

Review of the Employment Relations Act 1999

Department of Trade and Industry

February 2003

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Foreword by the Secretary of State for Trade and Industry

In 1999 we introduced the Employment Relations Act in order to ensure that the UK's system of employment law was based on fairness, flexibility and partnership. Through the statutory recognition procedure and other measures, the Act re-shaped important aspects of employment and trade union law. For the first time in a generation unions, were given legislative support to establish themselves as key partners at the workplace, working with employers for greater productivity and better work practices. We have built on the Act subsequently – for example, by introducing more family-friendly measures.

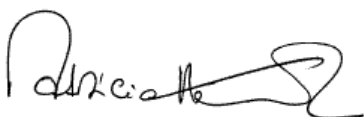
Over three and a half years on, we have honoured our commitment to look again at how the Act is operating. The timing of this Review is sensible. Though we worked closely with both employers and trade unions in drafting the Act, we knew we were legislating in difficult territory. So, we wanted an early check to see if the Act was working.

The findings of this Review show one thing more clearly than any other: despite predictions to the contrary, the Act has been a resounding success. The Act's provisions have been workable. With few exceptions, both employers and employees have accepted it as a reasonable settlement. A new culture at work is appearing.

However, the Review has identified some areas where the legislation is unclear or has left loopholes. We are therefore proposing some limited, though necessary, changes to an otherwise sound and effective legal framework.

We have also taken the opportunity of this Review to assess the implications of last July's judgment by the European Court of Human Rights in the *Wilson and Palmer* case. We have made proposals to enhance trade union rights, whilst retaining key freedoms of employers and workers to enter individualised contracts.

We plan to come forward with legislation during the life of this Parliament to implement the Review's recommendations. To help us draft this Bill, I would greatly welcome your views on the Review's findings and the proposals it contains.



Patricia Hewitt

Summary

This document sets out the findings of the Government's review of the Employment Relations Act 1999.

The review was announced by the Secretary of State for Trade and Industry on 11 July 2002, in line with the Government's commitment to review the Act, first made in the *Fairness at Work* White Paper. The Terms of Reference of the review are as follows:

The Government has reformed the labour market to build a durable and fair basis for constructive employment relations. By a range of measures, the UK labour market is achieving high levels of employment and combining fairness and flexibility.

In line with commitments made in the 1998 Fairness at Work White Paper, the Government will review the operation of the statutory union recognition and derecognition procedures in the Employment Relations Act 1999. The review will also look at the operation of the other provisions of the Act.

The review will be carried out by the DTI through full public consultation. The DTI will complete this task to a timetable enabling any legislative recommendations which the review may make to be introduced within the lifetime of this Parliament.

The review has found that the Act is working well. It therefore concludes that there is no case for making wholesale changes to the legislation. However, the review has identified some areas where there are problems and anomalies in the way the Act works. In many of these areas, the review puts forward firm proposals for change. On other issues, the review identifies a case for change but the Government wishes to reflect further before finalising its proposals.

The Government seeks your comments on the findings of the review and the proposals to change the legal framework, including those areas where the Government has yet to finalise its proposals.

The DTI has assembled a large amount of evidence upon which to base the review's findings. The review team met over twenty organisations to gather views and information about the Act's effects.

The Government asks you to consider whether you have any other evidence which the review should take into account.

The Government is committed to reducing regulatory burdens where this is appropriate. Many of the proposals in this document are intended to improve, simplify and clarify the operation of the legislation. We have undertaken a Regulatory Impact Assessment (RIA) analysing the effects of these proposals, should they be implemented. The overall conclusion of the RIA, set out in Annex D of this document, is that the changes would directly affect a small number of employers, and the benefits of the package would certainly exceed any associated compliance costs.

The Government would welcome your views on the analysis and information presented in the RIA, and further seeks information to help quantify the costs and benefits described in the Assessment.

You should send your responses by 22 May 2003 to:

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It is standard practice to make publicly available the names of respondents together with their responses, unless you indicate otherwise.

Trade Union Recognition and Derecognition

Chapter 2 of the consultation document examines the statutory procedure for the recognition (or derecognition) of trade unions for collective bargaining purposes. This was the centrepiece of the Act. The document gives a detailed analysis of the 236 applications which had been made to the Central Arbitration Committee (CAC) for statutory recognition, and other applications

made under the statutory process by the end of 2002. In addition, it presents information about the resolution of union requests for recognition outside the statutory framework.

The review has found that the statutory procedure has worked extremely well since it was introduced in June 2000.

It has encouraged the voluntary settlement of recognition claims, either following a CAC application for recognition or, more typically, without any CAC involvement. Consequently, while the CAC had made 52 awards for recognition by December 2002, a thousand deals for recognition have been voluntarily agreed between employers and unions since 1998. Over 700 of these have been reached since the statutory procedure was introduced.

The procedure has been workable and resolved claims efficiently within reasonable periods of time. For example, it has taken the CAC a median time of just 19 weeks to resolve the more complex cases which proceeded to a ballot or automatic recognition; during the life of the 1970s recognition scheme, the average time to conclude a case was over a year.

Inter-union disputes – another major problem with the 1970s procedure – have been rare and have not undermined the running of the statutory procedure.

Parties to CAC cases are generally content with the operation of the procedure. According to CAC data, 79% of parties responding to requests for feedback have expressed satisfaction with the process. Legal challenges – in the form of judicial reviews of CAC decisions – have been few and, in each one, the court has rejected the application or determined that the CAC had acted properly.

Parties have generally accepted the outcome of CAC cases. Where recognition has not been awarded, unions have accepted the decision and not resorted to other tactics such as industrial action to secure recognition. Where recognition has been awarded (or where it has been voluntarily agreed without using the statutory procedure), the employers and unions concerned appear to be moving forward into the bargaining process and establishing normal working relationships. Though it is too early to judge the overall long-term success of these relationships, some examples of productive and mutually beneficial working relations that have resulted from recognition are set out in Chapter 2 of this document.

Proposals to amend the statutory procedure and associated legislation

The Government has a number of proposals which would facilitate the smooth running of the statutory procedure, building on the considerable achievements to date. It also has proposals to clarify certain aspects of the procedure which have caused interpretive difficulties.

Top up recognition - The procedure should be amended to make it clear that unions can apply for top-up recognition where their existing voluntary agreement does not include *any one or more* of pay, or hours, or holidays. This was always the policy intention but the current wording of the procedure is ambiguous on this point.

CAC checks of union membership - The procedure should place a general requirement on both the employer and the union to co-operate with a confidential CAC membership check, ensuring full disclosure to the CAC of employee and union membership data. These checks are an essential component of the statutory procedure, but at present there is no explicit obligation on parties to assist the CAC in undertaking this work. Similar obligations would apply to assist the CAC in checking petitions.

Acas's role in non-statutory recognition - By design, Acas's role within the statutory procedure is very limited. This frees Acas to concentrate its efforts on resolving union claims for recognition via the voluntary route. Acas's work in this area has expanded three-fold since 1997, and often involves arranging membership checks and recognition ballots. To reduce the administrative complexity of performing these tasks, the law should be amended to place Acas-run ballots and membership checks on a clear statutory basis.

Definition of union membership - There is no definition of union membership given in the procedure. The CAC takes union membership to be a person who meets the definition of membership in the union's rule-book. This approach has worked satisfactorily, but the Government seeks views on the treatment under the procedure of individuals who receive free or reduced fee union membership.

Petitions - Employers and, more frequently, unions have submitted petitions to the CAC as evidence of worker attitudes towards recognition. This material is used by the CAC in making admissibility decisions. The procedure is silent on the way such petitions should be assembled. The review concludes there is no need to complicate the procedure further by specifying the form and content of petitions. However, it would welcome comments on whether there may be

value in further guidance being available from the CAC for parties considering the submission of a petition.

Disclosure of information to unions - The procedure should place a requirement on the employer to disclose to the union the number of workers in the union's proposed bargaining unit, together with their grade and location, at the stage where the parties are obliged to enter negotiations to agree the bargaining unit. This requirement would encourage openness and would increase the possibility of successfully concluding a voluntary settlement of this key issue.

Time limits - The various time limits within the statutory procedure have worked as intended in driving the process forward and discouraging delay. The Government proposes to build on this, by ensuring the CAC is given a discretionary power to reduce the 20-day period set aside for the employer and the union to negotiate the bargaining unit. This would speed up the CAC's consideration of the minority of cases where there is no prospect that negotiations would be fruitful.

Detriment and dismissal - The law currently provides individual workers protections against unfair dismissal and detriment for supporting recognition under the statutory procedure. Unions have alleged intimidation and victimisation by employers of workers during the course of some applications to the CAC, with a view to undermine support for recognition. They have called for the law to offer wider protections to workers. The Government will consider this matter further and keep under review the operation of the law in this area.

Union access - Union access to the workers in its proposed bargaining unit can be very limited prior to the balloting period. It is proposed that the union should be granted some access at an earlier stage of the procedure once the CAC has determined that the union's application is admissible. The form of this access would be limited to the distribution of written union material by a qualified independent person. Thereby, the workers who are the subject of an application can be informed by the union about an issue which closely involves them, while withholding their individual identities from the union

Determination of bargaining units - The review has concluded that the criteria for determining the bargaining unit have been readily applicable across the wide variety of circumstances which CAC cases have so far presented. The CAC has managed to give decisions within reasonable time periods, while involving both parties fully in the process. This is a significant achievement

given the pivotal, and sometimes complex, nature of the decision. The procedure has ensured that bargaining units are compatible with effective management, the overarching criterion in deciding their appropriateness. In about a third of cases the union's proposed bargaining unit was re-defined by the CAC to ensure compatibility. The Government believes that it would be helpful to clarify in the legislation the CAC's decision-making procedure in deciding whether the proposed bargaining unit is compatible with effective management. This would make clear that the employer's comments on the union's proposal and any counter proposal are taken into account by the CAC in determining whether the union's proposal is compatible with the statutory criteria.

CAC ballots - The Government has two proposals in this area. First, a specific provision should be added to the procedure giving a postal vote to those workers who are unable to attend their workplace on the day of a workplace ballot. Because no provision of this type currently exists, workers who are on leave or sickness absence may be denied a vote. Second, the Secretary of State should be given the reserve power to enable CAC ballots to be carried out by e-voting methods. This type of balloting has not yet been fully tested, but it is likely to establish itself as a secure, cost-effective and widely accessible method in the future.

Core issues for collective bargaining - Where the CAC awards recognition, the employer must, as a minimum, bargain about the core topics of pay, hours and holidays. The parties are free to bargain about other issues as they wish. The review concludes that this arrangement suits the fallback status of the statutory procedure. The evidence confirms that bargaining about training and (non-pay) equality issues is far from widespread, and they cannot yet be regarded as core topics. The Government welcomes employee involvement in these issues but does not believe that they should feature in collective bargaining through the statutory scheme. It therefore proposes to retain pay, hours and holidays as the core bargaining issues, in the absence of a clear definition in the Act.

The pensions partnership between employers and workers is crucial to the future of pensions. The Government therefore welcomes the fact that increasing employee interest in pensions is moving them up the collective bargaining agenda. At present, however, most recognition agreements – the great bulk of which remain voluntary – still do not include pensions. So, at the present time, including pensions as a core topic with respect to the specific fallback statutory procedure would risk the latter becoming more comprehensive in scope than voluntary bargaining agreements. That said, the Government looks forward to a time when more

widespread partner engagement on pensions would make it a suitable core topic for the fallback statutory procedure.

It is therefore proposed, first, to clarify that pensions shall not be regarded as 'pay' for the specific purposes of the statutory procedure for the present time. At the same time, it is proposed that the Secretary of State should be given an order-making power to add pensions to the three core topics, with a view to exercising this power when there is evidence that typical practice in recognition agreements is for pensions to be included as a bargaining topic.

Change of employer identity - The procedure should clarify the status of an application to the CAC for recognition, or a subsequent award of recognition, where the identity of the employer concerned has changed through a business transfer or for some other reason. Currently, the procedure is silent on the issue. It is proposed that the new employer should be treated as the original employer in both cases.

Associated employers - The review notes the CAC has encountered difficulties in deciding bargaining units in cases where associated employers operate from the same premises and where it may be unclear who employs the workers involved. The Government invites views as to whether the procedure should expressly allow the workers of associated employers to be classified within the same bargaining unit. This is a complicated issue which might have far-reaching effects if unlimited in its scope, and respondents are asked to consider what restrictions, if any, should be exercised on its use.

Technical changes - The review has identified a number of technical deficiencies and logical inconsistencies within the procedure. These are minor but it is proposed they should be corrected.

Power to amend the statutory procedure - The Government proposes that the Secretary of State should be given a power to amend the statutory procedure by order where requested to do so by the CAC. This would ensure that technical deficiencies in the long and complicated procedure could be amended more quickly.

The document examines other proposals made by interested parties to change the statutory procedure. After careful consideration of the available evidence, the review concludes that there is no persuasive case to change any other aspects of the statutory procedure based on experiences to date. For example, there is no evidence of a large pent-up demand for

recognition in organisations employing fewer than 21 workers: under 5% of CAC applications concerned organisations employing 21-30 people. It is the Government's policy to retain a small firms threshold on the basis that the statutory system is inappropriate for the smallest firms. Given this position, the existing level appears appropriate.

The 40% balloting threshold has worked – as intended – to demonstrate strong evidence of positive support for recognition. This has greatly contributed to employer acceptance of ballot results. The threshold is not set too high. There has only been one case where a union has achieved a simple majority in a ballot without also reaching the 40% threshold.

The provisions concerning so-called “automatic” recognition have operated – as intended – to fast-track awards where a majority of the workers are union members. The evidence also suggests that the procedure is right to give the CAC some discretion to order a ballot even though this membership threshold is exceeded. By the end of 2002, the CAC had ordered ballots in these circumstances on seven occasions, of which the unions won four.

Other Aspects of trade union and industrial action law

Chapter 3 examines the operation of those provisions in the Act which changed other aspects of trade union and collective labour law. At the same time, the chapter assesses the implications of the judgment reached by the European Court of Human Rights in the *Wilson and Palmer* case.

Discrimination on grounds of trade union membership or non-membership

The Act corrected an anomaly in the law by making it unlawful to discriminate by omission on grounds of union membership or non-membership. The review concludes that these extra protections have worked smoothly and are generally viewed as reasonable and sensible extensions of the pre-existing law.

In July 2002, the European Court of Human Rights (ECHR) ruled in the *Wilson and Palmer* case that UK law was in violation of Article 11 of the European Convention on Human Rights, which concerns the right of freedom of assembly and association. The discriminatory acts which gave rise to this case took place over ten years ago. The ECHR judgment was made on the basis of the law at that time. Circumstances have changed significantly since then. The Government has introduced a range of measures – not least in the Act itself – to strengthen representational

rights at work and union rights more generally. Also, the climate of employment relations has greatly improved since those days. Few, if any, employers would now give inducements to workers to relinquish union representation. Overtly anti-union behaviour is relatively rare. These are real advances.

However, the review concludes that parts of UK law, especially elements of the pre-1997 law relating to union membership rights, must be amended to achieve full compliance with the European Convention on Human Rights, while simultaneously ensuring that necessary flexibilities in contractual relations are maintained. The Government proposes this should be done by:

- a) repealing section 146(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (the so-called Ullswater Amendment);
- b) establishing a clear positive right for members of independent unions to use their union's services;
- c) amending the law to specify that the entering of individualised contracts would not constitute unlawful union discrimination against those union members not offered them, provided there is no pre-condition in the contracts to relinquish union representation; and
- d) repealing Section 17 of the Employment Relations Act 1999.

Trade union blacklists

The review has not discovered evidence that blacklisting is currently taking place. In line with its better regulation principles, the Government is reluctant to introduce unnecessary regulations. However, the Government proposes to put contingency plans in place which will ensure that regulations can be introduced swiftly if there is evidence of the re-appearance of blacklisting. This involves the immediate publication for consultation of the draft regulations. A separate consultation document containing these draft regulations has been published to coincide with the launch of this review document.

Industrial action ballots and notices

The review has examined the effects of the changes to industrial action law which the Act introduced. These were minor changes which left the essential features of industrial action law in place.

The Act's provisions have had a positive effect overall. They have helped parties re-open negotiations to avoid strike activity and reduced the scope for minor legal disputes over technicalities. The number of stoppages is at an all time low, although since a few of these involved a large number of workers, days lost through strikes have risen during 2002.

The review concludes that the essential features of strike law should remain unchanged. However, there are two areas where the Act's provisions might be amended further to reduce the complexity of industrial action law, while protecting the legitimate interests of union members and employers.

First, the law on notices is complex and gives rise to costly legal actions on minor points of law. The attempt to simplify this law in the 1999 Act has made the law even more complex and burdensome. This was not the intention. The Government proposes to make various changes to the law to ensure that simplification is achieved.

Second, the Act provides for the courts to disregard small accidental failures in the conduct and organisation of ballots. These arrangements have worked well and have reduced the scope for legal actions over minor technical breaches of legislation. However, as there remains considerable scope for unnecessary legal wrangling in the application of the law, the Government proposes to extend the ability of the courts to disregard small accidental failures.

Dismissal of striking workers

The Act introduced new protections from dismissal for striking workers. Since the Act's provisions came into effect, there has been just one Tribunal decision under this new jurisdiction. In this case (*Mr J Davies v Friction Dynamics Ltd*), the Tribunal decided that the dismissal had been unfair because it had taken place within the 8-week period. It also found that the employer had failed to take all reasonable procedural steps to resolve the dispute, as required by the Act. This was a test case; many other sacked workers at Friction Dynamics have also submitted claims for unfair dismissal. The Tribunal's decision is being appealed by

the employer. It is therefore too early to draw lessons from it. However, we will keep this case under review as it develops to see if any lessons should be drawn from it.

On the evidence so far available, the Government proposes to retain the 8-week period during which dismissals are automatically unfair. Most strikes are short-lived. Estimates suggest that around 1 dispute in 10 lasts longer than 8 weeks.

The Friction Dynamics case involved an alleged lock-out by the employer. The Government is concerned that the Act's protections might be weakened by the use of the lock-out. In particular, the employer might try to sit out the period of automatic protection by locking out the workforce for the bulk of the 8-week period, preventing a return to work. The Government seeks views on the idea that lock-out days should not count for the purposes of the 8-week period.

Right to be accompanied at disciplinary and grievance hearings

This new right was based on the widespread practice of allowing a chosen companion to attend these key meetings. The Acas Code of Practice on Disciplinary Procedures, which was first introduced in the 1970s, advised employers to allow a companion to attend hearings. The evidence suggests that the new right has operated smoothly since it was introduced in September 2000. Compliance appears high. In the first two years of its operation, only 136 applications were made to Tribunals of an alleged breach of the right. This is low given the very large number of qualifying hearings which occur each year.

However, evidence has been put forward that employers are unclear about the extent to which companions are permitted to speak at these meetings. This has led to further disagreements and misunderstandings arising. The Government therefore proposes to clarify the law setting out the circumstances where the companion is allowed to address hearings.

There is currently no right of appeal to the Employment Appeal Tribunal against decisions taken by Employment Tribunals concerning complaints about the right to be accompanied. It is proposed that a right to appeal should be established.

The institutional framework

Chapter 4 of the document assesses the operation of those provisions in the Act relating to the Central Arbitration Committee (CAC), Advisory, Conciliation and Arbitration Service (Acas), the

Certification Officer (CO), the Commissioner for the Rights of Trade Union Members (CRTUM) and the Commissioner for Protection Against Unlawful Industrial Action (CPAUIA).

The overall conclusion is that the changes to the functions of these bodies have worked as intended. In particular, the review gives a positive assessment of the way the CAC has undertaken its new duties under the recognition procedure.

The Act significantly extended the role of the CO in determining complaints by union members against their union. This has resulted in some increase in complaints to the CO, though their number has leveled off in recent months. The review concludes that whereas most complaints have some basis to them, the CO should be given additional powers to dispose of weaker cases more efficiently. The Government therefore proposes

- to give a power to the CO to strike out weak cases;
- to extend the CO's discretion not to meet the attendance costs of applicants in those cases where there is little prospect of success; and
- to allow the Employment Appeal Tribunal to take into account litigious activity before the CO in using its power to issue restriction of proceedings orders against vexatious litigants.

Other issues

Chapter 5 of the document reviews the various other provisions of the Act. Many of these provisions have been the subject of other reviews or policy initiatives. The Government has no proposals to make in these areas within the framework of this review, except to clarify the wording of the Secretary of State's power under section 23 of the Act to confer employment rights by regulation. In other areas, the provisions covered minor or technical changes to the law, which also do not require any adjustment.

