

**FULL  
REGULATORY IMPACT ASSESSMENT**

**EMPLOYMENT RELATIONS BILL  
2003**

# Employment Relations Bill

## Regulatory Impact Assessment

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## Executive Summary

1. The overall impact of the Bill will be to make existing legislation, mainly in the sphere of collective rights, work better. A summary table of the overall impact of the Bill is in Section 3.

### Implementing the findings of the review of the Employment Relations Act 1999

2. The Government announced on 11 July 2002 a review of the Employment Relations Act 1999. The main conclusions of the review are that the legislation is generally working well. It has improved employment standards at work in a way that is consistent with effective management, and helped to foster productivity through the promotion of partnership at work. It has created greater legal certainty, contributed positively to the overall climate of employment relations. Nevertheless, the review identifies a number of areas where changes would improve the working of the Act.
3. The changes are not expected to change significantly the overall balance of benefits and costs arising from the original Act.<sup>1</sup> There will be some benefits in terms of reductions in time, cost and uncertainty to employers, trade unions and other parties (e.g. the Central Arbitration Committee). Equally, some limited costs may be incurred by the parties, which result from the implementation of the changes.
4. The Bill also provides a legislative basis to spend money to modernise unions. It is estimated that this will between £5 and 10 million will be set aside for unions to spend on additional activities such as training union representatives, reviews of the way unions are managed, helping to increase participation on union activities by members and increasing the diversity of union organisations. We envisage little or no costs on business as a result of this measure.
5. Where quantification has been possible, calculations show that there will be a net aggregate benefit of £8,000 per year for employers. For unions, there will be a net aggregate recurring benefit of between £71,000 and £121,000 per year and a one-off familiarisation cost of about £30,000 from the Bill's provisions excluding the clause on union modernisation. Both unions and their members will benefit from the £5 to 10 million directly provided for modernisation, and from the resultant benefits which such investment will bring in the future through modernisation.
6. There will be an annual recurring cost to the Exchequer of about £50,000 and a cost of between £5 and 10 million spread over several years from 2005/06 through the Union Modernisation Fund.

### Information and consultation

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<sup>1</sup> The Regulatory Impact Assessment on the ERA 1999 is available on [http://www.dti.gov.uk/er/erbl\\_ria.pdf](http://www.dti.gov.uk/er/erbl_ria.pdf).

7. The Bill also includes powers to introduce information and consultation in the workplace<sup>2</sup> in Great Britain and Northern Ireland. The public consultation, which set out the options for implementing the EU Information and Consultation Directive (Council Directive 2002/14/EC) in Great Britain, ended on 7 November 2003.<sup>3</sup> It is expected that despite the up-front implementation costs, over time, there will be substantial economic and social benefits from the legislation.
8. One-off costs to business are expected to be around £45 million (aggregate), and around £46 million in annual recurring costs.<sup>4</sup> The benefits to business are difficult to quantify but they are likely to be in the order of hundreds of millions of pounds over a ten-year period.
9. For Northern Ireland the one off costs are expected to be around £1.3million and annual recurring costs are expected to be around £1.4 million or around 3% of the costs to UK businesses.

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<sup>2</sup> See Section 2

<sup>3</sup> See '*High Performance Workplaces. Informing and Consulting Employees*'(July 2002). Copies are available from DTI or online at: [http://www.dti.gov.uk/er/hot\\_topics.htm](http://www.dti.gov.uk/er/hot_topics.htm)

<sup>4</sup> These apply to the least costly option which allows for greater flexibility and which will only impact on undertakings where there is employee demand and also allows for the use of pre-existing agreements adapted to individual circumstances.

## **Section 1: Implementing the findings of the review of the Employment Relations Act 1999**

### **Purpose and intended effect**

#### Objective

1. To put in place legislative changes that will improve the working of the Employment Relations Act 1999 and other trade union legislation.

#### Background

2. The Government announced on 11 July 2002 a review of the operation of the Employment Relations Act 1999. The purpose of the review was to assess whether the changes to employment legislation introduced by the Act were effective in meeting the policy objectives of supporting a flexible and fair labour market and to further the Government's aims of promoting full employment, productive workplaces and fair standards at work. The Government made a commitment to implement the findings of the review in the lifetime of this Parliament.
3. The 1999 Act is a major piece of employment legislation. It is noted, in particular, for introducing statutory procedures enabling unions to be recognised by employers where the majority of the workforce want a union to bargain collectively on their behalf. The Act also encourages parties (via the right to be accompanied) to resolve workplace disputes more reasonably and expertly.
4. The main conclusions of the review are that the legislation is generally working well. It has improved employment standards at work in a way that is consistent with effective management, and helped to foster productivity through the promotion of partnership at work. It has created greater legal certainty, and contributed positively to the overall climate of employment relations. Nevertheless, the review identifies a number of areas where changes would improve the working of the Act.
5. The Government published a consultation document in February 2003, which set out the initial findings of the review and put forward proposals to amend employment legislation. The responses received from employer and employee representatives and organisations were carefully analysed.<sup>5</sup>
6. The legislative proposals resulting from the findings of the review and consultation process are being implemented by way of the Employment Relations Bill, which was introduced in Parliament on 2 December 2003. The impact of the clauses contained in the Bill is considered in this assessment.

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<sup>5</sup> The consultation document and the Government response can be found at [http://www.dti.gov.uk/er/erbill\\_2003.htm](http://www.dti.gov.uk/er/erbill_2003.htm)

## Risks

7. The Bill addresses practical difficulties identified during the review in the operation of provisions in the relevant legislation (mainly the Trade Union and Labour Relations (Consolidation) Act 1992 – which was amended by the Employment Relations Act 1999).
8. The provisions of the Bill aim to remove legal uncertainty, or unnecessary delay or cost that could arise from the legislation as currently drafted. While the resulting benefits are in aggregate relatively small, for parties that get caught by these uncertainties the resulting benefits are significant.

## Options

9. At the start of the review the Government faced three main courses of action:
  - a. Retain the law as it is;
  - b. Replace or supplement legislation by non-legislative approaches;
  - c. Change the legislation through repeals, clarifications and additions.
10. The review also considered options put forward by the main interested parties, including the CBI and the TUC. The review assembled evidence to understand the operation of the Act looking at administrative data on caseloads, relevant academic research and information provided by key interested parties. As discussed earlier, the evidence gathered showed that the 1999 Act is working well. It therefore concluded that there is no case for making wholesale changes to the legislation, or for non-regulatory approaches. However, the review identified some areas where there are problems and anomalies in the way the Act works. In view of the small costs involved, it therefore proposed to make some changes and improvements.
11. In addition, the Government proposes to establish a Union Modernisation Fund, which it estimates will cost the Exchequer between £5 and 10m spread over several years from 2005/06. The Fund aims to stimulate the process of modernisation. The Fund will also help unions adapt to changes to trade union law being made by the Employment Relations Bill, such as the power to introduce different methods of voting (for example e.voting).

## **Costs and Benefits**

### Business sectors affected

12. All sectors are covered by the Employment Relations Act 1999 and hence by these proposals. However, many of the Act's provisions deal with trade union law. Therefore unionised sectors are particularly

affected. Table 1 shows that union density is highest in the public administration, education, energy and water, health and transport and communication sectors. Not surprisingly therefore the statistics also show that union density is far higher in the public sector (59%) than in the private sector (19%). Those sectors in the private sector that will be particularly affected are energy and water, transport and communication, public administration, education and manufacturing.

**Table 1. Union density by industry sector: autumn 2002**

	All (%)	Private Sector (%)
Agriculture, forest and fishing	9	7
Mining and quarrying	23	24
Manufacturing	27	26
Energy and water	50	49
Construction	17	13
Wholesale and retail trade	11	11
Hotels and restaurants	6	5
Transport and communication	42	37
Financial intermediation	27	27
Real estate and business services	11	8
Public administration	59	34
Education	55	29
Health	45	17
Other activities	22	11
All	29	18

Source: Labour Force Survey

13. Table 2 shows the number of applications to the Central Arbitration Committee (CAC) for statutory union recognition by industry (up to 29<sup>th</sup> February 2004). If this pattern persists, manufacturing, transport and communications and other business services are likely to be more affected by the changes to the statutory recognition procedures.

14. Small businesses are least likely to be affected by the proposed changes. Firms with less than 21 workers are not covered by the statutory recognition procedure. Relatively few small businesses recognise trade unions<sup>6</sup>. The demand for statutory recognition has largely involved firms far larger than 21 workers. Only 16% of applications to the CAC<sup>7</sup> came from small firms employing up to 49 employees. For further discussion on the impact on small firms see paragraphs 103 to 105.

