Employment Bill 2004

Summary of Final Proposals, as Modified Following Consultation

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EMPLOYMENT BILL 2004

SUMMARY OF FINAL PROPOSALS, AS MODIFIED FOLLOWING CONSULTATION

Introduction

This document is a summary of the document *'Employment Bill 2004: Review of Consultees' Comments / Final Proposals as to the Contents of the Bill'*. It is not, and is not meant to be, a comprehensive description of the Bill.

1. About the Bill

In September 2002 the Department published, *"Employment (Amendment) Bill - Review of Legislative Changes",* which was followed by a further document *"A Review of Maternity and Related Rights"*.

The proposals in these documents are intended to form the basis of a new Employment Bill the aims of which are as follows:

- ♦ to modernise the Isle of Man employment law framework;
- ♦ to provide citizens of the Isle of Man with the basic canons of fairness that are a matter of course elsewhere;
- ♦ to encourage participation in the labour market, especially in flexible forms of working, by removing any discriminatory barriers that cannot be justified;
- ♦ to contribute to the work / life balance of citizens of the Island; and
- ♦ to ensure the Isle of Man is in compliance with those relevant treaties and conventions which are concerned with minimum labour standards and which apply to the Island.

Because the proposed amendments and additions to existing legislation are wide-ranging in nature and scope the Department has been advised by the Attorney General's Chambers that the optimum approach is to produce a consolidated Employment Bill. This will comprise:

- ♦ the contents of the Employment Act 1991;
- ♦ the contents of the short Employment (Amendment) Act 1996;
- ♦ those proposals arising from the *Review of Maternity and Related Rights*; as well as
- ♦ those proposals which arise from the *Review of Legislative Changes*, which are discussed in this paper.

2. The Bill's Main Proposals

The Bill's main provisions (other than those relating to maternity and related rights) are as follows:

- ♦ All workers should have an entitlement to **a minimum of 4 weeks' paid holidays** each year.

- Workers should have protection against unfair dismissal and detrimental treatment for **asserting statutory rights; for a health and safety related reason**; and, where they are aware of malpractice at work, for making a **protected disclosure.**

- **Part-time workers** should have the right to be no less favourably treated than their full-time counterparts in regard to their terms and conditions of employment except where any differential treatment can be justified on objective grounds. (An example of such justification might be excluding part-time workers from a share option scheme where the value of the share options was so small that the potential benefit to the part-timer of the options was less than the likely cost of realising them).

- **Fixed-term contract employees** should have the right to be no less favourably treated than their permanent counterparts in regard to their terms and conditions of employment except where any differential treatment can be justified on objective grounds (for example not permitting a fixed-term contract employee to attend a training course towards the end of the contract term). In addition, there should be protection against any abuse arising from the use of successive fixed-term employment contracts or relationships where the renewal on a fixed-term basis cannot be objectively justified.

- Employees should be able to complain to the Employment Tribunal if they are subjected to dismissal or discriminatory treatment short of dismissal for taking lawfully organised, official protected **industrial action** within the first four weeks of such action.

- The Employment Tribunal should be given **powers of re-employment.**

- The Employment Tribunal should be given powers to award **compensation for injury to feelings** in unfair dismissal cases and for detriment on trade union grounds. Such compensation which would be payable in exceptional cases only, should be subject to a limit of £5,000.

- The Employment Tribunal should be given powers to award compensation to employees who have not been issued with **a written statement of their terms and conditions** or where their employer has made an **unlawful deduction** from them.

- Those classes of **atypical workers** (for example crown employees, seafarers, persons working outside the Isle of Man) that are partially or wholly excluded from employment rights should be rationalised and enabling powers should be included in the Bill to extend the coverage of statutory employment rights of particular classes of atypical workers by secondary legislation.

- Workers should have a **right to be accompanied at a disciplinary or grievance hearing** by a trade union representative or fellow worker.

3. Regulatory Impact and Costs to Government

The detailed *Review of Consultees' Comments* contains information on both the costs to Government of individual proposals and the likely economic impact of the legislation.

The main **costs to Government** which can be expected to arise out of proposals in the paper are comprised of the following:

(a) Employment Tribunal running costs

In theory the proposed extension in employment rights has the potential to lead to more cases proceeding to the Employment Tribunal, the running costs of which are borne by the DTI. Most potential cases are, however, resolved through conciliation by the Industrial Relations Service and the Department does not expect a significant net change in the number of Tribunal applications.

At present the Tribunal is involved in approximately 15 - 20 cases per year (comprising both interlocutory and full hearings). It is of note that, to date, only 2 cases have proceeded to the Employment Tribunal under the three most recent Acts - the Shops Act 2000, the Employment (Sex Discrimination) Act 2000 and the Minimum Wage Act 2001.

(b) Payments to be made to the Chairman and Members of the Employment Tribunal.