The Act contained provisions which amended the awards which Tribunals could make in unfair dismissal and other jurisdictions. In particular, it increased the ceiling of the compensatory award for unfair dismissal from £12,000 to £50,000. These changes have worked as intended and there is no evidence that higher compensatory awards have had a significant effect on the total number of Tribunal claims or have significantly increased the median level of awards (most awards are below £3,500). The simplification of the award structure has generally worked well,

though a few workers – trade unionists who were previously eligible for special awards – may have received somewhat lower compensation as a result.

There are few cases of non-compliance with a re-employment award – the review is aware of only 2 cases in 2001/02 - but where they do not comply, employers should face a significant penalty for what is in effect a contempt of court. The current amount may be too low. The Government seeks views on whether employers should face a stiffer penalty in the form of higher additional awards for non-compliance.

Issues surrounding trade union law raised by the Better Regulation Task Force

Annex C of the document discusses a number of suggestions put forward by the Better Regulation Task Force (BRTF) to amend aspects of trade union law where the current regulation might impose unnecessary or burdensome restrictions on union behaviour.

In response to these ideas, the Government proposes

- (a) to remove the requirement for union presidents to be elected by a secret postal ballot of the entire membership, provided they are already elected members of the union executive;
- (b) to give the Secretary of State a power to change by order the balloting method used in statutory union ballots and elections. Currently, these secret ballots must be conducted by post. This power would give the flexibility needed to widen the range of balloting methods, when there was evidence that the method was sufficiently developed to apply safely and economically to this type of ballot; and
- (c) to retain the requirement on unions to hold review ballots on their political funds at least every ten years. These ballots serve an important democratic function and ensure that union members can collectively authorise their union's involvement in political activities. However, the Government is aware that the law on political fund ballots (and on other statutory union ballots and elections) is complex. The Government considers these ballots and elections should remain covered by statutory provisions but it invites views on simplifying the burden they impose.

Chapter 1: Introduction

1.1. This document sets out the findings of the Government's review of the Employment Relations Act 1999 (the Act). It seeks your comments on the findings and the options for change set out in the following chapters.

1.2. The review was announced by the Secretary of State for Trade and Industry on 11 July 2002, following commitments to review the Act, first made in the Government's *Fairness at Work* White Paper of 1998. The Terms of Reference of the review are as follows:

The Government has reformed the labour market to build a durable and fair basis for constructive employment relations. By a range of measures, the UK labour market is achieving high levels of employment and combining fairness and flexibility.

In line with commitments made in the 1998 *Fairness at Work* White Paper, the Government will review the operation of the statutory union recognition and derecognition procedure in the Employment Relations Act 1999. The review will also look at the operation of the other provisions of the Act.

The review will be carried out by the DTI through full public consultation. The DTI will complete this task to a timetable enabling any legislative recommendations which the review may make to be introduced within the lifetime of this Parliament.

1.3. You can submit your comments by 22 May 2003 via post or email to:

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It is standard practice to make publicly available the names of respondents together with their responses, unless you indicate otherwise.

1.4. The Employment Relations Act 1999 is a key piece of employment legislation. It represents a major step towards delivering the strategy set out in *Fairness at Work*. The policies set out in the white paper were designed to support a flexible and fair labour market and to further the Government's objectives of promoting full employment, productive workplaces, and fair standards at work.

1.5. Underpinning this, the Government's publication *Full and fulfilling employment: creating the labour market of the future* set out the policies to help achieve these objectives. The Government has worked to establish a **stable macro-economic environment** based on low inflation, sound public finances and competitive markets. It has enhanced **incentives to work** through reforms to the tax and benefit system, measures to promote flexible working and support working parents, and the introduction of the New Deal and the National Minimum Wage. It has adopted measures to **address skills shortages** through improving basic education and training, and seeking to foster a culture of lifelong learning; and it has introduced **fair standards for employees** and a **better framework for industrial relations** designed both to promote fairness and flexibility in the workplace and to contribute to productivity. Fair standards foster trust and commitment between employers and employees, and the Government is introducing new protections for working parents and people who work on fixed term or other atypical contracts, and providing new safeguards against discrimination at work.

1.6. The success of these policies is demonstrated by record employment rates – 1.25m more than five years ago – which are high by international standards. Nevertheless, there is a continuing productivity gap. UK productivity remains lower than that of France and Germany, and substantially lower than that of the US. At the same time, the number of strikes is at its lowest level since the 1930s, although the number of days lost to strikes rose due a small number of disputes involving many workers.

1.7. The Government believes that productivity can be improved by employers and employees working together, balancing rights and responsibilities. DTI consulted last year on implementing the EU directive on informing and consulting employees (for details, please see the paper *High-performance workplaces* at <http://www.dti.gov.uk/er/consultation/proposal.htm>.)

1.8. Unions have a key role in partnership working. While disputes do – and will continue to – occur, many employers and unions are forging new partnerships. There are many models for competitiveness, and the Government believes partnership is one way that companies can enhance their performance and profitability and so our national prosperity.

1.9. For a long time, a great many unions and employers have worked together under voluntary recognition arrangements. The best recipe for a lasting partnership is usually a relationship developed between employers and workers without any outside assistance. Before 1999, however, there were many workplaces where the workers wished to have a union recognised by their employer but were frustrated. Disputes over recognition were often among the most severe and disruptive. The Employment Relations Act provided for unions to be recognised by employers where the majority of the workforce want this.

Review of the Act

1.10. To achieve its labour market goals, the Government must understand how employment legislation is working in practice. The Act represented particularly important and far-reaching legislation, and contained a range of measures to modernise employment relations. A statutory requirement was placed on employers to recognise a trade union where the majority of the workforce want a union to bargain collectively on their behalf.

1.11. As well as providing for statutory recognition, the Act amended the law in several other areas. It introduced new protections from dismissal for workers taking industrial action. Workers won a new right to be accompanied to disciplinary or grievance meetings. And further protections were introduced against discrimination on the grounds of union membership.

1.12. The Act is complex and detailed. It was the product of extensive consultations and dialogue with employer bodies, unions and other organisations. This occurred both prior to the publication of *Fairness at Work* in May 1998, and throughout the drafting and Parliamentary passage of the Employment Relations Bill. The statutory recognition procedure was itself based on a helpful joint CBI/TUC paper presented to the Government in 1997, which scoped the issues involved in devising a workable and durable policy.

1.13. This review has looked at the impact of the Act since 1999, studied the available evidence and listened to those organisations most closely affected by the Act in operation. Some issues raised with us were not within the remit of the Act, and hence the review – such as the qualifying period for unfair dismissal claims. The key finding of the review is that the Act is working well. It has improved employment standards at work in a way which is consistent with effective management, and has fostered productivity; it has promoted legal certainty and benefited the overall climate of employment relations. As such, it has avoided the pitfalls of

earlier legislation (which led to prolonged legal challenges and industrial discontent), and vindicated the consultative process which developed its policies. This review has not demonstrated a case for significant changes to the Act or to its main provisions and thresholds.

1.14. Notably, the Act has encouraged the voluntary settlement of recognition claims, either following an application to the CAC or, more typically, without any CAC involvement. Consequently, while the CAC had made 52 awards for recognition by December 2002, a thousand deals for recognition have been voluntarily agreed between employers and unions since 1998.¹ Over 700 of these have been reached since the statutory procedure was introduced.

1.15. The statutory procedure has been workable and resolved claims efficiently within reasonable periods of time. For example, it has taken the CAC a median of just 19 weeks to resolve those cases which proceeded to a ballot or automatic recognition. During the life of the 1970s recognition arrangements, the average time to conclude a case was over a year.

1.16. Inter-union disputes – another major problem with the '70s procedure – have been a rarity and have not undermined the running of the statutory procedure.

1.17. Parties to CAC cases are generally content with the operation of the procedure. According to CAC data, 79% of parties responding to requests for feedback have expressed satisfaction with the process. Legal challenges – in the form of judicial reviews of CAC decisions – have been few and, in each case, the court has rejected the application or determined that the CAC had acted properly.

1.18. Parties have generally accepted the outcome of CAC cases. Where recognition has not been awarded, unions have accepted the decision and not resorted to other tactics such as industrial action to secure it. Where recognition has been awarded (or where it has been voluntarily agreed without using the statutory procedure), the employers and unions concerned appear to be moving forward into the bargaining process and establishing normal working relationships. Though it is too early to judge the overall long-term success of these relationships, some examples of productive and mutually beneficial working relations that have resulted from recognition are set out in Chapter 2 of this document.

¹ TUC 'Focus on recognition' (2003)

1.19. Nevertheless, the Government believes there are some areas where the Act has not worked as intended or could be simplified and clarified. Based on the evidence of the review, this paper outlines some options to correct problems and anomalies in the union recognition process, to amend aspects of trade union law, and to clarify some of the new rights the Act implemented. Proposals for change made in this paper do not include those areas of the Act which have been reformed since 1999 or where reform is being taken forward separately. (For example, parental rights were reviewed in the green paper *Work and parents: competitiveness and choice*, with changes introduced in the Employment Act 2002.) It is not the purpose of the review to cut across work already underway.

1.20. The paper accordingly breaks down into the following chapters. Chapter 2 assesses the operation to date of the statutory recognition procedure, and addresses a number of related issues and options for reform. Chapter 3 is concerned with other aspects of Trade Union or 'collective' law, and identifies where there is a case for change. Chapter 4 looks at the institutions involved, and examines how their operations might be amended. Chapter 5 contains all other subjects in the Act, pointing where appropriate to other sources of information or government work on assessment.

1.22 In addition to the main review, Annex C of this document discusses a number of suggestions put forward by the Better Regulation Task Force (BRTF) to amend aspects of trade union law where current regulation might impose unnecessary or burdensome restrictions on union behaviour.

1.22. The options outlined in this paper will be assessed according to their probable impact on the Government's labour market policies outlined above. The Government is committed to acting within the life of this Parliament. It will rigorously apply the principles of better regulation and will take forward non-regulatory alternatives where appropriate. A Regulatory Impact Assessment of the proposals within this document can be found at Annex D.

Chapter 2: Statutory recognition

Overview

2.1. The centrepiece of the Act is the establishment of a statutory procedure whereby unions can be recognised or derecognised for collective bargaining purposes (sections 1, 5 and 6; and Schedule 1 of the Act). A brief summary of how the process of statutory recognition operates is given at Annex A.

2.2. The Government's approach was to create a mechanism which enabled recognition of the union by the employer where the majority of the relevant workforce wanted this. The procedure was designed to balance the desire of a workforce to have a union bargain collectively on their behalf with the need for effective management. But, equally importantly, its aim was to encourage the voluntary settlement of recognition claims wherever possible. Voluntary resolution is widely acknowledged by all parties as the preferred route. The statutory procedure was therefore drafted as a fallback system to be used as the exception rather than the rule.

2.3. A further consideration when establishing the statutory procedure was the desire to avoid the difficulties which previous attempts to legislate in this area had encountered. The arrangements introduced by the Act have not suffered from the type of problems which so bedevilled the previous attempt in the 1970s to legislate in this area. This achievement should not be taken lightly. The 1970s approach failed because

- it could not deal effectively with inter-union disputes;
- it confused the role of the body (Acas) undertaking the statutory procedure;
- Acas had inadequate powers to test the views of the workforce;
- it suffered major challenges in the courts; and
- serious delays occurred in processing cases.

So in designing the new statutory procedure, conscious attempts were made to avoid these failings. For example, the procedure gave responsibility for the statutory procedure to one body

– the Central Arbitration Committee (CAC) – with Acas remaining separate to this process, fulfilling its traditional role of conciliating voluntary settlements.

2.4. On the evidence of its first two and a half years in operation, the procedure is, overall, working well. In particular, the large majority of recognition claims have been settled via voluntary resolution. There is clear evidence of a general rise in voluntary recognition agreements. TUC surveys have logged a thousand new instances of voluntary recognition since 1998, with three times more recognition agreements in 2000/2001 than in 1999/2000.² It is worth noting that this has been achieved without any evidence of a general recourse to industrial action to support recognition claims.

2.5. Acas casework figures also provide evidence of an increase in the voluntary resolution of claims. Acas completed recognition cases rose from 148 in 1999 to 339 in 2001.³ The proportion leading to full recognition over the same period increased from 33% to 60%, having peaked at 65% in 2000. The number of completed cases fell back slightly in 2002 to 316, with full recognition

occurring in 52%. Up to 31 December 2002 the CAC had received 236 applications for recognition. Of these, some 52 had led to statutory Trade Union recognition. However, the CAC is aware that in a similar number of cases a voluntary settlement⁴ had been achieved (for figures see the passage below on timescales). It is also worth noting that the procedure has not suffered from the constant inter-union disputes which were a feature of the 1970s statutory mechanism.

Box 1 – Recognition Case Studies

UNIFI/Barclays Stockbrokers

UNIFI, a union for workers in the finance sector, and Barclays Stockbrokers in Glasgow have developed a good working relationship following a voluntary deal to recognise the union.

In early 2001, UNIFI members asked the union to become involved in a consultation forum over a review of jobs and structures arising from a large fall in business volumes. Barclays Stockbrokers agreed to this request and the union provided advice and guidance to the forum members and to local management. The result of the forum work was that a redundancy package, specifically tailored to the needs of the workforce, and a set of agreed procedures was devised. Almost all job losses resulting were dealt with on a voluntary basis.

Following a series of joint presentations to all staff carried out by UNIFI officials and the Glasgow senior management team, a ballot on recognition was held. The union and employer built up a good working relationship. This resulted in 96% of those voting (amounting to 64% of those eligible) endorsing UNIFI recognition. Since that time, agreement has been reached on a consultative procedure and a representative structure.

² TUC 'Focus on recognition' (2003)

³ The Acas figures relate to calendar years

⁴ The figures for withdrawals due to voluntary settlements probably understates the true position as parties are not obliged to inform the CAC of the reason for the withdrawal.

2.6. The statutory procedure also seems to have served to help improve employment relations. Although these are early days and not much data exists, there is no widespread evidence of unions and employers failing to engage in collective bargaining where this has been achieved through either the statutory procedure or voluntary means. There are good examples of recognition producing co-operative and productive relations – these are highlighted by the case studies in Boxes 1,2 and 3. In industries where derecognition had previously occurred, there may have been a ‘back agenda’ of issues. However, there has been no widespread evidence of industrial action following recognition.

Box 2 – Recognition Case Studies

Prospect/National Trust for Scotland

In 2000, Prospect, a union representing engineers, scientists, managers and specialists in both public and private sectors, sought recognition from the National Trust in Scotland. In a ballot, the union secured [result]

Since the union was recognised, they have worked with the employer on a wide range of issues. In addition to core bargaining over pay, they have consulted on a harassment and bullying policy, redundancy policy, and seasonal/fixed term workers contracts. The employer and union are also shortly to enter discussions over a stress policy, for which the union has carried out a questionnaire of members.

The employer has found a formalised relationship with the union very valuable, and has built up exceptionally strong relationships with union officials, achieving positive outcomes particularly in discussions over recruitment and retention of staff.

2.7. The statutory procedure has also operated with little recourse to the courts. On only four occasions have the parties sought judicial review of CAC decisions. In two cases a judge refused leave to make an application; in the other two cases, the courts ultimately upheld the approach taken by the CAC. This is an indicator that the procedure has proved robust, and has been operated with few challenges to the CAC’s decisions.

2.8. Although during the review both union and employer representatives have lobbied for changes to the statutory recognition procedure, there is a general acceptance of the success of the process. In his address to the 2002 TUC Congress, Bill Morris, member of the TUC’s General Council with lead responsibility for employment law, said:

“Today, I can report that the new Trade Union recognition scheme has been a success story ... But, success in industrial relations is never judged only by law. More importantly, each year has seen a major growth in the number of voluntary agreements signed. This year saw a 300 per cent increase on last year. Few of these would have been reached if it were not for the legislation. Tens of thousands of new workers can now turn to their union for help and support at work.”

Box 3 – Recognition case studies

TGWU/S&A Foods

In late 2001, the Transport and General Workers Union made an approach for recognition to S&A foods, a leading player in the chilled food sector. The family owned business is based in Derby and employs 1200 people. The company was initially concerned and resistant. There was no other recognised union and they had no experience of working with a trade union, nor a wish to develop any. But, since it was clear that a significant number of the workforce wanted the union to be recognised, and to bargain on their behalf, the company decided to agree to the union’s request and a voluntary agreement was reached. Their recognition agreement with the T&G covers all hourly paid workers at the company for pay and other terms and conditions of employment.

Since the agreement, the parties have worked together to introduce major changes in shift patterns, with an established shop steward structure to allow communication between management and workers. Management and union reps are also working together to agree model procedures that will be followed by joint training on disciplinary and grievance procedures. The union is now using its contacts in the community to help the company consider new sites for development. It has also supported and promoted an open learning centre within the company.

2.9. Initial discussions with unions, employers’ groups and others have confirmed the Government’s view that the statutory procedure has been a success. However, in collecting evidence on the procedure’s operation, we have identified a number of areas in which changes to the recognition procedure could usefully be made. The statutory *derecognition* procedure is

largely the mirror image of the statutory recognition procedure. So where the text describes proposals to change the recognition procedure, it should be assumed that the Government also supports making the corresponding change to the derecognition procedure.

Thresholds

The small firms threshold

2.10. Under the Schedule, the CAC can only accept applications for recognition if the employer being asked to recognise the union (together with any associated employer) has 21 or more workers.

2.11. There are two main issues to consider on this subject – (a) whether there should be any threshold based on the size of the employer for access to the statutory recognition procedure

and (b) if so, where the size threshold should be set. On the first point, if no threshold existed, very small organisations could be required by law to bargain collectively – in extreme instances, where perhaps there were only one or two employees. Notwithstanding that small companies may in some instances voluntarily agree to recognise Trade Unions, the judgement was made at the time of the Act that it would be inappropriate to impose recognition in smaller firms. The Government remains of that view. Though most individual employment rights – including the right to be accompanied – apply to organisations of all sizes, it is not appropriate to impose collective employment relations on smaller employers.

2.12. Turning to the second issue – the precise level of the threshold – Table 2.1 shows that enterprises with 19 or fewer employees account for just under 20% of all employment.

Table 2.1: Breakdown of employment by size of firm⁵

No. of Employees	No. of Enterprises	Employment (000s)	% All Enterprises	% All Employment
1 – 4	784,070	2,298	20.6	8.4
5 – 9	209,630	1,497	5.5	5.5
10 – 19	118,165	1,643	3.1	6.0
Total	1,111,865	5,438	29.2	19.9

2.13. Evidence regarding private sector workplaces from WERS 1998⁶ shows that union presence is typically low in small firms. Only 20% of single establishment organisations employing 10 to 20 people had any union members in employment. Union density in such organisations was merely 4%. Only 9% of them recognised a union. Union representation was rare, even in companies which recognised unions – only 2% of all small firms (10 to 99 employees) had a lay union representative on site.

2.14. Applications to the CAC which satisfy the 21-worker threshold have been mainly in respect of larger, rather than smaller, employers. Table 2.2 gives a breakdown by size of employer, including one application where the CAC found that the employer had fewer than 21 workers.

⁵ Source: Small Business Service (2002). Figures are not available for enterprises employing 1-20 people.

⁶ WERS (Workforce Employment Relations Survey) 1998 findings on small firms for private sector workplaces.

Table 2.2: CAC applications⁷ to 31 December 2002, by size of employer

No. of Workers	No. of Applications	As % of All Applications
Under 21	1	0.5
21 to 30	9	4.6
31 to 49	22	11.2
50 to 99	32	16.3
100 to 199	48	24.5
200 to 499	32	16.3
500 and above	52	26.5
Total	196	100

2.15. Although there is significant union membership among small firms in certain sectors, the evidence supports the view that incidence of union membership and union recognition in small firms is generally very low. The demand for statutory recognition has largely involved firms far larger than 21 workers. Under 5% of applications were in the 21 to 30 worker category.

2.16. There have been calls to both raise and lower the threshold. On the basis of the evidence available, the judgement of the Government continues to be that the appropriate cut-off level is 21 workers. **The Government does not propose to make any changes to the threshold.**

The 10% membership/‘majority likely’ requirements

2.17. There are a number of criteria which a union must satisfy if its application is to be accepted by the CAC. In particular, the union must show that

- it has at least 10% membership in the proposed bargaining unit; and
- a majority of the workers in the bargaining unit would be likely to favour recognition of the union (the ‘majority likely’ test).

