where the CAC is satisfied that the employer has failed to comply with one of his duties) and further is a meeting which the employer is required to allow the worker in question to attend under the terms of the agreement or the order.
71. Paragraph 26(4D) makes provision in relation to the second duty (to provide reasonable access to the union) under paragraph 26(3) of Schedule A1 by making clear that an employer will have failed to comply with that duty if:
 - he unreasonably refuses a request for a meeting between the union (or unions) and any of the workers in the bargaining unit to take place without the employer or a representative of his being present; or
 - he or a representative of his attends such a meeting without having been invited to do so; or
 - he seeks to record or otherwise be informed of what occurred at the meeting, unless it is reasonable in the circumstances for him to do so; or
 - he refuses to give an undertaking that he will not seek to record or be informed of the proceeding unless it is reasonable for him to do so in the circumstances.
72. This paragraph does not affect the generality of the second duty under paragraph 26(3); an employer could fail to comply with that duty even where his actions are not those mentioned in paragraph 26(4D).
73. Paragraph 26(4E) makes clear that the fourth and fifth duties do not confer new rights on workers, but also do not affect any other right a worker may have.
74. *Subsection (4)* makes it clear that Acas (under its powers under section 199(1) of the 1992 Act) and the Secretary of State (under powers under section 203(1)(a) of the same Act) can issue Codes of Practice in respect of both the second and fourth duties on the employer.
75. *Subsections (6) to (10)* make amendments with the same effect to paragraphs 118 and 119 of the Schedule, which deal with the duties on employers informed of ballots pursuant to an application for derecognition of a union (or unions).

Unfair practices in relation to recognition ballots

76. **Section 10** inserts paragraphs 27A to 27F into Schedule A1 of the 1992 Act.
77. Paragraph 27A requires each of the parties informed by the CAC under paragraph 25(9) that a ballot is to be held must refrain from using any unfair practice. Paragraph 27A(2)

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provides that a party uses an unfair practice if it does any of the following with a view to influencing the outcome of the ballot:

- offers to pay money or give money's worth to a worker in the bargaining unit in return for that worker agreeing to vote in a particular way or to abstain from voting in the ballot;
- makes an outcome-specific offer to a voter (see paragraph 27A(3));
- coerces or attempts to coerce a worker in the bargaining unit to reveal how he intends to vote or did actually vote, or whether he intends to vote at all;
- dismisses or threatens to dismiss a worker;
- takes or threatens to take disciplinary action against a worker;
- subjects or threatens to subject a worker to any other detriment;
- uses or attempts to use undue influence on a worker in the bargaining unit.

78. Paragraph 27A(3) defines an "outcome specific offer" as an offer to pay money or give money's worth which is contingent on the outcome of the ballot as reflected in a declaration by the CAC that the union is (or is not) entitled to be recognised. However, offers which are contingent on anything which might subsequently occur or be done as a result of the CAC's declaration - say, the outcome of any collective bargaining resulting from a CAC award of recognition - are not categorised as an "outcome specific offer".

79. Paragraph 27A(4) makes it clear that this paragraph does not confer any new rights on a worker but does not affect any other right a worker may have.

80. Paragraph 27A(5) provides that Acas and the Secretary of State may issue Codes of Practice for the purposes of this paragraph in accordance with their powers under sections 199(1) and 203(1)(a) of the 1992 Act respectively.

81. Paragraph 27B provides that a party (a union or an employer who is informed of a ballot by the CAC) may complain to the CAC if it considers that another party has used an unfair practice. The complaint must be made within one working day of the last date on which votes can be cast in the ballot (or within one working day of the ballot if it took place on a single day). The CAC has 10 working days (or such longer period as the CAC may specify in a notice to the parties containing its reasons for extending the period) in which to decide whether a complaint is well-founded. Under paragraph 27B(4) a complaint is well-founded if the following two conditions are both met:

- the CAC finds that the party complained against did use an unfair practice;
- the CAC is satisfied that the use of that unfair practice changed or was likely to change the voting intentions (in terms of how he would vote or whether he would vote at all) or the voting behaviour (in terms of how he voted or whether he voted at all) of a worker in the bargaining unit.

82. Under paragraph 27B(6) if the ballot has not yet begun when the CAC comes to consider a complaint the CAC may postpone the ballot until a date after the end of the decision period. If it does so, the CAC must inform the parties and the qualified independent person of this by notice.

83. Paragraphs 27C to 27F set out the consequences of a decision by the CAC that a complaint is well-founded. Paragraph 27C(2) requires the CAC in such circumstances to issue a declaration that the complaint is well-founded.

84. Paragraphs 27C(3), 27C(4) and 27C(6) provide a discretionary power for the CAC to issue one or more remedial orders requiring a party to mitigate the effects of the unfair practice. Where a party fails to comply with such an order, the CAC is empowered under paragraph 27D to award recognition (if the party was an employer) or to reject

the union's application for recognition (if the party was a union). Paragraph 27D also provides for the CAC to award recognition where an unfair practice committed by an employer involves the use of violence or the dismissal of a union official, or where the CAC makes a second declaration against the employer about a further unfair practice. Similarly, the CAC may reject a union's application if it is responsible for an unfair practice involving violence or the dismissal of a union official, or where it is found to have committed a further unfair practice.

85. Paragraph 27C(3)(b) provides a discretionary power to the CAC to arrange for a further ballot where an unfair practice has occurred. Paragraph 27E (together with an amendment to paragraph 29 made by subsection (2) of this section) provide powers for the CAC to cancel the initial ballot where it is not completed, or to annul a completed initial ballot without disclosing its result. (These powers to cancel or annul the ballot without disclosing the result can also be used where the CAC awards recognition or rejects the union's application under paragraph 27D.) Paragraph 27F provides how the CAC should organise any further ballot and specifies the obligations on the parties in relation to this further ballot. The requirements are mostly the same as applied to the original ballot. The main differences are that (i) after being notified that the CAC intends to hold a further ballot, the parties are given 5 working days to inform the CAC that they do not want a ballot to be held, and (ii) the costs of the ballot do not have to be shared equally by both parties, thereby providing scope for the CAC to require the party which committed the unfair practice to pay all or the majority of the costs.

Application where agreement does not cover pay, hours and holidays

86. **Section 11** clarifies that a union may apply to the CAC when any one or more of the "core bargaining" topics are not included in the pre-existing agreement.
87. Where the CAC declares a union recognised, it is for collective bargaining on pay, hours and holidays (although the parties may vary this by agreement). These three items are regarded as the "core" issues for collective bargaining. Under paragraphs 35 and 44 of the Schedule, an application to the CAC for recognition is inadmissible or invalid if the applicant union is already recognised under a collective agreement covering any of the workers in the proposed bargaining unit and that agreement covers pay or hours or holidays. There has been some confusion over the meaning of these paragraphs in the 1992 Act. It has been contended that they imply that the CAC may only accept an application in these circumstances where the existing agreement covers none of pay, hours or holidays. An alternative view is that an application would be admissible if the collective agreement already in force covered one or more (but not all) of pay, hours and holidays. Section 11 provides that in such circumstances a union's application to the CAC is admissible if the collective agreement already in force does not cover all of pay, hours and holidays. Accordingly the CAC will be able to proceed with an application if the existing collective agreement only covers one or two of the matters (or none) but not if it covers all three.

Employer's notice to end bargaining arrangements

88. **Section 12** amends those provisions in Part IV of Schedule A1 which deal with an employer's notice under paragraph 99 of the Schedule that he wishes the bargaining arrangements (that are the result of an earlier declaration of statutory recognition by the CAC) to cease to have effect. Such notice may be given if both the employer believes that he, taken with any associated employer(s), employed an average of fewer than 21 workers in a given 13 week period and three years have passed since the CAC awarded recognition. The CAC must decide if such a notice complies with the requirements of paragraph 99(3). These are that the notice:
- identifies the bargaining arrangements;
 - specifies the period of 13 weeks in question;

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- states the date on which the notice is given;
 - is given within 5 working days of the day after the day on which the specified 13-week period ends;
 - states that the employer, taken with any associated employers, employed an average of fewer than 21 workers in the specified 13-week period; and
 - states that the bargaining arrangements are to cease to have effect on a date at least 35 days later than the day after the date on which the notice has been given.
89. If the notice complies with the above the bargaining arrangements will cease to have effect on the day stated unless the union makes an application to the CAC under paragraph 101 of the Schedule, asking it to decide whether the period of 13 weeks specified by the employer in fact ended on or after the expiry of three years starting with the date of the CAC's declaration of recognition and whether it is correct that the employer, and any associated employers, employed an average of fewer than 21 workers in the specified 13-week period. If the CAC accepts this application by the union, it must allow both union and employer to put their views on the questions to be decided and reach a decision about them. If the CAC decides that the employer's notice is correct and three years have passed since its declaration, then the bargaining arrangements will cease to have effect on the termination date. If the CAC finds that the employer's notice has been given within three years of its declaration, or that the notice is not correct, the employer's notice is treated as though it had not been given.
90. Currently, an application by the union under paragraph 101 to challenge the employer's notice cannot be accepted by the CAC if within the period of three years prior to that application the CAC has accepted an application
- by the union under paragraph 101, or
 - by the employer or a worker or workers under paragraph 106, 107, 112 or 128, that the bargaining arrangements should cease to have effect.
- and the two applications are in respect of the same bargaining unit. This has the effect that if the union has successfully challenged an employer's notice to end bargaining arrangements or has won a derecognition ballot in the previous three years, it cannot challenge a further application by the employer under paragraph 99, thus allowing the union to be derecognised without having an opportunity to put its views before the CAC.
91. *Section 12* rectifies this anomaly by providing that a previous relevant application (either a challenging application by the union, or an application to have bargaining arrangements ended by the employer or worker(s)) does not render an application by the union under paragraph 101 inadmissible. The section also provides that any unsuccessful application or notice to derecognise the union by the employer or a worker (or workers) renders any further such applications inadmissible for a period of three years.
92. *Section 12(4)* inserts paragraph 99A which provides that a derecognition notice given by the employer under paragraph 99 is invalidated if a relevant application or earlier notice relating to the same bargaining unit was given within three years prior to the date on which the current derecognition notice is given, that relevant application was accepted by the CAC, or the CAC decided that that notice complied with paragraph 99(3). A relevant application is an application for derecognition made by the employer under paragraph 106, 107 or 128, or an application by a worker (or workers) under paragraph 112.
93. *Subsections (1) to (3) and (5)* make consequential amendments to paragraphs 99 and 100.

94. *Subsection (6)* removes the bars (which are explained in paragraph 90 above) on a union's application in response to an employer's notice contained in paragraph 101(4) and (5). These paragraphs restricted a union's ability to challenge an employer's notice to end bargaining arrangements.
95. *Subsection (7)* inserts new sub-paragraphs into paragraph 103 to ensure that a derecognition notice by the employer under paragraph 99 shall be treated as given for the purposes of deciding the admissibility of derecognition applications by the employer or worker(s) under paragraphs 106, 107, 112 and 128 or for deciding the validity of later notices under paragraph 99 even though it is not treated as being given for other purposes.
96. *Subsection (8)* amends paragraphs 109, 113 and 130 of the Schedule. It has the effect that if there is a derecognition application by the employer or worker(s) under paragraphs 106, 107, 112 or 128 and within the three years prior to the date of the application a notice under paragraph 99 was given which the CAC decided complied with paragraph 99(3) the CAC must not accept the derecognition application.
97. *Subsection (9)* ensures that an application by the union(s) under paragraph 101 in the three years prior to the date of a derecognition application under paragraph 106, 107, 112 or 128 does not render that later application inadmissible.

Unfair practice in relation to derecognition ballots

98. *Section 13* inserts paragraphs 119A to 119I into Schedule A1, which concern unfair practices during recognition ballots. In particular, the provisions:
- create a duty on the parties to refrain from unfair practices;
 - set out how complaints of unfair practices are to be handled; and
 - provide for the consequences of a decision by the CAC that a complaint of unfair practice is well-founded in respect of a ballot on derecognition of a union held in accordance with paragraph 117 of the Schedule.
99. *Section 13* closely resembles section 10 applying the same or very similar provisions for defining unfair practices, and the consequences for a party which commits them, to the setting of a derecognition ballot. New paragraphs 119G to 119I contain distinctive additional provisions which apply to the case where a worker has made an application to derecognise the union and the CAC arranges a ballot. Additional provisions are needed because there are three parties (the worker, the union and the employer) which could commit an unfair practice in such ballots, in contrast to just two parties (the union and the employer) in recognition ballots and derecognition ballots on an application by an employer. New paragraph 119G has the effect of dis-applying the remedies provided in paragraph 119D from these cases, whilst applying the other provisions covering unfair practices which are set out in new paragraphs 119A to 119C and 119E to 119F.
100. Paragraph 119H provides for particular remedies, in certain situations, which might arise where a ballot is held in relation to an application under paragraph 112. It provides for the CAC to declare that the union is derecognised where it fails to comply with a remedial order to mitigate the effect of an unfair practice. It similarly provides for the union to be derecognised where the unfair practice involves the use of violence or the dismissal of a union official or where the CAC declares that the union has committed a second unfair practice. In corresponding situations where the applicant worker is found to have committed one or more unfair practices, been guilty of an unfair practice which included the use of violence or the dismissal of a union official, or failed to comply with a remedial order, the CAC is empowered to declare that the worker's application to derecognise the union is rejected. Where the employer has committed one or more unfair practices, used violence or dismissed a union official or failed to comply with a remedial order, the CAC may order that the employer should cease all further campaigning activity in relation to the ballot. Paragraph 119I specifies that such

orders (in addition to the remedial orders requiring the employer to mitigate an unfair practice) can be enforced through the courts by the union or the applicant worker in the same way as orders of the county court (in England and Wales) or orders of the sheriff (in Scotland). Paragraph 119I also establishes the same enforcement mechanism in relation to any orders under paragraph 119 which the CAC may issue to an employer to remedy a failure by the employer to fulfil the three duties set out in paragraph 118 to assist with the running of the ballot.