The Department has proposed (see Proposal 12 below) that enabling powers should be provided to allow for certain payments to be made to the Chairman and Members of the Employment Tribunal so that they are properly remunerated for their work. However, the Bill itself will not result in any additional outlay of expenditure and separate concurrence from Treasury would be necessary to implement the proposal through secondary legislation.

The **likely economic impact of the legislation** has been analysed by the Economic Affairs Division which undertook a review of all the original proposals put forward by the Department at the request of the Treasury to assess whether they might be expected to have any impact on the competitiveness of the Island. The following are extracts from the review:

"Many of the measures described below will have no appreciable impact on the vast majority of employers or employees in the Isle of Man.

Proposals on minimum holidays, rights for fixed term and part-time workers and parental leave enhance the rights of individual employees. They impose additional labour costs on employers. However, over the long term wages will adjust to compensate and the employment effects are likely to be minimal. In other words, employees end up paying for their new rights in the form of lower wages and there is no effect on productivity or competitiveness (see Nickell and Quintini, 2002).[1]

Other measures such as the proposals on minimum periods of notice, written statements for reasons for dismissal and compensation in cases of unfair dismissal are forms of employment protection. They impose extra cost on labour adjustment, that is the cost of hiring and firing people. Employment protection slows down flows through the labour market and may raise long-term unemployment and reduce short-term unemployment.

[1] Nickell, S. and G. Quintini (2002), 'The Recent Performance of the UK Labour Market', Oxford Review of Economic Policy, Vol. 18, No. 2, Summer 2002.

It tends to favour middle aged males at the expense of part-time workers, youths and females, but the effects are small. In so far as productivity and hence competitiveness goes, employment protection may enhance both as workers stay longer with employers and participate more effectively in the workplace but any effect is small (see Nickell and Layard, 1999).[2]

It is difficult to see how any of the proposals could have a major impact on the competitiveness of the Island's businesses. If any of the proposals do have an impact, they have not been notified during the consultation process. Much of the impact on the Island could arise as a result of a change in perception, rather than any real economic cost. It is also possible that some impact could arise from employers in the Isle of Man adopting employment practices of their parent companies in the United Kingdom."

[2] Nickell, S. and R. Layard (1999), 'Labour Market Institutions and Economic Performance' in O. Ashenfelter and D. Card (eds.), *Handbook of Labor Economics*, North Holland, 3c: 3029-84.

Appendix: Summary of all Proposals

A: The Trade Disputes Regulations Act 1936

1. **Obsolescent provisions which provide for criminal penalties for intimidation, violence and annoyance which might arise in the case of a trade dispute should be repealed and the wording of the Act should be updated.**

B: The Control of Employment Act 1976

2. **The Department's original proposals, mainly intended to ensure compliance with Article 6 of the European Convention on Human Rights *("the right to a fair trial")* are now contained within the Tribunals Bill and will thus be omitted from the Employment Bill.**

C: The Trade Disputes Act 1985

3.

(a) **Responsibility for securing a settlement in accordance with a court of inquiry's recommendations should be transferred from the Governor in Council to the Industrial Relations Service.**

In the Department's view, once the court of inquiry has delivered its report, the appropriate body to attempt to ensure any recommendations are implemented is the Industrial Relations Service.

(b) **The wording in the Act relating to the Governor in Council / Council of Ministers should be made consistent.**

(c) **For purposes of compliance with Article 6 of the European Convention on Human Rights *("the right to a fair trial")* there is a requirement to amend the Act so that the Appointments Commission, to be established under the Tribunals Bill, appoints any court of inquiry in any designated essential service in place of the Council of Ministers.**

Legal advice received by the Department is that a court cannot be said to be sufficiently independent and impartial when established under Section 3A of the Act, (that is after an essential service has been designated by Order by the Governor in Council and the Governor in Council has compelled the Council to appoint a Court of Inquiry). In this case the Court of Inquiry investigates the dispute and makes a written decision which is binding on the parties. (In contrast any court of inquiry appointed under Section 3 of the Act is not binding upon the parties).

D: The Redundancy Payments Act 1990

4. **Employers should be prohibited from receiving a redundancy rebate from the National Insurance Fund in respect of a redundancy payment made to a company director or beneficial owner of one half or more of the issued share capital of a company.**

At present these classes of employees are eligible to receive a tax free redundancy payment whilst the employer is, in addition, able to claim a rebate of up to 60% of the amount of the redundancy payment from the Manx National Insurance Fund. Yet often the company director / beneficial owner and the employer are one and the same.

E: The Employment Act 1991

5. **The Redundancy Payments Act (RPA) 1990 should be a designated Act for purposes of conciliation by the Industrial Relations Service (IRS).**

   At present, the IRS has no authority to conciliate in disputes connected to the RPA.