⁷ All cases minus those which are resubmissions or those where more than one union has submitted an application against the same employer

2.18. The rationale for applying these tests is that the union must have sufficient support to warrant triggering the statutory process. Thus, weak cases can be screened out early in the process. Of the 236 applications received up to 31 December 2002, the CAC has declined to accept 20.⁸ However, no application has been rejected on the grounds that it failed the 10% membership test.

2.19. Of the 20 inadmissible applications, 10 failed the 'majority likely' test. In the other 10, the grounds for rejection were the existence of competing applications (6 cases), the existence of a collective agreement (3 cases), and the failure to meet the small firms threshold (1 case).

2.20. Although unions do not have a right of access to the workforce at this stage of the statutory procedure, many have managed to gather petitions as further evidence of support for their application. Up to 31 December 2002 the CAC had made a decision on acceptance in 163 cases. Of the 105 cases where the union membership was 40% or over, only one failed the 'majority likely' test. In the remaining 58 cases, union membership was below 40%. 15 of these were not accepted, 9 because they failed the 'majority likely' test. In the vast majority of the 43 which were accepted, other evidence such as a petition was submitted to be considered alongside the membership evidence, meaning that support for recognition was shown to exceed 40%. In most instances, support exceeded 50%.

2.21. The evidence, then, is that few applications have failed the 'majority likely' test, and none the 10% membership test. The criteria therefore appear to be working well, deterring claims which do not meet their standards. **The Government does not propose on the basis of this evidence to make any changes in this area.**

Automatic recognition

2.22. The Schedule allows the CAC to award recognition automatically where a union has majority membership in the bargaining unit. However, it must hold a ballot, even where majority membership exists, if any of three qualifying conditions are met:

- if the CAC is satisfied that a ballot should be held in the interests of good industrial relations;

⁸ The figures on this page provide only a quick overview. For full details of how cases progressed, please see Annex B.

- if a significant number of the union members within the bargaining unit inform the CAC that they do not want the union to conduct collective bargaining on their behalf; or
- if membership evidence is produced which leads the CAC to conclude that there are doubts whether a significant number of the union members within the bargaining unit want the union to conduct collective bargaining on their behalf.

2.23. These qualifying conditions exist because union membership may not in all cases indicate support for collective bargaining. Up to 31 December 2002, the CAC had awarded recognition without a ballot in 21 cases. In 7 others, although the trade union had over 50% membership and sought recognition without a ballot, the CAC decided to proceed to the ballot stage. The breakdown of those cases is shown in Table 2.3.

Table 2.3: Cases involving membership over 50% and trade unions seeking recognition without a ballot

% Membership	No. Cases	Recognition without ballot	Ballot required
50 – 60	13	8	5
61 – 70	10	9	1
71 – 80	4	3	1
Over 80	1	1	-
Total	28	21	7

2.24. The figures show that recognition was awarded without a ballot in most cases where the trade union had over 50% membership, and particularly at the higher levels. However, there have been a number of instances in which the CAC has used its discretion, having considered the particular circumstances of individual cases and the conditions laid down in the statutory procedure, and ordered a ballot. In 4 of the 7 cases where the CAC proceeded to a ballot, the union secured a majority. (See Annex B for full details of ballots).

2.25. There have been various suggestions that the current arrangements in this area should be changed – including proposals on the one hand to remove the qualifying conditions (and therefore the possibility of a ballot in cases where the union membership exceeds 50%), and on the other to require a ballot wherever the employer requested one. Currently the procedure recognises that majority union support is a good indicator of majority support for collective

bargaining, but that there may be circumstances in which it is not wholly decisive. The law allows the CAC to check whether majority support exists in such circumstances by balloting the workers. Furthermore, ballot results have demonstrated that in certain cases, despite majority union membership, there is not sufficient support for collective bargaining. **The Government believes that the existing discretion available to the CAC has value and has been exercised appropriately. The Government therefore intends to maintain it.**

The 40% requirement for recognition

2.26. The statutory procedure requires a union to secure in a CAC ballot a 'yes' vote from:

- a majority of those voting; and
- the votes of at least 40% of all the workers in the bargaining unit.

It is the basis of the Government's policy that recognition should be awarded where the majority of workers in a bargaining unit want it. Reasonable employers respect the views of employees as long as those views are commonly shared across the workforce. The 40% threshold was introduced to ensure that a 'yes' vote would be a clear demonstration to employers and others of positive worker support for recognition. Employers cannot therefore argue that recognition was awarded simply on the basis of an unrepresentative ballot in which a minority of eligible workers voted.

2.27. Up to 31 December 2002, the CAC had organised 48 ballots. In 17 cases, the ballot did not lead to recognition. In 1 instance the union won a ballot majority, but secured less than 40% of the bargaining unit. In 12 cases, unions failed to gain both a majority of those voting and the 40% requirement. In 1 case, the union secured 50% (exactly) of the vote, and 48% of the bargaining unit. In 2 others, the unions secured over 40% of the bargaining unit, but only 46.5% and 44.4% of the vote, respectively. In the remaining case, the union won the support of 47% of the bargaining unit, but not a majority of those voting.

2.28. The evidence shows that – except for one case – ballot majorities have been accompanied by sufficient support within the bargaining unit. This clearly demonstrates that the twin tests of majority support are achievable and do not constitute an unreasonable barrier to recognition. Some unions argue that this level of success reflects the fact that unions first took their strongest cases to the CAC. This might be the case, though there is no hard evidence yet

available to back up that claim. Unions won ballots with as much regularity during the second year of the procedure as the first. The ballot threshold has provided confidence that where unions win recognition, they have the support of the workers in the bargaining unit. **On the evidence available, the Government does not propose to make any changes in this area.**

Bargaining units

Determination

2.29. In deciding the appropriate bargaining unit, the CAC must take into account a number of criteria. Chief among these – and over-riding – is whether the union’s proposal is compatible with effective management. Other considerations include the views of the parties and the desirability of avoiding small fragmented bargaining units, so far as these do not conflict with effective management. The decision of whether a bargaining unit is appropriate, given the statutory criteria, is a matter for the judgement of the CAC.

2.30. The CAC is obliged first to consider whether the union’s proposed bargaining unit is appropriate. If it is not, the CAC considers alternatives (such as one proposed by the employer). However, as the CAC carries out its initial test, the employer may put forward his/her counter arguments, including what the employer may regard as an appropriate bargaining unit. Although its initial test is solely to determine whether the trade union’s bargaining unit is appropriate, the CAC must use the evidence put forward by the employer to test that appropriateness.

2.31. This approach was challenged by judicial review in the CAC case involving TGWU and Kwik-fit. The CAC had decided that the union’s proposed bargaining unit was an appropriate one in as much as it met the statutory criteria. The High Court originally found that the CAC should have considered the employer’s proposed bargaining unit equally with the union’s. The CAC appealed and the judgement was overturned. The Appeal Court found that the CAC’s approach was correct. The Appeal Court judgement found that the Schedule did not call for a competition of bargaining units or an identification of the bargaining unit most compatible with effective management, but rather that the initial duty of the CAC was to consider the union’s proposal against the criteria laid down.

2.32. Up to 31 December 2002 the CAC had determined the bargaining unit in 53 cases. In 36 of these it had chosen the trade union’s proposed bargaining unit; in 9 the employer’s proposed

bargaining unit was chosen; and in 8 cases the CAC chose either a modified version of the union's proposal, or some other bargaining unit.

2.33. There have, though, been some calls to examine the criteria by which decisions on bargaining units are made. Unions have called for the 'effective management' criterion to be removed, while employers have proposed that the bargaining units proposed by the union and employer should be considered equally by the CAC.

2.34. The overarching criterion of effective management ensures that the statutory process results in sensible bargaining units, consistent with the objective of achieving productive workplaces. The evidence shows that while the union's proposed bargaining unit has been judged compatible with the criteria in the majority of cases, in a substantial number (around a third) it has not and a varied or different unit has been chosen. The existing determination process provides a reasonable balance, in that the employer's evidence also has a role, in two important respects: in testing the appropriateness of the union's proposed unit, and in providing a possible alternative if it fails the test.

2.35. The statute provides for a very rigorous assessment of the proposed bargaining unit – rightly so, as this is a critical decision. On the basis of the evidence, the Government is satisfied that this element of the procedure is working well. Changing it, as some employers have suggested, to require the CAC to choose between different proposals on the basis of which is more or most compatible with effective management would be a significant change to the balance of the recognition system as a whole. As noted above, the Government sees no case for fundamental change to the system. **However, it does propose to clarify the statute to make clear that the employer's comments on the union's proposal and any counter proposal are taken into account in determining whether the union's proposal is compatible with the statutory criteria.**

Small and fragmented bargaining units

2.36. As mentioned above, the CAC will, in considering the bargaining unit, look to avoid small and fragmented bargaining units. A proposed bargaining unit will be regarded as failing the test if it is both small and fragmented; the intention behind this criterion was to avoid complicated bargaining arrangements. It was recognised that there would always be specialist groups for whom a small bargaining unit is appropriate: there has been one case in which the bargaining unit the CAC determined constituted 50 workers from a total of workforce of 1500. While the unit

was small, the CAC did not regard it as fragmented. It carried out distinct functions and the workers had different terms and conditions to other workers.

2.37. The criterion has worked as intended, and the Government does not propose to make any changes in this area.

Treatment of associated employers

2.38. A claim for recognition can only be accepted by the CAC if there are 21 or more workers employed in total by the employer in question and any associated employer. Section 297 of the Trade Union and Labour Relations (Consolidation) Act 1992 sets out the test for whether companies are associated in respect of the statutory recognition procedure.

2.39. At present a bargaining unit can relate to one employer only, even if the application to the CAC is accepted on the basis of the 21-worker threshold being achieved through two employers being associated. It has been suggested that there may be circumstances in which the 'appropriate' bargaining unit would be one encompassing associated employers, and the procedure should allow the CAC to make such a determination where appropriate. This is a complicated area, and any change as suggested would have significant knock-on effects to other parts of the procedure. **The Government would welcome views on this proposal and what restrictions, if any, should be exercised on its use.**

Changes during the CAC process

2.40. Circumstances may arise where the employer or union believes that the original bargaining unit, which was subject to a CAC award of recognition, is no longer appropriate, perhaps because of a change in the structure of the business. In such a situation, either party may apply to the CAC to make a decision on the appropriate bargaining unit. At present, the CAC may accept an application regarding a change to the bargaining unit in circumstances where there has been both an award of recognition and a method of collective bargaining is in place. There can be no application until both have happened.

2.41. No applications have so far been accepted by the CAC under the part of the Schedule which deals with changes to the bargaining unit. There was, however, a case in which an employer attempted to bring an application for a change in the bargaining unit prior to

determination of the bargaining method. In this instance the CAC could not accept the application.

2.42. Although it is plausible that a bargaining unit may significantly change before the method is decided, it is likely to occur infrequently. In addition, the possible knock-on effects of changes to accommodate such situations would unnecessarily over-complicate the procedure. **The Government therefore proposes to make no change in this area.** (But see paras 2.103 and 2.104 on changes to employer identity).

2.43. It has been suggested that Part III of the Schedule, which deals with changes to bargaining units, is too complex and should be revised. However, no applications have thus far been accepted by the CAC under this part of the Schedule. There is no evidence on which to base any judgement of the workability of this part of the procedure. **The Government does not, therefore, propose to make any change to this part of the Schedule.**

Ballots

2.44. When the CAC orders a ballot on union recognition, this is carried out either at the workplace, or by post, or, if special factors apply, as a combination of the two (Annex B indicates the method used in each CAC ballot held so far). These special factors concern the workers' location or nature of their employment, or factors put to the parties by the CAC. There is a concern that, unless special factors apply and a combination ballot can be held, workplace ballots cannot include a provision for postal votes to cover those workers absent from the workplace (for example because they are working at another location on the day of the vote, or are on leave). **The Government proposes to change the law so that workers who are unable to attend their workplace on the day of the ballot would be able to vote by post.**

2.45. There has been much general discussion about the use of e-voting by various means. These new forms of balloting are, however, at an experimental stage. The Government is interested in promoting alternative forms of voting across society, and will look to introduce internet, email and other technologies into recognition ballots once their efficacy and security are proven beyond reasonable doubt. **The Government proposes, therefore, to introduce a reserve power for the Secretary of State to enable the CAC to order a recognition ballot to be carried out with electronic voting as one of the options.**

Access Rights

2.46. At present a union has a right to access workers in the bargaining unit only during a CAC-ordered ballot on recognition. Employers have a duty under the procedure to co-operate with this. If they do not co-operate, the CAC can ultimately award recognition without a ballot. There is also a statutory Code of Practice on union access to workers during CAC recognition and derecognition ballots. This sets out practical guidance on the issues which may arise, including the type of arrangements which should be put in place, and the types of behaviour the parties should or should not display. It also sets out processes for resolving any problems, including the use of Acas and the CAC.

2.47. The CAC received two formal complaints from unions regarding access during the course of the 48 ballots up to 31 December 2002. CAC orders were issued in respect of both. We are aware of a further formal complaint in early 2003. In this case the CAC suspended the ballot and held a hearing with the parties. This resulted in an agreed basis for the re-scheduling of the ballot. In general, we understand that parties involved in CAC-ordered ballots have tended to draw on the Code as the basis for determining access. In addition, Acas has provided assistance to the parties in regards to access issues, though it does not report any significant level of activity in this area.

2.48. When a union makes an application to the CAC to be recognised by an employer, it does so for collective bargaining in respect of a particular group of workers. But even if this application is accepted by the CAC, the union has no statutory right of access to the workers involved, to inform them about the recognition claim, until the CAC orders a ballot. Once an organisation has lodged a claim effectively on behalf of a group of workers, it is logical that those workers should be able to receive communications from that organisation. The Government has considered how access currently operates and believes that the process would be improved if unions were able to communicate with the workers in a bargaining unit at an earlier stage. **The Government proposes to allow the union access to the workers by means of postal communication, via a third party such as a Qualified Independent Person (QIP⁹). Views are invited on whether this could be extended to electronic systems of communication.** The proposed access would be from the day the CAC accepts the union's application, with the union meeting the cost involved. This would allow individuals to receive information from the union at an earlier point in the process and should assist in

⁹ QIPs are appointed by the CAC to conduct statutory recognition ballots.

achieving a better understanding by the workers of the union's request and their employer's response.

Definition of collective bargaining

2.49. When the CAC awards recognition to a union, this is in respect of collective bargaining on pay, hours and holidays. These three items are regarded as the 'core' issues for collective bargaining, which commonly occur in any substantial agreement. However, the procedure does not provide definitions of these terms. Limiting the scope of statutory recognition to these three items acts as an encouragement for parties to reach voluntary agreements, which can be extended as wide as they wish.

Training

2.50. Where the CAC both awards recognition and determines the method of collective bargaining, a union so recognised is entitled to information and consultation over training.

2.51. Evidence suggests that training is an issue which has taken some time to move up the bargaining agenda in the voluntary arena. However, it is an increasingly important aspect of dialogue between employers and workers, and the Government has encouraged this dialogue. The Employment Act 2002 contained provisions to place Union Learning Representatives (ULRs) on a statutory footing. ULRs now have clear rights for time off to undertake their important advisory work on training at the workplace. However, the Government has made it clear that ULRs would not be accorded rights to bargain over training. According to TUC figures, training was mentioned in around half of all recognition deals over the last two years, though the extent to which parties agreed to bargain over the issue is unclear.¹⁰ WERS 1998 showed that while 36% of employee representatives said they were consulted over training, only 7% said they negotiated over it.¹¹ Other studies suggest that while training may often appear in agreements, it is an item which is probably more often discussed than bargained over.¹² **The Government does not intend to add training to the current list of core bargaining issues**

¹⁰ TUC Focus on recognition (2002 and 2003). Trade union trends survey 02/1 and 03/01.

¹¹ Rainbird H (forthcoming) The influence of employee voice on workplace training provision and employability. ER Research Series.

¹² see Oxenbridge, S et al: 'Collective employee representation and the impact of law: initial responses to the Employment Relations Act 1999', British Journal of Industrial Relations (December 2002); and Oxenbridge, S and Brown, W: 'The Two Faces of Partnership? An Assessment of Partnership and Co-Operative Employer/Trade Union Relationships', Employee Relations, 24:3 pp. 262-276

for the purposes of the statutory recognition procedure.

Equality

2.52. The Government believes that equal treatment in the workplace is vitally important, and encourages constructive engagement between workers and employers on this subject. Unions can greatly assist employers in devising and monitoring equality policies. Unions have suggested that equality issues should be included in the statutory method of collective bargaining. Of course, key aspects of the equality agenda concern the three core issues of pay, hours and holidays. So, to a large extent, equality issues are already included within the definition of collective bargaining. **The Government does not intend to add equality to the current list of core bargaining issues for the purposes of the statutory recognition procedure.**

Pensions

2.53. In the UNIFI/Bank of Nigeria case, the parties asked the CAC to decide if pensions should be included in their negotiations. The CAC gave advice stating that, specifically in this case, 'pay' included all matters relating to the level or amount of employer pension contributions. This advice did not bind the CAC to take the same position in future cases, but did raise the question of whether employers and unions need more clarity in the statute.

2.54. In December 2002 the Government published a Green Paper *Simplicity, security and choice: working and saving for retirement*, which included various proposals for changes to the regulatory framework for private and occupational pensions. The Green Paper states that it is good practice for employers to consult their employees or employee representatives, or both, before making changes to pension arrangements (paragraph 4.99). It also states that the Government is "...therefore considering a requirement on employers to consult their employees or employee representatives, or both, before making changes to pension schemes" (paragraph 4.100). This matter will be considered alongside that of implementing the EC Directive on Information and Consultation.

2.55. This is a demonstration of the importance which the Government attaches to renewing the pensions partnership between employers and their employees, which it sees as being crucial to future pension provision. On the same basis, the Government welcomes the fact that

increasing employee interest in pensions is moving them up the collective bargaining agenda.

2.56. At present, however, most recognition agreements – the great bulk of which remain voluntary – still do not include pensions. At the present time, therefore, to include pensions as a core topic with respect to the fallback statutory procedure would risk the latter becoming more comprehensive in scope than voluntary bargaining agreements. That said, the Government looks forward to a time when more widespread partner engagement on pensions would make it a suitable core topic for the fallback statutory procedure. **The Government therefore proposes, first, to clarify that pensions shall not be regarded as ‘pay’ for the specific purposes of the procedure for the present time. At the same time, the Government proposes to give the Secretary of State an order-making power to add pensions to the three core topics, with a view to exercising that power when there is evidence that typical practice in recognition agreements is for pensions to be included as a bargaining topic.**

‘Top-up’ recognition

2.57. Generally, the statutory procedure does not permit unions to apply to the CAC where a recognition agreement already exists. This ensures that protection is given to existing voluntary agreements wherever possible. Exceptionally, the procedure provides for unions to re-visit an existing recognition agreement where the matters covered by that agreement do not include pay, hours or holidays. In such circumstances, the union may apply to the CAC to ‘top-up’ the existing agreement and include the missing issues in the agreement.

2.58. The CAC has not yet made any determinations on this matter, but there does exist some ambiguity over the circumstances in which ‘top-up’ recognition can be applied for. The Government intends the law to mean that unions can apply for ‘top-up’ recognition where their existing voluntary recognition agreement does not include any one or more of pay, or hours, or holidays. The other interpretation is that the union may apply only where none of the three core issues is covered by its existing bargaining arrangements. This alternative would capture only a very small number of voluntary agreements and would mean, for instance, that a union whose voluntary agreement with the employer covers only holidays would not be able to ‘top-up’, while a union without any agreement could apply for statutory recognition. Clearly this would be to the disadvantage of unions who have voluntary but narrower agreements, and wished to extend them.

2.59. **The Government proposes, therefore, to clarify the law ensuring that unions are able to apply for top-up statutory recognition where their voluntary agreement does not include any one or more of pay, or hours, or holidays.**

Membership checks & other information issues

Disclosure of confidential information

2.60. There are occasions in the statutory recognition procedure where the CAC needs to carry out checks of union membership levels to establish whether 10% of the bargaining unit are members of the union, or that a majority of the workers are union members. This involves access to confidential data concerning union membership and workers' personal details. In addition the CAC requires access to worker details to check petitions when applying the 'majority likely' test of admissibility.