<sup>6</sup> The Workplace Employee Relations Survey 1998 found that out of firms with 25 to 49 employees only 14% had a recognised union. See M.Cully, S. Woodland, A. O'Reilly and G. Dix (1999) *Britain at Work* London and New York, Routledge, Table 11.5.

<sup>7</sup> From 2000 to 29 February 2004.

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**Table 2. Number of CAC applications for union recognition by industry**

	Number of Applications	% of total
Manufacturing	140	48.1
Transport and Communication	55	18.9
Other Business Services	43	14.8
Wholesale & Retail	20	6.9
Other	12	4.1
Finance	10	3.4
Other Community Services	8	2.7
Education	2	0.7
Construction	1	0.3
Total	291	100

Source: Central Arbitration Committee June 2000 to 29 February 2004

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### Costs and benefits

15. The provisions of the 1999 Act help to reduce the scope for workplace disputes by establishing a statutory recognition procedure for trade unions by employers, when the majority of the workforce want this. It also encourages parties to resolve disputes more reasonably and expertly by introducing a right for workers to be accompanied by a companion in certain disciplinary and grievance proceedings.
16. The changes are not expected to alter significantly the overall balance of benefits and costs arising from the original Act.<sup>8</sup> There will be some modest benefits in terms of reductions in time, cost and uncertainty to employers, trade unions and other parties (e.g. the CAC). Implementation of the changes will result in some limited costs to the parties. Both are at a level where they are so small as to make quantification difficult.
17. The establishment of a Union Modernisation Fund, which is estimated to cost the Exchequer between £5 and 10m over several years beginning in 2005/06, will benefit unions.
18. This impact assessment considers the benefits and costs of each individual clause.

### Implementation Costs

19. Whenever employment law changes, parties have to become familiar with the new legislation.
20. In the case of the changes to union recognition and industrial action law, these refer to very specific circumstances, such as when an employer is faced by a recognition claim or making a strategic decision about its approach to standard employment contracts. These are quite specific circumstances and will, for most managers, be relatively rare. It is therefore likely that managers will in general have to 're-learn' the requirements of the legislation regardless of the changes made as a

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<sup>8</sup> Available on [http://www.dti.gov.uk/er/erbl\\_ria.pdf](http://www.dti.gov.uk/er/erbl_ria.pdf)

result of this review. In this case, there are no additional familiarisation costs.

21. Within trade unions, there will be some individuals (particularly full-time officials) who have frequent engagement with issues such as union recognition or industrial action. These individuals may need to spend a small amount of time becoming familiar with the new proposals and how they affect their work. The precise number of individuals affected is not known but is likely to be small (no more than a few hundred). Even if these individuals spent a few hours of their time on familiarisation, the total one-off cost to trade unions cannot be expected to amount to much more than £30,000.<sup>9</sup>
22. The clarification of the role of the companion at disciplinary or grievance hearings (made by clause 35) is unlikely to lead to familiarisation costs to employers, as the changes are of a relatively minor nature.<sup>10</sup>

## **Policy costs and benefits**

### **Part 1 - Changes to statutory union recognition procedure**

23. The purpose of the recognition provisions is to improve the climate of workplace employment relations by enabling union representation when there is clear evidence of workplace support. Empirical evidence suggests that the relationship between management and employees (often termed the 'climate' of employment relations) is a factor affecting workplace outcomes. A poor workplace climate can damage morale and employee commitment, and in turn business performance.<sup>11</sup> The policy objective is also achievable where union recognition does not result from a statutory recognition claim, but by the parties reaching a voluntary arrangement.
24. Indeed, the majority of recognition claims are reached on a voluntary basis, and many of the resulting benefits are likely to have occurred largely through encouraging employers and trade unions to reach recognition agreements voluntarily. The TUC logged over 1,100 new voluntary agreements between 1998 and 2003. About 850 of these occurred since the introduction of the statutory procedures covering 250,000 workers.<sup>12</sup> There is clear evidence of an increase in the

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<sup>9</sup> We estimate that the cost of a union official is £130 per day (Source: New Earning Survey 2003). Therefore if there were 500 union officials who had to become familiar with the legislation which took them half a day, this would cost £130 x 0.5 x 500 = £32,500.

<sup>10</sup> The law currently states that a person accompanying a worker at a disciplinary or grievance hearing has a right to address the hearing. This change makes it clear that this person can do so more than once. Most people currently interpret the legislation in this way.

<sup>11</sup> See Chapter 12 of M.Cully, S. Woodland, A. O'Reilly and G. Dix (1999) *Britain at Work, the sourcebook of findings from the 1998 Workplace Employee Relations Survey* (WERS98). London and New York, Routledge

<sup>12</sup> TUC (2003) *Focus on Recognition – trade union trends report 03/01*, and TUC (2004) *Focus on Recognition - trade union trends survey 04/01*.

number of voluntary recognition agreements reached both before, and particularly following the commencement on the 1999 Act.<sup>13</sup>

25. Use of the statutory recognition procedure itself has affected relatively small numbers of employers and employees to date. From June 2000 to the end of February 2004 there were 347 applications to the CAC for trade union recognition. Of these, 156 were withdrawn, often because the parties reached a voluntary agreement. 17% of all applications (36% of withdrawals) up to the end of December 2003 are known to be because a voluntary application was reached. This is likely to understate the true position as there is no requirement to inform the CAC of the reason for withdrawal. Up to the end of February 2004, the CAC made 87 CAC declarations of statutory recognition, covering more than 17,000 employees.<sup>14</sup> To put this in context, the Labour Force Survey shows that (in autumn 2003) 7.4 million employees were trade union members.

26. The principal costs of the statutory recognition procedure are the opportunity costs of the time involved in participating in the process that are borne by the parties (employers and trade unions). There will also be financial costs to the parties through, for example, legal fees or arranging workplace ballots. The process also involves costs to the public sector, largely to the CAC.

27. Clauses 1 and 4 – Determination of appropriate bargaining unit. Where a union and an employer cannot agree an ‘appropriate’ bargaining unit, the union may apply to the CAC to decide. It has been the subject of litigation whether the CAC should, as employer groups have argued, consider the employer’s or union’s proposed bargaining units equally. The Bill will clarify that the CAC, when deciding the appropriate bargaining unit, will first consider the bargaining unit proposed by the union, taking into account the need for effective management and the views of the employer (as well as other unchanged criteria). The Bill will clarify the role of employer evidence, including any alternative bargaining unit proposed by the employer, and make the process more transparent. The CAC had been interpreting the Schedule in this manner in any event, so this clarification will not result in significant costs or benefits.

28. Clause 2 – Enables the CAC to reduce the 20-day period for agreement of the bargaining unit, by way of notice to the parties, if there is no reasonable prospect of the parties agreeing an appropriate

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<sup>13</sup> TUC figures show that voluntary recognitions averaged about 7 a month until October 1999, rising to 13 a month to October 2000, peaking at 38 a month from November 2000 to October 2001 before slowing down to 24 a month from November 2001 to October 2002 and to 11 a month from November 2002 to October 2003. These figures tie in with evidence from Acas completed conciliation recognition deals (which include both voluntary and statutory procedures).

<sup>14</sup> 17,000 figure represent the number of workers covered by statutory recognition agreements awarded up to 31 August 2003. Source: CAC.

bargaining unit before the end of the period, or where the parties jointly request it. The CAC notice must give its reasons. The overall impact depends on how the power is exercised. The main benefit is to the parties in terms of processing the application more speedily. It is generally held that the speedier resolution of such issues leads to greater certainty and better industrial relations.