6. **Employees should be able to complain to the Employment Tribunal if they are subjected to dismissal or discriminatory treatment short of dismissal for taking lawfully organised, official, protected industrial action within the first four weeks of such action.**

   Following a dispute at the Manx Electric Authority the Isle of Man Trades Council presented a complaint to the International Labour Organisation (ILO) in December 1996 alleging violation of various ILO Conventions which have been extended to the Isle of Man including the *Freedom of Association and Protection of the Right to Organise Convention (No. 87)* and *the Right to Organise and to Bargain Collectively Convention (No. 98*. This became Committee of Freedom of Association (CFA) Case No 1912.

   The ILO's Committee of Experts concluded that *"[existing IOM law which protects workers that take industrial action] does not provide adequate protection for the purposes of the Convention: (i) because it still permits an employer to dismiss an entire workforce, even where the employer has initiated a lock-out or has provoked a strike through entirely unreasonable behaviour; and (ii) because an employer can rehire on a discriminatory basis so long as there is a gap of three months between the dismissal of the "victimised" workers and the rehiring. Consequently, the Committee asks the Government to introduce legislative protection against dismissal, and other forms of discriminatory treatment such as demotion or withdrawal of accrued rights, in connection with strikes and other industrial action….."*.

   The Department has proposed the following measures both in order to satisfy the concerns of the ILO about the adequacy of IOM employment law in this area and to assist in dispute resolution:

   - Abolish the one year qualifying period that applies for existing protective measures contained in *the Employment Act 1991* for employees taking both official and unofficial strike action. (These provisions prevent an employer from selectively dismissing or re-engaging strikers with impunity during the first three months of a dispute because these employees would then be able to claim unfair dismissal at the Employment Tribunal).
   - Allow employees to complain to the Employment Tribunal if they are dismissed or subjected to discriminatory treatment short of dismissal for taking lawfully organised, official industrial action ("protected industrial action").
   - Limit the length of the period during which dismissal or other detrimental treatment is automatically unfair if the reason for it is that the employee took lawfully organised, official "protected industrial action" to 4 weeks. It is felt that this period is sufficient

for both sides in an IOM dispute to have entered into serious negotiations.

7. The Employment Tribunal should be given powers of re-employment

The Department supports the Employment Tribunal having discretionary powers to order re-employment for the following reasons:

- Governments that have ratified ILO Conventions 87 and 98 (see 6 above) are obliged to legislate for a remedy of re-employment to guard against certain types of unfair dismissal.
- it is reasonable that the law should give any employees who are unjustifiably dismissed the possibility of their being re-employed.
- Experience in the UK shows that the great majority of persons who have been unfairly dismissed do not wish to return to work for their previous employer. Further, tribunals will consider a range of factors and will not recommend re-employment where it would be unworkable. On the assumption that the IOM Employment Tribunal, working with similar statutory provisions, adopts a practical approach akin to that used by tribunals in the UK it is likely that any order for re-employment on the Isle of Man would be extremely rare. By way of illustration, statistics published by the UK Employment Tribunals Service indicate that in 2000/01 of 5,294 cases of unfair dismissal upheld by the Tribunals only 15 resulted in re-employment.

NOTE : in certain circumstances such as where the employer does not comply with a re-engagement order the compensatory limit for unfair dismissal (presently £30,000) would be disapplied.

8. The Employment Tribunal should be given powers to award compensation for injury to feelings in unfair dismissal cases and for detriment on trade union grounds.

Compensation for unfair dismissal is based on length of service (the basic award) and any losses suffered by the complainant (the compensatory award). Extension of the principle of allowing compensation for injury to feelings, which already applies in respect of some Employment Tribunal jurisdictions (sex discrimination and discrimination on trade union grounds at time of recruitment), but not others, would enable the Employment Tribunal to take account of the employer's conduct and the manner in which the complainant was dismissed when deciding the level of any compensation and would mitigate against any particularly poor examples of employment practice.

- Following consultation the Department decided that such compensation, which would be payable in exceptional cases only, should be subject to a limit of £5,000 (which would be distinct from both the basic award and the compensatory award). Further, the Department will publish guidelines about bands of compensation that might be awarded in specific circumstances.
- For the avoidance of any doubt it is proposed to include an express provision in the Employment (Sex Discrimination) Act 2000 which states that compensation may include injury to feeling. At present the relevant provision is only implied.

NOTE: In the UK the overall limit of the compensatory award is presently £55,000 whilst there is no limit for compensation under the main discrimination legislation and for certain categories of dismissal. Whilst in the past, compensation for injury to feelings has

only been available in respect of discrimination cases, the Court of Appeal has recently decided that tribunals may award compensation for non-economic loss, including injury to feelings, arising out of the manner of an unfair dismissal.[1]

9. The Employment Tribunal should be given powers to award compensation to employees who have not been issued with a written statement.