2.61. During a CAC-ordered ballot, an employer is under obligation to co-operate, and in particular to supply the CAC with the names and addresses of the workers in the bargaining unit. No equivalent obligation exists for the employer (or the union) in respect of membership checks. To date, the CAC has established access to member and worker details through the voluntary agreement of the parties. Establishing these voluntary arrangements inevitably gives rise to some delay, and in some cases there has been an initial refusal by a party to co-operate. Although both parties have ultimately agreed to disclosure the information, these experiences demonstrate that the CAC is dependent on the goodwill of the parties to carry out key aspects of the procedure without delay.

2.62. **The Government therefore proposes to establish in the procedure a general requirement on both the union and employer to co-operate with a CAC membership check.** This requirement to disclose data would also enable the CAC to assess the accuracy of any worker petitions speedily. Further protections would also be introduced to ensure that confidential information was not revealed to the other party.

2.63. Acas, rather than the CAC, will run a membership check or ballot for the purposes of voluntary resolution of a recognition claim. During June 2001 to May 2002 – the second year of the statutory procedure – Acas ran 70 recognition ballots and 99 union membership checks. However, because Acas does not have a specific statutory duty to run ballots and checks, it and the parties face added stages in order to ensure that disclosure of the worker/member

information to Acas is consistent with the requirements of the Data Protection Act 1998. **The Government therefore proposes to establish that Acas-run ballots or checks have a clear statutory basis.** This should help to ensure that voluntary ballots and membership checks are carried out more efficiently.

Legal definition of union membership

2.64. The procedure does not provide a statutory definition of what is meant by 'union membership' for its purposes. Union rulebooks define who is counted as a member for that union. The union's definition may sometimes mean that individuals who are in arrears (usually up to some maximum period) are classed as members. A union may also allow workers to become members, at least for a specified period, at a discounted or 'nil' rate of membership fee. At present the CAC uses the union rulebook to define membership.

2.65. In some CAC cases employers have expressed concern over the status of certain union members and how the CAC treats membership for the purpose of making decisions. They argued that members who are paying nil or reduced fees may be a weak indicator of support for union recognition, as might those who have only recently joined the union. However, trade unions may argue that it is not unreasonable to reduce membership fees at a workplace where collective representation has not yet been achieved. In addition, they may argue that those who join during the course of a recognition campaign have linked membership directly with achievement of collective representation.

2.66. Up to 31 December 2002, the CAC had made decisions on acceptance in 163 applications, and awarded recognition without a ballot in 21. Although some employers have expressed a lack of confidence in the membership checks, and raised concerns over the inclusion of members on reduced fees, there have been few legal challenges and the courts have always upheld the CAC's approach. **Although the Government believes this area has operated satisfactorily, it invites views on the treatment for the purposes of CAC checks of workers who receive free or reduced-fee union membership.**

Union membership checks after point of acceptance

2.67. The CAC usually undertakes a check of a union's membership at the acceptance stage, unless the level of membership is not challenged by the employer. A further membership check can follow, if the CAC determines a different bargaining unit. Another check could also be made

later, if either party challenged the continued validity of the earlier check (perhaps because of turnover of workers/members). In cases where there is a high turnover of staff, it is possible that the original figures will be swiftly outdated. Equally, union membership could rise or fall, and so have an impact on the figures. Each new check involves the assembly of fresh data.

2.68. One approach suggested to the Government in order to avoid problems caused by oscillating union membership is that the CAC should 'freeze' the check on union membership at the point of acceptance. This would introduce certainty. Balanced against this would be the risk that it might lead the CAC to make decisions based on outdated information. **The Government does not support this approach, and proposes no change to the current system.**

Petitions of support

2.69. When a union submits a petition in support of an application for recognition, it does not have to be in a prescribed format, nor gathered within a set period before an application to the CAC. However, the CAC will consider "the circumstances in which the evidence was obtained, when it was obtained and the wording of the petition that may be submitted."¹³

2.70. As circumstances vary case by case, it would not seem appropriate to prescribe the format petitions must take. **That said, the Government would welcome comments on whether there may be value in further guidance being available from the CAC for parties considering the submission of a petition.**

Disclosure of information by the employer to the union

2.71. When a union approaches an employer to seek recognition under the procedure, there is no requirement for the employer to release any information to the union about the workers in the bargaining unit. Potentially relevant information could include the number of workers, their grade, and their location. However, during the course of voluntary negotiations, such information is often released, and any information passed to the CAC by the employer as part of any subsequent CAC case is automatically copied to the other party. This type of information is particularly relevant and helpful to the parties during the 20-day period set aside for them to reach a negotiated agreement on the bargaining unit.

¹³ 'Statutory Recognition - Guide for the Parties', CAC (April 2002)

2.72. The supply of relevant information can be an important component in bringing about the resolution of a claim. It may not, though, be appropriate to require the employer to disclose information to the union at an early stage in the procedure (for example, before the CAC has accepted the union's application) when the standing of the union's claim has not yet been established. However, following acceptance of an application by the CAC, a different regime should operate. **The Government proposes that the employer should be required to disclose the number of workers in the bargaining unit, together with their grade and location, at the CAC stage for negotiating the bargaining unit. This should further assist the promotion of voluntary settlements.**

Timescales

2.73. Time periods are set for most stages of the statutory recognition procedure. The principal reason for this approach is to help ensure that applications are processed as swiftly as possible, and do not become burdened by any unnecessary delays. The time periods in the statutory procedure are expressed in working days,¹⁴ while the analysis presented below looks at the time taken to process cases in calendar days/weeks.

2.74. A major problem with the statutory recognition procedure introduced in the mid-1970s was that serious delays often occurred. Cases which went to the final stage of that procedure took on average more than a year to process, with over 20% taking more than 18 months.¹⁵ The evidence shows that the current recognition procedure has not suffered such difficulties. In what is widely acknowledged to be complex and sensitive casework, the vast majority of claims have been processed to a conclusion within a satisfactory timescale. By 31 December 2002, 69 cases had 'gone the distance' under the statutory procedure in the sense that they had resulted in a CAC declaration that the union was either recognised or not recognised. The median case took just 19.3 calendar weeks, or a little under four and a half months, to complete.¹⁶ Table 2.4 shows how the length of cases is distributed.

¹⁴ A working day is defined in the statutory procedure as 'a day other than –a) Saturday or Sunday, b) Christmas Day or Good Friday, or c) a day which is a Bank Holiday under the banking and Financial Dealings Act 1971, in that part of Great Britain.'

¹⁵ Acas Annual report 1980. quoted by Wood SJ 'Learning through Acas: the case of union recognition', in Acas (2000) *Employment Relations in Britain: 25 years of the Advisory, Conciliation and Arbitration Service*, eds B Towers and W Brown.

¹⁶ Calculated from difference between date of application and date of declaration, in calendar days.

Table 2.4: Length of CAC cases, from application to declaration

Length of Case (Calendar Weeks)	Number of Cases	As % of all Cases
9 or less	4	6
10 to 14	16	23
15 to 19	16	23
20 to 24	16	23
25 to 29	8	12
30 to 34	2	3
35 to 39	6	9
40 and over	1	1
Total	69	100

Extensions of statutory time periods

2.75. The statutory procedure allows for the CAC to extend time periods, where necessary, in some cases. It has tended to exercise this discretion at the acceptance stage. The time allowed for this stage is 10 working days. In the 163 cases which have completed the acceptance stage, the median time taken by the CAC to complete the process was 3.7 calendar weeks. 138 cases required an extension, with an average extension of 23 calendar days.

Table 2.5: Length of acceptance period for CAC applications

Length of Period (Calendar Weeks)	Number of Applications	As % of Total Applications
Up to 2	25	15
Over 2 & up to 4	67	41
Over 4 & up to 6	35	22
Over 6 & up to 8	15	9
Over 8 & up to 10	7	4
Over 10 & up to 12	4	3
Over 12	10	6
Total	163	100

2.76. During this stage the CAC has to apply a number of admissibility tests, which require it to gather and check data on union membership and employment within the bargaining unit. As noted in the earlier section on membership checks, delays can occur while the CAC establishes arrangements for and conducts such exercises. Indeed, the reasons recorded by the CAC for extensions during this stage of the procedure suggest that obtaining information is the major factor at play in generating the need for extensions (see Table 2.6 below). The Government's proposals to facilitate membership checks, as set out in paras 2.60-62, should help to speed up this part of the statutory process.

Table 2.6: Reason for extension to applications during acceptance period

Reason for Extension	Number of Applications	As % of Total Applications Extended
To obtain more information	107	77
To hold a hearing	19	14
Request by employer	8	6
Request by both parties	3	2
Request by union	1	1
Total	138	100

2.77. Extensions have also occurred at the bargaining unit stage. The 20-working day period for negotiating the bargaining unit has been extended on 28 occasions, always at the request of both parties. The average (mean) extension was 31 calendar days. In 25 cases, the parties succeeded in agreeing the bargaining unit. This suggests the extra time has been used productively.

2.78. The CAC has determined the bargaining unit in 53 cases. The statutory period for this stage in the procedure is 10 working days. In virtually all cases the CAC has held a hearing before deciding this pivotal issue. Finding a suitable time for such meetings can be difficult. This helps explain why the CAC has needed to extend the statutory time period on 41 occasions. It has taken the CAC an average of 5.2 calendar weeks to complete this stage of the process (with a median of 4.3 calendar weeks).

20-day periods for negotiation

2.79. At present there are three 20-working day periods in the recognition procedure in which the parties are expected to negotiate with each other and discuss issues with the CAC:

- the first occurs prior to the CAC application and is for the parties to negotiate regarding the union claim for recognition;
- the second occurs when the CAC helps the parties reach agreement on the bargaining unit; and
- the third occurs if, following the CAC award of recognition, the parties approach the CAC for help over agreeing the bargaining method.

2.80. These periods can be extended, the first by agreement of the parties, the second by decision of the CAC, and the third by the CAC with the consent of the parties.¹⁷ It should be noted that the CAC only has powers to extend, not reduce, the 20 day-periods.

2.81. While the procedure provides a route to statutory recognition, it has encouraged parties to reach voluntary deals, which have risen significantly since the Act was passed. Indeed, the CAC is aware of more than 40 voluntary agreements having occurred following a statutory application. Of the 63 cases withdrawn at the acceptance stage, 13 were due to a voluntary settlement; at the bargaining unit stage, 23 out of 28 withdrawals were due to such an agreement; and at the ballot stage 8 of the 15 withdrawals were for this reason.

2.82. As the initial negotiation period occurs prior to the CAC application, that body has no record of its operation. In contrast, Acas has some direct knowledge of this part of the process, and indeed received a request to conciliate at this stage in 99 cases during the first 2 years of the statutory procedure's operation. This represents 13% of all recognition requests to Acas over the same period. In 85 of these 99 cases, conciliation took place, and in 55 recognition was achieved by the union (52 full, 3 partial). In the 136 CAC cases which have completed the second 20-day period, 54 have an agreed bargaining unit (40 agreed during the bargaining unit period, 14 prior to it), and 28 cases have been withdrawn – 23 because the parties have reached a voluntary agreement. In the third 20-day period, the CAC has not so far operated

¹⁷ There is also a 30-day negotiation period for the parties to agree a method of bargaining without CAC assistance.

very widely in a brokering role, and on only 6 occasions up to 31 December 2002 has it been required to decide the bargaining method.

2.83. There is evidence of widespread reaching of agreement on the bargaining unit during the negotiating period, and nearly all extensions to the 20-day period have led to an agreement. Most withdrawals at the bargaining unit stage have been due to the parties reaching a voluntary settlement. However, there have been occasions when no further negotiations between the parties have occurred during the period set aside for it. Under the present arrangements the CAC is unable to move proceedings on to the next stage.

2.84. The evidence suggests that periods for negotiation within the statutory process, and provision for extension of the time limits, have helped the conclusion of voluntary deals. There is no evidence of any widespread practice of employers slowing down the process for their own purposes. Although any standing reduction in the 20-day periods would leave little time for serious negotiation to take place, and decrease the likelihood of voluntary resolution of claims, there would seem to be value in giving the CAC discretion in appropriate cases to shorten the stage, and move proceedings on to the next: the time limit would be defined as '20 days, or some other period specified by the CAC'. **The Government proposes, therefore, to give the CAC a power to reduce the 20-day bargaining unit negotiation period.**

Time limit on applications to the CAC

2.85. The first step in the statutory recognition procedure is taken by the union sending a letter to the employer to request formal recognition. If the matter is not solved voluntarily, then the union can approach the CAC. Some concerns have been raised that the statutory procedure may be used simply as a bargaining tool, without any immediate intention to follow through with an application to the CAC if matters are not resolved on a voluntary basis. In addition, as there is currently no time limit on applications to the CAC following the letter, the employer is left with the indefinite prospect of a CAC case.

2.86. There is no evidence available which identifies the reasons for any delay in applications to the CAC. However, the CAC has studied a sample of their cases to ascertain the usual time gap between the union writing to the employer and an application being made to the CAC. The CAC took a random sample of 23 applications between nos. 112 and 222 (the latest application at that time). The average length of time between the letter to the employer and application to the CAC was 59 days. The distribution is shown in Table 2.7, with a median of 44 days.

Table 2.7: Applications (sample from cases 112 to 222), by number of days between the union's initial letter and CAC application

Number of Days	Number of Applications
Under 30	6
30-59	9
60-89	4
90-119	1
120-149	1
150 and over	2
Total	23

2.87. This suggests that in only a small proportion of instances was an approach to an employer not followed by an application to the CAC within three months. Obviously, cases which have not yet reached the CAC are not known about. However, if there were any limit on the length of time for cases to be brought to the CAC, this might impact adversely on the number of voluntary settlements and lead to an increased number of cases being referred to the statutory process.

2.88. On balance, therefore, the Government believes that a time limit on such approaches would not be appropriate, and therefore proposes no change in this area.

Withdrawn applications

2.89. Once a union makes an application, the CAC assembles a panel to consider whether to accept the case. If it does so, the union cannot then make another claim to the CAC within the next three years, for the same, or substantially the same, bargaining unit. Where a union makes an application to the CAC, but withdraws it before a decision on acceptance is made, no such penalty is incurred. However, in such cases, the employer may have spent some time assembling his/her case to put to the CAC, only for this work to then be nugatory. A question arises as to whether a union should then incur a penalty.

2.90. The amount of resources an employer will have spent preparing a case will partly depend on the length of time between union application to the CAC and withdrawal. In addition, the parties will often undertake further negotiations before an acceptance decision, and may ultimately agree a voluntary resolution of the claim.

2.91. There were 63 withdrawals before a decision on acceptance up to 31 December 2002. A breakdown is given in Table 2.8.

Table 2.8: Withdrawn cases before a decision on acceptance

Difference in Calendar Days between Case Application & Withdrawal Dates	Number of Cases	As % Total Withdrawals	Number of Known Voluntary Recognition Agreements
Up to 5	16	25	0
6 to 10	15	24	0
11 to 15	7	11	3
16 to 20	3	5	2
21 to 25	3	5	0
26 to 50	15	24	4
51 to 100	2	3	2
Over 100	2	3	2
Total	63	100	13

2.92. The average length of time between application and withdrawal was nearly 21 days, but the median was 11 days. Of those occurring after 10 days, it is known that 13 (or nearly 41%) were in instances where a voluntary recognition agreement was reached. If any penalty existed for withdrawal, then unions might decide to continue with their application anyway (even where perhaps for technical reasons it was destined to fail). This would be potentially wasteful to the parties and the CAC. **The Government therefore proposes to make no change in this area.**

Effective date for an existing collective bargaining agreement

2.93. Under the statutory procedure, if a collective bargaining agreement already exists for all or part of the proposed bargaining unit, an application to the CAC is inadmissible. However, the Schedule does not specify a date by which such a procedure must have been agreed. In effect, the agreement could be concluded right up to the date of the CAC's decision on acceptance. In theory at least, this could allow employers to avoid a statutory recognition agreement with one union by concluding an agreement with another, a short time before the CAC decision.

2.94. It would, though, be difficult to impose a cut-off for such a 'blocking' voluntary agreement. Regardless of the law on admissibility for CAC applications, the employer could conclude a deal with another union in the period between the date of the union's application and the date of the CAC's admissibility decision. The CAC would then have to consider an application for a bargaining unit which overlaps with an existing bargaining unit. This would raise, and take the CAC into, inter-union issues. The procedure has always sought to avoid CAC involvement in disputes between unions – and there have been relatively few since June 2000. Resolution of such disputes is a matter for the unions themselves and, in the case of affiliated unions, the appropriate TUC machinery. **The Government therefore intends to make no change to the existing procedure for determination of the effective date for an existing bargaining agreement.**

Treatment of non-independent unions

2.95. A CAC application could be 'blocked' because of an existing agreement with either an independent or a non-independent union.¹⁸ However, if the recognised union is not independent, workers in the bargaining unit can themselves apply to the CAC to have it derecognised. If this is successful, an independent union is then able to apply for recognition, without facing the 'block' from the existing recognition agreement.

2.96. At present, only individual workers, and not their union, may apply for derecognition. Independent unions have argued that they additionally should have the right to seek derecognition of a non-independent union, and that the union should further be able to specify the bargaining unit to which this derecognition would apply – at present, the application by a worker must be in respect of the entire existing bargaining unit. However, only two applications for derecognition of a non-independent union have been made, and both were later withdrawn. There is also no evidence of unions facing widespread problems in respect of the presence of non-independent unions 'blocking' their applications for statutory recognition. There has so far been only one application to the CAC not accepted because a non-independent union was already recognised.

2.97. The Government believes that primacy should usually be given to voluntary deals, but also believes that where a majority of the workers represented by a non-independent union wish to overturn that arrangement then a mechanism should exist to allow this. **The current**

¹⁸ Put briefly, a trade union is defined as "independent" if it is not under the domination or control of an employer or employers.

procedure provides for this, and there is no evidence of any difficulties in its operation which suggests amendments should be made. The Government does not propose to make any change in this area.

Three-year moratorium following an unsuccessful application

2.98. Where a union applies to the CAC but does not win recognition following acceptance of the application, it is barred from further applications for three years in respect of the same, or substantially the same, bargaining unit. This is the case even where circumstances might change and extra support for the union can be demonstrated.

2.99. There is no doubt that worker support for recognition could conceivably change within the three-year period. However, the procedure is designed to make unions consider carefully their chances of success before launching a claim. It was intended that there should be clear periods between potential claims so as to avoid constant disruption to the business of the employer and the workers. The Government continues to believe that this is the right approach to ensure a degree of stability in employment relations. **It does not, therefore, propose to make any change in this area.**

Detriment and dismissal

2.100. The Act provides protections for workers who are subjected to detriment or dismissal on a number of grounds connected to trade union recognition. For instance, a worker is protected from detriment on the grounds that he/she acted with a view to obtaining or preventing statutory recognition. Dismissal on similar grounds is also regarded as unfair. The remedies available at an Employment Tribunal are the usual ones, and interim relief is available in dismissal cases.

2.101. We are aware of no claims brought under either the dismissal or detriment jurisdictions contained in the statutory procedure. However, we understand that claims which probably could have been made under those jurisdictions have instead been made under the older jurisdiction protecting against unfair dismissal for taking part in union activities.