29. Clause 3 – Where the CAC has accepted a union’s application, clause 3 will introduce a new requirement on the employer to supply information to the union and CAC, listing the categories of worker, the workplaces in which they work and an estimate of the number of workers in each category at each workplace in the proposed bargaining unit. This is unlikely to have any significant cost impact on employers for two reasons. Firstly employers will already have to assemble and supply much of this information at the preceding admissibility stage of the procedure, and secondly, many employers currently provide this information in the negotiation period for agreeing the bargaining unit. This measure is meant to ensure that more information is available to inform union-employer discussions, thereby building confidence and encouraging the voluntary resolution of differences.
30. Clause 5 – Where the CAC has accepted an application for recognition, clause 5 allows the union to communicate with the workers in the relevant bargaining unit, at an earlier stage in the process, by means of postal communication via a Qualified Independent Person (QIP). This will allow unions to send information to workers, to inform them about the recognition claim that has been lodged on their behalf. The cost of any communication will be borne by the union, while letters are likely to be read during the employees’ own time. Furthermore, unions themselves will judge the cost effectiveness of this method and so decide whether to use it or not. Therefore the compliance costs to unions are likely to be minimal/zero.
31. Clause 6 – Pre-ballot notification period. At present the CAC does not have discretion to extend the pre-ballot notification period, as it does with other statutory periods in the procedures. Clause 6 will enable the CAC to extend the pre-ballot notification period where both parties request this, for the purpose of negotiating the settlement. This may have benefits in terms of reduced costs to employers, unions and the Exchequer and improved employment relations. It will allow the parties to continue negotiations to reach a voluntary settlement without unnecessarily incurring the cost of a ballot. An illustration of these costs can be found in the Regulatory Impact Assessment for the 1999 Act. This indicates a possible saving of about £2,000 per case.<sup>15</sup> If there were 5 such cases per year the saving would be about £10,000.
32. Clause 7 – Where the CAC is not satisfied that the majority of workers in a bargaining unit are union members, or where a majority are union members, but certain factors apply, the CAC can order a recognition ballot. The ballot will be run by a Qualified Independent Person (QIP). Clause 7 will allow workers to vote by post if they have good reason for

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<sup>15</sup> See [http://www.dti.gov.uk/er/erbl\\_ria.pdf](http://www.dti.gov.uk/er/erbl_ria.pdf)

not being able to attend a workplace ballot<sup>16</sup>. This will ensure that more people are able to vote, thereby helping to ensure that the result truly reflects opinion and is seen as a fair basis on which to develop future employment relations. The extra cost to the parties of allowing workers to vote by post rather than a workplace ballot is thought to be negligible.<sup>17</sup>

33. Clause 8 - Additional duties on employers informed of ballots. This clause imposes new duties on the employer not to offer inducements to workers not to attend union access meetings, or to make threats against workers for attending or taking part in union access meetings during the balloting period. The clause also makes clear that employers and their representatives should not attend access meetings unless they have been invited to attend by the union, or it is unreasonable for them not to attend. Employers will also be found in breach of their duty to provide reasonable access if they unreasonably seek to record or otherwise be informed of what happens at union access meetings.
34. At the time of the 1999 Act, the Government envisaged the employer's duty to provide reasonable access as implying that meetings should be private between the union and the workers in the bargaining unit, unless the union agreed otherwise, and that employers should not seek to interfere with union access arrangements. Guidance to this effect is contained in the existing statutory Code of Practice on Access to Workers during Recognition and Derecognition ballots. However, in the light of a number of allegations of employers interfering with these access arrangements and monitoring what was said at access meetings, the Government believes that there is value in clarifying its original intentions on the face of the law.
35. This is unlikely to result in any increase in costs to employers as most will be complying with the existing code of practice. Even where they are not, it is hard to see where any extra costs would arise in making employers desist from activities such as recording meetings organised by unions for employees or inducing employees not to attend union meetings by, for example, organising social events to coincide with the timing of these meetings or offering higher overtime rates for workers to stay at their posts during union meetings.
36. Workers will benefit from being better informed about the union's campaign and better placed to decide how they will vote in the ballot.
37. Clause 9 - Clause 9 introduces a new offence of unfair practices in relation to recognition ballots. This is intended to deal with the intimidation of workers by either employers or unions during the ballot period. Intimidation during a balloting period is not common, but has been rising. The CAC has received a small number of allegations of intimidation in relation to statutory recognition ballots. However, there is a concern that a small number of cases of behaviour which is not

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<sup>16</sup> Such as being on holiday or being off sick.

<sup>17</sup> About 75p to £1 per ballot, a slightly higher unit cost than for a ballot that is entirely postal.

within the spirit of the law could act as “demonstration cases” to employers and unions going through the process in future if the CAC is powerless to deal with them. Such behaviour would also have a negative effect on employment relations within the small number of companies affected, as well as potentially significant negative effects for individual workers.

38. The clause outlaws certain unfair practices in relation to recognition ballots such as bribery, coercion of workers to disclose how they voted or how they intend to vote, dismissing or threatening to dismiss workers, taking or threatening to take disciplinary action against workers, subjecting or threatening to subject workers to a detriment and using undue influence, such as force or threats of force and deceit. This will apply to unions as well as employers. The impact on employers and unions is likely to be minimal because these activities do not take place in the majority of cases. It is also unclear how stopping employers or unions from participating in these types of activities would result in a cost to either party. Employees however would gain from the results of a more democratic ballot and long term employment relations would benefit as all parties are likely to be more inclined to accept the result of a ballot (and therefore the outcome of the statutory procedure) where they believe that ballot has been fairly conducted.
39. This clause also introduces an order-making power for the Secretary of State to provide sanctions for the case where the CAC decides a complaint of unfair practices in relation to the ballot is well-founded. It is intended that the CAC be able to issue “make whole” remedies. The cost of sanctions would therefore not be monetary. The CAC might also order a new ballot and order the party at fault to bear the costs. The cost of a ballot is estimated to cost around £400 for a ballot of 200 members.
40. Clause 10 – Allows trade unions to bring claims to widen the scope of existing voluntary recognition agreements to cover all of the core bargaining topics set out in the statutory procedure. In principle, this increased certainty could stimulate additional CAC cases where existing agreements do not cover one or more of pay, holidays or hours (known as the ‘core bargaining’ topics).
41. It is not possible to estimate how many existing recognition agreements do not cover all of the ‘core bargaining’ topics.<sup>18</sup> However, a recent TUC report<sup>19</sup> stated that ‘the overwhelming majority’ of new voluntary agreements covered at least pay, hours and holidays.

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<sup>18</sup> In WERS98, all the areas required by the CAC are treated as a single category, so it is not possible to say how many workplaces had some elements missing.

<sup>19</sup> See TUC (2004) *Focus on Recognition – trade union trendssurvey 04/01*.

42. Any additional CAC caseload is therefore expected to be modest.<sup>20</sup> Five extra applications per year would cost the Exchequer less than £50,000.<sup>21</sup>
43. Clause 11 – An employer may seek to derecognise a union on the grounds that they no longer employ 21 workers. At present, the union may not apply to the CAC to challenge this if it has made a similar challenging application (in respect of the same bargaining unit) within the period of three years prior to the date of application. Clause 11 will ensure that the employer will no longer be able to seek derecognition on these grounds or any other, if he has already issued such a notice in the period of three years prior to the date of the application. No such applications have yet been made by employers, in part because most statutory recognitions are too recent<sup>22</sup>. This clause ensures that unions always have an opportunity to challenge an employer's attempt to derecognise before the CAC. It will prevent unfair derecognitions where the union has had no opportunity to put its case. To allow such unfair derecognitions would have damaging effects on employment relations and would prevent the realisation, in those cases, of the benefits that were envisaged by the Employment Relations Act 1999.<sup>23</sup>
44. Clause 12 – Clause 12 is identical to clause 9, except that it applies in the case of intimidation of workers during derecognition ballots. The costs and benefits associated would therefore mirror those of clause 9.
45. Clause 13 - Provides a right of appeal for the parties against a demand for costs from a QIP in relation to a ballot or communications with workers in the bargaining unit, where one or more of the parties believes that the costs demanded are wrong. We are unaware of any instances where a party has sought to contest the accuracy of a demand for costs from a QIP. Therefore, any cost implications will be negligible.
46. Clause 14 – General power to amend the Schedule. The Secretary of State currently only has power to make certain specific changes to the statutory recognition procedure by order. The Bill introduces a more general power for the Secretary of State to amend the statutory recognition procedure by order on the request of the CAC.
47. If this power were activated to make any substantial amendments, this would be subject to a further Regulatory Impact Assessment. By way of example on potential savings, if the CAC were to suggest changes

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<sup>20</sup> In 2002/03 the CAC processed 107 disclosure of information and trade union recognition cases. The cost of running the CAC was £989,830 (see CAC Annual Report). The cost per case is therefore £9,251. This includes the fixed cost of running the CAC. The marginal cost will therefore be lower.

<sup>21</sup> £9,251 x 5 = £46,255. This is a conservatively high estimate as it includes a proportion of the fixed costs of running the CAC.

<sup>22</sup> The first one dates from October 2000 (or the first possible applications for de-recognition date from October 2003).