The Tribunal is not presently empowered to award compensation for an employer's failure to issue particulars.

♦ Following consultation the Department decided that the Tribunal should be able to order a maximum of 4 weeks' pay be paid to the employee under this header. However, Where the employer makes good his failure to issue a written statement to the employee prior to the formal listing of the Tribunal hearing no compensation should be payable.

10.

(a) Following consultation the Department decided not to proceed with its original proposal that 'minimum notice periods for employees with less than 4 years' service should be increased.'

Many consultees were opposed to the Department extending some of the existing notice periods. In consequence the Department proposes to retain the existing notice periods pending further evidence that there is a sufficient case to alter them. Instead it is proposed to include enabling powers in the Bill which would permit the variation of notice periods by secondary legislation, should this be considered desirable in the future.

(b) The Department will clarify the meaning of 'any amount owed in lieu of notice' which comprises part of the definition of 'wages' (s 19 Employment Act 1991).

Whereas the Employment Tribunal can order payment of *any amount owed in lieu of notice* there is some doubt as to what exactly this means. The effect of the amendment will be to confirm that an employee will be able to recover the wages, other benefits and pension benefits to which he would have become entitled to if he had been given either the correct period of statutory notice; or (if greater than the statutory minimum notice) the amount of notice specified in his contract.

11. The Employment Tribunal should be provided with powers to compensate workers where their employer has made an illegal deduction from them.

Unauthorised deductions from pay are unlawful, unless authorised by statute or arise from any relevant provision of the employee's contract, yet the Employment Tribunal has no powers at present to penalise an employer who makes any such illegal deduction. From 2002 to 2003 70 such claims were lodged by employees at the IOM Tribunal.

♦ Following consultation the Department decided that the Tribunal should be able to order a maximum of 4 weeks' pay be paid to a worker under this header (instead of an additional penalty of up to 50% of the amount of the deduction as originally proposed).

[1] Dunnachie v Kingston upon Hull City Council, Court of Appeal 2004

However, where the employer repays the unlawful deduction prior to the formal listing of the Tribunal hearing no compensation should be payable.

- UK provisions apply not just to 'employees' but to 'workers' (which is a wider group than employees). As recent Isle of Man legislation concerned with wages, (primarily the Minimum Wage Act 2001 and subsidiary Regulations) applies also to 'workers' it would seem logical to adopt a consistent approach and to extend coverage of this part of the new Employment Bill to the wider group.

12.

(a) Enabling powers should be provided for the Employment Tribunal to restrict publication of material in specified circumstances.

This is to protect individuals in cases of sexual harassment or disability discrimination where evidence of a personal nature is likely to be given.

(b) Enabling powers should be provided to the Department to allow for certain payments to be made to the Chairman and Members of the Employment Tribunal.

The Department considers it necessary to put in place a flexible payment regime, (for which Treasury concurrence would be required), in respect of all relevant matters such as time to prepare cases.

The Department's other proposals relating to the Employment Tribunal, intended to ensure compliance with Article 6 of the European Convention on Human Rights *("the right to a fair trial")* are now contained within the Tribunals Bill and will thus be omitted from the Employment Bill.

13. Recovery of employment agency fees from individual workers should be specified as an illegal deduction.

The Employment (Agencies) Act 1975 prohibits employment agencies from charging a fee to individuals placed in employment and ensures that workers have free access to the labour market.

The Department is, however, aware of some problems that have been experienced where employers have sought to recover costs in relation to agency fees from workers, particularly those from outside the United Kingdom. The Department proposes to specify recovery of employment agency fees from individual workers as an illegal deduction and to make any term relating to such recovery unenforceable.

14.

(a) "The right not to suffer action short of dismissal" for union related reasons should be replaced by "the right not to be subjected to a detriment".

(b) The concept of 'detriment' should encompass 'omissions' as well as 'acts'.

(c) Members of independent unions should have a clear positive right to use their union's services.

(d) Employers and individuals should retain their freedom to agree individualised contracts. Such 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.

The change in terminology in (a) will make the approach to discrimination on trade union grounds consistent with that in the Employment (Sex Discrimination) Act 2000. The new wording will also make clear that, unlike 'action short of dismissal', a 'detriment' will encompass omissions (such as the withholding of benefits from employees on grounds related to their trade union membership) as well as acts.

Proposals (c) and (d) are consequent to recent decisions by the European Court of Human Rights relating to *Wilson and others v United Kingdom.*[1]

NOTE : The UK is presently in the process of extending coverage of its protection against discrimination for trade union reasons from 'employees' to 'workers'. There seems to be no good reason why the equivalent IOM provision - Employment Act 1991 s 21 - Trade union membership and activities - should not also apply to the wider group.

F: The Trade Unions Act 1991

15.