2.102. According to some unions, dismissal and other action has been taken by employers against their members as part of an attempt to undermine support for recognition. The TUC has proposed that such actions should be deemed 'unfair labour practices' which should be discouraged and penalised under the procedure. Unions have pointed to recent allegations of

intimidation and victimisation of workers and union members during a CAC-ordered recognition ballot in early 2003. The TUC's suggested definition of an unfair labour practice goes wider than the current dismissal/detriment protections and includes, for example, threats from the employer to close or relocate the business if recognition is awarded, or the establishment of an in-house staff association. There are a number of difficulties in applying the suggested approach. These include defining unfair labour practices in such a way as to allow the employer to undertake reasonable campaigning activity in favour of its preferred solution. Also, questions would arise regarding workable sanctions in the event of a breach which avoid confusing the roles of the CAC and the employment Tribunals. **However, the Government will consider further and keep under review the operation of the law in this area.**

Change of employer identity

2.103. Any change in the identity of the employer of workers in a bargaining unit, whether caused by a business transfer or some other development, would affect the recognition procedure in two situations. The first is where a change in the employer's identity (or other development) takes place while an application for recognition is before the CAC. The second is where such a change (or other development) takes place after a CAC declaration has been made. In each situation the statutory procedure is not clear as to how matters should be handled. There is a need for clarity. **The Government therefore proposes to require the CAC in both such situations to treat the new employer as if it were the original employer.**

2.104. Another issue related to Transfer of Undertakings (Protection of Employment) Regulations (TUPE) concerns a situation where a union applies to the CAC to extend an existing voluntary recognition agreement, because the original bargaining unit, or part of it, has been affected by a transfer. At present, the CAC cannot accept applications where the proposed bargaining unit covers workers, in whole or in part, for whom an existing recognition agreement is in place. Bargaining units will change from time to time in the voluntary arena, because of transfer and other reasons. The Government does not, therefore, regard TUPE as a matter for the statutory recognition procedure. Where there occurs a TUPE transfer affecting a bargaining unit, or part of a bargaining unit, covered by a statutory recognition agreement, this situation can be dealt with in line with Part III of the Schedule (i.e. changes to the bargaining unit). In addition, the proposed clarification in para 2.103 will assist. **The Government does not intend to make any other changes in this area.**

Miscellaneous issues

Appeals process

2.105. At present, no appeal system exists for CAC decisions, other than judicial review. It has been suggested that an additional mechanism could provide for appeal to the Employment Appeal Tribunal. However, although this has the initial attraction of providing a higher opinion where a party feels aggrieved regarding a CAC decision, there are a number of serious drawbacks to introducing an appeal mechanism:

- the statutory recognition process is complex, with a number of stages and strict timescales (see Annex A). Any appeals mechanism would introduce serious delays in the process, particularly if it had to be halted until the appeal was heard. Such delays are not neutral, and in most cases will favour the employer, since the union's recognition campaign will tend to lose momentum as the process is delayed; and

- the CAC is a specialist body, operating in a specialist area. Its decisions often turn on the application of expertise and experience, and knowledge of the particular case which has usually been built up over a series of discussions and hearings.

2.106. There is no widespread dissatisfaction by either employers or unions with the quality of CAC decisions. Judicial review already provides a means of challenge where a party feels the CAC has acted improperly. There have been four judicial review applications. In two cases a judge refused leave to make the application; in the two other instances, the ultimate judgement of the courts supported the CAC's approach. The outcome of these relatively few judicial cases suggests that the CAC has used sound judgement, and applied the law appropriately in reaching its decisions. **This, together with the significant disadvantages of introducing any additional appeals mechanism, leads the Government to conclude that no new appeals process should be introduced.**

Amending the statutory procedure

2.107. At present the Secretary of State does not have a general power to amend the statutory procedure, but does have the power, by order, to make certain specific changes. This is the case with regard to the thresholds for 21 workers and the recognition ballot, and the conditions for awarding recognition without a ballot.

2.108. The procedure is long and technical, and certain inconsistencies or factors that slow the process down could come to light as the body of cases builds further. This could particularly be the case in those areas which have so far remained untested (such as changes to bargaining units and derecognition). The current arrangement would require primary legislation to make any corrections outside the areas which the Secretary of State has an existing power to change by order.

2.109. The Government therefore proposes to allow the Secretary of State to amend the statutory procedure by order where requested to by the CAC. The order-making power would be subject to the Parliamentary affirmative resolution procedure.

Enforcement of the bargaining procedure

2.110. Following the CAC's award of recognition, the bargaining method becomes a contract between the parties. If either party fails to carry out the contract, the other can apply to the courts for an order of specific performance. Failure to carry out an order of a court could represent contempt of court and result in potentially unlimited fines.

2.111. In the 52 cases to 31 December 2002 where a trade union has achieved statutory recognition, only 6 have resulted in the statutory method being imposed by the CAC. In 13 cases the method is yet to be decided. In the remaining 33 cases, the parties have agreed a method, and the indications are that these are generally working satisfactorily.

2.112. The method requires the carrying out of certain procedures, but not a requirement to reach an agreement. There is a concern that if the method only requires the following of certain procedural steps, an employer may 'go through the motions' in following the bargaining method without any serious intention of reaching an agreement. There have been calls for an obligation to be placed on each party to bargain in good faith.

2.113. There have as yet been no cases of parties seeking specific performance through the courts, and so no legal test of the employer's (or union's) obligations. Inclusion of a duty to bargain in good faith was considered at the time of the *Fairness at Work* White Paper, but it was found that this approach was problematic. It would be difficult for any body given the duty to decide issues of 'good faith' to judge when negotiations had, or had not, been genuine. **The Government proposes no change in this area.**

Definition of 'workers' for the purposes of the statutory procedure

2.114. For the purposes of statutory recognition, the law uses the definition of a worker which has been in place for some 30 years without giving rise to significant problems, and applies across all the major provisions of collective employment law.

2.115. There has been some suggestion that the statutory recognition procedure should contain its own, broader, definition of 'worker'. This has arisen from concern that in some situations certain workers may not be included in the bargaining unit: for example where an employer has 'casual', or 'freelance' staff, called to undertake work for specific periods or pieces of work. Although this may be viewed by the union as a continuing relationship with the employer, their concern is that as these individuals may not be working at the time of a statutory recognition ballot, they would not be counted as a worker in the bargaining unit and so be entitled to vote.

2.116. The Government does not see any logic in amending the definition of a worker solely for the purposes of statutory recognition. There is an ongoing DTI review of employment status in relation to statutory employment rights, and this definitional matter can be considered as part of that review.

Seafarers

2.117. The statutory procedure excludes workers who are employed on a ship, with a register entry port outside Great Britain, or whose employment is wholly outside Great Britain, or who are not ordinarily resident in Great Britain. Concerns over this have been raised, but this is not an issue which can be looked into in isolation. **Any changes to the statutory procedure in this regard will be decided in the context of the Department for Transport review of the employment position of seafarers.**

Technical issues

2.118. There are a number of areas in the wording of the Schedule which require amendment in order to clarify the intention and understanding of the procedure.

2.119. An example is that at present the Schedule does not provide explicit instruction to the CAC for dealing with situations where there is a change in union circumstances during an application to the CAC, or after an award of recognition. Various technical issues arise if unions

merge or 'de-merge'. Where two independent unions merge, both lose their legal identity, and additionally the new union would be required to apply to the Certification Officer (CO) for the issue of a new certificate of independence. **The Government proposes to change the law to deal with these and related circumstances.** For instance, where two independent unions merge, the CO would automatically issue a new certificate of independence to the new union. In addition the CAC would have a specific power to continue with the application in the name of the new union, or to apply an existing award of statutory recognition to the new union.

Chapter 3: Trade Union and Industrial Action Law

Overview

3.1. In addition to establishing a statutory recognition procedure, the Act made other important changes to the law relating to trade unions and their members. The Act:

- strengthened the protections for individuals against detrimental acts by employers and employment agencies on grounds of membership or non-membership of a union (section 2 and Schedule 2);
- created a regulation-making power to make it unlawful for employers to dismiss, or take detrimental action short of dismissal, against workers who refused to enter into personalised contracts where collectively agreed terms would otherwise apply to them (section 17);
- established a power to introduce regulations outlawing the blacklisting of trade unionists (section 3);
- simplified and clarified aspects of industrial action law, while maintaining its essential features (section 4 and Schedule 3);
- created new protections against dismissal for employees engaged in official, lawfully-organised industrial action (section 16 and Schedule 5); and
- introduced a right for individual workers to be accompanied by a trade union official or a fellow worker at certain disciplinary and grievance hearings with their employer (sections 10-15).

3.2. This chapter examines each of these changes.

Discrimination on grounds of trade union membership or non-membership

3.3. Before the Act, it was unlawful for employers to discriminate by positive acts on grounds of trade union membership and activities. However, as was brought to light in a 1995 judgment

by the House of Lords in the *Wilson and Palmer* case, it was lawful to discriminate by failing to act. The Act corrected this anomaly by making it unlawful to discriminate by omission.

3.4. Discrimination by omission is not considered to be a common practice. However, these extra protections have worked smoothly and are generally viewed as reasonable and sensible extensions of the pre-existing law. Employer compliance appears high. Since these provisions came into force, the number of Tribunal applications regarding alleged discrimination has remained steady at around 250-300 a year.

3.5. Since the Act took effect, a major legal development has required the Government to reconsider the overall design of these protections. In its judgment of July 2002 in the *Wilson and Palmer* case,¹⁹ the European Court of Human Rights (ECHR) ruled that UK law was in violation of Article 11 of the European Convention on Human Rights, which concerns the right of freedom of assembly and association. The Government will change the law to ensure compliance with the Convention. The following paragraphs discuss the implications of the judgment and present the Government's proposals to ensure compliance with the Convention.

The Wilson and Palmer Case

3.6. The circumstances of this case date back to the late 1980s and concern the similar but unrelated treatment of Mr David Wilson by Associated Newspapers Ltd and of Mr Terrence Palmer and others by Associated British Ports. Put briefly, the case concerns a refusal by these union members to enter individualised contracts outside the framework of a collective agreement. The contracts also required those who signed them to forego the entitlement to be represented by a union in all or some of their dealings with the employer. Those employees who took up the new contracts received a one-off payment (in the case of Associated Newspapers) and higher pay/benefits thereafter (in both cases). The two employers both acted to derecognise the relevant union.

3.7. In considering these circumstances, the Court stated that "it is of the essence of the right to join a trade union ... that employees should be free to instruct or permit the union to make representations to their employer or to take action ... on their behalf."²⁰ Further, the Court concluded that "it is the role of the State to ensure that trade union members are not prevented

¹⁹ 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)

²⁰ paragraph 46 of the ECHR judgment

or restrained from using their union in attempts to regulate their relations with their employers”.²¹ In the Court’s judgment, the UK failed this test. UK law “permitted employers to treat less favourably employees which were not prepared to renounce a freedom that was an essential part of union membership”.²² Under UK law at the relevant time, “it was... possible for the employer effectively to undermine or frustrate a trade union’s ability to strive for the protection of its members’ interests.”²³

3.8. The discriminatory acts which gave rise to these complaints took place over ten years ago. The ECHR judgment was made on the basis of the law at that time. Circumstances have changed significantly since then. The Government has now introduced a range of measures – not least in the Act itself – to strengthen representation rights at work and union rights more generally. In addition, the climate of employment relations has greatly improved since those days. Few, if any, employers would now give inducements to workers to relinquish union representation, and overtly anti-union behaviour is relatively rare. These are real advances. However, following a close study of the ECHR judgment, the Government considers that parts of UK law, especially elements of the pre-1997 law relating to union membership rights, must be amended. These changes are set out below.

(i) The ‘Ullswater Amendment’ (section 148(3) of the Trade Union and Labour Relations (Consolidation) Act 1992)

3.9. The Ullswater Amendment made it lawful for an employer to discriminate against union members, provided that the purpose of the discriminatory action was “to further a change in the relationship with all or any class of his employees”. Among other things, this means that employer actions are lawful as long as their purpose is to bring about the derecognition of a union or to restrict the coverage of collective bargaining.

3.10. The Ullswater Amendment was introduced in 1993 by the then Government in response to an earlier judgment in the UK courts in the Wilson and Palmer case, with the specific objective of legitimising the type of employer behaviour illustrated in that case. In the light of the ECHR judgment, the Ullswater Amendment is no longer sustainable. It enabled employers to induce union members to forego union representation, thereby interfering in the relationship

²¹ paragraph 46 of the ECHR judgment.

²² paragraph 47 of the ECHR judgment

²³ paragraph 48 of the ECHR judgment.

between members and their union. **The Government therefore proposes to repeal the Ullswater Amendment.**

(ii) The right to use the services of a union

3.11. The ECHR judgment has made it plain that accessing the essential services of a union is intrinsic to exercising the right to belong to a union. Current UK law on union discrimination does not mention accessing or using union services, though it does refer to the unlawfulness of actions “preventing or deterring (a union member) from taking part in the activities of an independent union at an appropriate time”. Arguably, ‘taking part in union activities’ encompasses the notion of acting to use the services of a union. However, UK courts have not always taken that view. Following the ECHR judgment, it is possible that Tribunals and courts will interpret the law more widely as unions wish. However, this is not certain, and the law should be clarified. **The Government therefore proposes to establish a clear positive right for members of independent unions to use their union’s services.** In drafting these entitlements, the Government will ensure there is adequate protection for employers against excessive or inappropriate use of work time by workers when accessing union services.

(iii) Freedom to enter individualised contracts

3.12. Employers often enter contractual arrangements with individual workers which contain different terms from the provisions of a collective agreement. These arrangements give necessary flexibility to employers to reward and retain key staff, and to shape working patterns to specific or particular circumstances. Sometimes, employers can draw up and agree these individualised arrangements within the context of collective agreements. Indeed, some collective agreements specify the system under which bonuses or special payments to individuals are made.

3.13. The Government considers it essential that employers and individuals should retain their freedom to agree individualised contracts in these circumstances. However, as the ECHR judgment makes clear, there must be clear limits on the exercise of that freedom. In particular, the law should not allow employers to do what they did in the Wilson and Palmer cases, that is, offer inducements to workers on condition that they relinquish their rights to union representation and make it a condition of entering individualised contracts that workers must relinquish those rights. To avoid uncertainty, the law should spell out these freedoms and responsibilities. **The Government therefore proposes that the law should be amended to**

specify that the entering of individualised contracts would not constitute unlawful union discrimination against those union members not offered them, as long as there was no inducement to relinquish union representation and no pre-condition in the contracts to relinquish it.

(iv) Section 17 of the Employment Relations Act 1999

3.14. Section 17 of the Act provides a power to the Secretary of State to introduce regulations which protect workers against dismissal and detriment for refusing to enter individualised contracts because they wish to stay within a collective agreement. This provision has never been commenced, and therefore no regulations have been introduced under it.

3.15. Section 17, which was amended late in the Parliamentary passage of the Employment Relations Bill, is unpopular with both unions and employers. In light of the other changes which the Government now proposes to make, it serves no obvious purpose. **The Government therefore proposes to repeal section 17 of the Act.**

3.16. The Government considers that the ECHR judgment requires no other changes to UK law. For example, the Court re-affirmed its long-standing view that Article 11 does not require employers to recognise the unions of any union members they employ.²⁴ The judgment should not therefore be read as requiring changes to the coverage or content of the statutory recognition procedure.

3.17. The judgment refers to the right for the union “to be heard”, which the Court views as inherent to Article 11. Similar references to that right have appeared in various Court judgments since the 1970s. However, the Court has never expressed any view on what the right implies as a minimum. It certainly has never stated that the right to be heard requires the employer to respond to the points a union might make. The Court used the *Wilson and Palmer* judgment to repeat its view that Article 11 “does not ... secure any particular treatment of trade unions or their members and leaves each State a free choice of the means to be used to secure the right to be heard.”²⁵ Under current UK law, unions can exercise their right to be heard by a number of means, including the freedom to be recognised or seek recognition (either voluntarily or

²⁴ The Court stated at paragraph 45 of its judgment that it “does not consider that the absence under UK law of an obligation on employers to enter into collective bargaining gave rise, in itself, to a violation...of the Convention”.

²⁵ Paragraph 42 of the ECHR judgment.

under the statutory procedure), and generally to make representations to the employer. These and other arrangements guarantee the right to be heard implied by Article 11.

Blacklisting

3.18. The Act gives the Secretary of State enabling powers to introduce regulations banning the production, dissemination and use of union blacklists. The purpose of blacklists is to facilitate employer discrimination on grounds of trade union membership and activities.

3.19. Blacklisting can be a covert activity which is difficult to detect. However, there have been no known cases of union blacklisting – overt or covert – since the 1980s. In part, these changes reflect the improved state of employment relations today. In line with good regulatory practice, the Government considers it is inappropriate to introduce regulation where there is no evidence that a problem has existed for over a decade.

3.20. The Government is not, though, complacent on the issue. Blacklisting is an unacceptable activity which is incompatible with modern employment relations. The Government will act quickly to outlaw blacklisting, if there is any evidence that individuals or organisations are planning to draw up such lists, or if there is any evidence that there is a demand from employers for them. **As a contingency measure, the Government therefore proposes to finalise the drafting of these regulations at an early opportunity. We are publishing draft regulations for consultation in a separate document, together with a draft Regulatory Impact Assessment on them.** Once these draft regulations are completed, they can be presented to Parliament for approval without delay, should evidence suggest they are necessary.

Industrial action ballots and notices

3.21. The Act aimed to simplify and clarify the many complicated requirements on trade unions when organising industrial action. These changes included:

- re-designing the requirements on unions to disclose information to employers in pre-ballot and pre-strike notices, thereby ensuring that unions are not required to release the names of their members to employers;
- re-defining the circumstances in which unions can hold an aggregate ballot across two or more separate workplaces;

- allowing the courts to disregard minor and accidental failures in the balloting process;
- amending the 'health warning' on ballot papers to reflect the new law on unfair dismissal for taking industrial action;
- encouraging negotiations before strikes begin by allowing employers and unions to agree to extend the 4-week period within which a union must call industrial action following a ballot;
- encouraging negotiation after industrial action has begun by facilitating the suspension of industrial action;
- clarifying the status of overtime bans or call-out bans as action short of a strike for the purposes of industrial action law; and
- facilitating the balloting of merchant seamen by allowing more on-ship voting.

3.22. The Act left unchanged the essential features of pre-1997 law on industrial action. For example, the law on secondary industrial action and picketing was not altered, and the overall requirements to hold ballots and issue notices and sample ballot papers to the employer were retained. These features of the law are now well established and ensure that the inevitable disruption inherent in industrial action is confined as far as possible to those directly involved in an industrial dispute. **The Government therefore re-affirms its commitment to retain the essential features of the pre-1997 law on industrial action.**

3.23. Since the Act's provisions came into effect, the total number of disputes has remained very low. Indeed, in 2002, they reached a record low (the records go back over 70 years). Industrial action levels in UK are significantly lower than the averages for other EU and OECD countries. There has, however, been an increase in the number of days lost through stoppages over the last year.²⁶ This was driven by a handful of large disputes involving many workers. It is certainly wrong to argue that this upturn in days lost is due in any way to the Act's provisions, which changed strike law at the margin.

²⁶ In the years 1997, 1998 and 1999 the number of working days lost to industrial action were 235,000, 282,000 and 242,000 respectively. In the three years from 2000, this figure rises to 499,000, 525,000 and to 1.322 million in the year to December 2002. In 2002, however, there were just 140 stoppages, the lowest on record.

3.24. The Government considers that the Act's changes to industrial action law, though relatively minor, have still had a demonstrably positive effect on employment relations. The flexibility which the Act introduced has helped parties re-open negotiations to avoid strike activity, reduced the scope for legal disputes over minor technicalities, and removed some of the rough edges in the pre-1997 law. That said, there are two areas where the Act's provisions might be amended further to reduce the administrative burden on unions, while continuing to protect the legitimate interests of union members and employers.

(i) Industrial action notices

3.25. In organising industrial action, the law requires unions to provide a first written notice to the employer(s) concerned at least seven days in advance of a pre-strike ballot, and a second notice at least seven days in advance of any subsequent industrial action. The Act amended the law to ensure that unions were not required to release the names of their members to employers. In achieving this aim, the Act also changed the definition of the information which unions should disclose in notices. Namely, notices should contain:

(a) information "in the union's possession" which would help the employer "make plans and bring information to the attention of his employees" involved; and

(b) as a minimum, information "as to the number, category and location of the employees concerned", where the unions possesses this information.

3.26. There is evidence that the requirements on unions have become more arduous and more uncertain under the Act. The courts have interpreted the provisions as requiring unions to attach detailed matrices to their notices identifying the number and grade of their members at each workplace involved in the dispute – a task which is exceptionally difficult to perform where membership turnover is high or where members are often re-deployed to different workplaces. The disclosure of such detailed information was not always necessary under the previous law.

3.27. In the *London Underground Limited v RMT* case, the Court of Appeal upheld a High Court decision to issue an injunction preventing RMT from organising industrial action against LUL on the grounds that the pre-strike notice was defective. The judgment stated that the 1999 Act had not made it easier for a union to prepare notices, and may have made it more arduous. Unions have also complained that they are often required to supply detailed information – in addition to the matrices – to assist the employer "to make plans", a phrase which is open to

wide interpretation. In fact, unions do not know in advance what the notice requirements actually entail. This uncertainty is accentuated by the need for unions to provide information which might be held by lay officials, the precise extent of which will often be unknown to the union's full time officers (who are usually responsible for issuing notices).