Appeals against demands for costs

101. *Section 14* inserts a paragraph 165A into Schedule A1. It provides a right of appeal for the union(s) and/or employer against a demand for costs from a qualified independent person for the conduct of a ballot, or from an appointed person for sending information to the relevant workers.
102. Paragraph 165A provides that the recipient of a demand under paragraph 19E(3) (for the costs of sending information), paragraph 28(4) (for the costs of a ballot on recognition) or paragraph 120(4) (for the costs of a ballot on derecognition) may appeal against the demand to an employment tribunal within four weeks of receiving it. The employment tribunal must dismiss the appeal unless it is shown that the amount demanded is too great, or the amount specified as the share of the costs to be borne by a particular recipient is too great.
103. Paragraph 165A(6) provides that if an appeal is allowed, the tribunal must rectify that demand and the rectified demand shall have effect as though it were the original demand. Paragraph 165A(7) provides that a demand for costs is not enforceable until an appeal has been withdrawn or determined, but that after that time it shall be enforceable.

Power to amend Schedule A1 of the 1992 Act

104. *Section 15* amends paragraph 166 of Schedule A1. At present paragraph 166 contains limited powers for the Secretary of State to amend paragraphs 22 and 87 of the Schedule, by order, if the CAC informs the Secretary of State that either of these paragraphs has an unsatisfactory effect.
105. *Section 15* widens the scope of paragraph 166, by giving the Secretary of State a general power to amend any provision of the Schedule, if requested to do so by the CAC.
106. *Subsection (2)* replaces paragraphs 166(1) and (2) and inserts new paragraphs 166(2A) and 166(2B).
107. New sub-paragraphs 166(1) and (2) provide for the CAC to ask the Secretary of State to amend any provision of the Schedule if it considers that the provision has an unsatisfactory effect and should be amended. The Secretary of State may seek to rectify the problem either by using other powers to amend the Schedule where the provision is among those to which the powers apply or by using the new power in paragraph 166(2)(b).
108. Sub-paragraph (2A) clarifies that the Secretary of State has a discretion to amend the Schedule in any way and not just in a way suggested by the CAC. Sub-paragraph (2B) makes clear that the Secretary of State may use the powers, mentioned in sub-paragraph (2)(a), to amend the Schedule without the need for any representation from the CAC.
109. This section will not alter the requirement in paragraph 166 that any change to the Schedule, whether under the specific or general power, must be by means of an order that is approved by both Houses of Parliament.

Means of communicating with workers

110. *Section 16* inserts a new paragraph 166A in Schedule A1.

111. Paragraph 166A(1) provides that paragraph 166A applies in relation to any provision of paragraph 19D(2), paragraph 26(4) or paragraph 118(4). These paragraphs require the employer to provide the names and home addresses of workers for the purposes of their being sent information by the union, or for the purposes of a ballot on recognition or derecognition.
112. Paragraph 166A gives the Secretary of State an order-making power to provide that the employer must give to the CAC, in addition to the workers' home addresses, an address of a specified kind, which may include any address or number to which information can be sent by any means. Such an order must be made by statutory instrument and approved by both Houses of Parliament. The power contained in this section will enable the Secretary of State to provide that employers must give the CAC addresses for workers which enable communication or voting in ballots to take place by other means as well as by post (see also commentary on section 54).

Unfair practices: power to make provision about periods before notice of ballot

113. **Section 17** inserts a paragraph 166B into Schedule A1 to the 1992 Act. This paragraph provides an order-making power for the Secretary of State to prohibit employers and unions from using specified unfair practices during a specified period. Paragraph 166B(1) sets out that the Secretary of State may provide by order that employers and unions are prohibited from using practices which are specified as unfair practices in relation to particular kinds of application under Schedule A1. Such an order may also set out a specific period in which this prohibition will apply.
114. Paragraph 166B(2) provides that an order may make provision for the consequences of using a prohibited practice, including provision which modifies the effect of an existing provision of the Schedule which deals with the situation where a prohibited practice is used.
115. Paragraph 166B(3) makes clear that an order by the Secretary of State can confer functions on the CAC.
116. Paragraph 166B(4) sets out that an order may contain provisions which extend either or both the power of Acas under section 199(1) of the 1992 Act, or the power of the Secretary of State under section 203(1)(a) of that Act, to issue Codes of Practice in relation to the provisions laid down in the order.
117. Paragraph 166B(8) provides a definition of the term "specified", which is to mean specified in an order under this paragraph.

Power to make provision about effect of amalgamations etc.

118. **Section 18** inserts paragraphs 169A, 169B and 169C into the Schedule. Paragraph 169A provides an order-making power for the Secretary of State to make provision for any case where anything has been done under or for the purposes of the Schedule by or in relation to a union and that union amalgamates or transfers all or any of its engagements. For example, such an order may specify what will happen to an award of recognition where the union(s) in respect of which the award was made merges with another union or unions. The term "transfer of engagements" also covers the case where a union breaks up with the result that a section that was formerly a part of it becomes a union in its own right.
119. Paragraph 169A(2) has the effect that an order under this paragraph may make provision for cases where an amalgamated union, or union to which engagements have been transferred, does not have a certificate of independence.
120. Paragraph 169B contains a similar order-making power for the Secretary of State to make provision for any case where anything has been done under the purposes of the Schedule by or in relation to a group of workers and the employer of any of those workers is no longer their employer, by reason of a business transfer or otherwise.

121. Paragraph 169C provides that an order under paragraphs 169A or 169B must be approved by both Houses of Parliament.

Information about union membership and employment in bargaining unit

122. **Section 19** inserts a paragraph 170A into the Schedule. The new paragraph provides a power for the CAC to require the employer, the union(s) and applicant workers to give to a CAC case manager specified information to help inform its decisions under the Schedule. It also specifies the CAC's processes in handling and making use of such information.
123. Paragraph 170A(1) provides that the CAC may exercise the powers if it considers it necessary to do so to enable or assist it to exercise any of its functions under the Schedule.
124. Paragraphs 170A(2) and (3) provide that the CAC may require an employer, a union or an applicant worker to give the CAC case manager specified information about:
- the workers in a specified bargaining unit;
 - union membership among those workers;
 - the likelihood of a majority of those workers being in favour of recognition of a union(s) on their behalf; or,
 - the likelihood of a majority of those workers being in favour of having bargaining arrangements ended.
125. Paragraph 170A(5) provides that the recipient of a requirement from the CAC must provide, within the specified period, as much of the specified information as is in his possession.
126. Paragraph 170A(6) provides that the CAC case manager must prepare a report from the information supplied to him and submit this to the CAC. Under new paragraph 170A(8) he must also give a copy of this report to the employer, the union(s) and, if appropriate, the applicant worker(s).
127. Paragraph 170A(7) provides that if an employer, union or worker fails to comply with a requirement the case manager's report must mention this failure and the CAC may draw an inference against the party concerned. Paragraph 170A(9) defines the terms "applicant worker", "CAC case manager" and "specified" for the purposes of paragraph 170A.

"Pay" and other matters subject to collective bargaining

128. **Section 20** inserts paragraph 171A into the Schedule. A CAC declaration of recognition is for collective bargaining on pay, hours and holidays. Paragraph 171A(1) clarifies that for the purposes of the Schedule, the definition of "pay" does not include any matters relating to a worker's membership of an occupational or personal pension scheme, his rights under that scheme, or his employer's contributions to it.
129. Paragraphs 171A(2) to (4) permit the Secretary of State, by order, to amend relevant parts of the Schedule to add matters relating to pensions to the "core" bargaining topics of pay, hours and holidays. New paragraph 171A(5) allows the order to deem that the inclusion of pensions as a topic for collective bargaining shall have effect with regard to declarations of recognition and methods of collective bargaining already awarded under the Schedule.
130. Paragraph 171A(7) provides that any order made by the Secretary of State under the paragraph must be approved by both Houses of Parliament.

Information required by Acas for ballots and ascertaining union membership

131. **Section 21** inserts a new section 210A in the 1992 Act. *Subsections (1) and (2)* of the new section have the effect that where Acas is exercising its function to give assistance for the purpose of bringing about the settlement of a trade dispute, and the dispute is a recognition dispute, the parties to the dispute may jointly request Acas to hold a ballot of the workers involved or to ascertain their union membership.
132. *Subsection (4)* of the new section provides that if such a request is made, Acas has the power to require the parties to the dispute to give it, within a specified period, such information as it may specify about the workers involved in the dispute. However, *undersubsection (5)*, Acas may use the power only where it considers this is necessary to enable it to exercise its function to bring about a settlement and to assist it to comply with the parties' request for a ballot.
133. *Subsection (6)* of the new section provides that the recipient of a requirement from Acas must provide, within the specified period, as much of the specified information as is in his possession. *Subsection (7)* of the new section provides that a request for Acas to conduct a ballot or ascertain union membership may be withdrawn by any party to the dispute at any time and that, if this occurs, Acas is to take no further steps to conduct the ballot or ascertain union membership. Under *subsection (8)*, Acas is also required not to take those further steps if a party fails to comply with *subsection (6)*. *Subsection (9)* provides that Acas is not required to comply with any request made under the new section.
134. *Subsection (10)* defines the terms "party", "recognition dispute", "specified" and "workers" for the purposes of the new section.

Part Two: Industrial Action Law

Ballots and Notices

135. Sections 226 to 235 of the 1992 Act contain provisions relating to industrial action ballots and the ballot and industrial action notices that unions are required to give to employers. The Government introduced a number of changes to the provisions, including sections 226A and 234A dealing with notices, in the 1999 Act.
136. A trade union that organises industrial action would, in the absence of statutory provision to the contrary, be liable under the common law for the civil wrong of inducing a breach of contract. However, the 1992 Act protects unions from the legal liability that would otherwise result if certain conditions are satisfied. One of these is that before inducing its members to take part in industrial action, the union must have held a properly conducted secret ballot of the members it is likely to induce to take part. Other conditions are that the union must give the employers concerned advance notice in writing of the ballot and of the industrial action. Generally, the "ballot notice" has to describe which employees the union believes will be entitled to vote in the ballot, and the "industrial action notice" has to describe which employees the union intends to induce to take part in the industrial action.
137. The review of the 1999 Act and consultation process found that, following the amendments, these provisions of the 1992 Act were generally working well. However, the judgment in the case of *National Union of Rail, Maritime and Transport Workers v London Underground Limited* [2001] IRLR 228 highlighted a difficulty with the way in which information required to be given in ballot and industrial action notices should be presented. Further, the case of *National Union of Rail, Maritime and Transport Workers v Midland Mainline Ltd* [2001] IRLR 813 revealed that there was a lack of clarity as to the union members to whom the union was required to give an entitlement to vote in an industrial action ballot. Sections 22, 23 and 25 address these matters.