<sup>23</sup> The Regulatory Impact Assessment that accompanied the Employment Relations Bill 1999 cited improvements to industrial relations by providing a procedure whereby differences can be resolved with less conflict and that promote cooperation and partnership. See [http://www.dti.gov.uk/er/erbl\\_ria.pdf](http://www.dti.gov.uk/er/erbl_ria.pdf)

on efficiency grounds that reduced its costs by 2%, that would save around £20,000 per annum.<sup>24</sup>

48. Clause 15 – Communication with workers in the bargaining unit by electronic means. Clause 5 entitles unions to send written communication to workers in the bargaining unit via a third party from acceptance of the union's application. This Clause will provide a power to extend this right, to communication by electronic or other means when there is evidence that this means is widely accessible and secure. The powers provided for in this clause will not be commenced until issues surrounding cost, access and security are resolved. It is unlikely that unions would choose a means of communication with workers that is substantially more costly than their existing means.
49. Clause 16 - There is a concern that, as a consequence of clause 9 (and 12), unacceptable behaviour may shift to the pre-ballot period. Clause 16 therefore gives the Secretary of State power to extend these protection to earlier points in the process. If this power were to be activated, the secondary legislation required would be subject to a further Regulatory Impact Assessment.
50. Clause 17 - The statutory procedure is at present not clear on what will happen to an award of recognition where the employer changes identity (e.g. merges, is transferred or taken over). This clause gives the Secretary of State a power to make provision in cases where the employer changes identity, thereby ensuring that recognition awards and applications under the procedure can transfer, where appropriate, to the new employer. The major benefit to employers will be the removal of uncertainty in the limited number of cases where a change of employer takes place.
51. There are comparatively few circumstances where unions amalgamate, transfer their engagements to another union, or where they divide. However, where they do arise, sometimes they can involve big unions which are involved in several current cases, or which are the beneficiaries of quite a number of awards. It is important to clarify the status of such applications or awards. Clause 17 also provides a power for the Secretary of State to make provision relating to union mergers or divisions so that recognition awards and applications under the procedure can transfer to a newly-formed or a newly-merged union. This will help to guarantee continuity, thereby providing greater certainty for employment relations.
52. An order made under these powers may be subject to a further Regulatory Impact Assessment, where appropriate.

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<sup>24</sup> Total CAC costs for the financial year 2002/3 were £989,830. Source CAC Annual Report

53. Clause 18 – Establishes a requirement on both the unions and employer to cooperate with CAC membership checks, and clarifies what information should be disclosed. Unions and employers generally cooperate, so this clarification is unlikely to impose additional costs. Its main benefit is likely to be that it clarifies expectations, and ensures that the CAC can make decisions speedily and with full information.
54. Clause 19 – Clarifies that pensions shall not be regarded as ‘pay’ for the specific purposes of collective bargaining for the present time (and by virtue of an order making power for the future). At the same time, the Government proposes to give the Secretary of State an order-making power to add pensions to the three core bargaining topics, with a view to exercising that power when there is evidence that typical practice in voluntary agreements is for pensions to be included.
55. The first proposal will provide greater clarity. The effect of the second will be to empower the Secretary of State to bring the statutory recognition procedure into line with possible future voluntary bargaining practices by allowing pensions to be considered as one of the core topics. Any direct cost implications of this change will be negligible – adding pensions to the list of core bargaining topics should be, in itself, virtually costless. Any indirect costs and benefits for employers and unions resulting from the addition of pensions, are at present unquantifiable. If this power were to be activated, the secondary legislation required would be subject to a further Regulatory Impact Assessment to ensure that the benefits justified the costs.
56. Clause 20 – The Advisory Conciliation and Arbitration Service (Acas) can help parties achieve the voluntary settlement of disputes over recognition. This provision establishes a statutory function for Acas to ascertain support for recognition and union membership amongst workers in the relevant bargaining unit. This may lead to cheaper and faster ballots, by allowing the parties to dispense with the considerable task of seeking explicit consent (for data protection purposes) from individual workers for the processing of personal information in the course of these activities.

57. From June 2002 to May 2003, Acas ran 47 ballots and 52 membership checks. The average number of workers in these ballots was 131 and the average number of workers in these checks was 87.
58. For ballots, the costs of seeking consent currently fall on employers. We assume that this takes one day of a personnel officer's time, plus the cost of postage and stationery. The new provisions would therefore reduce costs – for example, if 50 ballots were run by Acas, this would represent a cost saving of around £13,000<sup>25</sup> per annum.
59. With regard to membership checks, the costs currently fall to the union and the employer, depending on the type of check. We assume that 50% of the time these are checks that involve employer costs (checks on workers). The other 50% of the time the costs would fall to the union (checks on members). Dispensing with the need to seek explicit consent to conduct such checks would lead to an aggregate cost saving per annum of about £7,000<sup>26</sup> to employers. The aggregate cost savings per annum for unions would be about £5,000<sup>27</sup>.
60. The aggregate cost saving per annum arising from this clause would therefore be about £25,000 (£20,000 to employers and £5,000 to unions). There would be other non-quantifiable cost savings in terms of avoidance of undue delays to the process of voluntary recognition.
61. Clause 50 (combined clause – see also paragraph 92) - In relation to the recognition schedule, this clause introduces a reserve power for the Secretary of State to enable the CAC to order a recognition ballot to be carried out by electronic voting or other non-postal methods. Electronic voting has the long term potential for benefits through reducing the costs of balloting employees on recognition. It is recognised, however, that there are currently issues of access, security and confidentiality.
62. If this power were to be activated, the secondary legislation required would be subject to a further Regulatory Impact Assessment. It is also envisaged that the discretion to order electronic voting would not be exercised if it were substantially more costly than existing means. Although the actual cost savings of electronic voting may be relatively small<sup>28</sup>, given the small number and size of recognition ballots per

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<sup>25</sup> The average weekly pay (excluding overtime) of full time personnel managers in 2003 in Great Britain was £811 (Source New Earnings Survey). We assume that the daily cost of a personnel manager is therefore £811 x 1.3 (to take into account non-wage costs) divided by 5 = £211. We assume that the cost of postage and stationery is 50p per voter. The cost of an average ballot is therefore £211 + (117 x £0.5) = £269.5. The aggregate cost saving will therefore be £269.5 x 50 = £13,475.

<sup>26</sup> The cost saving for one check will be £211 + (91 x £0.5) = £256.5. The aggregate cost saving will be £256.5 x 26 = £6,669.

<sup>27</sup> The cost of a union official's time is about £130 (Source New Earnings Survey 2003). Therefore the cost saving for one check will be £130 + (91 x £0.5) = £175.5. The aggregate cost saving will be £175.5 x 26 = £4,563.

<sup>28</sup> Assuming an average ballot size of 117 and other costs as for Acas-run ballots (see footnote 24) the cost of an average ballot is £269.5. There have been 58 recognition ballots from 6<sup>th</sup> June 2000 to 31<sup>st</sup> March 2003, or around 20 per year. Cost savings of 5% would therefore be 0.05 x 269.5 x 20 = £269.5. [ needs to be updated ]

annum, the significance to individual unions and ballots may be greater. There may also be benefits of convenience to individuals.

## Part 2 - Changes to Industrial Action Law

63. Clauses 21 and 24 – Simplifying industrial action notices. These clauses help to simplify the law on industrial action notices. They are likely to decrease the burden on trade unions by clearly defining what information they are required to assemble and present. To date there have been at least three high court challenges to proposed industrial action that were based largely on technical or procedural issues connected with the legislation on industrial action notices.<sup>29</sup> The cost of contesting such a case can be substantial for the affected parties, and there are also costs in terms of official's time, legal advice and for the union in protecting itself against a potential challenge. The changes do not impede action when there are substantive grounds to challenge the conduct of a trade union. The changes would instead reduce the risk of challenges merely on technicalities.
64. There were 133 stoppages in 2003. We assume that between 70% to 80% of notices of strike action do not in the end lead to a strike. Therefore there will be about between 400 and 700 notices served each year.<sup>30</sup> If union officials spend on average half a day making sure that they are protected against a potential challenge on technical grounds and on average use the services of a lawyer for two hours, there will be a saving of about £165<sup>31</sup> per notice served or in aggregate about £66,000 to £116,000 per annum.
65. Clause 23 -The law currently provides for courts to disregard small accidental failures in the conduct and organisation of ballots on industrial action, as long as the failures are accidental and on a scale unlikely to affect the outcome of the ballot. This clause removes potential uncertainty about the way this disregard affects the interpretation of the law on inducing workers to take industrial action by clarifying that unions can induce members to take action to whom it failed to accord an entitlement to vote, as long as that failure was small and accidental.
66. Clauses 25 and 26 – These clauses amend the law on the use of employer 'lock-outs' in industrial disputes. Days in which striking employees are locked out will be discounted from the 8-week unfair dismissal protected period during industrial action. The clauses are likely to directly affect the parties involved. Although, lock-outs are very rare in the UK and so in aggregate the expected costs and

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<sup>29</sup> The three cases were London Underground Ltd vs. RMT (1 Feb 2001), Midland Mainline Ltd vs RMT (22 June 2001), and Westminster City Council vs Unison (March 2001).