3.28. The law on notices is complex and gives rise to costly legal actions on minor points of law. In some ways, the attempt to simplify this law in the 1999 Act has made the law even more complex and burdensome. This was not the intention. **The Government proposes to make various changes to the law to ensure that simplification is achieved, by:**

- simplifying the minimum informational requirement (i.e. the number, category and location of the employees) to avoid the need to supply matrices. Instead, unions would be required to identify the *total* number of employees involved, and to list the categories and workplaces affected;
- defining more tightly the meaning of information "in the union's possession" as only information stored electronically or on paper which is held at certain trade union offices (national and regional head offices); and
- re-defining the purposes for which the information is provided by replacing the 'making plans' element of the current definition with a more precise formulation.

3.29. **The Government invites comments on each of these three proposals.**

3.30. The Government is also aware of an inconsistency in the requirements relating to pre-ballot notices and pre-strike notices. The pre-strike notice must contain a reference to the section of the 1992 Act (s234A) requiring such notices. Yet there is no corresponding requirement in the pre-ballot notice to mention the section of the 1992 Act (s226A) which concerns those notices. This inconsistency complicates the process and could lead to errors. **The Government proposes to harmonise the law by deleting the requirement for pre-strike notices to refer to s234A.**

(ii) Disregarding small accidental failures

3.31. The Act provides for the courts to disregard small accidental failures in the conduct and organisation of ballots, as long as the failures are accidental and on a scale which would not

affect the outcome of the ballot. These arrangements have worked well and have reduced the scope for legal actions over minor technical breaches of the legislation. However, there still remains considerable scope in the legislation for unions to trip up on points of detail.

3.32. The Government's decision to retain the essential features of the pre-1997 law means there is only limited scope to simplify this complex body of legislation further. However, to avoid unnecessary legal wrangling about the application of the law, the Government proposes to extend the ability of the courts to disregard small accidental failures in the following two areas:

(a) Section 232A of the 1992 Act makes it unlawful for unions to induce members to take action if those members were not given an entitlement to vote. Unions can easily make small slips in this area, as the *RMT v Midland Mainline* case demonstrates.²⁷ Given the variable standard of union records and the frequent movement of members from one job to another under the same employer, there is plenty of scope for unions to make accidental errors at the margin. The Government therefore wishes to consider whether a specific new disregard should be introduced in this area of the law. This issue has already surfaced in the Court of Appeal in the *P v NASUWT* case, where the Court held that a similar disregard applied to section 232A.²⁸ The decision in that case is currently being appealed in the House of Lords. The Government will study the conclusion and reasoning in the forthcoming judgment with care before finalising its legislative proposals in this area.

(b) A new disregard relating to small failures to follow the law on pre-ballot and pre-strike notices could be introduced. The disregard would concern accidental errors on a scale which would not significantly reduce the practical help provided through the notices to the employer. This measure would reduce the scope for legal wrangling over minor technicalities in an area of the law where unions need to process a lot of information to meet the statutory requirements.

3.33. The Government invites comments on the desirability of ensuring that the first of these disregards continues in effect, and of creating the second.

²⁷ In *RMT v Midland Mainline*, the union was found to have made a number of errors in the balloting process. Some of these fell within the 'small, accidental' category. However, the union was found to be overstepping this boundary by not balloting staff who might reasonably be expected to be induced to take action, even though the union was not aware of their position.

²⁸ In the *P v NASUWT* case, a parent attempted to prevent action by teachers to exclude a pupil from lessons. Two union members, who had recently moved to the school, were called on to take action even though they had not been balloted. The Court of Appeal interpreted the scope of the existing disregard as in effect encompassing section 232A(c) of the 1992 Act. This case also identified an erroneous cross-reference within the disregard provisions of the 1999 Act. The Government intends to correct this error at the earliest opportunity.

Dismissal of Striking Workers

3.34. The Act introduced new protections from dismissal for striking workers. In brief, the Act made the dismissal of an employee for taking lawfully organised, official industrial action unfair if:

- it takes place within eight weeks of the employee commencing industrial action; or
- it occurs after this period and the employer has not taken all reasonable procedural steps to resolve the dispute.

3.35. Since the Act's provisions came into effect, there has been just one Tribunal decision under this new jurisdiction. In this case (*Mr J Davies v Friction Dynamics Ltd*), the Tribunal decided that the dismissal had been unfair because it had taken place within the 8-week period. The Tribunal also found that the employer had not taken all reasonable procedural steps to resolve the dispute. This is a test case and many other sacked workers at Friction Dynamics have also submitted claims for unfair dismissal. The Tribunal's decision is now the subject of an appeal to the Employment Appeal Tribunal. It is too early, therefore, to reach a definitive assessment of its implications. However, we will keep this case under review as it develops to see if any lessons should be drawn from it.

3.36. In drafting the Act, the Government was conscious that most strikes are short-lived. This has remained the case. Estimates based on the strike data collected by Office of National Statistics show that in the period January to September 2002, 12 industrial disputes (around 1 in 10 of all disputes) lasted longer than 8 weeks.

3.37. **On the evidence so far available, the Government proposes to retain the 8-week period during which dismissals are automatically unfair.** This period covers the bulk of industrial action, and, as mentioned above, the Act's protections extend beyond this period where it can be shown that the employer failed to take the steps needed to settle the dispute. This arrangement provides incentives to encourage both employers and unions to resolve their trade disputes. This advantage would be lost if the period of automatic protection were extended indefinitely as some unions wish. Such an extension would also mean that employers could never take lawful action to dismiss strikers, and recruit a permanent replacement workforce, in the small number of very long-running disputes where all scope to reach resolution has been exhausted.

3.38. **The Government also proposes to retain the existing arrangements whereby applications can be made to Tribunals.** In particular, there is no reason to introduce interim relief for this category of case. Interim relief is a near-instant remedy where a wrongfully dismissed person is reinstated or is paid normal wages until a full Tribunal hearing occurs. Both forms of relief are clearly inappropriate where strike action is in effect ongoing.

3.39. These elements of the legislation will be retained, but the Government is concerned that the Act's protections might be weakened by the use of the 'lock-out' tactic. As currently drafted, the legislation might encourage employers to sit out the 8-week period of automatic protection by preventing any return to work by strikers. This would exacerbate a dispute and possibly prompt a union to extend its strike activity in response. 'Lock-outs' are rare in this country, though unions allege it occurred in the Friction Dynamics case. **The Government therefore seeks views on whether 'lock-out' days should be exempted from the 8-week period.** This would mean that the days when employees wanted to return to work but could not do so because of a lock-out would not count for the purposes of the 8-week period. So, if an employer locked out his striking workforce during the second week of a dispute, then the total period of protection would be extended by a further week (from 8 to 9 weeks) to offset the effect of the lock-out.

3.40. One potential problem with this proposal is the uncertainty it might create for the strikers where the employer locked them out indefinitely. The Government would wish to avoid the situation where employees would enjoy no protection in these circumstances (because they were never dismissed). Arguably, under existing case law, a failure to take the workers back in effect constitutes a dismissal. If there were doubt on this point, it should be possible to amend the legislation to clarify the issue.

Right to be accompanied

3.41. The Act introduced the right for workers to be accompanied at disciplinary or grievance hearings. Where the worker is required or invited by their employer to attend certain categories of disciplinary or grievance hearing, and the worker reasonably requests to be accompanied, the employer must permit the worker to bring along a companion of their choice. The companion must be either a trade union official or a fellow worker.

3.42. This new right was based on the widespread practice of allowing a chosen companion to

attend these key meetings. The Acas Code of Practice on Disciplinary Procedures, first introduced in 1977, advised employers to allow a companion to attend hearings. Unsurprisingly, the evidence suggests that the new right has operated smoothly since it was introduced in September 2000. Compliance appears high: in the first two years of its operation, only 136 applications were made to Tribunals of an alleged breach of the right. This figure is low, given the very large number of qualifying hearings which occur each year. These cases do not show that the right is unworkable or difficult to apply.

3.43. There have been calls to widen the role of the companion into that of a representative. The Act does not allow the companion to answer questions on behalf of the worker, or to attend hearings in their place. This makes sense and reflects the long-standing advice given in the Acas Code. The companion is there to provide support and not to substitute for the worker. That said, the Act recognises that the companion should play an active role in proceedings, and provides for the companion to address meetings and confer with the worker. Unions are concerned that this aspect of the Act is not fully working as intended, and employers are restricting the input which the companion may make. This has led to further disagreements and misunderstandings about the conduct of hearings, which have distracted the parties from resolving the substantive issues concerned. **The Government therefore proposes to clarify the law by setting out in more detail the circumstances in which the companion is allowed to address hearings.**

3.44. The right to be accompanied applies only to hearings which the employer arranges as part of disciplinary and grievance procedures. This means that the right would not apply where the employer does not have disciplinary and grievance procedures, or where they exist and the employer refuses to apply them. To fill this gap, the Employment Act 2002 introduced various provisions to reinforce the need for employers to adopt and use procedures. In particular, the 2002 Act established statutory disciplinary and grievance procedures, which will be incorporated automatically into all contracts of employment. The right to be accompanied will apply in meetings required to be held by these statutory procedures.

3.45. The implementation of these provisions within the Act over the next year or so should ensure that the existing widespread use of procedures becomes virtually universal. The statutory procedures do not give an entitlement for the worker to take paid time off to consult the companion in advance of hearings. Though this may be a good practice, which employers might voluntarily permit, the Government does not consider it should be made compulsory for

employers of all sizes. Often, such preparatory meetings can be adequately organised during rest periods or outside working time altogether.

3.46. The Act does not currently provide any appeal mechanism against decisions reached under this jurisdiction. That is an oversight. **The Government therefore proposes to amend the law in order to allow a right of appeal to the Employment Appeal Tribunal over decisions concerning the right to be accompanied.**

Chapter 4: The Institutional Framework

Overview

4.1 The Act changed the constitution, functions and administrative provisions of five Government-funded institutions involved in trade union and collective employment rights matters:

- the Central Arbitration Committee (CAC) (sections 25 and 26);
- the Advisory, Conciliation and Arbitration Service (Acas) (sections 26 and 27);
- the Commissioner for the Rights of Trade Union Members (CRTUM) (section 28);
- the Commissioner for Protection Against Unlawful Industrial Action (CPAUIA) (section 28);
and
- the Certification Officer (CO) (section 29 and Schedule 6).

4.2. This chapter discusses the operation of these provisions.

Central Arbitration Committee

4.3. As outlined in Chapter 2, the CAC has since June 2000 dealt with an expanding caseload.

4.4. Satisfaction levels with the CAC are quite high, and the Government believes that it has done an excellent job in discharging the functions granted to it by the Act. The CAC's own user satisfaction survey found that 79% of those who responded were satisfied with the service provided.

4.5. There are a number of areas, however, which warrant further consideration.

Justification of decisions

4.6. At present the CAC is required by statute to give reasons for some of its decisions (e.g. extending the period in which it must determine the bargaining unit), but for others only to notify the parties (e.g. determining the bargaining unit, and recognition without a ballot).

4.7. There is no general duty in administrative law for decision makers to give reasons for their decisions, although the Courts have been finding a duty to give reasons in more cases. Building on statutory obligations, the CAC does in practice give reasons, including where these are not required by the statutory procedure. It has, though, been suggested that parties would welcome the CAC being required to give full reasons in all cases, including where these are not required by the statutory procedure.

4.8. The CAC uses its industrial relations experience and judgement to make decisions. Evidence set out elsewhere in this document (especially Chapter 2), supports the view that the CAC has displayed sound judgement in discharging its duties under the Schedule. There have been just four instances where CAC decisions have been subject to judicial review. In two, the judge refused permission for leave to make the application, and in the other cases the courts have ultimately upheld the CAC's approach. Although the CAC is not required in all instances to give reasons, its practice is to do so. **The Government is of the view that the current system has worked well, with few judicial review challenges. It does not propose to make changes in this area.**

Rules and procedures

4.9. The decisions of some bodies in the employment field, such as Employment Tribunals, are governed by separate legislative rules of procedure. However, the decisions the CAC takes under the statutory recognition procedure are governed entirely by Schedule I of the Act and not by any separate legislative rules of procedure. The CAC operates under a very lengthy Schedule – enshrined in primary legislation – running to around 27,000 words. This contains highly detailed procedures setting out how applications for statutory recognition are to be dealt with. **It would not be appropriate for the CAC to be subject to a further layer of procedural rules; this would complicate the procedures further and would be likely to make the decision-making process more, rather than less, confusing.**

4.10. Schedule I is a lengthy and complex document. It has been suggested that some re-ordering may make the contents more readable. However, given the body of cases which has been built up, and parties' levels of familiarity with the Schedule in its present form, it might cause more confusion to re-order it (and therefore alter all of the references in it). Moreover, the CAC does make available on its website information as to how the statutory procedure operates, and additionally issues a guide to the parties. The guide to the parties is regularly updated, and the CAC is encouraged to maintain this valuable source of information. One area of the guide which may require change is the level of information on CAC membership and petition checks. **If the Schedule is changed to include a requirement for the parties to co-operate in regard to membership and petition checks (see Chapter 2), then the guide to the parties will need to be revised in order to reflect this change.**

Oral hearings

4.11. At present it is the CAC which decides whether a case requires an oral hearing or whether decisions can be made on paper evidence. While there is no right for either party to demand a hearing, the CAC consider such requests carefully in the light of the circumstances of the case and the evidence which has been presented. Granting the right to a hearing at every stage could lead to serious delays in the process. **The Government therefore proposes no change to the current arrangements.**

Changes of Panel Members

4.12. Changes to CAC panels during a case are infrequent, but they are sometimes required – for example because the illness of a member. Of 236 applications received up to 31 December 2002, a change has been made in 24 cases (the Chair has been changed twice, worker members fourteen times, and employer members eight times).

4.13. Continuity in cases can be very important, and if one or both parties feel that a change would in some way undermine the process, this could lead to a loss of confidence in the procedure. However, without the flexibility to substitute members where appropriate, the proceedings would come to a temporary halt. This would not seem appropriate for a statutory body, required to operate to strict legislative timetables. **Therefore the Government believes the current system for fielding substitute panel members should continue to operate.**

General CAC duty

4.14. The CAC has as its general duty

‘...encouraging and promoting fair and efficient practices and arrangements in the workplace, so far as having regard to that object is consistent with applying other provisions of this Schedule in the case concerned.’

4.15. The CAC has sought to carry out its quasi-judicial role under the statutory procedure in an impartial manner. In what is potentially a highly controversial area, and notwithstanding comments regarding the detailed operation of the process in particular cases, the CAC has the general confidence of the social partners. The Government believes that the CAC has operated to its terms of reference in a proper manner, and that the statutory recognition procedure has been successfully delivered. **The Government does not therefore propose any changes to the CAC’s general duty.**

The Advisory, Conciliation and Arbitration Service (Acas)

4.16. Among its other activities, Acas plays a valuable role during the recognition procedure, and is also dealt with in Chapter 2. The Act also made an amendment to its general duty. Before the Act, Acas’s general duty was

‘to promote the improvement of industrial relations, in particular, by exercising its functions in relation to the settlement of trade disputes under sections 210 and 212.’

4.17. The Act simplified this wording, removing the particular requirement on Acas to give priority to its work on dispute resolution. The current general duty is therefore

‘to promote the improvement of industrial relations.’

4.18. The general duty reflects what Acas does and gives the Service the scope it needs to set its own priorities. It has not caused problems for either Acas or the users of its highly-valued services. **The Government therefore proposes to leave the general duty unchanged.**

4.19. The Act also changed the timing of Acas's annual reports to ensure they cover the same time period as its accounts. This minor change has worked as intended and no further changes are proposed.

Commissioner for the Rights of Trade Union Members (CRTUM) and Commissioner for Protection Against Unlawful Industrial Action (CPAUIA)

4.20. The Commissioner for the Rights of Trade Union Members (CRTUM) had the function of providing material assistance to trade union members in taking, or contemplating taking, certain legal proceedings against their union or a union official. The main function of the Commissioner for Protection Against Unlawful Industrial Action (CPAUIA) was to provide similar assistance to individuals taking, or contemplating taking, legal action against unions whose unlawful organisation of industrial action had deprived that person of goods and services. Both Commissioners, especially CPAUIA, had light caseloads.

4.21. The Act abolished both offices. Their abolition has caused no known problems and there have been no calls to re-establish the Commissioners.

Certification Officer (CO)

4.22. The Act extended the role of the CO to determine complaints from union members about alleged breaches of union rule or of the statute regulating the affairs of unions. The CO is more accessible than the courts in deciding these complaints. This approach represents a more appropriate way of resolving differences between individual members and their union than financing court actions via CRTUM.

4.23. The CO's new powers, which came into effect in October 1999, led to a significant increase in his caseloads within the first year or so of the legislation taking effect. This was caused by an initial surge of breach of rule complaints. This upward trend has subsequently slowed down, as Table 4.1 shows. In contrast, Table 4.2 shows there has been little change in the number of complaints made to the CO about breaches of the statute regulating unions.

Table 4.1: CO activity in breach of rule cases

	25 October 1999 - 31 March 2000 (c 5 months)	2000 - 2001	2001 - 2002	1 April 2002 - 31 Dec 2002 (9 months)
Decisions	0	48	57	21
Enquiries	61	189	96	90

Table 4.2: CO activity in breach of statute cases

	1997 Calendar Year	1998 Calendar Year	1 January 1999 - 31 March 2000 (i.e.15 months)	2000 - 2001	2001 - 2002	1 April 2002 - 31 Dec 2002 (9 months)
Decisions	6	13	19	13	11	5
Enquiries	7	6	18	7	7	4

4.24. From 1 April 2000 to 31 December 2002, 26% of breach of statute cases were withdrawn before the CO made his decision. Of those where a decision was made, unions won 55% and applicants 45%. For breach of rule complaints, 12% were withdrawn before a decision was made. Of those that reached a hearing, unions won 81% and applicants 19%.

4.25. The Government believes that the CO has played a valuable role in allowing union members to hold their unions to account. The CO first encourages the parties to sort out their complaints internally, and generally operates as a fallback where this does not work. The number of cases, though declining a little from their peak, indicates there is a real demand for the CO's services. Even where applicants lost their cases, experience has shown that in most of them, there were reasonable grounds for applicants to raise their concerns. That said, there is some evidence that the process could be made more efficient. In particular, a small minority of complaints have gone to a hearing where the complaints may have been misconceived or had

very little chance of success. These cases have imposed a cost on the parties and slowed down the work of the CO, who at present has little discretion to prevent such cases following the full process.

4.26. The Better Regulation Task Force, in response to points raised by trade unions, has asked the Government to consider if the CO could be given greater scope to dispose of weak or vexatious cases more expeditiously, saving the respondent union from having to defend each case at a full hearing. The Government has considered this point and understands the concern of unions, while remaining mindful that applicants also have rights. The Government does, though, see some scope for changes to be made in the following three areas.

(i) Power to 'strike out' weak cases

4.28. Employment Tribunals have the power to strike out certain categories of case. They can make an order at any stage of the proceedings that an application be struck out or amended on the grounds that it is scandalous, misconceived or vexatious, and also for want of prosecution (i.e. cases where a Tribunal has not heard from the applicant for some time). 'Scandalous' means irrelevant and abusive of the other side. 'Misconceived' includes having no reasonable prospect of success. A 'vexatious' claim has been described as one that it is not pursued with expectation of success but rather to harass the other side or out of some improper motive. However, the term is also used more widely so as to include anything which is an abuse of process. Tribunals must provide an opportunity to show cause why the order should not be made. They have a discretion as to whether the opportunity should take the form of an oral hearing.

4.29. **It is proposed that the CO should be given a similar power to that of employment Tribunals to strike out cases.** The Employment Appeal Tribunal would hear any appeals against such orders. Employment Tribunals seldom use their power to strike out, and it is expected the CO would act similarly. However, the power would help establish a necessary safeguard against serious abuse of the system.

(ii) Attendance costs at CO hearings

4.30. The CO has normally met the reasonable travel and subsistence costs of applicants (and their witnesses) who attend hearings, under a scheme established by the Secretary of State. Unions cannot claim a similar reimbursement of their expenses. **It is proposed that the**

scheme should be amended to make it clear that the CO has a broad discretion on whether to reimburse such expenses, taking into account all the circumstances of the case.