Information about employees to be balloted on industrial action

138. *Section 22* amends section 226A of the 1992 Act, which specifies the information required to be contained in a “ballot notice”.
139. Section 226A currently requires a union conducting an industrial action ballot to provide each employer the union reasonably believes to employ members who will be entitled to vote with a notice stating that it intends to hold a ballot and the starting date of the ballot. As the section is at present, the notice is also required to contain information in the union’s possession that would help the employer to make plans and bring information to the attention of the employees the union intends to ballot, and has to include information, if the union has it, as to the number of employees involved, their category of work and workplace. The notice must be received by the employer at least 7 days before the starting date of the ballot.
140. Additionally, the union has to ensure that each employer concerned receives a sample voting paper at least 3 days before the starting date of the ballot.
141. *Section 22* simplifies the requirements of section 226A by making changes to the information the union is required to supply. The changes make it desirable, in the interests of clarity, to restructure the provisions of the section and the section therefore does so.
142. *Subsection (2)* contains an amendment that is consequential on section 226A(2F), which is inserted by subsection (4). The new subsection (2F) relates to the requirement to provide an employer concerned with a sample voting paper and makes no substantive legal change to the requirement.
143. *Subsection (3)* replaces the current subsection (2)(c) of section 226A. New subsection (2)(c)(i) has the effect that the information unions are required to include in the notice must contain the lists and figures mentioned, respectively, in new subsections (2A) and (2B) inserted into section 226A by subsection (4), and an explanation of how the figures were arrived at. New subsection (2)(c)(ii) provides that where some or all of the affected employees are employees from whose wages the employer makes deductions representing payments to the union, then the notices must contain either the lists, figures and explanation mentioned in subsection (2)(c)(i) or the information mentioned in new subsection (2C). The intention is to reduce the uncertainty currently present in section 226A by making the information that the union must supply specific and removing the need for the union to determine what information has to be given by reference to what would help the employer to make plans and bring information to the attention of those to be balloted. The provisions also allow unions to meet their obligations under section 226A by referring in the notice to union members who pay their union subscription through deductions from pay (a practice known as “check-off”).
144. *Subsection (4)* adds new subsections (2A) to (2I) to section 226A. New subsections (2A) and (2B), taken with the new subsection (2)(c), change the information required to be given by the current subsections (2)(c) and (3A) of section 226A.
145. The effect of new subsection (2A) is that the notice must contain a list of the categories to which the “employees concerned” (that is to say, the employees of the employer who the union reasonably believes will be entitled to vote in the ballot) belong and a list of the workplaces at which they work.
146. The effect of new subsection (2B) is that the notice must contain figures showing the total number of the employees concerned, the number of them in each category in the list of categories given in accordance with the new section (2A), and the number of them that work at each workplace in the list of workplaces given in accordance with the new subsection (2A).
147. New subsection (2C) contains the requirements that must be met if the notice, as permitted by subsection (2)(c)(ii), provides information in relation to employees from

whose wages the employer makes deductions representing payments to the union. The effect is that the information so provided must enable the employer readily to deduce the total number of the employees concerned, the categories of employee to which the employees concerned belong and the number of them in each of those categories, and the workplaces at which the employees concerned work and the number of them who work at each of these workplaces.

148. New subsection (2D) contains a new requirement that the lists and figures the union supplies are to be as accurate as reasonably practicable in the light of the information in the possession of the union.
149. New subsection (2E) has the effect that for this purpose information is regarded as being in the possession of the union only if it is held, for union purposes, in a document (including an electronic document) and is in the possession or under the control of a union officer or an employee of the union. The effect is that information held only by branch officials or other lay representatives of the union is not in the union's possession for the purpose of subsection (2D).
150. New subsection (2G) repeats the substance of the current subsection (3A)(b) of section 226A by ensuring that the section does not require the notice to name the employees concerned.
151. New subsection (2H) defines the term "employees concerned" to mean those employees who the union reasonably believes will be entitled to vote in the ballot.
152. New subsection (2I) defines the term "workplace" in relation to an employee, so making section 226A more precise.
153. *Subsection (5)* omits the current subsections of section 226A that are superseded by the section, while *subsection (6)* makes a change to a reference in section 226A(5) that is consequential on the insertion of new subsections (2A) to (2I).

Entitlement to vote in ballot on industrial action

154. **Section 23** amends section 227(1) of the 1992 Act. The amendment clarifies that the members to whom the union must accord an entitlement to vote in an industrial action ballot are all those it is reasonable for the union to believe will be induced by it to take part in the action. This resolves the issue that arose in the *Midland Mainline* case (see above at paragraph 137) by putting it beyond doubt that the union does not have to give such an entitlement to members who might take part even though not induced to do so by the union.

Inducement of members not accorded entitlement to vote

155. **Section 24** amends section 232B of the 1992 Act and inserts a new provision into section 62 of that Act.
156. The organisation of an industrial action ballot can be complicated and can sometimes involve many thousands of people. Under the 1992 Act as it stood before the changes made by the 1999 Act, the whole ballot could be invalidated if a union committed minor errors in determining who was eligible to vote, or failed to send ballot papers to *all* those required to be given an entitlement to vote.
157. The 1999 Act inserted section 232B, which provides that such errors are to be disregarded as long as they are accidental and on a scale unlikely to affect the outcome of the ballot. The 1999 Act also inserted section 232A, which defines the circumstances in which a union that induces members to take industrial action who should have been given an entitlement to vote but were not, loses its protection against legal liability. The dispensation for accidental failures in section 232B does not presently refer expressly to the purpose of section 232A but in *P (a minor) v National Association of Schoolmasters/*

Union of Women Teachers [2003] 2 AC 663, the House of Lords nevertheless held on the facts of the case that it did apply indirectly.

158. *Section 24(1)(a)* amends section 232B to ensure, in the interests of clarity, that where a union's failure to comply with the requirements of the 1992 Act is currently covered by the dispensation for accidental failures, and that failure would otherwise result in a failure to comply with section 232A, the latter failure is also to be disregarded. The main effect is that where a union accidentally fails to ballot an insignificant number of those it intends to induce to take part in industrial action, the union will not lose its protections against legal action because it induces them to take part in the action. The amendment confirms the judgment of the House of Lords in *P v NASUWT* (see above at paragraph 157) by making the position clear on the face of the legislation.
159. *Section 24(1)(b)* corrects a drafting error in section 232B. Section 230(2B) has the effect that where merchant seamen are entitled to vote in an industrial action ballot and are on a ship or outside Great Britain, special arrangements for enabling them to vote apply. Section 232B should have referred to section 230(2B) but refers instead to section 230(2A). The error was identified in *P v NASUWT*.
160. *Section 24(2)* inserts a new paragraph into section 62(2) of the 1992 Act. Section 62 of the 1992 Act gives union members a right to take legal action against their union if they are likely to be or have been induced to take part in industrial action and certain of the balloting requirements contained in sections 226 to 234 of the 1992 Act have been contravened. The effect of the new subsection is to include section 232A in the list of requirements contravention of which gives union members the right to take such legal action.

Information about employees to be contained in notice of industrial action

161. *Section 25* amends section 234A of the 1992 Act, which specifies the information required to be contained in an "industrial action notice".
162. Section 234A currently requires a union to provide each employer the union reasonably believes to employ members who will be induced to take part in the proposed industrial action with a notice. The notice must state whether the action is intended to be continuous or discontinuous and give, in the first case, the date on which it is intended to start and, in the second, the dates on which it is intended to take place.
163. As the section is at present, the notice is also required to contain information in the union's possession that would help the employer to make plans and bring information to the attention of the employees the union intends to induce and has to include information, if the union has it, as to the number of employees involved, their category of work and workplace. The notice must be received by the employer at least 7 days before the first date on which the industrial action is intended to take place.
164. *Section 25* simplifies the requirements of section 234A by making changes to the information the union is required to supply. The changes, which are similar to those made by section 22 in relation to the requirement to give employers a ballot notice, make it desirable, in the interests of clarity, to restructure the provisions of the section and the section therefore does so.
165. *Subsection (2)* replaces the current subsection (3)(a) of section 234A. New subsection (3)(a)(i) has the effect that the information unions are required to include in the notice must contain the lists and figures mentioned respectively in new subsections (3A) and (3B) inserted into section 234A by subsection (3). It also provides that the notice must contain an explanation of how the figures are arrived at. New subsection (3)(a)(ii) provides that where some or all of the affected employees are employees from whose wages the employer makes deductions representing payments to the union, then the notices must contain either the lists, figures and explanation mentioned in subsection (3)(a)(i) or the information mentioned in new subsection (3C). The intention

is to reduce the uncertainty currently present in section 234A by making the information that the union must supply specific and removing the need for the union to determine what information has to be given by reference to what would help the employer to make plans and bring information to the attention of those the union intends to induce to take part in the industrial action. The provisions also allow for unions to meet their obligations under section 234A by referring in the notice to union members through deductions from pay (a practice known as “check-off”).

166. *Subsection (3)* adds new subsections (3A) to (3F) to section 234A. New subsections (3A) and (3B), taken with the new subsection (2)(a), change the information required to be given by the current subsections (3)(a) and (5A) of section 234A. The effect of new subsection (3A) is that the notice must contain a list of the categories to which the “affected employees” (that is to say, the employees of the employer who the union reasonably believes will be induced to take part in the industrial action) belong and a list of the workplaces at which they work. The effect of new subsection (3B) is that the notice must contain figures showing the total number of the affected employees, the number of them in each category in the list of categories given in accordance with the new subsection (3A), and the number of them that work at each workplace in the list of workplaces given in accordance with that subsection.
167. New subsection (3C) contains the requirements that must be met if the notice, as permitted by subsection (3)(c)(ii), refers to affected employees that are employees from whose wages the employer makes deductions representing payments to the union, as permitted in subsection (3)(a)(ii). The effect is that the information provided in this way must enable the employer readily to deduce the total number of the affected employees, the categories of employee to which the affected employees belong and the number of the affected employees in each of those categories, and the workplaces at which the affected employees work and the number of them who work at each of these workplaces.
168. New subsection (3D) contains a new requirement that the lists and figures the union supplies are to be as accurate as reasonably practicable in the light of the information in the possession of the union.
169. New subsection (3E) has the effect that for this purpose information is regarded as being in the possession of the union only if it is held, for union purposes, in a document (including an electronic document) and is in the possession or under the control of a union officer or an employee of the union. The effect is that information held only by branch officials or other lay representatives of the union is not in the union’s possession for the purpose of subsection (3C).
170. New subsection (3F) repeats the substance of the current subsection (5A)(b) of section 234A and ensures that the section does not require the notice to name the affected employees.
171. *Subsection (4)* amends subsection (5) of section 234A. This subsection defines which employees are covered in principle by the notice and sets out the circumstances in which their inducement by the union to take part in industrial action is covered by the notice. At present the employees covered are the “affected employees” but this term relies on the reasonable belief of the union as to those who will be induced and its use in subsection (5) therefore leads to an imprecise result. Subsection (4) has the effect that the employees covered will be those falling within a category and employed at a workplace specified in the notice. This test is clear and objective.
172. *Subsection (5)* substitutes for the present subsection (5A) of section 234A new subsections (5B), (5C) and (5D).
173. New subsection (5B) defines a “notified category of employee” and a “notified workplace” for the purpose of the notice. A notified category of employee means a category of employee that is listed in the notice or, where the notice contains the information mentioned in subsection (3C), a category of employee that the employer

can readily deduce from the notice is a category of employee to which some or all of the affected employees belong, at the time the employer receives the notice. A notified workplace means a workplace that is listed in the notice or, where the notice contains the information mentioned in subsection (3C), a workplace that the employer can readily deduce from the notice is the workplace at which some or all of the affected employees work, at the time the employer receives the notice.

- 174. New subsection (5C) defines the term “affected employees” to mean those employees who the union reasonably believes will be induced to take part in the industrial action.
- 175. New subsection (5D) defines the term “workplace” in relation to an employee, so making section 234A more precise.
- 176. *Subsection (6)* contains a consequential amendment to a reference in section 234A(8).

Protections for Striking Employees

Previous position

- 177. **Sections 26 to 28** contain provisions that increase the protections given to employees by section 238A of the 1992 Act. That section, which was inserted by the Employment Relations Act 1999, provides protections to employees if they are dismissed for taking lawfully organised official industrial action (protected industrial action). The section made it unfair to dismiss an employee for this reason (1) during the eight week period following the start of the protected industrial action, (2) after this period where the employee’s participation in the action had ceased within the 8-week period, or (3) after this period where the employee’s participation had not ceased before the end of the period unless the employer has taken reasonable procedural steps to resolve the dispute with the union. The section lists a number of matters to which regard must be had when determining whether reasonable procedural steps have been taken. These include whether either the employer or the union have refused an offer to use the services of a conciliator or mediator. One tribunal case has been brought under this jurisdiction (*Mr J Davis v Friction Dynamics*). One issue raised by the case, which occurred in controversial circumstances, was how section 238A applied where the employees taking protected industrial action were locked out while taking it. A second issue was whether the employer had engaged fully in the conciliation process or was merely going through the motions to comply with the requirements of the section.

Dismissal where employees taking protected industrial action locked out

- 178. **Section 26** amends the protections for striking employees in section 238A of the 1992 Act by changing the length and scope of the protected period currently specified in the section. It does this by extending the period from 8 to 12 weeks and by providing for ‘locked-out’ days to be disregarded when determining the length of the period. As a result of the amendments made by this section, the period will in effect end when 84 days have passed since the start of the action on which no lock-out has occurred. This means, for example, that where a lock-out occurred on two days, the total period of protection becomes 86 days.
- 179. *Subsection (2)* introduces the term “protected period” into section 238A.
- 180. *Subsection (3)* inserts four new subsections, (7A) to (7D), into section 238A of the 1992 Act that have the effect of lengthening the period of protection when a lock-out occurs. New subsection (7A) states that the total length of the “protected period” equals the “basic period” plus any “extension period”.
- 181. New subsection (7B) defines the basic period as 12 weeks beginning with the first day of protected industrial action. New subsection (7C) defines the extension period. It means that the total period of protection is extended beyond the basic 12 week period by one day for each day on which the employee was locked out that occurred either within the basic period or within an extension period.

182. New subsection (7D) ensures that the period of protected industrial action can begin even though a lock-out might be in force on that day.