<sup>30</sup> Calculated as  $133/30\%$  to  $133/20\% = 443$  to  $665$ .

<sup>31</sup> The cost of a day of a union official's time is estimated to be about £130 per day, and for an hour of a solicitor's time about £50 (the hourly wage of £25 times two to take into account overheads). If the saving in time is on average half a day of a union official's time and two hours of a solicitor's time this would save £165. Source of earnings: New Earnings Survey, Great Britain 2003.

benefits of such activities are very small. However these proposals may lead to an improvement in the conduct of disputes by both parties involved and therefore help in reaching a quick and efficient settlement. Even if a rare event, the costs to individuals who are dismissed can be high.

67. Clause 27 - This clause defines the basic actions that employers and unions should take when they engage in mediation or conciliation to try and settle an industrial dispute. It ensures that employers and unions do not use the current wording of the legislation as an excuse for not engaging fully in the process of conciliation and mediation. The impact of this legislation is expected to be small as such instances are relatively rare. The clause will directly affect only the parties involved in trade disputes. It should lead to an improved use of the services of a conciliator or mediator, thereby encouraging the quicker and more efficient settlement of disputes.

### Part 3 – Rights of trade union members, workers and employers

68. Clauses 28 to 31 – These clauses ensure that UK law on the right to association is fully in compliance with the European Convention on Human Rights. This follows from the ECHR judgment in the Wilson and Palmer case<sup>32</sup>. Although the 1999 Act clarified that employers could not discriminate by omission against members who wished to use their union's services, the judgment requires the Government to make further changes in this area. The clauses will establish a clear right for members of independent unions to use their unions' services. The provisions also make it unlawful for an employer to offer an inducement to a worker to establish, sever or change his relationship with a union, including agreeing not to have his terms and conditions determined by a collective agreement. However, the clauses do permit the employer to retain the services of certain workers by offering them individualised contracts designed to reward or retain key workers.
69. These changes are likely to have a significant impact on businesses or workers only if inducement to relinquish union representation is currently widespread. There is no direct evidence on this point, but circumstantial evidence suggests that this form of employer action is no longer widespread (if it ever was in the first place). Inducement to relinquish representation was used by employers as a strategy to facilitate de-recognition and the run-down of union membership. The findings of both the WERS98 and more recent monitoring of trade union recognition by the TUC both suggest that employer derecognition has been a rare event since the end of the 1980s. Hence any effects on business practice are likely to be small.

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<sup>32</sup> The judgment was issued on 2 July 2002 and, in full, concerned the applications of Wilson & The National Union of Journalists; Palmer, Wyeth and others & the National Union of Rail, Maritime & Transport Workers; Doolan and Others v The United Kingdom (Application Nos 30668/96, 30671/96 and 30678/96).

### Exclusion and expulsion from trade unions

70. Clause 32 - This clause changes the provisions under which individuals are protected against exclusion or expulsion from trade union membership. It increases the ability of unions to exclude or expel individuals because of their unacceptable political activities. It also narrows the scope for a union to make relatively minor errors when dealing with political activists which could result in its actions being unlawful.
71. Unions in general wish to ensure that far-right political activists do not try to infiltrate their ranks. There have been a number of recent high-profile tribunal cases<sup>33</sup> relating to the exclusion or expulsion of BNP members from unions. In addition, there are also reported cases of unions not excluding individuals because they are uncertain about the effect of the current law effects and their freedom to act. The clause should give more scope to unions to act with confidence against racist political activists and a greater number of exclusions or expulsions of such individuals are likely to occur, especially in the short term. As it will be more difficult for such political activists to show they have been unlawfully excluded or expelled, the clause should lead to fewer tribunal cases against unions, especially in the longer term. Because the clause also removes the minimum award of compensation in some circumstances involving membership of a political party, it should reduce the financial incentive under the current law to bring these cases to a tribunal. The cost to a union of a tribunal application, assuming that it goes to a hearing and that the union seeks legal advice, is estimated to be around £3,500. If the union loses they are at present subject to a minimum compensation of £5,900. In the future unions are unlikely to be taken to a tribunal for these activities, thus saving costs.
72. Most unions pursue active policies to promote diversity at the workplace and to combat racial or other forms of discrimination. Their effectiveness in these areas is undermined by far-right political activists within their ranks. The clause should therefore improve the ability of unions to promote these policies at the workplace. This should lead to more harmonious workplace relations and, insofar as it leads to less discrimination at work, to the better and more productive use of labour. The clause therefore brings these wider benefits to employers and to society more generally.
73. Clause 33 removes from the EAT the function of determining the compensatory award in cases where an individual has been unlawfully excluded or expelled from union membership but not admitted or re-admitted afterwards. It also has a similar effect in cases where a union breaks the law on unjustifiable discipline. Some cost savings should

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<sup>33</sup> *Mr. J. Lee v Aslef* (ET case No. 1301889/02) and *Mr. C. Potter v UNISON* (ET case No. 19000120/2003).

result from the employment tribunal (ET) hearing the case and making the award on all occasions.

74. Under the current law the EAT has to familiarise itself with the case considered by the ET before it can make an award. This is in order to achieve simply the same level of understanding of the facts of the case that the ET already has. The number of hours required is clearly dependent upon the complexity of the case and other factors such as whether there are linked cases. At the very least, the EAT panel members will need to study the tribunal's decision in detail. If we assume it would take 2 to 5 hours, on average, for the panel members of the EAT to acquaint themselves with the facts of a case, and it is estimated that the hourly cost of a panel member is over £150 an hour, then it would typically cost the EAT over £450 to familiarise itself with the case.
75. Both an EAT panel and an ET panel would take the same amount of time to complete an award hearing, approximately half a day in an average case. There can be variations if a case is very complex or if it is linked to others. However, there is a differential additional cost per sitting of at least £100 for the EAT panel as opposed to the ET panel and this can increase depending on who chairs the panel. There will also be incidental costs of producing second copies of papers and supporting information, and the administrative costs associated with the replication of these papers.
76. Clause 34 - This clause clarifies the law in relation to the qualifying period for claims of unfair dismissal, or selection for redundancy, on grounds of trade union membership and activities. In particular it relates to the burden of proof for the reason for dismissal in such cases where the worker is in the first twelve months of employment or is subject to an upper age limit. The current wording of the legislation has led to some confusion and the clause clarifies that the burden of proof for the reason for dismissal will lie with the employer in both cases. Costs associated with this change should be small because there are few Employment Tribunal claims relating to this very specific area. There may be benefits in terms of clarity and consistency of the law between this and other protections for employees that apply from the first day of employment.

### Other rights of workers and employees

#### Right to be accompanied

77. Clause 35 – Clause 35 will make sure that the role of the companion at certain disciplinary and grievance hearings is better defined. This measure is unlikely to result in extra costs as it seeks to clarify existing rights rather than an extend them. Familiarisation costs are discussed in paragraph 21.
78. Clause 36 – Clause 36 introduces a right of appeal to the Employment Appeal Tribunal (EAT) from employment tribunal decisions concerning

the right to be accompanied. There is currently no provision for this to happen. Clause 35 may result in a few more cases being taken to the EAT, at an average cost per case of £4,000 (about £1,000 to government and £3,000 to employers).<sup>34</sup> There were 160 employment tribunal applications made in Great Britain for year 2002/03 where the main jurisdiction was the right to be accompanied. The number of cases that are likely to go to the EAT for full hearing is therefore estimated to be about 2 to 4 a year.<sup>35</sup> Therefore, the estimated aggregate cost to firms would be up to about £12,000 per year.