(iii) Vexatious litigants

4.31. Under the Act, the CO can refuse to consider a complaint if the applicant is subject to a 'restriction of proceedings' order issued by the High Court or the Employment Appeal Tribunal (EAT) identifying that person as a vexatious litigant. However, in considering whether such an order should be made, the EAT can take into account only those proceedings in an Employment Tribunal or before the EAT. In other words, it cannot take into account any allegedly vexatious actions before the CO. This means that the EAT has no means of preventing vexatious individuals from pursuing cases before the CO so long as they focus all or the vast majority of their litigious activity on the CO. **The Government therefore proposes to allow the EAT also to take into account proceedings before the CO when exercising its power to make 'restriction of proceedings' orders.**

Chapter 5: Other issues

Overview

5.1. This review has already examined those parts of the Act dealing with trade union and collective labour law, together with the related institutional framework. The Act included various other provisions covering a wide range of other employment issues affecting individuals at work. This Chapter discusses these provisions under the following three headings:

- (a) provisions which have not been reviewed elsewhere;
- (b) provisions which have been the subject of other reviews or initiatives; and
- (c) miscellaneous or technical provisions.

The Act's provisions which have not been reviewed elsewhere

Tribunal awards for unfair dismissal (sections 33 and 34)

5.2. The Act made several changes to the law governing the awards made by Employment Tribunals in unfair dismissal cases. Namely, it:

- index-linked the minimum and maximum limits on payments and awards;
- raised the maximum limit on compensatory awards from £12,000 to £50,000²⁹; and
- simplified the awards structure in cases where employers failed to comply with re-instatement or re-engagement orders.

These changes came into effect in October 1999.

5.3. The annual index-linking of awards against the Retail Price Index ensures they retain their value in real terms. Previously, they were raised following a major review each year or so. This change has worked as intended. It has brought predictability to the revaluing of awards and

²⁹ This £50,000 limit has subsequently been increased annually in line with inflation.

has reduced the administrative burden, and Parliamentary time, involved in revising the level of awards to take account of inflation. **The Government does not propose making any changes to the new system for index-linking.**

5.4. Raising the maximum limit on compensatory awards to £50,000 ensures that the small number of higher-paid applicants affected by the previous limit are now normally fully compensated for their losses by a Tribunal (higher claims can be made to the courts on grounds of breach of contract). It also ensures that employers are not liable for unlimited compensation.

5.5. Unfair dismissal cases have increased only marginally since the raising of the limit, from 55,573 applications in 1999/2000 to 56,397 in 2001/02.³⁰ This small rise suggests that the higher awards on offer have not had a significant effect on the total number of claims.

5.6. Table 5.1 provides data on the value of awards since 1997.

Table 5.1: Tribunal awards, 1997-2002

Period	Limit	No. of cases reaching limit	Median
1/4/97-31/3/98	£11,300	140	£2,310
1/4/98-24/10/99	£12,000	148	£2,482
25/10/99-31/1/01	£50,000	15	£2,379
1/2/01-31/1/02	£51,700	10	£2,531
1/2/02-31/8/02	£52,600	19	£3,180

5.7. This shows that the median award has risen by a small amount since these provisions came into force, but is still very far short of the ceiling. It should be noted that awards are calculated by actual losses and therefore depend on such factors as a claimant's pay and time out of work. The increase in the median is of course far short of the four-fold increase in the maximum. So it cannot be argued that the large rise in the maximum has driven up awards across the board. As expected, the numbers receiving the higher maximum are low. This confirms that the current ceiling, as intended, affects very few claimants.

³⁰ Figures for applications under all jurisdictions including unfair dismissal for reasons of pregnancy, transfer of undertakings, union activity etc

5.8. It should be noted that the former £12,000 limit is currently being challenged in two Transfer of Undertakings (Protection of Employment) Regulations (TUPE) cases where the losses were found to be £89,000 and £94,000. It is argued that the limit is contrary to EU law in that it prevents the compensatory award from being an adequate and effective remedy. **Subject to the outcome of these cases, the Government is not minded to make any further changes to the level of compensatory awards.**

5.9. Before the Act, the Tribunals operated a complex set of rules when awarding compensation to applicants for non-compliance with an order to reinstate or re-engage. The Act simplified the system.

5.10. If the employee is seeking reinstatement or re-engagement and is found to have been unfairly dismissed, the Tribunal will consider the practicability of the worker returning to work for the employer. In cases where the employee was partly to blame, the Tribunal will also consider whether or not it would be just. It may then order re-employment. In 2001-02 re-employment was awarded in 11 cases.

5.11. In two of these cases, the employer refused to re-employ the worker. When an employer fails to comply with a reinstatement or re-engagement order, the Tribunal will firstly award compensation in the normal manner. This is made up of a basic award for loss of job security, and a compensatory award for loss of earnings and benefits. The Tribunal may then order an additional award to penalise the employer, made up of 26-52 weeks' pay. A 'week's pay' for these purposes is capped, currently at £260.³¹

5.12. The Government believes that in the very few instances where employers are ordered to re-employ workers, but refuse to comply, they should face a significant penalty for what is in effect a contempt of the Tribunal. The current amount may be too low. **The Government therefore seeks views on raising the minimum and maximum limits for additional awards where an employer fails to comply with a reinstatement award.**

5.13. The Act also abolished special awards, which were made in some cases of unfair dismissal, for example on grounds of trade union membership. These were generally higher than the additional awards then available in standard cases of unfair dismissal. **The Government does not propose to reintroduce special awards**, since doing so would

³¹ This figure is index-linked. The maximum award based on the current amount is currently £13,520.

reintroduce unwelcome complexity into the awards system. The Government considers that the same penalty for non-compliance with a re-employment order should apply regardless of the reason for dismissal.

Employment outside GB (section 32)

5.14. The Act abolished a provision specifying that certain employment rights, such as the right not to be unfairly dismissed, applied only to employees who ordinarily worked in Great Britain under their contract of employment. The application of such rights is now decided by general principles of international law.

5.15. While these principles can be complex, they have the general effect that a case cannot be brought in Great Britain unless a proper connection with Great Britain already exists. The Government took the view in 1999 that the overall effect of the change would be broadly neutral, in that it would not substantially increase or decrease the number of people who would be able to exercise employment rights in Great Britain. **The Government is not aware of any evidence to the contrary, and thus has no plans to change the position.**

The Act's provisions covered by other reviews or initiatives

Maternity and parental leave (sections 7, 9, Schedule 4); and Time off for dependants (sections 8, 9, Schedule 4)

5.16. These provisions contain the main provisions for working parents in the Act. They extend (mainly via a regulation-making power) existing maternity rights and establish (again via a regulation-making power) a new entitlement to 13 weeks' parental leave. These policies, together with the right to time off for dependants, have been thoroughly reviewed in the Green Paper *Work and Parents: Competitiveness and Choice*. The findings of that review, including legislative changes such as new paid paternity and adoption leave rights and enhancements to maternity provision, were implemented in the Employment Act 2002 and by subsequent regulations.

Fixed term contracts (section 18)

5.17. The Act prohibited the use of waivers for unfair dismissal, but not for redundancy payments, in fixed term contracts. More wide-ranging changes to the law on fixed term work

were introduced in the Employment Act 2002 and subsequent regulations. The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 have the effect that redundancy payment waiver clauses inserted into contracts agreed, extended or renewed after 1 October 2002 are invalid.

Part-time workers (sections 19 – 21)

5.18. The Act introduced a regulation-making power for the Secretary of State to ensure that part-time workers receive no less favourable treatment than full-time workers. Following full public consultation, regulations were made in 2000.

Employment status: regulation-making power (section 23)

5.19. The Act established a power for the Secretary of State to make regulations extending existing employment rights to individuals not already covered. A wide review of employment status matters is currently under way. A discussion document was published in July 2002 as part of this review.

5.20. The regulation-making power in section 23 of the Act was amended slightly by the Employment Act 2002. The Government considers that the amendment is restrictive and might not serve better regulation principles. It enables the regulations to confer rights only by amending existing primary or secondary legislation and not by means of regulations simply stating that an existing right applies to the individuals in question. The change means that regulations may be unnecessarily complicated and clumsily expressed. In line with better regulation principles, the power to draft regulations that confer existing rights without amending existing legislation would give the Government the flexibility to choose the best method of drafting regulations extending rights according to the circumstances of the case. As a result the regulations would be more straightforward and easier to understand. **The Government therefore proposes to change the regulation-making power so that the desired flexibility and clarity can be achieved in drafting regulations.**

Partnership Fund (section 30)

5.21. The Act gave the Government authority to establish the Partnership Fund to assist and develop partnerships at work. Details of the operation of the Fund can be found at www.dti.gov.uk/partnershipfund. The Fund has proved popular to date and has committed the

original 1999 budget of £5m in supporting 159 projects. The Fund was given an additional budget of £9m in December 2001 and has expanded its remit to include sector and regional projects, as well as the production of guidance on best practice.

Employment agency regulation (section 31, Schedule 7)

5.22. The Act amended the order-making power in the Employment Agencies Act 1973 under which the Secretary of State regulates employment agencies. It also provided for the amendment of the prohibition on charging fees to people seeking work and extended the powers of inspectors. This area is the subject of a separate review. Details of the public consultation can be found at www.dti.gov.uk/er/agency.

Transfer of Undertakings (section 38)

5.23. The Act contains a technical provision empowering the Secretary of State to make orders extending the scope of the TUPE regulations to situations falling outside the coverage of the Acquired Rights Directive (which the TUPE regulations implement). So far, one order has been made under the provision, to ensure protection for support staff transferring from local authorities to the Rent Officer Service Agency. At the end of 2001 the Government put forward for consultation a package of proposals for reform of the TUPE regulations, some of which could entail the further use of the power in section 38 of the Act. These proposals are still under consideration.

Conclusion

5.24. Apart from the technical change mentioned at paragraph 5.20, the Government has no proposals to change the law in any of the areas covered by sub-section (b) as an outcome of this review. Of course, proposals may separately emerge in the other ongoing work which has been mentioned above.

Miscellaneous or Technical issues

National Minimum Wage (NMW): residential members from religious communities and Inland Revenue enforcement (sections 22, 39)

5.25. The Act amended the law governing the National Minimum Wage in two ways:

- by exempting residential members of religious communities from the NMW; and
- by empowering the Inland Revenue to use tax and other information to enforce the minimum wage.

5.26. These are technical changes which have operated as intended. The Low Pay Commission monitors the operation of the NMW regime and has not reported any difficulties concerning the operation of these provisions.

Dismissal of school staff (section 40)

5.27. This section of the Act brought the qualifying period for claiming unfair dismissal for this group of staff into line with that for other employees across the economy. This change has worked as intended in harmonising the treatment of all employees.

Security and intelligence services (section 41, Schedule 8)

5.28. The Act allowed this particular group of workers to make complaints to Employment Tribunals about breaches of employment law. This change has enabled this special group of workers to access the Tribunals in as similar a way as possible to other employees.

Conclusion

5.29. **The Government has no proposals to change the law in any of the areas covered by sub-section (c).**

Annex A: Outline of Part I of the Statutory Recognition Procedure

A1. The statutory procedure is contained in Schedule I of the Act. The following is a short guide as to how the procedure operates in respect of a union(s) seeking recognition (Part I of the Schedule).³² It is not a definitive statement of the law, and does not cover every permutation of circumstances. Instead, the intention is to assist the reader in following the issues considered during the review and options identified for reform. It does not go into the operation of other sections of the statutory process, such as handling changes to bargaining units, and derecognition procedures.

A2. There are a number of stages in the process, usually with a specific timetable for each. These timescales can generally be extended, either by a decision of the CAC alone, or following consent of the parties. The philosophy underpinning the process is that voluntary resolution of claims is the preferred route, and this is encouraged even after union application to the CAC. If statutory recognition for collective bargaining is awarded, this is in respect of pay, hours and holidays only.

Stage 1 – Trade union writes to the employer seeking recognition

A3. For a request to be valid, the employer (together with associated employers) must employ 21 or more workers. Only independent unions have access to the statutory procedure. The entire process is triggered by the union writing to the employer, requesting recognition, and identifying the bargaining unit of the workers concerned.

A4. The employer has 10 working days 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 by the CAC as an agreement for recognition. In such instances, if the parties subsequently fail to agree on the bargaining method, they can approach the CAC for assistance and determination. The agreement cannot then be terminated by the employer for a period of three years. This applies to a voluntary agreement at whichever stage in the process it is agreed.

A5. Alternatively, if the employer agrees to negotiate, the parties have 20 days to conclude discussions – or longer by mutual agreement. The parties may call on the services of Acas to

³² Fuller guidance on the Schedule appears on the CAC web site: www.cac.gov.uk

assist with this process. 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 may make an application to the CAC.

Stage 2 – Application by trade union to the CAC

A6. The CAC has 10 days 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 bargaining unit to be members of the union, and for the CAC to be satisfied that a majority of the workers in the bargaining unit would be likely to favour recognition. In addition, 3 years must have passed since any previous application by the union was accepted by the CAC in respect of the bargaining unit in question.

Stage 3 – Agreement or determination of the bargaining unit

A7. If the union's application is accepted, the parties have a period of 20 days to agree a bargaining unit if they have not already done so. If the parties fail to agree the 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. The CAC has 10 days to make this decision. If the bargaining unit agreed/determined is different from that originally proposed by the union, then the CAC must re-apply the acceptance criteria in respect of the new bargaining unit.

Stage 4 – Determining whether to award recognition

A8. Once the bargaining unit is established, the CAC must decide whether to declare the union 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 due to any of three conditions: if the CAC is satisfied that a ballot should be held in the interests of good industrial relations; if a significant number of members inform it that they do not want the union to conduct collective bargaining on their behalf; or if membership evidence is produced which leads it to conclude there are doubts whether a significant number of the union members want the union to conduct collective bargaining on their behalf.

Stage 5 – Recognition ballot

A9. A ballot is held if the union does not have majority membership in the bargaining unit, or if the CAC decides despite majority membership that a ballot should still be held for any of the reasons given in Stage 4 above. The CAC gives a 10-day notice period for the holding of the ballot. Unless during this period 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, which must take place within 20 days of his/her appointment. 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.

A10. In addition, the employer must give the union access to the workers in the bargaining unit during the balloting period. A statutory Code of Practice on access applies. The employer must also supply to the CAC the names and addresses of the workers in the bargaining unit. This information is used by the QIP for the ballot itself, and also to distribute union literature to the workers (if the union wishes, and at the union's cost). 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 recognised for the purposes of collective bargaining on behalf of the bargaining unit. Otherwise the union is not recognised.

Stage 6 – Method of Collective Bargaining

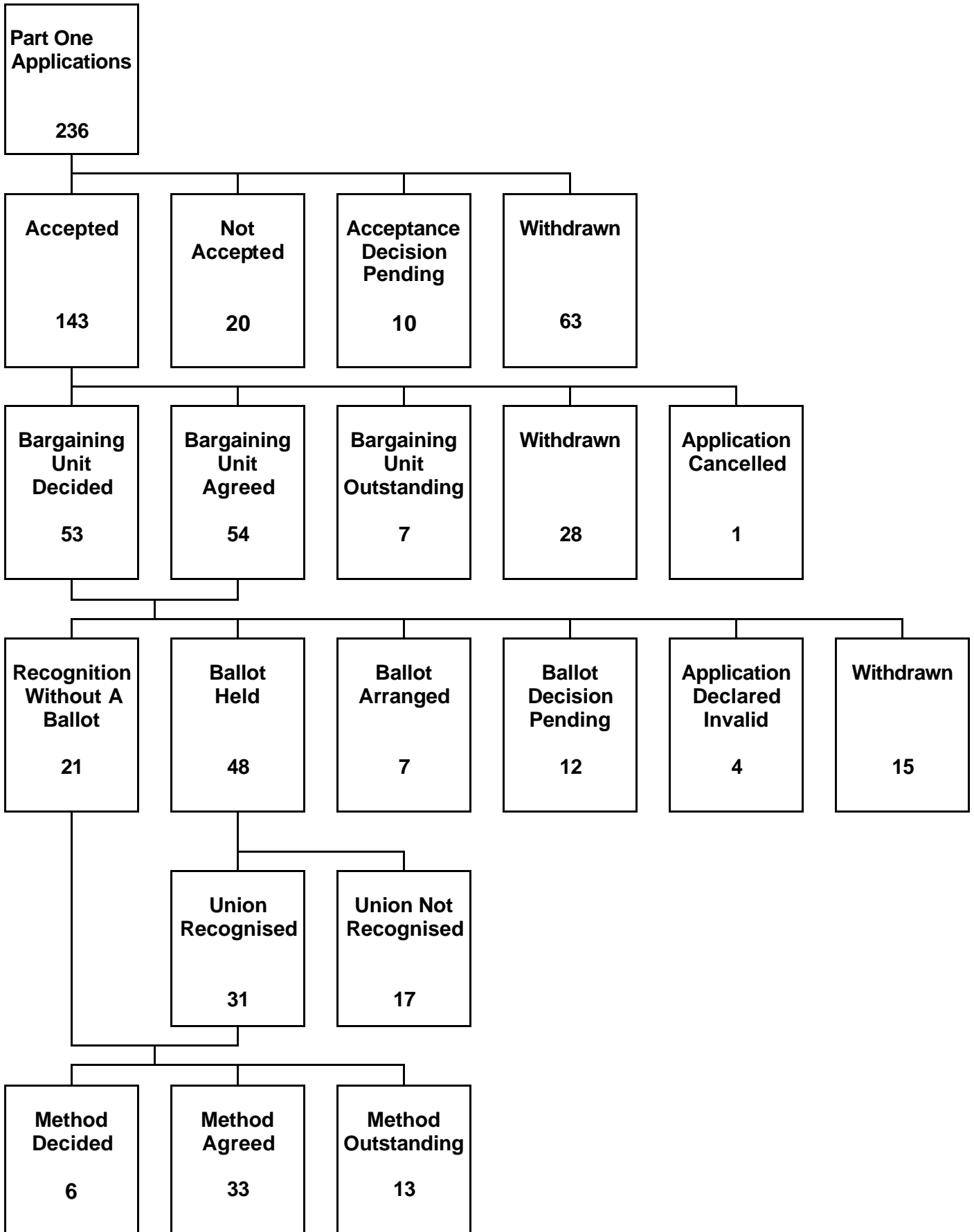
A11. Following recognition, the parties have a period of 30 days (or longer if they agree to extend it), to reach an agreement on the way in which they will conduct their collective bargaining. If the parties do not agree a method, they can approach the CAC for assistance. There is a 20-day period for the CAC to broker an agreement. If there is still no agreement, the CAC determines the bargaining method. In doing so, the CAC must take into account the method specified in an order by the Secretary of State, although it may depart from this method as it thinks appropriate in the particular circumstances.

A12. The method becomes a contract between the parties. If either party believes the other is subsequently not following it, then the remedy is the seeking of an order of specific performance by the courts.

A13. Where the CAC has both awarded recognition, and determined the method of collective bargaining, the union has the further statutory right to be informed and consulted over training.