Date of dismissal

183. **Section 27** amends section 238A of the 1992 Act by substituting “the date of the dismissal” for the words “it takes place” (referring to when the dismissal takes place) at each place where they occur in the section, and then defining the expression “the date of dismissal” in the same way as it is defined for the purposes of section 238 by section 238(5). The effect is that for the purposes of section 238A “the date of the dismissal” means:
- the date on which the employer’s notice was given, where the employee’s contract of employment was terminated by notice, and
 - in any other case the effective date of termination.
184. The effect is to ensure that where section 238A applies in relation to a dismissal with notice the dismissal is treated as occurring when the notice is given and not when the period of notice expires.

Dismissal after end of protected period

185. **Section 28(1)** inserts a new subsection (6)(e) into section 238A of the 1992 Act, introducing new matters to which the tribunal is to have particular regard when assessing whether the employer has taken reasonable procedural steps to resolve the dispute with the union. The duty to have regard to those matters applies where the parties have accepted that the services of a conciliator or mediator will be used. The matters themselves are set out in new section 238B which subsection (2) inserts into the 1992 Act.

New Section 238B

186. Subsections (2) to (5) of new section 238B set out the procedural actions that the employer and the union should take where they have agreed that conciliation or mediation services will be used. The issue of whether the employer and union have taken the actions set out is a matter to which the tribunal is to have particular regard.
187. Subsection (2) sets out the first matter, which is whether the conciliation or mediation meetings have been attended, on behalf of the employer and union, by an “appropriate person”. Under subsection (6), an appropriate person is, in the case of the employer, a person who has the authority to settle the matter on behalf of the employer or a person authorised by such a person to make recommendations to him or her with regard to the settlement of the matter. In the case of the union, an “appropriate person” is a person responsible for handling the matter subject to the conciliation or mediation on behalf of the union.
188. Subsection (3) sets out the second matter, which is whether the employer and union have co-operated with the conciliator or mediator in the making of arrangements to set up meetings.
189. Subsection (4) sets out the third matter, which is whether the employer and union carried out any actions that they agreed with the conciliator or mediator to take. An additional requirement in subsection (7) is whether those actions were carried out in a timely manner.
190. Subsection (5) sets out the fourth matter, which is whether the employer and union answered reasonable questions put to them at meetings with all of the parties present. This formulation recognises that there will be occasions when either party should be entitled to refuse to give a response to a question.

191. Subsections (8) and (9) place limitations on the evidence that the conciliator or mediator may be required to give to the tribunal when it is considering the matters referred to in section 238A(6)(e). These provide, among other things, that confidential information passed by either party to the conciliator or mediator ought not be disclosed to the tribunal without the party's consent.

Part Three: Rights of Trade Union Members, Workers and Employees

Inducements and detriments in respect of membership etc. of independent trade unions

192. The general effect of sections 146 and 152 of the 1992 Act as they are at present is to make it unlawful for employers to subject employees to detriment (section 146) or dismiss them (section 152) on grounds of their union membership (or non-membership) or on grounds of taking part in union activities "at an appropriate time".
193. In July 2002 the European Court of Human Rights delivered its judgment in the case of *Wilson & the National Union of Journalists, Palmer, Wyeth & the National Union of Rail, Maritime & Transport Workers, Doolan & others v United Kingdom* [2002] IRLR 568 ("*Wilson and Palmer*") (a summary of the judgment can be found at <http://www.echr.coe.int/Eng/Press/2002/july/WilsonandOthersjudepress.htm>). The Court concluded that UK trade union law was incompatible with Article 11 of the European Convention on Human Rights (freedom of association) in that where a trade union was recognised by an employer for the purposes of collective bargaining about the terms and conditions of a group of employees, the law did not prevent the employer from offering inducements to the employees in the group to persuade them to surrender their collective representation and have their terms settled instead by negotiations between each individual employee and the employer. The Government believes that the principle underlying the decision of the Court extends beyond the facts in *Wilson and Palmer* and is applicable to a number of other comparable circumstances. The purpose of sections 29 to 32 is therefore to secure that these provisions deal not only with the facts in *Wilson and Palmer* but also with the other circumstances considered by the Government to be comparable.

Inducements relating to union membership or activities

194. **Section 29** inserts new sections 145A to 145F into the 1992 Act.

New section 145A

195. Subsection (1) of the new section gives a worker the right not to have an offer made to him by his employer where the employer's sole or main purpose is to induce the worker to do or not do certain things. The things are (1) not to be or seek to become a member of an independent trade union, (2) not to take part in the activities of an independent trade union at 'an appropriate time', (3) not to make use of the services of a trade union at 'an appropriate time', and (4) to be or become a member of a trade union.
196. All the limbs of this right are new but while the first, second and fourth limbs reflect the matters covered by the right not to be subjected to detriment already contained in section 146 of the 1992 Act, the third limb relating to making use of union services is entirely new.
197. Subsection (2) defines the term 'an appropriate time' for the purposes of the rights given by subsection (1). The effect of the definition, which is based on the definition used in the section 146(2) of the 1992 Act as amended by sections 30 and 31, is that the limbs of the right relating to taking part in union activities and making use of trade union services apply where the worker takes part in the activities or makes use of the services outside the worker's working hours, or during them at a time when, in accordance with arrangements agreed with the employer or consent given by the employer, it is permissible for him to do so.

*These notes refer to the Employment Relations Act 2004
(c.24) which received Royal Assent on 16 September 2004*

198. Subsection (3) defines the term “working hours” used in the definition of “an appropriate time”. Working hours means any time when the worker is required to be at work by the contract under which he works.
199. Subsection (4)(a) defines “trade union services” to mean services made available to a worker by an independent trade union by virtue of his membership of the union. Subsection (4)(b) states that references to a worker making use of trade union services include “consenting to the raising of a matter on his behalf by an independent trade union of which he is a member”, so ensuring that a worker consenting to his union raising a matter is regarded as making use of union services.

New section 145B

200. In general terms, new section 145B gives a new right to a worker who is a member of an independent trade union seeking recognition from or recognised by the employer not to have an offer made to him where similar offers are made to other workers and the sole or main purpose of the employer in making the offers is to secure that the terms of the workers will not, or will no longer, be determined by a collective agreement negotiated with the union.
201. Subsections (1) and (2) of the new section 145B have the effect that a worker who is a member of an independent trade union recognised by, or seeking recognition from, his employer for the purpose of collective bargaining has the right not to have an offer made to him by his employer if (1) his acceptance of the offer, together with the acceptance by other workers of similar offers, would have the result (‘the prohibited result’) that the workers terms and conditions will not, or no longer, be determined by collective agreement negotiated by or on behalf of the union, and (2) the employer’s sole or main purpose in making the offers is to achieve that result.
202. Subsection (3) has the effect that it is immaterial to the operation of the new right whether the offers are made to the workers simultaneously.
203. Subsection (4) provides that having terms of employment determined by collective agreement is not to be regarded as making use of a trade union service for the purposes of the new section 145A, or sections 146 or 152 in their form as amended by the Act. This removes the possibility of conflict between new sections 145A and 145B and ensures consistency in the interpretation of new section 145A and sections 146 and 152.

New section 145C

204. New section 145C sets out the time limit for bringing tribunal proceedings for contravention of the rights in new sections 145A and 145B. Paragraph (a) of the new section provides that a tribunal shall not consider a complaint unless it is presented within three months of the day that the offer was made or, where the offer is part of a series of similar offers, the date when the last was made. However, paragraph (b) of the new section allows a tribunal to consider a complaint presented later where it is satisfied that it was not reasonably practicable for the complaint to be presented within the normal three-month period.

New section 145D

205. New section 145D contains provisions as to how complaints under new sections 145A and 145B are to be considered by an employment tribunal.
206. Subsections (1) and (2) provide that on a complaint under new section 145A or 145B it shall be for the employer to show what his sole or main purpose in making the offer was.
207. Subsection (3) states that in determining whether the employer made an offer or the purpose for which he did so, the tribunal shall take no account of any pressure applied to the employer by the organisation of any industrial action or the threat of such action, and that the question shall be determined as if no such pressure had been applied.

The wording of subsection (3) is based on section 148(2), which is the corresponding provision relating to detriment claims under section 146.

208. Subsection (4) relates only to an offer that is alleged to have contravened new section 145B. The subsection requires that in determining whether the employer's sole or main purpose in making offers was to achieve the prohibited result, the matters to be taken into account by the tribunal must include any evidence showing (1) that when the offers were made the employer had recently changed or sought to change, or did not wish to use, arrangements agreed with the union for collective bargaining, (2) that when the offers were made the employer did not wish to enter into arrangements proposed by the union for collective bargaining, or (3) that offers were made only to particular workers and were made with the sole or main purpose of rewarding those particular workers for their high level of performance or of retaining them because of their special value to the employer.

New section 145E

209. New section 145E contains the remedies that apply where an employment tribunal finds that there has been a contravention of one of the new rights given by sections 145A and 145B.
210. Subsections (1) and (2) have the effect that if the tribunal finds a complaint to be well-founded it is to make a declaration to that effect and make an award to be paid by the employer to the worker in respect of the offer complained of.
211. Subsection (3) has the effect that the award to be paid to the worker is a fixed sum of £2,500 but that the award can be subject to a reduction or increase under the provisions of the Employment Act 2002.
212. Subsection (4) relates to offers in contravention of sections 145A or 145B that have been accepted. Subsection (4)(a) has the effect that if the acceptance of the offer resulted in the worker agreeing to vary his terms of employment later, the employer cannot enforce the agreement to vary or recover any sum paid or other asset transferred that constituted the inducement.
213. Subsection (4)(b) has the effect that if the acceptance of the offer resulted in variations of the worker's terms of employment nothing in new sections 145A or 145B makes the variations unenforceable by either the employer or the worker.
214. Under section 146 as it is at present, an employee already has the right not to have action taken against him by his employer that subjects him to detriment where the ground for taking the action is membership or non-membership of a trade union or taking part in the activities of a trade union. It should be noted that section 146, as amended by section 30 of the Act, will include the right not to be subjected to detriment on the ground of making use of "trade union services" (as defined in section 146 as amended) or of a failure to accept an offer made in contravention of new section 145A or 145B.
215. Subsection (5) makes it clear that neither the rights given by new sections 145A and 145B nor the remedies contained in new section 145E prejudice any right conferred on a worker by section 146 or 149 of the 1992 Act. This ensures that any worker who is subjected to a detriment because he has not accepted an offer that is unlawful under new section 145A or 145B is able to complain to an employment tribunal both under section 146 and under new section 145A or 145B. This ability for the worker to claim under both the sections relevant to his circumstances means that his refusal of the offer need not have the result that he loses out financially. It also means that the incentive for workers to accept an offer that contravenes section 145A or 145B is reduced.
216. Subsection (6) provides that in ascertaining compensation under section 149, no reduction may be made on the ground that a complainant contributed to his loss by accepting or not accepting an offer contravening section 145A or 145B or that

the complainant has received or is entitled to receive an award in respect of such a contravention.

New section 145F

217. New section 145F contains interpretative and other supplementary provisions, and is modelled on section 151 of the 1992 Act as amended by sections 30 and 31 of the Act. Subsection (1) provides that references to “being or becoming a member of a trade union” include references to being or becoming a member of a particular branch or section of that union or of one of a number of particular branches or sections of the union.
218. Subsection (2) ensures, consistently with subsection (1), that references to “taking part in the activities of a trade union” and to “services made available by a trade union by virtue of membership of the union” include taking part in the activities of and the services made available by a particular branch or section of the union or one of a number of particular branches or sections. This ensures that the rights conferred by new section 145A apply where it is a branch of the union that is involved rather than the union itself.
219. Subsection (3) defines the meaning of “worker” and “employer” for the purposes of sections 145A to 145E. “Worker” is defined as an individual who works or normally works:
- under a contract of employment; or
 - under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client; or
 - in employment under or for the purposes of a government department (except the armed forces) where the employment is not under a contract mentioned in above.

Sections 145A to 145E are drafted so that a worker who has a right conferred on him by section 145A or 145B can bring a complaint in respect of a breach of that right even if he does not bring it while he is still a worker. “Employer” is defined as the person for whom the worker works, or, in the case of a former worker, the person for whom he worked.

220. Subsection (4) provides that the remedy for an infringement of the rights conferred on an individual by sections 145A to 145E is by way of a complaint to an employment tribunal in accordance with Part III of the 1992 Act, and not otherwise.

Extension of protection against detriment for union membership etc.

221. *Section 30*. Section 146 of the 1992 Act (detriment on grounds related to union membership or activities) currently confers rights only on employees, that is to say, individuals who are working under a contract of employment or, where the employment has ceased, were doing so.
222. The effect of *section 30* is to extend the rights conferred by section 146 to “workers”. *Subsection (8)* inserts into section 151 the same definitions of “worker” and “employer” as are used for the purposes of sections 145A to 145E (see paragraph 219 above).
223. *Subsections (1) to (5)* amend section 146 of the 1992 Act to substitute the term “worker” for the term “employee” and ensure that the section works properly in relation to circumstances where the individual is a worker but not an employee.
224. *Subsection (6)* inserts a new subsection (5A) into section 146 providing that the section does not apply where the worker (that is the worker mentioned in subsection (1), (2C) or (3) of section 146) is an employee and the detriment he suffers is dismissal. The reason is that where an employee is dismissed for reasons that correspond to the grounds mentioned in section 146 he is able to claim unfair dismissal under section 152 of the

1992 Act (which section 32 amends to cover dismissal for use of union services or the refusal of an offer infringing new section 145A or 145B).