79. Clause 37 – Clause 37 amends Section 23 of the Employment Relations Act 1999. This provides the power to confer statutory employment rights on individuals that are not currently covered by certain Acts or European legislation. As the words of Section 23 stand, this can only be achieved by means of a provision in a Statutory Instrument (SI) that actually amends the legislation conferring the right, and not by means of a provision simply saying in the SI that the right applies to the individuals in question (a free standing order). This amendment provides the power to draft a free standing order which provides that the existing right applies to the individuals in question.
80. Clause 37 does not introduce a new power, but it simplifies the procedure involved. It would involve no additional costs.
81. Clause 38 – Clause 38 clarifies the current law by removing age and service restrictions on protection against unfair dismissal for asking to work flexibly. It also ensures that selection for redundancy for reasons related to the flexible working regulations will be treated as unfair dismissal. These changes will have the effect of ensuring that the number of beneficiaries is as intended at the time the flexible working legislation was drafted. The costs and benefits have therefore already been assessed.<sup>36</sup>
82. A description of the costs and benefits of clauses 39 and 40 (Information and Consultation) can be found in Section 2.

#### Part 4 – Enforcement of minimum wage legislation

83. Clauses 41 to 43 – The Bill makes three minor amendments concerning the operation of National Minimum Wage enforcement

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<sup>34</sup> Source SETA 98 and the Employment Tribunal Service (ETS) 2002/03 Annual Report. Legal costs to employers were £1,188 plus 64 hours of management and staff time at a cost of about £25 per hour making a total of £2,788. The cost of full-time tribunal chairmen and fees related to hearings was £28.2 million in 2002/03. During the period the ETS held 22,263 tribunal hearings and 756 full EAT hearings. This gives a cost per hearing of £1,225.

<sup>35</sup> In 2002/03 the Employment Tribunals disposed of 95,554 cases and the EAT disposed of 756 cases at full hearing. So roughly 1% of applications go to the EAT. If we applied this to the number of applications brought under the right to be accompanied then this would be equivalent to 2 cases per year. Taking into account that these may not be typical of all cases, then in the future 2 to 4 cases may be brought per year.

<sup>36</sup> For a description of the costs and benefits see the Regulatory Impact Assessment <http://www.dti.gov.uk/er/fworkingRIA.pdf>

regime, which are not expected to have a discernible economic impact on those employers affected.

#### Part 5 - Certification Officer

84. Clauses 44 and 45 – Allow the EAT to take into account proceedings before the Certification Officer (CO) when making a restriction of proceedings order against vexatious litigants and to allow the CO to strike out weak cases.
85. These changes will have an impact at the margin. The intended effect of the clauses is to improve the functioning of the judicial process (by ruling out weak cases). The main beneficiaries are therefore likely to be the taxpayer and trade unions – against which action is taken.
86. For illustration, a typical cost for such a case is estimated to be £1,200, consisting of the cost of a solicitor for 2 to 3 days and a trade union official for one day<sup>37</sup> (although there is likely to be significant variation).
87. Total cost savings, however, are likely to be modest. Relatively few proceedings are brought against trade unions at present, though they have increased since the Act's provisions came into effect in 1999.<sup>38</sup>
88. Clause 46 – This clause provides that on the amalgamation of two or more unions that the amalgamated union will be automatically listed by the Certification Officer. Where all of the amalgamating unions have a certificate of independence, the Certification Officer will also issue the newly amalgamated union with a certificate of independence. Where any of the amalgamating unions do not previously have a certificate of independence, the amalgamated union will be treated as it would at present. The benefits would include the saving for the union of the prescribed fee for a certificate of independence. This currently costs unions a fee of £3,891<sup>39</sup> plus the time taken by union officials to complete the application form (It is assumed that this takes two days). Over the period 2000/01 to 2002/03 there were on average two mergers or transfers of engagement each year. Therefore the savings to unions would be very modest overall, but relatively significant to individual unions.
89. Clause 47 – This clause provides that appeals (to the EAT), against a decision of the Certification Officer in cases involving the listing of unions or the issuing of certificates of independence, may only be made on points of law. This measure is unlikely to have any significant

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<sup>37</sup> The average weekly salary of a solicitor is £923 (source New Earnings Survey 2003). We apply an additional factor of 2 to take into account non-wage labour costs including overheads. The costs of a union official is assumed to be £130 per day. The total savings is therefore  $(3/5 \times £923 \times 2) + (£130) = £1,238$ .

<sup>38</sup> In 2002/03 the Certification Officer issued 28 decisions. This compares with 57 in 2001/02 and 48 in 2000/01. Only a small minority of complaints have gone to a hearing where the complaints may have been misconceived or had very little chance of success.

<sup>39</sup> See "Annual Report of the Certification Officer 2002-03" available on <http://www.certoffice.org>

cost impact on either party. There have only been two appeals to the EAT against decisions of the CO between 1996 and 2001<sup>40</sup>.

### Part 5 – Miscellaneous

90. Clause 48 – Election of union presidents. At present union presidents must be elected via a secret postal ballot of the union members. This means that the president may have to be elected twice, to his position as a member of the executive, and also to post of president. This clause removes the requirement for a union president to be elected by a secret postal vote of the entire membership provided they are already an elected member of the union executive. Most union presidents are members of their executives before they are elected president. For a union with 1,500 members the costs savings of not having to hold an extra ballot would be about £750 to £1,125.<sup>41</sup>
91. Clause 49 – This clause allows trade unions and employers' associations to use auditors from incorporated firms. This is likely to have modest cost savings. Under this proposal, unions would not have to undertake tendering processes should their accountants incorporate and thus become ineligible. The cost saving is estimated to be around £1,000 per union.<sup>42</sup> There may be further benefits in allowing unions to access a larger pool of the auditing market, bringing with it more variety in the services that are on offer.
92. Clause 50 – statutory ballots (also see paragraph 61) – At present the Trade Union and Labour Relations (Consolidation) Act 1992 provides that all statutory union ballots (e.g. industrial action, political fund ballots, mergers etc.) must be by post. The Better Regulation Task Force recommended that a wider range of balloting methods should be employed, e.g. telephone and internet voting. They suggested that independent scrutineers of ballots could be given discretion to decide which method should be used, when satisfied that new methods of balloting are safe, fair and secure. The Government's policy is to encourage non-traditional forms of voting, where appropriate. However, because it is not yet clear that such alternative methods are safe and secure, the Bill provides a power for the Secretary of State to change balloting methods, by order, once there is evidence that the new methods are fair and safe.
93. If this power were to be activated, the secondary legislation required would be subject to a further Regulatory Impact Assessment. It is envisaged that the independent scrutineers would not order electronic voting, if it were substantially more costly than existing means.

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<sup>40</sup> Both cases involved certifications of independence.

<sup>41</sup> Assuming that the unit cost of a ballot is 50-75p.

<sup>42</sup> We assume that this takes two days of a union finance officer, one day of an administrative support officer and one day of a union representative's time. The cost of this time is estimated as the wages (from the New Earnings Survey) plus a margin of 30% to take into account non-wage costs. Each employers' association would also benefit by a similar amount.

### Provision of Money for Trade Union Modernisation

94. Clause 51- This clause provides a legislative basis for the Secretary of State to spend money to modernise unions. It is the Government's intention to use this provision to establish a Union Modernisation Fund.
95. The Fund will enable the Government to support modernisation initiatives such as training union representatives in workplace dialogue on issues other than collective bargaining and individual rights and supporting reviews of internal union structures and organisation and implementation of efficient management systems. It will also help to increase participation in union activities by members, by improving communications between unions and their members, supporting statutory and non-statutory balloting and increasing the diversity of union organisation (in terms of women, ethnic minorities and other groups).
96. The Fund will seek to support activities that are additional to current practice, and would not have otherwise occurred in the absence of the Fund. The purpose of the fund is not to finance day-to-day activities of unions on recruitment or, collective bargaining. The Fund is not intended to cut across or duplicate existing union support mechanisms.
97. It is intended that between £5 and 10 million will be set aside for the Union Modernisation Fund with spending aiming to start in 2005/06. Financing will be conditional on whether such activities will contribute to the modernisation of unions. The figure of £5 to £10 million is based in part on experiences with the Partnership at Work Fund. Unions spend about £800 million each year. Assuming 5% of that figure - about £40 million - represents investment by unions in their future, the Fund could support about a 10% increase in such union expenditure over a two year period. That seems a realistic target for quality projects of an innovative nature, which unions could effectively manage.
98. Unions and their members should benefit both from the payments directly provided by the Fund, and from the resultant benefits which such investment will bring in the future through modernisation.
99. We envisage little or no costs on business as a result of this measure. The Fund will be used exclusively by unions and there would be no obligation on employers to assist unions in applying for assistance or to collaborate with unions in running assisted projects. Employers should indirectly benefit from this Fund as it helps to foster improved employment relations through partnership working between professionally-run unions and business.