(a) A trade union should be required to notify the relevant employer: of its intention to hold an industrial action ballot; of the results of the ballot; and prior to taking industrial action.

(b) (In addition to existing requirements) a union should be required to give seven days notice of industrial action to the Industrial Relations Officer.

There is scope to improve the present communication requirements of the Trade Unions Act 1991 regarding notice to both the employer and the Industrial Relations Service.

(c) Ballots for industrial action should be conducted by post.

Whereas there is already a requirement in the Trade Unions Act 1991 that *"ballots shall be conducted so as to secure that so far as is reasonably practicable, those voting do so in secret"*, in the Department's view postal ballots tend to produce a more credible result.

The objective of the proposal is to ensure that individuals can reflect in private before deciding whether to take industrial action. It is understood that most unions conduct ballot for industrial action by post anyway. Postal ballots would only be required in respect of a decision to take industrial action and not for matters such as whether to accept a pay offer etc.

(d) Small accidental failures to comply with balloting requirements should be disregarded.

In the UK some employers have sought to challenge the legality of particular ballots on the grounds that trivial errors in the process invalidated the ballot.

[1] Application Nos. 30668/96 30671/96 30678/96

(e) The definition of "short of industrial action" on ballot papers should be further clarified.

In the UK some employers have attempted to advance specious technical arguments regarding whether an overtime ban and a call-out ban is industrial action or action short of a strike.

G: The Employment (Amendment) Act 1996

16. Protection against discrimination at recruitment on the basis of trade union membership should be extended to cover 'trade union activities' and 'previous trade union membership'.

The proposal is in order to avoid any confusion and uncertainty as to the extent of protection of the Employment (Amendment) Act 1996.

H: Amendments to more than one Act

17. The main time limits for presenting applications to the Employment Tribunal should be retained.

The Department had consulted as to whether there was a case for a single 6 month time limit for presenting an application to the Employment Tribunal. Whilst the arguments for and against altering the limits were finely balanced the Department noted that a significant number of consultees were opposed to changes in this area, that there would be some disadvantages and that there was no overriding case to change the existing limits.

In addition, the Department had also proposed to reduce the period for making an application for a redundancy payment from 12 months to 6 months. Again, however, the Department has decided to retain the existing limit.

18.

(a) The threshold of one year's continuous employment, which is required to bring a case of unfair dismissal, should be retained. However, abolition of the one year limit to bring a case of unfair dismissal on grounds of racial or religious discrimination should be brought forward to be dealt with in the Employment Bill.

The Department had consulted as to whether there was a case for reducing the threshold of one year's continuous employment, which, with some specified exceptions, is required to bring a case of unfair dismissal. The Department has concluded that whilst the arguments for and against reducing the main one year qualifying period are finely balanced there is no overriding case to change the existing threshold and consequently it is proposed to leave the qualifying period at one year for the time being. (The corresponding UK threshold is also set at one year).

Abolition of the existing qualifying period to bring a case of unfair dismissal on grounds of racial or religious discrimination will make the legislation consistent with other anti discrimination provisions in the Isle of Man and the United Kingdom.

(b) The existing requirement for employees to have a minimum of 4 weeks' service before being entitled to a written statement of reasons for their dismissal should be removed.

As there is immediate protection against certain types of dismissal the existing requirement is inappropriate.

NOTE: an employee should be entitled to receive a written statement without having to request it if she is dismissed while she is pregnant or after childbirth in circumstances in which her maternity leave period ends because of her dismissal.

19.

(a) Schedule 5 of the Employment Act 1991, which deals with classes of workers that are wholly or partially excluded from statutory employment rights, should be updated as follows:

(i) The existing policy of excluding workers without a required permit under the Control of Employment (CEA) legislation from employment rights should be expressly extended to cover other IOM employment legislation. Overseas workers without entry clearance from Immigration and / or a valid overseas permit (a separate group to those requiring CEA permits) should be treated in the same way as persons without permits under the Control of Employment Act.

Under the common law, any 'contracts' of employment for illegal workers would be unlawful. The purpose of the express exclusion in the Employment Act 1991 was to resolve any doubt and avoid the need for legal argument on the point.

IOM employment law is presently silent about the position of overseas workers without entry clearance from Immigration and / or a valid overseas permit.

(ii) Fixed-term contract employees should not be permitted to waive their rights in relation to unfair dismissal or redundancy.

Fixed-term work is where a person is engaged to work for a set period of time with a definite start and end date. Until recently, UK law allowed fixed-term contract employees to waive their employment rights in respect of unfair dismissal and redundancy. This was an exception to the usual rule that employees cannot contract out of their employment rights for their own protection. One reason the UK abolished the 'waivers' was because some employers kept staff permanently employed on renewable fixed-term contracts, their employees being obliged to give up their employment rights for what were in reality open-ended jobs.