Detriment for use of union services or refusal of inducement

225. **Section 31.** The general effect of section 146 as it was before the amendments made by the Act, is that an employee has the right not to have action taken against him by his employer that subjects him to any detriment where the ground for taking the action is membership of an independent trade union, non-membership of any trade union or taking part in the activities of an independent trade union at an appropriate time. Section 31 amends section 146 to add to the grounds on which “workers”, as defined in section 151 (as amended by section 30) have the right not to be subjected to any detrimental action.
226. *Subsection (2)* amends subsection (1) of section 146 and has the effect that a worker has the right not to be subjected to any detriment by an act (including a deliberate failure) done by his employer for the purpose of preventing or deterring him from making use of trade union services at “an appropriate time” or penalising him for doing so.
227. *Subsection (3)* amends subsection (2) of section 146 to extend the meaning of “an appropriate time” already contained in the section to the use of trade union services. The result is that the definition of “an appropriate time” used here is the same as that used in the new section 145A(2) inserted by section 29.
228. *Subsection (4)* inserts new subsections (2A) to (2D) into section 146.
229. New subsection (2A)(a) defines “trade union services” to mean services made available to a worker by an independent trade union by virtue of his membership of the union. Subsection (2A)(b) states that references to a worker’s making use of trade union services include “consenting to the raising of a matter on his behalf by an independent trade union of which he is a member”, so ensuring that a worker consenting to his union raising a matter is regarded as making use of union services.
230. New subsection (2B) has the effect that if an independent trade union raises a matter on behalf a worker who is a member of the union, with or without his consent, penalizing him for that is to be treated as penalising him for making use of union services.
231. New subsection (2C) gives a worker the right not to be subjected to any detriment by an act (including a deliberate failure) done by his employer because of the worker’s failure to accept an offer infringing the worker’s rights under new section 145A or 145B inserted by section 29.
232. New subsection (2D) has the effect that where a worker is not given a benefit that he would have been given had he accepted an offer infringing his rights under section 145A or 145B, the failure by the employer to give him the benefit shall be taken to subject him to a detriment. This ensures that a worker treated in this way can complain to an employment tribunal not only about the making of the offer that infringed his rights but also about the detriment resulting from the failure to give him the benefit contained in the offer.
233. *Subsection (5)* repeals subsections (3) to (5) of section 148 of the 1992 Act (consideration of complaint under 146 of the 1992 Act). Subsections (3) to (5) of the 1992 Act had the effect that where an employee was subjected to a detriment by an act, or deliberate failure to act, by his employer this was not caught by section 146 if the employer’s purpose was “to further a change in the relationship with all or any class of his employees”. This expression covered the case where an employer made an offer for the purpose of inducing employees to give up a right to have their terms of employment determined under a collective agreement, that is to say the situation that arose in *Wilson and Palmer*, and therefore meant that section 146 did not give any protection to employees in that situation.

234. *Subsections (6) and (7)* replace the part of section 51(1) relating to taking part in the activities of a trade union with a new subsection (1A) of section 151 securing that references in sections 146 to 150 to “taking part in the activities of a trade union” and to “services made available by a trade union by virtue of membership of the union” relate to taking part in the activities of and the services made available by a particular branch or section of the union or one of a number of particular branches or sections. This ensures that the interpretation to be given to these expressions in sections 146 to 150 is consistent with that to be given to them in new sections 145A to 145E (inserted by section 29) by virtue of new section 145F.
235. *Subsection (8)* repeals section 17 of the Employment Relations Act 1999. Section 17 of the 1999 Act provided a power for the Secretary of State to make regulations to protect workers against dismissal and detriment for refusing to enter into an individual contract which includes terms different from those in a collective agreement which would otherwise apply. Section 17 was never commenced and has been superseded by sections 31 and 32.

Dismissal for use of union services or refusal of inducement

236. *Section 32* amends section 152 of the 1992 Act (dismissal on grounds related to union membership or activities), the general effect of which is to make it automatically unfair to dismiss an employee if the reason or principal reason for dismissal is membership of an independent trade union, non-membership of any trade union or taking part in the activities of an trade union at an appropriate time. Section 32 amends section 152 to add to the reasons that make the dismissal of an employee automatically unfair.
237. *Subsection (2)* amends subsection (1) of section 152 and makes it automatically unfair to dismiss an employee if the reason or principal reason for his dismissal is that he had made use, or proposed to make use, of trade union services at an appropriate time, or that he had failed to accept an offer made in contravention of new sections 145A or 145B.
238. *Subsection (3)* amends subsection (2) of section 152 to extend the meaning of “an appropriate time” already contained in the section to the use of trade union services. The result is that the definition of “an appropriate time” used here is the same as that used in the new section 145A(2).
239. *Subsection (4)* inserts new subsections (2A) and (2B) into section 152.
240. New subsection (2A)(a) defines “trade union services” to mean services made available to an employee by an independent trade union by virtue of his membership of the union. Subsection (2A)(b) states that references to an employee’s making use of trade union services include “consenting to the raising of a matter on his behalf by an independent trade union of which he is a member”, so ensuring that an employee consenting to his union raising a matter is regarded as making use of union services.
241. New subsection (2B) has the effect that if the reason or principal reason for dismissing an employee who is a member of an independent trade union is that the union raised a matter on his behalf, with or without his consent, the employee shall be treated as being dismissed for making use of union services.
242. *Subsections (5) and (6)* replace the part of section 152(4) relating to taking part in the activities of a trade union with a new subsection (5) securing that references in section 152 to “taking part in the activities of a trade union” and to “services made available by a trade union by virtue of membership of the union” relate to taking part in the activities of and the services made available by a particular branch or section of the union or one of a number of particular branches or sections. This ensures that the interpretation to be given to these expressions in sections 152 is consistent with that to be given to them in sections 146 to 150 by virtue of section 151 (as amended by section 31), and in new sections 145A to 145E (inserted by section 29) by virtue of new section 145F.

Exclusion and expulsion from trade unions

The previous position

243. Section 174 of the 1992 Act provides rights for individuals not to be excluded or expelled from a trade union. In particular, subsection (2)(d) of section 174 provides that a union may exclude or expel someone for their conduct provided the exclusion or expulsion is “entirely attributable” to that “conduct”. However, subsection (4) of that section provides that certain conduct does not count as “conduct” for the purpose of subsection (2)(d). This conduct is:
- current or former membership of a trade union;
 - current or former employment by a particular employer or at a particular place;
 - current or former membership of a political party; or
 - conduct for which disciplinary action taken by a union would be regarded as unjustifiable (section 65 of the 1992 Act).
244. It follows that if an exclusion or expulsion is partly attributable to conduct in this list it is contrary to section 174.
245. These provisions have caused difficulties for unions when tackling the problem of political activists from extremist political parties infiltrating their ranks; recent relevant cases¹ have illustrated the problems faced by unions.
246. Section 176 of the 1992 Act provides the remedies for an unlawful exclusion or expulsion. Under its provisions, an individual whom an employment tribunal holds to have been unlawfully excluded or expelled may apply later for compensation. Where the individual has been admitted or re-admitted to the union, the application must be made to an employment tribunal. However, where the individual has not been admitted or re-admitted, the application must be made to the Employment Appeal Tribunal (EAT). In these latter cases, a minimum compensatory award (set at £5,900 from February 2004) applies.

Exclusion or expulsion from trade union attributable to conduct

247. **Section 33** amends section 174 of the 1992 Act and changes the provisions in section 176 of the 1992 Act which contain the remedies for breaching the rights contained in section 174. These amendments make it clear that trade unions are entitled to exclude an individual wholly or mainly for taking part in the activities of a political party, and introduce new compensation arrangements where the tribunal considers that an exclusion or expulsion was attributable mainly to membership of a political party. It leaves the existing law unchanged in other conduct cases.
248. *Subsection (2)* amends section 174(2)(d). It has three effects: firstly, that a union is free to exclude or expel where the exclusion or expulsion is wholly attributable to conduct, and the conduct is neither “excluded conduct” nor “protected conduct”; secondly, that a union is free to exclude or expel where the exclusion or expulsion is to some extent, but not wholly or mainly, attributable to “protected conduct”; and thirdly that a union may not exclude or expel where the exclusion or expulsion is to any extent attributable to “excluded conduct”. It follows that exclusions and expulsions are unlawful where “excluded conduct” is the sole, main or subsidiary reason for the union’s decision, and where “protected conduct” is the sole or main reason.
249. “Excluded conduct” and “protected conduct” are defined at *subsection (3)* which inserts a revised subsection (4) and new subsections (4A) and (4B) into section 174 of the 1992 Act. “Excluded conduct” is defined in revised subsection (4). It includes those types of conduct, other than membership of a political party, which are set out in

¹ *Mr. J. Lee v Aslef* (ET case no. 1301889/02) and *Mr. C. Potter v UNISON* (ET case no. 19000120/2003).

the existing subsection (4) of section 174 and currently fall outside the definition of “conduct”. “Protected conduct” is defined at new subsection (4A) as being or ceasing to be, or having been or ceased to be, a member of a political party. New subsection (4B) qualifies this definition by making it clear that political activities of any kind do not fall within the definition of “protected conduct”.

250. *Subsection (4)* inserts four new subsections into section 176 of the 1992 Act, which concerns the remedies for unlawful exclusions and expulsions.
251. New subsection (1A) of section 176 provides that where a tribunal makes a declaration that a complaint is well-founded under section 174 the tribunal shall make a further declaration in cases where the exclusion or expulsion was mainly attributable to “protected conduct” stating that the exclusion or expulsion was mainly so attributable.
252. New subsection (1B) concerns the circumstances where both of these declarations have been made and provides for the tribunal to make a further declaration. If it appears to the tribunal that the other conduct to which the exclusion or expulsion was attributable consists wholly or mainly of conduct which was contrary to the rules of the union or an objective of the union, then the tribunal is to make a declaration to that effect.
253. New subsection (1C) provides that it is immaterial for the purposes of subsection (1B) whether the complainant was a member of the union at the time of the conduct contrary to the rule or objective.
254. New subsection (1D) provides that a declaration by virtue of subsection (1B)(b) shall not be made unless the union shows that it was reasonably practicable for the complainant to have ascertained the objective(s) in question, at the time of the conduct of his that is in question. The subsection also provides that if the complainant was not a member of the union at the time of the conduct then the objective(s) in question must have been reasonably practicable for a member of the public to ascertain and that if the complainant was a member of the union at the time of the conduct then the objective(s) in question must have been reasonably practicable for a union member to ascertain.
255. *Subsection (5)* makes a consequential change to the existing subsection 176(3)(a).
256. *Subsection (6)* inserts two new subsections into subsection (6) of section 176 of the 1992 Act relating to the level of the compensation to be awarded. New subsection (6A) provides that if, on the date the application for compensation was made to the tribunal under section 176, the individual had not been admitted or re-admitted into the union, then the tribunal shall not award less than the current minimum of £5,900 in compensation. New subsection (6B) provides that this minimum does not apply when the tribunal has made the declarations mentioned in both new subsection (1A) and new subsection (1B) of section 176.
257. *Subsection (7)* provides that references in sections 174 and 176 to the conduct of an individual include references to conduct which took place before the coming into force of the section.

Applications no longer to be made to Employment Appeal Tribunal

258. *Section 34* amends section 176 of the 1992 Act to secure that where an unlawfully excluded or expelled individual has not been admitted, or re-admitted, to the union at the time when he makes his application for compensation his application for compensation is to be made to the employment tribunal and not, as before, to the EAT. It also makes corresponding changes to section 67 of the 1992 Act concerning the remedies for unjustifiable discipline, which have the effect that all applications for compensation under that jurisdiction are also required to be made to an employment tribunal.

Other rights of workers and employees

Disapplication of qualifying period and upper age limit for unfair dismissal

259. **Section 35** replaces section 154 of the 1992 Act with a new section 154 altering the test that disapples the qualifying period and the upper age limit provided by sections 108(1) and 109(1) of the Employment Rights Act 1996 in relation to complaints to employment tribunals of alleged breaches of sections 152 and 153 (dismissal or selection for redundancy on grounds related to union membership or activities). It has the effect of ensuring that the burden of proof lies on the employer to show the reason for dismissal in all complaints of unfair dismissal, or selection for redundancy, on trade union related grounds, including cases where the employee has less than a year's service or has passed the upper age limit.

National security: powers of employment tribunals

260. **Section 36** replaces subsection (6) of section 10 of the **Employment Tribunals Act 1996 (c.17)** (procedure regulations in relation to cases involving issues of national security) to clarify that the power conferred by that subsection applies to any proceedings where a national security issue is at stake and not just Crown employment proceedings. This power provides for tribunals to invoke special hearing arrangements where national security issues arise, whether or not an application is made to them to do so.