### Securing compliance

100. There is no evidence at present that employers or trade unions find it difficult to comply with the provisions of the 1999 Act. As the

proposed changes are mainly technical, compliance should remain high.

### Equity and fairness impact

101. The financial impact of these changes will on the whole be modest as they are mainly about making existing legislation work better. The improvements made by the Bill will benefit union members, employers, workers and those seeking statutory recognition (who work in firms with over 20 employees). However, activities that will be supported by the Union Modernisation Fund include support for increasing the diversity of union organisations (in terms of women, ethnic minorities and other groups).

102. Statistics show that women are equally likely to be members of trade unions compared with men. There is also no substantial difference between ethnic minorities as a whole and white trade union membership. Therefore, with the exception of the clause dealing with union modernisation, it seems likely therefore that the majority of Bill's changes are unlikely to have an impact on equity.

### Impact on small business

103. Small businesses are least likely to be affected by the proposed changes. Firms with less than 21 workers are not covered at all by the statutory recognition procedures. Relatively few small businesses recognise trade unions<sup>43</sup>. Only 16% of applications to CAC<sup>44</sup> came from small firms employing up to 49 employees.

104. The DTI review team met with small employers (in the East Midlands area) who voluntarily recognise or deal with a union to seek their views on the costs and benefits of collective bargaining in small firms, and to gain a better understanding of how the collective bargaining process may operate in a small firm.

105. The Small Business Service additionally interviewed a number of small employers with a range of attitudes towards trade union recognition. What emerged from both these consultations was a degree of variation between the approaches and practices of employee relations and management adopted by these employers. The Government remains of the view that while some small employers voluntarily choose to recognise unions, it would be inappropriate to impose collective bargaining on smaller firms. Employers consulted were drawn from the textiles and clothing, print and logistics sectors.

### Competition assessment

106. We have applied the Competition Filter and have concluded that neither the technical changes nor the introduction of the Union Modernisation Fund will noticeably affect the degree of competition in affected sectors.

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<sup>43</sup> The Workplace Employee Relations Survey 1998 found that out of firms with 25 to 49 employees only 14% had a recognised union.

<sup>44</sup> From 2000 to end 2002.

### Monitoring and evaluation

107. The Review drew on feedback from stakeholders together with analysis of existing management information from the CAC and Acas and relevant academic research. A combination of analysis of CAC processes<sup>45</sup>, monitoring of legal cases as and when they emerge, and review of relevant research will be used to monitor and evaluate the new proposals once they have been implemented.

### Consultation summary

108. In July 2002, the Government announced a review of the Employment Relations Act 1999. Following informal discussions with unions, employers' groups and others, the DTI published a consultation document on 27 February 2003. Copies of the consultation document were provided to those organisations with whom the Department had undertaken informal consultation, those who had expressed a prior interest in similar consultations, and other significant contacts. It was also available on the website or to order. The deadline for responses was 22 May 2003. In total, 71 contributions were received. A list of government agencies and departments that have been consulted is in the Annex.

109. A summary of the results of the review are in the background note in paragraphs 2 to 6). Further details can be found in the response document available at [www.dti.gov.uk/er/erareview](http://www.dti.gov.uk/er/erareview) .

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<sup>45</sup> A study will review the scope and content of new agreements made in the context of the 1999 Act; including, the extent they include reference to pensions, training or (non-pay) equality issues and how they feature in practice.

## Section 2: Directive to establish a general framework for informing and consulting employees in the UK (Clauses 39 and 41)

### Summary<sup>46</sup>

110. This is a summary of the partial Regulatory Impact Assessment (RIA) prepared by the Department of Trade and Industry to accompany the public consultation document '*High Performance Workplaces. Informing and Consulting Employees*'.<sup>47</sup> The purpose of the proposed legislation is to implement the European Community Directive on Information and Consultation (I&C) in Great Britain. The Directive establishes a right to new minimum standards for workforce communication and involvement in undertakings with 50 or more employees or establishments with 20 or more employees. It is to be phased in between 2005 and 2008. It is proposed that the legislation should apply at the undertaking level.<sup>48</sup>
111. Tables 3 and 4 below present the expected quantifiable costs associated with a number of different options for implementing the Directive. Costs are based on the expected number of firms that will need to set up or alter systems for informing their employees and the additional set up costs (meetings to agree and establish an I&C system) and running costs (for instance the costs of additional meetings) that this will entail.
112. Firms that employ less than 50 employees will not come within the scope of the Information and Consultation Regulations.<sup>49</sup> This significantly reduces the likely cost impact of the Directive on UK business.
85. We have estimated the likely recurring and non-recurring costs faced by UK firms with 50 or more employees under several options. Option 1 would involve doing nothing. However, the Directive has been adopted into Community law and must be implemented, so Tables 3 and 4 do not include this option. Option 2 would apply the requirements in Article 4 of the Directive to all undertakings with 50 or more employees. However this Option is inflexible, as it makes no allowance for pre-existing or newly negotiated information and consultation agreements that take account of the individual circumstances of a particular business. Under Option 3, the requirements in Article 4 of the Directive would apply to all undertakings with 50 or more employees as with Option 2, but only where 10% of the workforce has requested information and

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<sup>46</sup> For the complete version of the Regulatory Impact Assessment that accompanied the last consultation on these regulations see [http://www.dti.gov.uk/er/consultation/perf\\_work.htm](http://www.dti.gov.uk/er/consultation/perf_work.htm)

<sup>47</sup> Copies are available from DTI or online at: [http://www.dti.gov.uk/er/hot\\_topics.htm](http://www.dti.gov.uk/er/hot_topics.htm)

<sup>48</sup> An undertaking is defined as a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States.

<sup>49</sup> The legislation will therefore cover about three quarters of employees, but only 3% of businesses with employees.

consultation arrangements.<sup>50</sup> This would ensure that there is a degree of employee demand for information and consultation, but does not get around the problem of relative inflexibility and rigid structures. Under Option 4, the legislation will only impact on undertakings where there is some employee demand for information and consultation, but it also allows for the use of pre-existing agreements adapted to the individual circumstances of the undertaking concerned, or gives employers and employees the opportunity to draw up new agreements. As such, Option 4 is the most flexible of the options and imposes least cost.

**Table 3. Summary of costs for medium firms under different options\***

Costs	Option 2	Option 3	Option 4
Non-recurring cost	£68m	£29m	£26m
Recurring cost	£78m	£29m	£28m
Present value of recurring costs	£431m	£244m	£232m
Total (present value basis)**	£499m	£273m	£258m

Source: DTI estimates

Note: \*Medium firms have 50-149 employees and represent 65% of those affected.

\*\*Rounded total of non-recurring and present value over 10 years of recurring costs.

**Table 4. Summary of costs for large firms under different options\***

Costs	Option 2	Option 3	Option 4
Non-recurring cost	£45m	£20m	£19m
Recurring cost	£52m	£20m	£18m
Present value of recurring costs	£275m	£166m	£153m
Total (present value basis)**	£320m	£186m	£172m

Source: DTI estimates

Note: \*Large firms have 250 or more employees and represents 35% of those affected.

\*\*Rounded total of non-recurring and present value over 10 years of recurring costs.

113. It is expected that despite the up-front implementation costs, there will be substantial economic and social benefits from the legislation over time. Employees will gain the right to be consulted on important decisions and have access to information that could directly impact on their working lives. Employers should see gains from a better informed, more motivated and committed workforce. This should lead to lower turnover of staff and higher productivity and if employees are more willing to undertake training as a result of greater information and consultation, the result would be a more skilled workforce. These benefits are more likely to be felt under Option 4 as they allow for a more flexible approach, taking the individual characteristics of the undertakings into account and allowing existing practices that are working well to continue uninterrupted. Given the nature of these benefits, however, it is not possible to quantify them. However, we

<sup>50</sup> Under this Option, the legislation is activated if at least 10% of all employees (subject to a minimum of 15 and a maximum of 2,500 employees) in an undertaking make a formal request for information and consultation.

estimate that they are in the order of magnitude of hundreds of millions over a ten-year period.<sup>51</sup>

### Risk assessment

114. The risk that exists with the status quo is that employers and employees are not making the most of their relationship within the workplace and as such are not contributing their full potential. Approximately half of all firms in the UK with over 25 employees have a formal means of communication and consultation between employers and employees – WERS98<sup>52</sup> found that 47% of firms have (at least) a joint consultation committee at the workplace level. All other member countries of the European Union except Ireland have legislated for the provision of information and consultation systems, usually via a works council, or an equivalent type of body. This is not to say that all companies required to have a works council do so – in many countries the proportion of firms with a works council is not particularly high, especially among smaller firms (e.g. less than 60% of Dutch companies with 50 to 100 employees have established a works council) and one of the reasons frequently given by companies is that employees do not want one.