Annex B: CAC Caseload Statistics

As at 31 December 2002



CAC Ballot Results as at 31 December 2002

i) Recognition awarded

Case Number	Union	Employer	Type	Number in BU	Turnout		For		Against		% BU in favour of recognition	Membersh Level % *	
					No.	%	No.	%	No.	%			
1	126	TGWU	Kwik-Fit	P	574	469	81.7	466	99.4	3	0.6	81.2	27
2	89	TGWU	Britton Merlin	P	192	120	62.5	119	99.2	1	0.8	61.9	25
3	88	TGWU	Andrews (Sheffield)	P	181	136	75.1	133	97.8	3	2.2	73.5	45
4	188	TGWU	Grosvenor Casinos	P	970	604	62.3	589	97.5	15	2.5	60.7	25
5	101	GPMU	DSR	C	69	36	52.2	35	97.2	1	2.8	50.7	43
6	186	TGWU	Rest Assured Ltd	C	212	130	61.3	125	96.2	5	3.8	59.0	28
7	59	TGWU	Whitbread	P	130	112	86.2	107	95.5	5	4.5	82.3	22
8	75	BAJ	Mirror Group	P	553	333	60.2	317	95.2	16	4.8	57.3	26
9	11	MSF	Saudia Arabia	P	139	116	83.5	110	94.8	6	5.2	79.1	49
10	189	TGWU	Cytec Engineering	C	51	47	92.2	44	93.6	3	6.4	86.3	45
11	52	TGWU	Hozelock	C	266	200	75.2	186	93.0	14	7.0	69.9	35
12	123	TGWU	Lunar Caravans	P	141	103	73.1	95	92.2	8	7.8	67.4	53
13	124	TGWU	Snack Factory	P	263	204	77.9	183	89.7	21	10.3	69.6	37
14	110	TGWU	Riverstone Spinning	W	196	153	78.1	137	89.5	16	10.5	69.9	23
15	61	MSF	Aim Composites	P	106	68	64.2	60	88.2	8	11.8	56.6	35
16	97	TGWU	Optare Group	P	338	274	81.1	222	81.0	52	19.0	65.7	36
17	80	TGWU	Chilton	W	63	41	65.1	33	80.5	8	19.5	52.4	46
18	182	GMB	Ifor Williams	P	398	300	75.4	236	78.7	64	21.3	59.3	34
19	73	BALPA	Easyjet	P	300	261	87.0	195	74.7	66	25.3	65.0	43
20	19	AEEU	Huntleigh Healthcare	W	172	157	91.3	117	74.5	40	25.5	68.0	56
21	128	BECTU	MTV Europe	P	131	74	56.5	54	73.0	20	27.0	41.2	16
22	129	AEEU	Honda	C	4045	3120	77.1	2272	72.8	848	27.2	56.2	37
23	146	BALPA	Excel Airways	P	56	47	83.9	34	72.3	13	27.7	60.7	72
24	74	URTU	James Irlam	P	467	277	59.3	189	68.2	88	31.8	40.5	20
25	166	TGWU	Nacam UK	C	161	157	97.5	104	66.2	53	33.8	64.6	24
26	93	ISTC	Lowe & Fletcher	P	88	74	84.1	46	62.2	28	37.8	52.3	48
27	140	TGWU	Bacardi-Martini	P	235	196	83.5	122	62.2	74	37.8	51.9	33
28	183	GMB	Northbourne Ltd	P	25	23	92.0	14	60.9	9	39.1	56.0	57
29	72	GPMU	Derwent Information	P	595	420	70.6	244	58.1	176	41.9	41.0	27
30	185	ISTC	Cornelius Electronics	C	131	103	78.6	58	56.3	45	43.7	44.3	21
31	12	GPMU	Red Letter	W	50	48	96.0	25	52.1	23	47.9	50.0	60

ii) Recognition not awarded

Case Number	Union	Employer	Type	Number in BU	Turnout		For		Against		% BU in favour of recognition	Membership Level %	
					No.	%	No.	%	No.	%			
32	169	Unifi	Bank Hapoalim	P	46	29	63.0	18	62.1	11	37.9	39.1	27
33	157	Amicus & GMB	Alan Worswick	P	29	28	96.6	14	50.0	14	50.0	48.3	41
34	178	GPMU	Ritrama (UK) Ltd	C	53	52	98.1	25	48	27	52.0	47.2	57
35	57	MSF	Teachers Group	P	47	32	68.1	15	46.9	17	53.1	31.9	36
36	34	BAJ	Essex Chronicle	P	50	43	86.0	20	46.5	23	53.5	40.0	49
37	94	MSF	Unipart	P	130	117	90.0	52	44.4	65	55.6	40.0	60
38	90	UNIFI	Turkiye Is Bankasi	P	17	14	82.4	6	42.9	8	57.1	35.3	63
39	60	MSF	APW New Forest	P	112	60	53.5	23	38.3	37	61.7	20.5	32
40	54	BFAWU	Seabrook Crisps	W	239	218	91.2	80	36.7	138	63.3	33.5	23
41	99	GPMU	The Printworks	P	88	79	89.8	29	36.7	50	63.3	33.0	43
42	120	Amicus	GE Caledonian	C	730	692	94.8	243	35.1	449	64.9	33.3	30
43	164	GPMU	Opasco	P	25	12	48.0	4	33.3	8	66.7	16.0	54
44	70	BALPA	Ryanair	P	245	140	57.1	46	32.9	94	67.1	18.8	49
45	111	TGWU	King Asia Foods	W	154	125	81.2	39	31.2	86	68.8	25.3	55
46	86	TGWU	William Beckett	W	34	33	97.1	10	30.3	23	69.7	29.4	32
47	82	AEEU	Honeywell Garrett	C	90	89	98.9	25	28.1	64	71.9	27.8	56
48	121	TGWU	Economic Skips	P	47	35	74.5	4	11.4	31	88.6	8.5	56

* The membership figures quoted are the latest available in the process – at either the acceptance, revalidation, or recognition without a ballot stage. In four cases the union had over 50% at the acceptance stage, but did not claim recognition without a ballot – Cases 111, 123, 164 and 178. In another case while the union had 60% at the acceptance stage, the CAC subsequently found it did not have the majority membership required for recognition without a ballot – Case 94.

Key

Type: P = postal, W = workplace, C = combination.

BU = Bargaining unit.

Annex C: Issues raised by the Better Regulation Task Force

C1. The Better Regulation Task Force (BRTF), an independent advisory body which examines the effects of Government regulation, wrote to the Secretary of State for Trade and Industry on 7 June 2002 identifying four areas of trade union law where regulation might impose unnecessary or burdensome restrictions on union behaviour. In one of these areas – the quasi-judicial role of the Certification Officer in hearing complaints against unions by their members – the Task Force’s suggestions relate to the operation of the Employment Relations Act 1999. The others fall outside the scope of the review. However, the Government considers it sensible to use this consultation document to announce its response to all four points.

Election of union presidents

C2. The law requires the following union officials to be elected by postal ballot every five years or less:

- union presidents (or equivalent);
- general secretaries (or equivalent); and
- a member of a union’s executive.

C3. There are various exceptions to this requirement. For example, there is no need to have statutory elections for presidents and general secretaries whose role is largely ceremonial because they are both non-voting members of the executive and their term of office is 13 months or less.

C4. Presidents are usually members of a union’s executive. This means they can be the subject of two elections – first, to join or remain in the executive and second, to become or remain union president. The BRTF considers that the need to hold two ballots imposes a “costly administrative burden” on trade unions. They propose that if a President is an elected member of an executive, only the statutory election to the executive should be required.

C5. The role of most union presidents is largely ceremonial, acting as a figurehead for the union at home and abroad. Presidents generally chair union conferences and meetings of union executives. However, their influence over decision-making within unions can hardly be distinguished from that exercised by other executive members. There therefore appears to be no obvious reason why these positions are so vital to the interests of union members as to require what is in effect a double election. Such elections can be expensive. As a rule of thumb, it costs about 75p - £1 to ballot an individual member. So, it would cost approximately £45,000-£60,000 for a medium-sized union of 60,000 members to elect its President.

C6. Before this law came into effect, it had been the long-standing practice of some unions for executives to appoint or elect a President from within their own number, without a ballot of the entire membership. This approach was particularly helpful to unions if a President resigned from his post in mid-term on, say, health grounds. A new President could then be appointed quickly. **In response to the BRTF's suggestion, the Government therefore intends to remove the requirement for union presidents (or, where a union has no such position, their equivalents) to be elected by a secret postal ballot of the entire membership, provided they are already elected members of the union executive.**

Union political funds

C7. The 1992 Act requires trade unions to hold a postal ballot of their entire membership to establish a political fund. Further, the law requires unions to hold review ballots at least every ten years thereafter to confirm whether union members still wish to devote union resources for expenditure on political objectives. Given the expense involved in running the review ballots and the existence of other legal safeguards against abuse, the BRTF asked whether it was still valid to require the union to hold review ballots.

C8. The Government understands the case for reform. However, these ballots serve an important democratic function and ensure that union members can at regular intervals collectively authorise their union's involvement in political activities. **The Government will therefore retain the requirement on unions to hold review ballots at least every ten years.**

C9. The Government is aware that the law on political fund ballots (and on other statutory union ballots and elections) is complex. **The Government considers these ballots and elections should remain covered by statutory provisions but it invites views on simplifying the burdens they impose.**

Requirement for the Certification Officer to hold hearings

C10. Union members may complain about certain alleged breaches of union rules or statute to the Certification Officer (CO). The Task Force was concerned that the CO had insufficient powers to deal with weak or vexatious complaints without involving both him and the respondent union in a time-consuming and costly consideration of the complaint. This issue is discussed in some detail in Chapter 4 of this consultation document.

Balloting

C11. Unions are required by statute to hold a number of secret ballots and elections. For example, they are required to ballot before calling on their members to take industrial action. At present, all these statutory ballots must be postal. The BRTF considers that unions should be allowed to use a wider range of balloting methods, including telephone or internet balloting. It suggests that the independent scrutineers of these ballots should be given discretion to decide which method should be used, provided they are satisfied that the chosen method would be safe and satisfactory.

C12. The Government wishes to encourage modern methods of voting, where appropriate. As yet, it is unclear whether such forms of balloting would always be efficient and abuse-proof when applied in this setting. Consideration must also be given to individuals who for a variety of reasons might be unable to use electronic voting methods, and who would therefore be disenfranchised. **The Government therefore intends to give the Secretary of State a power to change by order the balloting method used in statutory union ballots and elections.** This power would give the flexibility needed to widen the range of balloting methods, when there was evidence that the method was sufficiently developed to apply safely and economically to this type of ballot.

Annex D: Regulatory Impact Assessment

Purpose and intended effect

D1. The Government announced on 11 July 2002 a review the Employment Relations Act 1999. The purpose of the review is to assess whether the various changes to employment legislation introduced by the Act have been 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.

D2. The review has largely concentrated on the provisions in the Act relating to the framework of industrial relations, especially the statutory requirement on employers to recognise a trade union where the majority of the workforce want a union to bargain collectively on their behalf.

D3. The main conclusion of the review is that the legislation is generally working well. It has improved employment standards at work in a way that is consistent with effective management, and has fostered productivity; it has promoted legal certainty and benefited the overall climate of industrial relations. It has operated in a manner consistent with the promotion of partnership at work. Nevertheless, the review has identified a number of areas where changes would improve the working of the Act. The impact of these proposals is considered in this assessment.

Risks

D4. The proposals are intended to address practical difficulties in the operation of the legislation identified during the review.

D5. The proposed changes remove potential risks of legal uncertainty or of unnecessary delay or cost that could arise from the legislation as drafted.

Business sectors affected

D6. All sectors are covered by the Employment Relations Act 1999 and hence by these proposals.

D7. In practice, the likely impact of these changes will vary by sector. Experience to date of applications to the Central Arbitration Committee (CAC) for union recognition shows the following sectoral pattern:

Business Sector	Number of Applications	As % of Total Applications
Manufacturing	113	47.88
Transport and Communication	41	17.37
Other Business Services	40	16.95
Wholesale & Retail	12	5.08
Other Occupations	11	4.66
Finance	10	4.24
Other Community Services	6	2.54
Education	2	0.85
Construction	1	0.42
Total	236	99.99

Source: CAC, June 2000 – 31 December 2002

Costs and benefits

D8. The Employment Relations Act 1999 itself helps to reduce the scope for workplace disputes by establishing statutory procedures for trade union recognition when this enjoys the clear support of the workforce. It also encourages parties (via the right to be accompanied) to resolve disputes more reasonably and expertly.

D9. The changes proposed following the Review are not expected to change significantly the overall balance of benefits and costs arising from the original Act. 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). Equally, implementation of the changes will incur some limited costs to the parties. Both are at a level where they are so small as to make quantification difficult.

D10. This impact assessment therefore considers the benefits and costs of individual proposals in two parts: a discussion of broad areas where some impact might be expected; and a briefer tabulated assessment of other more detailed proposals.

Implementation Costs

D11. Whenever employment law changes, parties have to become familiar with the new legislation.

D12. In this case, the proposals for change 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 result of this review. In this case, there is no additional familiarisation cost.

D13. 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 appraising themselves of 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 £100,000.

Proposed changes to statutory union recognition procedure

D14. 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, in turn associated with drivers of business performance.³³ The policy objective can be achieved even where union recognition does not ensue from a statutory recognition claim, by the parties reaching a voluntary arrangement

D16. Indeed, the impact of the Act is likely to have occurred largely through encouraging employers and trade unions to reach recognition agreements voluntarily and outside of the statutory process. The TUC have logged 1,000 new voluntary agreements from 1998 to 2002, with over 700 of these occurring since the introduction of the statutory procedures.³⁴ There is clear evidence of an increase in the number of voluntary recognition agreements reached both before and following the Act.

D17. Use of the statutory recognition procedure itself has affected relatively small numbers of employers and employees to date. There were 52 CAC declarations of statutory recognition up to December 2002, covering some 12,000 employees.³⁵ To put this in context, the Labour Force Survey shows that 7.3 million employees were trade union members in autumn 2001.

D18. 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 in arranging workplace ballots. The process also involves costs to the public sector, largely to the CAC.

D19. The proposed changes to the detailed workings of the statutory recognition procedure are not expected to lead to significant changes in the benefit-cost balance of the Act. This is because they are unlikely to change the probability of trade unions securing recognition and thus are unlikely to generate more applications or to change employers’ overall strategies on how they handle CAC applications. Instead, the changes will improve the way the procedure works, with modest reductions in time, cost and uncertainty to the parties concerned.

³³ See Chapter 12 of ‘Britain at Work’ (1999), the sourcebook of findings from the 1998 Workplace Employee Relations Survey (WERS).

³⁴ TUC, ‘Focus on Recognition’, (2003).

³⁵ These figures represent the number of workers covered by statutory recognition agreements awarded up to 31st December 2002. Source: CAC.

Proposal to amend legislation to clarify application procedures for 'top up' recognition

D20. The proposal allows trade unions to bring claims to widen the scope of existing voluntary recognition agreements to cover the minimum scope set out in the statutory procedure. In principle, this increased certainty could stimulate additional CAC cases where existing agreements do not cover pay, holidays and hours of work.

D21. It is not possible to estimate how many existing recognition agreements do not cover all the areas covered by the statutory procedure.³⁶ However, information drawn from an analysis of the context of relatively new voluntary recognition agreements suggests that the number is small. In 2001/2002, a total of 306 union recognition agreements were reached, 24 on a statutory basis, and 282 voluntary deals. Although the TUC report did not disclose any figures, the report stated that, of this number, "the overwhelming majority" of voluntary agreements covered at least pay, hours and holidays.

D22. Any additional CAC caseload is therefore expected to be very modest.

Proposals to give the CAC power to reduce the time period at one stage during the application/recognition process

D23. This is unlikely to have any significant impact on the costs of the recognition process to the affected parties, as it does not directly require any changes in the work required of each party. There may be some modest savings to the CAC from a more streamlined process, plus, of course, the benefit to all parties of speedier dispute resolution.

Proposed changes to the law governing collective employment relations

Proposals addressing discrimination on grounds of trade union membership or activities

D24. A series of proposals have been put forward to ensure that parts of UK law are in compliance with the European Convention on Human Rights. This follows from the Wilson and Palmer case. Although the ERA clarified that employers could not discriminate by omission against members who wished to use their union's services, the judgement requires the Government to make further changes in this area. The proposed changes are intended to establish a clear right for members of independent unions to use their unions' services. The proposals also remove the right of employers to discriminate against trade union members provided this is to further a change in the relationship with all or any class of employees. (A further proposal is to specify that individualised contracts will not constitute unlawful discrimination against union members that are not offered them, provided there is no inducement to relinquish union representation and no pre-condition in the contracts of employees to relinquish it.)

D25. These changes are only likely to have a significant impact on businesses or employees 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 derecognition and the run-down of union

³⁶ In WERS, 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.

membership. The findings of both the 1998 WERS 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 minimal.

Proposals to simplify the law on industrial action notices

D26. These proposals are likely to decrease the burden on trade unions in terms of information they are required to assemble and present. To date there appear to have been 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.³⁷ The likelihood of cases going to litigation over these issues is therefore quite small. However, the cost of contesting such a case can be substantial to the affected parties, and there are also costs in terms of official time and legal advice, for the union in protecting itself against a potential challenge. The proposed 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 when, for practical reasons, it may be very difficult for trade unions to be seen to have followed all the necessary requirements.

Call for views on amending the law on the use of employer lock-outs in industrial disputes

D27. Any proposals adopted along these lines are likely to have a small effect on the parties involved. Lock-outs are very rare in the UK and so in aggregate the expected costs and 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.

Proposals to allow the EAT to take into account proceedings before the Certification Officer (CO) in determining vexatious litigants, to allow the CO to strike out weak cases and to allow the CO to withhold expenses in certain cases

D28. These proposals will have an impact at the margin. The intended effect of the proposals 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 whom action is taken.

D29. For illustration, a typical cost estimate for such a case is estimated to be £1,100 which consists of the cost of a solicitor for 2-3 days and a trade union official for one day³⁸ (although there is likely to be significant variation.)

D30. Total cost savings, however, are likely to be modest. Relatively few proceedings are brought against trade unions at present.

Proposal to introduce a reserve power for the Secretary of State to enable the CAC to order a recognition ballot to be carried out with electronic voting

³⁷ 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).

³⁸ The average Weekly salary of a solicitor is £900.1 and £483.3 for a trade union official. NES 2002, pp 19 & 22. Note, the calculation is defined as $(0.5 \times 900.1) + (1/7 \times 483.3)$. The number £1100 comes from the fact that the legal fees are likely to be greater than the respective earnings and so they have been scaled upward by a factor of 2 to reflect this.

D31. Electronic voting has the potential for benefits through reducing the costs of balloting employees on recognition and – if it was thought to increase employee turnout – increasing the legitimacy of recognition ballots. It is recognised, however, that issues of access might occur. Questions might arise, for example, about the use of employers’ electronic systems and the security and confidentiality issues this raises.

D32. If this power were to be activated, the secondary legislation required would be subject to a further Regulatory Impact Assessment.

More detailed changes

Proposal	Description of Likely Impact
<p>Allow union access to workers by means of postal communication, via a third party such as the Qualified Independent Person [Section 2.49 of the Consultation Document]</p>	<p>The cost is likely to 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 do it or not. Therefore the compliance costs are likely to be minimal/zero.</p>
<p>Seeking views on the treatment of associated employers [Section 2.38 of the Consultation Document]</p>	<p>Here the government is looking at linking bargaining units together where there may be circumstances in which the ‘appropriate’ bargaining unit would be one encompassing more than one associated employer, and the Schedule should allow the CAC to make such a determination where appropriate. This is only likely to be used in a small number of cases so the impact in terms of costs and benefits is likely to be small.</p>
<p>Clarify that pensions shall not be regarded as ‘pay’ for the specific purposes of the procedure for the present time. At the same time, the Government proposes to give the Secretary of State an order-making power to add pensions to the three core topics, with a view to exercising that power when there is evidence that typical practice in recognition agreements is for pensions to be included as a bargaining topic. [Section 2.53 of the Consultation Document]</p>	<p>The effect of the second proposal will be 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. The first proposal will simply provide greater clarity, rather than affect the outcomes of CAC decisions, nor will the coverage of pensions be affected. It may have a potential benefit in that it may decrease the scope for future litigation.</p>
<p>Establishment of a general requirement on both the unions and employer to co-operate with a CAC membership check [Section 2.62 of the Consultation Document]</p>	<p>Unions and employers generally co-operate anyway so this general requirement is unlikely to impose additional costs. Its main benefit is likely to be that it clarifies</p>

Document]	expectations – but this is likely to be very small.
Establish that Acas-run ballots or checks have a clear statutory basis [Section 2.63 of the Consultation Document]	This may lead to cheaper ballots, by clarifying their status under data protection legislation reducing the paperwork involved in the procedure of conducting checks, e.g. writing letters to employees to request information for checks etc. From June 2001 – May 2002, Acas ran 70 ballots and 99 checks.
Give CAC a power to reduce the 20-day bargaining unit negotiation period. [Section 2.84 of the Consultation Document]	The overall impact of this depends on how the power is exercised. If it is on a limited basis, its effect will be to slightly reduce the costs to the CAC as unions will not need to wait for the appropriate time to elapse before proceeding to the next stage.
Change the law to deal with changes in union circumstances and related circumstances [Section 2.119 of the Consultation Document]	Very few such circumstances do arise therefore the main benefit is the simplification of the process for trade unions and CAC, and a modest cost saving to employers.
Require the employer to disclose the number of workers in the bargaining unit, together with their grade and location, at the CAC stage for negotiating the bargaining unit [Section 2.72 of the Consultation Document]	This unlikely to have any significant cost impact on employers for two reasons. Firstly, they will already have this information and secondly, they may have to provide this information later on in the bargaining stage anyway.

Securing compliance

D33. There is no evidence at present that employers or trade unions find it difficult to comply with the provisions of the Act. As the proposed changes are mainly technical, compliance should remain high.

Impact on small business

D34. 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 and unions in the past have tended to concentrate their recruitment and recognition activities on larger enterprises where these activities are most cost-effective.

Competition assessment

D35. The technical changes proposed will not affect the degree of competition in affected sectors.

Monitoring and evaluation

D36. The Review has drawn on feedback from stakeholders together with analysis of existing management information from the CAC and drawing on relevant academic research. A combination of analysis of CAC processes, 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.