Right to be accompanied

261. **Sections 37 and 38** make amendments to the legislation relating to the "right to be accompanied" in disciplinary and grievance hearings.
262. The 1999 Act introduced a statutory duty on employers to permit workers invited or required to attend certain disciplinary and grievance hearings to be accompanied by a companion falling within the category of people listed in subsection (3) of section 10 (a fellow worker or certain trade union officials). The "companion" is permitted to address the hearing (but not to answer questions on behalf of the worker) and confer with the worker during the hearing.

Role of companion at disciplinary or grievance hearing

263. **Section 37** clarifies the role of the companion at disciplinary hearings by amending section 10 of the 1999 Act. New subsections (2A), (2B) and (2C) replace the current subsection (2). New subsection (2A) reiterates that the employer must permit the worker to choose the companion as long as the companion falls within the category of people in subsection (3) (which is not being amended).
264. New subsection (2B) expands on what the employer must permit the companion to do at a hearing. Paragraph (a) of subsection (2B) provides that the companion will now be able to address the hearing to (i) put the worker's case; (ii) sum up that case; and (iii) respond on the worker's behalf to any view expressed at the hearing. Paragraph (b) of subsection (2B) repeats the current provision in the 1999 Act that the companion may confer with the worker during the hearing. The companion is thus able to address the hearing on more than one occasion, and is entitled to respond to views expressed.
265. New subsection (2C) provides that the employer is not required to permit the companion to answer questions on the worker's behalf (paragraph (a)), address the hearing if the worker indicates that he does not wish the companion to do so (paragraph (b)), or use the powers in a way that prevents the employer from explaining his case or any other person making his contribution (paragraph (c)).
266. **Subsection (2)** of section 37 ensures that references to the right to be accompanied in section 11 of the 1999 Act refer to the extended meaning specified in subsections (2A) and (2B).
267. **Subsection (3)** adds a new subsection (3A) to section 12 of the 1999 Act. It makes it clear that where a worker attends a hearing as a companion of another worker, he is protected against detriment and dismissal not only in respect of the act of accompanying

the worker but also for addressing or seeking to address the hearing (as permitted under new subsection (2B)).

Extension of jurisdiction of Employment Appeal Tribunal

268. **Section 38** corrects an oversight in the 1999 Act. It ensures that the Employment Appeal Tribunal has jurisdiction to hear appeals against employment tribunal decisions in relation to the right to be accompanied. This oversight received judicial confirmation in *Refreshment Systems Ltd (t/a Northern Vending Services) v. Wolstenholme* [2003] UKEAT 0608-03-2710.

Ways in which provisions conferring rights on individuals may be made

269. **Section 39** makes a technical amendment to section 23 of the 1999 Act.
270. **Section 23** gives the Secretary of State the power by order to confer the employment rights contained in specified Acts and in subordinate legislation implementing European legislation on individuals that do not have the rights
271. As the words of the section stand, the order is only allowed to achieve these results by means of provisions that amend the legislation conferring the right, and not by means of a provision simply saying that the right applies to the individuals in question (a free-standing provision). New subsections (5A) and (5B) have the effect that an order will be able to extend employment rights either by the use of a free-standing provision or by amending the legislation conferring the right.

Protection of employees in respect of jury service

272. **Section 40** amends the law to protect employees who are dismissed, or otherwise detrimentally treated, because they serve on juries or are summoned to do so.
273. *Subsections (1) and (2)* insert a new section (section 43M) into the Employment Rights Act 1996. The new section provides that an employee has the right not to be subjected to detrimental treatment on the ground that he has been summoned for jury service or has been absent on jury service. Detrimental treatment does not include failure to pay remuneration during such an absence unless the employee's contract of employment entitles him to be paid during the absence.
274. *Subsection (3)* inserts new section (section 98B) into the 1996 Act. The new section provides that it is unfair to dismiss an employee because he has been summoned for jury service or has been absent on jury service. It does not apply if the employer shows that his undertaking was likely to suffer substantial injury if the employee was absent; that he made this known to the employee; and that the employee nevertheless unreasonably refused or failed to apply to the appropriate officer to be excused from jury service, or to have his service deferred.
275. *Subsections (4) and (5)* add section 98B to the list, contained in section 105 of the 1996 Act, of reasons for which it is unfair to dismiss an employee on grounds of redundancy (if others in the same circumstances are not dismissed).
276. *Subsection (6)* adds section 98B to the list, contained in section 108(3) of the 1996 Act, of exceptions to the requirement for one year's qualifying service before being able to bring a claim for unfair dismissal.
277. *Subsection (7)* adds section 98B to the list, contained in section 109(2) of the 1996 Act, of exceptions to the rule that an employee who has reached the "normal retiring age", or otherwise the age of 65, may no longer bring a claim for unfair dismissal.
278. *Subsections (8) and (9)* amend sections 237 and 238 of the 1992 Act. Section 237 provides that an employee dismissed while taking unofficial industrial action has no right to complain of unfair dismissal. Section 238 has the general effect that an

employee dismissed while taking part in official industrial action or involved in a lock-out only has a right to claim unfair dismissal if some of the other employees taking part or involved are not dismissed, or (where all are dismissed) if he is not offered re-engagement and some of the others are. Subsections (8) and (9) add section 98B to the list of exemptions to these provisions.

Flexible working

279. *Section 41* amends the law to extend to those taking advantage of the statutory provisions about flexible working certain exemptions to standard qualifying conditions for unfair dismissal. It also ensures that the flexible working provision inserted into the Employment Rights Act 1996 (“the ERA 1996 Act”) is correctly cross-referred to in other parts of legislation.
280. Section 104C of the ERA 1996 Act provides that where an employee is dismissed, and the reason (or the main reason) is that the employee made or proposed to make a flexible working application, exercised or proposed to exercise a right under section 80G, brought proceedings against the employer under section 80H, or alleged the existence of any circumstance giving grounds for bringing such proceedings, he will be regarded as having been unfairly dismissed.
281. Section 237 of the 1992 Act provides that an employee dismissed while taking part in unofficial industrial action has no right to complain of unfair dismissal. Section 238 of the 1992 Act has the general effect that an employee dismissed while taking part in official industrial action or involved in a lock-out only has a right to claim unfair dismissal if some of the other employees taking part or involved are not dismissed or (where all are dismissed) if he is not offered re-engagement and some of the others are.
282. *Subsections (1) and (2)* of section 41 add section 104C to the list of exemptions to these provisions. Accordingly an employee dismissed for a reason connected with a flexible working application can complain of unfair dismissal despite being involved in official or unofficial industrial action.
283. *Subsection (4)* inserts a new subsection (7BA) into section 105 of the ERA 1996 Act. It ensures that where an employee is selected for redundancy and the reason or principle reason for his selection was one of those specified in section 104C this will be treated as an unfair dismissal.
284. *Subsection (5)* adds section 104C to the list, contained in section 108(3) of the 1996 Act, of exemptions to the requirement for one year’s qualifying service before being able to bring a claim for unfair dismissal. To qualify for the right to request flexible working, an employee need only have 26 weeks’ continuous employment (in addition to other qualifying factors). This subsection ensures that the protection against unfair dismissal contained in section 104C applies to all employees qualified to request flexible working.
285. *Subsection (6)* adds section 104C to the list, contained in section 109(2) of the 1996 Act, of exemptions to the rule that an employee who has reached the “normal retiring age”, or otherwise the age of 65, may no longer bring a claim of unfair dismissal. This subsection ensures that the protection against unfair dismissal contained in section 104C applies to employees regardless of their age.
286. In 2002, two provisions were inserted after section 47C in Part 5 of the Employment Rights Act 1996 by primary legislation: the first by the Tax Credits Act 2002 and the second by the Employment Act 2002. The provision inserted by the Tax Credits Act became 47D, and after a correction to the numbering, the flexible working provision was inserted by the Employment Act 2002 as 47E.
287. However the change in the numbering of the flexible working provision was not reflected in a series of consequential amendments listed in Schedule 7 of the 2002 Act. The result is that sections of the 1996 Act incorrectly refer to section 47D (inserted by the Tax Credits Act, and not section 47E (flexible working)).

288. *Subsections (3), (7) and (8)* ensure that references to section 47E of the 1996 Act replace the incorrect reference to section 47D in sections 48, 194, 195 and 199 of the same Act.

Information and Consultation: Great Britain

289. **Section 42** enables the Secretary of State to make regulations regarding the right of employees, or their representatives, to be informed and consulted by their employer in relation to matters prescribed in the regulations. The regulations to be made under this power will implement the EC Directive on Information and Consultation (Directive 2002/14/EC) which establishes a general framework for informing and consulting employees in the European Community (“the Directive”).
290. The Directive was agreed on 11 March 2002 and Member States are required to implement it by 23 March 2005. Article 1 of the Directive states that its purpose is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in the European Community. The practical arrangements are left to Member States to determine. The Department of Trade and Industry published a discussion paper, *High Performance Workplaces: The role of employee involvement in a modern economy*, in July 2002. Discussions also took place with the CBI and the TUC on how the requirements of the Directive should be implemented. The CBI and TUC agreed on a framework for implementation and on the basis of that agreement, a consultation document, *High Performance Workplaces: Informing and Consulting Employees*, was issued on 7 July 2003 to seek views from a wider audience on the proposed scheme. Draft regulations were included in the consultation document. (A copy of both documents, and the Government’s response are available on the DTI website at www.dti.gov.uk/er/consultation).
291. The powers under section 2(2) of the European Communities Act 1972, which are usually used to implement EU Directives are not considered sufficiently wide to cover all aspects of the proposed regulations, so this section provides a general power to make regulations.
292. **Section 42(2)** provides that regulations made under this section must make provision as to the employers to whom they apply. *Paragraph (a)* of section 42(2) provides that these provisions may stipulate that the regulations apply to the employer’s undertaking by reference to factors that include the number of employees employed in the undertaking; *paragraph (b)* provides that the regulations may stipulate the method by which the number of employees in the undertaking is to be calculated; and *paragraph (c)* has the effect that the regulations may apply to undertakings of different sizes from different dates.
293. Article 3 of the Directive provides that Member States have the option of applying the implementing legislation to “undertakings” employing at least 50 employees or “establishments” employing at least 20 employees (“undertakings” and “establishments” are both defined in Article 2). In either case, it is for the Member State concerned to determine the method for calculating the number of employees employed. The draft regulations apply to undertakings of 50 or more employees.
294. Article 10 of the Directive contains transitional provisions which allow certain Member States to implement the Directive in stages until 23 March 2008 depending on the number of employees employed in the undertaking or establishment. The DTI intends to take advantage of this derogation and to provide that the regulations will apply initially to undertakings with 150 or more employees from March 2005, to undertakings with between 100 and 149 employees from March 2007 and to undertakings with between 50 and 99 employees from March 2008.
295. **Section 42(4)(a)** makes provision for the regulations to provide that employment tribunals will have jurisdiction to resolve disputes arising out of them and to confer jurisdictions on the Employment Appeal Tribunal; it is intended that this power will be used in relation to the protection of individual rights under the regulations.

296. *Section 42(4)(b)* enables the Secretary of State to confer functions on the Central Arbitration Committee and it is intended that this will be used to allow the CAC to resolve disputes under the more general provisions of the regulations. Paragraph (c) of subsection (4) provides that the regulations may require or authorise the holding of ballots and paragraph (d) provides that they may make amendments to, or apply similar provisions to, those in (1) the Employment Rights Act 1996 (in particular Part 5 which relates to protection from suffering detriment in employment; Part 10 which relates to unfair dismissal; and Part 13 which relates to particular types of employment), (2) the Employment Tribunals Act 1996 (which confers jurisdictions on employment tribunals and the Employment Appeal Tribunal), and (3) the 1992 Act.
297. *Section 42(5)* is a general power for the Secretary of State to make whatever additional provisions may be necessary to implement the requirements of the Directive and deal with related matters.
298. *Subsections (7) and (8)* provide that the regulations to be made by a statutory instrument that is subject to the affirmative resolution procedure.

Information & Consultation: Northern Ireland

299. *Section 43* provides separate powers for the Department of Employment and Learning Northern Ireland (DELNI) to make regulations on information and consultation.
300. Although the Information and Consultation Directive applies to the UK as a whole, employment is a devolved matter in Northern Ireland and it will put in place its own regulations on information and consultation. DELNI intends to make regulations mirroring those the Government intends to make in relation to Great Britain, and also issued the consultation document; *High Performance Workplaces: Informing and Consulting Employees*, in 2003 (see paragraph 290 for internet link).
301. During times when the Northern Ireland Assembly is suspended, Northern Ireland usually implements employment legislation which mirrors employment legislation in Great Britain by means of an Order in Council. DELNI proposes to bring forward legislation mirroring the provisions of this Act in this way. However, during House of Commons Committee an amendment was made to the Bill, at the request of the Minister for Employment and Learning Northern Ireland, to provide a power to enable DELNI to make regulations on information and consultation directly under the Act. This will enable Northern Ireland to meet the March 2005 deadline for implementing the Information and Consultation Directive regardless of whether devolution is restored in the meantime.
302. The powers in section 43 mirror those in section 42 as described in the paragraphs above, save for the need to make specific reference to Northern Ireland institutions and legislation in subsections (1), (4), (5), (7), (8) and (9).