Whereas the Department had originally proposed to abolish the unfair dismissal waiver but retain the redundancy waiver, such a policy is difficult to reconcile with the objective of preventing fixed-term contract employees from being less favourably treated than permanent employees. Further, the Department is aware of the continuing use of fixed-term contracts in what are in effect permanent positions so that, particularly in these circumstances, differences in the extent of employment protection between permanent employees and fixed-term contract employees doing the same or similar work cannot be justified.

(iii) The territorial exclusion in IOM employment law should remain in place for the time being.

It is necessary for the existing exclusion to remain in place at least until the Rome Convention, which sets out a framework of legal principles that govern questions of territorial jurisdiction and the applicable law, is brought into force in the Isle of Man and the position in the UK, subsequent to the recent removal of the territorial restriction there, has become clearer either through evolving case law or until the Secretary of State uses his extant powers to make amendments to the Employment Rights Act 1996. In the medium term any proposals to modify existing legislation can be dealt with by regulations. **The Department does, however, consider that in the event of an employer's insolvency access to the Manx National Insurance Fund to underwrite cash entitlements should be dependent upon the Fund having received (or having been entitled to receive) the National Insurance contribution liabilities in relation to that employment.**

(iv) The Department's Marine Administration Division wishes to seek a reciprocal agreement between the UK and the IOM to deal with rights of mariners on vessels operating between the Isle of Man and the British Isles.

The Department had originally proposed to unilaterally extend employment protection to persons on Manx registered ships operating to and from the Island, wherever they are domiciled. Such a proposal would not, however, have dealt with the position of IOM mariners on UK registered ships operating to and from the Island.

(v) Employment rights of mariners on IOM registered vessels operating internationally should be dealt with by a combination of a new Merchant Shipping Bill and new secondary legislation.

Both the Isle of Man and the UK exclude this group from nearly all mainstream employment rights. The preferred approach of the Department's Marine Administration Division is that the particular and special needs of this class of seafarers should be dealt with through marine specific legislation. The Division is working on a consultation document to precede a new Merchant Shipping Bill.

(vi) Crown employees should be brought within the scope of provisions to deal with refusal of employment on trade union grounds under the Employment (Amendment) Act 1996; the police should be excluded from access to these provisions.

The Employment (Amendment) Act 1996 is silent as to whether these groups are covered by the Act. It is clearly inappropriate that the provisions should extend to the police, who are barred from membership of trade unions other than the IOM Police Federation.

(vii) The exclusion category "employer's spouse" should be abolished completely.

Exclusion or limitation of employment rights on grounds that an employee is the spouse of the employer is both archaic and incompatible with the Employment (Sex Discrimination) Act 2000 which, (in addition to dealing with discrimination on the ground of a person's sex) makes unlawful any discrimination against married persons.

(viii) The existing exclusion category "Workers performing specific tasks not expected to last for more than 12 weeks" should be abolished completely.

The Department understands that the existing exclusion is rarely used. A new permitted derogation from employment rights for employees engaged for limited periods of time would be likely to create more problems than it would solve. It is the Department's view that policy in this area should be subject to overall policy concerning qualifying periods and fixed-term contracts.

(ix) The exclusion category "part-time workers" should be abolished completely.

The Department considers that part-timers and full-timers should have the same statutory employment rights and that differential treatment of part-timers serves no useful purpose. Moreover exclusion or limitation of employment rights on grounds that an employee works part-time is not compatible with the Employment (Sex Discrimination) Act 2000 which makes less favourable treatment of part-time employees susceptible to challenge on the grounds that it may constitute indirect sex discrimination.

(x) The wording of s 54 Employment Act 1991 "Qualifying period and upper age limit" [to bring a case to the Employment Tribunal] should be amended so as to ensure employers have retirement ages which are non discriminatory.

Whilst persons over retirement age are presently precluded from bringing a case to the Employment Tribunal there is a need to ensure that the particular retirement age set by each employer is the same for both men and women.

(b) Enabling powers should be included in the Bill to extend the coverage of statutory employment rights by secondary legislation.

Such powers would permit the Department to apply specified rights to groups who are not currently covered by them in a way which is best suited to the needs of different types of working person. These powers are necessary in the Isle of Man, as in the United Kingdom, due to the sheer diversity of forms of atypical work, the fast moving and continuing evolution of particular forms and the need to be able to address rights pertaining to particular groups of workers relatively swiftly.

I: Additions

20. Employees should have protection against unfair dismissal and detriment and workers should have protection against detriment for asserting statutory rights.

The Department proposes that there should be statutory protection for persons seeking to exercise relevant statutory rights, (for example, in the circumstance where an employee seeks to obtain a written statement of his terms and conditions).

21. Employees should have protection against unfair dismissal and detriment and workers should have protection against detriment for a health and safety related reason.

(For example in the circumstance where a worker raises a concern about conditions at work which he or she reasonably believes to be harmful to health or safety).