115. Given that many organisations may already have some means of employee involvement in place, the proposed legislation has provisions that allow firms with existing arrangements in place to retain them thus accounting for inherent differences amongst firms and to ensure that the legislation is applied in a less burdensome way.

### Impact on small business

116. Given that the legislation only applies to undertakings with over 50 employees, we do not expect any direct impact on small firms.

### Competition assessment

117. We have applied the Competition Filter and we believe that the competition impact is likely to be very modest, depending on the option chosen, for the following reasons:

118. The proposal will impact on all business sectors but will apply only to those businesses that employ over 50 employees. The legislation should in the longer-term help to increase the competitiveness and hence overall productivity of UK firms. However firms with I&C that compete in markets with firms without I&C may, in

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<sup>51</sup> Illustrative calculations for Option 4 based on a modest increase in productivity for those firms where there is employee demand and the ability to implement a structure that suits them, suggests that benefits may be in the order of hundreds of millions of pounds over ten years. A modest increase in productivity is defined as an annual increase rising to 0.05% per annum or a one-off productivity boost in the fourth year after implementation of 0.2%– in choosing these rates we took into account the econometric evidence from Germany on the impact of wages councils, the fact that causality can work both ways, and that if the gains were much more firms would probably be setting up structures without legislation.

<sup>52</sup> Workplace Employee Relations Survey 1998.

the short term, be at a disadvantage, as they will bear a high fixed cost, and benefits may take some time to be realised. The timing of the implementation of the legislation, however, is likely to help as larger firms will come under the legislation before medium sized firms, thus giving the latter some protection. However, firms with between 50 and 99 employees may be under some competitive pressure in 2008 compared with small firms if they have to set up I&C procedures. This is unlikely to give those smaller firms any market power though, unless they are in very niche markets.

119. Those industries with a higher proportion of larger firms will be more affected by the legislation. These include mining, quarrying, energy and water, and manufacturing. However, we do not think that there is likely to be a detrimental impact on competition, unless as explained earlier this gives small firms some market power in a small niche market.
120. The legislation is unlikely to result in barriers to entry under Options 3 and 4, as it will take some time for a workforce to trigger a demand for an I&C agreement (if they do so at all). The fixed and sunk costs of the legislation will not be triggered as the firm enters the new market. In this respect Option 4 looks the most favourable as it allows for a more gradual introduction of I&C. Option 2 would however introduce some extra sunk costs to entry into a new market.
121. The costs per firm arising from the proposals outlined in Options 2 to 4 are small and likely to be proportionate according to the size of the business (i.e. whether it is a medium sized or large business). In addition, the operation of a transitional period will enable affected current businesses to spread such costs over a period of time, lessening the impact further. Given the low costs per firm involved, the fact that these are proportionate and apply across all sectors, the proposal would not be expected to create significant concerns for competition. The proposals could result in some businesses with 50 staff seeking to reduce their staff numbers to avoid application of the requirements. However, this is unlikely to be a strategy adopted by many businesses given the low costs per firm of the proposal and the fact that reducing staff would run contrary to any benefits that could be derived from the proposal of increasing employer–employee relations.
122. Clause 40 provides for a power to implement the Information and Consultation Directive in Northern Ireland. The costs to employers in Northern Ireland of introducing legislation on information and consultation represents about 3% of the total cost to UK employers overall.
123. If a flexible approach were adopted in implementing the legislation this would mean total one off costs to employers in Northern Ireland of about £1.3 million and total annual recurring costs of about £1.4 million per year. Employers in Northern Ireland, like employers in the rest of the UK, should also benefit from a better informed, more motivated and committed workforce. Employees will gain the right to be

consulted on important decisions and have access to information that could directly impact on their working lives.

### Consultation

124. The Department of Trade and Industry took steps during 2002 to canvass the views of as many people as possible prior to drafting legislation for the Information and Consultation Directive. A discussion paper entitled *High Performance Workplaces* was published in July 2002, and comments were invited over a period of five months, ending on 11 December 2002. During the autumn a series of 13 roundtable meetings were held around the UK hosted by organizations such as TUC, Acas, CBI and other employer organizations.
125. The findings of the 2002 consultation paper *High Performance Workplaces* show that most respondents were in favour of having information and consultation in the workplace, although many stressed the importance of a flexible approach to methods of employee dialogue.<sup>53</sup>
126. A further consultation document, *High Performance Workplaces: Informing and Consulting Employees*, containing draft legislation proposals was published on 7 July 2003. The consultation period closed on 7 November.
127. Consultations on the implementation of the Directive have also been undertaken in Northern Ireland, in 2002 and 2003 respectively. The responses have been similar to those received in the equivalent consultations here, in Great Britain, and have contributed to the overall UK approach to implementing the Directive.
128. The Department is considering responses and will be publishing a revised version of the regulations during 2004.

### Monitoring and evaluation

129. The Department will monitor the take-up of information and consultation in the workplace and the extent of implementation costs through regular contact with social partners.
130. The 2004 Workplace Employment Relations Survey (WERS5) will also provide a baseline to measure the extent and type of information and consultation in the workplace before the regulations come into place. The next WERS will enable us to measure any changes that the legislation had brought about. A case study report would enable us to get a better idea of costs to business in terms of costs of setting up procedures, the running costs of meetings and other costs and benefits of the legislation. Ideally this would be done 2 to 3 years after the legislation has been implemented.

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<sup>53</sup> See chapter 2 of the consultation document *High Performance Workplace: Informing and Consulting Employees*.

## Section 3: Summary of costs and benefits

**Table 5. Summary of costs and benefits of Employment Relations Bill**

	Benefits Annual	Costs Annual	Costs One-off
<b>General</b>			
Review of ERA 1999	The changes remove potential risks of legal uncertainty or of unnecessary delay or cost that could arise from the legislation as drafted. While the resulting benefits are in aggregate likely to be relatively small, for parties that get caught by these uncertainties the resulting benefits are significant.		
<b>Employers</b>			
Review of ERA 1999	£20,000	£12,000	
Powers to legislate on Information and Consultation <sup>a</sup>	Employers should see gains from a better informed, more motivated and committed workforce. This should lead to lower turnover of staff and higher productivity and if employees are more willing to undertake training, a more skilled workforce. We estimate that these benefits are in the order of magnitude of hundreds of millions over a ten year period.	£46 million	£45 million (of which £1.2 million are familiarisation costs)
<b>Unions</b>			
Review of ERA 1999	£71,000-121,000 plus £5-10m over several years from the Union Modernisation Fund		£30,000 (familiarisation costs)
<b>Individuals</b>			
Powers to legislate on information and consultation <sup>a</sup>	Employees will gain the right to be consulted on important decisions and have access to information that could directly impact on their working lives.		
<b>Exchequer</b>			
Review of ERA 1999		£50,000 (to the Central Arbitration Committee) plus £5-10 m over several years to the Union Modernisation Fund	

<sup>a</sup> These are the costs of Option 4. Costs for Options 2 and 3 are expected to be greater and benefits are expected to be smaller. For further details see Section 2.

131. Table 5 summarises the main costs and benefits to employers, individuals, unions and the Exchequer arising from the Employment Relations Bill 2003.

Ministerial declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed by the responsible Minister

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Date.....

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## **Annex**

### **Government agencies and departments consulted**

Advisory, Conciliation and Arbitration Service  
Central Arbitration Committee  
Certification Officer  
Council on Tribunals  
Department of Constitutional Affairs  
Department for Education and Skills  
Department for Employment and Learning Northern Ireland  
Department for the Environment, Food and Rural Affairs  
Department for Transport  
Department of Work and Pensions  
Employment Appeal Tribunal  
Foreign and Commonwealth Office  
Inland Revenue  
Insolvency Service  
Law Officers  
Northern Ireland Office  
Office of the Deputy Prime Minister  
Office of the e-Envoy  
Small Business Council  
Small Business Service  
Scottish Executive  
Scottish Office  
Welsh Assembly  
Welsh Office