Part Four: Enforcement of Minimum Wage Legislation

303. *Sections 44 to 47* amend the National Minimum Wage Act 1998 (“the 1998 Act”) and the Agricultural Wages Act 1948.
304. The 1998 Act has the effect that all qualifying workers are entitled to be paid at least the rate of the national minimum wage, as set by regulations made by the Secretary of State. Section 13 allows the Secretary of State to appoint enforcement officers to pursue national minimum wage cases on behalf of workers. The Secretary of State has appointed the Inland Revenue to enforce the national minimum wage, except that, in the agricultural sector, agricultural wages officers (who in England and Wales are officials of the Department of the Environment, Food and Rural Affairs) enforce the national minimum wage whilst enforcing the agricultural minimum wage. Section 14 sets out the powers of enforcement officers to obtain information, and sections 15 and 16 set out the ways in which information gathered by officers may be used. Schedule 2 to

the 1998 Act amended the existing legislation relating to agricultural wages to provide, *inter alia*, that the enforcement regime for the national minimum wage was to be the enforcement regime for the agricultural minimum wage.

305. If an enforcement officer believes that a worker or workers have not been paid the minimum wage by the employer in question, an enforcement notice can be issued under section 19. If the employer fails to comply with the enforcement notice, the officers have the power to take further action. They may bring a case against the employer through the courts or tribunals (section 20) and/or issue a penalty notice (section 21). A penalty notice imposes a financial penalty on the employer, related to the period of his failure to comply with the enforcement notice, in addition to any arrears of the national minimum wage.
306. *Section 44* inserts a new section 16A into the 1998 Act. As sections 15 and 16 currently stand, restrictions apply to the use and supply of information obtained by enforcement officers. In particular, information must not, generally speaking, be supplied to any other person or body and, even where this is permitted, the authorisation of the Secretary of State is required. Because of these restrictions, it is considered that, when investigating an alleged breach of the 1998 Act, enforcement officers are unable to inform the worker what the employer or the employer's records revealed about the worker's claim, and similarly are unable to inform the employer about the case put forward by the worker.
307. Subsections (1) and (2) of new section 16A accordingly allow an enforcement officer to disclose information obtained by the enforcement officer (e.g. from the employer) to the worker where that information relates to such worker.
308. Similarly, subsections (3) and (4) of new section 16A enable an enforcement officer to disclose information obtained by the enforcement officer (e.g. from the worker) to the employer where that information relates to such employer.
309. Subsection (5) of new section 16A defines what the terms "agency worker", "enforcement officer" and "the relevant legislation" mean for the purposes of this new section of the 1998 Act. The definition of "the relevant legislation" ensures that agricultural wages officers (in England and Wales and in Northern Ireland) have this new disclosure power when enforcing the agricultural minimum wage.

Enforcement notices

310. *Section 45* amends section 19 of the National Minimum Wage Act 1998. *Subsections (1) and (2)* make it clear that, while enforcement notices relating to the arrears due must cover all pay periods up to three months before the date of the notice, they need not cover more recent periods.
311. *Subsection (3)* amends section 19 of the 1998 Act, to make it absolutely clear that a single enforcement notice may relate to more than one worker irrespective of whether the employer's failure to pay the minimum wage is a previous or ongoing failure.
312. *Subsection (4)* ensures that these amendments do not have effect in relation to the agricultural minimum wage in Scotland.

Withdrawal and replacement of enforcement notice

313. *Section 46(1)* inserts six new sections, 22A to 22F, into the National Minimum Wage Act 1998 which enable an enforcement officer to withdraw and replace an enforcement notice or a penalty notice. A short explanation of enforcement notices and penalty notices is given at paragraph 305 above.

New section 22A (withdrawal of enforcement notices)

314. Subsection (1) allows officers to withdraw enforcement notices. Subsection (2)(a) provides that, if the officer does not issue a new enforcement notice, then subsection (3) takes effect. This means that no new penalty notice may be issued in connection with the withdrawn notice, that any penalty notice already issued ceases to have effect, that any fine already paid by the employer must be repaid by the Government with interest, that any appeal ongoing against the withdrawn notice ceases to have effect and that while individual workers cannot bring civil proceedings relying on a withdrawn notice after the withdrawal, they can continue with any such proceedings brought before the withdrawal
315. Subsection (2)(b) allows the officer, where he withdraws an enforcement notice and decides to issue a new enforcement notice, to decide whether to apply subsection (3); effectively this enables him to decide whether a penalty notice issued in relation to the withdrawn enforcement notice and any appeal against the notice should continue to have effect. Subsection (4) provides that the appropriate rate of interest on sums repaid shall be that specified in section 17 of the Judgments Act 1838. Subsection (5) provides that where subsection (3) is applied the notice of withdrawal must make its effect clear to the employer.

New section 22B (replacement of enforcement notices)

316. Subsection (2) provides that officers may – at the same time as withdrawing an enforcement notice – issue a new notice, which covers some, or all of the workers covered by the withdrawn notice. Subsection (3) makes it clear that the replacement notice cannot cover any new workers, although these could of course be covered by a separate enforcement notice.
317. Subsection (4) has the effect that if a replacement enforcement notice is served on an employer that, incorrectly, covers any new workers that were not covered by the first notice, then it is treated as a replacement notice that attracts the automatic consequences set out in new section 22A(3) (see above). In particular, it will not be possible to issue any penalty notice following on from the first enforcement notice, and any penalty notice already served in respect of the first notice will cease to have effect.
318. Subsection (5) states that the replacement notice must cover all pay periods where arrears are due up to the service of the new notice; the effect is that the new notice is required to cover not only all underpayments during the period covered by the first notice but also all underpayments in the period between the service of the old and new notices except the most recent. *Subsection (6)* makes it clear that when a replacement notice is issued in respect of a first notice that covers all or nearly all of the 6 year limitation period – the maximum period for which arrears may be recovered – the replacement notice runs back from the date when the first enforcement notice was issued and not the date of issue of the replacement notice. The amendment avoids the unsatisfactory position that would result if the maximum period to which a replacement notice could apply did not extend back to the time of an underpayment covered by the first notice.
319. Subsection (7) states that the new notice must set out any differences between it and the withdrawn notice, and explain the position, under the new sections 22C and 22D described below, in relation to any penalty notices issued in relation to the withdrawn notice and any appeal against the withdrawn notice or civil proceedings brought in reliance on it.
320. Subsection (8) has the effect that if the new notice fails to contain the information required by subsection (5) it takes effect as if it were a notice to which the new section 22A(3) had been applied; this means that any penalty notices issued in relation to the old notice or appeal against it will cease to have effect. Subsection (9) provides that an officer may only issue a replacement notice once.

New section 22C (effect of replacing an enforcement notice on penalties)

321. Subsection (1) makes it clear that this new section only applies where an officer has issued a new enforcement notice which states that section 22A(3) does not apply. Subsection (2) states that the withdrawal of the old enforcement notice does not affect any penalty notice served in connection with the old notice.
322. Subsection (3) has the effect, however, that the existing penalty notice will automatically fall if it includes an amount in respect of non-compliance in respect of a worker and the amount could not validly have been included if the old enforcement notice had been as it should have been according to the new one. Subsection (4) allows officers to issue replacement penalty notices in these circumstances.

New section 22D (effect of replacement on appeals and civil proceedings where section 22A(3) not applied).

323. Subsection (2) makes it clear that any appeal made by the employer against the old enforcement notice will continue to stand against the new notice, but allows the employer to substitute a new appeal against the new notice if he wishes.
324. Subsection (3) provides that if an appeal is made against a new enforcement notice when the effect of a penalty notice served in respect of the old enforcement notice has been preserved or a new penalty notice has been served in reliance on the old enforcement notice, the authority of the tribunal to rectify the penalty notice applies and so do the provisions governing the effects on a penalty notice of an appeal against the enforcement notice it is based on.
325. Subsection (4) provides that a compliance officer cannot start proceedings to recover minimum wage underpayments on behalf of a worker in reliance on an enforcement notice that has been withdrawn, but that if proceedings have already been brought by a compliance officer on behalf of a worker before the withdrawal of an enforcement notice, they may continue despite its withdrawal.

New section 22E (withdrawal of penalty notices)

326. Subsection (1) allows an officer to withdraw a penalty notice if new evidence has come to light which means it should not have been issued or that the amount of the fine is incorrect. This new section may be used either when an enforcement notice is withdrawn and replaced (as covered by the new sections already described) in a way that undermines the old penalty notice or in cases where the enforcement notice is not withdrawn, but the officer believes that the penalty notice is incorrect for some reason.
327. Subsection (3) provides that if a penalty notice is withdrawn and not replaced then any fines already paid by the employer in connection with it must be repaid by the Government with interest, and any appeal ongoing against the notice falls. Subsection (4) states that the appropriate rate of interest to be applied is that specified in section 17 of the Judgments Act 1838.

Section 22F (replacement of penalty notice)

328. Subsection (2) makes it clear that any new penalty notice must be issued at the same time as the old one is withdrawn, and that the amount of any new penalty must be less than the old one. Subsection (3) states that the new penalty notice must make the differences between the old and new penalty notices clear and indicate the effects of subsections (4) to (7).
329. Subsection (4) provides that if the penalty stated in a withdrawn penalty notice has already been paid when a new penalty notice is served, the excess above the amount specified in the new notice must be returned to the employer with interest; subsection (5) states that the rate of interest applying is that specified in the section 17 of the Judgments Act 1838. Subsections (6) and (7) have the effect that any appeal made by the employer

against the old penalty notice will continue to stand against the new notice, but allow the employer to substitute a new appeal against the new notice if he wishes. Subsection (8) makes it clear that an officer may only issue a replacement penalty notice once. Subsection (9) makes it clear that the right of officers to issue two or more penalty notices in connection with the same enforcement notice is unaffected.

330. *Subsection (2)* of section 46 has the effect that where an enforcement notice is appealed against the tribunal is not permitted to rectify the amount specified in the notice upwards; it also makes clear that an appeal can be made if the notice covered a pay reference period ending more than six years before the notice was served. *Subsection (4)* ensures that these amendments do not have effect in relation to the agricultural minimum wage in Scotland (since agricultural wages are a devolved matter). *Subsection (5)* has the effect that the new provisions allowing for the withdrawal and replacement of enforcement and penalty notices will apply to the enforcement of the agricultural minimum wage in England, Wales and Northern Ireland, as well as the national minimum wage.

Enforcement officers for the agricultural wages legislation

331. *Section 47(1)* inserts a new section 11A into the Agricultural Wages Act 1948. Subsections (1) and (2) of new section 11A, as well as continuing to allow the appointment of officials from the Department of the Environment, Food and Rural Affairs, permit officials from other government departments, bodies or ministries to act as agricultural wages officers in England and Wales. Subsection (3) of new section 11A provides that agricultural wages officers must be able to produce a formal document showing that they have the authority to act as officers. Subsection (4) of new section 11A obliges agricultural wages officers to identify themselves as such in certain circumstances.
332. *Section 47(2)* makes consequential amendments to section 12 of the 1948 Act, removing or substituting wording that would otherwise contradict or duplicate the requirements of new section 11A.
333. *Subsection (3)* preserves the validity of appointments of agricultural wages officers made prior to the coming into force of the new section 11A. It deems the appointment of officers under the old provisions to have been made under the new section 11A.

Part 5: the Certification Officer

Sections 48 and 49

334. The Certification Officer (“CO”) is an independent statutory officer established under the Employment Protection Act 1975. His functions (prior to the 1999 Act) included:
- maintaining lists of trade unions’ and employers’ associations;
 - the auditing of accounts;
 - annual returns;
 - financial affairs;
 - overseeing the political funds of trade unions;
 - ensuring observance of statutory requirements governing mergers between trade unions;
 - certifying the independence of trade unions;
 - determining complaints concerning trade union elections.

335. The 1999 Act enlarged the CO's role, most significantly by giving him the power to determine certain complaints from trade union members on alleged breaches of trade union law or trade union rules. The enlargement of the CO's role means that he can effectively serve as an alternative to courts as a means of resolving disputes. The law does however place some requirements on complainants to use internal procedures before going to the CO.
336. The 1999 Act also gave the CO the power to refuse to hear complaints made by individuals whom the courts or the EAT had categorised as "vexatious litigants".
337. *Section 48* provides the CO with a new power to strike out weak, vexatious or misconceived cases while *section 49* widens the power of the Employment Appeal Tribunal (EAT), on application from the Attorney General or the Lord Advocate, to place "restriction of proceedings" orders on vexatious litigants by enabling the EAT to take into account complaints made to the CO; the section also extends the effect of such orders to proceedings before the CO.