NOTE: in the UK the limit of the compensatory award is set aside for dismissals for a health and safety reason, just as it is for a dismissal for making a protected disclosure (see Section 22). There are good reasons for the Island disapplying its own limit (which in any case is much lower than the corresponding UK limit) for dismissals on either of these grounds.

22. Employees should have protection against unfair dismissal and detriment and workers should have protection against detriment for making a 'protected disclosure'.

In the UK *the Public Interest Disclosure Act 1998* enacted additions to the Employment Rights Act 1996 in order to provide protection for workers who discover malpractice at work. The Act enables workers to be able to voice their concerns knowing that, provided what they do is in the public interest, they will have legal protection from being dismissed or disciplined. Qualifying disclosures include: criminal offences; failure to comply with any legal obligation; miscarriages of justice; endangerment of any person's health or safety; and damage to the environment.

The UK Act followed a number of disasters such as Piper Alpha in which 167 oil workers perished in the North Sea in 1988 and the Clapham rail crash in which 35 people died. At the public enquiries that followed these events it was argued that these disasters might not have happened had such legislation been in place. The Cullen Enquiry into Piper Alpha uncovered a culture in which staff felt unable to raise health and safety concerns with their management whilst the Hidden inquiry into the Clapham rail crash revealed a similar reluctance among staff to come forward.

The Department proposes to bring forward similar provisions in the Employment Bill.

23. A right to reasonable paid time off should be provided to employees who are also trustees of their occupational pension scheme, for the performance of their duties or for undergoing relevant training

The responsibility of pension trustees is crucial; they are the cornerstone of the new regulatory framework, set up since the Maxwell scandal, in both the United Kingdom

and the Isle of Man. UK employees already have those rights the Department is proposing.

24.

(a) Part-time workers should have the right not to be less favourably treated than their full-time counterparts in regard to their terms and conditions of employment except where any differential treatment can be justified on objective grounds.

Less favourable treatment of part-time workers than full-time workers is both unfair and inefficient. Further, in many cases it will constitute indirect sex discrimination. As well as disadvantaging those who are subject to less favourable treatment, it can also be detrimental to labour markets by potentially restricting the movement of labour. Full-time workers may be less willing to move into part-time work for fear of being treated less favourably (e.g. lower hourly pay or less opportunity for advancement). In addition, people looking for work may be discouraged from looking for or accepting part-time work if they expect to be treated less favourably than in a full-time job. Regulations to be made under proposed enabling powers in the Bill, will enable part-time workers to challenge less favourable treatment workers more easily than is possible under the Employment (Sex Discrimination) Act 2000.

(b) The Department's existing powers to issue codes of practice should be supplemented for the purpose of eliminating discrimination against part timers.

It is intended that a new code of practice will contain guidance for the purpose of facilitating the development of opportunities for part-time work.

25.

(a) Fixed-term contract employees should have a right not to be less favourably treated than their permanent counterparts in regard to their terms and conditions of employment except where any differential treatment can be justified on objective grounds.

(b) There should be protection against any abuse arising from the use of successive fixed-term employment contracts or relationships where the renewal on a fixed-term basis cannot be objectively justified.

Less favourable treatment of fixed-term contract employees than permanent employees may result in marginalisation and social exclusion of such employees and lead to a two tier workforce. In order to protect fixed-term employees a principle of non-discrimination should be applied to those in fixed-term employment and they should be provided with the right to be treated no less favourably than permanent employees of the same employer doing similar work where the less favourable treatment is on the ground that the employee is fixed-term and is not justified on objective grounds. In addition, where a fixed-term employee who has been continuously employed on fixed-term contracts for four years or more is re-engaged on a fixed-term contract without his continuity being broken, the new contract should have effect under the law as a permanent contract unless the renewal on a fixed-term basis is objectively justified.

NOTE : The legislation would not be retrospective so that no fixed-term contract would be deemed to a permanent contract until four years after the passing of the legislation.

26.

(a) All workers should have a minimum entitlement to 4 weeks' paid holidays each year.

(b) Enabling powers should be included in the Bill to regulate other aspects of working time if considered necessary.

With some limited sector specific exceptions, working hours of workers in the Isle of Man are not regulated by statute. The same situation applied to UK workers until 1998 when European legislation resulted in sweeping changes. In the United Kingdom, the *Working Time Directive* was implemented by the *Working Time Regulations* which provides a number of rights and protections. These include a right to 4 weeks' paid leave each year; a limit of 48 hours a week which an employee can be required to work; and a right to a day off each week.

Entitlement to a minimum period of paid leave would parallel existing entitlement to receive a minimum wage and the Department would be supportive of proposals for workers in the Isle of Man to be given a minimum of 4 weeks' paid leave each year. Because employers could include bank holidays in the 4 weeks (as in the UK but in contrast to European practice) the Department considers that paid leave entitlement should be kept under review with the long term aim of achieving a total of 6 weeks' paid annual leave in the future.