Striking out by Certification Officer of applications or complaints

338. *Section 48* inserts new section 256ZA into the 1992 Act.
339. Subsection (1) of new section 256ZA provides that any part of an application or complaint to the Certification Officer can be struck out at any stage in the proceedings. The power relates both to the nature of the complaint/application itself, and to the way in which the applicant (or representative) has conducted the proceedings.
340. Subsection (3) of the new section provides that the CO may strike out a case on his own initiative or on the application of the union member or trade union concerned. Subsections (4) and (5) of the new section require the CO to notify the party against whom he proposes to make a striking out order, allowing the party to challenge the proposed order (but not if the party has already had an opportunity to do so orally).
341. Subsection (6) of the new section relates to the CO's general power to regulate his own procedure. It clarifies that the CO will still be entitled to make further provisions about the striking out of proceedings.

Restriction of proceedings orders: proceedings before the Certification Officer

342. *Section 49(1) to (7)* amend section 33 of the Employment Tribunals Act 1996 ("the 1996 Act"). Section 33 of the 1996 Act sets out the circumstances in which the EAT may make a "restriction of proceedings" order. Such an order prevents vexatious litigants, in the main, from instituting further proceedings before employment tribunals or the EAT, without the permission of the EAT.
343. *Subsections (1) to (7)* insert references to the CO into the current provisions of section 33 of the 1996 Act. This permits the EAT to take into account vexatious proceedings and behaviour before the CO (as well as before employment tribunals and the EAT) when deciding whether to make a restriction of proceedings order. It also has the effect that person subject to a restriction of proceedings order is prevented from bringing proceedings before the CO without the leave of the EAT.

Amalgamations: approval; listing and certification

344. Under the 1992 Act, the CO may grant a listed trade union a certificate of independence. Where two (or more) unions merge to become one newly amalgamated union, the amalgamating unions cease to exist as separate trade unions. They are removed from the list of trade unions held by the CO, and their certificates of independence (if they had one) are cancelled. The newly formed union would then be required to apply for listing and a new certificate.

345. **Section 50** provides that on the amalgamation of two or more listed unions in accordance with Part I Chapter VII of the 1992 Act, the amalgamated union will automatically be listed by the CO, subject to the provision of specified information. Where all the amalgamating unions held a certificate of independence, a certificate of independence will automatically be issued to the new union.
346. **Subsection (1)** amends section 98 of the 1992 Act by replacing the existing subsection (2). The new subsection sets out the requirements to be satisfied before an instrument of amalgamation can be approved by the CO. The instrument must comply with the requirements of any regulations in force under the Chapter. Further, the name of the new union must not be one already listed; this requirement is based on the requirement in section 3 of the 1992 Act which prohibits a union from being listed with such a name. However, the CO can approve an instrument of amalgamation where the name of the new union is the same as that of one of the amalgamating unions.
347. **Subsection (2)** inserts new sections after section 101 of the 1992 Act. New section 101A provides that where the amalgamating unions are already listed when the CO registers their instrument of amalgamation, then he must enter the name of the newly amalgamated union on the list of trade unions. He must also remove the old names. The change to the list will have effect from the date of amalgamation. New sections 101A(3) and (4) provide for the automatic issue of a certificate of independence to the amalgamated union, where both or all of the original unions had such a certificate in force at the time of the amalgamation.
348. New section 101B(1) and (2) provide that once a newly amalgamated union is registered and listed by the CO, it must send him the information set out in subsection (1) and the applicable fee. Under subsection (3) both must be sent within 6 weeks (or longer if the CO directs) from the date on which the instrument takes effect. If the union fails to comply with these requirements the CO must remove it from the list of trade unions. **Section 50(3)** applies the new provisions in 101A and 101B to unincorporated employers' associations, and amends cross references.

Restriction of grounds of appeal from Certification Officer

349. **Section 51** amends sections 9 and 126 of the 1992 Act.
350. **Section 9** provides that where an organisation of workers is aggrieved by the refusal of the Certification Officer to enter its name on the list of trade unions (or a decision to remove it), or to issue it with a certificate of independence, it may appeal to the Employment Appeal Tribunal. Section 126 similarly provides for an appeal by an organisation of employers against the CO's decision not to enter its name on the list of employers' associations (or a decision to remove it).
351. As the sections stood before amendment there was a right of appeal on questions of both fact and law. In both cases, therefore, the EAT was effectively permitted to substitute its decision for that of the CO.
352. **Section 51(1) and (2)** amend sections 9 and 126 respectively, to limit appeals to points of law only, thereby bringing the sections in line with other parts of the Act providing for appeals from the CO. These amendments mean that it is no longer necessary to require the EAT to direct the CO to issue or withdraw a certificate or list a union or employers' association or remove it from the list. Therefore, sections 9(3) and 126(2) are repealed (by section 51(1)(b) and (2)(b)).

Part 6: Miscellaneous

Additional case in which election for president of union not required

353. *Section 52* amends section 46 of the 1992 Act, which sets out election requirements for certain positions in trade unions. Under section 46 as it is at present, every person holding the position of:

- President (or equivalent) – subsection (2)(c);
- General Secretary (or equivalent) – subsection (2)(d); or
- member of the executive - subsection (2)(a) and (b);

must be elected to that position by virtue of a postal vote of all the union members.

354. However, there are a number of circumstances where this requirement does not apply. This section adds another exemption, applying only to the position of president.

355. *Subsection (3)* of the section inserts a new subsection (4A) to section 46 providing that Chapter 4 (elections for certain positions) of Part 1 the 1992 Act does not apply to the position of president if:

- the holder of the position was elected or appointed to it in accordance with the rules of the union;
- at the time of his election or appointment as president he had already been elected, in accordance with the Act, to some other position for which an election is required by section 46;
- it is less than five years since he was last elected to that other position or he was elected to it in accordance with the Act after his election or appointment as president; and
- ever since his election or appointment as president he has held another position for which election is required by section 46, having been elected to in accordance with the Act.

356. The practical effect of new subsection (4A) is that a union will be allowed to elect or appoint a president (provided it is in accordance with their rule-book to do so), so long as the president already holds the position of General Secretary or is a member of the executive and has been properly elected to that position by a postal vote of all the union's members in accordance with the Act. It therefore removes the need for a second election.

357. The other subsections of the section make minor and consequential amendments to section 46 that are desirable because of the insertion of new subsection (4A), and do not change the substance of the law.

Removal of rule preventing appointment of body corporate as auditor

358. *Section 53* amends sections 34, 36 and 37 of the 1992 Act. These sections concern the appointment and rights of trade union auditors. By virtue of section 131(1) of the 1992 Act the amendments also apply to the appointment and rights of auditors of unincorporated employers' associations.

359. *Subsection (1)* amends section 34. Section 34 provides the eligibility criteria for the appointment of an auditor of a trade union. As the section stood before amendment, subsection (5)(c) had the effect that a "body corporate" (e.g. a limited company) was not permitted to act as a trade union auditor. Subsection (1) of the section repeals subsection (5)(c) of section 34, with the result that a body corporate is permitted to act as a trade union auditor.

360. *Subsection (2) and (3)* insert new subsections (1A) and (5) into section 36 which relates to the duty of the auditor of a trade union to make a report to the union on the audited accounts. Taken together the new subsections have the effect that where the auditor is a body corporate or partnership the report is to be signed in its name by an individual authorised to sign on its behalf.
361. *Subsection (4)* inserts a new subsection (4) into section 37 (rights of auditors). Under section 37(3) trade union auditors have a right to attend and be heard at general meetings of the union. New subsection (4) has the effect that where the auditor is a body corporate or partnership these rights are exercisable by an individual authorised by it to act as its representative at the meeting.

Means of voting in ballots and elections

362. *Section 54* - Unions are required under the 1992 Act to hold ballots or elections:
- for certain major positions within the union (sections 46 to 61);
 - to approve a political resolution for the purpose of enabling the union to spend money on political objects (sections 73 to 78);
 - when amalgamating with or transferring its engagements to another union (sections 100 to 100E);
 - when proposing to organise industrial action (sections 226 to 234);

Currently, the provisions governing the above ballots and elections require the method of voting to be by post. The 1992 Act also governs recognition and derecognition ballots under Schedule A1.

363. The general effect of the power contained in *section 54* is to allow the Secretary of State, by order subject to the affirmative resolution procedure, to widen the means of voting that are to be available in ballots and elections conducted under the provisions of the 1992 Act. The order has to specify what means of voting are available in principle in relation to a description of the ballot or election.
364. An order under this section may also identify “a responsible person” to determine, in relation to a particular ballot or election of that description, the voting means that must or may be used (these are permitted to be different for different voters in order to take account of the varying circumstances that may apply in relation to different groups of voters). The order must contain factors to be taken into account and criteria to be applied by the responsible person in making this determination. In specifying these the Secretary of State is under a duty to have regard to the need for ballots to meet a required standard such that there is an opportunity to vote, the votes cast are secret and the risk of unfairness or malpractice is minimised. Since the requirements in relation to ballots under Schedule A1 to the 1992 Act are less stringent in relation to these matters than the requirements in relation to other ballots under the Act, it is possible that a responsible person will be able to permit a method to be used in Schedule A1 ballots which he could not permit to be used in other ballots.
365. *Subsection (1)* provides that the Secretary of State may make provision, in relation to any description of ballot or election authorised or required by the 1992 Act, that any ballot or election or ballot of that description is to be conducted by one or more “permissible means” specified in the order as determined by “the responsible person”.
366. *Subsection (2)* provides that a “permissible means” is a means of voting that the order provides is permissible for a specified description of ballot or election and *subsection (3)* provides that “the responsible person” is a person specified, or of a description specified, in the order.
367. *Subsection (4)* enables an order made under this section, (a) to include provision about the determinations by the responsible person as to what means are to be used or allowed

in a particular ballot, including requirements that he is to take specified factors into account or apply specified criteria, (b) to allow different means of voting to be chosen by the responsible person in different circumstances, and (c) to allow the responsible person to permit some or all of the voters to have a choice of means by which they may vote.

368. *Subsection (5)* has the effect that the “means” that an order made under the power in the section may specify as being “permissible means” must always include (or consist of) postal voting.
369. *Subsection (7)* provides that an order made under this section may modify the provisions of the 1992 Act, exclude or apply (with or without modifications) the provisions of the Act and make provision, in relation to a ballot or election conducted by a specified means, that is similar to any provision of the Act.
370. *Subsection (10)* prohibits the making of an order providing that a means is permissible for a description of ballot or election unless the Secretary of State considers that a ballot or election of that description conducted by that means could, if particular conditions were satisfied, meet the “required standard” specified in subsection (12) of this section, and that in relation to any ballot or election of that description the responsible person will not be permitted to allow the use of the means unless he has taken specified factors into account or applied certain criteria.
371. *Subsection (11)* provides that in specifying factors in the order that the responsible person is to take into account or criteria he is to apply, the Secretary of State must have regard to the need for ballots and elections to meet the “required standard” specified in subsection (12).
372. *Subsection (12)* provides that for the purposes of subsections (10) and (11) of the section, a ballot or election meets “the required standard” if it is such that those entitled to vote have an opportunity to do so, votes cast are secret and the risk of unfairness or malpractice is minimised.
373. *Subsections (6), (8), (9) and (13)* contain ancillary and procedural provisions.

Provision of money for trade union modernisation

374. *Section 55* provides a legal basis for the Secretary of State to spend money to modernise trade unions. In a Parliamentary written statement on 10 February 2004, the Minister for Employment Relations, Consumers and the Post Office explained the Government’s objectives in assisting unions to modernise through the creation of a Union Modernisation Fund. The Minister gave examples of the types of projects which could be supported by the Fund. He indicated that the Government would consult in the autumn of 2004 on the draft rules and procedures of the fund, with a view to commencing the scheme during the 2005/06 financial year.
375. *Subsection (1)* of section 55 inserts new section 116A into the 1992 Act.

New section 116A

376. Subsection (1) of new section 116A defines the five purposes for which the Secretary of State may give money to a trade union.
377. Subsection (2) has the effect that, subject to the exception provided by *subsection (2)* of section 55, a trade union must be independent to receive money from the Secretary of State. Section 5 of the 1992 Act provides the definition of an independent trade union and section 6 of that Act provides for unions to apply to the Certification Officer for a certificate of independence.
378. Subsection (3) gives the power to the Secretary of State to determine the way the assistance is to be provided and terms attached to the disbursement of the support.

*These notes refer to the Employment Relations Act 2004
(c.24) which received Royal Assent on 16 September 2004*

379. Subsection (4) prohibits any money provided to a trade union under section 116A from being added to that union's political fund. (Provisions relating to trade union political funds can be found at Part I, Chapter VI of the 1992 Act).
380. Subsection (5) provides that the Secretary of State is entitled to recover any amount added to a trade union's political fund in contravention of the prohibition at subsection (4), and must take such steps as are reasonably practicable in order to do so.
381. Subsection (6) provides that any amount recovered under subsection (5) must be recovered from the political fund.
382. Subsection (7) makes clear that the provision at subsection (5) does not prevent the terms on which money is provided to trade unions under that section from also including other sanctions to be applied against any union which contravenes the prohibition on adding monies to its political fund.
383. *Subsection (2)* of section 55 amends section 118 of the 1992 Act to provide that federations of trade unions do not need to have a certificate of independence to qualify for support under new section 116A.