In order to assist employers make the necessary transitional arrangements, there should be a 12 month lead in period from the date that detailed Regulations, implementing the primary legislation, receive Tynwald approval.

Some consultees had extensive concerns regarding the adoption of aspects of the Working Time Directive other than paid holidays. There would need to be extensive consultation prior to regulating any other aspects of working time and proper consideration as to which groups of workers would have to be excluded (e.g. mariners). However, the Department considers it prudent to include enabling powers in the Bill to regulate other aspects of working time if considered necessary. The Department would enter into an extensive consultation exercise before seeking the approval of Tynwald for any Regulations dealing with aspects of working time other than for paid holidays.

27. Workers should have a right to be accompanied at a disciplinary or grievance hearing by a trade union representative or fellow worker.

At present there is a code of practice, published in 1992, on 'Disciplinary Practice and Procedures in Employment' which states that disciplinary procedures should '*give individuals the right to be accompanied by a fellow employee of his / her or, where a union is recognised by a trade union representative.'* The Department considers that there is a case for extending the approach taken within the code so as to provide all workers, except the truly self employed, with a right of accompaniment at a disciplinary or grievance hearing. It is reasonable and equitable that individual workers, whether or not they are trade union members and whether or not their trade union is recognised, should be able if need be to defend their interests at work effectively. Whereas it is expected that most employers treat people fairly, a minority may not. The law should provide protection from any intimidation, assist those who might have difficulties in defending themselves, and ensure that workers have a real opportunity to present their case.

J: Changes to secondary legislation

28. A revised code of practice on discipline and grievance procedures should be published.

The Department is aware from the Industrial Relations Service and other sources that the existing code of practice "Disciplinary Practice and Procedures in Employment" is in need of revision. The code also needs to reflect the change in policy set out in 27 above.

29. A code of practice on bullying in the workplace should be published.

The Department is aware that there are allegations of bullying in some workplaces in the Isle of Man. It is considered that perhaps the most helpful approach that can be taken is to take steps to draw up a code of practice on bullying in the workplace and to monitor the extent of any problem.

K : Other matters identified following publication of the original consultation document

30. For the avoidance of any doubt it is desirable to include an explicit provision which confirms that an applicant seeking to pursue a dual claim of unfair dismissal / sex discrimination cannot receive compensation twice for the same loss.

There is an explicit provision in corresponding UK legislation.

31. For the avoidance of any doubt it is proposed to include a new provision in the Employment (Sex Discrimination) Act 2000 which explicitly states that unfavourable treatment of a woman on the ground of her pregnancy, for a reason connected with her pregnancy or for reasons relating to a pregnancy related illness constitutes direct sex discrimination.

Because European Court of Justice decisions do not apply to the Isle of Man it is possible that the established legal principle that less favourable treatment of a woman on the ground of her pregnancy constitutes direct discrimination, could be challenged if a case of sex discrimination relating to detrimental treatment on such grounds were to proceed to the IOM Employment Tribunal. The Department considers that it is in nobody's interests to reopen the debate, long put to rest in the UK, as to whether detrimental treatment on the ground of pregnancy is or is not sex discrimination.

32. For the avoidance of any doubt it is proposed to include a new provision to the effect that a settlement reached under the auspices of the Industrial Relations Service is an exception to the general rule that nobody can contract out of employment rights (such as rights and obligations in respect of unfair dismissal).

There is an explicit provision in corresponding UK legislation.

33. The Department considers that there is a need for a consistent approach between the Employment (Sex Discrimination) Act (ESDA) 2000 and other employment legislation and consequently proposes to amend ESDA s46 to remove the provision which allows the Discrimination Officer or an advocate to arrange a 'compromise agreement'. This will mean that the only exception to the general restriction on contracting out of employment rights and obligations will be in respect of agreements reached under the auspices of the Industrial Relations Service.

The Department considers that this measure is in the best interests of employers and employees.

34. The Department proposes to deal with a loophole in the Minimum Wage Act 2001 in order to ensure enforcement officers can issue enforcement notices to require the payment of minimum wage arrears to *former* workers as well as to current workers.

This lacuna was imported from the UK legislation.

35. The Department proposes to modify the blanket security exemption of acts done in the interests of national security in the Employment Act 1991 and the Employment (Sex Discrimination) Act 2000 so that the provisions are in accordance with the European Convention on Human Rights.

The UK has modified its equivalent legislation.

36. The Department plans to align the wording of those sections of the Redundancy Payments Act 1990 and the Employment Act 1991 which deal respectively with change in ownership of a business and change of employer.

The existing wording is inconsistent so that it might be unclear as to when a redundancy payment should be properly payable in certain circumstances.